INTERPRETING FCC BROADCAST RULES & REGULATIONS: Volume 2

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INTERPRETING FCC BROADCAST RULES & REGULATIONS

VOLUME 2

By the Editors of BM/E Magazine

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PREFACE

The first volume of this work, published in the Fall of 1966, achieved wide-spread acceptance and acclaim. Originally published as a series of articles in BM/E Magazine, more than 20 important topics governed by FCC policies, rules and regulations are included in the previous work.

Since that time, however, the FCC has taken many actions, including changes in its policies and views which affect day-to-day broadcast operations. Subjects range from the amount of commercial time considered acceptable to specific formats for sponsor and station identifications — from in-depth views on Section 315 to cases involving the "Personal Attack" rules — from cigarette commercials vs. the Fairness Doctrine to non-communications act violations — from revised program format forms to TV-CATV cross-ownership — from rules governing CATV to rules governing translators, pre-sunrise operation, the Emergency Broadcast System, monitoring stereo and SCA operations, and many more.

Because of their importance to broadcasters,

these subjects, among others, were chosen for in-depth coverage in BM/E Magazine during the past two years, and are reprinted herein as a single documentary source. The topics were carefully researched, and the content thoroughly checked for authenticity and accuracy by some of the capitol's foremost communications lawyers. The original articles have been rearranged to follow a logical sequence. For example, three different articles relating to various ID Rules appear as successive sections in this book, thereby providing the reader with all the research information published on the subject to date. In closing, we again remind readers that this is a second Volume, not a new edition of the first volume. This book, therefore, does not replace the first one; rather, it supplants the original volume.

The Editors

October, 1968

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Comparative Criteria for Choosing Applicants

DURING THE past few years, we have witnessed a tremendous upsurge in the volume of standard, FM, and TV applications for construction permits. In many instances, there were two or more applicants for the same facilities, thereby necessitating a Commission hearing to determine the best qualified applicant. In 1965, the Commission issued a policy statement as a future guide to be followed in the comparison of applicants in a hearing.

This discussion does not deal with the issues of basic legal, financial, and technical qualifications to become a licensee; it is more particularly directed toward the areas explored and criteria employed by the Commission, as set forth in the policy statement, in comparing each applicant. These are commonly referred to as the *Comparative Issues.*

The Commission has set forth two primary objectives toward which the comparative portion of a hearing should be directed. They are (1) the best practicable service to the public, and (2) a maximum diversity of control of mass communications media.

The first objective is so obvious that it requires little further comment. The *raison d'etre* of the Commission is to insure that the broadcaster *will* serve the public interest. Desirability of the second objective has been discussed pre-

viously. To wit: (1) "The Commission believes that the better method of creating a diversity of viewpoints in an area, through the broadcast medium, is to grant broadcast authorizations to as many separate owners as possible." (2) "The Commission was guided by the Congressional policy against monopoly in the communications field (e.g., as expressed in Section 313 of the Communications Act), and the concept (recognized by the courts) that the broadcasting business is, and should be, one of free competition."

The Commission has decided that the two primary goals stated above are quite compatible. Service by a broadcaster to an area implies the ability and flexibility to meet the changing local tastes, needs, and interests. Since independence and individuality of approach are elements of rendering good program service, *the primary goals of good service and diversification of control complement each other.*

Diversification of Control

Diversification *is a factor of primary significance since,* as set forth above, *it constitutes a primary objective in the licensing scheme.* As in the past, the Commission will consider both common control and less than controlling interest in other broadcast stations and other media of mass communications. Control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression in the same community. The number of other mass communication outlets of the same type, in the community proposed to be served, will also affect, to some extent, the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements

which the Commission believes significant. It will consider interests in existing media of mass communications to be more significant in the degree that they: (1) are larger (i.e., go towards complete ownership and control); (2) are in (or close to) the community being applied for; (3) are significant in terms of numbers and size (i.e., the area covered, circulation, size of audience, etc.); (4) are significant in terms of regional or national coverage; and (5) are significant with respect to other media in their respective localities.

Full-Time Participation

The integration of ownership and management is, frequently, of *decisional importance.* It is inherently desirable that those with the legal responsibility oversee day-to-day operation of the station. In addition, with such integration, there is a likelihood of greater sensitivity to (1) an area's changing needs and (2) programming designed to serve these needs. This factor is of vital importance in securing the best service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

The Commission is *primarily interested in full-time participation* by owners in management. To the extent that the time spent is less than full time, the comparative credit given will drop sharply, and no credit will be given to the participation of any person who will not devote substantial amounts of time to the station on a *daily* basis. In assessing proposals, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management, the Commission also looks to the positions which the participating owners propose to occupy. Also, it accords particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of

news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility are considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. *Purely consulting positions will be given no weight.*

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se*, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. The importance of this is demonstrated by the Commission's great emphasis on program surveys in renewal and other applications.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will be accorded much less weight than present residence of several years' duration.

Previous broadcast experience, while not so significant as local residence, also has rapidly diminishing value when put to use through integration of ownership and management. Also, previous broadcasting experience includes activ-

ity which would not qualify as a past broadcast record, (i.e., where there was not ownership responsibility for a station's performance). Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, it will be deemed of *minor* significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. The Commission recognizes that station ownership by those who have broadcasting experience may still be of some value even where there is not the substantial participation to which it will accord weight under this heading. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who will devote *some time* to station affairs. Similarly, a very slight credit will be given for experience not accompanied by full-time participation. *Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community or experience to any use in the operation of the station.*

Proposed Program Service

The United States Court of Appeals for the District of Columbia Circuit has stated that ". . . in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." (*Johnson Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 40, 48, 175 F. 2d 351, 359.) The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time. and precisely for-

mulated program plans may have to be changed not only in details but in substance—to take account of new conditions existing at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to be of no significance.

The basic elements of an adequate service have been set forth in the Commission's July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry." The applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. *Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.*

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged.

In light of the considerations set forth above, and experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will *not* be taken under the standard issues. The Commission will designate an issue where

examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences, upon which the reception of evidence will be useful, may petition to amend the issues.

Past Broadcast Record

This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. *It is rarely a factor of substantial importance.* A past record within the bounds of average performance will be disregarded, since average future performance is expected. Therefore, the Commission is not interested in the fact of past ownership *per se*, and will not give a preference because one applicant has owned stations in the past and another has not.

The Commission is interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, it will consider past records to determine whether the record shows (1) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (2) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission.

Character

The Communications Act makes character a relevant consideration in the issuance of a license. Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a desig-

nated issue, character evidence will not be taken. The intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponent's minor blemishes, no matter how remote in the past or how insignificant.

Other Factors

As the Commission has stated, its interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. Thus, it will favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be presented.

Past experience has shown that hearings have run for long periods of time because of the number of areas of comparison. The Commission's new guidelines of July 28, 1965, "Policy Statement On Comparative Broadcast Hearings," is an attempt to (1) formulate a higher degree of consistency of decision and (2) prevent undue delay in the disposition of comparative hearings. As is evident from the foregoing discussion, the various factors cannot be assigned absolute values; some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are nearly countless. Nevertheless, it behooves all parties who are interested in applying for new broadcast facilities to keep these comparative criteria in mind. Additionally, consultation with an attorney well versed in the practice of communications law is essential to obtain a realistic appraisal of one's chances in a given case.

The Financial Showing

ALL LICENSEES are familiar with the financial portion (Section III) of an application for construction permit (Form 301). Few, however, are cognizant of the tremendous number of cases and thousands of man-hours that have been expended in litigation relating to the showing necessary to meet the Commission's financial requirements. These requirements affect those who may be applying for: (1) a major change in facilities; (2) transfer of control or assignment of license; (3) renewal; (4) any application that estimates $5000 or more in expenditures; and, of course, (5) new stations.

Since the earliest days of broadcasting, the Commission has required an applicant to show that he is financially qualified to construct and operate a broadcast facility. Section 308 (b) of the Communications Act provides, in part, as follows:

> "All applications for station licenses . . . shall set forth such facts as . . . to citizenship, character, and *financial* . . . and other qualifications of the applicant to operate the station. . . ."

Analysis of the Commission's financial requirements should prove helpful to existing licensees and applicants.

Analysis of Section III (Financial)

Paragraph 1 (*a*) requests information relating

to costs of: (1) equipment; (2) antenna system; (3) land for antenna and/or studio site; and (4) other expenses such as legal and engineering fees. All of these items can be supported by estimates from reliable sources. Usually, a simple letter from a recognized supplier is utilized. The two most nebulous and challenging portions of this paragraph relate to: (1) estimated cost of operation for the first year; and (2) estimated revenues for the first year.

Estimating the first year's estimated *costs of operation* by an applicant—in a manner that will withstand cross-examination—may not be as simple as first impression may indicate. When the applicant computes this figure, he should consider his programming and staffing proposals carefully. For example, if the applicant proposes extensive *local* programming, his staff proposal must be greater than that of otherwise comparable stations. Since the Commission tends to equate "public service" with the extent of proposed *local* programming, those involved in comparative hearings with other applicants are well-advised to propose a staff larger than average. Obviously, this increases proposed operating costs and, hence, the overall financial requirements.

The first year's *estimated revenues* create a problem only if the applicant intends to rely thereon for *any* portion of his financial commitment. The problem is one of *proving* (to the Commission's satisfaction) that the analysis of estimated revenues is correct. When an applicant reflects a "thin" financial picture and relies on projected revenues, the latter assumes monumental importance.

Paragraph 1(b) requests justification of the figures employed in response to 1 (a) (above). Antenna and equipment costs can be justified by obtaining a letter from a reliable supplier setting forth these various figures. The purchase or leasing of land, office space, and remodeling or construction of buildings may be justified by various means such as: (1) options to lease or purchase;

(2) contracts of sale; and (3) estimates from bona fide contractors as to costs of remodeling or construction. Estimates of the first year's cost of operation and revenues may be based upon: (1) experience as a broadcaster in the same geographical area; (2) general broadcast experience elsewhere: (3) survey of similar stations in the same market; (4) survey of commercial establishments in the market to ascertain interest in advertising; (5) survey of population to ascertain interest in proposed programming as a gauge to approximate audience that would attract advertisers; and (6) numerous other methods.

Paragraph 1 (c), 2, 3, and 4 are basically designed to elicit the details of an applicant's ability to meet his financial commitments as outlined in Paragraphs 1(a) and (b).

Comparative Hearing Problems

An applicant who does not anticipate having his application consolidated in hearing with competing applications may generally employ the overworked characterization of "reasonableness" in estimating his expenses and revenues. Additionally, if the financial showing relating to the applicant's ability to meet expenses is not adequate or clear, a simple amendment setting forth additional details will usually satisfy the Commission. However, when a hearing with competing applicants is anticipated, a markedly different situation arises.

In comparative hearing, one's application will *not* be considered with the "comparative criteria" (*BM/E,* Nov. 1966) unless the basic financial qualifications have been met. In other words, the financial showing is of a "threshold" nature, a condition precedent to the comparative phases of the hearing. The Commission has stated:

> "Where one applicant in a competitive proceeding has not been found by the Commission to be financially qualified, an affirmative showing will be required that such applicant is so qualified

before it is entitled to comparative consideration with the other applicants in a proceeding. . . ." See *Brush-Moore Newspapers, Inc.*, 9 RR 922 (1953).

Basic qualification issues affect an applicant's ability to meet the minimum standards required of all applicants by the Commission. If an applicant cannot make an adequate showing, proof that he can meet his financial commitments, his application fails. With respect to this issue, *the main question relates to the applicant and his financial proposal.* It makes no difference that one applicant has more funds than another; *the major point is whether each applicant can justify his own financing scheme.* "The fact that one applicant has demonstrated greater financial strength will not be given weight in deciding whether to make a grant of it or to a competing applicant whose financial situation is adequate for carrying out its proposal if it is awarded a construction permit." See *Northeastern Indiana Broadcasting Co., Inc.*, 9 RR 261 (1953). However, if greater financial strength is pledged to more local programming, better equipment, and hence more public service, a comparative advantage may be achieved.

During the 30's and 40's, the Commission adhered to the basic premise that, in order to be financially qualified, every applicant must be able to meet: (1) *costs of construction, and (2) expenses for operation of the station over a reasonably extended period of time.* See *Radio Enterprises, Inc.*, 7 FCC 169 (1939). During the initial planning for a-m facilities, many applicants found it extremely difficult to prove that there would be adequate advertiser support. Those applicants relying, at least in part, upon projected revenues, were required to make an evidentiary showing that businesses in the community would support the station. Where an applicant for a new station had secured advertising commitments of $2,741.85 per month, thus indicating adequate commercial support, this overcame the claim of an existing

station that the community could not support another station. See *Capitol Broadcasting Co.*, 6 FCC 72 (1938).

During the 1950's, with the meteoric growth of TV and fm facilities, it became evident that the portion of the Commission's financial criteria (relating to the availability of financing to meet operating expenses for a *reasonable period of time)* required more explicit definition. Too much time and effort had been spent in haggling over the interpretation of "reasonable period of time." Therefore, *the Commission established a more definite criteria.* Applicants must demonstrate adequate financing to meet costs of construction plus *the first three months' operating costs.* The Commission said:

> "The Commission in considering an applicant's financial qualification is not concerned with the question of whether, *in the long run, a station can maintain* itself economically . . . An applicant who has sufficient funds available *to build and operate his station for at least three months is* financially qualified . . ." (Emphasis supplied.) See *Sanford A. Schafitz,* 24 FCC 363; 14 RR 582 (1958).

The new criteria established a practical pegboard upon which the Commission and all applicants could base their analyses. However, the early 1960's witnessed a veritable deluge of new applications for fm facilities; additionally, with the advent of the all-channel receiver law, applications for new uhf television stations increased appreciably. Many of the new applications were in markets where there were numerous facilities in the same broadcast service. Naturally, the major networks were affiliated with the vhf stations. Since these stations covered larger areas (thereby delivering larger audiences), the ability of a new uhf station to attract network affiliation was practically nil. Since, from the outset, the economic viability of uhf was poor, many individuals decided to obtain a uhf construction permit and

"sit on it" until the economic climate changed. The Commission was so anxious to encourage uhf activity that they were most lenient in applying the financial requirements. As a result, many financially weak applications were granted, and construction permits were held for years without any construction. The Commission finally realized that it must augment financial requirements to avoid further useless grants of uhf CPs. Finally, the Commission's concern was evidenced by the promulgation of new financial qualifications criteria. On June 30, 1965, the Commission adopted these new guidelines in the pivotal *Ultravision* case (*Ultravision Broadcasting Co.*, 5 RR 2d 343 (1965)):

> "Applicants for commercial uhf television stations in markets where there are three commercial vhf television stations will be required to submit evidentiary proof relating to estimated construction costs and estimated operating expenses during the first year of operation. The applicants should not encounter any particular difficulty in submitting evidentiary proof concerning amounts allocated for staffing, programming, fixed charges and other expenses during the first year of operation, and in establishing that the funds allocated for programming are reasonably likely to suffice for effectuation of program proposals."
>
> "*Applicants* for commercial uhf television stations in three-vhf-station markets *should be permitted to demonstrate their ability to meet all fixed charges and operating expenses during the first year of operation* either by proof that adequate funds are available and committed for the purpose without income, or by a convincing evidentiary showing that the available and committed funds will be supplemented by sufficient advertising or other revenue to enable the applicants to discharge their financial obligations during the first year. *Where viability of the proposed facility during the first year is dependent on income, the accuracy of the estimate becomes a critical factor in determining whether a continuing operation is likely.* In such cases, it is essential that applicants demonstrate the soundness of figures submitted. Where applicants are able to demonstrate financial ability to meet costs and expenses for the first year without income only because the first

monthly or quarterly installment payments for equipment or other fixed charges have been deferred beyond that period, the Commission will scrutinize with care the applicants' itemizations of expenses." (Emphasis supplied.)

Shortly thereafter, on July 7, 1965, the Commission issued a public notice (FCC 65-595), *Clarification of Applicability of New Financial Qualifications Standard Concerning Broadcast Applications,* whereby the new standards discussed in the *Ultravision* case would be applied to *all other broadcast applications.*

". . . we shall hereafter require all applicants for commercial broadcast facilities, whether a-m, fm, vhf-TV or uhf-TV, to demonstrate their financial ability to operate for a period of one year after construction of the station. In those instances where operation during the first year is dependent upon estimated advertising revenues, the applications will be required to establish the validity of the estimate."

How does the new standard affect applicants from a practical standpoint? First, each applicant must present a showing that there are adequate finances to construct and operate his facility the first year without any income. Therefore, he will be able to obtain grant of his application without any delay caused by searching questions from the Commission. Additionally, if the application should be designated for hearing with other applications, no financial issue will be designated against his application.

Second, if the applicant must rely on projected revenues, he should be sure to heed the Commission's admonishments relating to "the accuracy of the estimate" and the ability to demonstrate the "soundness of figures submitted."

A new slant to the financial requirements was developed by the Commission's Review Board in the *Chicagoland* case, 7 RR 2d 221, by holding that since the burden of proof with respect to

the *Ultravision* issues was the applicant, it could rely on the testimony of one of its principals to establish that there was a reasonable possibility that the station would be constructed and continue to operate; however, it took the risk that the proof might not be adequate without further evidence. Upon review (Chicagoland TV Co., 7 RR 2d 612), the Commission ruled that proffered letters from potential advertisers could be considered in order to reach a determination as to the reasonableness of the applicant's projected revenues. Accordingly, applicants in hearing must *prove* that their estimated costs are reasonable and, if they seek to rely on revenues during the first year of operation to defray any of those costs, their estimated revenues are reliable. The applicant will not be advised by the Examiner if its proof is adequate. The applicant will learn its fate in the Examiner's Decision.

Clearly, the Commission has augmented its financial requirements appreciably since the 1930's and 1940's—from funds sufficient to operate "a reasonable period of time," to "three months without any income," to one year. While estimated revenues may be relied upon, they are difficult, if not impossible, to prove. In any event, they constitute a very "risky" financial basis. Perhaps the essence of the changes in financial requirements may be summed up by the word "proof." The applicant, more than ever before, must prove all statements relating to his financing.

Fines and Forfeitures – Up 600% Since '64

All licensees should be aware of the pertinent portions of the Rules concerning their liability for fines and forfeitures. As adopted on February 2, 1961, Section 10.503(b) (1) (E) reads as follows:

". . . shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violations occur shall constitute a separate offense. Such forfeitures shall be in addition to any other penalty provided by this act."

". . . (3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation *occurring more than one year prior to the date of issuance of the notice of apparent liability* and in no event shall the forfeiture imposed for the acts or ommissions set forth in any notice of apparent liability exceed $10,000." (Emphasis supplied.)

In other words, the Commission is impowered to impose a *maximum fine of $1,000 per day for each violation!* However, *the total amount of fines assessed,* no matter how numerous, *cannot exceed $10,000.* (Of course, the Commission's power does not end here; it still retains its long-standing authority to designate a license for hearing.)

The Preview Issue (Dec. 1964) contained an article entitled, "FCC Fines Are Beginning to Pinch." Set forth therein was the prediction: "It

is clear that the use of forfeitures and fines, as the Commission's primary lever against violators, will become more prevalent and painful in the years to come. Many broadcasters have already felt the poignant sting of this four-year-old Commission tool, but many more remain vulnerable targets by ignoring or overlooking the Commission's policing."

Increase Of Forfeiture Proceedings

An analysis of the number of forfeiture proceedings instituted during the fiscal years 1964, 1965, and 1966, as reported in the Commission's Annual Reports, discloses that there has been an upsurge in the incidents of fines levied on licensees. In 1964, notices of apparent liability were issued to 13 stations. Examples of the most salient consisted of: (1) $2,500 for unauthorized assignments and transfers; (2) $500 for violation of operating log requirements; (3) $250 for failure to make sponsorship identification of paid-for advertising; (4) $1,000 for failure to file time broker contract; and (5) $250 for failure to give sponsorship identification of teaser announcements. During the same year, *forfeitures* were ordered for 15 stations which had responded to previous notices of apparent liability, including: (1) $1,000 for failure to identify sponsorship; (2) $1,000 for equipment and other rule violations; (3) $3,500 for violation of operator requirement rule; (4) $500 for violation of logging requirements rules; and (5) $500 for violation of operating hours.

During fiscal year 1965, Notices of Apparent Liability were issued to 38 stations (compared to 13 such notices in fiscal 1964). The great majority involved AM stations. Of the 1965 total, 19 paid the amounts set forth in the notice, five responded and were permitted to pay lesser amounts, and one was later relieved of liability.

The amount of the forfeitures varied with

the number and seriousness of the violations. The largest order during 1965 was $8,000 for lack of control over program content. Other fines assessed over $1,000 included: (1) $5,000 for violation of logging and sponsorship identification rules; (2) $1,000 for violation of first-class operator rule; (3) $4,000 for failure to originate the majority of its programs from its main studio; and (4) $1,500 for failure to reduce power at night as required by its license and operation without a licensed operator on duty.

Other violations leading to forfeitures included numerous instances of failure to employ first-class operators to the extent required by the rules ($500—$1,000) and other violations of the operator rule; several unauthorized assignments of license or transfers of control ($500—$1,000); operating nondirectionally at night and by remote control without authority ($1,000); operating changes of facilities without prior program test authority ($100); failure to keep maintenance logs ($500); broadcasting advertisements involving a lottery ($350); rebroadcast without the originating station's consent ($100); failure to maintain modulation within tolerance ($250 or $500); failure to make required filing of time-brokerage contracts ($500); and failure to make a required sponsorship announcement in connection with a political broadcast ($1,000). A total of $34,150 in forfeitures was paid by stations during this fiscal year.

1966—A Banner Year For Fines

Fiscal year 1966 was marked by considerably greater use of the forfeiture penalty than at any previous time since the Congress gave the Commission this authority in 1960. A total of 78 notices of apparent liability—up from 38 in 1965 and 13 in 1964—were issued during the fiscal period, representing apparent *fines of $83,125.*

Thirty-one final forfeiture orders were issued for amounts totaling $39,050. Twenty licensees elected to pay forfeitures totaling $8,875 without waiting for issuance of a final order. (As the reader may know, all forfeitures are payable to the U.S. Treasury, not to the FCC.)

Among the most common violations leading to issuance of liability notices were operation without a properly licensed operator, violation of logging requirements, failure to broadcast identification of the sponsors of sponsored programs or announcements, failure to file ownership or financial reports, broadcast of lottery information, excessive deviation from assigned frequency, failure to give proper station identification, unauthorized transfer of control, failure to maintain tower lights, broadcast with excessive power, and rebroadcast of programs of another station without obtaining authority of the originating station.

The 1960 Fine Amendment Reviewed

The 1960 Amendment to the Communications Act (P.L. 86-752, approved 9-13-60) permits the Commission to assess fines upon licensees for "willful and repeated" violations of the Commissions' Rules or of the Act. *Nearly all violations are assummed to be "willful."* Why? All licensees, and their staff and agents, are expected to know the rules; ignorance is no excuse. *"Repeated" has been held to be any violation occurring more than once.* Thus, the statutory mandate that fines be "willful and repeated" offers little or no solace for licensees.

Factors Determining the Size of the Fine

How does the Commission determine the size of the fine? Three of the most important criteria are: (1) the importance of the station in its market; (2) the financial condition of the station; and (3) the past broadcast record

of the licensee, including the number of prior offenses.

Forfeitures Levied on Late Filed Renewals

On December, 2, 1965, the Commission announced that, beginning with the license renewal applications due to be filed by March 1, 1966, the Broadcast Bureau would bring to its attention all instances in which broadcast licensees fail to make *timely filing of their license renewal applications* in accordance with the Commission's Rules.

Except in cases where delay is found to be justified, the Commission levies forfeitures for late filing.

Thereafter, the Commission developed a more comprehensive and precise policy with respect to late renewal applications. On March 15, 1966, a Commission Release notified all licensees as follows:

> "Licensees are put on notice that it is the experience of the Commission that receipt by the Commission of renewal applications at sometime less than 90 days prior to expiration of the station license *does not provide adequate time* for a complete review of such applications and frequently results in *deferral of action* and the consequent delay in issuance of a renewal until sometime *after expiration of the current license.* Additionally, Section 309 (b) of the Communications Act provides that the Commission *may not grant any* renewal application until at least 30 days have elapsed after issuance of a public notice by the Commission that such application has been accepted for filing." (Emphasis supplied.)

Subsequently, on June 24, 1966, *the Commission issued a forfeiture schedule for those licensees filing late renewal application,* as follows:

(1) $25 for the first through the 15th day,
(2) $100 from the 16th through the 60th day, and
(3) $200 from the 61st through the 90th day.

Commission Delegates Authority to Issue Fines

In 1966, the Commission effected an amendment (x) to Section 0.281 of the Commission's Rules. *This subparagraph delegated authority to the Chief of the Broadcast Bureau as follows*:

"to issue Notices of Apparent Liability in amounts not in excess of $250 under Section 503 (b) of the Communications Act, . . . "

Thus, fines not exceeding $250 may be issued by the Commission staff without Commission approval.

Prior to this delegation of authority, each fine was reviewed by the Commissioners. They considered the merits and amount of the fine. The Commission was proceeding cautiously in this area. When the 1960 Fine Amendment was adopted, there was a dormant anxiety that the authority to fine, if placed in the hands of the Commission's staff, might be abused. This concern was rekindled in 1966, when the Commission gave the Broadcast Bureau authority to levy fines of $250 or less without seeking approval of the Commissioners.

Despite the problems inherent in the delegated authority to fine, the Commission has found its workload too great to accord individual attention by the Commissioners to each fine. The number of violations and violators make such treatment implausible. In actual practice, the decision has worked out reasonably well.

To Avoid Fines By Delegated Authority and Delay Payment

It must be noted, however, that the licensee has not lost access to decision by the Commissioners. For example, if a licensee receives a notice of apparent liability of $100 for a certain violation, he can delay his response for a few weeks and file a letter barely within the 30-day limit, explaining the surrounding circumstances and requesting that the liability either be waived or reduced substantially. When such a response is received by the staff, they *forward it for consideration by the Commissioners.* Because the Commission is understaffed, and therefore literally deluged with work, it will take a few weeks before they reply.

At that point, approximately 45 days has lapsed since the issue of the forfeiture notice. Assuming the Commission's action upon your letter-request is unfavorable (either a denial or inadequate reduction in the amount of the fine), you may file *a request for reconsideration.* You have an additional 30 days (from receipt of the Commission's action on your initial request) to do this. By utilizing this second 30-day period, you have legally postponed payment approximately 75 days.

By the time the Commission acts upon your *request for reconsideration,* approximately 90 days will have elapsed. At that point, you have an additional 30 days to make payment. Therefore, when you finally make payment, approximately 120 days will have elapsed.

While the advantages of (1) obtaining a ruling by the Commissioners (as opposed to the staff), and (2) delaying payment for four or more months appear obvious, *there are disadvantages. First,* it is time-consuming, troublesome, and if your lawyer assists, costly. *Second,* it focuses staff attention upon you and your violation; as a "contested" fine, more records will be made and kept on the case; and adverse

publicity, in the trade press, may result. *Third,* in the vast majority of cases, you will not induce the Commission to overrule the staff's recommendation. Your initial request and your subsequent plea for reconsideration, in most cases, merely postpones the inevitable.

Courts Reverse FCC Forfeiture Rulings

On the other hand, if your have the funds and proclivity to "wage war" with the Commission over a fine, you may take the case to court. You are entitled to a trial *de novo* (based on the original merits of the case) in the Federal District Court where your station is located.

In two recent cases, decided in January and April 1966, (*United States* v. *Hubbard Broadcasting, Inc.,* 6 RR 2nd 2069 and *United States* v. *WHAS, Inc.,* 7 RR 2d 2055) the licensees were victorious. The fines were set aside because the Court did not agree that the violations were "willful and repeated." Encouraging as the precedents are, few licensees are willing to incur the legal and other expenses necessary to take a fine case that far.

In most cases, the *disadvantages* of requesting a reduction or cancellation of a fine outweigh the advantages. However, there are cases wherein the licensee's reasons may well result in favorable action on such a request.

Arnold Toynbee once observed, "You can't adjust life to law; you must adjust law to life." While his wisdom may serve to admonish federal lawmakers (and rulemakers) to proceed with caution, it is of small solace to the broadcast licensee. In fact, quite the contrary appears applicable; in this instance, the licensee is well advised to adjust his life to the law and the ever-changing Commission Rules.

"Overcommercialization" Reviewed

SOME MOST PREGNANT QUESTIONS HAVE ARISEN: (1) Does the Commission maintain commercial standards? If so, in what form? (2) *What are these standards*? (3) *Is the Commission, by virtue of its recent "Commercial Inquiry," changing these standards*?

These probative, curious and Delphic questions flow from the Commission's October 24, 1966, Public Notice (FCC 66-923). In this cryptic and unimposing Notice (above and hereinafter referred to as the "Commercial Inquiry"), the Commission required *all* broadcast licensees, without exception, to file "updated" information concerning their proposed commercial practices. This request was made, purportedly, to bring all licensees within the boundaries of the program forms adopted for radio (*BM/E* Feb. & Mar. 1966 issues) and TV (*BM/E* Dec. 1966 issue) and to afford each licensee an opportunity to state its commercial content in *minutes* rather than in terms of the number and length of commercial announcements. Its effects, and the trends reflected thereby, warrant the reader's avid attention. This unassuming Commercial Inquiry has caused considerable, warranted concern. The questions set forth in the above paragraph will be discussed in the order posed.

Does the Commission Maintain Commercial Standards? If so, in What Form?

Yes! And, no! The ambiguous answer is necessitated by the Commissions' ambiguous and volatile commercial "policy." This nebulous and oracular standard can be better understood by a cursory review of its inconsistent and surprise-filled background.

Over the years, the FCC has considered overcommercialization in a host of cases, too numerous to list, and has consistently taken the position that this was "an important element in judging the overall program performance of an applicant or a licensee." However, *in none of these cases did the Commission* (or its predecessor Agency) *establish definite standards or even broad guidelines as to the formula used to distinguish "overcommercialization" from acceptable commercialization.*

While the Commission has maintained a continuing interest in this problem, there have been few cases wherein the FCC actually concluded that there was overcommercialization. In those infrequent cases, the findings of so-called overcommercialization have resulted in nothing more than "short-term" renewals. In most cases, the licensee has seen the error of his ways before, or at least in the middle of, a hearing, adjusted downward his commercial proposal, and received a renewal. In most of the hearing cases, the amount of overcommercialization was so extreme as to be obvious. (See 1962 case, 24 RR 315, wherein the a-m licensee proposed 6 to 8 minutes commercial in every 14½ minute period —an average of 50% or more commercial.)

Throughout over 40 years of broadcasting and federal regulation thereof, a definite commercial standard or guideline (in written form) is conspicuously absent. These unwritten policies have not appeared in case digests, memoranda, opinions, and orders, or even in letters to licensees. Why, the reader may ask, has the Federal Governmnet judiciously avoided reducing these transitory, fugitive and ever-changing policies to writing? There are a wealth of *legal* reasons

militating against rigid guidelines. A brief review thereof follows.

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

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

Section 326 of the Communications Act of 1934, as amended, states:

> "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 communications."

In an inexhaustible list of precedents, *the courts, the federal agencies, and the Commission have repeatedly disavowed any authority to "censor"* the right of free speech. In the case of the FCC, "censorship" would involve any rule which dictates what the licensee must offer (or not offer) in the way of program content. (Notable exceptions to this dearth of written specifics may be found in those cases wherein the Commission has properly forbade the broadcast of obscenities, criminal acts, libel, lotteries, and the like. Few, if any, would quarrel with the prohibition of amoral or *criminal* program content.) In a more general sense, "censorship" of program content — the amount of music, agricultural, religious, sports, news, and even *commercials* — remains a somewhat unsettled issue!

In numerous *FCC* cases, *the courts have ruled that the choice of programs rests with the licensee* and that the Commission is forbidden to censor. (See, for example, *McIntire v. Wm. Penn Broadcasting*, 151 F. (2d) 597, C.C.A. 3d, 1945.) Also, see U.S. Supreme Court decision in *Farmers Educational and Cooperative Union*, 360 U.S. 525 (1959).)

Despite all of the above, the Commission, from

time to time, has asserted (and seemed to assume) that it has authority to regulate the amount of commercial content broadcast.

In one of its more recent "Magna Carta's," entitled *Report and Statement of Policy Re: Commission En Banc Programming Inquiry,* 20 RR 1902 (1960), the Commission, in justifying its authority to control commercialization, stated:

> "Notwithstanding the foregoing authorities, the right to the use of the airwaves is conditioned upon the issuance of a license. . . ."

Thus, after thoughtful review of the clearly anti-regulatory legal premises, the Commission pointed out that it does not have to issue or renew a license to one—as contrasted with its (Commission's) view of proper programming. It implies that its basic obligation — to make broadcasters program in consonance with the public interest — may supersede the explicit and repeated "censorship" prohibitions.

In January 1964, the Commission adopted a *Report and Order* (FCC 64-22, 1 RR 2d 1606) regarding "Commercial Advertising Standards." In that proceeding, *the Commission had proposed to adopt fixed rules to restrict the amount of advertising broadcast* by its licensees. While the Commission continued to maintain that it has authority to promulgate commercial standards, it concluded:

> ". . . We will continue to take whatever steps are necessary and appropriate to prevent its occurrence [overcommercialization] . . . however, [*the*] *adoption of definite standards in the form of rules limiting commercial content, would not be appropriate at this time.* . . ." (Emphasis supplied).

> ". . . we will give closer attention to the subject of commercial activity . . . *on a case-by-case basis.* . . . Attention will be given to situations where performance varies substantially from standards [promises] previously set forth. . . ." (Emphasis supplied.)

To the chagrin of then Chairman Henry and Commissioner Cox, in July 1964, the Commission granted a series of renewal applications that embodied apparent overcommercialization. The dissenters offered an impassioned plea for *definite commercial standards*, because the licensees, guilty of commercial excesses, as pointed out by the staff, were granted renewals anyway. In some of these cases, the excesses of commercial content far exceeded (1) NAB Code limits and (2) the "promises" set forth in the last renewal. It is interesting to note that most of the punishment (short-term renewals or fines) administered for "overcommercialization" to date has been predicated upon the licensee's failure to program as proposed (promise vs. performance test) — *not* upon excessive commercialization *per se*.

The next significant action is the current (October 1966) Commercial Inquiry seeking commercial content in *minutes* — as distinguished from the number and length of commercial announcements — from *all* licensees.

Thus, in response to the question, "Does the Commission maintain commercial standards? *BM/E* must respond both "Yes, and no." *In summary, for 40 years, the Federal Government has espoused an acute interest in the amount of commercial "chatter"; but, the intensity of this interest has undergone a marked change every five years or so; moreover, the law is such that it is difficult for the Commission to establish firm and fixed advertising standards; additionally, no two broadcasting markets are alike; for these reasons and others, the Commission has never set in print, in any form, its "commercial standards"; however, by indirection (the refusal to issue a license or grant a renewal), the Commission controls commercial content!*

Today, the major problem is to ascertain or define these *unwritten, amorphous commercial ceilings! But, what are the Commercial Standards?*

As the Commission might say, "These standards must be predicated upon the needs of the public and can be determined only by the licensee." *There is no lucid answer!* There is only inference, supposition and speculation. The ever-present, unwritten implication was and is that the *commercial proposal must comply with current Commission standards.* This nebulous, and still undefined policy, has a long history of vacillation.

During the past 20 years, the Commission has repeatedly altered its commercial standards. For example, during much of the 1940's and early 1950's, the Commission would accept a statement to the effect that "The licensee proposes to adhere to the NAB Code limits." In the middle and late 1950's, it became necessary to be more specific; a recitation of Code compliance was unsatisfactory; the licensee was expected to assert that it would ". . . . not *generally* broadcast any commercial in excess of one minute in length and no more than three such commercials, aggregating no more than three minutes, in any given 14½ minute period." In the 1960's, this technique became unpalatable to the FCC. With the advent of the KORD case in 1961, the Commission augmented its use of the *"promise vs. performance"* test. In this era, high commercial ceilings were not nearly so dangerous as composite week statistics that demonstrated that the licensee was programming substantially more commercials than proposed.

However, by artful wording and the liberal use of such evasive terms as "generally," many licensees were able to justify their "performance" with their *inexact* "proposal." Several Commissioners became most disturbed. With the exception of a few, ancient and distinguishable cases, the Commission had no legal precedent or procedures upon which to base definite advertising standards. This situation resulted in the *proposal to adopt definite standards by amending the Rules.* Under pressure from Con-

gress, as indicated previously, *this proposal was defeated*, by a 4-3 vote, in January 1964 — with Commissioners Henry, Cox and Lee dissenting. The latter two remain on the Commission today, and Commissioner Nicholas Johnson (Henry's replacement) may be logically expected to follow in the same general tradition of his predecessor.

As NAB Code requirements stiffened, its standards, once again, became more attractive guidelines. Within very recent years, the Commission has encouraged licensees to propose to adhere to the Code standards. With the adoption of the long-anticipated new program forms (Section IV's) and program logging requirements for a-m and fm (in 1965) and TV (in 1966), the Commission, at long last, had renewal, assignment, transfer, and new license forms (Section IV's programming proposals), with "teeth." Now, the licensee must set forth his commercial proposals in terms to which the Commission may bind him. Hence, the "promise vs. performance" test is more effective, and, more saliently, the Commission is better able to ascertain *exactly* what the licensee is proposing.

During much of the 1960's, the a-m/fm licensee could obtain renewal by proposing "20 minutes commercial during the average broadcast hour" with limited exceptions wherein the ceiling was raised to "22 minutes." By adhering to this *unwritten* rule, the licensee could obviate letter-inquiries and deferral of renewal. Those exceeding these limits were required to make out a strong case in support. Generally, the licensee yielded to the Commission's will, when questioned, and brought his commercial proposal in line with the "20- and 22-minute ceilings." That was the unwritten, commercial policy in effect prior to the issuance of the 1966 Commercial Inquiry.

Has the Commission, Via Its Recent Inquiry, Changed the Commercial Standards?

Much to the surprise of many — in view of the current composition of the Commission — the Commissioners, by virtue of strong staff influence, were prompted to issue the *October 1966 Commercial Inquiry.* In so doing, the Commission concluded its Notice with the following statement:

> "By this action *the Commission does not imply or seek to impose any particular requirement or limitation on the commercial practices of licensees,* but does seek full, specific and responsive statement as to licensee's commercial practices." (Emphasis supplied.)

Once again, by artfully avoiding a classic opportunity to spell out its convictions in the matter, the Commission has left the broadcaster puzzled. However, *the general import of the message* was received "loud and clear" by the industry. That is, *the licensee had best propose to comply with the NAB Code commercial standards.*

The instant responses to the Inquiry were due to be filed prior to January 1, 1967. Many licensees filed well in advance of that date. One FCC staff member reports that ". . . *in excess of 95% of those replying indicated that they would comply with the NAB Code.*"

Interestingly, assuming the accuracy of the *Commission's 1963 staff-analysis (Report and Order,* re Commercial Advertising Standards, 1 RR 2d 1609, footnote 4), "*40% of the licensees analyzed proposed to exceed NAB Code commercial limits.*"

Thus, the October 1966 Commercial Inquiry form appears to have resulted in a substantial decrease, in commercial proposal, by an estimated 35% of the broadcast industry! That is, where "40%" of the industry exceeded NAB limits in 1963, only 5% exceed it today. Such a marked departure is somewhat astounding when one considers that *the Commission has not set forth, to this day, either broad or specific com-*

mercial standards in written form. Such pronouncements have been, and continue to be, judiciously avoided.

The Commission has appeared to have accomplished its long-sought goal by innuendo, indirection, or quasi-intimidation. The licensees, as a group, appear to believe that, the Commission's assertions to the contrary notwithstanding, a failure to meet and comply with NAB Code standards, may result in letter-inquiries, deferred renewal, possibly a hearing, and/or a loss or denial of license. Accordingly, they conclude that a few extra commercials are not worth the risk. Is it really necessary to yield so quickly? Have the prior, more liberal commercial standards really changed that much? Will the Commission really enforce its ephemeral commercial standards?

Reports in the industry press have indicated (1) the "rules" have not really changed, (2) the thrust of the Commercial Inquiry is to elicit exact and precise commercial proposals and not to reduce commercial content, and (3) exceptions, well stated and justified, will be permitted.

For several weeks, the Commission has chosen to postpone action upon a series of renewals which the staff has recommended for deferral. Within the last two weeks, the Commission has ruled that several of these stations should receive letters. The *feeling*—and "feeling" is what has determined acceptable and unacceptable commercial policies for 40 years—*is that most requests to exceed the NAB Code limits will meet with stern opposition—BUT probably not result in a hearing or loss of license!*

In the case of a-m and fm stations, some staff members speculate that the Commission will approve many requests wherein the licensee proposes to exceed Code limits from 10% to 15% of the time. In the case of TV stations, excesses of the Code commercial limitations, supposedly, will be confined to 5% to 10%. At

least, this is the current thinking. As a practical matter, *percentages* of permissible commercial excesses (e.g., ". . . licensee will adhere to the NAB commercial limits 90% of the time. . . .") are apt to prove disappointing. To wit, *depending entirely upon the reasons advanced,* a request to exceed NAB Code limits 15% might be granted in one a-m case, and a 5% excess denied in another. At present, there are no meaningful guidelines or "rules of thumb"—except for the NAB code standards.

What reasons will the Commission accept as sound justification for commercial excesses? This is a question that can be answered *only* by the licensee and the specific and unique facts of his case. The chances are that most requests for exception will be denied *indirectly.* That is, after letter-inquiry and deferred renewal, most licensees will voluntarily reduce their commercial proposals.

Conclusion

BM/E is compelled to observe that *it is not necessarily prudent or appropriate to agree to or adhere to the NAB Code standards so quickly*—unless you feel it desirable from a public interest and financial standpoint! Why? *First,* the Commission is overloaded with hearing cases and can ill afford renewal hearings on borderline commercial-policy issues. *Second,* the Commission's *legal* footing to "censor" or indirectly dictate commercial content is shaky at best. The only court cases on point do not indicate a disposition to ignore the First Amendment of the Constitution or Section 326 of the Communication's Act. Congress might rally to your defense. In brief, the Commission might lose and would prefer undoubtedly to avoid taking the risk of losing its present *indirect* leverage. *Third,* if you have (in your opinion) legitimate, good faith reasons to propose commercial standards greater than those permitted under the NAB Code, you should

present them; if you receive a letter-inquiry, you could reduce your commercial proposals; in fact, you could "stick to your guns" up to the unlikely day your case was designated for hearing; further, you could proceed through the issuance of an Initial Decision by the Hearing Examiner, and, if unsuccessful, adjust your commercial proposal at that time.

In any event, there are *many* opportunities, along the way, to reduce your commercial proposals to NAB levels and receive favorable action upon your application. *It seems tragic that the average licensee's first reaction is to yield rather than to defend his democratic rights.* Of course, it may cost money to resist, but, then, the matter can be settled in a day by agreeing; moreover, the loss of substantial advertising dollars, over a period of years, may well result in large cash loss. In brief, any licensee, who really needs to exceed the "new commercial standards" (the standards of the NAB Commercial Code), should be daring enough to make a tacit attempt at least. While bureaucracy is upon us, we should not lose our willingness to defend our freedoms. In our sacrificial zeal to avert controversy, let us not lose sight of the Supreme Court's 1959 admonition (in *Farmers Educational Cooperative Union*) as follows:

> ". . . expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication."

While the Commission is vested with the authority and obligation of requiring broadcasters to meet the needs of the public, *the licensee*, as the Commission has consistently held, *is the final judge*. Even a greater commercial content may be needed by (1) the public in some cases or (2) the broadcaster to provide funds for other forms of needed programming.

There are two basic methods of resolving the

problems encountered by the new and more stringent — although unwritten — commercial standards. *First*, the licensee can follow the advice of Demosthenes (renowned Greek orator and statesman), "The readiest and surest way to get rid of censure is to correct ourselves." Or, in the vein of Epicurus (a Greek slave immortalized by his philosophy), the licensee may assume the attitude that, "The greater the difficulty the more the satisfaction in surmounting it." To date, "95%" of the licensees have chosen the former and brought their commercial proposals in line with the NAB Code limits. Curious, but apparently true.

BM/E propounds neither view and concludes simply that the licensee's commercial proposals, today as in the past, should set forth standards which (*in the licensee's opinion*) are consonant with good taste, public need and the economic viability of his operation. *If* the resultant proposal exceeds NAB Code ceilings, the proposal should be *very specific* as to the following:

(1) when such excesses would occur,
(2) how frequently such excesses would occur,
(3) the commercial ceilings that would then apply,
(4) the percentage of total broadcast time in which NAB Code limits would be exceeded, and
(5) *detailed and convincing reasons to* justify these excesses.

If necessary, you can revise and reduce your commercial proposal subsequently. If questioned, you need not "run scared;" defend your *honest* judgment (and freedoms). On the other hand, if the NAB Code limits satisfy the needs of your audience and station, it would be most prudent to propose accordingly.

Sponsorship ID Rules Revised to Accommodate "Want Ad" Programs

SINCE THE EARLIEST DAYS of broadcasting, the Commission has consistently adhered to the basic tenets of Section 317, as reflected in the "Sponsorship Identification Rules" (Sections 73.119, 73.289 and 73.654). In brief, they provide that all matter broadcast by any station for valuable consideration must be (a) *announced as sponsored, paid for, or furnished, and (b) by whom.* In the *BM/E* issue of September 1965, the article entitled, "Section 317—The Advertising Section," stressed the fact that the Commission has *consistently* applied the strictures imposed by 317 and the sponsorship id rules.

In the past few years, in accordance with the provisions of Section 317(d)[1] the Commission has granted a number of requests substantially similar in nature for waiver of the sponsorship

1. "317(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement."

identification requirements of Section 317(a)[2]. *These requests involved the broadcast of "want ad" or classified advertisement programs,* wherein individuals sponsor brief advertisements. Since the waivers constitute a departure from established precedent, a brief review of the sponsorship id rules and the recent waiver proposal is appropriate.

The Rigidity of the Basic Rule

One of the best examples of the Commission's attempts to stem violations of the sponsorship id rules is best evidenced by a warning contained in a Public Notice released October 10, 1950. In pertinent part the release maintains that:

> "Although the statute does not specify the exact language of the required announcement, *its plain intent is to prevent a fraud being perpetrtated on the listening public* by letting the public know the people with whom they are dealing. *Therefore, reference must be made to the sponsor of his* product in such manner as to indicate clearly not only that the program is paid for, but also the identity of the sponsor.
>
> "It is apparent that under the Act and the Commission's Rules . . . the sponsor or his product must be identified by a distinctive name

2. "317(a)1 All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That service or other valuable consideration shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

"317a (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talents, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program."

and not by one merely descriptive of the type of business or product. Thus, Henry Smith offers you, or Smith Stove Company offers you, or Ajax Pens brings you . . ." would be sufficient as would reference to a registered brand name (Renzo, Lucky Strike, Duz). However, "Write to the Comb Man." Send your money to Nylons, Box 000. This program is sponsored by the Sink Man or words of similar import which are merely descriptive of the product sold and which do not constitute the name of the manufacturer or seller of goods, or the trade or brand of the goods sold, would not comply with S 317 . . . This is true even where such descriptive terms have been adopted by the selling agency as a convenient method for direct radio merchandising of the products of any company. In all cases the public is entitled to know the name of the company it is being asked to deal with, or at least, the recognized brand name of his product.

"It is also pertinent to point out that the mandate of S 317 of the Act applies with equal force to political broadcast." (Emphasis supplied.)

The Commission has emphasized that (1) with regard to ordinary broadcast matter, reasonable diligence must be exercised by a licensee to ascertain and identify the true sponsor and source of all the material presented over his station, and (2) with regard to discussions of public controversial issues or political discussions, *the highest degree of diligence* must be exercised by a licensee to ascertain the actual source responsible for furnishing the material.

In summary, the present sponsorship id rules, like those in the past, require:

(1) Any broadcast matter—for which money, service, or other valuable consideration is directly or indirectly paid or promised to any station—must be announced as sponsored, paid for, or furnished either in whole or in part, and by whom or for on whose behalf such consideration was supplied.

(2) "Service or other valuable consideration" does not include any service or property furnished without charge, unless it is furnished in consideration for an identification beyond that rea-

sonably related to the use of such service or property on the broadcast.

(3) Licensees must use "reasonable diligence" to obtain information from its employees and agents of any data which might require sponsorship identification.

(4) In political or controversial issue programs, if records, tapes, scripts, services, etc., are provided, an announcement stating such things were given and identifying the true supplier, must be made at the beginning and end of the program.

(5) Sponsor announcements must fully, fairly, and clearly identify the *true* identity of the person(s) by whom or on whose behalf the payment is made or promised.

(6) In the case of advertising commercial products or services, an announcement of the sponsor's corporate or trade name of his product is sufficient, provided, however, that the mention of the name clearly identifies the sponsor without confusing, misleading, or teasing the audience.

New Rules Proposed

On March 3, 1967, the Commission adopted a Notice of Proposed Rule Making looking towards amendment of Part 73 of the Commission's Sponsorship Identification Rules (Docket Number 17252), to accommodate "want ads" or classified advertisements by individuals sponsoring brief advertisements. The proposed rule would afford such "want-ad" advertisers the same kind of anonymity which is available to users of classified want-ads in the newspapers. This would prevent abuse of advertisers such as harassment of women advertisers by crank telephone calls.

To date, licensees seeking waiver made substantially similar representations regarding safeguards and precautionary measures to be established if the Commission granted the request for waiver, namely it would attach to the program log for each day's classified want ads a list showing

the name, the address, and, where available, the telephone number of each person purchasing such ads. Of course, this information would be made available to any member of the public having a legitimate interest therein.

In view of the numerous similarly worded requests for waiver, the Commission proposed an additional subsection to the sponsorship id rules (73.119, 73.289, and 73.654) to read as follows:

> "The announcements required by Section 317(A) of the Communications Act of 1934, as amended, are waived with respect to the broadcast of want ads or classified advertisements sponsored by individuals. The waiver granted in this paragraph shall not extend to classified advertisements or want ads sponsored by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph the following conditions shall be observed:
>
> "(1) *The licensee shall maintain a list* showing the name, address, and (where available) the telephone number of each advertiser and shall attach this list to the program log for each day's operation; and
>
> "(2) *Shall make this list available to members of the public* who have a legitimate interest in obtaining the information contained in a list.
>
> "Commission interpretations in connection with the provisions of this Section may be found in the Commission's Public Notice entitled *Applicability of Sponsorship Identification Rules* (FCC 63-409; 28 FR 4732, May 10, 1963) and such supplements thereto as are issued from time to time" (Emphasis supplied.)

Conclusion

In effect, the proposed amendments provide a blanket waiver of the announcements required by Section 317(a) for classified advertising sponsored by private individuals, *but not for advertisements sponsored by any business enterprise, corporate or otherwise.*

The proposed rule requires each licensee who

wishes to take advantage of the waiver to comply with certain minimum safeguards as set forth in the proposed rule. These safeguards are merely a modification of the safeguards required by the Commission as a condition to its grant of waiver in the past years under similar circumstances. There seems to be little doubt that the proposed rule will be adopted in the very near future. It will (1) assist the Commission, (2) relieve licensees of the burden of filing applications for waiver, and (3) provide additional protection for the public.

The proposed rules do not herald a radical departure from the Commission's past strict enforcement of the sponsorship identification rules. Basically, they recognize a valid waiver requirement in a specialized area; consequently, all licensees can expect continued rigid enforcement of the sponsorship id rules.

Recent Changes in ID Rules

The requirements of the id rules are found in Sections 73.117(AM), 73.287(FM) and 73.652(TV).

ID Rules In General

The rules require the licensee to identify the station by announcing the call letters and location (city of license). For a-m and fm stations, these id's must be given at the beginning and ending of each time period of operation and as follows: (1) within two minutes of the hour *and either* the half hour *or* quarter and three-quarter hours; (2) in the case of a single consecutive speech, play, religious service, symphony concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program; or (3) in the case of variety shows, athletic contests, and similar programs of longer duration than 30 minutes, within five minutes of the time given above.

For TV, the id's must be given *both visually and orally* at the beginning and ending of each time period of operation, *and either visually or orally* (1) during the operation on the hour or (2) in the case of a single consecutive speech, play, religious service, symphony, concert, or operatic production, at the first interruption of

the entertainment continuity and at the conclusion of the program.

The importance of these rules cannot be overemphasized. They were promulgated at the very beginning of the broadcast regulation, first by the Department of Commerce and later by the Commission. *The underlying reason for the requirements of the rules has been to assist the regulatory agency in its monitoring.*

New Rules Concerning IDs for Translator Stations

On December 1, 1966, the Commission released a Memorandum Opinion and Order (RM-440, FCC 66-1074, 91767) amending Sections 74.750 (c) (7) and 74.783 (a) of the rules governing television broadcast translator stations. The Commission recognized that station identification for TV translators is useful and often necessary; however, it found that it could dispense with the identification requirement for translators with power of 1 watt or less. In other words, the order eliminated the need for television translator stations of powers of 1 watt or less to identify themselves; nevertheless, it retained this requirement for those translators with powers exceeding 1 watt.

The licensees that filed comments in the proceeding suggested that the Commission could further relax the id rules for translator stations in order to include powers higher than 1 watt. However, the Commission indicated that its principal concern was with potential interference to other radio stations. It is believed that the problem of identifying the source of signals by the Commission is compounded in the absence of a call sign or some other quickly recognizable method of relating the signals observed to a particular transmitter in a specific location. In the case of the very low-powered vhf translators the Commission was able to eliminate the requirements for station identification because the range of such signals is very limited,

thereby permitting the use of simple radio-location methods. In the case of high-powered translators, their signals extend over a much larger area, and simple radio location methods are not feasible.

As is evident, the Commission has recognized the practical necessity of allowing a relaxation of its id rules insofar as translator stations are concerned; however, it is also evident that the Commission is still concerned primarily with the original reasons for the establishment of the id rules—to be able to monitor and establish the identity of a station over the air.

New Rules for TV Auxiliary Broadcast Stations

On October 15, 1965, the Commission issued a Notice of Proposed Rulemaking (FCC 65-930) which looked towards modification of Section 74.682 of the Rules. This section sets forth station identification requirements, television auxiliary broadcast stations (TV pickup stations, television studio-transmitter link stations, and television intercity relay stations). On December 1, 1966, the Commission issued a Report and Order (Docket No. 16,240, FCC 66-1101) modifying Section 74.682 of the Rules.

The present rules require each television auxiliary station to identify itself by transmitting its call signals at the beginning and end of each period of operation. During operation, the rules required that the call sign of the station or the associated television station must be transmitted *on the hour*; however, such identification transmissions *need not interrupt program continuity.* When the stations were operated in an integrated relay system, the station at the point of origination could transmit the call signs of all the stations in the system. The transmissions of the call sign would normally employ the type of emission for which the station is authorized, either visual or aural. When the transmitter was used for visual transmission

only, the call sign could be transmitted in International Morse Code by keying the carrier or a modulating signal impressed on the carrier.

The modified rules, for TV auxiliary stations, as adopted on December 1, 1966, read as follows:

74.682 Station identification.

(a) Each television broadcast auxiliary station shall transmit station identification at the beginning and end of each period of operation and at intervals of no more than one hour during operation, by one of the following means:

(1) Transmission of its own call sign by visual or aural means or by automatic transmission in International Morse telegraphy.

(2) Visual or aural transmission of the call sign of the TV broadcast station with which it is licensed as an auxiliary.

(3) Visual or aural transmission of the call sign of the TV broadcast station for whose signal it is relaying to its own associated TV station.

(b) Identifiation transmissions during operation need not be made when to make such transmission would interrupt a single consecutive speech, play, religious service, symphony concert, or any type of production. In such cases, the identification transmission shall be made at the first interruption of the entertainment continuity and at the conclusion thereof.

(c) During occasions when a television pickup station is being used to deliver program material for network distribution it may transmit the network identification in lieu of its own or associated TV station call sign during the actual program pickup. However, if it is providing the network feed through its own associated TV broadcast station it shall perform the station identification required by paragraph (a) of this section at the beginning and end of each period of operation.

(d) A period of operation is defined as a single uninterrupted transmission or a series of in-

termittent transmissions from a single location or continuous or intermittent transmission from a television pickup station covering a single event from various locations, within a single broadcast day.

(e) Regardless of the method used for station identification it shall be performed in a manner conducive to prompt association of the signal source with the responsible licensee. In exercising the discretion provided by this rule, licensees are expected to act in a responsible manner to assure that result.

The basic purpose of call signs is to provide identification. For years, stations have used their call signs, both at required id times and at other times, for promotional purposes to keep the public aware of their identity. In this connection, identification of auxiliary installations is of little or no concern; however, this is not the only purpose of station identification. The transmission of station identification by call sign and location is also intended to assist enforcement agencies in this country and abroad in rapid identification of signal sources and to indicate that the signals originate at a legally licensed station. The transmission of station identification may be compared to the display of license plates on a motor vehicle. Since it is usually impractical for a radio station to *display* its call sign at all times, the Commission's Rules and international agreements require the transmission of station id's at reasonably frequent intervals. If this were not required, it would be next to impossible for monitoring stations to recognize licensed stations and to quickly identify stations guilty of infractions of the Rules. Additionally, the proper use of call signs also protects stations against wrongful accusations which could arise as a result of similarities in their transmission with those of the real wrong-doer. When signals are observed and no station identification is transmitted, there is a

strong suspicion that the signals originate from an unlicensed transmitter.

It was not the purpose of this recent modification to eliminate the requirement for station identification. Its purpose was to modify the requirements so as to meet practical operating problems without the sacrifice of information necessary for the proper identification of stations.

TV Auxiliary Station ID Problem Analyzed

In promulgating the modified rule, the Commission realized that it had to establish a middle ground between adherence to its basic philosophy of availability from the basic purposes of station id's and the practical operating problems inherent in the establishment of too strict a rule. The television auxiliary services involve transmissions under a variety of circumstances. Some equipment carries both visual and aural transmissions and other equipment carries only visual information. Some transmitters are attended and others operate unattended. Therefore, *it becomes difficult if not impossible to prescribe specific methods of station identification that will embrace all possible situations. The Commission's principal concern is to assure rapid identification of observed signals and to prohibit the transmission of unidentified signals.*

For example, the transmission of station identification is most difficult at unattended stations. In the TV auxiliary services, these are either TV intercity relay stations or intermediate stations in a multihop television STL circuit. The Rules do not permit unattended operation of TV pickup stations or the originating station in a television STL circuit. The Commission pointed out that devices for the automatic transmission of call signs at unattended TV auxiliary stations are available; however, these devices rely upon a timing mechanism which ac-

tuates the call sign transmission at regular predetermined intervals. Unless the break in program continuity for station identification occurs at prescisely these intervals interruption to the program itself may occur. Furthermore, unless some means are provided to disconnect the intercity relay or STL circuit from the transmitter of the TV station, using the system during such automatic transmissions, the call signs of the TV auxiliary stations may be broadcast by the TV station. This is certainly undesirable.

In order to meet the Commission's enforcement requirements, *transmission of the call letters and location of the parent TV station over the TV auxiliary station would provide the necessary information.* This may be done as a part of the regular station identification transmission of the parent station, thereby solving the timing problem and avoiding transmission of auxiliary station call signs by the broadcast station. *However, this is not practical in the case of an intercity relay system which delivers programs obtained from another TV station,* or from network lines to the parent TV station. Since broadcast stations must obtain permission from the originating station before rebroadcasting their programs, an indirect form of station identification is possible if the intercity relay system carries the call sign of the originating station or an appropriate network identification. Although this may complicate rapid station identification, the Commission believes it to be an acceptable method of station identification in those special cases.

The transmission of station identification by *attended* TV auxiliary stations poses no timing problem. However, there is the problem of retransmission of the TV auxiliary call sign by the parent TV station. The present rule requires transmission of the TV auxiliary call sign at the beginning and end of each period of operation, and it permits use of the TV station call sign

during the remainder of the period of operation, which is easily accomplished at television STL stations and at TV pickup stations when used in conjunction with the parent TV station. On those occasions when TV pickup stations are used in conjunction with other TV stations or for a network feed, other methods of station identification as outlined above are permitted.

The question as to the type of emission to be used for station identification is fairly simple. For monitoring purposes, transmission by aural means or in International Morse telegraphy is best, although aural or visual identification is allowable and may be preferable. Use of visual or aural identification is comparatively simple over STL circuits and TV pickups when actively engaged in covering a remote broadcast. However, TV pickup equipment may be dispatched to the scene of a remote broadcast in advance of an actual broadcast for the purpose of establishing the circuit while cameras and sound equipment are not sent out until the time of the actual broadcast. In such cases, present rules permit the use of International Morse telegraphy transmitted automatically. *The use of telegraphy is permissive, not mandatory,* and licensees may elect to provide for aural, or visual identification on these occasions.

New Rules Revise Station ID Requirements

THE SO-CALLED "ID RULES" are found in Section 73.117 (a-m), 73.287 (fm), and 73.652 (TV). Briefly, they require the licensee to "identify" the station by announcing the call letters and location (city of license). For a-m and fm stations, these id's must be given at the beginning and ending of each time period of operation and (1) within two minutes of the hour, and either the half hour or the quarter and three-quarter hours; (2) in the case of a single consecutive speech, play, religious service, symphony concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program; or (3) in the case of variety shows, athletic contests, and similar programs of longer duration than 30 minutes, within five minutes of the times given above. For TV, the id's must be given both visually and aurally at the beginning and ending of each time period of operation and (1) during the operation on the hour or (2) in the case of a single consecutive speech, play, religious service, symphony, concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program.

The id rules were promulgated at the very beginning of broadcast regulation, first by the Department of Commerce and later by the Commission. In the past, the underlying reason for

the requirement was to *assist the regulatory agency in its monitoring.*

On January 25, 1967, the Commission adopted a Notice of Proposed Rule Making (FCC 67-114) to prohibit broadcast licensees in station identification announcements, promotional announcements or any other broadcast matter from leading or attempting to lead members of the listening or viewing public to believe that their stations have been assigned to cities other than those specified in their licenses. (In the matter of amendment to Part 73 of the Commission's Rules and Regulations relating to station identification requirements, Docket No. 17145, Report and Order, released 8/30/67.)

Efforts of certain licensees to mislead the public as to the licensed location of their stations have long been a matter of concern to the Commission. *Gulf Television Co.,* 12 RR 447; *Tulsa Broadcasting Co.,* 12 RR 1256. More recently, *McLendon Pacific Corp.,* 8 RR 2d 1187 (the licensee of station KABL), the Commission found such practices by a licensee undesirable (but under the particular circumstances of that case not in violation of existing rules) because the call letters and city in which the station was licensed were announced at the time specified for station identification.

This case is most interesting and informative because it was instrumental in galvanizing the Commission to review the entire station "id" problem, institute a rule making, and adopt the Report and Order mentioned above.

KABL's alleged violation of the station identification rule was based upon its conduct in making announcements required by the rule at specified intervals and in its "local color" announcements at other than the specified intervals. In making the required station identification, KABL coupled the announcement of its call letters and location with language concerning its coverage of San Francisco.

The Commission's Order involving KABL arose

as the result of complaints by city officials of Oakland, to which KABL is licensed, that the station consistently identified itself with San Francisco rather than with Oakland. Following receipt of the complaint, Commission monitoring disclosed the following announcement at station identification times:

"This is Cable—K-A-B-L, Oakland 960 on your dial, in the air everywhere in San Francisco." (Clang-clang of cable-car bell) At other times, other than the times specified for mandatory id's announcements or "promos" such as the following were broadcast:

> This is Cable—K-A-B-L music on aisle 96 from San Francisco. Serenade in the morning from aisle 96 on your San Francisco dial. . . . . This is KABL, in the air everywhere over the great Bay area, constantly in fashion with beautiful San Francisco. . . . . This is KABL, 960 on your San Francisco dial, with enchanting melody for San Francisco, the world's most enchanting city. . . . . This is KABL music, the voice of San Francisco from aisle 96 on your radio dial. . . . . A symphony of sound on KABL designed for San Fancisco.

The Commission ordered a hearing (Docket 16214) to determine whether an Order of forfeiture in the amount of $10,000 or some lesser amount should be issued. In an order released December 13, 1966, the Commission found that by announcing the station's call letters and the city of license, KABL *complied with the literal provisions of the rules and nothing more was required!*

Consequently, the Commission concluded, after review of information coming to light regarding misleading station identification announcements, that it was necessary to amend the rules. It further believed that nothing short of a general prohibition of the broadcast of misleading matter on this subject would cover all situations and prevent the defeat of the intent and purpose of the station identification rules. Accordingly, it

adopted a notice of a proposal to amend Part 73 of the rules to provide that:

> A licensee shall not in station identification announcements, promotional announcements or any other broadcast matter either lead or attempt to lead the station's listeners to believe that the station has been assigned to a city other than that specified in its license. (The amendment to the rules relating to television stations substitutes the word "audience" for "listeners.")

The Rules Analyzed

The majority of the parties submitting comments supported the proposed rule or its purpose, and one urged the Commission to go further and specify that even in nonbroadcast forms of advertising and promotion stations may not identify themselves with communities other than those in which they are licensed. However, most of the parties favoring the rule asked clarification (1) to specify that stations licensed to more than one city or authorized to use multiple-city identification may in all program matter identify themselves accordingly, and (2) to specify that stations licensed to one city but providing substantial service to other cities or nearby areas may so describe the scope of their coverage — provided no attempt is made to mislead the audience as to their licensed location. One of the parties in this group asked the Commission to state that licensees shall be entitled to declaratory rulings under Section 1.2 of the Rules. *The Commission emphasized that it was not its intent in proposing the rule making to infringe on any authorization for multiple-city identification or to inhibit the broadcast of truthful statements about a station's coverage area.*

A minority of the comments opposed the rule. Many of these comments were based on misconceptions of its effect in the areas described above; i.e., the use, where authorized, of multiple-city identification and the right to broadcast accurate statements regarding a station's coverage area.

However, several submitting opposition comments professed fear that the rule would impose many other prohibitions upon the programming of stations whose licensed locations are suburban communities. Among the consequences conjured up by this group were prohibitions against (a) the broadcast of any public service announcements or programs on behalf of organizations located in the principal city; (b) the broadcast of programs designed to serve the needs and interests of the entire coverage area of the station; and (c) the broadcast of advertising sponsored by businesses located in the principal city. A few of those submitting comments even professed fear that a suburban station would be required to delete or severely restrict the amount of news broadcast about events occurring in the adjacent principal city — lest the Commission hold that the broadcast of such news would mislead the station's listeners as to its location.

The Commission set forth that all such fears in the terms stated above were groundless. It repeatedly stated that a station has an obligation to serve its entire coverage area, and the broadcast of public service announcements and other programming, including news, which pertains to or is of interest to persons in its entire coverage area is not inhibited by the proposed rule. However, as set forth in Section 73.30(a) of the Rules, *the primary responsibility of a licensee is to "serve a particular city, town, political subdivision or community which [is] specified in its station license." The further obligation to serve its entire service area may not be used as justification to ignore the licensee's primary responsibility or to mislead a station's audience as to its licensed location.*

In his statement concurring with the Rule Making, Commissioner Johnson raised numerous questions going to the Commission's basic allocation policies, and invited comments thereon. In response, some filing comments urged that the Commission abandon the principle of licensing stations to individual communities and permit

them to identify themselves with entire metropolitan areas. In support of this view, it was urged that (1) the concept of community service is anachronistic; (2) stations in metropolitan regions now actually serve homogeneous areas rather than political entities, and (3) the people in such metropolitan areas have the same interests. Although such arguments merit consideration, the commission did not propose in this proceeding to consider the revision of its historic concept of station allocation. The proceeding was instituted to determine whether a rule should be adopted to prohibit misleading announcements regarding station location as presently assigned. As Commissioner Johnson recognized in his concurring statement, the Commission has in some areas permitted a substantial increase of interference in order to grant applications for first local transmission services. If the Commission were now to relieve such licensees of their local service obligations, it might well reconsider the need for so many facilities in some metropolitan areas.

Until such time as it may consider revising its basic policy in allocating facilities, the Commission shall continue to license stations primarily to serve their own communities and secondarily to service their entire coverage areas: Although the contention has been made that all metropolitan areas are now homogeneous and have the same programming needs, the Commission found no evidence was presented to support such a proposition. In fact, the Commission mentioned that the tremendous growth of suburban newspapers in recent years would lead to the conclusion that although many suburbanites work in the principal city, they retain their interest in the political, civic, cultural, social and educational affairs of their home communities.

In releasing its Notice of Proposed Rule Making the Commission recognized that if such a rule were finally adopted, it would be desirable to issue a supplementary list of examples of its application for the guidance of licensees. It did not

release a list of examples at that time because it believed that comments of interested parties in the proceeding would be of assistance in preparing the examples. After considering all suggestions and questions of interpretation submitted in the comments, the Commission incorporated, by reference in the rule, examples of ways in which it intends to apply the rule to specific practices. It previously followed this practice with respect to rules on sponsorship identification and fraudulent billing practices, and it apparently has proved helpful. The list of examples will be enlarged as experience dictates, and they should answer most of the specific questions posed in the comments. Most importantly, they will serve to negate the criticism advanced in some comments to the effect that the rule is vague and lacks clearly defined standards.

Following are examples set forth by the Commission illustrating the application of the rule to certain kinds of broadcast statements — whether or not broadcast at the time at which station identification is required.

1. Station xxxx's licensed location is Central City. It broadcasts an announcement: "This is Station xxxx, Central City," or otherwise refers to its location as in Central City.

Ruling: Such statements comply with the rules.

2. Station xxxx has been granted authority by the Commission to use dual-city identification. It broadcasts an announcement: "This is Station xxxx, Central City and Nearby City."

Ruling: The announcement complies with rules, assuming that the named cities are those specified in the dual-city authorization.

3. Station xxxx is licensed to a suburban community, Suburbia, but also provides primary coverage to substantially all of the adjacent metropolitan area. It broadcasts an announcement: "This is xxxx, Suburbia, serving the greater Principal City area."

Ruling: The announcement complies with the rules. Similarly valid announcements,

provided the station's coverage data support the claims, might be:

"Station xxxx, Millville, serving the Green River Valley."

"Station xxxx, Millville, serving Millville, Rushville and Oakville."

"Station xxxx, Millville, serving the Tri-City area."

4. Station xxxx is licensed to Central City only. It broadcasts an announcement: "Station xxxx, serving Central City—Nearby City."

Ruling: The announcement violates the rule because it appears designed to lead listeners to believe that xxxx has been authorized to identify with Nearby City as well as Central City.

5. Station xxxx is licensed to Suburbia. It broadcasts an announcement either at the time for station identification or at any other time: "This is xxxx, covering the greater Principal City area."

Ruling: The announcement violates the rule, since it appears designed to lead listeners to believe that xxxx is licensed to Principal City rather than Suburbia.

6. Station xxxx correctly identifies itself as located in Suburbia at the times specified in the Rules for mandatory station identification, but at other times refers to its locations as "Here in Principal City" or it makes other references which would be inconsistent with the station's assignment to Suburbia.

Ruling: Such statements and references violate the rules, since they attempt to lead listeners to believe that xxxx has been assigned to a city other than that specified in its license.

7. Station xxxx is licensed to Suburbia. It broadcasts public service announcements not only for organizations located in Suburbia but for those located in Principal City as well.

Ruling: The mere broadcasting of public service announcements or other program

matter relating to Principal City or any other city is not a violation of the station identification rule. However, the primary responsibility of xxxx is to serve Suburbia.

8. Station xxxx is licensed to Suburbia. At the times specified in the rules for mandatory station identification, it gives its call letters and licensed location, but at other times it broadcasts such statements and references as the following:

"In the air, everywhere, over Principal City."

"This is xxxx, a symphony of sound designed for Principal City."

"This is xxxx with enchanting music for Principal City, the world's most enchanting city."

"xxxx, the tiger of Principal City radio."

"Principal City's best music station."

"From the good guys of Principal City Radio."

Ruling: Since such announcements "either lead or attempt to lead the station's listeners to believe that the station has been assigned to a city other than that specified in its license," they violate the rule.

9. Station xxxx, licensed to Suburbia, broadcasts announcements: "Station xxxx, Suburbia, in the air everywhere over Principal City."

Ruling: Although the station's license location is given, the announcements appear designed to create the impression that xxxx is licensed to both cities or, indeed, to Principal City alone, and therefore violate the rule. Such announcements are to be distinguished from those recited in Example 3, since the areas there described as being served included the city specified in the station's license.

10. Station xxxx, licensed to Suburbia, broadcasts many "vignettes" referring to places or historical events associated with Principal City. The wording of the "vignettes" makes it evident that they are designed to create the impression that xxxx is assigned to or located in Principal City.

Ruling: This is a violation of the rule.

Of course, no all-encompassing pronouncement with innumerable examples relating to station "id's" and promos will be able to answer all of the specific problems that arise. In those instances, consultation with communications counsel is recommended.

Section 315 (Political Broadcast) Revisited

SECTION 315 of the Communications Act, as amended, and the pertinent Commission Rules [Section 3.119 and 3.120 (a-m), 3.289 and 3.290 (fm), and 3.654 and 3.657 (TV), which are, with negligible variances, identical] have stimulated as much controversy and confusion as any matter in the broad field of communications law. To attempt an exhaustive treatment of this subject matter in the space limitations of this article would be impossible. Therefore, this article is designed to refresh your recollection as to the fundamental obligations of the broadcaster under Section 315 and discuss major changes in case precedent and FCC policy during recent years.

In brief, Section 315 provides that any broadcaster who allows the "use" of his facilities by any legally qualified candidate must provide "equal opportunities," without censorship, to all other such candidates with comparable times, rates, and treatment. The problem, as usual, is one of semantics. To understand the Act and the rules, the broadcaster must be able to define the pertinent terms. The following definitions emanate from FCC memos, letters, public notices, numerous cases, and comments by the Commission's staff.

(1) A *legally qualified candidate* is one for whom the electorate can vote. See *Socialist Labor Party of America,* FCC Report No. 1934. This may or may not include those unlisted on the ballot. If

under your state or local law "write-ins" are permissible, then any *bona fide* candidate may qualify. *"Bona fide* candidate," a term often bandied about by the Commission although never really defined thereby, refers to one who has made, or is making, a conscientious effort to obtain election; this may be evidenced by his promotional material, speaking engagements, and other proof or effort. (Naturally, any party nominee is a qualified candidate.) In the last analysis, the definition of a "legally qualified" or "bona fide" candidate is *determined by State law.* [See Section 3.120(f), 3.290(f), and 3.657(f) of the Rules.] However, the FCC may interpret State law.

(2) *"Any public office"* would include federal, state, municipal, and other elections in which the local citizenry may vote.

(3) *"Use"* of the broadcasters' facilities by a candidate has been broadly defined as *any and all appearances by a candidate* other than for a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event. [See *WMCA, Inc.,* 7 RR 1132 (1952); *KNGS,* 7 RR 1130 (1952); and *Use of Broadcast Facilities by Candidates for Public Office,* FCC 62-1019, 31 Fed. Reg. 6660 (1966).]

(4) *"Equal Opportunities"* means *comparable time, rates, and treatment.* Comparable *time* does not necessarily mean the exact day, hour, and show, but rather approximately the same amount of time in a time segment of equal commercial value. Comparable *rates* would indicate that any rate discounts given one candidate must be afforded to all. (Of course, no candidate may be charged more than the rate charged regular commercial advertisers.) Comparable *treatment* implies that the broadcaster will not discriminate against any candidate in its practices, regulations, facilities, or services rendered. (See FCC 62-1019 as cited above.)

(5) The provision that the broadcaster shall have *"no power of censorship"* has been repeatedly held to *preclude all censorship* except as to deletion of

obscene language or materials concerning lotteries. In the absence of a state law that exempts broadcasters from liability for libel by a political candidate using its facilities, the only sure protection rests in libel and slander insurance. [The Commission has vehemently asserted that broadcasters are protected from libel suits in such cases. See *Port Huron Broadcasting Company (WHLS)*, 4 RR 1 (1948), and *WDSU Broadcasting Company*, 7 RR 769 (1951).] However, several state courts have disagreed, and prior to 1959 the United States Supreme Court had not ruled on point. See *Daniell v. Radio Voice of New Hampshire, Inc.*, 10 RR 2045 (1954). The controversy of a broadcaster's libel liability has been resolved, at least temporarily by the Supreme Court's decision in *Farmer's Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 252 (1959). That case follows the earlier FCC rulings that Congress could not have intended to compel stations and/or broadcast stations to carry political speeches without censorship and, at the same time, subject the broadcaster to the risk of a libel suit. See Branscomb's "Should Political Broadcasting Be Fair or Equal? A Reappraisal of Section 315," 30 Geo. Wash. L. Rev., 63, 65 (1961).

Observations Concerning Section 315

With the above definitions in mind, the simple statements in Section 315 and the pertinent Commission rules should be more meaningful. Perhaps the most important thing to remember is that *a station need not carry any political broadcast*, but if it permits the use of its facilities by one candidate, it must afford equal opportunities to all candidates for *that* office during *that* campaign.

While the broadcaster cannot censor candidates, he can and should censor noncandidates. See *Felix v. Westinghouse Radio Corporation*, 6 RR 2086 (1950). It is vitally important that licensees understand that the Section 315 prohibition of censorship applies *only* to candidates. In all other

instances, the licensee has complete authority over and responsibility for the content of its programs.

In accordance with the Commission's rules, *the licensee must maintain and permit public inspection of a complete record of all requests for broadcast time* made by or on behalf of candidates for public office and information concerning the licensee's disposition of such requests *for at least two years*.

Section 3.120(e) of the Rules provides that "A request for equal opportunities must be submitted to the licensee within one week of the day on which the prior use occurred." On April 23, 1964, the Commission addressed a letter to Senator Yarborough, concerning the alleged failure of various stations owned by one licensee to honor Yarborough's *untimely* request for "equal time at no charge," which broadened "the seven-day rule." The owner-licensee of the various stations, also a candidate for the democratic nomination for U.S. Senator, utilized time on his stations without charge. By letter, the owner-licensee offered Senator Yarborough comparable time without charge, and the latter replied that he would utilize this opportunity but failed to state precisely when. Subsequently, when the latter requested specific time periods, the owner-licensee refused and advanced the so-called "seven-day rule" in defense. The Commission held that ". . . *where the licensee, or a principal of the licensee, is also the candidate, there is a special obligation upon the licensee to insure fair dealing* in such circumstances. The licensee is therefore estopped from relying upon the seven-day rule . . ." (Emphasis supplied.)

Fairness Doctrine and Section 315 Compared

There is an unavoidable overlap of the "Fairness Doctrine" and Section 315 of the Act. Previously distinguished, the latter pertains *only* to political candidates while the former concerns broadcast licensees' broad obligation to afford reasonable opportunity for the discussion of conflicting views

on matters of public importance. Obviously, any hotly contested campaign for public office might well constitute a "matter of public importance" and thus appear to fall within the domain of the "Fairness Doctrine" and obligate a "fair" coverage of all sides of the controversial matter. Conversely, cannot the "equal opportunities" provision of Section 315 be attached to matters of public importance? Exactly where is the line to be drawn?

Section 315 is readily distinguishable from the Fairness Doctrine in that it applies *only* to political candidates, and, therefore, no provision of Section 315 is applicable to the broader issues, controversies, and matters encompassed by the Fairness Doctrine. While Section 315 does not encroach upon the Fairness concept, the basic element of fairness would seem to include Section 315. A simple formula, to aid the broadcaster in making the distinction, follows: *"Political candidates require application of Section 315 of the Act; and political issues and broad matters of public interest and importance require application of the Fairness Doctrine."*

Unhappily, while the above may serve as some small assistance, the question arises, "In view of the fact that the Commission has repeatedly asserted that *non*candidates are not subject to the provision of Section 315, are their utterances not then subject to the Fairness dicta?" Or, "Are station editorials attacking a particular candidate subject to the Fairness Doctrine?

The prevalent attitude seems to be that where noncandidates (including spokesmen, station announcers, and program participants) comment upon candidates for public office, the Fairness Doctrine applied. Therefore, if the licensee should editorialize on behalf of a political candidate, it should furnish the opposing candidate with a copy of the editorial and permit a *spokesman* for the other candidate, *but not the candidate himself,* to answer the editorial in a comparable time period. Similarly, if one of the station's staff members, or a participant on a show, should support or attack

any candidate, the licensee should offer a *spokesman* of the agreed candidate approximately the same quality and quantity of broadcast time. If you allow a candidate, rather than his spokesman to reply to the comments of a noncandidate, Section 315 will apply immediately. A chain reaction of "equal opportunities" requirements might result and throw your program schedule into a "cocked hat." (Next month's article, analyzing the Fairness Doctrine, will delve more thoroughly into the problems inherent in personal attacks and political editorializing.)

Remember, *the requirements of the Fairness Doctrine are greater as to political candidates* than they are as to controversial issues. On the plus side is the fact that while the broadcaster may not censor candidates under Section 315, *he may censor noncandidates* under the Fairness Doctrine. In short, the licensee may require the noncandidate to confine his remarks to the subject matter which gave rise to his appearance. The licensee should endeavor to maintain tapes of programs dealing with, or touching upon, political elections. Thus, in the event a brief comment is made by a noncandidate over the licensee's station, the station's obligation under the Fairness Doctrine would be negligible. However, if the station had no record of the nature and length and comments made, a dispute might arise concerning the amount of "free" time required and result in complaints to the Commission. If the station's policy to give away as little time as possible, the licensee must be able to *prove* that controversial matters aired have been provided approximately equal coverage.

Summary

In light of the above, the broadcast licensee's obligation under Section 315 of the Communications Act, as amended, might be summarized as follows:

(1) A station need not carry any political broadcast, but if it permits the "use" of its facilities by

one "legally qualified candidate" it must afford "equal opportunity" to all candidates for that office during that campaign. (Of course, licensees are expected to devote some time to broadcasting matters of a political and controversial nature and thus do their part to keep the public informed.)

(2) *Section 315* of the Act applies *only* to political candidates and its provisions should be reviewed whenever dealing with the candidates themselves.

(3) The requirements of Section 315 apply, *regardless of the nature of the broadcast,* whenever a legally qualified candidate is permitted to "use" the facilities.

(4) *The Fairness Doctrine applies to noncandidates,* this includes all spokesmen for candidates, comments made by all noncandidates participating in the licensees' programs, and broadcast editorials. The overlap of Fairness and Section 315 is evidenced by the fact that the requirements of the Fairness Doctrine are greater as to political candidates then they are as to controversial issues. (The Fairness Doctrine now appears in Section 315(a) (4) of the Act.)

(5) Each contest for each office is separate, and a primary campaign is distinct from a general election campaign. The licensee may choose only one, or none, of the several campaigns for "use" by candidates.

(6) The "equal opportunities" requirement of Section 315 applies as soon as a station permits the "use" of its facilities by a "legally qualified candidate," even though such use be only as a guest on another program. There is no "use" when the station allows a candidate to participate in a *bona fide* news event, news documentary, news interview, or "on-the-spot" news coverage broadcast.

(7) The "equal opportunities" requirement necessitates an offer of comparable time, rates, and treatment.

(8) Equal opportunities need be afforded only to candidates themselves, and not to supporters of candidates or to political parties.

(9) Section 315 precludes censorship of candidates' slanderous comments and all other matters, except for permissible deletion of obscene language or matter pertaining to lotteries. The Supreme Court decision in *Farmer's Educational, supra,* notwithstanding, slander and libel insurance is advisable. Section 315 does *not* preclude full censorship and direction of all matter aired by *non*-candidates. The licensee can and should censor and direct comments by *non*candidates.

(10) Exactly the same *rates* must be charged and discounts allowed candidates as are charged and allowed commercial advertisers. Rate discounts and policies made available to one candidate must be made available to all others. (This does not preclude the station from offering candidate A a lower rate, per spot, for package buying, than it offers candidate B for the purchase of less spots. It does, however, require that the station offer the "package plan" to all candidates.)

(11) The licensee should not permit a candidate to reply to a comment made by a noncandidate *or* a noncandidate to reply to a candidate. If this is done, both Section 315 *and* the Fairness Doctrine will apply, thus compounding the licensee's responsibilities.

(12) The licensee can *require* all candidates to submit advance scripts of their talks, *provided* that the licensee requires this of all candidates and makes no attempt to censor the material. The licensee may and should impose the same requirement upon noncandidates.

In summary, the licensee is urged to require appropriate members of its staff to review Section 315 of the Act, and Sections 3.119, 3.120, 3.289, 3.290, 3.654, and 3.657 of the Commission's Rules and Regulations. The latter two rules pertain to a-m, but identical rules apply to fm and TV. A thorough knowledge and familiarity with the pertinent rules and Section 315, coupled with the distinctions and overlap illustrated above, should enable the broadcaster successfully to comprehend his responsibilities as to "fairness" and the "equal

opportunities" requirement of Section 315. Since the licensee's responsibilities under each are different, it is essential that the broadcaster know which set of standards applies to a given situation.

Of course, this article (and next month's article on Fairness), cannot possibly constitute complete coverage of these broad and complex subjects. However, when read *together*, they should enable you to reduce the problems to an acceptable size.

Recommendations

It is most desirable that those responsible for policy decisions adopt, well in advance of each election, a comprehensive policy for use of the stations for political broadcasts, including spot announcements.

The policy should spell out precisely what campaigns will be covered and in what manner. For example: (1) Candidates for the Presidency, United States Senate, and United States House of Representatives, and their authorized spokesmen, will be required to purchase time and spots; (2) candidates for all State offices, and their spokesmen, will be required to purchase time and spots; (3) each candidate for a major city office, but not his spokesman, will be given two five-minute periods in evening hours in the two weeks before the election, and will be required to purchase any additional time and spots; (4) candidates for minor offices, such as dog catcher, garbage collector, etc., will not be afforded the opportunity to use the station. The policy should be fair, taking into consideration anticipated network orders, and the design should avoid the possibility that the station will be unable to carry out its statutory responsibilities by heavy purchases of time and spots on the last two or three days before the elections. The policies should also include the manner of handling programs and spots concerning bond issues, referendums, and the other local and state issues on the ballot.

By virtue of establishing clearly defined policies, in advance of the campaigns, the licensee will be

able to anticipate responsibilities under Section 315 and the Fairness Doctrine and facilitate the appropriate adjustments in programming.

In any event, the licensee should continue to make conservative decisions, proceed with caution and vigilance, and consult with communications attorneys whenever any questions arise.

The "Personal Attack" Rules

THE SO-CALLED "PERSONAL ATTACK" rules require specific procedures still foreign to many broadcasters. Since violations are increasingly prevalent subject to fines and censures, they warrant careful review.

Adoption of 'Personal Attack' Rules

On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291, Docket No. 16574) to provide procedures in the event of certain personal attacks. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). On July 5, 1967, the Commission released a Memorandum Opinion and Order revising its Rules by adding Section 73.300, 73.598 and 73.679, all to read identically as follows:

Personal attacks; political editorials.[1]

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notifi-

1. Note: In a specific factual situation, the Fairness Doctrine may be applicable in this general area of political broadcasts. (See Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.)

cation of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates. their authorized spokesman, or those associated with them in the campaign, or other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* that where such editorials are broadcast within 72 hours prior to the day of election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a reponse and to present it in a timely fashion.

The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. First, it will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Second, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (§503 (b) of the Act) in cases of clear violations by licensees or designate for hearing. Of course, pursuant to §503 (b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. The Commission stressed that the *personal attack principle is applicable only in the context of the*

discussion of a controversial issue of public importance.

These rules serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine. As set forth in the 1949 *Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 FCC 1246 at 1249 (1949),* "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed, rather than the right on the part of the government, any broadcast licensee, or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

The Fairness Doctrine was given specific Congressional approval in the 1959 amendment of Section 315 (a) of the Communications Act (73 Stat. 557, 47 U.S.C. 315(a)). *The personal attack principle is simply a particular aspect of the Fairness Doctrine.* The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." (13 FCC 1252). *The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself.* "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses, but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." (1949 *Report, supra,* 13 FCC 1250).

It is the contention of some broadcasters that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of

broadcasters' rights of free speech and free press under the First Amendment. Naturally, the Commission believes these contentions are without merit. It discussed the constitutionality of the Fairness Doctrine generally in the *Report* on Editorialization (13 FCC 1246-1270). "We adhere fully to the discussion, and particularly the considerations set out in paragraph 19 and 20 of the Report." *Letter to John H. Norris (WBCB),* 1 FCC 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in *Red Lion,*[1] concluded "that there is no abrogation of the petitioners' (licensee's) free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters (which) seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean v. American Public Press, supra at 249." Red Lion, supra,* at 41.

The Commission has emphasized again that the "personal attack" rules do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint within a reasonable amount of time after such a presentation occurs.

The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational fm; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 FCC 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike &

1 Affirmed sub. nom. Red Lion Broadcasting Co., Inc. v. FCC, Case No. 19,938, D.C.Cir. (June 13, 1967).

Fischer, R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer, R.R. 951 (1962). "Thus, the Commission has repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must *'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.'* Public Notice of July 26, 1963; Controversial Issue Programming, FCC 63-734" *Springfield Television Broadcasting Corp.* 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material disseminated over his broadcast facilities.

As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. The Commission notified all licensees of their responsibility in this respect by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer. *Despite such notification and the Commission's rulings, the procedures specified have not always been followed—even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that it codified the procedures* into the "personal attack" rules. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees to "withhold from expression over his facilities relevant news or facts concerning a controversy or . . . slant or

distort the presentation of such news." (See *Report on Editorialization, supra.)*

The obligation for compliance with these rules is on each individual licensee at it is for compliance with the Fairness Doctrine generally. *Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with the rules merely because the attack or editorial occurred on a network program.* Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation under the rules would be satisfied.

Confusing Semantics of the Rules

A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. *The long-applied standard of what constitutes a personal attack remains unaffected by this codification:*

> (T)he personal attack principle is applicable where there are statements, *in connection with a controversial issue of public importance,* attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* Public Notice of July 1, 1964, footnote 6.

As stated in the Notice of Proposed Rule Making, the Commission recognized that in some circumstances there may be uncertainty or legitimate dispute concerning (1) whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or (2) whether the group or person attacked is "identified" sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.* When they arise, *licensees will have to continue making good faith judgments*

based on all of the relevant facts and the applicable Commission interpretations. As stated in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who *in good faith* seek to comply with the personal attack principle. The rules are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond—even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist).

Some broadcasters hold the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues; however, such issues are not the focus of the Fairness Doctrine.

Timely Compliance with Personal Attack Rules

Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than *one week after the attack,* a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. *Along with the notice, he is required to send a tape, transcript, or accurate summary of the attack to the attacked person or group.* This time limit should be suffi-

cient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in a doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligations from his counsel or the Commission, no sanctions would be imposed—even if the matter is not finally resolved within the one week period. This one week outer time limit does not mean that such a copy should not be sent earlier or indeed, before the attack occurs—*particularly where time is of the essence.*

Personal attacks (1) on foreign groups or foreign public figures and (2) made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign, are excluded from the rule. *Attacks by candidates against other candidates are covered by the "equal opportunities" provision of Section 315—not the personal attack principle.*

Finally, subsection (c) of the rule clarifies licensee's obligations *in regard to station editorials* endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice including, if the licensee so agrees, himself.

The phrase *"reasonable opportunity" to respond* is used because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. *Notification shall be within 24 hours of the editorial,* since time is of the essence in this

area, and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In many cases, licensees will be able to give notice prior to the editorial. *Indeed, such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election.* While such last-minute editorials are not prohibited, the Commission emphasized as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle—unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion.

As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle. (Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.) The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political editorials may arise, and, in such cases, rulings on the particular factual settings may be necessary.

In summary, the long-standing and seldom-heeded "personal attack" policies have been codified into rules which confusingly overlap with the licensee's obligations under the Fairness Doctrine, editorializing policies, and the statutory political broadcast provisions (Section 315 of the Act). Careful review of the rules, first-quoted-above, and the balance of this article should be of assistance. Individual cases require consultation with your attorney.

Cigarette Ad Ruling and Its Effect on the Fairness Doctrine

ON SEPTEMBER 8, 1967, THE COMMISSION adopted a Memorandum Opinion and Order (RM-1170, FCC 67-1029) applying the Fairness Doctrine to cigarette advertising. Initially, the Commission had issued its ruling on June 2, 1967, in a letter to WCBS-TV in New York City. It followed a complaint from Mr. John Banzhaf, III, stating that the station had not afforded him or some other responsible spokesman an opportunity to present "contrasting views" on the subject of cigarette smoking after having presented numerous cigarette commercials.

In turning down numerous requests by various parties for reconsideration, the Commission stated that the Fairness Doctrine may be appropriately applied to cigarette advertising; the ruling implements the policy of Congress as embodied in the Cigarette Labeling Act; other products are not affected by the ruling; it will not have an adverse effect on the broadcasting industry; *the ruling does not curtail cigarette advertising;* and it is the obligation of the licensee, operating in the public interest, to provide information pointing out the hazards of cigarette smoking if the station carries cigarette advertising.

WCBS-TV replied that it had presented programs providing contrasting views on smoking but maintained that the Fairness Doctrine did not apply to commercial advertising.

Arguments Against the Cigarette Ruling

The principal contentions against the merits of the ruling are: (a) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (b) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (c) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (d) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by smoking and the suggestion that a licensee might, *inter alia*, present a number of public service announcements of the American Cancer Society or the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (e) that the ruling cannot logically be limited to cigarette advertising alone; (f) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (g) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination.

Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to the Constitution were answered by the Commission in Docket No. 16574, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack of Where a Station Editorializes as to Political Candidates.* (See Nov. 1967 *BM/E* article "The Personal Attack Rules.") By a Memorandum Opinion and Order released on July 10, 1967, in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, the Commission adhered to that determination in this proceeding. The Fifth Amendment challenge was also rejected in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* Case No. 19,938, (C.A.D.C., decided June 13, 1967).

In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees* (13 FCC 1246) which was meant to apply *only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising.* It was further urged that no mention of advertising was made in the 1964 Fairness Primer (29 F.R. 10415) and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it was asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315(a) of the Communication Act (73 Stat. 557, 47 U.S.C. 315(a)), limited the scope of the doctrine to programming of that nature since it did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties stated, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

The Commission found otherwise. The Commission stated that the circumstance that Congress specifically incorporated the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." (S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; 105 Cong. Rec. 14439.) Most important, the amendment refers to the obligation imposed upon broadcast licensees" . . . *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (Emphasis supplied.)

The Commission further argued that it has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners—and from which the station received a rebate on each prescription sold. *KFKB Broadcasting Association* v. *Federal Radio Commission* (47 F. 2d 670, 671 (C.A.D.C.)). The Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life*

Insurance Co. (2 FCC 455, 457-459). The Commission stated that "(a) broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." (2 FCC at 458) See also *WSBC, Inc.*, 2 FCC 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 FCC 298 (both involving advertising of quack medicines by one not licensed to practice medicine).

In short, the Commission held that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time. (See 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913.) While the agency's position as to what the obligation to operate in the public interest required for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an

abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard.

Summary

The Commission has ruled that (1) *the Fairness Doctrine applies to cigarette advertisements,* (2) *the ruling applies only to cigarette advertising,* and (3) *stations,* while not obligated to provide equal time for response, *must provide a "significant amount of time"* on a regular basis. The Commission stressed that implementation of its ruling would be consistent with the policy of the Cigarette Labeling Act, and that, as in other areas, the manner of compliance is left to the *good faith, reasonable judgment of the licensee.*

Violations Will Be Considered at Renewal Time

In denying the petitions for reconsideration, the Commission emphasized, " . . . we believe that the licensee's statutory obligations to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints . . . posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and may in normal use be hazardous to health and that *the licensee's compliance with this duty may be examined at license renewal time* . . . It is our belief that the public interest standard and Fairness Doctrine have been embodied in this principle from their inception." (Emphasis supplied.)

Discussing the effect of the ruling on the advertising of other products, the Commission emphasizes that cigarette advertising presents a unique situation. "As to whether there are other comparable products whose normal use has been found by Congressional and other Government

action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely." The ruling, the Commission stressed, *imposes no Fairness Doctrine obligation with respect to other product advertising.*

Additionally, the Order stated that the Commission does not consider itself to be "the proper arbiter of the scientific and medical issue here involved . . . has not sought to resolve that issue." It makes the point that there is an issue of substantial public importance involved and it must be presented fairly to the American people.

The remaining (and still unanswered) question in the minds of many broadcasters relates to the Commission's intentions in this area. Will it gradually extend the "Fairness Doctrine" to other advertisements? The FCC says, "No" but history would indicate to the contrary.

In any event, broadcasters (that carry cigarette advertisements) would be well advised to provide some public service announcements daily to set forth the hazards of smoking. The quantity of same should be determined with the assistance of your legal counsel.

Non-Communications Act Violations

During the past 35 years, broadcasters, as well as all other segments of the business community, have been subjected to increasingly stringent governmental regulation. Today, an alert broadcaster must have a good working knowledge of numerous legal fields including labor laws, Internal Revenue laws, antitrust laws, false advertising, etc.

We have witnessed a great many hearings at the Commission whereby applications for (1) construction permits, (2) transfers and/or assignments, and (3) renewals have been designated for hearing on the grounds that the applicants and/or licensees had been found by a federal court to have violated laws relating to monopoly, restraint of trade, unfair competition, etc.

The Commission has not promulgated exact rules in this area; consequently, what can a licensee expect from the Commission when he (1) intentionally or (2) unintentionally violates local, state, and/or federal laws? What criteria does the Commission employ? Should there be a difference in procedure or result in any of these situations:

(a) Whether the finding of the violation is in a civil or criminal case;

(b) Whether the finding of violation is by the United States Supreme Court or some lower court;

(c) Where, after the finding of violation, a decree is entered by an appropriate court which

results in the elimination of the practice which was a violation of state or federal law;

(d) Where there has been no finding of violation or no filing of suit, but the Commission is in possession of information which shows that there has been a violation of state or federal law.

In approaching these issues, the Commission is concerned with two basic considerations: (1) Under the Communications Act of 1934, as amended, licensees are required by law to operate radio stations in the public interest; (2) the Commission, in its licensing functions, is obligated to see that this legislative mandate is carried out in order to encourage the larger and more effective use of radio in the public interest. It is in the light of these requirements that the problems presented must be considered.

Section 307(a) and 310(b) of the Communications Act provide that the Commission *may* grant applications only if the public interest, convenience or necessity will be served. No intelligent appraisal of applicants in terms of this standard can be made without an examination of the basic character qualifications of these applicants, and Congress, in §308(b) of the Act, specifically gave the Commission authority and imposed upon it the duty to make such examination in evaluating applicants for broadcast facilities.

An important aspect of this examination is the conduct of the applicant. *(KFKB Broadcasting Association, Inc.* v. *Federal Radio Commission,* 44 F. 2d 670.) Obviously this does not include every phase of an applicant's behavior, but only that part which has some reasonable relationship to ability to operate a broadcast station in the public interest. As pointed out in *Mansfield Journal Co.* v. *Federal Communications Commission,* 180 F. 2d 28, 33, ". . . in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station . . . it is appropriate that the Commission examine pertinent aspects of the past history of the applicant."

The Commission believes a pertinent part of this history would clearly include any violation of State or Federal law. In the past, it has considered various types of unlawful conduct including violations of Internal Revenue laws, conspiracy to violate antitrust laws, false advertising and other deceptive practices, in passing upon qualifications of applicants. In this respect, the Commission has been sustained by the Courts. In *Mester, et al* v. *United States, et al*, 70 F. Supp. 118, affirmed per curian 332 U.S. 820, the U.S. District Court for the Eastern District of New York stated that the Commission might consider as one element of evaluation the applicant's flagrant disregard and violation of various U.S. government regulations designed for public protection. In *National Broadcasting Company* v. *United States*, 319 U.S. 190, 222, the Supreme Court stated that the Commission is permitted to exercise its judgment as to whether violation of the antitrust laws disqualify an applicant from operating a station in the public interest; and "might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." It must be concluded, therefore, that the Commission's authority to consider violation of Federal laws, other than the Communications Act of 1934, in evaluating applicants for radio facilities is well established and that a postive duty is imposed upon it to exercise authority.

As the Courts have held, by exercising such authority the Commission is not encroaching upon the administrative and enforcement jurisdictions of other governmental agencies or the courts. Thus, in the above-mentioned National Broadcasting Company case the Commission pointed out to the Court that in adopting the network regulations it was not attempting to apply the antitrust laws as such, but was concerned only with practices violative of the antitrust laws to the extent that they "had a bearing upon the matters

which were entrusted to the Commission." The Supreme Court expressed its approval of this interpretation. In the Mester case, *supra,* the Commission was not attempting to impose penalties for violations of laws administered by the Federal Trade Commission. However, it considered such violations along with other conduct pertinent to a determination whether the applicant had the qualifications to operate a broadcast station as required by the Communications Act.

A very recent Commission decision (March 27, 1968) concerned the application for assignment of license of station WFMT, Chicago, Illinois, from Gale Broadcasting Co., Inc., to WGN Continental FM Company (BALH-1039), a wholly owned subsidiary of a series of subsidiaries of a larger newspaper, The Tribune Company and owner of an a-m and TV station in the same market. Although this case is known in the industry because it instigated the proposed new rules limiting future a-m, fm and TV ownership in the same market to a single licensee (this subject to be discussed in a future article), the grant of the applicant is contingent upon the following language:

> The Commission noted there is pending civil action against the Chicago Tribune-New York News Syndicate, Incorporated (wholly-owned by the Tribune Company) which furnishes comic strips, columns, and specialty and variety features to 1700 daily newspapers in the United States. Grant of the WEMT (fm) assignment application was made without prejudice to such further action as the Commission may deem appropriate as a result of the pending civil antitrust suit, *United States of America v. Chicago Tribune-New York News Syndicate, Incorporated,* Civil No. 4596, U.S. District Court for the Southern District of New York, filed Nov. 21, 1967.

The contention has been made by many parties that no blanket policy should be adopted by the FCC which would absolutely disqualify applicants for radio facilities where they are found

to have violated a federal law or which would attempt to specify the exact weight or significance to be given by the Commission to such violations. Such evaluations should be made only on a case-to-case basis in the light of the specific facts involved in and related to the violation, and the Commission has agreed with this argument. As mentioned above, the Commission must be satisfied that an applicant has the requisite qualifications to assure that public interest will be served by a grant of his applicant. This determination cannot be made on the basis of isolated facts but should include a careful, critical analysis of all pertinent conduct of the applicant. It believes that if an applicant is or has been involved in unlawful practices, an analysis of the substance of these practices must be made to determine their relevance and weight as regards the ability of the applicant to use the requested authorization in the public interest. It does not believe that the outcome of this determination should be prejudged by the adoption of any general rule forbidding any grant in all cases where unlawful conduct of any kind or degree can be shown. Nor does it believe that any rule could adequately prescribe what type of conduct may be considered of such a nature that in all cases it would be contrary to the public interest to grant a license.

While the Commission has determined that no blanket policy should be enunciated, in view of the apparent confusion which has existed with respect to the subject, and the concern expressed by those interests have been or may be affected in the future, the Commission has set forth what it believes is the correct approach for properly determining on a case-to-case basis the weight to be given violations of State or Federal law other than the Communications Act. By so doing, the Commission has not instituted a "trick substitute" for the exercise of administrative discretion. There is no easy formula or slide rule which can be used to give the answer to every such case that comes before it. However, as discussed in

the following paragraphs, the FCC has stated a general policy or philosophy that it employs.

Commission Criteria Analyzed

Many have argued that the violation of a U.S. or State law raises no presumption adverse to an applicant. With this point of view, the Commission disagrees. Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate broadcast facilities as a trustee for the public. This is not to say that a single violation of a State or Federal law or even a number of them necessarily makes the offender ineligible for a grant. There may be facts which are in extenuation of the violation of law; or, there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest. *In all such cases, a matter of prime concern is whether the violation was committed inadvertently or willfully. Innocent violations are not as serious as deliberate ones.*

Another matter of importance is whether the infraction of law is an isolated instance or whether there have been recurring offenses which establish a definite pattern of misbehavior. A single transgression of law, particularly if inadvertently committed, might raise little question with respect to qualifications; however, a continuing and callous disregard for laws may justify the conclusion that the applicant cannot be expected in the future to demonstrate a responsible attitude toward his obligations as a broadcast licensee. In this connection, the matter of time is important. There necessarily must be more concern with recent violations than with those which occurred in the remote past and have been followed by a

long period of consistent adherence to law and exemplary conduct on the part of the applicant. Cases which must be viewed with most critical scrutiny are those where the applicant has been involved in violations over a long period of time or is presently engaged in illegal practices. In all such cases a strong presumption of ineligibility is raised and a heavy burden of proof is imposed on the applicant to show he is qualified to operate a broadcast station in the public interest.

It is irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case. In either case it is the conduct of the applicant and not the type of suit brought that is important. As pointed out by the Department of Justice in a Memorandum, "while the bringing of a criminal case may sometime indicate a more flagrant and willful disregard of the antitrust laws than does the filing of a civil complaint, so many factors enter into determination of the type of action to be brought that whether the suit was civil or criminal has little relationship to the question whether the defendant's acts were in deliberate disregard of the antitrust laws or whether his violation was flagrant or persistent."

Futhermore, *it is not the particular tribunal which makes the finding, but the finality of the decree which is significant.* There is no logical basis for giving greater evidentiary weight in character determination to a final decree of the higher court than to that of a lower court from which no appeal was taken.

The question is presented as to *what significance should be given to the fact that a suit alleging a violation of law has been filed against an applicant or where the Commission is in possession of facts showing that the applicant has violated the law but where there has been no final adjudication by an appropriate authority.* The fact that suit has been instituted is not the important consideration. The question raised and facts involved, however, may be of concern to the

Commission. As hereinafter pointed out, the Commission has the authority to examine pertinent aspects of the past history of an applicant and this history, of course, includes any violation of State or Federal law. Even though no suit alleging illegal conduct has been filed, or if one has been filed but has not been heard or finally adjudicated, the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the FCC.

Violations of antitrust laws have been the principal basis for the FCC's concern in this area. Therefore, such violations are discussed below.

Congressional concern with free competition in the broadcasting field is evident in the very explicit and specific provisions of §§313 and 314 making the antitrust laws applicable to broadcasting. This concern is amplified in the legislative history of these provisions. As the Supreme Court pointed out in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 137, Congress in setting up the Communications Act of 1934 "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." As the Supreme Court further pointed out in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 478 (1940) "the Act recognizes that the field of broadcasting is one of free competition." In that case the Court held that the Act "expressly negatives" the idea of monopoly in the broadcasting field. It is clear from the legislative history of the Act and from various provisions therein that Congress conceived as one of the Commission's major functions the preservation of competition in the broadcasting field and the protection of the public as against the private interest.

It has been argued that there is no need or basis for the Commission to disqualify applicants because they have been involved in violations of the antitrust laws since the Commission has the

means of preventing the growth of monopolistic practices. Thus, it is contended that if the Commission effectively enforces the duopoly and multiple ownership rules there can be no real danger of a monopoly developing in the broadcasting field. This argument misses the point. While it is true that enforcement of the Commission's multiple ownership rules can prevent any applicant from acquiring an excessive number of stations, there are many other monopolistic practices against which there are no rules. And, while in the course of time and where such practices are discovered, the Commission can adopt rules which might prevent recurrence of these monopolistic practices, the fact remains that such practices might exist for a long period of time before they are discovered or corrected. During this period, the existence of these restrictive practices can prevent the maximum development of broadcasting not only for that period but also for the future. It is well known that once certain practices develop, it is exceedingly difficult in applying corrective measures to restore the situation to the same healthy conditions that would have prevailed had not the restrictive conditions been permitted to arise. Thus, it is important that only those persons should be licensed who can be relied upon to operate in the public interest. When passing upon applications of persons who have engaged in monopolistic practices in other industries, the Commission must be concerned as to whether such person would also engage in monopolistic practices in broadcasting. Their conduct in other fields is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee.

While the preceding discussion has emphasized the antitrust aspects of the Commission's concern in this area, broadcasters should not minimize the reflections that would be cast upon their qualifications if other areas of State or Federal laws were violated. For example, the tremendous

growth of federal and state regulation in the field of labor law should be carefully watched. Reported convictions by State employment agencies or the NLRB as to unfair and/or discriminatory hiring and employment practices would be a serious matter in the eyes of the Commission. The same pitfalls are found in many other areas.

How does a licensee avoid Commission sanction in this area. Obviously, he should not violate the law. However, there are many instances where the law is inadvertently violated. How does a broadcaster protect himself in this instance? Prepare a complete memorandum about the violation. Retain all written correspondence, and set down all oral conservations pertaining thereto in writing to be inserted in the file. Also, all legal papers concerning a hearing or case in court should be retained. Consequently, if questions from the Commission should arise immediately or years later, you will have a complete file to extract the necessary information so that the Commission can be satisfied as to *the licensee's intentions as well as the nature of the violation.*

Monitors for Stereo or SCA Operation

ON APRIL 2, 1964, the Commission issued a Notice of Proposed Rule Making (FCC 64-298) requesting comments looking toward Amendment Of Part 73 of the rules "To Require FM Broadcast Stations Engaging In Multiplex Stereophonic Programming Or SCA Operation To Install Type Approved Frequency And Modulation Monitors Capable Of Monitoring Subcarrier Operation." Numerous comments were filed in response thereto by a number of fm licensees, equipment manufacturers, organizations, and individuals having a general interest in the broadcast industry. Appropriate rules (Sections 73.253, 73.283, 73.295, 73.297, 73.332, 73.553, 73.583, and 73.595) were adopted on *May 25, 1966.*

The Notice set forth the Commission's belief that fm stations engaged in stereo broadcasting and in the transmission of additional programming under a subsidiary communications authorization (SCA) should adhere to more exacting standards for type approved *frequency and modulation monitors.* This would assist the FCC in establishing the technical adequacy of such operation.

Most of the comments filed with respect to multiplex frequency monitors questioned their need. As set forth by the Commission, the general consensus was that it is unnecessary for a crystal oscillator to check continuously the frequency of a similiar crystal oscillator. Most of

the parties suggested occasional checks of frequency to insure proper frequency stability.

Upon re-examination of this problem, the Commission decided that the parties' contentions were correct. Nevertheless, the Commission also decided that each licensee must have available a means of determining that the pilot subcarrier and SCA subcarrier frequencies are maintained within proper limits. The Commission drew upon its experience in the field of TV broadcasting and concluded that, if the licensee checks the operating frequency on a daily basis, using a simple procedure which will indicate that the operating frequency is within authorized limits, a separate frequency monitor is unnecessary.

As reflected in new Sections 73.295(i) and 73.297(b), the Commission reached a similiar conclusion. However, the Commission found it necessary to specify a permissible tolerance for variation in the resting (or authorized) frequency of the SCA subcarrier particularly because there is no reference point in the present rules. The Commission chose 500 Hz as reasonable and well within the confines of good engineering practices. Accordingly, on May 25, 1966, Sections 73.283, 73.295, 73.583, and 73.595 were amended to provide for daily the logging of the necessary readings.

Modulation Monitors

Sections 73.253 (a), 73.332 (b) and 73.553 (a) were amended on May 25, 1966, to recognize the existence of three different types of *modulation monitors:* (a) those for nonmultiplex operations, (b) monitors for stereophonic operation, and (c) monitors for SCA operations. These are to be referred to as nonmultiplex, stereophonic, and SCA monitors as reflected in Note 1 to Sections 73.253 and 73.553.

Consequently, because (1) equipment modifications would be necessary and (2) the passage of time required for submission of the monitor

for type approval with the necessary passage of time for a station to obtain the type approved model, the Commission adopted an *effective date of June 1, 1967,* as reflected in Note 2 to Sections 73.253(a) and 73.553(a). Additionally, since (1) the Commission's actions in this proceeding were delayed, (2) the manufacturers had produced stereophonic and SCA modulation monitors in reliance upon the Commission's ultimate adoption of specifications for type approval, and (3) numerous licensees had purchased and installed these monitors while awaiting the Commission's decision, *the Commission decided to extend the time for compliance — for those licensees who had purchased and installed such monitors prior to July 5, 1966 — to January 1, 1972.* This latter action was taken with the understanding that the installation and use of the non-type approved monitors did not in any way relieve the licensee of the responsibility for maintaining stereophonic or SCA operation in compliance with the appropriate technical rules (Section 73.322 and 73.319).

Specifications Of Modulation Monitors
Analysis of Section 73.332

Section 73.332(d) (1) now requires that the type approved modulation monitor indicate the modulation percentage of the carrier produced by the main channel (L+R) signal with an accuracy of ±5 percent for all frequencies from 50 to 15,000 Hz. In order to insure the accuracy of this indication, the Commission found it necessary to expand the proposed rule to provide that (1) the frequency characteristic be such that the attenuation at the pilot subcarrier frequency (19 kHz) is at least 26 dB and (2) the attenuation in the frequency range of 23 kHz and above, (where a-m subcarrier sideband information is present) is at least 46 dB. Similiarly, in 73.332(d) (2), the Commission expanded the proposed rules to require measurement of modulation percentage of the carrier produced by the

supressed subcarrier and its sideband. It requires the frequency characteristic to be such that (1) the attenuation at 19 kHz and 57 kHz be at least 26 dB and (2) the attenuation at 15,000 Hz and below and 59 Hz and above shall be at least 46 dB. With these specifications, the Commission believes that the accuracy of the indication will be accomplished. Similiarly, subparagraph (3) (73.332(d) (3) specifies the requirement that the modulation monitor indicate the modulation of the carrier by the pilot subcarrier.

With respect to Paragraph 73.332(d) (9), the Commission established greater specificity as to the accuracy of the visual peak preset indicating device (more commonly the "peak flasher"). Since the peak flasher is normally more accurate in indicating modulation peaks under program conditions, and, because it is a peak indicating device — whereas the modulation meter is a semipeak indicator — the Commission decided this action appropriate. [The existing Rules — Section 73.332(b)], for nonmultiplex modulation monitors, require the use of the peak indicating device; however, they are not specific in defining its accuracy. The Commission intends to do so at some future date. Meanwhile, since it is establishing new classes of modulation monitors, the new monitors produced will be examined for type approval under the more specific accuracy requirements. When there is disagreement between the peak preset indicator and the semipeak modulation meter indications, *the peak flasher will be considered the prime indicator.*

When an fm station is transmitting an SCA program in addition to a stereophonic broadcast, an undesirable characteristic which may occur in an improperly adjusted system is cross-talk (from the SCA and main channels into the stereophonic subchannel and from the stereophonic subchannel into the main channel). Therefore, *paragraph 73.332(d) (6) is intended to provide the licensee*

with a means of measuring cross-talk to insure compliance with the rules.

With respect to type approval specifications for SCA modulation monitors, Paragraph 73.-332(f) (1) was added because of the Commission's belief, as demonstrated by most SCA monitors being produced, that the licensee engaging in SCA operation desires a single monitor exhibiting main channel modulation as well as SCA modulation. To insure the accuracy of this main channel indication, the Commission specified that the frequency characteristics be such that the attenuation in the SCA range, from 20 to 75 kHz, be at least 46 dB.

Additional Matter

Sections 73.553, 73.583, 73.595, and 73.596 (relating to *non*commercial education fm's) were amended in similiar fashion to that described — with the exception that Note 2 to Section 73.553 does not permit continued use until January 1, 1972, of those non-type-approved monitors which were purchased and installed prior to July 5, 1966. This decision was prompted because of the limited number of noncommercial educational fm stations engaging in stereophonic and SCA operations. However, the Commission will grant waivers for these stations upon request.

The Commission called attention to the fact that, while it was amending Section 73.297 and 73.596 relating to stereophonic broadcasting, *it deleted the requirment that stations so operating shall notify the Commission of the hours of stereophonic* broadcasting and any change therein. At the time of adoption of the original rule, the Commission felt it desirable to be informed as to the extent of stereophonic broadcasting; however, since the Commission believes that such operation has progressed in satisfactory fashion, it sees no further need to be informed of the hours of stereophonic broadcasting.

As set forth in a recent article concerning

Fines and Forfeitures (Fines And Forfeitures — Up 600 percent Since 1964, January 1967), the Commission has increasingly utilized its authority to fine numerous licensees for various violations. We can only assume that the Commission will be on the alert to be sure that the new monitoring rules are not violated, and it behooves all licensees affected to be sure that they are in compliance.

If you are not absolutely confident about the application of the rules or any portion thereof, you should consult with a competent radio engineer and/or a communications attorney without delay.

New Rules On Experimental FM Operation

ON DECEMBER 13, 1967, the Commission adopted a Report and Order (Docket No. 17660, RM-1140, FCC 67-1337), amending Section 73.262 of the Rules concerning the period for experimental operation of fm broadcast stations.

The *previous rule in this regard, Section 73.262, limited the experimental period for fm stations to the period between 1:00 A.M. and 6:00 A.M., local standard time,* and unlike the TV rule (Section 63.666) did not make provision for other experimental periods.

Reasons for Change in Rules Re Testing And Maintenance Of Facilities

In support of its request for increased hours of experimentation for testing and maintenance of facilities, the commenting parties had urged that (1) fm facilities are allocated upon the same fundamental philosophy as television facilities (which are not limited as to time during which non-program material may be transmitted); (2) the propagation characteristics of fm signals are similar to television signals, (3) the nature of fm and television signals do not require restrictive time periods for experimentation as is required in the case of standard broadcast signals, and (4) the mileage separation plan affords the necessary protection to other stations. Because of the similarities of fm and television signals, the NAB re-

quested that the fm experimental period for testing and maintenance of facilities be lengthened one hour so as to permit testing from midnight to 6:00 A.M., local standard time, instead of from 1:00 A.M. to 6:00 A.M., local standard time. Furthermore, because many fm stations operate on limited schedules and with limited personnel, the previous rule works, in many cases, an unnecessary hardship on personnel; and return to the station for the testing period by the personnel thereby resulted in added expense to the licensee. The NAB claimed that the one hour increase will result in no degradation of the Commission's technical standards, and no "perceptible" increase in interference would occur to other fm stations. What did FCC do about it?

Reasons For Changes In Rules Re Improvement Of Facilities

With respect to its request for permission for fm stations to conduct experimental tests looking toward improvement of its facilities, the proponents stated that, with the increased complexity in the transmission of fm signals brought about by SCA and stereophonic broadcasting, it is necessary to conduct tests other than during the designated experimental period. This argument was advanced because SCA and stereophonic broadcasting, in many cases, requires precise adjustment of both the receiver and the antenna system. Since the receiver adjustments are made by the listener and service personnel during daylight and early evening hours, the parties requested that the Commission provide, upon proper conditions, that experimentation may be made in periods other than the designated experimental period. The conditions requested for experimentation looking toward improvement of an fm station were (1) that informal application must be made to the Commission; (2) that the fm station complies with Section 73.261 of the Rules which deals with minimum hours of transmission; and (3) that no interference is caused to other fm stations.

All the comments filed in the proceeding supported the requested relaxation in the rules. No oppositions to the proposal were filed. Some of the parties, however, proposed two changes: (1) that routine test and maintenance activities be permitted at any hour of the day without informal application for authority, and (2) that the time reference in the rule be made to local *clock* time rather than local *standard* time.

Conclusions

As to routine testing at any time, the Commission found that it can relax the requirement for prior informal authority without adversely affecting the public interest; at the same time, *this would relieve the Commission and the licensees of the burden of seeking and receiving permission each time such tests are deemed necessary.* However, the Commission's new rules require *notification of the commencement of such tests and adjustments to (1) the engineer in charge* of the district in which the station is located *and (2) the Commission in Washington.* The rule adopted reflected this change. It is important to note that while the NAB proposal referred to "technical experimentation," the only references in the petitions to experimentation were to routine testing of equipment, adjustments of equipment for SCA and stereo operation, and the like. *There was no intention to include actual experimentation with signals and standards other than those authorized in the Rules, as is the case with the TV rule.* The Commission decided it would be useful to include such experimental operation by fm stations, and the rule adopted does so. However, since this type of operation may have an impact on the listening public and the development of the fm broadcast service, *the Commission retained the requirement for prior Commission approval of such operations.*

With respect to changing the rule *to specify local clock time rather than local standard time,* the Commission found that people's living habits

are geared to locally adopted clock time, and that the purpose of the new rules will be defeated if local standard time is retained in the rule. For example, during the summer months, when daylight saving time is in effect, the station could not begin testing until 1:00 A.M. daylight saving time or 12 midnight, standard time. If the station during this same summer period wished to begin programming at 6:00 A.M. daylight saving time, it would have to cut short its testing period—having only 5 hours instead of the intended 6 hours. Following adoption of the Uniform Time Act of 1966, sometimes known as "daylight saving time" or "advanced time," has become all but universal in the conterminous 48 states from late April until late October. Accordingly, it changed the time reference to read *prevailing local time.*

Accordingly, the Commission amended Section 73.262 to read as follows:

'Section 73.262 Experimental Operation'

(a) The period between 12 midnight and 6:00 A.M., prevailing local time, may be used for experimental purposes in testing and maintaining apparatus by the licensee of any fm broadcast station on its assigned frequency and not in excess of its authorized power, without specific authorization from the Commission.

(b) Fm broadcast stations may (with prior notification to the Commission and the Engineer in Charge of the radio district in which the station is located) test, maintain, and adjust the apparatus at the station during other time periods; and may (upon informal application) conduct technical experimentation directed to the improvement of technical phases of operation during other time periods, and for such purposes may utilize a signal other than the standard fm signal, subject to the following conditions:

(1) That the licensee complies with the provisions of §73.261 with regard to the minimum number of hours of operation.

(2) That emissions outside the authorized bandwidth shall comply with §73.317(a) and that no interference is caused to the transmissions of other fm broadcast stations.

(3) No charges either direct or indirect shall be made by the licensee of an fm broadcast station for the production or transmission of programs when conducting technical experimentation.

Specific problems concerning the above, should be directed to your attorney.

Revised Program Forms for TV Stations

ON AUGUST 13, 1965, the Commission released a Report and Order (FCC 65-686) in Docket 13961 adopting a revised program form (Section IV-A) for AM and FM applicants. On October 10, 1966, an additional Report and Order (FCC 66-903) was released in the same Docket revising the TV program forms (IV-B). The February 1966 issue of BM/E magazine carried an article reviewing the changes in the AM and FM program forms. Some of the information and suggestions contained therein apply with equal force and validity to the revised TV forms.

The New TV Program Form (Section IV-B) In General

The new Section IV-B applies solely to TV stations and will replace the old Section IV. Thus, Section IV-A (AM-FM) and Section IV-B (TV) will appear in applications for new stations and changes in facilities (Form 301), renewals (Form 303), assignment of license (Form 314), and transfer of control (Form 315). The new Section IV-B, like its counterpart IV-A, employs different methods of inquiry, expands greatly upon the factual detail required to support the answers to the basic

questions, and should better enable the Commission to determine if the applicant has (1) ascertained the needs of its audience, 2) attempted to meet those needs, and (3) performed in substantial compliance with its last proposal.

Section IV-B includes the following major subdivisions:

Part I—Ascertainment of program needs
Part II—Past programming
Part III—Proposed programming
Part IV—Past commercial practices
Part V—Proposed commercial practices
Part VI—General station policies and practices
Part VII—Other matters and certification

The Importance of Part I

As stated previously, "Part I may eventually become the most important part of your renewal application." The Commission has consistently reiterated that the local broadcaster knows his own community much more intimately than any official at the Commission; consequently, throughout its existence, the Commission has been loathe to interfere with the programming decisions of broadcasters. Additionally, the Commission has and does not desire to become involved in any action that may be construed as censorship, in violation of First Amendment's protection of freedom of speech. However, because the Commission is charged with the statutory responsibility of granting licenses "in the public interest," and since its basic philosophy is to foster greater expression by local interests, the Commission has emphasized that it would be abrogating its responsibility by not establishing certain broadly-stated criteria whereby licensees would be judged to be operating *in the public interest where the station is located.* Part I provides the Commission with a method

FCC Requests Statements of Proposed Commercial Practices

As part of the Commission's overall review of renewal applications of commercial radio and television stations, it has heretofore been considering representations as to commercial practices made in response to the inquiries contained in Section IV of Form 303. The Commission has recently amended this Section so that the representations and data now sought are stated in terms of minutes of commercial matter rather than the number and length of commercial announcements. The Commission believes it would be more fair and efficient to base its review of a licensee's performance on the factors and data included in the new program forms as quickly as possible, without waiting for all licensees to file renewal applications on the new forms in the normal course of business.

Accordingly, the Commission has requested all commercial television and radio stations, without exception, to file a statement of their proposed commercial practices prior to January 1, 1967, in accordance with the requirements of the recently adopted program forms. These statements will be considered as amendments to each licensee's most recent application for license or license renewal. Any evaluation of commercial practices will be made on the basis of the representations made therein.

of ascertaining whether a licensee has (1) made meaningful efforts to determine the tastes, needs, and desires of those within its service area, and (2) provided and proposed programs in response to those needs.

The Commission recognizes that there is wide disagreement over the details that should be required of an applicant in reporting on ascertainment of community needs and interests. An awareness of and a response to such needs is essential. Realistically, a question seeking

The form requires, in addition to a statement as to proposed commercial practices, a statement, where appropriate, as to the basis on which a licensee has concluded that a maximum amount of commercial matter in excess of 18 minutes per hour for radio (AM or FM) or 16 minutes per hour for television (rounded to the nearest minute), as a normal practice, would be consonant with the needs and interests of the community which licensee serves. These limits are in general accord with those generally accepted by the industry as appropriate, as expressed in NAB Codes. The Commission has given great weight to such industry judgment, without denying the right of each broadcaster to make his own different judgment on any reasonable basis in terms of his particular situation.

Licensees are cautioned that responses in the interim form should not be in terms of vague generalities or references to industry codes, but should be as precise as possible. If a licensee proposes to exceed his normal commercial time limits other than in special situations, a question may arise as to whether the proposal is in fact an established norm. By this action the Commission does not imply or seek to impose any particular requirement or limitation on the commercial practices of licensees, but does seek a full, specific and responsive statement as to licensee's commercial practices.

such information can be phrased only in somewhat general terms. The Commission believes that the question in the form (Question #1), reasonably interpreted, can be readily answered—provided good faith efforts have been made to ascertain needs. While the ultimate program decisions must be made by the licensee, the Commission expects broadcast permitees and licensees to make a positive, diligent, continuing effort to provide a program schedule designed to serve the needs and

Effective Dates of Section IV-B

The effective dates of the new TV forms (Section IV-B) should be noted. (See Report and Order in Docket 13961, FCC 66-903, released October 10, 1966). They are as follows:

Effective Date	Application
December 1, 1966	Form 301—application for new TV facilities or major changes thereof.
December 1, 1966	Forms 314 & 315—applications for assignment and transfer filed by assignees and transferees.
December 1, 1967	Forms 314 & 315—applications for assignment and transfer filed by assignors and transferors.
November 1, 1967	Form 303—application for renewal. However, applications due to be filed on or after January 1, 1967, but prior to November 1, 1967, shall use Parts I, III, V, VI, and VII of the revised form (IV-B) and Questions 1(a), 2(a), 3(a), 4(a), 5(a), 5(b), and 10 of the present form.

interests of the public before making decisions. The "survey" efforts must include consultation with (1) the general listening public, (2) leaders in the community, and (3) professional and eleemosynary organizations. The Commission's experience with the radio form has shown that some applicants are not providing full answers to the questions on ascertainment of community needs (Question #1). It has cautioned applicants to study this question and to supply a complete and responsive answer to each part. As set forth by the Commission, the question is designed to elicit full information as to:

(a) The steps that an applicant has taken to become informed of the real needs and interests of the area served and to provide programming which constitutes a diligent effort to provide for such needs and interests;

(b) Any suggestions that may have been made as to how the station could help meet the needs and interesst of the community from the viewpoint of those consulted;

(c) The applicant's evaluation of the relative importance of all such suggestions and the consideration given them in formulating the station's over-all program structure;

(d) The programming that applicant proposes, either generally or specifically, to meet the needs and interests of the community as he has evaluated them.

Program Survey Methods

(1) Have members of your staff, especially those who belong to various civic groups (e.g., service clubs, philanthropic organizations, PTA, citizens' associations, religious groups, and the like) conduct oral surveys and submit periodic memoranda to you as to the results and/or have brief questionnaires completed and tabulated for your use. Actually, the distribution and tabulation of questionnaires on 3 x 5 cards would be less time-consuming than posing the questions orally and preparing a memo on the results.

(2) Keep a record of community (program) contacts by your staff.

(3) Send out form letters, seeking opinions on programming.

(4) You might retain an independent survey firm.

(5) Periodically, broadcast a request for such information from your audience. You might offer a small prize for the best recommendations.

Regardless of the methods you employ to ob-

tain documented indications of the interests of your audience, you should:

(1) Immediately set up procedures, policies, and plans to obtain such evidence;

(2) Examine the survey results carefully;

(3) Prepare a brief resume of each survey to be included in your renewal application;

(4) Make some effort to adopt the meritorious suggestions received.

Again, we must emphasize that a disregard of the Commission's strong interest in this area is at best unwise, and it could conceivably result in designation of an application for hearing.

Replies which relate to proposed future programming and commercial operation constitute representations upon which the Commission relies. Such representations are not, of course, exact detailed statements of proposed day-to-day operations, and literal adherence to them in that respect would neither be possible nor necessarily desirable. Because the proposals as to programming and commercial matter are representations relied upon by the Commission in determining whether grant of an application is in the public interest, licensees are given the responsibility for advising the Commission whenever substantial changes occur. It is not possible to define what would constitute a substantial change so that it may be applied in every case. This is a judgment to be made by the licensee in the exercise of sound discretion. It does not require that every departure from programming and commercial proposals is to be reported to the Commission. The type of changes in commercial practices which should be reported are:

(1) a station deciding as a matter of policy to increase the maximum percentage of commercial matter which it proposes to allow;

(2) when the station determines that it is exceeding these proposed maximums approximately 10% of the time.

Silence on the part of the Commission is not an indication that the Commission has passed on the matter. The station's performance in the public interest will be evaluated in any event at the time of next renewal.

To avoid any confusion resulting from the adoption of one form for all television applicants, it should be understood that applicants for major changes need file Section IV-B unless a substantial change in programming is proposed. Assignors and transferors need not answer any portion of the form if the information required of such applicants has been filed with the Commission within 18 months prior to the filing of the application and it is referenced and identified.

Conclusion

Many have criticized the Commission for developing another method of harrassment of the licensee. However, if the Commission is to carry out Congress' mandate, it must have adequate information upon which to base a valid and informed judgement. While the form was under consideration, there were numerous proposals such as (1) to create one TV form for Renewals and a separate form for all other applications, and (2) proposals requiring programming and commercial information for three weeks rather than one.

The Commission took the licensees' problems into consideration and decided that the above proposals would impose too cumbersome a task; consequently, it decided to (1) use one form (IV-B) for all TV applications, (2) employ one composite week, and (3) discard the necessity of "spot" counting of commercials.

The Commission has forwarded copies of the new form to all licensees. It behooves them to read and analyze it as soon as possible.

TV Multiple Ownership Rules Reviewed

THE PURPOSES of the Commission's multiple ownership rules are to promote (1) the maximum competition among broadcasters and (2) the greatest possible diversity of programming sources and viewpoints. The rules appear in §§73.35, 73.240, and 73.636. These sections govern multiple ownership of stations in the standard, fm, and television broadcast services, respectively. Each section is divided into two main parts: (1) the so-called "duopoly" or "overlap" portion which provides limitations on the common ownership or control of broadcast stations in the same broadcast service which serve substantially the same area, and (2) the "concentration of control" portion which proscribes the grant of a license for an a-m, fm, or TV station to any party —if the grant "would result in concentration of control" in the particular broadcast service "in a manner inconsistent with public interest, convenience or necessity."

The concentration of control portion sets forth a number of specific factors that will be considered by the Commission in determining whether a particular grant would result in a concentration of control contrary to the public interest. In this regard, the a-m and fm rules state:

> In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to

such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question.

The TV rule uses the identical language except for the absence of the words "classes of stations involved."

The concentration of control portions go on to state that although the aforementioned factors will be considered in determining whether the grant of a license would result in undue concentration of control; in any event such a concentration will be deemed to exist if the grant would result in more than a specified maximum number of stations in each service. That maximum is seven a-m stations, seven fm stations, and seven TV stations, no more than five of which may be vhf. The *concentration of control of mass media is not precluded by a specific rule but is rather impeded by Commission policy.*

These provisions are designed to further maximum competition among broadcasters and, more significantly, *the greatest possible diversity of programming sources and viewpoints.* The Commission has dedicated itself to the prevention of undue concentration of control of mass media and to the development of the greatest diversity and variety in the presentation of information, opinion, and broadcast material. Its actions in this area have been guided by the Congressional policy against monopoly in the Communications Act, and the concept, as recognized by the courts, that the communications business is and should be one of free competition. (See FCC 64-1171, December 18, 1964.)

The Duopoly Rules

As adopted initially Sections 3.35(a), 3.-240(a), and 3.636(a) of the Commission's Rules provided limitations on the common ownership or control or multiple a-m, fm, and TV stations which served substantially the same area. These provisions of the Rules, commonly referred to as

the "duopoly" or "overlap" rules, were intended to preserve and augment the opportunities for effective competition in the broadcast industry and to implement the Commission's policy of maximizing diversification of program and service viewpoints. The latter policy has assumed a very special importance in a democratic society. As stated in the following case, it is well established that ". . . the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." (*Associated Press v. United States,* 326 U.S. 1,20; *Scripps-Howard Radio, Inc. v. F.C.C.,* 89 U.S. App. D.C. 13, 19, 189 F. 2d 677 cert. den., 342 U.S. 830).

Concentration of Control Problems

The question of diversification of mass communications media has double aspects—diversification in the locality involved, and diversification of the total mass communications ownership without restriction to the community in question. Where one applicant was licensee of a 250-watt a-m station in the city, with the smallest service contours of the four stations located there, it was entitled to a preference over the other applicant, which controlled the only morning and Sunday paper in the city and which, in turn, was closely affiliated with the only other paper in the city. The newspaper applicant argued that operation of a television station will attract a greater portion of a radio station's listeners than of a newspaper's readers, and thus a grant to the newspaper applicant would achieve a greater degree of competition. The Commission did not agree and preferred the radio applicants. *The Commission observed that it seeks to achieve diversification in the control of all media of communications and not merely of broadcast facilities.* See *Radio Fort Wayne, Inc.,* 9 RR 1221 (1945). *This case reflects the FCC's proclivity to prefer moderate "concentration of control" of broadcast facilities*

to a combination of broadcast and newspaper ownership.

In a Public Notice issued December 18, 1964 (FCC 64-1171, 29 FR 18399, 3 Pike & Fischer RR 2d 909), the Commission, citing figures, expressed its concern over the marked increase in multiple ownership of telcvision stations in recent years,—*especially of vhf stations in the largest markets* where the number of viewers is greatest and where diversity of interests and viewpoints should be maximized.

Subsequently, on June 21, 1965, after further study of the matter, the Commission released a Notice of Proposed Rule Making and Memorandum Opinion and Order in Docket 16068 (FCC 65-547, 30 FR 8166, 5 Pike & Fischer RR 2d 1609) which proposed adoption of an amendment to the concentration of control portion of the TV multiple ownership rule thereby providing *for ownership of not more than three TV stations or more than two vhf stations in the top fifty television markets.*

At the same time, the Commission terminated the interim policy expressed in the December 18 Public Notice and substituted therefor a new interim policy as follows:

> Absent a compelling affirmative showing to the contrary, we will designate for hearing any application filed after June 21, 1965, for a new television station, assignment of license, or transfer of control, the grant of which would result in the applicant or any party thereto having interests in violation of those set forth in proposed §73.636(a) (2) (ii) in the attached Appendix. *Divestiture will not be required, but commonly owned stations in excess of the number set forth in the proposed rule which are proposed to be assigned or transferred to a single person, group, or entity will be designated for hearing.* However, no hearing will be designated in any of the foregoing situations which involve applications for assignment or transfer of control filed in accordance with §§1.540(b) or 1.541(b) of the Commission's rules, or applications for assignment or transfer of control to heirs or legatees by will or intestacy if the assignment or transfer does not create common interests which would be proscribed by the above-mentioned section — — — — —. (Emphasis supplied.)

The new interim policy was published in a Public Notice released on June 21, 1965 (FCC 65-548, 30 FR 8173, 5 Pike & Fischer RR 2d 271), the same date on which the Notice of Proposed Rule Making and Memorandum Opinion and Order was released in Docket 16068. The latter document, in addition to proposing an amendment of §73.636 of the Rules, disposed of petitions for reconsideration of the December 18 interim policy and requested comments as to the aforementioned "top fifty market" rules.

The notice, after having presented statistics showing that there is an apparent trend toward more vhf stations coming under group ownership in the largest markets and a corresponding decline in the number of single-station owners, stated that the Commission was concerned that under the present limitation of five vhf stations per owner there might be a continuation of the trend. It also expressed concern that the future growth of uhf—which has its greatest immediate potential in the largest markets—might follow the vhf pattern. The proposed rule was designed to counter the apparent vhf trend and to prevent the development of a similar trend in uhf. *The Top-Fifty-Market Concept* was proposed for three reasons. These are (a) the substantial degree of ownership concentration reached in these markets; (b) the high proportion of the total population resident in these areas and consequently the very large audiences reached by the individual vhf stations; and (c) the availability of ample economic support for individual, local ownership of both vhf and uhf stations in these markets."

The Notice of Proposed Rule Making (para. 19) asked that parties focus their comments ". . . upon the question of need for the changed rules and the appropriateness of the specific rule proposed. In arguing need, or lack of need, for a new rule, parties may submit programming showings in a manner which seeks to demonstrate that the programming was made possible solely by virtue of a multiple ownership situation which

could not arise under the proposed rule. Parties opposing the proposed rule should concentrate primarily upon the question of public benefits which may be ascribed to multiple ownership in excess of the level proposed herein. In short, the issue posed is not as between multiple ownership and single ownership, but as between the present level and a more limited degree of such ownership."

Elsewhere in the Notice (paras. 16-18) comments were requested on six specific questions. The Commission studied all of the comments filed. Only one filed expressed the view that there was an undue concentration of control in television broadcasting. However, the commenting party also stated that the proposed rule would be ineffective *without the further requirement of divestiture! All other parties expressed the view that there was no undue concentration of control and opposed the proposed rule.*

Finally, on February 7, 1968, the Commission issued a Report and Order deciding *that the proposed rule should not be adopted and that the proceeding should be terminated.*

First, the Commission noted that since the institution of the instant rule making proceeding many new uhf stations have been activated in the major markets. This has lowered the previous degree of concentration of station ownership in these markets, and the development of uhf is providing as many separate owners and separate viewpoints as would have occurred with a more restrictive multiple ownership rule in the absence of these stations. Equally important, the Commission observed that, insofar as uhf stations are concerned, an absence of the type of restriction proposed in the rule may well serve to make for a more rapid development of such stations and enhance the chances of development of a fourth commercial TV network. It would significantly contribute to the entry of persons who have the know-how and the financial resources to enter into and carry on uhf television broadcasting

during this most crucial period. Indeed, the Commission believed this consideration of possible benefits to television service through entry of the multiple areas, although not as critical as in the uhf area, is also relevant to the public interest judgment to be made in this field with respect to vhf operation. Consequently, the Commission decided that *the problem of concentration in the top 50 markets should continue to be dealt with upon the basis of case-by-case consideration within the standards of the present multiple ownership rules.* Of course, while there are the benefits of predictability in the adoption of a specific limit for the 50 largest markets, the Commission decided that the greater flexibility permitted by an ad hoc approach is preferable. Since there is a standard in the rules limiting total ownership and control by any one party, the Commission emphasized that it *will continue carefully to scrutinize every acquisition, whether in the top 50 markets or in other communities, to prevent undue concentration.*

More particularly, in light of the special problems concerning the top 50 markets set forth in the Notice of Proposed Rule Making above, the Commission will *expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two vhf stations) in those markets. The compelling showing should be directed to the critical statutory requirement of demonstrating, with full specifics, how the public interest would be served by a grant of the application*—that is, the benefits in detail that will be relied upon to overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public. In other words, within the total limits now contained in the rules, the Commission will continue to adhere to the ad hoc approach in order to deal with particular situations in particular communities. A fixed limit would be too restrictive and the Commission's conclusion in this respect was further reinforced by the present critical phase of uhf

development and the need to have enough flexibility to take appropriate action.

Conclusion

From the foregoing discussion, broadcasters might assume that the Commission's refusal to adopt its proposed Top Fifty Market rule and return to the case-by-case approach means that the multiple ownership criteria have not been changed. This assumption appears false.

Today, the FCC's case-by-case approach to all transfer and assignment applications is appreciably more intense; any sign of concentration of control will require extensive explanation to pass the rigors of Commission review.

To augment the anxieties of broadcasters the Top Fifty Market Proposal was rejected by a 4-3 vote, and three dissenting opinions were attached to the *Report and Order*. Commissioner Bartley's dissent was cryptic, but Commissioners Johnson and Cox were lengthy and vitriolic. Finally, in a recent address, Commissioner Cox, in discussing the multiple ownership rules usually said, in effect, "The rules don't require divestiture *now* . . ." The obvious, unintended implication was that the rules some day may require divestiture.

In closing, the broadcasters may prudently expect more trouble in all facets of the multiple ownership. They should have their legal counsel maintain close surveillance of all developments and file comments liberally in future rule making proceedings.

The FCC's Position on Television-CATV Cross-Ownership

PREVIOUS BM/E ARTICLES have dealt with the Commission's long-standing concern with any actions increasing monopoly of the communications industry. (See (1) *BM/E*, May 1966, "The Drive For Diversified Ownership," (2) *BM/E*, June 1966, "Concentration Of Control Of Mass Media," and (3) *BM/E*, July 1966, "The Multiple Ownership Philosophy.") These FCC interests have been aimed primarily at cross ownership between radio, TV and newspapers. Currently, the Commission is considering the application of similar "monopoly" restraints to CATV.

Background

With the extraordinary growth of CATV, the Commission's concern was evidenced in the case Lompoc Valley Cable TV (2 RR 2d 22), adopted March 4, 1964, when it was faced with the following question:

> . . . [A]s a matter of policy, whether a multiple owner should be permitted to acquire . . . extensive holdings in the community antenna field or whether the policy underlying the Commission's multiple ownership rules requires that the Commission strive to prevent such entry.

The question was not then answered, since the Commission determined that a hearing was re-

quired on independent grounds and, in addition, that a pending application (2400-C1-TV-(9)-64) for transfer of Lompoc Valley's parent corporation would "provide a more convenient vehicle for Commission consideration." The following week, on March 11, 1964, the Commission adopted its Opinion in Rust Craft Broadcasting Company, FCC 64-208 (2 RR 2d 83), in which *although it consented to the transfer of control* of a television broadcast station in Clarksburg, West Virginia to a CATV system operator in that city, *it stated*, in relevant part, as follows:

> [W]e regard situations of this kind with growing concern and therefore propose in the near future to institute an inquiry into the problem of joint ownership of CATV systems and television stations in the same communities. Pending that event, we serve notice that any applications involving such combined ownership—however accomplished—will be carefully scrutinized and may, in appropriate cases, be deferred until we finally develop a long range policy with respect to this problem.

In addition, other activities illustrated the increasing problems facing the Commission in this general area. For example, a television broadcast licensee in Dayton applied to the Dayton City Council for a franchise to operate a CATV system in Dayton. Similarly, the television station licensee in Utica, New York obtained a franchise for a community antenna system to serve Utica, and applications for microwave relay facilities to serve the system were before the Commission. Apart from these specific cases, there were many instances in which television broadcasters acquired ownership interests in the CATV field outside of their own service areas. These acquisitions, of course, did not require Commission approval unless authorizations issued by the Commission were involved. The Commission believed that it was the appropriate time to institute an inquiry looking toward establishing and clarifying its policy with respect to broadcast licensee owner-

ship of CATV systems. If it was to carry out its statutory responsibilities in this field, policy determinations had to be made without further delay.

Early Proposal for Rule

For the purpose of obtaining pertinent information on the problems described above, on April 16, 1964, an inquiry was instituted (*In the Matter of Acquisition of Community Antenna Television Systems By Television Broadcast Licensees*, Docket No. 15415.) Views and data were invited from the broadcasting industry, the CATV industry, and any other interested groups or members of the public. The particular questions included the following: (1) to what extent do television broadcast licensees now own interest in CATV systems; (2) to what extent and in what manner do CATV systems originate any programming, including commercial announcements, which they furnish to their subscribers; (3) to what extent, if any, does ownership of CATV systems, or interests therein, by television broadcast licensees conflict with §73.636 (a) (2) of the Commission's rules relating to concentration of control, or the policies underlying such rule; (4) under what conditions, if any, should television broadcast licensees be permitted to own CATV systems, or interest therein, where the CATV systems serve portions of the area served by the licensee's television broadcast station; and (5) does ownership by a television broadcast licensee of CATV interests, in substantially the same area or in different areas, raise any question of conflict of interest detrimental to the public interest in television broadcasting?

The comments received in response to the *Notice of Inquiry* generally took the following positions:

(1) CATVs are not broadcast stations, particularly since they generally do not originate programs, and they therefore do not come under the

Commission's multiple ownership rules. Nor should CATVs be deemed to come within the spirit of the multiple ownership rules, since they promote diversity by bringing in new signals, and do not really compete with television broadcast stations.

(2) There really is no problem on common ownership. CATVs serve very few people in comparison to television stations. Furthermore, they provide a complementary service, and broadcasters are in a good position to enter this new field with their existing knowledge. Additionally, the interests of subscribers and viewers will not be subordinated because the investments in both the cable system and the television station are large. Local bodies and the Commission are also present to make sure that the interests of CATV subscribers and television audiences are both protected.

(3) In many places, especially small communities, CATV will come in any event and it is necessary for the television station to own the CATV to protect it against ruinous competition.

(4) Program origination by CATVs is not a problem at this time since it is very expensive and cannot compete with the regular popular television programs. At the present time program origination is limited to weather scanning with few exceptions.

(5) Television broadcasters have an absolute right to enter any legitimate business, and it would be arbitrary to permit CATVs to develop in great numbers in other hands, including multiple ownerships, while preventing broadcasters from entering this business.

On July 27, 1965, the Commission adopted its *First Report* terminating this proceeding. While no anti-cross ownership rules were adopted, the Commission indicated that it was concerned with the possibility that cross-ownership between CATV systems and television broadcast licensees might give rise to abuses inconsistent with the public interest—at least in particular cases. However, *two things persuaded the Commission that the danger of such abuses is not sufficiently great to warrant an overall or across-the-board prohibition against cross-ownership of CATV system and television stations.* The inquiry that

the Commission conducted in the docket did not disclose any substantial evidence of widespread abuses. Further, since the issuance of the Notice Of Inquiry and Opinion, referred to above, the Commission issued its *First Report and Order* in Dockets No. 14895 and 15233 (4 RR 2d 1725) and its *Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971* (4 RR 2d 1679). The rules that the Commission promulgated and proposed to promulgate appeared to be adequate to prevent discriminatory use of a CATV system to favor one local broadcaster against another. Additionally, the Commission's general rules should ordinarily suffice to insure a technically efficient operation by any broadcaster; and any broadcaster who fails to make a reasonable effort to put out an efficient signal runs the risk of losing his license. The Commission believed that these considerations were adequate to prevent the dangers of any general abuse of cross-ownership.

The Commission realized that the problems involved in determining the proper role for CATV in the mass communications system are complex and far reaching and involve many interrelated policies. These considerations were mentioned by the Commission to emphasize the fact that this Report with the conclusions stated therein were (1) preliminary, (2) tentative, and (3) subject to further consideration and modification.

Current Inquiry and Proposal to Restrict CATV-Broadcast Monopoly

True to its promise, *on April 12, 1967,* the Commission instituted an *Inquiry into Developing Patterns of Ownership in the CATV Industry* (Docket No. 17371, 32 Fed. Reg. 6221). No proposed rules were appended.

The Commission observed that the emerging pattern of growth indicates that CATV is ceasing to be simply a passive reception device of utility solely in outlying areas away from regular tele-

vision service; rather, it is developing into a significant force in communications on its own merits. Coupled with this development, the Commission observed an increasing trend toward *program origination on CATV systems.* Taken together, the rapid spread and changing nature of CATV call for consideration by the Commission of the long range function and role of CATV in the totality of communication services. Consequently, the Commission believes that the promised emergence of CATV systems with programming capability in large metropolitan markets requires that it begin to consider the application of more traditional policies and rules on *concentration of control, duopoly, and diversification of mass media.* This proceeding again *inaugurated general inquiry into the present ownership of the CATV industry and the probable future ownership of the industry.* On the basis of the limited information available, the Commission does not believe it appropriate to do more at this time than *seek views and suggested courses of action from interested parties;* however, if the early responses to this inquiry appear to justify such action, this inquiry *may be expanded to include proposed rule making designed appropriately to establish guidelines for the ownership and control of the CATV industry.*

Without intending to restrict comment, the Commission believes it helpful to point out that *its main areas of concern at this time are focused on the public interest questions arising from ownership and control of CATV systems by Commission licensees* in other communication services, excluding the new Community Antenna Relay Service; and the public interest problems that may be inherent in such cross-ownership. As indicated, it also desires comments on the question of *whether its present rules and policies relating to such matters as multiple ownership, duopoly, concentration of control and diversification of mass media should be adapted to ownership and*

control of CATV by licensees, or whether other more appropriate standards are indicated.

Comments were filed in June 1967, and the Commission has not yet issued its comments or decision. Nevertheless, this proceeding is basically a continuation of the previous investigation of the entire cross-ownership problem in Docket 15415, supra. In any event, *this proceeding seems to lay a foundation for sweeping rules restricting such cross ownership in the following possible ways:* (1) preclusion of cross ownership of broadcast and CATV facilities in the same or closely related markets, (2) limitation as to the number of CATVs that may be owned by the same individual, group of individuals, corporation, or individuals, groups, or corporations related thereto. (3) limitations upon ownership of newspaper and CATV in the same or related communities, (4) application to CATV of something akin to the diversification of control of mass media, multiple ownership and duopoly (overlap) rules and policies now applicable to broadcasters, and (5) furtherance or restriction of program origination by CATV.

Such restrictions serve as "two-edged swords," cutting both ways. That is, the adverse effects, potential herein, may injure broadcasters and CATV operators alike. *Consider the following possible effects of such rules.*

1. A restriction as to the number of CATVs that may be owned by one group will restrict somewhat the potential buyers of CATV properties and tend to depress CATV prices or, at the minimum, decrease future appreciation.
2. A preclusion of broadcast-CATV ownership in the same or related areas (e.g., within the Grade B of a TV or the 1 mV/m contours in a-m and fm) would:
   (a) Prevent the broadcaster from acquiring ing a CATV in the area specified, and
   (b) Prevent the CATV owner from acquiring a broadcast facility in the said area.
3. Restriction of newspaper-CATV ownership will similarly reduce (a) investment opportuni-

ties for such newspapers and (b) eliminate many, affluent would-be buyers.

4. In general, such rules will militate against "bigness" in CATV.

In both 2(a) and 2(b) above, we have situations that tend to diminish the opportunities of the broadcaster and the cablecaster from logical expansion into a closely related business. Not only does this diminish investment opportunities but will constitute further reduction of potential buyers for radio, television, and CATV properties.

We have indicated, in previous articles, that the Commission is gradually directing its policies toward complete separation among, and diversification of, broadcast facilities and newspaper interests. *Effectively, the Commission seeks the greatest possible diversity of public opinion sources. Ideally, it would like to separate the ownership of TV from a-m, a-m from fm, and newspaper from TV, a-m, and fm, in every community.*

With the emergence of CATV as a program originator, the Commission may be expected to add CATV to the list. Moreover, unlike broadcasting, it has an opportunity to "nip CATV in the bud."

We recommend that all licensees keep a close watch on this proceeding, and, consult with their communications counsel whenever the Commission requests further comments that may affect their interests. While the time for filing comments has passed, it may well be advisable to file informal comments expressing your views —be they pro or con.

The CATV Rules Reviewed

VOLUMES HAVE BEEN WRITTEN and even more has been said about the complex enigmas and problems posed by the meteoric rise of Community Antenna Television ("CATV" or "Cable TV").

Great questions face all concerned: How does the cable operator adjust to federal regulation? To broadcasters? How does the broadcaster adjust to the cable operator? What aid and protection has been accorded the broadcaster under the so-called CATV rules? Will the rules really impede cable development? Legally and generally, where has CATV been and where is it going? Commission rulings on the matter of CATV as in all others, reflect the ever-changing attitudes and policies of the government and may well foreshadow new *broadcast* rules. In times of augmented bureaucracy, and corresponding private unrest, it is incumbent upon *all communicators* to pay close heed to all promulgations of the ubiquitous Federal Communications Commission.

Background of CATV Rules

The story of the development of the CATV rules weaves an interesting and almost theatrical tale. It began obscurely (allegedly in Penn-

sylvania and Oregon) in 1949. Since no one was directly affected by CATV operations in mountainous and television-void areas, the FCC, the broadcast industry, and the public were silent. As cable TV began to assume a more forceful and ominous posture, a series of momentous rulings were issued by the Federal Communications Commission. These include the following (details are included in footnotes):

- August 1956 - Rule on restricting radiation from CATV cables[1]

- January 1958 - Commission denied its right to control CATV (Intermountain Microwave case) [2]

- Later in 1958 - CATV systems were viewed as intrastate not requiring Commission's authority to contruct or operate[3]

- 1959 - After extensive inquiry decided there was no basis for asserting jurisdiction over CATV[4]

- 1962 - Commission reversed itself and denied a common carrier's application to expand its services to improve CATV on the grounds that a local station might suffer economic ruin[5]

- 1964 - Adapted a notice of Proposed Rule Making[6]

- April 1965 - Adopted First Report and Order invoking rules on CATV systems using microwave services[7]

- April 1965 - Adopted notice of Proposed Rule Making covering all CATV systems[8]

- February 1966 - Issued Public Notice 79927, top 100 market rule, wherein Grade B signals of any station could not be extended into a top 100 market with an evidentiary hearing[9]

• March 1966 - Released Second Order and Report regulating all CATV systems.[10]

The rule on restricted radiation caused little concern and was passively accepted. Actions in 1958 and 1959 clearly indicated a hands-off policy. It was rather sudden in 1962 that the FCC made evident that it did want to regulate CATV, prior repudiations of jurisdiction notwithstanding. This change in view did follow, however, after a considerable change in the members making up the Commission. The April 1965 First Order and Report became the first significant CATV rules invoked. The top 100 market rule is now infamous. This action created near panic in the hearts and minds of many cable investors. If valid and enforceable, and so far it is deemed both, this action stood to preclude CATV's from offering service in markets wherein they obtained franchises and expended hundreds of thousands of dollars. Would such blatantly unconstitutional deprivation of rights be upheld in the courts? While this issue is presently being litigated in several circuits, it seems certain that *the Commission will be sustained.*

Before delving into the CATV rules as such, it is important to recognize that the rules adopted to date are not dispositive of many of the issues and questions posed in the April 1965 *Notice of Inquiry!* In other words, the *Notice of Inquiry* was divided into two major sections: *Part I* concluded that the FCC has legal jurisdiction over all CATV systems and proposed (a) to extend to *non*microwave CATV's the rules adopted to date are not dispositive of many of systems (the carriage and nonduplication provisions), and (b) invited comment on various other matters relating to color duplication, educational television, and the like. *Part II* of the Notice initated a *broader inquiry* into (a) the effect of CATV entry into major cities, (b) the need for limitations upon carriage of "distant" television signals, (c) "leap-frogging," (d) program origination by CATV, and mis-

cellaneous matters. In adopting the CATV rules in the March 1966 *Second Report* (the basis of all cable rules to date), the Commission stated, "This Report and Order deals only with these aspects (Part I and paragraph 50 of Part II) of the proceeding." An erroneous impression exists that, while more CATV rules are coming some day, the Commission has completed its activity for the moment. This is not so! Under the *still-pending Notice*, more rules are both possible and probable in the not distant future.

Major Divisions of the CATV Rules

There would appear to be an undue amount of confusion concerning the major categorizations of the CATV rules. The rules appended to the widely-read and little understood *Second Report* appear repetitious and confusing. What are the distinctions between Parts 21, 74, and 91? Why are they there? A logical and understandable analogy rests in the rules applicable to a-m, fm and TV services. Quite frequently a rule adopted for one service will be adopted (in precisely or substantially the same form) in the remaining two services. For example, the Program Log Rules may be found in Sections 73.112 (for a-m), 73.282 (for fm), and 73.670 (for TV). Each of these is substantially the same as the others. Such is the case with Parts 21, 74 and 91 relating to CATV systems in general; more specifically these three parts may be ascribed to the several methods by which CATV's receive their TV signals. In brief, the distinctions are as follows:

Part 21: Relates to CATV systems receiving some or all of their television signals from *microwave* common carriers.
Part 74: Subpart J relates to those CATV systems receiving some or all of their TV signals via *CARS* (Community Antenna Relay Service), a special portion of the spectrum reserved for microwave use by CATV operators. The CARS spectrum space is a *private microwave* service

and must be distinguished from public microwave services (such as common carrier, business radio, etc.). The CARS spectrum is less desirable from both technical and economic aspects. Through CARS, the FCC is gradually forcing CATV's out of using the valuable and superior portion of the spectrum allocated for "public" microwave service.
Subpart K relates to the rules applicable to all *non-microwave* CATV systems and covers approximately 75% of the now-operating systems.
Part 91: Relates to CATV's receiving some or all of their TV signals from *business or industrial radio microwave* service. This accounts for the smallest segment of the CATV industry.

Since the vast majority of CATV systems are *not* served by microwave (common carrier, CARS, or industrial in origin), they need *not* concern themselves with Parts 21 and/or 91 of the Rules and may concentrate upon Subpart K of Part 74. Therefore, by treating the rules affecting "all" CATV systems, as set forth in Part 74, the reader can glean an adequate comprehension of the effect of federal regulation upon CATV to date.

Divisions of Part 74, Subpart K of the Rules

Section 74.1101 - Definitions of terms
Section 74.1103 - Carriage, Non-duplication (program exclusivity), and miscellaneous requirements.
Section 74.1105 - Notification (to TV stations and others) *Prior* to commencement of *any* new system or extension of service to a "new geographic area."
Section 74.1107 - "Top 100 Market" Rule.
Section 74.1109 - Procedures for waiver of rules, special relief, ruling, and other relief.

Section 74.1101 - *Definitions of Terms.* This Section is fundamentally self-explanatory, providing rudimentary definitions of the "terms of art," and need not be paraphrased here. However, interpretive comment on several points is warranted.

First, the term *"community antenna television system"* does *not* include any CATV system which (a) has *less* than 50 subscribers or (b) serves only the residents of one or more apartment dwellings under common control, ownership, and management.

Second, the terms "Grade A" and "Grade B" contour are defined in a manner consistent with established (FCC) engineering practice and Rules 73.683 and 73.684. Unfortunately, the distinctions between the "predicted (or theoretical) contour" and "measured (or actual) contour" give rise to endless controversies and imbroglios between engineering experts. From the standpoint of the carriage, nonduplication, and "top 100 market" rules, the definitions of Grade A and B contours is crucial. It is generally known, and even accepted by the Commission (Memorandum Opinion and Order of January 19, 1967, FCC 67-34, paragraphs 11-13), that *the so-called "predicted contour"* may be erroneous and *may be rebutted* by a "substantial supporting (engineering) showing." While the Commission specifies that the *method* of engineering necessary to rebut the predicted contour must be made in conformance with procedures set forth in Section 73.684 (f), *it does not define "substantial showing."* So, while the cablecaster or broadcaster may rebut the predicted contour to meet his peculiar needs, the required amount of rebuttal evidence (number of measurements, amount of data, etc.) is left open to speculation. In any event, if there is a *bona fide* question as to the validity of a predicted contour, and it serves the reader's interests to challenge same, it would be prudent to have an engineer (recognized by the FCC as an expert) prepare a definitive showing pursuant to 73.684 (f).

Section 74.1103 - *Carriage and Nonduplication Aspects.* The Commission adopted its carriage and nonduplication requirements on two basic

grounds: (1) the failure of CATV's to carry *local* stations (those providing a Grade B or stronger signal to the community served by the CATV system), and to afford them fundamental exclusivity upon their programming, constitutes unfair competitive practices; and (2) a failure to impose these requirements might result in grevious and irreparable injuries to existing and future television service. The specific provisions of the carriage requirements are set forth below.

Section 74.1103 (a) - *Carriage Requirement in General.* Upon request of the station, CATV's must carry, in order of highest priority, the following:

(1) All TV stations delivering a *principal city contour signal* to the community of the CATV.
(2) All TV stations delivering a *Grade A signal* to the community of the CATV.
(3) All TV stations delivering a *Grade B signal* to the community of the CATV.
(4) All translator stations with power of 100 W or higher, operating *in* the community of the CATV system.

The reader should note that the CATV system does *not* need to carry the above stations *unless* there is a *request for carriage by said TV station (s)*. Moreover, those with insufficient channel capacity to comply may file a petition for waiver (under Section 74.1109) or extension of time to comply *within* 15 *days* after receipt of the requests for carriage. *Requests for waiver, or extension of time to comply, based upon grounds other than limited channel capacity, have enjoyed little success!*

In minor amendments to the rules (FCC 67-34 as released January 1967), the Commission noted that where a CATV system is within the Grade B or better signal of both a satellite and its parent station, it shall carry the one of higher priority (stronger signal) and may select between stations of equal priority.

Finally, the Commission has made infinitely clear that carriage is required where *any* part of the community of the system falls within the Grade B or stronger contour of any station. Under existing precedent, there are limited methods of obtaining a waiver. These include: (1) demonstrating insufficient channel capacity or (2) providing a "substantial supporting showing" to prove that the "predicted contour" is not the "actual contour," and therefore that the rule is inapplicable. In addition, the CATV operator may qualify under one of the following exceptions:

Section 74.1103(b) - *Exception to Carriage Rules.* CATV system need NOT carry a station's signals IF:

(1) That station's network programming is "substantially duplicated" (74.1101 (f)) by one or more stations of higher priority; *and* carrying such signal would prevent the system from carrying an *independent TV;*
(2) There are two or more signals of *equal* priority which "substantially duplicate" each other, and carrying either would preclude carriage of an *independent TV;* and
(3) A *translator* signal duplicates or substantially duplicates a higher priority signal carried by the CATV.

Section 74.1103(c) - *Switching Devices.* Where the CATV qualifies for one of the above exceptions and does not carry a 100-W translator signal of Grade B or higher priority, *it must* (1) *install and maintain a switching device for each subscriber* (to permit switching from cable to "off-air" reception), or (2) obtain *written* statements from the subscribers indicating that they do not desire the switching device. Obviously, "high band" or 12-channel systems, in most cases, will *not* be able to take advantage of exceptions 1 or 2 discussed under 74.1103(b) above.

Section 74.1103(d) - *Manner of Carriage.* In addition to the requirement that the CATV system may not degrade the signal quality of the stations carried, *it cannot, if requested by a station, carry that station's signal on more than one channel of its system.*

This provision is designed to prevent CATV operators from carrying the "protected" station on the channels of duplicating stations during times when the latter must be deleted. By such procedure, the CATV system could maintain programming on as many channels as possible. The FCC was, and is, concerned that such tactics might disrupt viewer loyalty by confusing the identities of individual stations. Accordingly, "local" stations may preclude the CATV, *by specific request,* from carrying its signal on more than one channel of the system. Cases to date on point have shown that the Commission will require rigid enforcement of this provision.

As additional protection for the broadcaster, the Commission has provided in Par. 74.1103(d)(2) that, *upon request of the TV station, the CATV shall carry the said TV signal on the channel upon which the TV is transmitting.* In other words, the cable channel must be the same number as the channel of origination.

However, this rule provides the CATV system with an *escape.* It says that this requirement need not be adhered to unless it is "practicable without material degradation." While the rule fails to state who shall be the judge of the technical feasibility (of carrying TV signal(s) on the same channel as it originates), the logical implication is that the CATV system must make the decision. Accordingly, if it appears technically more sound, the CATV system can arrange TV signals in any manner it chooses—contrary requests of the TV station(s) notwithstanding.

Section 74.1103 (e) - *Nonduplication in General.*

The CATV system shall *maintain the program exclusivity* of all 100-W translators and Grade B or higher priority signals carried on the systems *against signals of lower priority.* CATV's can*not* duplicate the programs of such stations *on the same day* as broadcast by the protected station.

Section 74.1103(f) - *Notice Required for Nonduplication.* The following provisions apply:

(1) The television station must *request* nonduplication protection from the CATV system.
(2) The CATV, in turn, may *request* that the TV station seeking protection provide:
(a) Eight days prior notice of the date and time of every program to be protected; and
(b) Eight days prior notice of the date and time of every program to be deleted.

In order to force the TV station to give eight days prior notice, the CATV—*after* the TV's initial request for protection—must provide a list of all TV stations it carries and indicate channel substitutions, if any. *This places the burden of determining and listing programs to be protected and deleted upon the TV station seeking protection.* Technically, *all CATV systems should be prepared by now to provide this protection upon request*; that is, they should have the "switching" equipment installed and operable. It should be emphasized that, contrary to the rules proposed in April 1965, only "same day" protection need by afforded; that is, the CATV may provide programming, duplicative of the local stations, any day prior or subsequent to the day of its telecast by the latter.

Section 74.1103(g) - *Exceptions to Nonduplication Rule.* The CATV system need *not* delete a program IF:

(1) In so doing, it would leave available to subscribers *less than two network programs;*
(2) It is offered by the network in prime time (6:00 P.M. to 11:00 P.M., Eastern time) and is broadcast by the station requesting deletion, in

whole or in part, outside of what is locally considered prime time;
(3) The *time* of presentation is of special significance (e.g., a speech), only *simultaneous* nonduplication protection need be afforded;
(4) It is offered in *color* but will be broadcast in black and white by the station seeking protection.

Section 74.1105 - *Notification Necessary Prior to Commencement of New or Expanded CATV Service.* No CATV system may commence operation of a new system, expand its system into a "new geographic area," or commence provision of a distant signal (extend a station's signal beyond its Grade B contour and offer same to its subscribers) *unless*:

(1) It provides notice to:
(a) All TV stations entitled to carriage on the system (i.e., those providing a Grade B or stronger signal to the community served by the CATV);

(b) The licensee of a 100W or higher power translator operating in the community of the CATV;

(c) To all local, area, and state educational authorities where a noncommercial educational TV signal will be extended.

(2) Copies of all such notice must be supplied to the FCC.

(3) These notices should be supplied within 60 days after receipt of a franchise.

(4) In any event, *no CATV system shall commence such operations until thirty days after notice has been given.* It appears that a number of CATV systems have ignored the above requirements; such CATV's are subject to *cease and desist proceedings and fines* by the FCC.

(5) The notice shall include:

(a) name and address of the CATV,

(b) all of the communities to be served by the CATV,

(c) all TV signals to be carried by the CATV, and

(d) the estimated time upon which new service will commence.

Where a petition opposing the service is filed with the FCC, new service may *not* be offered

until the Commission issues its decision. The apparent purpose of this provision is to provide all interested parties with an opportunity to file objections with the FCC. In the absence of such objections, service may be instituted within 30 days after provision of notice.

Interestingly, *cases to date reflect an unwillingness* on the part of the Commission *to grant special relief*—even to broadcasters. *In re Tucson Cable TV Company,* FCC 67-69 as released January 24, 1967, the Commission denied a broadcaster's request for application of CATV rules more stringent than those adopted. The FCC reasoned that the TV station had failed to show that it is contrary to the public interest to apply the existing rules.

This case, and others like it, create the distinct impression that the Commission is not disposed to waive its CATV rules, nor is it apt to grant special relief for more strict rules, in the absence of amended rules. Effectively, the FCC places a heavy burden upon all petitioners (those seeking something more or less than the rules provide) to demonstrate that the public interest clearly justifies such action. Of course, nowhere do the cases or rules reflect or imply the extent or kind of showing necessary to obtain such special relief, and it is unlikely that such requests will be granted. This position seems to aid and injure CATV and broadcast interests equally.

It is important to recognize that the so-called carriage and nonduplication rules are *not* applicable, absent a *request* from the TV station(s). In the case of nonduplication, this affords the CATV operator to request *eight* days *prior* notice of the date and time of *each* program to be (1) protected and (2) deleted. This imposes the substantial clerical burden upon the TV station(s).

Section 74.1107 — "Top 100 Market" Rule

Section 74.1107(a) - Requirement for Evidentiary Hearing: Reduced to its simplest terms,

this provision requires that those CATV systems —operating in a community which receives a Grade A signal from *any* TV station licensed to serve any market ranked in the 100 largest television markets—*may not extend* the Grade B signal (offer a "distant" TV signal) of any television station *UNLESS:*

(1) a petition for waiver of this requirement is filed with and granted by the FCC; or,

(2) a request for FCC approval is filed, an evidently hearing held, and subsequent Commission approval obtained.

Section 74.1107 (b) - Procedures Relating to Evidentiary Hearing:

After the CATV system has obtained any necessary franchises or has entered into a lease (with a telephone company) or other arrangement authorizing construction of a CATV system in the "top 100 markets," it must file a request (pursuant to Section 74.1107(a) above) for evidentiary hearing. Section 74.1107(b) provides that this request shall set forth:

(1) the name of the community involved;

(2) the date upon which the franchise, or other legal authorization, was obtained;

(3) the signal(s) proposed to be extended beyond their Grade B contours; and,

(4) the specific reasons demonstrating that such approval is consistent with the public interest.

The commission will give public notice of the filing of such requests, and interested parties may file a response or statement (opposition to request) within *thirty* days after such public notice; and a reply to such opposition must be filed within *twenty* days after the latter.

After interested parties have had an opportunity to file pleadings espousing their views, the Commission shall designate the request for approval for evidentiary hearing. Issues will be specified in the hearing order. The *burden of*

proceeding with the introduction of evidence, and the burden of proof, shall be placed upon the CATV system making the request. Thus, the CATV is assigned the onerous burden of proving that its proposed operation will not impair the (1) development of new television service and/or (2) healthy maintenance of existing television service in the area.

Effectively, the CATV system must prove a negative, involving questions of potential economic injury. As the reader may know, the Commission has frowned upon and refused to hear economic injury cases advanced *by* broadcasters *against* broadcasters. (See *BM/E,* March 1965 issue, article entitled "The Volatile Question of Economic Injury.") Since few, if any, broadcasters have ever succeeded in proving, in evidentiary hearing or otherwise, that the proposed operation of another broadcast facility would cause sufficient economic injury to force the complaining station out of business, the FCC, in recent years, has denied all requests for hearing. In short, the FCC has not denied a competing broadcast application upon economic grounds.

These salient and probative facts notwithstanding, the Commission *has* seen fit to place the burden of proving economic injury, in a *negative* form, upon CATV operators — that is, the CATV system must prove that it will *not* cause undue economic injury. Thus, the CATV operator must meet a burden of proof—that broadcasters historically have been unable to sustain against applications in the *same* broadcast service—concerning an indirectly related service (TV vs. CATV). Moreover, there is no precedent, in either broadcast or cable law, to establish the type and quantity of evidence necessary to meet this burden. In brief, the Commission has created what is tantamount to an "air-tight" case for the broadcaster. In so doing, the FCC has created the unavoidable impression that it does *not* intend to permit waivers of the "top 100

market" rule. Perhaps this procedure is justified and perhaps not. In any event, this burden of proof constitutes a formidable, if not totally insurmountable, barrier to the extension of Grade B signals within the top 100 markets.

Countless petitions for stay, petitions for reconsideration, and petitions for waiver of this rule have been denied. (See FCC 66-455, FCC 66-456, Report No. 3821, et al.) This trend is borne out in nearly all of the precedents to date.

There have been limited exceptions to the above. For example, in *Chenor Communications, Inc.* (FCC 66-468), *Coldwater Cablevision Incorporated* (FCC 66-569), and *Martin County Cable Company, Inc.* (FCC 66-570), all released in July 1966, the Commission granted requests for waiver of the top 100 market provisions. While numerous allegedly supporting reasons were given, the Commission's favorable action was obviously stimulated by one *primary* factor—*no one opposed the waivers!*

Another minor area of exception to the "no grant" policy is evidenced in a series of cases that reflects the Commission's disposition to grant waivers of 74.1107 wherever it will permit carriage of a noncommercial educational television station. (For example, see *Buckeye Cablevision, Inc.*, Report No. 6146, September 1966.)

It is conceivable that amendments to the copyright law will result in a relaxation of these rules. Such amendments might remove one of the FCC's primary concerns—the unfair competitive positions from which broadcasters and cablecasters compete. More likely, in time, restrictive CATV rules will be relaxed as a direct result of public demand. However, such a change may be 5 or 10 years in coming.

Section 74.1107(c) - Procedures for Special Relief: In addition to the *prima facie* applicability of the top 100 market rule to all CATV systems falling within prescribed classification, 74.1107(c) affords interested parties an opportunity to file (pursuant ot 74.1109) for the imposition of the

top 100 market rules in areas *not* encompassed in the normal definition of the term.

From a practical standpoint, the Commission is not disposed to grant such requests. Wherever a party requests the implementation of CATV rules greater or lesser than those in effect, it imposes the burden of proving that the public interest warrants such extraordinary relief. The burden required is an unknown quantity, and the cases to date reflect only denials of such requests. (See *Old Pueblo Broadcasting Company* and *TV Transmission, Inc.*, both reported in January 1967 Report No. 2522.)

Section 74.1107(d) - Effective Dates and Minor Consideration: This provision provides that: (1) the top 100 market rule became effective on February 15, 1966; (2) those providing "distant" signals, in the top 100 markets on or before that date, need not comply with this rule; (3) such systems, however, must comply with the rule as to service commenced—which would extend service to a "new geographic area" in the same or a new top 100 market—after February 15, 1966.

This Section raises the difficult problem of defining a *new geographic area.* This puzzling problem is best explained in the context of the Commission's January 1967 *Opinion and Order* (Dockets 14895 et al., FCC 67-34) making minor amendments to the CATV rules adopted in the March 1966 *Second Report and Order.* Therein, the Commission states that the entry of the CATV system *into any new, incorporated area* will be considered as entry into a "new geographic area." Thus, in the case of *incorporated* areas, a clear and comprehensible definition is set forth. Unfortunately, *unincorporated areas* will be treated on a case-by-case basis. They may, or may not, be deemed "new geographic areas."

To wit, in the *Mission Cable* case, 4 FCC 2d 236, the CATV system urged that—by the virtue of the fact that it had commenced service in one portion of the unincorporated County prior to

February 15, 1966—it was entitled to "grandfather" rights to provide service to the balance of the County after that date. The Commission *rejected* this view and held that the presence of substantial tracts of undeveloped land between subdivisions within the County created separate communities. Accordingly, further expansion was held to be into "new geographic areas," and the top 100 market rule was applicable thereto; approval, via evidentiary hearing, must be held pursuant to 74.1107(a).

Therefore, in cases involving *unincorporated* areas, the decision must be made on a case-by-case basis. *It would appear that most doubtful cases will be deemed to be "new geographic areas."*

Section 74.1109 - Procedures for Relief

Section 74.1109(a) - Procedures in General: While Section 74.1107(c) provides for certain relief under the top 100 market rule, Section 74.1109 is the *primary* provision relating to requests for relief from the CATV rules (affecting *non*microwave systems); 74.1109 provides TV stations, CATV systems, and other interested parties with *broad rights* to petition (by formal pleading or informal letter-request) for modification of the CATV rules. Thereunder, the Commission asserts that it may (1) waive any provision of the instant rules, (2) impose additional or different requirements than promulgated, or (3) issue a ruling on a complaint or disputed question.

Section 74.1109(b), 74.1109(h) - Mechanics of Procedure: These provisions provide, in substantial part, as follows:

(1) The petition shall state the relief requested, detailed facts, and demonstrate a "public interest" need for warranting the grant.

(2) Factual allegations must be supported by the affidavit of a person(s) having actual knowledge of the facts, and exhibits must be verified by the person preparing same. (Note: Some CATV petitioners have failed to comply with this provision, and the Commission has found the pleading

fatally defective. See *In Re Durfee's TV Cable Company*, FCC 66-1044, November 1966.)

(3) Interested persons may submit comments (oppositions) to petitions or requests filed under 74.1109(a). Correspondingly, the petitioner may file a reply (to comments submitted in opposition to its initial request) within twenty days after the opposition(s) is filed.

(4) The Commission may (a) grant the request in whole or in part, (b) deny the request, (c) issue a ruling on a dispute, (d) specify other procedures, or (e) issue temporary relief pending in-depth consideration.

Effectively, 74.1109 *provides all persons with an opportunity to express their views on the activities or proposals of any CATV System* of interest. The Commission has opened the door to all and has disregarded the normal requirements of "legal standing."

Evidence of "Bureaucratic Trends"

The vast majority of legal "experts" in the Communications Industry do not believe that the FCC has jurisdiction over CATV. They assert that the existing statutes and precedents indicate a lack thereof. Commissioners Lee Loevinger and Robert Bartley have consistently observed that the Commission is devoid of legal jurisdiction: their dissents have been numerous, prolific, and carefully documented.

However, the validity of jurisdiction appears to be an academic and irrelevant point. The appellate courts today have an overwhelming proclivity to spare no effort to unearth any legal reasoning that will support the several regulatory agencies. In short, it is highly unlikely that any of the numerous pending cases, challenging the FCC's jurisdiction, will prove beneficial to the CATV industry.

Commissioner Loevinger and others have aptly stated that the Commission's assumption of jurisdiction over CATV has laid the foundation for more extensive and restrictive regulation of

the Broadcasting Industry and others within its domain. For example, it is most probable that the FCC will deny, for the first time, a pending microwave common carrier application based upon the *content* of the matter to be provided by the carrier to several CATV systems. (See the pending applications of Dal-Worth Microwave, Inc., File Nos. 7661-2-CI-P-66, proposing to provide certain channels of nonbroadcast programming to several CATV systems in the State of Texas.)

In adopting its CATV rules, be it properly or improperly, the FCC has stated, for all practical purposes, it has or will assume jurisdiction over *anything* that *may* affect or injure broadcasting service to the public. While such conduct may be appropriate and in the public interest, it does not appear to be within the purview of existing statutes. In any event, it is entirely conceivable that the assumption of jurisdiction over CATV will be cited as precedent for future encroachment upon and regulation of less related industries.

Moreover, the Commission's intense interest in program origination by CATVs will result, in all likelihood, in Congressional and/or agency action restricting and/or dictating the substance of such originations. *This,* of course, *will bring the FCC squarely into the area of regulating program content.* Historically, the Commission has judiciously avoided such regulation and has repeatedly stated that its controls and directives do not cover program content. See *United States v. Paramount,* 344 U.S. 131, 166 (1948); *Superior Films v. Department of Education,* 346 U.S. 587 (1954). See *Report & Statement of Policy Re: Commission En Banc Programming Inquiry,* 20 *RR* 1901. Also, see First Amendment to the United States Constitution and Section 326 of the Communications Act of 1934 as amended; the latter states, in pertinent part,

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over radio signals . . . and no regulation or condition shall be promulgated or fixed by the Com-

mission which shall interfere with the right of free speech by means of radio commmunication."

Obviously, the reason why the Act refers to this restriction in terms of *radio* is becausc there was no CATV at the time. In radio, TV, and other areas of communication, the Commission has avoided regulation of program content—except insofar as lotteries, libel, and criminal acts are concerned. In recent years, the FCC has "crowded" this area by refusing to grant renewals, because (1) their commercial content was too high or (2) their programming proposal did not appear to be offered in response to adequate surveys of the tastes, needs and desires of the audience. In so doing, by indirection, the FCC has begun to regulate program content. *Very* gradually, the "free speech" protection accorded broadcasters is being eroded.

With the advent of FCC control of program origination over CATV—a matter which appears clearly unconstitutional and without precedent or statutory support—it logically follows that the FCC is free to expand its endeavors into the program content offered by broadcasters! After all, if the Commission is entitled promulgate rules concerning program content for one "communications" service (i.e., CATV), the authority for similar promulgations, affecting other services within its administrative domain (i.e., radio, television, microwave, etc.) must surely exist. To be trite, "If it's good for the goose, it's good for the gander."

Undoubtedly, there are many at the Commission who would disagree and "scoff" at the above-suggested extension of regulation into the area of program content. But, then, FCC faces and personalities do change, and there was a time when the Commission's upper eschelon "scoffed" at the suggestion that the FCC would ever assume even limited jurisdiction of CATV—without Congressional mandate.

We do not presume to pass upon the propriety

or impropriety of the Commission's regulation of CATV. The fact is, limited regulation of CATV is *now* in effect. More regulation will surely come, and ultimate licensing of CATVs by the Commission (as well as by local government authorities) may be forthcoming and other regulations as suggested above. It appears a matter of logical deduction that the CATV rules have laid the foundation for greater and more extensive regulation of the broadcast industry.

If broadcasters were to view CATV rules in the above light, their disposition to encourage or ignore additional CATV regulation might be altered graphically. Unquestionably, the independent regulatory agencies have been accorded extensive powers and broad discretion in the exercise thereof; but, if democratic government is to survive, this power and discretion must be mollified and mellowed with restraint.

(1) In August 1956, the Commission adopted (Docket 9288, 13 RR 1546a) a Rule (Section 15.161) restricting radiation (electrical impulses escaping from CATV cables) in certain specific respects. This rule is of a solely technical (engineering) nature. It should be noted that this early action related to *use of the airwaves*, and as such fell clearly within the purview of the Commission's widely-recognized jurisdiction under the Communications Act. This action was accepted passively by the cable industry, was accorded little coverage in the communications trade press.

(2) In January 1958, in *Intermountain Microwave*, 24 FCC 54, the Commission explicitly *denied its right to control* CATV and asserted that an assumption of jurisdiction under Titles II and/or III of the Communications Act would be ". . . arbitrary, capricious and discriminatory and unwarranted . . ."

(3) Later in 1958, in *Frontier Broadcasting Company*, 24 FCC 251, the Commission observed that—even though it held CATV systems to be common carriers—they would come within the scope of Section 214 (*intra*state wire communications) and, therefore, would *not* require Commission authority to construct or operate.

(4) In 1959, the Commission conducted an extensive inquiry and adopted a *Report and Order* (Docket No. 12443, 26 FCC 403) concluding that (a) there is ". . . no present basis for asserting jurisdiction or authority over CATV's . . ." and (b) *rules* requiring CATV's ". . . to carry the signals of the local station . . . (*would*) *require changes in the Communications Act* . . ." (Emphasis supplied.)

(5) In 1962, after some 14 years of CATV activity, and 3 years after its lengthy Inquiry Into The Impact of Community Antenna Systems et al, and disavowal of jurisdiction over same (note 4 above), the disposition, began to undergo a metamorphosis—partially as a result of changes in members making up

the commission. Suddenly, in *Carter Mountain Transmission Corp.*, 32 FCC 459, it became evident that the FCC did indeed want to regulate CATV—*prior repudiations of jurisdiction notwithstanding*. The FCC denied a common carrier's application for a license to expand its facilities—and thus improve its service to CATV customers—on the grounds that the local TV station (KWRB) might suffer economic ruin via CATV. This case contradicted, although it did not formally reverse, the prior decisions and laid the foundation for a series of rule making proceedings that gave rise to the CATV rules.

(6) In July 1964, the Commission adopted a *Notice of Proposed Rule Making* (Docket 15586, FCC 64-72) promulgating rules relating to the licensing of microwave services used to relay television signals to CATV systems. In light of the many changes therein, it would be an academic exercise to recount those proposals here.

(7) In April 1965, the Commission adopted the *First Report and Order* (FCC 65-335) in the above matter and made applicable (to CATV systems using microwave services to provide television signals to their subscribers) a substantial portion of the CATV rules as we know them today. Thus, the first significant CATV rules were invoked.

(8) On the same day, April 22, 1965, the Commission adopted a *Notice of Inquiry and Notice of Proposed Rule Making* (Docket 15971, FCC 65-334, 1 FCC 2d 453). This Notice suggested the adoption of rules, (akin to and *greater than* those made applicable to microwave-served CATV's (as discussed in note 7 above) affecting *all* CATV systems—whether microwave was used or not. The documents discussed in notes 6 through 8, and the prolific comments filed by interested parties, comprise the pillars upon which the current CATV rules are founded.

(9) On February 15, 1966, by its Public Notice 79927, the Commission announced that it was adopting rules affecting all CATV systems forthwith. By this notice, it made effective immediately its now infamous "top 100 market" rule. The latter provides that any CATV system, operating within the Grade A contour of any TV station licensed to serve any market ranked in the "top 100 television markets" by the American Research Bureau, may *not* extend the Grade B signal of any television station without an evidentiary hearing before the Commission resulting in the latter's "approval."

(10) On March 8, 1966, the Commission released its *Second Report and Order*, FCC 66-220, 2 FCC 2d 11, promulgating that which we now identify loosely as "the CATV rules." Effectively, these rules made applicable, to *non*microwave-served CATV's, the rules adopted in April 1965 relating only to *microwave*-served systems. Moreover, the March 1966 rules were, in general, more harsh upon CATV than the 1965 promulgations.

Translator Policies and Rules

SINCE THE EARLY 1950's, numerous licensees as well as the Commission have wrestled with the "translator problem" and the place that translators should occupy in the total broadcast allocations scheme. On various occasions, broadcasters have alleged that translator stations constitute substantial adverse economic impact upon existing or potential television broadcast stations—particularly those in small markets.

On April 23, 1965, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971 (CATV and Related TV Auxiliary Services) FCC 65-344 [4 RR 2d 1679], in which it proposed "a reexamination of all our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services." On March 8, 1966, the Commission released its Second Report and Order in Dockets 14895, 15233, and 15971, (Distribution of TV Signals to CATV Systems and Related Matters), 2 FCC 2d 725, [6 RR 2d 1717], in which it resolved some of the questions presented and terminated the proceedings in Docket Nos. 14895 and 15233. However, it ordered that the proceedings in Docket No. 15971 were not terminated pending consideration of the comments filed in Part II of that proceeding. These comments included the question of the Commission's future policies for

television broadcast translator stations. On June 22, 1967, a second notice initiated a general reexamination of the Commission's policies and rules applicable to television broadcast stations.

Background Of Present Rules And Policies

In 1956, in order to make possible the provision of television service to small, isolated communities and sparsely settled areas beyond the range of existing stations, the Commission began the authorization of uhf translator stations (relatively inexpensive installations which picked up television signals and rebroadcast them on channels in the higher portion of the uhf band). Initially, they were permitted to operate with a maximum power of 1 watt; thereatter, in order to increase the opportunity for reception of this service, the Commission amended its rules so as to permit operation with power up to 10 watts. For technical reasons, translators were not permitted to originate any broadcast material themselves or to rebroadcast any signal except that of a broadcast station or another translator. Therefore, they did not, in their own operations, generate any revenue. They were usually operated by nonprofit corporations or associations, and built by subscription, or operated by public bodies; in a few instances, television licensees constructed translators to fill "holes" in the coverage areas of their stations. Like broadcast stations generally, translators were required to have the consent of the stations whose signals they rebroadcast.

Although the authorization of uhf translators eased the situation, in view of the relatively high installation and operating costs of uhf translators as well as the limited number of receivers, public demand for the licensing of vhf translators continued. This demand was finally satisfied in 1960 when Congress amended the Communications Act by adding Section 319 (d) to permit the Commission to license the pre-existing vhf repeaters, and by amending Section 318 to allow operation of

translators without an operator. The Commission then adopted rules permitting the licensing of one-watt vhf translators, and provided for a change-over procedure to permit the licensing of existing repeaters until they could obtain permits and equipment for regular vhf translator operation under the new rules. Ten hundred and forty-four repeaters were authorized under the change-over procedure, and provision was made for conversion of these repeaters to regular translator operations.

The policies and rules developed in the early translator proceedings were shaped by the nature of the repeater operations as they then existed. As a result, the policies and rules were primarily designed to accommodate the interests of small community groups, principally in the far west, which sought translators to supply service not otherwise available. Soon, however, a new element appeared. With the legalization of vhf translators, numbers of commercial television broadcast licensees filed applications for vhf translators to rebroadcast their stations' signals. The motive underlying many of these applications was mainly competitive, and it posed obvious new problems. When the new trend became apparent, the Commission formulated limitations on the use of vhf translators by commercial licensees which were adopted in 1962. In essence, these limitations prevent the use of vhf translators by commercial licensees for competitive purposes by: (a) authorizing their use only within the predicted Grade B contour of the primary station (§ 74.732(e) (1) of the Rules); and (b) forbidding their use where program duplication would result within the predicted Grade A contour of the duplicated station and beyond the predicted principal community contour of the primary station (§74.732(e) (2) of the Rules). Because the Commission considered that a demonstrated public demand for vhf translator service was a countervailing consideration not present in the case of licensee applications, no such

limitations were imposed on the use of vhf translators by private parties. At the same time, in order to promote the wider use of uhf generally, the Commission placed no restrictions on licensee use of uhf translators.

While these events were occurring in the translator field, a great territorial expansion of CATV was taking place. Since the unregulated CATVs were not subject to the limitations imposed on translators, this development proved to have significant implications in the translator field. Television stations were faced with the competition of distant and duplicating signals but the signals were supplied by CATVs rather than translators. At the same time, the rapid spread of CATVs minimized the public's anticipated role in seeking translators, both as a result of lessened demand and because of the CATV's other advantages over translators. These advantages included (1) the CATV's ability to use microwave relays to obtain input signals regardless of location or distance; (2) the ability of the CATV to furnish a large number of signals; and (3) the assured financial base of the CATV which, in contradistinction to most translator operators, can enforce payment for its service. The growth of CATV has affected the Commission's translator policies in other ways. As concern mounted over the possible adverse effects of CATV on regular television stations, the Commission recognized that some of the considerations applicable to CATV are, in at least related form, applicable to translators. Thus, the Commission has found it has to devote considerable attention to questions of economic impact and program duplication in connection with translator applications.

On July 7, 1965, the Commission adopted a Report and Order in Docket 15858 to permit high power TV translators on unoccupied assignments in the Table of Assignments. The Order (1) permitted vhf and uhf translators of 100 watts transmitter output; (2) regular TV

station licensees as well as other qualified parties were eligible to be a licensee of a high-power translator; (3) the high power translator would in no way preclude the grant of an application for a regular or satellite television station on the channel, and the licensee of the translator also would be given an opportunity to file a competing application to convert the translator to a regular broadcast station, (4) the rule prohibiting existing TV stations to extend their Grade B coverage by means of vhf translators could be used on the remaining vhf assignments in the Table; and (5) objections to high power translators from regular TV stations would be treated on a "case-by-case" basis. Basically, the Commission adopted the foregoing Order because it believed that TV assignments are unused due to the financial problems associated with small markets. The Order established a simple and economical method whereby existing licensees and others could provide service to people in underserved areas on a translator basis until such time as a regular station may become economically feasible. With respect to the impact of the high power translator stations on regular TV stations, the Commission decided to treat this on a "case-by-case" basis. Several parties commenting were concerned that the impact of these high-power translators on small market stations required safeguards such as nonduplication of programs; however, the Commission stated, "We do not believe that we should at this time attempt to foresee all the problems which may occur and to cure them in this proceeding. As we stated in our Notice [4 RR 2d 1679] "More generally, we are of the opinion that all of our rules and policies should be reexamined to see if they are holding back or encouraging a variety of off-the-air services." Pending the formulation of a definitive policy with respect to these matters, we have in recent actions on translator requests, adopted the policy of generally conditioning

grants upon the outcome of Docket 15971, and further that the translator, upon the request of a television broadcast station within whose Grade A contour the translator will operate, will not duplicate a program broadcast by the TV station, simultaneously or within 15 days."

On November 30, 1966, the Commission adopted a Report and Order (Docket No. 16424) amending the rules providing for certain frequencies in the 1990- to 2110-MHz band be made available for use by TV translators as microwave relays from TV stations to translators.

Policy Problems

The Commission believes that the policy areas now requiring consideration in Docket 15971 include: (a) the need for continuing the policy of prohibiting licensee-owned vhf translators beyond the primary station's Grade B contour; (b) the limitations, if any, to be imposed on translator duplication of regular television stations; (c) the possibility of different requirements for translator stations used in connection with educational television stations; (d) the limitations, if any, to be imposed on vhf translators in areas with predicted uhf service; (e) the possibility of higher power for vhf translators; and (f) new steps, if any, which may be taken by the Commission to encourage the wider use of translators. In addition, this proceeding provides a convenient forum in which to consider various other changes which have been suggested but not yet acted upon. These possible changes include tightening of the technical requirements for translator equipment, origination of local announcements and programming on uhf translators, and use of translators solely as relays to carry broadcast signals greater distances for ultimate use by translators. The following paragraphs contain a brief discussion of these matters.

Licensee-Owned Vhf Translators Beyond the Primary Station's Grade B Contour

Licensee use of vhf translators beyond the primary station's Grade B contour is now prohibited by §74.732(e) (1) of the Rules. The Commission adopted this restriction after a rule making proceeding and a determination that, "The vhf spectrum is too crowded and the problems of potential interference are too great for the Commission to authorize vhf translators unless there is a clear and compelling need therefor demonstrated by active interest of the people in the area." The Commission also said at that time that it was apparent that some television stations were planning to use vhf translators to extend their service ". . . into new markets at relatively little cost and with no responsibility for meeting the needs of the new community for local programming and might result in delaying the development of new stations and keep existing stations from expanding their service to cover these areas through authorized facilities."

The reasoning set forth above still largely obtains today. However, the proliferation of CATV systems and the Commission's actions on requests for waiver of this translator rule require a new look at the problem. The Commission has waived the rule in several instances where it was indicated that the proposed vhf translator would be located beyond the predicted Grade B of *any* regular television broadcast station. This has been done in the sparsely populated southwestern states and in Alaska and Hawaii. The Commission believes, on the basis of its experience since 1962, that it may now be appropriate to allow television stations to establish vhf translators beyond their predicted Grade B contours when doing so does not result in the invasion of another television station's predicted Grade B contour. In those situations, the Commission's concern with potential inter-

ference and the effect on the possible development of new stations would appear to be less valid now—particularly, since with respect to the latter concern, CATV is being established freely in such areas under the CATV rules adopted earlier in Docket 15971. Accordingly, the Commission proposes to amend §74.732(e) (1) of the Rules to permit a television broadcast licensee to establish a vhf translator beyond its predicted Grade B contour when it does not invade the predicted Grade B contour of another television station.

The Commission also believes that it may be appropriate to amend §74.732(e) (1) to allow television broadcast licensees to contribute to the costs of operation and maintenance of established vhf translators which rebroadcast their signals wherever such translators are located. It believes that this type of support can be allowed without doing damage to its policies beyond the present rule. Since the establishment of the translator usually disposes of the interference problem, it may additionally dispose of its concern that vhf translators not be used merely as competitive weapons, but, rather, reflect the true interests of the public within the communities concerned.

Translator Duplication of Regular Television Stations

In its 1962 rule making, the Commission attacked the problem of duplication by adopting a rule refusing to permit a licensee-owned vhf translator within the predicted Grade A contour of another regular television station if program duplication would result, except where the primary station to be rebroadcast furnishes a predicted principal community contour over the area to be served. However, since such a station would be affected regardless of the status of the translator applicant as a licensee or nonlicensee, this solution does not really meet the question

of the translator's impact on the duplicated station. The Commission has responded to this problem in two ways: (a) beginning in 1963, it has authorized licensee-owned vhf translators within the Grade A contour of duplicated television stations provided the translator is operated on a nonduplication basis, and (b) it has considered the possible effects of duplication in all cases without regard to the ownership of the translators or whether the translators would be vhf or uhf. A product of this case-by-case approach to duplication problems was adopted as an interim policy in *Lee Co. TV, Inc.*, FCC 65-483, [5 RR 2d 257] (1965). In this proceeding, the Commission announced that as an interim measure, pending the outcome of this proceeding (Docket 15971), it would impose nonduplication conditions on all translators proposed within the predicted Grade A contour of a duplicated station.

Frequently, the duplicated station had not sought protection; therefore, the *Lee Co.*, approach to the duplication problem presented difficulties. Additionally, the task of providing nonduplication protection added to the difficulties confronting the translator operator—especially if it was not a commercial operator. Consequently, in its Second Report and Order in this proceeding (Docket 15971), the Commission amended its interim policy and returned to a modified form of its 1962 policy requiring imposition of a nonduplication condition only in the case of a licensee-owned vhf translator located within the predicted Grade A contour of a duplicated station.

The Commission's experience with translators has been that only in a relatively few situations do proposals for translators result in controversy concerning duplication of programming or economic impact. However, when problems arise, they arise whether or not the translators are licensee-owned and with both vhf and uhf proposals. Therefore, the Commission believes that

it would be desirable to take a completely new look at its translator nonduplication policy.

Vhf Translators in Areas with Predicted Uhf Service

The Commission's present policy regarding the use of vhf translators, in areas receiving uhf service, is contained in Section 74.732(d) of the Rules. It prohibits the authorization of a vhf translator in an area which is receiving satisfactory uhf service from either a television station or a translator—except upon a showing of exceptional circumstances justifying such intermixture. This rule has served both to promote the broader use of uhf and to avoid the adverse impact of vhf signals on uhf service areas. In view of the passage of the all-channel receiver legislation in 1962, and, since the passage of time should insure the circulation of uhf-equipped television receivers which the rule was intended to promote, it seems likely that Section 74.732(d) of the Rules will gradually outlive its usefulness. (In an abundance of caution, the Commission may never eliminate the rule.) *In the interim, the Commission will continue its policy of designating for hearing vhf translator applications which threaten to have an adverse impact on an area's potential for uhf* (*e.g., Spartan Radiocasting Company,* FCC 64-95, 1 RR 2d 1085 (1964).)

Different Requirements for Translators Used With Educational Television Stations

The Commission's Rules do not impose any special requirements on the use of translators with educational television broadcast stations, and, to date, no special problems have arisen as a result. Nevertheless, the Commission invited comments directed to the question of whether there are any special requirements which should be adopted with respect to the use of translators with educational television broadcast stations.

Higher Power for Vhf Translators

The Commission has periodically received both formal and informal requests urging that it increase the permissible output power of vhf translators from the present limit of one watt.[1] The arguments in support of such requests are that: the present one-watt limit prevents the transmission of an adequate signal in many areas where the population is widely scattered; higher power would provide better signals in all locations; it would eliminate the need for some existing translators; higher power is sometimes necessary to overcome interference (for example, the interference caused by some CATV radiations); and higher power would be especially useful where a translator rebroadcasts another translator.

The Commission proposes to strike a balance by (1) lifting the power limit for vhf translators to *10 watts transmitter peak visual power in the continental United States west of the Mississippi River and in the States of Alaska and Hawaii, and (2) maintaining the 1-watt maximum in the rest of the United States.* In order to keep the potential of interference to other services at about the same level, it also proposes to amend Section 74.750 (c) (2) of the Rules to require that all emissions appearing on frequencies more than 3-MHz above and below the upper and lower edges of the assigned channel be attenuated no less than 50 decibels for transmitters of more than one-watt transmitter peak visual power. The present requirement is 30 decibels for uhf translators of 1 watt or less. Since the rules require that greater attenuation may be required if interference results from any out-of-band emissions, the Commission believes the requirement of 60-dB attenuation for harmonics is adequate. It

[1]Two basic considerations led to the selection of the present one-watt limit on vhf translators, (1) the danger of interference to other services and (2) the problem of interference among the translators themselves.

recognizes that greater power may make it more difficult for individual communities to find vhf channels on which to operate translators without mutual interference. In this regard, it should be noted that in the absence of offset carrier operation, such as is used with regular television stations, there is a greater interference potential—the loss being 17 decibels. This means that a 10-watt translator would be the equivalent of a 500-watt regular television station so far as co-channel interference potential is concerned. Further, the service range for a similar increase in power increases by a relatively small amount so that a point of diminishing returns is soon reached so far as translator operation is concerned. In view of the foregoing, comments were invited on the proposal (1) to increase the permissible power of vhf translators to 10 watts, (2) on the impact that such an amendment might have on the availability of frequencies for translator use, and (3) on the desirability of imposing geographical limitations on the areas where such translators could be utilized.

Type-Accepted Equipment May Be Required

Consideration of the possibility of increasing the authorized power of vhf translators leads to a question regarding the status of the equipment to be used. In 1960, in order to lessen the impact of the vhf translator rules on existing repeater operations, the Commission provided that construction permits could be issued for custom-built transmitters which had not been type accepted. Section 74.750 (d) (3) of the Rules presently provides a procedure for type accepting such transmitters after issuance of a construction permit but prior to issuance of a license. Since many translator operators have been unable to comply strictly with the technical requirements for type acceptance, the Commission has found that this procedure is unsatisfactory. As a result, the Commission has experienced undue delays in

processing applications involving custom-built equipment with the further result that the processing time for all translator applications has been extended. While this result was an unavoidable consequence of rapidly legalizing more than a thousand existing repeaters, the Commission sees no reason to continue to cope with this problem; it noted that there are now a variety of inexpensive type-accepted translators available. Consequently, to assure the use of acceptable equipment, and thus shorten the processing time for all translator applications, the Commission proposes to require that all applications for new translator stations specify the use of type-accepted equipment. Custom-built equipment could still be proposed, but only if it was type accepted prior to the filing of an application for construction permit. Comments have been requested on this proposal.

Origination of Local Announcements

It has been suggested periodically that the translator rules be amended to permit translators to originate both programs and advertising. The Commission is now considering these possibilities. Since financing is a substantial handicap facing translator operators, thereby discouraging the wider use of translators, parties proposed that the Commission authorize the origination of program material on translators. However, they misunderstood the technical operation of a translator, and, as a result, made proposals which exceed a translator's capabilities. A translator does nothing more than convert or "translate" a television signal to another channel and retransmit it. This type of operation does not require that the translator be able to maintain frequency tolerance and band width requirements, and the present rules do not require the use of equipment designed to satisfy these requirements. (See *Notice of Proposed Rule Making* in Docket No.

16424, Microwave Relays to Translators, FCC 66-41, 1966.) On the other hand, if such a transmitter is modulated with locally generated program material, maintenance of frequency tolerance and band width requirements would be an immediate problem. Thus, in net effect, proposals to permit translators to originate programs are proposals for the further relaxation of the technical requirements for television broadcast stations to permit the use of inexpensive and technically inferior transmitting equipment. Unless it can be demonstrated that these standards are high enough to provide a quality picture and to prevent interference, the Commission is not disposed to change them. It will, of course, give careful consideration to any comments designed to make such a showing. However, *in the absence of a persuasive showing in this regard, the Commission will not authorize the origination of program material on translator stations.*

Nonetheless, the Commission believes it is necessary to take what action it can to assist translator operators in securing their financial base so that the benefits of this valuable auxiliary service can be fully realized. The most logical new source of revenue for translator operators would appear to come from the origination of some sort of visual announcement; for example, solicitations of funds for the maintenance of the translator or announcements to the effect that the translator operation is subsidized by one or more local merchants. Brief announcements or "credits" could be presented in the form of slides or still pictures with comparatively inexpensive signal generating and scanning apparatus which could be substituted for the signal normally transmitted by the translator. While the technical characteristics of the modulating signals generated by such apparatus would not meet the requirements of the Commission's Rules, the Commission believes that they could be tolerated if limited to brief periods and infrequent intervals. However, in view of the difficulties which could arise from even such

limited operations. *the Commission believes it necessary to limit this proposal and to authorize it only for use with uhf translators.* Three additional considerations support this limitation: (a) vhf translators are relatively less expensive than uhf translators. so there is less need to seek additional financial support for them: (b) the Commission is of the view that uhf translators are to be encouraged where possible: and (c) most important. should there by an improper operation in the uhf band the translator would not interfere with the critical safety frequencies which would be vulnerable to a malfunctioning vhf translator. (For example, on September 14, 1967, the Commission granted its first rule waiver whereby a uhf translator station in Florida was permitted to broadcast visual announcements for seven days in the form of still slides to solicit public financial support. The announcements, not to exceed sixty seconds duration, were broadcast daily between 7:00 P.M. and 9:00 P.M. on schedule half-hour station breaks. A visual monitor was employed on the transmitted signal at all times, and a report on public reaction to the operation was made to the Commission. Sources at the Commission indicate that the report was inconclusive —possibly because other advertising efforts were in progress at the same time.)

The question of the time when these announcements would be transmitted would be one for mutual agreement between the translator operator and the primary station. Since there are periods of time devoted to purely local advertising, it seems likely that agreement could be reached for the use of this time for translator announcements. Additionally, noncommercial stations rebroadcast by translators should also be permitted to agree to the use of specific times for such announcements. *Consequently, the Commission will consider amending the rules, governing uhf translators, to permit the limited transmission of local slides or still pictures and voice announcements* containing advertising, public

service announcements, acknowledgements, and other similar material by automatic means—for brief periods of time, not to exceed twenty seconds, at intervals of no less than one hour.

Use of Translators as Relays—'Chain' Translators

One of the serious difficulties facing translator operators is the fact that in some areas a satisfactory signal may not be available for rebroadcast. One way to bring television signals to such areas is by rebroadcasting the signals of one or more translators. Variations of this system are in wide use; however, there is an upper limit to the number of translators which can be used for this purpose due to the poorer signal to noise ratio. Section 74.731 (c) of the Rules prohibits the use of translators solely as relays but permits them to be used incidentally for this purpose provided they also serve the general public. While this rule has generally been effective, it does not provide the best signal to communities at the far end of a particular chain. If there are locations, which could get more or better signals from a translator relay system, *it may be in the public interest to permit such operation*, and the Commission will consider this possibility. *Nonetheless. the Commission will generally adhere to the policy that translators should serve surrounding areas*—even if they are being used by other translators as a pickup point, and *a convincing showing of the need for pure relay operation would be required.* The Commission has invited comments on the question whether Section 74.731 (c) of the Rules should be amended to allow the use of translators as relays—where a showing is made that this is the most feasible method of obtaining a usable signal in the area for which service is proposed.

Comments Requested by the Commission

In view of the foregoing, the Commission in-

vited comments from interested parties on the following proposed rule changes:

(a) Amend Section 74.732 (e) (1) to permit regular television broadcast licensees to own and operate vhf translators beyond their predicted Grade B contours in situations where the translator would not be located in another station's predicted service area;

(b) Amend Section 74.732 (e) (1) to permit regular television broadcast licensees whose signals are being rebroadcast to contribute to the operating and maintenance costs of established vhf translators without regard to location;

(c) Amend Section 74.735 (a) to raise the maximum allowable power for vhf translators located west of the Mississippi River and in Alaska and Hawaii from one (1) to ten (10) watts transmitter peak visual power;

(d) Amend Section 74.750 (c) (2) to require, with respect to more than one (1) watt vhf translators, that all emissions appearing on frequencies more than 3-MHz above and below the upper and lower edges of the assigned channel be attenuated no less than 50 decibels (the present requirement is 30 decibels);

(e) Amend Section 74.731 (c) to permit the use of translators solely as relays when necessary to carry the desired broadcast signal to another translator to be rebroadcast;

(f) Amend Section 74.750 (d) (3) which provides for licensing of non-type-accepted vhf translators transmitters, to provide that all applications for new translator stations specify the use of type-accepted equipment; and

(g) Amend Section 74.731 to permit uhf translator operators to engage in limited origination of local slides or still pictures and voice announcements containing advertising, public service announcements, acknowledgments, and other similar material by automatic means and for brief (not to exceed twenty (20) seconds) periods of time, at intervals of no less than one hour.

In addition, the Commission invited comments concerning the appropriate role of translators in television transmission and broadcasting, and particularly concerning the following specific suggestions or proposals:

(a) The limitations, if any, to be imposed upon translator duplications of regular television stations' programming;

(b) The limitations, if any, to be imposed upon

vhf translators in areas with predicted uhf service;

(c) Whether there are any special requirements which should be adopted with respect to the use of translators rebroadcasting educational television broadcast stations;

(d) Whether translator licensees should be permitted to originate program material, and, if so, subject to what increased technical requirements; and

(e) Whether the television station licensee whose signal is being rebroadcast should receive a preference over other applicants for a translator authorization in case of conflicting requests.

Conclusion

While comments were due in August 1967, the Commission has not acted on the above and comments on same are still welcome. It is apparently safe to conclude that, absent abundant and convincing comments to the contrary, the Commission will adopt rules (1) insofar as it will not hamper the growth of uhf, permitting as much expansion of translators as is technically feasible and (2) creating as much competition as possible for CATV systems.

New Pre-Sunrise Rules for Class III (Regional) Stations

ON JUNE 28, 1967, the Commission adopted an "Amendment of the Rules with Respect to Hours of Operation of Standard Broadcast Stations" (Docket Number 14419, RM-268). The Report and Order was released July 13, 1967 (FCC-67-767), whereby the Commission amended Sections 73.87, 73.190 and added Section 73.99 to the Rules. Some licensees may have received a copy of the Report and Order; however, it seems that a great many licensees are completely devoid of any knowledge whatsoever concerning the new rules.

Although the reports in the trade press may have created the impression that a simple solution to the long pending and extremely complicated pre-sunrise operation problem has been found, we regret to report that, for many stations—at least for most stations operating on regional (Class III) channels—the reports are not well founded.[1]

All standard (a-m) broadcast station assignments in the United States are subject to the Communications Act of 1934, as amended, and

1. Class III stations operate on the following regional channels: 550, 560, 570, 580, 590, 600, 610, 620, 630, 790, 910, 920, 930, 950, 960, 970, 980, 1150, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1350, 1360, 1370, 1380, 1390, 1410, 1420, 1430, 1440, 1460, 1470, 1480, 1590 and 1600.

two treaties with other North American countries, the United States-Mexican Agreement and the North American Regional Broadcast Agreement (NARBA), the latter encompassing Canada, Cuba, the Bahamas, Jamaica, and the Dominican Republic.

Although the United States no longer maintains diplomatic relations with Cuba, the United State scrupulously adheres to the Agreement. Unfortunately, Cuba has not done so in recent years. The treaties have been supplemented by a series of notes covering specific engineering (technical) matters exchanged between the governments directly involved. All rules, regulations, and policies of the Federal Communications Commission must be compatible with the Communications Act, the treaties, and the supplemental notes. The new pre-sunrise rules must be interpreted and applied accordingly.

For many years, the Commission's rules and policies have permitted Class III stations, whether unlimited time or daytime only, to operate with their daytime facilities (power and antenna system) between the hours of 4 A.M. and sunrise (local *standard* time), even though the license of unlimited time stations specified operation with daytime facilities only between sunrise and sunset and the licenses of daytime only stations specified operation only between sunrise and sunset; provided that no unlimited time station operating with its nighttime facilities complained of objectionable interference.

Until 1954 the Commission received virtually no complaints of pre-sunrise interference from unlimited time stations. That year, unlimited time WING Dayton, Ohio, complained to the Commission of extremely severe pre-sunrise interference from daytime only WGRD, Grand Rapids, Michigan (both on 1410 kHz). After the Commission refused to order WGRD to cease pre-sunrise operation, the United States Court of Appeals (D.C. Circuit) reversed the Commission, held that WGRD was not entitled to a hearing on the

complaint, and ordered WGRD to cease pre-sunrise operations. *Music Broadcasting Company* v. *FCC*, 217 F. 2d 339. In 1961, the same Court held that unlimited time Class III stations could prosecute objections against applications which would cause pre-sunrise interference. The effect of the two decisions was to make it virtually impossible for any Class III station to operate pre-sunrise with its daytime facilities if any unlimited time station operating with its nighttime facilities objected. These decisions threatened to interrupt the long established pre-sunrise operation of all but a handful of the 2000 Class III stations.[2]

The history of the Commission's attempts to find a reasonable and practical solution to the pre-sunrise problem is set forth in the accompanying *Report and Order* and will not be repeated here. It suffices to say, only a very few of the Class III stations will be completely happy with the solution. However, is appears to be the best compromise possible of a most difficult problem.

Before the Commission could amend its rules, it was absolutely necessary to reach an agreement with Canada because the seasonable fluctuations of sunrise and sunset are greatest in northern areas of the United States. Even with the recently completed agreement with Canada, the possibility of interference with Mexican and Cuban Class III stations also must be considered under the United States-Mexican Agreement and NARBA. Although discussions have been held between the United States and Mexican Governments, the date of final agreement revising the present agreement cannot be estimated with certainty. For obvious reasons, there is no possibility of any agreement concerning pre-sunrise operations with Cuba in the foreseeable future.

The New Rules:

The new and amended rules will bring about

2. Broadcasting Yearbook, 1967 Issue, lists 2063 Class III stations on regional channels.

the following changes in the operation of every unlimited time Class III station now using its daytime facilities (power and antenna system) before sunrise:[3]

1. Every unlimited time station now operating before sunrise with a power of 1 kW or 5 kW and its daytime antenna system must discontinue such pre-sunrise operation on and after October 28, 1967;

2. When pre-sunrise occurs prior to 6 A.M. local *standard* time every station must use its nighttime facilities before sunrise; and

3. When sunrise occurs after 6 A.M. local standard time, each station may request a Pre-sunrise Service Authorization (PSA) to operate between 6 A.M. local *standard* time and sunrise with a power of not more than 500 W and its daytime antenna system.

Similar restrictions have been imposed upon all daytime only Class III stations. No daytime only station will be permitted to operate before sunrise unless sunrise occurs after 6 A.M. local standard time and a Pre-sunrise Service Authorization for operation with not more than 500 W has been granted by the Commission.

Procedures to be followed to obtain a PSA:

1. The request for a Pre-Sunrise Service Authorization may be submitted in letter form, signed by the same persons authorized to sign formal applications;

2. The letter request must be accompanied by a study of a consulting or other qualified engineer showing that cochannel stations in foreign countries will not receive interference from the requested pre-sunrise operation. The engineer must first determine the nighttime interference free limit (or contour) of any foreign station which might possibly be affected by the proposed oper-

3. The only possible exception is for unlimited time Class III stations now operating with a daytime power of 500 W

ation. Then he must show that additional interference will not be caused to any foreign station by use of the following methods of computation:

(a) With respect to all foreign stations under consideration, except those in Mexico but including those in Canada and Cuba, the propogation curves and procedures of NARBA must be used to determine the existing nighttime interference free limits (or contours) [4]: for stations in Mexico, the propogation curves and procedures of the United States-Mexican agreement must be used;

(b) Computations to determine if pre-sunrise operation with 500 W power will cause additional interference to any Canadian station must use the new propogation curve (Figure 12) adopted by the amendment of Section 73.190 of the rules; such computations to foreign stations in countries other than Canada must use the appropriate curves and procedures of NARBA or the United States-Mexican Agreement; and

(c) If the computations show that pre-sunrise operation with 500 W power would cause additional interference to any foreign station, the maximum power which could be used without causing such additional interference must be determined.

Significant Dates:

1. *August 31, 1967;* Deadline for submission of letter requests for Pre-Sunrise Service Authorization (PSA) to obtain prompt consideration; and

2. *October 28, 1967;* Discontinuance of all pre-sunrise operations by Class III stations except those using their nighttime facilities or those having been issued PSA's.

Additional Comments

Pre-sunrise operation by unlimited time stations with either their nighttime facilities or under a PSA will cause a loss of existing pre-sunrise service in most cases because of the weak signals in the nulls of the nighttime directional antenna arrays. The new pre-sunrise service will

4. It is understood the Canadian Department of Transport soon will supply to the Federal Communications Commission computations of the nighttime interference free limits (or contours) of Canadian Class III stations.

not be as good as evening service when all cochannel stations are operating with their nighttime facilities because interference will be received from daytime only stations operating pre-sunrise under PSA's.

However, there will be improvements in some cases. In many cases, daytime only stations now operating pre-sunrise with 5 kW cause most severe interference to the present pre-sunrise operations of unlimited time stations. Much of this interference will be substantially reduced. In many other cases, pre-sunrise operation of unlimited time stations with their daytime facilities cause most severe interference to present pre-sunrise operations of other unlimited time stations. Most, if not all, of this interference will be cut back to the nighttime level. The end result may not be as severe as first expected.

Nevertheless, the new rules will cause substantial hardship upon many Class III stations as well as severe hardship upon the public by loss of service. However, most of the pre-sunrise operations with daytime facilities would have been shut down completely if the Commission had been required to enforce its rules (and treaty obligations) in the manner ordered by the Court whenever an unlimited time station operating pre-sunrise with its nighttime facilities objected to pre-sunrise interference.

On the other hand, some daytime only Class III stations will be able to operate pre-sunrise for the first time, thereby providing a new service to the public.

It seems reasonable to believe that petitions for reconsideration will be filed with the Commission and appeals will be filed with the United States Court of Appeals. However, unless the petitions and appeals present some new and novel questions of law and supporting arguments, we believe that the Commission's action will be affirmed. The possibility is a little greater that a stay of the effective date of the new rules pending action upon appeals will be ordered by the Court.

There appears to be a reasonable possibility, however, that the Commission will grant a fairly short extension of the effective date of the new rules. Some consulting engineers have already advised that they expect to be so overloaded with requests to prepare pre-sunrise studies for daytime only stations that they may not be able to meet the deadline for many clients.

The possibility of any significant changes in the new rules by the Commission appears most remote. It is unrealistic to expect that the Commission, on its own initiative, would ask Canada to modify the agreement which took so many years of negotiation to obtain.

Recommendations

In some instances, particularly when the present daytime power is 1 kW and/or when a deep null of the nighttime array falls over a very heavily populated area, 6 A.M. to sunrise operation with a power of not more than 500 W may provide better service than operation with the nighttime facilities. Accordingly, we recommend the following:

1. Have your consulting engineer study the pros and cons of pre-sunrise operation with a PSA;
2. Make every effort to obtain Report and Order FCC-67-767, dated July 13, 1967, amending Sections 73.87, 73.190, and adding Section 73.99.
3. If your operation will be most severely and adversely affected, you should contact your communications attorney in order to advise him of such adverse effects so that he may evaluate the desirability of further action.

The Emergency Broadcast System

IN THE EARLY 50's the big bomber, in combination with atomic devices, was the most potent offensive air-weapon devised. Guided missiles were still on the drawing boards. It was common knowledge that the Japanese had employed homing devices on the Hawaiian radio stations at the time of the attack on Pearl Harbor; similarly, the Germans had employed this technique to find their targets in England. Consequently, the Department of Defense was fearful that our highly developed broadcast system might be our enemy's best friend during a surprise attack. Test flights over the eastern portion of the U.S. disclosed that, under normal operation, a clear-channel station could provide a good navigational aid—at distances up to 400 miles during the day and more than 1,000 miles at night—to aircraft employing automatic direction finders flying at an altitude of 10,000 feet.

The Development of CONELRAD

Operation Without Identification: This entailed operation on the regularly assigned frequency *without identification.* This proposal was very simple, and it might provide some confusion to the enemy; however, a station can

be easily identified by its frequency and bearing. Therefore, this method had no real practical value.

"On-and-Off" Transmission on a Station's Regularly Assigned Channel: This method contemplated operating the station on its regular frequency without identification; however, it would only broadcast for approximately 30 seconds every 10 to 15 minutes. This proposal was not deemed feasible because of (1) insufficient deception and (2) insufficient time for broadcast of Civil Defense messages to the public.

Change of Station Frequency: In this method, all stations would shift to one of two frequencies (640 kc and 1240 kc) and operate without identification. This method provided greater deception than the other methods described. In each case the system frequency chosen for a station would be the result of an engineering study, with a view to providing the greatest deception to aircraft navigation. Therefore, it was essential that these stations be able to operate on the specified emergency frequency as well as their normal frequency. The resulting ability by large numbers of stations to operate on a common frequency created good deception and, at the same time, suitable ground coverage for Civil Defense purposes. With so many stations having knowledge of the plan, it was highly probable that the enemy would also be aware of its details; even so, the plan provided effective security because the station signals could not be used for navigation. The Commission arranged various groups of stations into "clusters." Each member of the cluster would operate in a non-cyclical sequence. Each station would be on the air for a short period of time—such as one minute. There would be no lost air-time, and the length of time and order of operation would be varied. Consequently, since an automatic direction finder indicates the direction of the strongest signal,

the "sequential" operation of the system by various clusters of stations on the same frequency would greatly reduce the possibilities of use for air navigation.

The system, as finally adopted, in the early 50's, was called CONELRAD—a shortening of the words "Control of Electromagnetic Radiation." The Air Defense Control Center (ADCC) was given overall supervision for activation of the system. Special telephone lines were run to Basic Key Stations. These stations then relayed alerts to Relay Stations either by telephone or radio broadcast. Additionally, other stations were designated Skywave Key Stations. They were designated to disseminate alerts primarily during the experimental period as alternates for local key stations which might not be in operation.

The stations arranged in clusters were also interconnected with wire lines. This enabled these cluster stations to be turned on and off in sequence from a central control point.

Under the CONELRAD plan, FM and TV stations were required to leave the air for the following reasons:

(1) Aircraft direction finders can be manufactured for use on the FM and TV spectrum. These stations were usually high powered and were often located directly in, or close to, a city. Therefore, they made excellent navigation beacons.

(2) Battery-operated portable or automobile receivers were usually not available to the general public for the reception of FM or TV signals; therefore, widespread power failures would render FM and TV programs ineffective.

The Emergency Broadcast System (EBS)

During the late 1950's, it became apparent that a different system must replace CONELRAD. Formulated during the days when radio

stations were employed as "homing devices," the system became outmoded as technology reduced this problem. Most of the new bombers contained numerous alternate and highly sophisticated navigational systems that almost flew the bomber to the target unassisted. Additionally, the advent of missiles, with their inertial guidance systems, were replacing the obsolete bombers that may have used radio stations as homing beacons. The cost to the U.S. Government of maintaining private-line communications between the various cluster stations in order to operate sequentially on either 640 kc or 1240 kc was proving highly expensive. As long as the enemy might use our stations to seek out their targets, the expense could be justified; howver, when it became apparent that CONELRAD's primary purpose was no longer necessary, a new concept was evolved—the Emergency Broadcast System (EBS). The plan was adopted pursuant to Executive Order 11092, as signed by the President on February 26, 1963. It was based on the requirements of the White House, the Department of Defense (Office of Civil Defense), the Office of Emergency Planning, and various Rules and Regulations of the FCC.

The Basic EBS Plan

The primary purpose of EBS is to provide the President with a reliable means of communicating with the general public during the period preceding, during, and following an enemy attack. *Only the President can order the activation of EBS.* All of his messages, intended for the public, must be carried live.

The secondary purposes of EBS, in order of priority, are: (1) state programming, (2) local programming, and (3) national programming. Despite the technical requirement permitting only the President to activate EBS, the facilities of EBS are available for use at other times by the Governor of a state, or any other regional

or local official charged with responsibility in case of an emergency.

No licensee is required to participate as a member of EBS; *it is purely voluntary.* If a licensee participates, it is issued a National Defense Emergency Authorization (NDEA) by the Commission. Each NDEA station assumes the responsibility for serving a certain designated area with Presidential messages, national programming, state information, and local news and messages.

The National Industry Advisory Committee (NIAC) was created in order to implement and perfect EBS on a nationwide basis. The committee is composed of members from broadcasting, amateur radio, citizens radio, domestic common carriers, industrial communications, internal common carriers, maritime communications, and public safety communications. This main group has its working counterparts on the local and regional level. These are: (1) Regional Industry Advisory Committee (RIAC), serving eight regional units of the Federal Government; (2) State Industry Advisory Committees (SIAC), serving state areas; and (3) Local Industry Advisory Committees (LIAC), serving local areas. All of these committees work in close liaison with each other in order to formulate plans and procedures to make EBS function as effectively as possible.

The EBS plan provides that as many stations as possible remain on the air on their normal frequencies, licensed power, and hours of operation in order to take full advantage of the public's normal listening habits. Numerous stations across the country have been selected as primary and alternate stations for the purpose of relaying information. Under a monitoring system, if a primary station were to fail, then the alternate station would go into operation. This alternate choice of routes will be especially needed during a post-attack period. It is assumed that many

of the major metropolitan areas would be devastated. The major land-line and broadcast facilities in these areas would be disrupted; then the alternate stations surrounding these areas will assume the information relay functions originally assigned to the stations in the devastated areas.

Technically, because the off-air pickup and relay of AM signals is highly unsatisfactory, the state defense networks are being organized through selected FM and TV (aural) facilities. These signals are more readily susceptible to relay and less prone to be affected by outside electrical interference.

The EBS station will be able to receive information from a variety of sources, including: (1) a land line to the local telephone company exchange, (2) off-air-pickup of FM signals from the state defense network, (3) the AP/UPI ticker, and (4) land line or remote pickup to the city and other local government offices such as Civil Defense, Police, Mayor, Fire, Health, Water, and various County authorities.

Presidential messages, of course, have top priority clearance; *state and local information* have second and third priority clearance, respectively; *national news* is fourth in order of importance. The plan is coordinated so that any of the alternative sources can be utilized to relay information across the country. Major metropolitan areas have been bypassed by hardened (underground) land lines. If these become inoperative, the alternate off-air pickups can be employed.

Activation of EBS

If the President is in Washington, D.C., he will be able to activate the system through the White House Communications Agency (WHCA). This center is connected by land-line to a telephone company toll test center. This, in turn, is con-

nected by land-line to the four major networks, ABC, CBS, NBC, and MBS. They, in turn, are connected to the Intermountain and Yankee Networks. Additionally, the White House is connected by remote FM links to major stations in Washington, D.C., as well as in surrounding communities. These, in turn, will be able to relay information by land-line and off-the-air pickup.

If the President is away from the White House, he will have the same alternatives available to him via telephone toll test centers nearest him, remote broadcast, short-wave, and, of course, classified methods known only to a few top echelon government authorities.

Criteria for Eligibility in EBS

In order to apply for a National Defense Emergency Authorization, the usual governmental "red tape" has been reduced to a minimum. The application consists of a simple letter, in quadruplicate, identifying your station and requesting NDEA for permission to participate in EBS. If your station is located in Minnesota or any state east of the Mississippi River, you address the letter to: FCC Field Supervisor, OEC, Eastern United States, OCD Region Three, Thomasville, Georgia. Stations located west of Minnesota and the Mississippi River should write: FCC Field Supervisor, OEC, Western United States, OCD Region Seven, Naval Auxiliary Air Station, Santa Rosa, California.

The following explanatory documents should be attached to the formal letter of application:

(1) *Presidential and National Programming News*: A statement that you are affiliated with one of the major networks or that your station has arranged for interconnection with the networks by local land-line loop will suffice.

(2) *State Programming*: A statement that you are cooperating with the SIAC is adequate.

(3) *Local Programming*: A letter countersigned by both your station and the local gov-

ernment authority setting forth a brief description of arrangements made is sufficient.

(4) *FCC Engineering Requirements (Standard Broadcast)*: Since the FCC Field Supervisor has already completed this evaluation, no explanatory statement is necessary.

(5) *Cooperation in the origination and broadcasting of the common local emergency program*: A statement setting forth the action taken in establishing a Local Industry Advisory Committee (LIAC) is adequate.

(6) *Public education concerning EBS*: A statement that you will cooperate with the Office of Civil Defense to disseminate public education materials meets this requirement.

(7) *Hours of operation*: Merely indicate your daily sign-on and sign-off schedule.

(8) *Adequacy of staff and physical facilities*: At a later date, additional information may be requested; however, no explanatory statement is required initially.

(9) *Participation in the Radiological Fallout Monitoring Program*: You should contact the local or state civil defense director to make arrangements to be provided with a CD radiological fallout monitoring set. (CD pays for this.) A statement of the action taken will be adequate.

(10) *Special information as to issuance of NDEA's to FM and TV stations*: FM and TV stations are additionally charged with the responsibility of developing a State Defense Network (SIAC). Consequently, the SIAC Chairman will submit a coordinated proposal reflecting the total State Defense Network to NIAC for transmittal to the FCC for approval. Only then will an NDEA be issued to an FM or TV station.

FM or TV stations participating in *state defense networks only* do not need to comply with the criteria set forth above. These are networks that have been established within separate states in order to provide the Governor and other officials access to the public in times of emergency.

INTERPRETING FCC BROADCAST RULES & REGULATIONS: Volume 3

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Preface

Since the second volume of this work was published in late 1968, several important decisions have been made and precedents set regarding many of the operational aspects of broadcasting and CATV. The following material, originally published as a series of articles in BM/E Magazine, further clarifies some of the controversial questions which have plagued station operators during the past decade.

This material is drawn from more than 20 articles and covers a wide range of subjects—in-depth views on Section 315 and "Personal Attack" rules, community leader and public surveys, lotteries, multiple ownership, the new CATV rules, and more. Each topic was carefully researched and thoroughly checked prior to original publication and the articles are arranged according to subject matter to follow a natural sequence. As with the previous two volumes, this one contains all new material; it is not a revised edition.

The Editors

Contents

Responsibility in Programming

The recent brouhaha over the Commission's pronouncements concerning broadcast licensee responsibilities to review records before broadcast —especially as they relate to drugs—highlights a troublesome area for many broadcasters and the Commission. A look at programming, censorship, and the obligations of broadcasters and the Commission is appropriate.

Censorship and Programming

At the heart of the controversy is the pronouncement of the United States Congress embodied in the Communications Act. Specifically, in Section 326 of the Act, Congress has stated,

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

While it is clear that the Commission may not censor material broadcast by stations, it is equally clear that licensees are responsible for program material broadcast over their facilities, except, of course, for statements made by political candidates.

In its 1960 *Programming Policy Statement*[1] the Commission noted that broadcasters are required to program their stations in the "public interest, convenience, and necessity." Therefore, despite the Congressional restrictions on censorship and First Amendment freedoms of speech, a

broadcaster's freedom to program is not absolute. As the Commission has declared,

> The licensee is not a bookstore, but a public trustee of an inherently limited resource who is fully responsible for its operation in the public interest.
>
> * * *
>
> It is nonsense to assert that the licensee can be indifferent to [the responsibility of material broadcast over his facilities]. If a person approaches a station to buy time to attack his neighbor, or simply to let loose a torrent of vile language, he will not be presented.[2]

But Commission restraints on materials that may be broadcast must be carefully circumspect. The Commission's role as a practical matter, as well as a legal matter, cannot be one of program dictation or program supervision. As Supreme Court Justice Douglas noted,

> The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that pleases the bureaucrat but which rile the . . . audience. The political philosophy which one radio sponsor exudes may be thought by the official who makes up the programs as the best for the welfare of the people. But the man who listens to it . . . may think it marks the destruction of the republic. . . . Today it is a business enterprise working out a radio program under the auspices of the government. Tomorrow it may be a dominant, political or religious group. . . . Once a man is forced to submit to one type of a program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold.[3]

Frederick W. Ford, then-Chairman of the Federal Communications Commission, noted in 1960 before a Senate Subcommittee that,

> When it comes to questions of taste, unless it is downright profanity or obscenity, I do not think that the Commission has any part in it. I don't see how we could possibly go out and say this program is good and that program is bad. That would be a direct violation of law.[4]

More recently, the Courts have provided further insight into the Commission's authority to dictate program fare. The famous *Red Lion* case makes it clear that the public has a right to listen and view without intervention or restraint by Congress or the Commission.

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which are crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[5]

The Courts have also indicated that where speech is to be banned from the airwaves, it must be banned with precision so that the ban will not have a "chilling effect" beyond its scope. The Court of Appeals, in two separate cases, has warned the Commission accordingly:

> There is high risk that [public interest rulings relating to specific program content] will reflect the Commission's selection among tastes, opinions and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[6]
>
> * * *
>
> The Commission must be cautious in the manner in which it acts; regulations which are vague and overboard create a risk of chilling free speech . . .[7]

An examination of the foregoing reveals several salient aspects of the Commission's authority relating to programming, as well as to broadcast licensee's responsibilities. First, the Commission may not censor nor dictate program material under the strict provisions of the Communications Act and the First Amendment, unless generally recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, and the like. Second, it is the broadcast licensee's duty to furnish program material attuned to the "public interest, convenience, and necessity." Common sense guidelines generally apply; indeed, most licensees would not broadcast program material

falling in the above-mentioned censorship exemption categories.

Yet, in spite of the supposedly clear guidelines set forth over the years, certain unique situations may arise where the ambiguity of Commission pronouncements are brought into disturbingly sharp focus. The most recent example of this concerns the Commission's policy statement regarding broadcast licensee responsibilities to review records before broadcast.

The Drug Records

On March 5, 1971, the Commission released its *Public Notice* concerning *Licensee Responsibility to Review Records Before Their Broadcast.*[8] The Commission noted that they had received a number of complaints concerning the lyrics of records played on various stations relating to the use of drugs. The avowed thrust of the *Notice* was to "simply" notify licensees that they must make a judgment whether some of the records played on their stations "tended to promote or glorify" the use of illegal drugs, and that stations could not follow a policy of playing such records without someone in a responsible position (i.e. a management level executive at the station) knowing the content of the lyrics. The Commission ominously declared that,

> Such a pattern of operation is clearly a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station.
>
> *It raises serious questions as to whether a continued operation of the station is in the public interest . . .* (Emphasis supplied.)

The reaction of the industry was quick in arriving. Like the proverbial scatological material caught in an implement for creating a current of air or a breeze, the Commission received a fallout of abuse. "Stations Told to Halt Drug-Oriented Music" and "FCC Bars Broadcasting of Drug-Linked Lyrics" were the newspaper headlines of the day. One of the more well-reasoned reactions

was a Petition For Reconsideration filed by the Federal Communications Bar Association (an association of some 670 attorneys specializing in, or having an interest in, communications law).

The Association posed several pertinent questions to the Commission in its Petition, including the following:

> Does a song "tend to promote or glorify the use of illegal drugs": (1) only if it contains explicit advocacy of such use, or does a song fall into that category if it does no more than describe in a favorable way a person's sensations on using drugs?; (2) if it expressly advocates repeal of laws making the use of drugs illegal? (If so, would the Commission view adversely the broadcast of such a song but view differently an interview with a law enforcement official or doctor who favored the repeal of certain laws against the use of drugs?); (3) if it is viewed by a part of the audience as favorable to the use of drugs and by another part as unfavorable?; (4) if the reference to illegal drugs is concealed and is in what amounts to code, so that the average person, including the average devotee of popular songs, is not aware of the reference? (5) if when it originally was published it had no such connotations but later came to be understood in some quarters as making favorable reference to the use of illegal drugs? If, for example, "How High The Moon" became popular with drug users because of its title, and came to mean to them a favorable view of drug use, would it then come to be a song which tend[s] to promote or glorify the use of illegal drugs?.

Other organizations and licensees filed timely comments with the Commission. The FCC quickly responded with its *Memorandum Opinion and Order* adopted and released on April 16, 1971.[9] In its *Order*, the Commission said its initial *Notice* "simply reflected the well-established concept of licensee responsibility" and was erroneously otherwise depicted by the media. The Commission also specifically noted that whether or not to play a particular record relating to drugs does not raise an issue as to which the Government may intervene. However, the FCC did make clear, again, that broadcasters *could jeopardize their licenses by failing to exercise "licensee responsibility" in this area.*

> A licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine. . . . The point is that such records are not withdrawn from the area of license responsibility.

The Commission's *Order* did not directly address itself to many of the questions posed in various comments filed in response to its *Notice*. However, a somewhat clearer picture of the Commission's attitude in this area emerged. In sum, broadcasters who willfully and repeatedly broadcast records which obviously and blatantly tend to glorify or encourage the use of drugs will have their licenses placed in jeopardy. Responsible broadcasters, who mistakenly broadcast blatant records in the above-mentioned category, or who broadcast records with obviously ambiguous or questionable lyrics on an irregular basis as a part of their normal program format, will not be encouraging Commission disfavor. Again, common sense in programming should prevail.

Conclusion

The Commission is theoretically proscribed from censoring program material except in carefully designated areas. However, incidents like the statement concerning "drug records" highlight the pervasive Commission influence on its licensees. Purists may rightly argue that the Commission has taken it upon itself to legislate morals in contravention of Congressional and Constitutional mandates. Nonetheless, the "marginal" station operator, the operator who scoffs at many of the rules and regulations, will probably be the only licensee subjected to searching Commission inquiry concerning his stewardship. Nevertheless, if you have questions concerning this troublesome area, your counsel should be consulted.

1. 20 RR 1901 (1960).
2. FCC 71-428 (released April 16, 1971).
3. **Public Utilities Commission v. Pollak**, 343 U. S. 451.
4. 20 RR 1901 at 1907.
5. **Red Lion Broadcasting Co. v. FCC**, 395 U. S. 367.
6. **Banzhaf v. FCC**, 405 F. 2d 1082, **cert. denied**, 396 U. S. 842.
7. **National Association of Theatre Owners v. FCC**, 420 F. 2d 194, **cert. denied**, 397 U. S. 922.
8. FCC 71-205, March 5, 1971.
9. FCC 71-428, April 16, 1971.

Program Logs

Commission requirements for disclosure of programming information have long been a source of tedium to broadcasters. In its 1968 Program Logging Rules[1] amending the AM and FM rules designed to "streamline" log keeping and remove archaic requirements, and to conform requirements to provisions of the TV rule, the Commission endeavored to insure that information required by the revised "reporting" forms would be contained in station program logs. Yet, despite these clarifications, Commission sanctions against broadcasters appear to have measurably increased since promulgation of its 1968 Rules.

Forfeitures imposed upon broadcast licensees for "logging" violations have ranged as high as $9000, depending upon 1) the nature of the violation, and 2) the licensee's financial condition. In some cases, "logging" violations serve as one of several grounds for denial of license renewal, particularly when part of a course of "willful, fraudulant conduct." In a series of decisions, the Commission has declared that violations which occur through "ignorance or oversight" and/or those committed by "officers or employees" of the licensee are not excusable. Also, corrective action taken subsequent to Commission citation, though a "mitigating" factor, does not rectify the original violation. Because of the increase in the number of Commission sanctions and the possibility of severe punishment, a review of pertinent elements of the "Program Logging Rules" is in order.

Programs

For each *program*, the Commission requires entries identifying 1) its name or title, 2) its time slot, 3) its type, and 4) its source. (For programs presenting political candidates, an entry must be made showing the candidate's name and political affiliation.) Licensee classifications as to *type* and *source* are often the subject of Commission challenge. Hence, a brief definition of each classification follows.

The definitions of the following eight *types* of programs (a) through (h) are intended *not* to overlap each other and will normally include all the various programs broadcast. Definitions (i) through (k) are sub-categories, and programs falling under one of these three sub-categories will also be classified appropriately under one of the first eight categories. There may be further duplication within types (i) through (k)—a program presenting a candidate for public office, prepared by an educational institution, for instance, would be within both Political (POL) and Educational Institution (ED) sub-categories, as well as within the Public Affairs (PA) category. Program definitions are:

a) Agricultural (A) includes market reports farming, and other information specifically related to the agricultural population. (Too many licensees improperly place agriculture-type fare in the public affairs category.)

b) Entertainment (E) includes all programs intended primarily as entertainment, music, drama, variety, comedy, quiz, etc.

c) News (N) includes reports dealing with current local, national, and international events, including weather and stock market reports; and commentary, analysis and sports news, when an integral part of a news program.

d) Public Affairs (PA) includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs. *A public affairs program is one which deals with public issues.* The licensee should expect the Commission to challenge the PA classification of a program which does not have this essential characteristic.

e) Religious (R) includes sermons or devotionals, religious news, and music, drama, and other types of programs designed primarily for religious purposes.

f) Instructional (I) includes programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) which deal with the discussion or appreciation of literature, music, fine arts, history, geography, and the national and social sciences; and programs devoted to occupational and vocational instruction, and hobby programs. (Here again, too many licensees erroneously classify "instructional" fare as "public affairs.")

g) Sports (S) includes play-by-play and pre- or post-game related activities, as well as separate programs of sports instruction, news or information—fishing opportunities, golfing instructions, etc.

h) Other (O) includes all programs not falling within categories (a) through (g).

i) Editorials (EDIT) includes programs presented for the purpose of stating opinions of the licensee.

j) Political (POL) includes those which present candidates for public office or which express (except in station editorials) views on candidates or on issues subject to public ballot.

k) Educational institution (ED) includes any program prepared by, on behalf of, or in cooperation with educational institutions, educational organizations, libraries, museums, PTAs or similar organizations. Sports programs are not included.

Program *sources* are classified as either 1) local, 2) network, or 3) recorded, as defined by the following rules.

1) A *Local Program* includes any program which is primarily or wholly produced by the station, taped or recorded, so long as live talent is employed more than 50 percent of the time. In addition, the following programs shall be classified as "local:" a) local program fed to a network, b) non-network news program, and c) identifiable units of programs primarily featuring records or transcriptions which are *live* and separately logged. Yet programs featuring *recorded* records and transcriptions must be classified accordingly even though a station announcer appears in connection with such material.

2) A *Network Program* (NET) is any program furnished to the station by a network (national, regional or special). This includes delayed broadcasts of programs originated by networks.

3) A *Recorded Program* (REC) is any program not otherwise defined—including, without limitation, those using recordings, transcriptions, or tapes.

Commercial Matter

For all *commercial matter* (CM), the Commission requires entries identifying 1) the sponsor(s) of the program, 2) the person(s) who paid for the announcement, or 3) the person(s) who furnished materials or services. In addition, any entry or entries must be made showing the total duration of commercial matter in each hourly time segment or the duration of each commercial message in each hour.

Commercial matter includes "commercial continuity" (CC) i.e., the advertising message for which a charge is made or consideration is received. Included in the latter are 1) "bonus spots," 2) trade-out spots[2], and 3) promotional announcements of a future program where consideration is received for such an announcement or where such announcement identifies the sponsor of a future program beyond mention of the sponsor's name as an integral part of the title of the program (e.g., where the agreement for the sale of time provides that the sponsor will receive promotional announcements, or when the promotional announcement contains a statement such as "Listen tomorrow for the—[program name]—brought to you by—[sponsor's name]—.")

Exceptions to the above classifications include:

a) Promotional announcements, unless they fall in a CA classification;

b) Station identification announcements for which no charge is made;

c) Mechanical reproduction announcements;

d) Public service announcements;

e) Announcements that materials or services have been furnished as an inducement to broadcast a political program or a program involving the discussion of controversial public issues; and

f) Announcements made pursuant to the local notice requirements ("pre-grant" and "designation for hearing").

Furthermore, it is incumbent upon the licensee to make an entry denoting as close an approximation to the *time consumed* (duration of commercial matter) as possible. Notable exceptions to this requirement are *religious* and *political* sponsored programs. Because of the difficulty in measuring the exact length of "commercial continuity" in such programs, the Commission does not require licensees to compute commercial matter.[3] The exception does not, of course, apply to any programs advertising commercial products or services, nor is it applicable to any commercial announcements. Since 1969, the Commission has imposed more forfeitures upon licensees for violations of commercial logging rules than for any other single category. One licensee was fined $2000 for failure to log as "commercial time" the play time of records of artists which were played immediately before and/or after announcements promoting their appearances.[4] In another case, the Commission ruled that "where musical recordings were so combined with commercial announcements, either by the play of such recordings immediately before, immediately after, or simultaneously with voice announcements, that which might otherwise be considered entertainment was instead merely an extension or part of the advertising message of the program sponsor and should have been logged as commercial."[5]

Furthermore, the Commission held that the broadcasting of extraneous, or "ad lib," matter to promote a show or dance represents "commercial matter," and should be logged as such.[6] In light of Commission scrutiny into commercial logging practices, broadcasters would be well advised to exercise caution in reporting same.

Public Service Announcements

For all public service announcements (PSA), the Commission requires an entry showing 1) that it has been broadcast, and 2) the name of the organization or interest on whose behalf it is made. By Commission definition, a PSA is "any announcement for which no charge is made and which promotes programs, activities, or services of federal, state or local governments (e.g., recruiting, sales of bonds, etc.) or the programs, activities or services of non-profit organizations (e.g., UGF, Red Cross, Blood Donations, etc.) and other announcements regarded as serving community interests, excluding time signals, routine weather announcements and promotional announcements."

The subject of certain Commission sanctions, PSAs have often been confused with "commercial" classifications. Indeed, the Commission sanctioned one licensee for logging as PSA spot announcements dealing with a drug information program, to be sponsored by industrial concerns in return for "institutional identification" at the beginning and close of the message.[7] Because the licensee is receiving consideration for broadcasting such announcements, he is required to log them "commercial." In an extension of this principle, the Commission held that 1) the fact that the licensee derived no substantial direct benefit from advertisements of a lottery to be held at a county fair, and 2) that his principal intention was to advertise the fair did not constitute a defense to his logging such announcements as PSA.[8] The Commission reasoned, "the very fact that one had to be present at the fair for which admission was charged" constituted a consideration for the announcement which placed it in the "commercial" category.

Because the Commission has, increasingly, been disposed to impose substantial forfeitures on licensees for logging violations, it is the wise broadcaster who exercises due care in meeting Commission requirements in this area. When necessary, broadcasters should 1) supply *extra information* for purposes

of clarifying their chosen logging classifications, and 2) *consult* with *communications counsel* when classification difficulties arise. No less an effort will suffice to meet Commission requirements.

1. 12 RR 1599 (1968).
2. Announcements broadcast in return for receipt of free transportation, prize merchandise or other goods or services are to be logged "commercial." 16 RR 2d 156 (1969).
3. Report and Order, Docket No. 14187.
4. KISD, Inc., 18 RR 2d 1187 (1970).
5. Old Dominion Broadcasting Co., Inc. 20 RR 2d 748 (1970).
6. KOKA Broadcasting Co., Inc., 21 RR 2d 981 (1971).
7. Chemung County Radio, Inc., 18 RR 2d 165 (1970).
8. 21 RR 2d 203 (1971).

Broadcasters' Responsibility to Community Needs Re-emphasized

SINCE ITS 1960 TREATISE ON PROGRAMMING (Report and Statement of Policy re: Commission En Banc Program Inquiry, 20RR 1902) and its 1965 issuance of the program form (Parts IV-A and IV-B of the renewal, transfer and construction permit forms), the Commission has demonstrated an increasing interest in the licensees' efforts to seek out and meet the programming needs. On August 22, 1968, the Commission again manifested its concern in a Public Notice (FCC 68-847) captioned "Ascertainment of Community Needs by Broadcast Applicants." Therein, the Commission observed that broadcast applicants (for new licenses, renewals, transfers and assignments) frequently tender deficient showings in these areas.

The Commission restated its 1968 holding *(in Andy Valley Broadcasting,* FCC 68-290) that:

> A Survey of community needs is mandatory and that Applicants, despite long residence in the area, may no longer be considered *ipso facto,* familiar with the programming needs of the community.

Apparently, numerous broadcast applicants fail to follow the edicts of the 1960 treatise on programming, the prolific case precedent, and/or, more saliently, do not respond fully to Parts IV-A and/or IV-B of the FCC forms.

In its determination to force broadcast applicants to provide this data, in its 1968 *Minshall Broadcasting* case (11 FCC 2d 796), the Commission articulated the four elements necessary to respond to Part I of the "new" (1965) Section IV-A and IV-B:

(a) Full information on the steps taken to ascertain community needs;
(b) Program suggestions received from listeners;
(c) Applicant's evaluation of suggestions; and,
(d) Programming to be offered in direct response to those needs.

Numerous broadcasters have charged that (1) the Commission is attempting, and has practically accomplished, a "back-door" entry into control of their program content and (2) promulgation of the aforementioned notice further undermines their basic rights of free speech. It appears that the 1960 Program Inquiry, the 1965 issuance of new program forms (Parts IV-A and IV-B), and the August 1968 Public Notice all portray an inexorable trend towards ultimate governmental control of programming. In any event, it is important that all licensees understand (1) their responsibilities and (2) analyze the Commission's requirements as to broadcaster's programming.

Analysis of the Commission's reemphasized programming goals

The Commission's August 1968 reemphasis of the importance of ascertaining community needs should not be taken lightly. For years, the Commission has gradually intensified its interest in this area and augmented its determination that licensees will comply. To wit, the foundation of the American system of broadcasting was laid in the Radio Act of 1927; therein, Congress placed the basic responsibility for all matter broadcast in the hands of the station licensees. That obligation was carried forward to the Communications Act of 1934, and remains unaltered and undivided.

In the sense that his license to operate his station imposes upon him a nondelegable duty to serve the public interest in his community, the licensee is, in effect, a "trustee."

In the 1960 programming treatise, the Commission stated that it had a statutory responsibility

to review and pass upon a licensee's program proposals. Section 307(b) of the Communications Act requires the Commission to "make" such distribution of licenses . . . among the several States and communities to provide a fair, efficient and equitable distribution of radio service to each of the same. Under this section, the Commission has consistently licensed stations with the end objective of either providing new or additional programming service *to* a community, area or state, or of providing an additional "outlet" for broadcasting *from* a community, area or state. Implicit in the former alternative is increased radio reception; implicit in the latter alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required.

Formerly, by reason of administrative policy, and, since September 14, 1959, by necessary implication from the amended language of Section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Prior to 1960, this meant a review, usually in terms of filed complaints, in connection with the applications made each three year period for renewal of station licenses. However, that was a practice largely traceable to workload necessities, and was not limited by law. Today, the Commission examines renewals in depth—with or without complaints.

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If

he has accomplished this, he has met his public responsibilities.*

Major elements to meet local needs

The major elements usually necessary to meet the public interest, needs and desires of the community include: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programming. While the Commission does not intend these elements as all-embracing or constant, nor does it claim to dictate the amount that

*Historically, it is interesting to note that in its review of station performance, the Federal Radio Commission sought to extract the general principles of broadcast service which should (1) guide the licensee in his determination of the public interest and (2) in evaluating the licensee's discharge of his public duty. The Commission attempted no precise definition of the components of the public interest; it left the discernment of its limit to the practical operation of broadcast regulation. It required existing stations to report the types of service which had been provided and called on the public to express its views and preferences as to programs and other broadcast services. It sought (1) information from as many sources as were available in its quest of a fair and equitable basis for the selection of those who might wish to become licensees and (2) the supervision of those who already engaged in broadcasting.

The spirit in which the Radio Commission approached its unprecedented task was to seek to chart a course between (1) the need of arriving at a workable concept of public interest in station operation, and (2) the prohibition laid on it by the First Amendment to the Constitution of the United States and by Congress in Section 29 of the Federal Radio Act against standards or guidelines which evolved from that process were adopted by the Commission and have remained as the basis for evaluation of broadcast service. They have mainly been incorporated into various codes and manuals of network and station operation. The Commission emphasized that these standards or guidelines in no sense constitute a rigid mold for station performance, nor are they considered as a Commission formula for broadcast service in the public interest. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.

licensees shall carry of each, the Commission has felt for years that licensees generally don't do an adequate job of meeting the local needs. As a result, the Commission has become more determined each year to force the licensee to ascertain community needs. Even the responses to the new program form have not proved, to the Commission's satisfaction, that licensees generally seek out and meet community needs—particularly as to local programming. The August 28th notice is further evidence of that concern.

Failure to provide enough detail may result in hearing

The Communications Act provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, only "upon written application" setting forth the information required by the Act and the Commission's Rules and Regulations. If, upon examination of any such application, the Commission shall find the public interest, convenience and necessity would be served by the granting thereof, it shall grant said application. If it does not so find, it shall so advise the applicant and other known parties in interest of all objections to the application, and the applicant shall then be given an opportunity to supply additional information. If the Commission cannot then make the necessary finding, the application is designated for hearing, and the applicant bears the burden of providing proof of the public interest. It is not inconceivable that, in the future, hearings may be ordered on the renewal questions concerning the sufficiency of program surveys.

The amount of necessary program survey data

The Commission desires documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public (who

will receive the signal) and second, consultation with leaders in communty life. As to the latter, while the Commission's August 28th Notice does not define the degree of specificity required, it appears to expect renewal applications to (1) give the names and addresses of those personally contacted or surveyed and (2) list a respectable number of contracts. The desired number would vary with the size and affluence of the licensee; the number required can best be ascertained by consultation with your attorney.

To date, the Commission has applied an "even hand" on the tenuous dividing line that runs between its licensing responsibilities and the broadcasters' constitutional right to free speech. So long as the licensee can show reasonable effort to ascertain his local community's and service area's tastes, needs and desires, he will fulfill his obligations to the public and, hence, meet the Commission's requirements. Nevertheless, in light of the Commission's August 28th Notice, all licensees would be well advised to take another look at their policies regarding program surveys and consider possible expansions thereof. Consultation with appropriate attorneys is recommended.

Ascertainment of Community Needs

On February 23, 1971, the Commission issued a major Report[1] clarifying the confusion that arose from its December 19,1969, *Primer on Ascertainment of Community Needs*.[2] The Primer was designed to guide broadcasters preparing Part I ("Ascertainment of Community Needs") of Section IV of applications for new or changed facilities for license renewals or for assignments and transfers. The February 1971 Report will place in perspective the Primer and the matter of ascertaining community needs.

Part I of Section IV requires specific and explicit data regarding ascertainment of community needs and problems. For example, licensees are required to state the specific methods used to ascertain community needs, including (1) identification of representative groups, interests and organizations consulted, (2) identification of the communities or areas which the station will serve, (3) a listing of significant needs and interests to be served by the station, and (4) a listing of typical and illustrative programs which will be broadcast to meet these ascertained needs.

This seemingly innocuous, brief portion of various FCC application forms has engendered substantial problems for broadcasters and the Commission. One problem: Many broadcasters initially tried to respond to the questions in terms only of program needs. Unfortunately, many apparently still do. More troublesome however is this: The questions designed to require broadcaster inquiry into community needs have (perhaps be-

cause of their brevity) raised significant problems of interpretation. For example, how should a broadcaster actually go about ascertaining community needs; who should be interviewed; how many persons should be interviewed; what are "significant" needs; how many and what kind of programs should be broadcast?

1. The 1969 proposed Primer

To answer some of these perplexing questions, the Commission released its proposed Primer on Ascertainment of Community Needs in December 1969, "to clarify and provide guidelines as to the Commission's requirements and policies with respect to the ascertainment of community problems by broadcast applicants" and to solicit comments with respect to specific provisions of the Primer.

While most broadcasters are generally familiar with Commission requirements regarding ascertainment of community needs and the provisions of the 1969 Primer, there are some new developments to be found in careful study of the February 1971 *Report and Order in Docket No. 18774.*[3]

II. 1971 Report (i.e. Primer Revisions)

While most of the provisions of the 1969 Primer remain unchanged in the 1971 Report, some significant portions have been revised:

(1) **Exemptions:** Educational organizations filing applications for noncommercial educational broadcast stations are now exempt from the provisions of the Primer. However, religious organizations applying for broadcast stations "cannot turn their backs on secular problems" and must ascertain community problems and devote portions of their programming toward those problems.

(2) **Changes in facilities:** Part I of Section IV must be completed by applicants for "major changes" in facilities, if the proposed change would result in the increase of the area of coverage by more than 50%, or if there is a proposed substantial change in programming.

Under the terms of the 1969 Primer, it appeared that a proposed change resulting in 55% increase of area, and a diminution of 10% of existing coverage area, would not require the submission of Section IV data since there would be only a *net* increase of 45%. To clarify this construction, the Commission now specifically states that Part I of Section IV is applicable and must be submitted,

> [With a] construction permit for a change in authorized facilities when the station's proposed field intensity contour (Grade B for television, 1 mV/m for FM, or 0.5 mV/m for AM) encompasses a new area that is equal to or greater than 50% of the area within the authorized field intensity contours.

However, the Commission does note that if there is virtually no population in the gain area, a showing to that effect will relieve the applicant of the Primer's requirements.

(3) **Daytimers requesting fulltime facilities:** Under the provisions of the 1969 Primer, daytime AMs requesting fulltime authority had to submit Part I data (e.g., surveys, programs to meet needs) to Section IV-A. However, under the 1971 Primer, *this requirement has been deleted.* The Commission noted that at least two groups filing comments on the proposed Primer said it was obvious that the problems of the community do not change when the sun goes down.

(4) **Renewals:** *Different renewal standards are presently under consideration by the Commission.* The necessity of ascertaining community needs via the present complex process may be eliminated; however, until new rules are adopted, renewal applicants are required to comply with the present standards of the Primer.

(5) **Current information:** Some broadcasters expressed a desire to have the necessity of filing new Section IV "community needs" data eliminated—provided such data had been filed within the preceding 18 months. However, *the Commission has elected to retain its one-year standard,* noting that otherwise community-needs data would

not be current enough "for us to make an informed judgment." The 1971 Primer rule is that new Section IV data need not be compiled and submitted, thereby unnecessarily duplicating recent efforts, *if such data were submitted within the previous twelve months.* Applicants should also note that they may begin preparation of an application up to six months before filing.

(6) **Purpose of section IV:** The Commission has described the purpose of Section IV as (1) to show what the broadcast applicant has done to ascertain the needs and interests of the community to be served, and (2) to list the programs or other broadcast matter proposed to meet these needs and interests.

The Commission, especially before releasing the 1969 Primer, found that a large segment of the broadcasting industry "steadfastly interpreted community 'needs' to mean program preferences." For example, the Commission received applications indicating that some communities' principal needs were for more country and western music, or for more sports programs, and the like.

Following the release of the 1969 Primer, a review of applications indicated that true community needs and problems (as opposed to program preferences) were finally being ascertained. Despite the Commission's assurances that the word "problems" (as used in the Primer) was to be considered generally synonymous with "community needs and interests," however, many broadcasters believed the 1969 Primer to be a major shift of Commission policy. *This is not true.* The Commission believes that the diverse interpretations given the Primer by broadcasters are unwarranted; however, the Commission has conceded that obvious confusion exists (as opposed to the clarification hoped for from the 1969 Primer) and declared that some revision via its 1971 Primer was in order.

Among the clarifications made in the recently released *Report and Order,* the Commission succinctly states that the purpose of Part 1 of Section

IV is to ascertain community "problems, needs, and interests." The key is the phrase "problems, needs, and interests."

In answer to the Primer question, "What is the general purpose of Part I, Section IV-A or IV-B?" the Commission has said:

> To show what the applicant has done to ascertain the *problems, needs and interests* of the residents of his community of license and other areas he undertakes to serve . . . and what broadcast matter he proposes to meet those *problems, needs and interests,* as evaluated. The word "problems" will be used as a short form of the phrase *"problems, needs and interests."* The phrase "to meet community problems" will be used to include the obligation to meet, aid in meeting, be responsive to, or stimulate the solution for community problems. (Emphasis supplied.)

Obviously, among the major questions that continue to perplex broadcasters are: How should ascertainment of community problems be made? Who should be interviewed? Where should the interviews be made? What are the significant data to be obtained from the interviews? What programs to meet needs should be proposed?

(1) Who should be interviewed?

The Commission has made it clear that licensees must interview community leaders *and* members of the general public to ascertain community needs and problems. In its 1971 Primer the Commission has declared that members of the general public (laymen) *must* be interviewed, "for they may perceive community problems differently than community leaders."

(2) Surveys outside community of license

It should be remembered that a licensee's primary obligation is to the city of license and other obligations are secondary. However, if a station is licensed to two cities (e.g., Minneapolis-St. Paul) community needs and problems must be ascertained in both cities. In the 1971 Primer, the Commission has *removed* the 1969 Primer's

requirement that an applicant for a station licensed to a city within a Standard Metropolitan Statistical Area (SMSA) must ascertain community problems in each of the cities within that area. Explains the Commission:

> First, many metropolitan areas have numerous political subdivisions. For example, there are more than 100 communities within the SMSA of New York City and Chicago. We do not, and cannot, require a station licensed to Chicago to present broadcast matter that is specifically responsive to the problems of each of those subdivisions. Second, as presently stated, an applicant for a station licensed to Joliet, Illinois, part of Chicago's SMSA, would be required to ascertain community problems in all the political subdivisions surrounding and including Chicago, if its signal actually encompassed that area. That, too, is an unnecessary result, since it would apply a more stringent requirement as to applicants for stations licensed to suburban communities than to those in the central city.
>
> We are adopting, instead, a somewhat different limitation on the discretion of all applicants, as to the communities in which an ascertainment of community problems must be made. That is that an applicant will be required to submit a showing as to why he does not undertake to serve a particular major city that falls within his service contours, up to a maximum of a 75-mile radius from the transmitter site.

In those outlying areas which applicants decide to survey, consultations with community leaders who can be expected to have a broad overview of community problems will be sufficient to ascertain community problems. Thus, *it is clear that survey efforts in outlying areas need not be nearly as extensive as those for the city of license.*

(3) Determining composition of city of license

This is the area most perplexing to broadcasters attempting to complete a comprehensive and meaningful survey of community problems. The Commission has declared that data relating to the composition of the community (demographics) must be submitted with the application and that a statistically reliable sampling must be

made. "The applicant is expected to choose [and interview] members from each of those broad groups that reflect the compositions of the city of license." *A random sample is not sufficient!* Each applicant is expected to contact leaders of "each significant group" within the community.

After attempting to conduct a "statistically reliable" survey of his community and trying to compile data relating to the community's composition, few broadcasters will find solace in the Commission's pronouncement that, "in our view, the ready availability of the sources of that information make such studies easily within the resources of all broadcast applicants."

The 1971 Primer clearly states that each applicant is required to submit, in exhibit form, a study of the composition of the community (demographic data):

> The applicant must submit such data as is necessary to indicate the minority, racial, or ethnic breakdown of the community, its economic activities, governmental activities, public service organizations, and any other factors or activities that make the particular community distinctive with respect to its composition.

The Commission notes that reliable demographic data are available from such sources as the U.S. Census Bureau and local Chambers of Commerce. As an example of available data, the Commission makes reference to the Census Bureau's periodically-issued *County and City Data Book—A Statistical Abstract Supplement.*

> This publication does not contain the most detailed information published by the Census Bureau. However, the following partial listing of data set forth there as to cities is indicative of the extensive information that is readily available: total population; land area; population density; percent nonwhite; percent Negro; percent foreign born; total foreign born; country of origin as a percent of total foreign stock; median age; percent under 18 years of age; percent 65 years of age and over; the median number of school years completed, the percent completing less than 5 years of school; . . . total income; median family income; . . . hospitals; total general city revenue and breakdown as to source; total city expenditures and a breakdown as

to disposition, including public welfare, education, highways, health and hospitals, police protection, fire protection, sewerage, other sanitation, parks and recreation, interest on general debt, outstanding debt, and city payroll. This information is given for every city with a population over 25,000. Similar information is given for each county, with more agricultural data, so that cities less than 25,000 would be included in the county portion of the publication. More detailed information or source of information as to other areas may be found in the following government publications which may be available in local libraries or can be purchased from the Government Printing office: *Statistical Abstract of the United States; Directory of Federal Statistics for Local Areas, A Guide to Sources; Directory of Federal Statistics for States, A Guide to Sources.*

While the partial list above seems ominous in terms of the wealth of available data, the Commission has declared that it is not concerned with minutia, and those challenging an applicant's showing must demonstrate that the applicant has failed to recognize a significant group. For example,

> It should be noted that if an applicant finds that there are ten labor unions in the community, the group we consider significant is that of unions generally, each union is not considered a separate group.

(4) Consultations with community leaders

In its 1971 Primer, the Commission has reaffirmed that the applicant's principals and management should consult with community leaders for survey purposes. The reason: If non-decision-making personnel, or some organization or person other than the applicant, conducted the survey, the information gathered would go through a "filtering process" that might exclude many valuable details. Notes the Commission:

> It is doubtful that a written report can fully convey the nuances of any extensive conversation, or the extent of the sincerity, frustration or anger that may be associated with some community problems. Moreover, the person-to-person interview with the

management of the station is more likely to establish a contact with the station in the interviewee's mind. Thus, a community leader knows someone to call if he believes there are matters that warrant further discussion.

However, joint consultations—such as luncheons, group meetings, and the like—may be used by the principals or key management personnel in communicating with community leaders.

(5) Consultations with the general public

The broadcaster has a wider choice in determining who may conduct consultations with the general public, and the Commission has revised the Primer to make it clear that an applicant's *employees below management level* may conduct consultations with laymen. Also professional research or survey services may be used; however, all such consultations (whether by nonmanagement personnel or research services) must be supervised by principals, management-level employees, or prospective management-level employees.

The Commission continues its less-than-enthusiastic endorsement of the use of professional survey organizations, even for consultations with members of the general public. The FCC's attitude is best summed up in the Primer with a response to the question "To what extent may a professional research or survey service be used in the ascertainment process?"

> Answer: A professional service would not establish a dialogue between decision-making personnel with the applicant and community leaders. Therefore, such a service may not be used to consult community leaders. However, a professional service . . . may be used to conduct consultations with the general public. A professional service may also be used to provide the applicant with background data, including information as to the composition of the city of license. The use of a professional research or survey service is not required to meet Commission standards as to ascertaining community problems. The applicant will be responsible for the reliability of such a service if it is utilized.

(6) How many persons should be consulted?

The Commission still refuses to designate a specific number of community leaders and/or members of the general public to be interviewed. The Commission says it is not a question of numbers, but whether the applicant has consulted leaders of the significant groups found within the community. Therefore, in response to the specific question "How many should be consulted," the FCC has declared:

> No set number or formula has been adopted. Community leaders from each significant group must be consulted. A sufficient number of members of the general public to assure a generally random sample must also be consulted. The number of consultations will vary, of course, with the size of the city in question and the number of distinct groups or organizations. No formula has been adopted as to the number of consultations in the city of license compared to other communities falling within the station's coverage contours. Applicants for stations in relatively small communities that are near larger communities are reminded that an ascertainment of community problems primarily in the larger community raises a question as to whether the station will realistically serve the smaller city, or intends to abandon its obligation to the smaller city.

Suppose, however, that after surveying the area the broadcaster discovers he has had limited success in eliciting data, or that there appear to be few community problems. Is it safe to assume that only a few problems exist? The Commission's answer is no:

> The assumption is not safe. The applicant should re-examine his efforts to determine whether his consultations have been designed to elicit sufficient information. Obviously, a brief or chance encounter will not provide adequate results. The person interviewed should be specifically advised of the purpose of the consultation. The applicant should note that many individuals, when consulting with broadcast applicants, either jump to the conclusion that the applicant is seeking programming preferences, or express community problems in terms of exposure or publicity for the particular group or groups with which they are affiliated. The applicant may properly note these comments, but should ask

further questions designed to elicit more extensive responses as to community problems.

(7) Listing of problems

The December 1969 Primer was unclear as to whether *all* community problems ascertained had to be listed, or whether "significant" problems would suffice. The Commission has made it clear that *all ascertained community problems should be listed,* whether or not the broadcaster intends to include them in program fare; however, those comments that are clearly frivolous need not be listed.

Following the listing of all community problems, the applicant must evaluate all responses and decide which problems are the most significant—the problems that will be treated via proposed program fare. However, in listing the most significant problems and proposed programs to be broadcast in response thereto, the applicant must avoid overly broad descriptions. He must specifically show *what* broadcast matter is proposed to meet *what* problem:

> The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems that are to be treated by it. One appropriate way would be to list the broadcast matter and, after it, the community problem or problems the broadcast matter is designed to meet. Statements such as "programs will be broadcast from time to time to meet community problems," or "news, talk and discussion programs will be used to meet community problems," are clearly insufficient. Applicants should note that they are expected to make a positive, diligent and continuing effort to meet community problems. Therefore, they are expected to modify their broadcast matter if warranted in light of changed community problems. If announcements are proposed, they should be identified with the community problem or problems they are designed to meet.

1. FCC 71-176, _____FCC2d_____, released February 23, 1971.
2. 20 FCC2d 880 (1969).
3. Id. fn. 1.

Program Surveys — Recent Cases

From its beginning, the Commission has been concerned with the licensee's efforts to satisfy "local tastes, needs and desires." This has been part of the Commission's statutory responsibility. However, where does the Commission's responsibility end and where does it begin to transgress on the licensee's right to make independent programming judgments? In other words, do the Commission's "local needs" criteria mark "the beginning of the end"—the eventual government control of programming?

In the Minshall case [11 FCC 2d 796 (1968)], the Commission set forth the four elements required by Part I of the "program forms" (Section IV-A and IV-B):

(a) Full information on the steps taken to ascertain Community needs;
(b) A record of program suggestions received from listeners;
(c) Applicant's evaluation of these suggestions;
(d) Programming to be offered in direct response to the suggestions.

Section IV (A or B), Part I

In Andy Valley Broadcasting System, Inc., 12 RR 2d 691 (1968), the Commission held, ". . . The new form now makes a program survey mandatory. Applicants, despite long residence in the area, may no longer be considered, ipso facto, familiar with the programming needs and interests of the community." Therefore, a broad-

caster—even a long-standing member of the community—will have to show evidence that he has surveyed the community, consulting with public officials, educators and leaders in other areas of community life—*i.e.*, religion, entertainment media, agriculture, business, labor, the professions and eleemosynary organizations, as well as others who represent the interests of the community.

So the question has become, how does a licensee apply the four "guides" set forth by the Minshall Case? The answer must start with a general outline of their essential elements:

Consultations with community leaders.

These consultations help determine the needs of the community as seen by the groups represented. A representative range of groups and leaders are needed to give the applicant a better basis for determining the total needs of the community. Interviewees should be identified by name, position and organization. The consultations should elicit constructive information about community needs, not mere approval of existing or pre-planned programming. Whether the survey be by direct mail, telephone, on-the-street interviews and/or any combination of the foregoing with others, the program form application *must* indicate the licensee's method(s). While the *number* of consultations required varies with the size of the market, it is reasonably safe to assume that *the names and addresses of at least 15 interviewees should be stated in the renewal.*

Suggestions received.

The application should include the *significant suggestions* as to community needs received from community leaders—whether or not the applicant proposes to treat them through its programming service. The applicant must also explain his choice of "significant" needs by *retaining material supporting* the basic evaluation. For example, suggestions that occur in nine out of ten interviews are certainly significant. However, a suggestion

that has appeared twice in one hundred interviews is definitely *not* significant.

Licensee's evaluation.

The applicant is expected to evaluate the relative importance of those suggestions and consider them in formulating the station's over-all program service. The applicant should explain his "modus operandi" or methods used in analyzing the surveys. For example, the applicant may convene round-table discussions between announcers, program directors and management to analyze each survey, keeping a brief memo of the discussions in his program-survey files.

Programming service proposed to meet the needs as evaluated.

The fourth element set forth in Minshall should be the response to Question 1.C. or 1.D. It calls for the applicant to relate his program service to the needs of the community as evaluated —*what* programming service is proposed to meet *what* needs. In other words, this response is the logical answer to the needs established in the preceding responses.

Gradual Emergence of Indirect Censorship

The Commission's zeal in determining the adequacy of the licensee's efforts to meet "local" needs may gradually emerge as a form of censorship and/or program dictation.

As to censorship, Section 326 of the Communications Act of 1934, as amended, provides that:

> "Nothing in this chapter (Act) shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

In Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959), the Supreme Court stated succinctly:

> ". . . expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication."

And as to program dictation, the Commission's role as a practical (as well as a legal) matter *cannot be one of program supervision or choice*. Supreme Court Justice Douglas commented most adequately about this problem in Public Utilities Commission v. Pollak, 343 U.S. 451, 468, as follows:

> "The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that please the bureaucrat but which rile the . . . audience. The political philosophy which one radio sponsor exudes may be thought by the official who makes up the programs as the best for the welfare of the people. But the man who listens to it . . . may think it marks the destruction of the Republic . . . Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant, political or religious group. Once a man is forced to submit to one type of program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold."

So it seems that broadcasters have nothing to fear from the Commission when responding to Section IV (A or B), Part I. However, the earlier discussion of programming to be offered in response to needs offers a tempting opportunity for the Commission to substitute its own judgment. Commissioner Lee Loevinger poignantly commented about this very problem.

"The traditional FCC approach has been to demand minimum amounts of programming in various specified categories. Licensees have been required to report the percentage of programming falling in such categories as entertainment, religion, agricultural, educational, news, discussion, talks, and miscellaneous. The 1960 program policy statement, *supra*, listed 14 categories, including some of the foregoing and additional ones such as programs for children and editorials.

"This approach is based upon certain implicit assumptions which, simply stated, are these: The public interest in broadcasting is composed of a number of elements, principally those specified in the FCC program reporting forms. Each licensee should serve the public interest. It is the function of the FCC to require each licensee to serve the public interest or else forfeit his license. In order to serve the public interest, each licensee must provide all, or most, of the elements which the FCC specifies as serving the public interest. Therefore, each licensee must provide some programming of each type specified by the FCC (or, in exceptional cases, of most but not all types), or risk losing his license.

"An important point to note in analyzing this approach is that it is based altogether on category classification and has nothing whatever to do with excellence or merit. A program is classified as "talk" whether it is Einstein discoursing on relativity, Niebuhr discussing morality, or the local bartender talking about the proper proportions for a martini. A program is classed as "entertainment" regardless of whether it is based upon pornography, contemporary crime and violence, or classical drama. Hence, it is apparent that a statistical supervision of program categories has about the same relation to a program merit as a requirement for hiring employees on the basis of geographical origin does to a civil service merit system. This approach ultimately rests upon an assumption that category diversity is per se a desirable quality in broadcast programming.

"The hope that excellence, merit or even genuine diversity might be provided by the requirement of a statistical 'balance' or distribution among prescribed categories of programming has been frustrated by experience. For while the FCC has officially insisted on the necessity for such statistical balance virtually since inception, its insistence has neither discouraged or prevented bad programs nor provided or encouraged good programs.

"A final issue with respect to mandatory or rewarding action by the government to require or

encourage program quality is that of determining the kind of action to be taken. The only reward or inducement that the government has to offer, however, is the grant of continuance of a license. As a consequence, the practical distinction between mandatory or rewarding action and prohibitory or punitive action is difficult to see. For if the rewarding action consists of the grant or continuance of a license, we are merely saying the same thing in different words. Further, as noted above, *once the FCC takes action either to grant or to deny a license on the basis of specific programming, all those who are subject to its licensing power are, in effect, compelled to comply with the standard stated or implied by that action.* If the standard is based upon the broadcasting of a desirable program other licensees are in effect required to broadcast the same or similar programs." (Emphasis added.)

Of course, there is still no ready answer to the question, "Is the Commission merely exercising its statutory responsibility when it applies its 'criteria,' or is it intruding into the licensee's right of free speech?" It does seem that *the broadcaster must expect greatly increased scrutiny of his programming presentations.* Every licensee must expect the Commission to review thoroughly Section IV-A, Part 1, to determine whether he has completed enough "spadework" in support of the program he proposes as meeting "ascertained" needs, interests, and desires.

Every licensee should guard against being coerced (in any fashion) into making programming decisions merely to satisfy the Commission; such decisions by any licensee would truly threaten the foundations of free broadcasting in this country. No matter how erudite, intellectual, or well educated the Commission's staff may be, not one of them is in nearly as good a position as the licensee to make rational, considered and supportable decisions on programming needs in the licensee's community. So far, the Commission's staff has not exceeded its statutory limitations. It has taken great pains to be certain it is not substituting its own "programming judgment." However, the Commission has assumed a more stringent attitude towards broadcasters disclosing "weak"

efforts to determine their community needs. For example, numerous renewals have been deferred —pending receipt of additional information requested by the Commission's staff concerning responses to Section IV (A or B), Part I.

To minimize the Commission's intrusion in this area and to avert inquiry into your practices, you should make more frequent and more detailed surveys of the tastes, needs and desires of your audience. Telephone surveys, street-corner interviews, conferences with civic leaders, postcard surveys, lengthy questionnaires, surveys by your staff of their own social clubs (Elks, Lions, etc.) are a few of the many techniques available. Surveys should be made *every* year and should be *documented. Staff meetings,* to analyze results, should be held regularly. And, at the moment, the most important survey is the survey of civic leaders in your service area. In any event, if you have the slightest doubt concerning the responses to the questions therein, consult with your attorney.

The Licensee's Programming Responsibility and Conflict of Interest

THE FIRST AMENDMENT OF THE CONSTITUTION provides all licensees with the basic right to communicate ideas without abridgement. Section 326 of the Communications Act of 1934 specifically prohibits censorship. The fact that one may not engage in broadcasting without first obtaining a license does not mean that the terms for holding that license may unreasonably restrict or abridge the free speech protection of the First Amendment and the Act. While the Commission must determine if program service is reasonably responsive to the needs and interests of the public, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. Therefore, the responsibility for the selection and presentation of broadcast material ultimately falls upon the individual station licensee.

However, since broadcasters are required to program their stations in the public interest, convenience and necessity, the broadcaster's freedom is far from absolute. The Commission may not grant, modify, or renew a broadcast license without finding that the operation of the station is in the public interest. Thus, the licensee must make a diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of the public it serves.

The anomaly. On the one hand, the Commission is prohibited from dictating programming to licensees; on the other, it is compelled to make certain the public interest is being served.

This dichotomy has resulted in a gray area that has been the source of great confusion and concern to many licensees. Of course, the Commission has a natural proclivity to expand its indirect control of programming.

Many of the questions which cause broadcast licensees the greatest concern relate to programming. What precisely is the licensee's program control responsibility? Exactly, what is the extent of the Commission's control over programming?

Superficial and casual attention by licensees to these questions may well lead to a deferred renewal, hearing, severe fine, or something worse. To compound the problem, as is customarily the case with regulatory agencies, there are no easy answers to the questions. The licensee can keep out of trouble by understanding the development of the Commission's position, the current trends, and by endeavoring to offer somewhat more than is required.

Licensee and/or employee conflict of interest

All broadcasters realize that the Commission holds them strictly accountable for the content of their programming. However, what sanctions will the Commission apply? If the licensee's employee is at fault, to what degree will the licensee be held responsible? As stated previously, there is no written rule; the broadcaster must look to all the circumstances and employ its good faith judgement; and the Commission will employ the identical criteria. For example, if the violation concerns serious violations of the Communications Act and/or the Criminal Code (as exemplified by the "payola" and "plugola" scandals of the late 50's), the Commission will assess a very large fine and/or order a hearing looking towards revocation of the broadcaster's license. (See letters to WMEX, WILD and WORL, Boston, and WHIL, Medford, all in Massachusetts, March 1, 1960, Report No. 3498, 85075.);

Alternatively, if the facts indicate that the licensee was (1) acting in good faith, (2) the violation is minor and the first mistake, the Commission will most likely ask only for a letter of explanation from the licensee. (See letter to KGFJ, Los Angeles, California, February 1, 1968, Report No. 7000, 12027.) Both of the preceding Commission investigations concerned record selection procedures by disc jockeys; however, the Massachusetts station's procedures reflected gross derogation of their responsibility to supervise their employees, and the KGFJ letter merely reflected concern that the licensee might not be exercising proper supervision of its disc jockeys. What does the Commission consider to be "adequate" supervision by a broadcaster of its employees engaged in programming decisions? At what time is the licensee required to inform its listeners that it has an economic or other interest in the subject matter of a program—such as a newscast or a station editorial? Review of several relevant cases and policy decisions should aid the broadcaster to make such a determination.

Conflict of interest precedents

In a case investigating possible payola violations (where a nonpublic hearing was held), testimony indicated that (1) the licensee was not aware of any violations until informed thereof by the Commission, and (2) the recurrence from time to time of some violations raised a question as to the licensee's diligence in implementing the station's procedures regarding acceptance by certain employees of favors, loans, extraordinary forms of entertainment, and information regarding "outside" business ventures which might create a conflict of interest with their roles as employees of the station.

For example, a careful reading of the no-payola statements the broadcaster required of employees and outside record promoters to sign would have revealed ambiguities in some of the

statements which should have been resolved at the time. This would have demonstrated greater desire on the station's part to make these measures really effective; also, it would have enabled the station to make its policies clear where misunderstanding may have existed. Furthermore, although it appears that the station investigated a number of payola complaints against employees, by memorandum, the President suggested that such complaints not be accepted thereafter over the telephone. Allegations involving such serious violations should have been accepted and investigated. Additionally, such investigations—especially when reports of payola continued to be received—should have been conducted with great thoroughness. In some instances the station resorted to independent sources to dispose of reports of improper practices, in others, the station seemed to have accepted the self-serving statements of the individuals involved without further confirmation. The only way a licensee can avoid imputation of knowledge of improper conduct on the part of its employees is to investigate fully all reports or other indications of misconduct.

A licensee has an obligation to exercise special diligence to prevent improper use of its radio facilities when it has employees in a position to influence program content who are also engaged in outside activities which may create a conflict between their private interests and their roles as employees of the station.

Receipt of unusual favors or gifts of more than nominal value should obviously be prohibited. Further, if conflicts of interest in the form of outside economic interests of station personnel are not prohibited, then the personnel involved should be insulated from the process of program selection. When complete insulation cannot be effected, a licensee should take extraordinary measures to insure that no program matter is presented as a result of such practice. In this case, the Commission decided

that the derogation of responsibility by the licensee was not so serious as to foreclose the proposed assignment of license of the station to a new owner. See *Crowell-Collier Broadcasting Corp.*, 8 RR 2d 1080 (1966).

In an inquiry concerning conflict of interest by the broadcaster, a station owned an airport restaurant which was involved in a controversy with the airport authorities. The station broadcast several editorials advancing the arguments of the restaurant; the broadcaster stated that it emphasized the restaurant's arguments because the local newspaper had presented "the other side of the story"; however, the station had not revealed its ownership of the restaurant to its listeners. The Commission found that a licensee's obligation to serve the public interest does not preclude it from editorializing on matters in which it has a significant personal interest; however, its decision to do so imposes a responsibility to reveal to the broadcast audience the extent and nature of its private interest. See *Gross Telecasting Inc.*, 13 RR 2d 1067; 14 FCC 2d 239 (1968). The Commission decided that the circumstances of the case did not warrant assessment of a fine or forfeiture; however, the questions raised as to the licensee's qualifications would be considered with the next application for renewal of license of the station.

Current policies espoused in NBC-Huntley case

In another case, where an NBC news commentator (Chet Huntley) attacked a federal meat inspection law, and the commentator had investments in cattle business, the network failed in its responsibility to take the appropriate action to reveal the facts to its listeners. Additionally, since the matter discussed was "a controversial issue of public importance," the network was responsible under the Fairness Doctrine to afford a reasonable opportunity for the presentation of conflicting viewpoints. See *National Broadcasting Company*, 14 RR 2d 113 (1968). After taking

all the circumstances of NBC's and Huntley's virtually unblemished records of good broadcasting into consideration, the Commission decided that it would only require NBC to submit a statement concerning revision of its procedures to guard against any further conflicts of interest. However, the Commission considered the matter of such importance, it issued a statement discussing the licensee's responsibilities in its new operations and any other potential conflicts of interest situations:

> The licensee is responsible for the integrity of its news operations. To insure that integrity, the licensee must exercise reasonable diligence to determine whether or when one of its news employees is properly discharging his news functions in connection with a matter as to which he has a significant private interest which might reasonably be thought to have an effect on the discharge of that function. There are, of course, a variety of factual situations which might confront the licensee and a corresponding variety of actions which it might take. It might determine that the conflict is of a minimal or insignificant nature, or that it is so great as to call for the substitution of another, disinterested news employee to deal with this particular matter, or that while there could be said to be a significant conflict, broadcast journalism would be best served by permitting the employee to continue his duties while divulging the nature of the conflict to the audience, so that they are made aware of the fact that in this instance the commentator does have a significant private interest in the matter he is discussing. In short, here as in so many areas, the licensee is called upon to make reasonable good faith judgements as to the nature of any conflicts and the remedial action, if any, called for.
>
> Similarly, we do not believe it appropriate for this agency to specify the particular route to be taken by a licensee in order to exercise reasonable diligence in this area. One method which might be used would be to require periodic statements of the interests of the employees, with the obligation to keep them current. The licensee, particularly in small broadcast operations, might pursue other methods (e.g., making clear the principle against undisclosed conflicts of interest and requiring dis-

closure in any doubtful situation). Here again, the choice is one for reasonable, good faith judgement of the licensee. However, where a conflict matter is or clearly should be known to the licensee, it has a special duty to take appropriate steps to ascertain the full facts and to take whatever remedial action is called for.

Renewal Competition and Community Needs

The spectre of competition haunts every station operator at license renewal time. The past few years have raised this fear with the WHDH debacle in Boston (where an existing operator's license was awarded to a competing applicant), and with the plethora of recently-filed applications contesting the present licensee's continued operation.

The much-debated "Pastore Bill" (S. 2004) seeks stringent restrictions on competing applications filed against existing licensees. It is cogently argued, however, that this Bill practically eliminates competition in the broadcast services (already tainted with a monopolistic aura). Controversies between Congress and the FCC—as recently demonstrated by the FCC's refusal to give Congress its files in the WIFE case—have stymied, if not foreclosed, favorable action on S. 2004.

Certain members of the public, the Congress, the FCC, Department of Justice and the Administration have all demonstrated support for public competition in renewals and for a restructuring of the broadcast industry. But under the WHDH case, it seemed likely that the competitors would prevail in most cases—even over broadcasters with good and/or exceptional broadcast records. This inherent risk threatened the stability of the entire industry and placed in jeopardy the licenses of good, as well as bad, broadcasters. Thus, even the proponents of competitive renewal hearings apparently agreed that a compromise should be reached. And a new policy—to protect good broadcasters—was formulated.

The Federal Communications Commission has attempted to set forth guidelines for existing broadcast licensees (and potential applicants for presently authorized facilities) by issuing its Policy Statement On Comparative Hearings Involving Regular Renewal Applications. Many have misinterpreted the new policy and have concluded that the days of renewal challenges are over. Clearly, this is NOT the case.

The Statement does, however, indicate changes in the Commission's disposition as to the treatment of applications filed in competition with regular renewal applications.

Background Considerations

The "public interest" has always been uppermost in the Commission's mind when considering broadcast applications. And so, in issuing its policy statement, the Commission has balanced the interests of (1) existing licensees (whose expenditures, especially in television, approach astronomical proportions) and (2) the public need for free competition.

The Commission has reaffirmed the desirability of the limited license term (3 years) and has declared that it will permit review of the broadcaster's "stewardship" at regular intervals to determine whether the public interest is being served. Also, the Commission will give new parties a chance to demonstrate, in public hearings, that they will serve the public better.

In other words, the Commission believes that the "public interest" will be benefited most if both elements—the "statutory or competitive spur" of a potential license challenge and the practical consideration of "predictability and stability" for existing broadcast operations—are sanctioned.

Specific Policy Statements

The Commission's new policy (largely formulated some years ago,[1] but now specifically stated)

provides comfort for the existing licensee who has truly operated in the public interest. For the operator who has relied on a diet of entertainment fare and commercials, however, there is little solace.

The Commission has declared:

> If the applicant for renewal of license shows, in a hearing with a competing applicant, that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operaton of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his renewal will be granted.

The statement is worthy of being engraved in stone and affixed to your program manager's wall.

The Commission's declaration appears to mean that an existing licensee, who truly and substantially serves the public needs and interests of the communities in his coverage area, need have no fear that his license will be taken away and given to a competing applicant. But it's open season on those without substantial public interest fare.

The policy for treatment of renewals and competing applications (1) encourages good faith competing applications; (2) forces the broadcast renewal applicant to run on his past record; (3) increases, for broadcasters with marginal operations, the risk that their licenses will not be renewed; and, happily, (4) provides a sanctuary for all broadcasters that truly ascertain and serve community needs.

Community Needs Surveys—the Primer

As any knowledgeable broadcaster can readily testify, the most onerous portion of the application is that in Section IV, dealing with "Ascertainment of Community Needs." Commission policy regarding adequate response to this section

has changed perceptably over the past few years. It now culminates in the "Primer."

The most salient features of the Primer (and those that most directly affect the renewal applicant) relate to a clarification of the phrase "community needs and interests." The Commission states that "needs and interests" are to be considered generally synonymous with "community problems." These are not, repeat not, program needs and interests. "Problems" is the key word. The main thrust of the applicant's response should be directed to this end and the licensee must propose and broadcast programs to serve these "community problems."

The applicant must ascertain and identify the problems of his community. This must be accomplished by consultations with leaders of a representative range of groups and with members of the general public from communities throughout the area served. The Commission now requires that applicants actually determine what constitutes a "representative range of groups." He must determine the kinds of groups involved in the total makeup of the community.

The representative cross-section must be both societal and geographical. It is incumbent upon the applicant to indicate, by cross-sectional survey, statistically reliable sampling, or some other valid method, that the range of groups, leaders and individuals consulted is truly representative of the economic, social, political, cultural, and other elements of the community. Guesswork or estimates based upon alleged familiarity of the area are inadequate.

Professional research organizations may not be hired to do the major portion of the survey. While a professional service could be used to provide background data, the individuals primarily responsible for consultations with community leaders are the principals or top-level employees or prospective employees of the applicant.

Community leaders are considered to be the prime repository of knowledge of community problems; however, members of the general public must be consulted as secondary sources.

When the surveys are complete, the applicant is expected to list, in exhibit form, all significant community problems, whether or not he proposes to treat these problems through proposed programming. Then, the applicant is expected to determine on a good faith basis which of the problems merit treatment by the station, and how they are to be treated. There must be an exhibit linking programs and problems. The applicant is expected to state the title, time segment, duration, frequency of broadcast, and description of the program and to describe the community problem which it deals with.

Short announcements, editorials and news programs may be proposed as secondary programming to meet community problems, but the perceptive applicant and operator is one who produces and presents actual program fare to meet community problems.

Conclusion

The renewal hearing policy does not eliminate the risks of competing applications. It encourages good faith challenges. Marginal and poor programming may well result in a grant of the competing application. Only the good broadcaster has been insulated from any meaningful threat of losing his license. The "bad" broadcaster has been thrown to the wolves.

The nuances and semantics of "good" and "bad" programming are yet to be defined by case law. The new Primer on Ascertainment of Needs shows how to become a "good" broadcaster: ascertain needs and respond to them with some substantial programming.

Renewal applicants now have guidelines to follow in protecting their existing operations. The Commission seeks to promote "conscientious and

good faith substantial service" to the public—not a "triennial flirtation with such service."

The perceptive broadcaster who plans ahead will protect his investment and continue to operate under Commission aegis. His plan: diligent, continuing surveys of the communities served by the station; programming to meet community problems; and programs responding to community problems.

The new policies will tend to discourage spurious and frivolous competitors. But they may well encourage good faith challenges against mediocre and poor broadcasters!

1. See Hearst Radio, Inc., 15 FCC 1149 (1951) and the *Policy Statement on Comparative Broadcast Hearings*, 4 FCC 2d 393 (1965).

Renewal: Comparative Hearing and Existing Licensees

While only a few station operators must actually meet competition at license renewal time, *every* operator faces the possibility of challenge. The Commission has struggled for many years with the problems of relevant criteria and required performance in renewal applications. Currently, it is exploring pertinent standards for *television broadcasters,* who have, increasingly, been challenged at renewal.

The Commission and the courts have played havoc with renewal standards. Once yielding an "insuperable advantage" in comparative hearings to an incumbent broadcaster, the Commission has, over the past few years, steadily elevated its performance requisites. The television broadcaster has been an unwitting witness to these proceedings and, with the ensuing confusion, has been forced to exercise "guesswork" to determine exactly what performance is required of him.

1970 Policy Statement

In its 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants," [1] the Commission stipulated a two-part hearing process which made it difficult for challengers to gain "equal footing" with incumbents. The Statement said, in pertinent part, that a full comparative hearing which considers the merits of *both* incumbent and challenger would be granted if, and only if, the existing licensee could NOT demonstrate a past record of "substantial service without serious deficiencies." In other words, if the licensee demonstrated a "substantial" past performance at

this initial hearing, the Commission would not proceed to the second phase of the hearing but, rather, would grant the renewal application forthwith. The Commission elaborated:

> The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if this is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainment of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service is also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field.

1971 Court Decision

Spurred bv the U. S. Court of Appeals' decision in *Citizen Communications Center* v. *FCC.*,[2] the Commission has been called to reevaluate its "pertinent standards." In effect, the Court is forcing the Commission to consider "superior" service as an alternative test to "substantial" service in granting renewals. In addition, the Court admonished the Commission for utilizing its two-stage hearing process. Stating that the Commission's policy had a "deadening effect" upon renewal challenges, *the Court reversed this guideline* and maintained that it violated the mandates of 1) Section 309 (a) of the Communications Act, and 2) Section 309 (e) of the Act, as interpreted in *Ashbacker.*[3] The Court declared:

> The Act says nothing about a presumption in favor of incumbent licensees at renewal hearings. The Act provides, inter alia, that no license shall be construed to create any rights beyond its terms, conditions and period,

that an applicant waives any claim to a frequency because of previous use, that a renewal license may be granted for a term not to exceed three years, and that a license does not vest in the licensee any right in the use of the frequency beyond the license term. The Commission has in effect abolished the comparative hearing mandate by Section 309)(a) and (e) and converted the comparative hearing into a petition to deny proceeding.

The Court acknowledged the "greater burden" the challenger must sustain in order to prevail over his incumbent-opponent in a comparative hearing. Yet, the Court maintained this is a "substantive" burden and forbade the Commission from strewing the challenger's path with "procedural" obstacles. The challenger must be given a chance to meet the incumbent on "equal ground;" *he must be given a full, comparative hearing.*

Performance Required

For the television broadcaster, what constitutes a "substantial" or "superior" performance? What criteria will the Commission evaluate at renewal? What are "serious deficiencies?" How can a broadcaster assure favorable and expeditious treatment by the Commission at renewal? How does the Commission balance the need for stability in the industry with the need for a competitive spur?

The Commission is currently wrestling with all these problems. At hearing, the incumbent broadcaster is held to a performance test of "substantial" or "superior" service to the needs and interests of his area. The Commission and the Court of Appeals (*Citizen* case) are engaged in a battle of semantics over just what these tests mean. The Commission uses "substantial" in the sense of a solid or strong performance as contrasted with a service only minimally meeting the needs and interests of the area. The Court uses "superior" in the sense of a performance surpassingly good or comparatively better. As confusing as this is to the broadcaster, he need only heed the warning of this semantic battle: *The Court is steadily forcing the Commission to grant licenses at renewal to the group that would provide the "best possible" service.* As the Court put it:

Only records which demonstrate "unusual attention to the public's needs and interests" are to be given favorable consideration, since average performance is expected of all licensees.

However, in its "Further Notice of Inquiry"[4] issued in August 1971, the Commission asserted ". . . it did not intend to overturn the policy that 'a plus of major significance' should be awarded to a renewal applicant whose past record warrants it." Hence, if the broadcaster renders full performance in the public interest and presents his past record at renewal in an ample, solid fashion, he should warrant such a "plus." "Full performance" means a conscientious service throughout the three-year period and not an upgrading of same during the third year because of the imminence of possible challenge. The Commission forbids such a "triennial flirtation" with the public interest.

Insisting that it is impossible to delineate with mathematical precision what constitutes "substantial" service, the Commission, nevertheless, has proposed such guidelines in two selected areas of television programming: 1) local programming and 2) informed electorate programming (i.e., News and Public Affairs).[5] The proposed figures, as general guidelines constituting "substantial" service, are as follows.

1) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% in the prime time period, 6-11 p.m., when the largest audience is available to watch).
2) The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF station (including a figure of 8-10% and 5%, respectively, in the prime time period).
3) In the public affairs area, the tentative figure is 3-5%, with, as stated, a 3% figure for the 6-11 p.m. time period.

It should be noted that these figures are general, tentative, and not applicable to "unprofitable" stations and independent UHFs. The burden is on the existing licensee to show the inapplicability of these guidelines. In addition, stations with "lesser revenue figures" are not held to as strict a standard as pro-

posed in these guidelines. Rather, each station would be bracketed according to revenues, ranging from stations (top 50 markets) with revenues 1) over $5,000,000, 2) between $5,000,000 and $1,-000,000 and 3) below $1,000,000. Standard of performance in local and informed electorate programming would be judged according to financial ability to develop same.

The Commission recognizes the existence of an infinite number of variables in proposing these guidelines. It believes that only individual inspection, perhaps in the hearing process, could definitively delineate whether substantial service was being rendered by the broadcaster. Consistently, these guidelines would not be automatically definitive either for or against the renewal applicant. If the applicant did not meet the guidelines, he could argue that his service was "substantial" or "superior," citing, perhaps, "an exceptional qualitative effort." A showing of an "exceptional" dedication of funds, staff, and other resources would likely compensate for a lesser quantitative showing.

In sum, *these percentage guidelines will likely be adopted by the Commission on the basis of its notice.* For the television broadcaster, they will be more relevant than the current quarrel as to what constitutes "substantial" or "superior" service. Most saliently, they would give a general indication of what is called for, at least *quantitatively,* to meet public interest requirements in two critically important areas.

The Commission further holds that "serious deficiencies" in an incumbent's past performance constitute damaging, if not controlling, evidence against his renewal case. Commission examples of "serious deficiencies" are: overcommercialization, fraudulent practices as to advertisers, violation of racial discrimination rules. violations of the Fairness Doctrine, rigged quizzes,[6] plus numerous others. However, precise standards being impossible to define in this area, all matters relating to alleged "deficiencies" in the incumbent's operations must be explored in the hearing process.

In its *Citizens* decision, the Court also raised for the Commission's consideration certain additional criteria for evaluating an incumbent's performance. These criteria include: 1) elimination of excessive and loud advertising; 2) delivery of quality programs; 3) the extent to which the incumbent has reinvested the profit from his license to the service of the viewing and listening public; 4) diversification of ownership of mass media; and, 5) independence from government influence in promoting First Amendment objectives."[7] Indeed, the Court suggested that a "plus" in the overall weighing process be accorded the incumbent meeting these criteria.

Suggestions:

The broadcaster is clearly caught in the middle by the prevailing uncertainty. The performance standard he is required to meet is, at best, ephemeral. Yet he would be wise, both as a matter of conscience and skillful management, to practice, where economically practicable, the following:

1) *Programming*: Operators should develop substantial local, public service programming designed to meet the particular tastes, needs, and interests of the community they are licensed to serve. Increasingly, the Commission is encouraging "localism" in the areas of news and public affairs programming. *A special effort to meet the "percentage guidelines" proposed by the Commission should be made.* Although it has not ruled on the "profits reinvestment" issue, the Commission will give same greater consideration in renewal hearings in the future. Indeed, the operator who shows a substantial investment of profits into service may well nearly insure his license against challenge.

2) *Advertising:* Operators should refrain from putting on an excessive number of commercials in the broadcast day. In addition, loud and vexatious commercials should be eliminated. A balance between sound economics and audience appreciation is advised. In any event, a wise operator will keep thorough records on the amount and nature of ad-

vertising in order to justify his advertising practices at renewal.

3) *Diversification of control:* Operators should be aware that the Commission will consider diversification as "a factor to be properly weighed and balanced with other important factors, including the renewal applicant's prior record at a renewal hearing." At this "inquiry" stage, the Commission seems to be saying that multiple mass media ownership will have a demerit effect upon a renewal applicant's case, but it may be offset by showing a superior operating performance or it may be "cured" by divesting during the comparative hearing process.

1. 22 FCC 2d 424 (1970).
2. Case No. 24,471, decided June 11, 1971.
3. Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327 (1945).
4. FCC 71-826, Docket No. 19154.
5. Notice of Inquiry, FCC 71-159, Docket No. 19154.
6. 22 FCC 2d at 426.
7. Slip Opinion at 25, n. 35; at 26 n. 36; at 28.

Commission Policy and Proposals: Programming

In its *Notice of Inquiry and Notice of Proposed Rule Making*[4] relating to license renewals, the Commission set out certain proposals designed to promote the fulfillment of public interest obligations by the licensee. Indeed, these proposals elaborated upon and extended the 1970 "Comparative Hearing Policy Statement" and raised the spectre of Commission sanctions in event of non-compliance. Said the Commission:

> Programming is the essence of service to the public, the principal ingredient of which is the diligent, positive and continuing effort by the licensee to discover and fulfill the needs and interests of his area.

Although relatively few broadcasters face competition at renewal, this fact does not eliminate the very real threat of facing Commission sanctions, which include: 1) letter of censure, 2) monetary forfeiture, 3) short-term renewal, or in rare instances, 4) a revocation proceeding, or 5) a combination of two or more of the above. Sanctions are generally levied for violations of Commission rules in the broad area of programming, employment practices and advertising.[3] Such sanctions are imposed by the Commission to both spur the licensee to a better performance and spur potential competitors to challenge by weakening the existing licensee's standing before the Commission.

Efforts to determine community needs must be adequately documented. Leaders and individuals consulted must be identified by name, position, and organization. There must be sufficient material avail-

able to assure that a careful investigation of the community was made and that meaningful results were obtained. Experience of an applicant or interviewers in a particular community or in broadcasting in general is insufficient unless coupled with an adequate survey or investigation of the community.

As a second element of the showing on community needs, an applicant is required to list in his application all *significant suggestions about community needs received through consultations with community leaders and individuals,* whether or not it is proposed to treat them in the proposed programming service. The listing of suggestions as to community needs should include those which the applicant decides not to meet in preparing his program schedule.

The third step required of an applicant in making a programming showing is to make some subjective evaluation of the various suggestions received in the investigations made with respect to community needs. An applicant may be required to justify the evaluation of the relative importance of suggestions received and how these evaluations are reflected in the formulation of program proposals. Initially, at least, it is not essential to show why some community needs found will be treated in a proposed programming service and why others were not. Applicants should be prepared to do so in the event there is need to respond to a request for enlargement of issues.

The fourth requirement of a proposed programming showing is relating *what* programming service is proposed to meet *what* needs. In other words, a relating of the programming service to the needs of the community as they have been evaluated by the applicant.

The Commission has stated that an applicant may wish, in addition, to survey his listening public as to the types of *programs* they prefer. Once again, it is emphasized that this is *supplementary to* and apart from the survey of community needs. Here again, valid sampling methods are expected.The Commission indicates that the latitude a station has to

specialize in one type of entertainment programming (such as classical, country and western, rock 'n roll, soul music, talk and discussion) increases as the number and diversity of stations in its community increase.

Pursuant to the goals espoused by adoption of the "Programming Section" (IV-A), the Commission has also adopted rules to require 1) *broddcast notice* of the manner in which the public may express opinions about broadcast service and 2) the maintenance of a *local public file* of opinions received by licensees.[5] In addition, it has revised publication rules (Sec. 1.580) so that the public will have increased opportunities to participate in the formulation of licensees' programming decisions.

The Commission stated that it:

> . . . does not condone the practice of community groups waiting until long after an application for renewal of license has been filed before raising any complaints they may have concerning a station's policies or program practices. Complaints concerning a licensee's hiring or employment practices should be brought to the attention of the licensee and/or Commission immediately upon their occurrence, and this can be done any time during the license period. Likewise, community groups can and should take any complaints they may have concerning a licensee's programming or program policies to the licensee at any time during the license period. Such practices should serve to encourage better relationships between the licensee and concerned community groups. The practice of waiting until long after a renewal application is filed before seeking correction of alleged past derelictions of a licensee (which it has been given no prior opportunity to consider) is disruptive of the Commission's processes.

Hence, the Commission has and is currently taking affirmative action in order to stimulate broadcasters to both promise more and meet their promises with performance. In its actual renewal processes, the Commission will likely pay particular attention to the following: 1) the applicant's fulfillment of community tastes, needs and interest, and, particularly, his attention to community feedback; 2) the applicant's performance during the past renewal period in the critical programming categories (e.g., local pro-

grams, news, public affairs, etc.); 3) the applicant's programming proposals in his past renewal application as compared to his actual programming during the past renewal period; and 4) any information suggesting violation of the Act and/or Commission rules and policies.

Policy and Proposals: Employment Practices

Aside from the broad programming requirements, the Commission may, via its forfeiture power, impose sanctions for discriminatory practices in employment. The Commission has adopted rules which require that all broadcast stations with *five or more full time employees* establish, maintain, and carry out a positive, continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice.

To implement this latter provision of its Rules, the Commission requires that each of its permittees and licensees adopt programs which will:

a) Define the responsibility of each level of management to insure positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

b) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

c) Communicate the station's equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis;

d) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion or national origin from the station's personnel policies and practices and working conditions;

e) Conduct continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity

In addition, it is contemplated that broadcast application forms be revised so as to provide specific

sections wherein applicants for renewal or new facilities or for acquisition of facilities will have to state what specific practices will be followed in order to assure equal employment opportunity for Negroes, Orientals, American Indians and Spanish surnamed Americans in each of the following aspects of employment practice: recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff and termination. The "employment" section need not be filled in if the station has less than five full time employees or if it is in an area where the relevant minorities are represented in such insignificant number that a program would not be meaningful, in which case a statement of explanation will be required.

Commission Policy and Proposals: Advertising

Commission sanctions might also be taken at renewal, though not limited thereto, for a station's failure to eliminate any "false, misleading or deceptive advertising." In this regard, the Commission directs particular attention to the fact that licensee responsibility is "not limited merely to a review of the advertising copy submitted for broadcast, but the licensee has the additional obligation to take reasonable steps to satisfy himself as to the reliability and reputation of every prospective advertiser and as to his ability to fulfill promises made to the public over the licensed facilities."[8] Though it does not like to make judgments whether particular broadcast advertisements are false or misleading and generally defers on these matters to the FTC, the Commission may act in a clear, flagrant case. An Advertising Primer, outlining deceptive advertising regulations, is currently being explored with the FTC and would be of immense value to broadcasters.

Moreover, the Commission operates under a commercial policy which stipulates a normal commercial content of *18 minutes in each hour* with specified exceptions permitting up to 20 minutes in each hour during no more than 10 percent of the total weekly hours of operation. A further exception would per-

mit up to 22 minutes where the excess over the 20 minute ceiling is purely political advertising.

[1] 22 FCC 2nd 424 (1970).
[2] Especially *Citizens Communications Center* v. *FCC*, Case No. 24,471, decided June 11, 1971.
[3] Technical violations are also sources of Commission sanction. Because they are so varied and numerous, technical violations will not be treated in this article.
[4] Docket No. 19153, Adopted: February 17, 1971, Released: February 23, 1971.
[5] Educational broadcasters would be exempted from these proposed rules.
[6] FCC 61-1316, 11839 (§11:402).

Personal Attack

Of concern to broadcasters are the Commission's Rules governing "fairness"—the licensee's broad obligation to air all sides of a controversial issue of public importance.

Generally, the "Fairness Doctrine" requires that the broadcast licensee: 1) encourage, implement and foster the carriage of programming designed to expose public issues; and 2) afford a reasonable opportunity for all sides of important, controversial issues to be aired by the licensee's station.

The Rule

Specifically, the Commission's Rules (Section 73.123 for AM; 73.300 for FM, and 73.679 for TV) relating to the personal attack provisions of the Fairness Doctrine require that:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.
>
> (b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news

event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

(c) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, that where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The Commission believes licensees must act affirmatively to achieve compliance with the "Fairness Doctrine." However, the licensee has considerable discretion in choosing the particular form of affirmative action to be used. It is not a matter of choosing one method and rigidly adhering to it; the licensee's analysis of a particular situation and selection of the means to achieve "fairness" is what counts. Specifically, the Commission has stated (in a letter to *Mid-Florida Television Corporation*) that,

> The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith to choose the precise means of achieving fairness.

In practice, however, what do the various provisions of the rule mean?

Specific Rule Provisions

The personal attack provisions of the rule state that when, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee must, among other things, offer a reasonable opportunity to respond over his facilities.

The most significant problem with the rules is the *interpretation* of its provisions; that is, what is meant by "views of a controversial issue of public importance?" Additionally, it may be asked what is the definition of "an attack upon the honesty, character, or integrity of a person or group?"

In adopting personal attack provisions for "Fairness Doctrine" rules (Docket No. 16574, July 1967), the Commission stated that "we stress that the personal attack principle is applicable only in the discussion of a controversial issue of public importance." However, the Commission pointed out that some comments had been received which,

> [I]ndicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the "Fairness Doctrine." This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the "Fairness Doctrine."

In establishing these personal attack provisions, the Commission additionally noted that the purpose of establishing the rules was to clarify and make more precise the procedures which licensees are required to follow in personal attack situations:

> The long-applied standard of what constitutes a personal attack remains unaffected . . . [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character,

or honesty or like personal qualities, and not when an individual or group is simply named or referred to . . . Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable; it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above.

The Commission, however, also recognized that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule.

Succinctly, however, the Commission declared that,

> The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations. In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies. This would be the appropriate procedure should there arise a question of the applicability of the principle of a factual situation.

Therefore, in answer to the questions raised above concerning interpretation of the rule, the best course of action, in doubtful personal attack situations, is to *consult the Commission (either through your counsel or directly) for interpretation of its rules and policies.*

Specific Examples

Consider the following hypothetical cases to help your understanding of "Fairness Doctrine" and personal attack rule applicability: First, suppose your station *sells* time to an individual who uses your station to discuss a controversial issue of public importance. During his broadcast, he attacks a group opposing his point of view. May you restrict a reply to *purchased* time on your facility? **No.** Even if the first individual purchased time, you would be re-

quired to 1) notify the group attacked, within one week, of the date, time, and identification of the broadcast; 2) provide a script or tape of the broadcast attack; and 3) offer a reasonable opportunity to respond over your facilities.

Second, consider the following situations involving specific candidates or public-office holders: Suppose your station sells time to Candidate A, his authorized spokesman, an individual, a group, or an organization supporting Candidate A to urge his election. Candidate A does not appear personally on any of these broadcasts; however, issues in the campaign and/or the candidate are discussed. Then an authorized spokesman, an individual, a group, or an organization supporting Candidate B requests "fairness" time under the FCC's existing policies. Does the "Fairness Doctrine" apply? **Yes.** The Commission has held that the "Fairness Doctrine" is applicable and, in answering this question, the Commission reiterated "Fairness Doctrine" requirements: When a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views.

Would free time have to be provided to Candidate B's spokesmen or supporters? The Commission has held that the public's "right to know" cannot be defeated by the licensee's inability to obtain paid sponsorship for presentation of a contrasting viewpoint *even where the initial presentation was made under paid sponsorship.* However, when spokesmen or supporters of Candidate A have purchased time, the Commission feels *it would be inappropriate to require licensees to, in effect, subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen with free time.*

Suppose your station sells time to an individual, a group, or an organization supporting Candidate A and the time is used to criticize Candidate B or his position on the issues of the campaign. Authorized spokesmen, an individual, a group, or an organization supporting Candidate B request fairness time under the FCC's policies. Must you furnish time on

your station? The Commission says the "Fairness Doctrine" is applicable here; however, you would not be obligated to provide *free time* to authorized spokesmen for Candidate B, or to those associated with him in the campaign, *if authorized spokesmen for Candidate A, or those associated with him in the campaign, had* used paid time on your station to criticize Candidate B or his position on the campaign issues.

In other words this latest statement of Commission policy means if your station *sells time* to Candidate A, or to an individual, a group, or organization supporting Candidate A, and, 1) Candidate A does not appear personally on the program, but issues in the campaign and/or the candidate are discussed, or 2) the broadcast time is used to criticize Candidate B or his position on the issues of the campaign, *then the "Fairness Doctrine" does apply* and time must be made available; however, *you would not be obligated to provide free time.*

Conclusion

Obviously, the problems presented by the "Fairness Doctrine" and its rules relating specifically to personal attack are many. When specific factual situations arise which may cause potential trouble for your station, you should contact your counsel at once.

The Fairness Doctrine

In general, this doctrine requires that the broadcast licensee: (1) encourage, implement and foster the carriage of programming designed to expose public issues; and (2) afford a reasonable opportunity for all sides of important, controversial issues to be aired by the licensee's station.

Evolution of the Fairness Doctrine

The Fairness Doctrine has grown out of a series of cases. Its definitive policy statement appeared in the Federal Communications Commission's 1949 *Editorializing Report*,[1] and was the subject of the 1969 landmark case, *Red Lion Broadcasting Company, Inc. v. FCC.*

As noted in its *Editorializing Report*, the Commission has always believed that the full implementation of the Fairness Doctrine places an *affirmative* obligation on broadcast licensees:

> If . . . the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to chose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views.

In a letter to *Mid-Florida Television Corporation*, the Commission further explained the "affirmative obligations" of broadcast licensees:

> The mechanics of achieving fairness will necessarily vary with the circumstances and it is within

> the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith to choose the precise means of achieving fairness.

Thus the Commission believes *licensees must act affirmatively* to achieve compliance with the Fairness Doctrine. However, the licensee has considerable discretion in choosing the particular form of affirmative action to be used. It is not a matter of choosing one method and rigidly adhering to it; the licensee's analysis of a particular situation and selection of the means to achieve "fairness" is what counts.

In *Red Lion* the Supreme Court noted the broadcast licensee's duty, as pronounced by the Commission, to give adequate coverage to public issues and, in so doing, to meet the requirements of the Fairness Doctrine. The Court also pointed out that "this must be done at the broadcaster's own expense, if sponorship is unavailable," and "the duty must be met by programming obtained at the licensee's own initiative if available from no other source."

Fairness Doctrine refinements

In its letter of June 3, 1970, to Nicholas Zapple, Communications Counsel, Committee on Commerce, United States Senate, the Commission presented hypothetical cases to explain its more restrictive applications of the Fairness Doctrine.

Consider the following situation: Your station

sells time to candidate A, his authorized spokesman, an individual, a group, or an organization supporting candidate A to urge his election. Candidate A does not appear personally on any of these broadcasts; however, issues in the campaign and/or the candidate are discussed. Then an authorized spokesman, an individual, a group, or an organization supporting candidate B requests "fairness" time under the FCC's existing policies. Does the Fairness Doctrine apply?

Yes. The Commission has clearly held that the Fairness Doctrine is applicable[2] and, in answering this question, the Commission reiterated what the Fairness Doctrine requires: When a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views.

> Where a spokesman for, or a supporter of Candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues, there has clearly been the presentation of one side of a controversial issue of public importance. It is equally clear that spokesmen for or supporters of opposing Candidate B are not only appropriate, but the logical spokesmen for presenting contrasting views. Therefore, barring unusual circumstances, it would not be resonable for a licensee to refuse to sell time to spokesmen for or supporters of Candidate B comparable to that previously bought on behalf of Candidate A.

Would *free time* have to be provided to candidate B's spokesmen or supporters? The Commission has held that the public's "right to know" cannot be defeated by the licensee's inability to obtain paid sponsorship for presentation of a contrasting viewpoint *even where the initial presentation was made under paid sponsorship.*[3] However, when spokesmen or supporters of Candidate A have purchased time, the Commission feels *it would be inappropriate to require licensees to, in effect, subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen with free time.*

Suppose your station sells time to an individual, a group, or an organization supporting Candidate A and the time is used to criticize Candidate B or his position on the issues of the campaign. Authorized spokesmen, an individual, a group, or an organization supporting Candidate B request fairness time under the FCC's policies. Must you furnish time on your station?

The Commission says the Fairness Doctrine is applicable here; however, you would not be obligated to provide *free time* to authorized spokesmen for Candidate B, or to those associated with him in the campaign, *if authorized spokesmen for Candidate A, or those associated with him in the campaign, had used paid time* on your station to criticize Candidate B or his position on the campaign issues.

In other words this latest statement of Commission policy means if your station *sells time* to Candidate A, or to an individual, a group, or organization supporting Candidate A, and (1) Candidate A does not appear personally on the program, but issues in the campaign and/or the candidate are discussed, or (2) the broadcast time is used to criticize Candidate B or his position on the issues of the campaign, *then the Fairness Doctrine does apply* and time must be made available; however, *you would not be obligated to provide free time.*

Proposed new rules

The Commission is now considering whether it should place licensees under an *even more compelling obligation to actually seek out appropriate spokesmen* to represent one side of a controversial issue of public importance.

Last year the Commission considered a case where a licensee, after presenting only one side of a controversial issue in an editorial, had rejected a spokesman for the other side as inappropriate. The Commission held that while such rejection

may come within the wide latitude given the licensee under the general provisions of the Fairness Doctrine, the licensee was under a *compelling obligation* to take steps to obtain an appropriate spokesman. Thus, the licensee could *not* rely on general announcements over the air but, instead, had to invite specific persons believed to be appropriate spokesmen to appear.[4]

The Commission now proposes that where a licensee presents only one side of a controversial issue in a *series of broadcasts* (more than one broadcast) within a "reasonable" time period (probably six to nine months or less), with no plans of its own to present other viewpoints, the licensee may rely upon the general announcement technique *only for the first presentation.* If no appropriate spokesmen come forward as a result of the on-the-air announcement and the same controversial subject is again discussed, the licensee must directly contact specific persons believed to be appropriate spokesmen to present the contrasting viewpoint.

These persons must be given the essence of what has been broadcast and offered a "clear and unambiguous opportunity" to respond.

Under the proposed rules, therefore, if a licensee broadcasts more than one "program" on a controversial subject, and no group or individual comes forward in response to the licensee's on-the-air invitation to present opposing viewpoints, then the licensee must actively go out and find "appropriate spokesmen" to present the opposing view—even if these "appropriate spokesmen" have neither seen nor heard the licensee's initial broadcast.

Conclusion

The Commission continues to expand broadcaster's responsibilities under the Fairness Doctrine. The *Red Lion* case of 1969 has sharpened Commission sensibilities and, as a result, has

placed a greater burden on the broadcaster.

You and your staff should carefully consider all of the foregoing in planning your programming. If you have questionable areas of Fairness Doctrine applicability, get in touch with your counsel.

The Fairness Doctrine continues to generate voluminous mail each month to the Commission. Thoughtful planning and a genuine effort to broadcast all sides of controversial issues will, hopefully, free your station from Commission inquiry.

1. 3 FCC 1246 (1949)
2. Letter to Nicholas Zapple 19 RR 2d 421, (1970)
3. Cullman Broadcasting Company, 40 FCC 576, 25 RR 895 (1963)
4. Richard C. Ruff, 19 FCC 2nd 838 (1969)

New Dimensions to "Fairness"

The United States Court of Appeals for the District of Columbia Circuit has just issued a decision which is reverberating around broadcast licensee's control rooms throughout the country. The Court has, in effect, added a new dimension to "fairness" by declaring that, as a general policy, a broadcaster *cannot* refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. That is, if a broadcaster sells time on its facilities to regular commercial advertisers, it must also sell time to groups or individuals who wish to speak on controversial issues.

There is still much controversy over the exact scope of the Court's order. However, the reality to you, the broadcaster, is that you may very well face some knotty legal questions in refusing to make time available to groups or individuals who wish to use your facilities to speak out on controversial subjects.

Before discussing the Court's pronouncements, a review of the broad precepts of the "Fairness Doctrine" is in order.

Basic Fairness Doctrine

The Fairness Doctrine concerns a broadcast licensee's broad obligation to air all sides of a controversy of public importance. In general, this doctrine requires that the broadcast licensee: (1) encourage, implement and foster the carriage of programming designed to expose public issues; and (2) afford a reasonable opportunity for all

sides of important, controversial issues to be aired by the licensee's station.

The Fairness Doctrine has evolved out of a series of cases. Its definitive policy statement appeared in the Federal Communication's 1949 *Editorializing Report*, and was the subject of the 1969 landmark case, *Red Lion Broadcasting Company, Inc. v. FCC*. The Commission believes that the full implementation of the Fairness Doctrine places an "affirmative obligation" on broadcast licensees:

> If . . . the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views.[1]

What is meant by an "affirmative obligation?" The Commission attempted to explain its interpretation in a letter to *Mid-Florida Television Corporation:*

> The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith, to choose the precise means of achieving fairness."

However, in view of the Court's recent decision, can it now be correctly stated that it is, in

fact, "within the discretion of the licensee . . . to choose the precise means of achieving fairness?"

The Court's Decision

According to the decision of the Court of Appeals in *Business Executives' Move for Vietnam Peace v. FCC, et al,* the broadcaster still retains considerable discretion in methods of achieving fairness. The Court simply says that broadcasters may *not* refuse to sell advertising time to groups or individuals wishing to speak out on controversial issues. Obviously, many do not agree with the Court's "simple" pronouncement; industry reaction has been swift and vocal —much of it adamantly against the Court's decision.

The case arose before the Court as a result of The Business Executives' Move for Vietnam Peace attempt to *purchase* time on a station in Washington, D.C., for broadcast of several recorded one-minute announcements which it believed "offered the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time."

The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations," and featured statements by leading businessmen and retired military officers.

The Washington radio station, over a period of eight months, repeatedly refused to sell any time to the business executives. According to the Court, the station cited no particular objection to the planned announcements. Rather, the station relied solely upon an across-the-board policy barring all editorial advertisements, recognizing "its long-established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues."

In essence, the Federal Communication Commission agreed with the station. Before the Court, the Commission argued that it is permissible for

a licensee to follow a general policy of rejecting all editorial advertisements, because (1) the fairness doctrine should be interpreted to all rejection of paid controversial advertisements since licensees have a broad leeway to exercise their professional judgment as to the format for presentation of controversial issues. Therefore, acceptance of the particular format of paid advertising was by no means compulsory; and (2) the First Amendent was equally permissive and to do otherwise would create chaos in broadcasting.

Noting that the broadcast media "function as both our foremost forum for public speech and our most important educator of an informed people," the Court rejected the arguments set forth and noted that the narrow question at hand was whether such groups or individuals have a limited right of access to radio and television for *paid* public issue announcements, and whether the Commission's ruling that a *total exclusion* of such announcements was permissible.

In response to the argument that chaos would result from non-exclusion of paid advertisements, or that those groups with the most amount of money would tend to dominate the airwaves (since they could afford to purchase more air time), the Court indicated that regulations must be developed by the Commission and broadcasters. But in so doing, basic guidelines of immediate importance to broadcasters were developed. The Court declared,

> Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to 'non-prime time' or any other major discrimination in the placement of editorial advertisements

would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that some such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that non-commercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A one-sided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting some editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow view-

point. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. However, we are confident of the Commission's ability to set down guidelines which avoid that danger."

In a scathing slap at the industry, the Court, in conclusion, declared as follows:

> The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism (sometimes said to be characteristic of radio and television as a whole) have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.
>
> Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country."
>
> We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an extreme form of control which totally excludes controversial public debate from broadcast advertising time.
>
> We hold specifically that a flat ban on paid public issue announcements is in violation of the

First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or for that matter, of any other particular applicant for air time —must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

[1] 3 FCC 1246 (1969)

The Supreme Court Speaks On Fairness

The widely-heralded Red Lion—RTNDA case was decided by the U.S. Supreme Court on June 9, 1969. In this case, a consolidation of two conflicting lower court decisions granted certiorari, the Court finally settled the constitutionality of the Fairness Doctrine and Personal Attack Rules.

The Fairness Doctrine

The Fairness Doctrine requires that broadcast licensees: (1) encourage, implement and foster the carriage of programming designed to expose public issues and (2) afford a reasonable opportunity for airing all sides of important, controversial issues carried over the broadcaster's station.

The Cullman Broadcasting Co. case, 25 RR 895 (1963), required the broadcaster to provide *balanced* exposure of controversial issues—at his own expense, if necessary. Another series of cases —including Metropolitan Broadcasting Corp., 19 RR 602 (1959—required broadcasters to carry all sides of such issues, at their own expense, if necessary, and to initiate special programming when necessary in order to provide balanced coverage of controversial issues. In 1959, the United States Congress amended the "equal time for political candidates" requirements of Section 315 of the Communications Act. Almost parenthetically in that amendment Congress alluded to " . . . the obligation imposed upon them (broadcasters) under this Act . . . to afford reasonable opportunity for the discussion of conflicting views on issues of

public importance." The Commission viewed this language as a statutory approval of the Fairness Doctrine. And now, so do the courts.

Since its first formal articulation in the Commission's 1949 *Report on Editorializing*, 13 FCC 1246, the Fairness Doctrine has thus acquired substantial support from the Commission's policy statements and case precedent, and received indirect approval from the United States Congress. But until Red Lion—RTNDA, there was, nevertheless, extensive controversy as to the legal validity of the Fairness Doctrine.

The Fairness Doctrine was held constitutional in a June, 1967, decision by the U.S. Circuit Court of Appeals for the District of Columbia. But then, in September, 1968, one aspect of the Fairness Doctrine—the Personal Attack Rules—was held unconstitutional by the U.S. Court of Appeals for the Seventh Circuit (Chicago). It was this conflict that brought the Supreme Court to consider the question.

The Personal Attack Rules

Unfortunately, there is an unavoidable overlap between the Fairness Doctrine and Section 315 of the Communications Act. Section 315 pertains *only* to political candidates. The Fairness Doctrine, however, concerns the licensee's *broad* obligation to air all sides of a controversy of public importance. Obviously, a hotly contested campaign for public office (normally covered by Section 315) might also constitute a "matter of public importance," apparently falling under the Fairness Doctrine and obligating the broadcaster to offer "free" time, if necessary, for "fair" coverage of all sides of the controversial matter.

Into this overlap the personal attack rules began to emerge in the early 1960's. Personal attacks tend to arise from discussions of extremely controversial issues and/or discussions by one political candidate (or his spokesman) about another political candidate. The Fairness Doctrine,

because of its breadth, would be applicable to both situations. A logical extension of the Fairness Doctrine would (the Commission decided) require broadcasters to provide the person or group attacked with an opportunity to respond—not on an equal time basis (pursuant to Section 315 of the Act), but on a reasonably comparable time basis (pursuant to the Fairness Doctrine).

After the considerable delay typical of its gradual, back-door approach to major new regulation, the Commission proposed in 1966 to adopt Personal Attack Rules. On July 5, 1967, the Commission revised its Rules by adding Section 73.300 (AM), 73.598 (FM), and 73.679 (TV) to provide, in substance that:

> (1) If during program presentations of controversial issues, an attack is made upon the honesty, character, or integrity of an *identified* person or group, the licensee shall (within a week after the attack) provide the parties attacked with the specifics of the attack (a script or tape of the attack or, if neither be available, an accurate summary of the attack) and offer a reasonable opportunity to respond on-the-air. This principle would be applicable to a statement by a representative of a political candidate whenever an attack is lodged against the opposing candidate. (Naturally, if a political candidate is the one launching the attack, Section 315 of the Act comes into play. The broadcaster is required to provide the opposing candidate with "equal time.")
> (2) The provisions of the Personal Attack Rules have not been made applicable to attacks by foreigners or to comments made on bonified newscasts.
> (3) In the case of editorials, in which the licensee endorses or opposes legal candidates, notice and an offer of time must be given within 24 hours.

In the 1967 Red Lion case, the complainants launched an unsuccessful challenge against the entire Fairness Doctrine. In the 1968 RTNDA case, the Chicago appellate court, while not ruling that the *entire* Fairness Doctrine was unconstitutional, did hold that the Personal Attack Rules would inhibit broadcast dissemination of views on political candidates and controversial issues, that

the Commission's Personal Attack Rules were too vague, that the First Amendment of the Constitution applies equally to the press and the broadcast media, and that the Personal Attack Rules contravene the First Amendment and as such are unconstitutional. The Chicago Court concluded that the Commission's Order adopting the Personal Attack Rules must be "set aside."

The Fairness Doctrine and Personal Attack Rules—the Court's Dicta

The Supreme Court stepped in to resolve the issues, pointing out in Red Lion—RTNDA dicta that:

(1) The United States Congress has authorized the Fairness Doctrine and the Commission's Rules on personal attacks and political editorial.

(2) Such Rules and policies do not abridge the freedoms of speech and press protected by the First Amendment but, instead foster those objectives; accordingly, they are legally valid and constitutional.

(3) Wherever a personal attack has been lodged against the person involved in a public issue, the Fairness Doctrine and the Commission's Rules require that the individual attacked be offered an opportunity to respond.

(4) The Fairness Doctrine compels broadcasters to provide adequate coverage of issues and to be fair in its treatment and exposition of opposing views. Such opposing views must be offered, even if it must be done at the broadcaster's own initiative and expense.

(5) If one candidate is endorsed in a political editorial, the other candidates must be offered time to reply either personally or by spokesman. (In effect, the Supreme Court has made it most imprudent for any broadcaster to carry an editorial endorsing a political candidate, because the opposing candidate will then be able to claim the opportunity to appear personally.)

(6) The Commission has broad power ("not niggardly, but expansive") to make sure that broadcasters operate in the public interest. Arguments that the Personal Attack Doctrine and/or the Fairness Doctrine in general contravene the basic freedoms of speech and press were vastly outweighed, the Court decided, by the broad mandate Congress has given the FCC.

(7) The Court explained at length the statutory background of the Fairness Doctrine, so as to assert the legal basis of the Commission's powers in this area.

(8) The public-interest language of the Communications Act, the Court noted, authorizes the Commission to *require* licensees to use their stations for discussion of public issues. The Commission is free to implement this requirement by reasonable rules and regulations, as long as it does not abridge freedom of speech and press and is not performing censorship as proscribed by Section 326 of the Act. (Unfortunately, the language is not helpful in outlining what boundaries, if any, limit the Commission in dictating the amount and content of public issue and/or other programming that must be carried by licensees. In fact, the dicta of the case may well be read some day as the foundation of program censorship and control by the Federal Government. Many current regulatory powers of the Commission were once viewed as equally ludicrous.)

(9) Perhaps the decision implies that the First Amendment standards (and protections) are different for broadcasters than they are for the public. The Court noted that where there are substantially more individuals who might seek broadcasting facilities than there are frequencies to allocate, it would be inane to accord the broadcasters with full First Amendment rights. (This observation seems inconsistent with a number of cases decided by lower federal appellate courts and appears to give the Commission the broadest sanction it could have hoped for.)

10) It is the right of viewers and listeners which is paramount, not the right of broadcasters.

(11) The Commission could require broadcasters to share their frequencies with others. The First Amendment confers on broadcasters no right to prevent others from broadcasting on their frequencies and no right to an unconditional monopoly of the scarce resource.

(12) There is at least a possibility that the Personal Attack and Political Editorial Rules will lead to elimination of coverage of controversial issues. However, the Commission has the power to insist that licensees give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees as trustees for the entire community, obligated to give suitable time and attention to matters of great public concern.

(13) Despite the Court's extremely broad language, it did not ratify every past and future decision by the Commission with regard to programming. It did, however, create the impression that there are no effective prohibitions against greatly increased regulation of broadcasting by the Commission.

Conclusion

Ostensibly, this case stands for little more than the premise that the Fairness Doctrine and related Personal Attack Rules are legally valid and constitutional. Unfortunately, the overtones of the case appear to transcend the relatively narrow boundaries of the Fairness Doctrine. In effect the Red Lion—RTNDA case gives the Commission a "green light" to adopt virtually any regulation that appears feasibly related to the ephemeral concept of public interest. Clearly, it is a case you should pay close attention to and review with your legal counsel.

Boundaries of "Obscene or Indecent" Language Over-the-Air

The question as to the scope of permissible language over-the-air has been the subject of heated debate in the courts, at the Commission, and a problem of great dimension to broadcasters. How does a broadcaster best balance the interests of a specialized audience's right to hear speech which is "like it is" with the general audience's right to be free from listening to language which offends their personal standards of decency? To what limits may a broadcaster allow an interviewed guest to come forth with spontaneous utterances of salty language? Will a broadcaster's restrictions on the type of language used inhibit or enhance the desired "robust and wide-open debate"[1] encouraged by the FCC?

In a series of forthright opinions on free speech, U.S. Courts have proscribed certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[2]. In all cases, the courts have set standards for proscribed speech which take into account the considerations which gave birth to the nomenclature—the nature of the speech and the circumstances under which it was uttered.

With both the constitutional imperative and historical case precedents in mind, Congress, in 1948, passed legislation which prohibited "obscene, indecent, or profane language by means of radio communication" and imposed a punishment of up to $10,000 fine or imprisonment of up to two years[3]. Its language was derived from Section 326 of the 1934 Federal Communications Act which expressed, to a substantial degree, that this prohibition was *not* to be construed as giving the Commission the power of censorship over programming.

The few opinions construing the U.S. Code 1464 prohibition have, when taken together, involved a mixing of principles which tend to obliterate any clear demarcation or distinction. Like the "freedom of speech" cases before them, the FCC and the courts have imposed no semantic straitjacket in defining a standard for "obscene, indecent, or profane language." *Per contra*, in the few pertinent cases, they have attempted to balance a number of considerations, including the following:[4]
1) Whether to the average person, applying contemporary community standards, the dominant theme of the language taken as a whole appealed to prurient interests;[5] 2) the subject matter of the program, the context in which the utterance was made, and the value or relevance of the utterance to the segment of listeners to which it was directed; 3) whether the questionable language was essential to the integrity or reality of the presentation; 4) the time of the broadcast, the likelihood that children might be in the audience, and the mitigating fact of cautionary announcements; 5) whether the broadcaster had an opportunity to control the content of the speech, whether the utterance was spontaneous, and whether the program presented was live or filmed.

Like the criterion established in the general "obscenity cases" *(Roth, Jacobellis, Memoirs, Ginsburg)*, the prevailing limits of permissible language

over-the-air is, at best, confusing. An attempt to cite the perimeters of free speech, in order to give broadcasters some boundaries for judging their own problems in this area, follows.

Marginal or objectionable language, which falls into the category of "obscene, indecent, or profane," often occurs over-the-air during the "talk show" or "personal interview." Such language usually appears in the form of the curse expletive ("hell," "damn," "God damn it!") or the sexual expletive ("f. . .," "m.f.," "s. . ."). In the *WUHY-FM* case, the FCC found the personal interview comments of Jerry Garcia of the rock music group, "The Grateful Dead," to fall within the 1464 prohibition. Garcia's use of sexual expletives interspersed with his comments were found objectionable to the FCC because of the following:

a) Although such language is commonly used in the average person's everyday personal life, it is not commonly used in public (e.g., on an elevator, when testifying in court).

b) Such language has no redeeming social value, is patently offensive, and conveys no extension of thought or meaning to the interviewee's comments.

c) The use of such language has very serious consequences to the "public interest in the larger and more effective use of (broadcast media)."[6]

The Commission distinguished between "obscene" and "indecent" in finding Garcia's language objectionable. Finding that his use of sexual expletives had no "dominant appeal to prurience or sexual matters," and, hence, was not obscene, the Commission found such language "indecent." By this, it meant the "vulgar, coarse and offensive use of sexual terminology in a manner far exceeding the bounds of common decency."[7] Hence, the broadcaster must be cautious in permitting guest interviewees who tend to use such language to appear lest he be faced with (a) a law suit or (b) the loss of part of his viewing audience.

In another recent case, the courts found the spontaneous use of curse expletives by an interviewed guest not prohibited by 1464.[8] Here, the words "God damn it" uttered in a moment of anger were held not to be "obscene, indecent or profane." Determinative factors in *Gagliardo* were:

a) The words were delivered in the heat of debate and were not a matter of course.

b) The interviewee's intent to use the words uttered could not be proved.

Thus, a distinction emerged which appears to permit the spontaneous utterance by an interviewed guest, but not the voluntary expression—for voluntariness implies the power of choice. It is the duty of the broadcaster to control the language content of his programs. Analysis of the foregoing cases reflects the following general guidelines:

a) If a broadcaster has an interview containing objectionable language on tape or film, he'd be wise to refrain from broadcasting same. That the interviewee has spoken spontaneously no longer prevails as the issue; the *broadcaster* has had time to consider the interview's contents and, unlike the interviewee, can choose not to air it.

b) It is not so much the words used as the manner and context in which they are utilized which is determinative. If used spontaneously and without warning to the broadcaster, he is not charged with the burden of control.

c) The broadcaster will be held accountable for objectionable language by interviewed guests unless he can show that such language was essential to the integrity or reality of the presentation. In this case, the broadcaster is usually protected if the presentation is limited to readings from classics or descriptions of works of art.

Obviously, the Commission possesses great latitude in proceeding in this area under the "public interest" standard. Heretofore, it has yielded free

speech a "preferred position" and given nearly all language full protection of the guarantees. It would prefer not to be responsible for interpreting and applying 1464 at all. Relying on the principle in *Burstyn*,[9] the Commission regards the interpretation of 1464 as "a matter of first impression which can only be definitively settled by the courts."[10] With the boundaries of permissible language inconstant and the value varieties utilized by the Commission and the courts for determining language that is "obscene, indecent, or profane" so ephemeral, the broadcaster would be wise to seek the advice of counsel whenever a 1464 problem arises.

1. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367.
2. See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), 86 L.Ed. 1031, 1035, 62 S.Ct. 766, opinion by J. Murphy.
3. 18 U.S.C. §1464.
4. See *In re WUHY-FM*, 24 FCC 2d 408 at 410.
5. *Roth* v. *U. S.*, 354 U.S. 476, at 479, 77 S.Ct. 1304, at 1311 (1957).
6. Section 303(g).
7. The Commission relied heavily on *U. S.* v. *Limehouse*, 285 U.S. 424, 52 S.Ct. 412, 76 L.Ed. 843 (1932) which held that the word "filthy" included language that was "course, vulgar, disgusting and indecent and plainly related to sexual matters."
8. *Gagliardo* v. *U. S.*, 366 F.2d 720 (1966).
9. *Burstyn* v. *Wilson*, 343 U.S. 495, 502-503 (1951).
10. *In re WUHY-FM*, *supra*, at 342.

Seven-Day Rule Amended

A recent FCC news release reads, in part:

> Complaints to the Commission from the public during April [1970] totaled 3,298 . . . .
>
> Because of numerous local and state primary elections, there were a considerable number of complaints and inquiries regarding Section 315 of the Communications Act . . . .

All broadcast and cable licensees have an obligation to provide "equal time" to opposing candidates for public office. As the news release quoted above indicates, the "equal time" provisions of the Communications Act cause much concern and many problems.

The Commission, of course, has to balance the interests of the candidates with the interests of the licensee: the broadcaster must be able to plan his airtime and other schedules beforehand. Thus, to bring about advance notification to the broadcaster of his obligations to opposing candidates, the FCC adopted in 1959 what has become known as the "Seven Day Rule." It forces candidates to file their "equal time" requests early. This rule has been further refined and amended in 1970.

Seven Day Rule Examined

Suppose Candidate X purchased and used many hours of broadcast time during his entire

campaign. Could his opponent, Candidate Z, wait until the last week before election day and then present his claim for equal time on your station? According to the Commission's "Seven-Day Rule" (before amendment in 1970), "a request for equal opportunities must be submitted to the licensee within one week of the day on which the prior use occurred."[1]

Under this rule, Candidate Z could not request equal time for those broadcasts that occurred *more than seven days before his request.* So, if Candidate X has purchased and used 18 hours during three months of his campaign, but used only one hour in the week preceding Candidate Z's request, Z would be *entitled* to only one hour of broadcast time under the "Seven-Day Rule" of the equal time provisions.

Suppose, however, Candidate X broadcasts a campaign speech on September 23. Within seven days, Candidate Y requests "equal time." Candidate Y's appearance is announced on the air before broadcast time. Candidate Z, learning of Y's forthcoming broadcast, makes a request for equal time, some 17 days *after* Candidate X used his air time. Has Candidate Z filed his request in time? Do the "equal time" provisions apply? Or, has Z been cut off by the "Seven-Day Rule?"

Before answering these questions, it would be appropriate to review Section 315 and examine its pertinent provisions.

Section 315 in General

Briefly, Section 315 provides that any broadcaster who allows the "use" of his facilities by any legally qualified candidate must provide "equal opportunities," without censorship, to all other such candidates with comparable times, rates, and treatment.

A "legally qualified candidate" is defined as one for whom the electorate can vote. If *write-in* candidates are permissible under your state or

local law, then these individuals must be considered legally qualified candidates.

The term "use" of a broadcaster's facilities by a candidate is broadly defined as any and all appearances by a candidate *other than* for a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event.

"Equal opportunities" is defined as comparable time, rates, and treatment. Comparable time does not necessarily mean the exact day, hour, and show, but, rather, about the same amount of time in a time segment of equal commercial value.

Keep this in mind and the simple statements of Section 315 and pertinent Commission rules become more meaningful. Of course, broadcasters must remember the most important rule: A station need not carry *any* political broadcast. However, if the station permits the use of its facilities by one candidate, it must afford equal opportunities to all candidates for *that* office during *that* campaign.

Amendment to "Seven-Day" Rule

Returning to our situation above, it is interesting to note that the Commission construed its Rule to hold that Candidate Z had "timely filed" his request for equal time, even though such request was filed some 17 days after Candidate X had first "used" the broadcast facilities.[2]

A television station had argued that the "prior use" terminology of the "Seven-Day Rule" referred to the original telecast by Candidate Z. Declared the TV station:

> To reach any other conclusion would make possible a *chain* of "equal time" requests which would go on and on, each succeeding request triggered by a preceding grant of "equal time" and would negate completely the one-week cut-off which obviously is the underlying reason for . . . [the Rule].

Not so, replied the Commission. *The FCC's reasoning: The rule provided merely that the broadcaster must receive a request for equal time within one week of the day on which the prior use occurred.* "To have the restrictive effect urged . . . the rule would have to be explicitly worded in terms of "the *prior first* . . . use." (Emphasis supplied.)

The Commission also declared that the "Seven-Day Rule" allowed for sufficiently orderly planning by the broadcaster, supposedly fully effective in a two-candidate race, and "as a practical matter, [it] would appear to be effective in all races, since candidates usually desire time and do not let their Section 315 right depend on the action of their rivals."

Wrong. In little more than 19 months, *the FCC reversed its reasoning* and declared, "our further consideration of this problem leads us to the view that the [Seven-Day Rule] as presently written may well have an adverse effect upon the orderly planning of station activities in political broadcast situations."

The Commission has thus placed new emphasis on broadcasters' scheduling problems, recognizing that licensees should have specific knowledge about obligations under Section 315 within a reasonable time after opposing candidates have acquired rights to "equal opportunities."

No limitation has been placed on *when* a candidate must actually "use" his "equal time"—although timing clearly cannot be "unreasonable." The Commission has announced "we believe that the licensee should know of his Section 315 obligations not later than *seven days after they first arise.*"

Under this amendment to the "Seven-Day Rule," chain requests (contemplated in our situation above) would be eliminated. The FCC now recognizes that this problem is becoming increasingly significant, especially in view of the large number of multi-candidate races. In fact, where

the "equal time" appearance of a second candidate (Candidate Y above) takes place shortly before election day, the broadcast licensee may be unable to accord "equal opportunities" to all other candidates (Candidate Z and others, *ad infinitum*) in the time remaining before the election.

To avoid this undesirable situation, the "Seven-Day Rule" *has now been amended to read as follows:*

> A request for equal opportunities must be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred; *Provided* however, that where the person was not a candidate at the time of such first prior use, he shall submit his request within one week of the first subsequent use after he has become a legally qualified candidate for the office in question.

The proviso in the amended rule means that any new candidate requesting equal opportunities could do so after he becomes a candidate and requests equal time within seven days of a subsequent use by his opponent.

The key words to the amendment are, of course, "the first prior use." These are precisely the words contemplated by the Commission in the 1968 situation noted above. By the addition of this term, chain requests for equal time have virtually been eliminated. The broadcaster may rest somewhat easier, now that he can expect to know (in almost every instance), within seven days of the first candidate's use of his facilities, how much "equal time" must be made available.

Conclusion

Consider the following hypothetical situations:

1) Candidate A, seeking a U.S. Senate seat, comes to your station and requests broadcast time to make a speech on his behalf. He offers to pay your rate card price. Must you make time available? *No*, as long as you have not made time available to other candidates for the same office. Re-

member, your station need not carry any political broadcast—but if you permit the use of your facilities by one candidate, you must afford equal opportunities to all candidates for *that* office during *that* campaign.

2) Suppose Candidate A buys time on your station and broadcasts a speech on August 1. Candidate B requests "equal time" on August 6 for a broadcast on August 15. Must you make time available to Candidate B? *Yes.* Under both the old Seven Day Rule and the new amended rule, B has filed a timely request for equal time.

3) Under the situation given in (2) above, suppose Candidate C then hears B's broadcast of August 15 and seven days later, on August 22, requests equal time. Is Candidate C entitled to equal time? *No.* The amended Seven-Day Rule, now in effect, eliminates this possible "chain" of requests. Candidate C (unless he had become a candidate after August 1, but before August 15, under the proviso of the Rule noted above) would be precluded from using your facilities by the way of a request for "equal time."

The Commission's amendment of the "Seven-Day Rule" permits easier scheduling and planning by the broadcaster. The licensee will now be able to ascertain the full scope of his equal time responsibilities within seven days after he first allows the use of his station by a candidate. The only exception, of course, would occur if a new candidate qualifies after the first use of the facility.

Election time is generally a lucrative period for broadcasters with sizable "off-the-rate-card" purchases, prepaid. The FCC's elimination of those possible chain requests (arising under its old rules) now enables the broadcaster to plan his schedule well in advance.

1. Sections 73.120(e) (AM stations); 73.290(e) (FM); 73.590(e) (Educational FM); 73.657(e) (TV); 74.1113(d) (CATV).

2. Letter to William S. Green, 15 FCC 2d 96, 14 RR 2d 544 (1968).

The Lottery Statute: Contests and Promotions

WITH MEMORANDUM Opinions and Orders[1] issued June 6, 1969, the Commission relieved three stations of forfeitures assessed in letters dated January 10, 1968. The forefeitures ($2000 against both WNEP-TV and WBRE-TV, and $1000 against WMUU) resulted from violations of Section 1304 of Title 18, United States Code, which prohibits broadcast of lottery information. The reason given in the June 6 action for lifting the assessments was that there had been no prior judicial or Commission decisions from which the licensees could reasonably have anticipated that their broadcasts violated Section 1304. All three cases dealt with the issue of "consideration" in the contests promoted by the stations.

To constitute a lottery within the legal prohibition, a promotional scheme must contain three essential elements—a *prize*, whose winner is chosen by *chance* from a group of contestants who have furnished *consideration* in order to be eligible for the prize. If the element of consideration is absent from a scheme, it is not a lottery and thus avoids the prohibition of the section. To eliminate this element from the contests, the Commission said, "Nonpurchasing contestants must be able to obtain chances in the same places at the same times, and in the same number as purchasing contestants, in a setting which does not otherwise encourage a purchase." Since this was not the case in the contests advertised on the three stations, the Commission assessed forfeitures for broadcasting lottery information. The result of the cases was to

expand the lottery rules somewhat, although the Commission decided it would not be appropriate to enforce the expanded interpretation of "consideration" against the three stations.

WMUU Case

WMUU broadcast the following commercial announcement concerning a Pepsi-Cola "Bottle Cap" prize plan:

> Pepsi is giving away 400 compact, portable tape machines in Greenville, Spartanburg, Laurens, Union and Cherokee Counties. If you're among the first 400 people to find the words 'transistor tape player' under a Pepsi cap, you'll be the proud winner of a tape player.

While paid chances were available wherever Pepsi-Cola was sold, free chances were available only from the local bottling company or local route salesmen. The standard, however, is that free chances must have "reasonable equal availability" with paid chances, and the Pepsi promotion did not meet it. Nonpurchasing contestants must be able to obtain chances in tne same places at the same times as purchasing contestants in a setting which does not otherwise encourage a purchase. Thus, in any "on-product" merchandise-sales promotion (where some chances are attached to the product and other chances are given free), "reasonably equally available" means that such free chances can be readily obtained from *all or at least most* of the customary retail outlets for such products—such as grocery stores and supermarkets.

Although the licensee has a responsibility to review announcements carefully for completeness and accuracy, the WMUU broadcast did not mention that free chances were available. Any announcement of this kind of promotional scheme should adequately describe the availability of free chances and the locations, times and manner in which they may be obtained. The Commission found that such cryptic phrases as "no purchase

necessary" or "nothing to buy" do not meet this requirement. Further, the way the operation is carried out is as important as the way its rules describe it. The licensee must therefore make certain that the scheme is being carried out in accordance with the rules.

WNEP-TV and WBRE-TV Cases

Here is an example of the promotions presented by WNEP-TV and WBRE-TV:

> 'I won $25.00 in cash.'
> 'I won $5.00 in cash.'
> Yes, you can win cash from Vaughn's bread. Look for the 'win cash' coupon in Vaughn's white bread, in the thrifty king size, farm style and many more. If the number on your coupon ends in one or more zeros, you are a winner of up to $25.00 in cash. Not only can you win cash but you'll enjoy the finest loaf of bread baked. Notice the firm texture, taste the good flavor, taste the extra freshness. No wonder Vaughn's bread is the No. 1 favorite. It is good for you and your health, and now, win cash. Choose Vaughn's bread and look for your lucky 'win cash' coupon. No purchase necessary.

The Commission observed that *participating grocers had been instructed to limit free coupons "one to a customer," whereas Vaughn bread purchasers could get as many coupons as they wanted* by purchasing loaves of Vaughn's white bread. Also, they could obtain the free coupon by requesting it. In order to remove the element of consideration in an "on-product," merchandise-sales promotion such as Vaughn's, the Commission held that the number of chances a nonpurchaser can obtain must be *reasonably equal* to those available to a purchaser. In the Vaughn case, nonpurchasing participants could obtain only one chance, whereas the purchaser could obtain any number of chances. Such a limitation unreasonably disadvantages the nonpurchasing contestant and does not eliminate the element of consideration.

Conclusion

In most promotional schemes of this sort which have come to the Commission's attention, a provision was made for free chances to be distributed at stores selling the product advertised. The supply of free chances, however, was often exhausted long before the distributor made his next delivery. It is the sponsor's responsibility to make sure stores do not run out of free chances. And while an isolated incident is not fatal, the Commission has warned licensees that *repeated failure of the sponsor or retail outlets to supply free chances will turn the scheme into a lottery.*

Nonpurchasing contestants are disadvantaged in schemes allowing only one free chance to each person applying for it, while the purchaser may get as many chances as he wants by buying the appropriate number of products, plus the one free chance. *In order to eliminate the element of consideration, nonpurchasing and purchasing contestants must be able to get an approximately equal number of chances.*

Licensees must exercise *reasonable diligence* to make sure that promotions advertised over their facilities are not lotteries. *The broadcaster may not always rely solely on the wording of the proposed advertisements or on other representations of the advertiser.* In order to assure himself that his facilities are not being used for unlawful purposes, he should take all reasonable steps to learn whether the promotion *in its actual operation* is being conducted as a lottery. *Licensees are also responsible for assuring themselves that announcements regarding such schemes are not otherwise false or misleading,* and that the advertisements provide an accurate description of the contest which sets forth the pertinent rules so that the public will not be misled. Finally, announcement of a promotional scheme (which depends upon the reasonably equal availability of free chances) should adequately describe the availability of such free chances and the locations, times and manner in which they may be obtained.

Such cryptic messages as "no purchase necessary" or "nothing to buy" do not meet this requirement.

In view of the Commission's increased attention to violation of the lottery rules (and the possible stringent forfeitures that may result from violations), each broadcaster should scrutinize all such promotions with extreme care, and when questions arise, consult expert counsel.

1. FCC 69-608, FCC 69-609 and FCC 69-610.

Public Inspection of Network Affiliation Contracts

ON MARCH 25, 1969, the Commission released a Report And Order (FCC 69-289, Docket No. 14710), effective May 1, 1969, amending the rules to permit Public Inspection of Network affiliation contracts. Most broadcasters have felt at first that the Orwellian "Big Brother" has taken another step towards absolute control of the broadcast industry. However, many are not familiar with the reasons behind the new FCC rules. In fact, most smaller broadcasters may be surprised to learn that the Commission adopted these rules to give them a better competitive position in the market place.

Background

On July 16, 1962, the Commission released a Notice Of Proposed Rule Making (FCC 62-745, Docket No. 14710) and proposed public inspection of network affiliation contracts, agreements or understandings filed with the Commission pursuant to Section 1.613 of the Rules.[1] The Notice was quite brief. It included the Antitrust Subcommittee of the House Committee on the Judiciary[2] recommendation, in 1957, that the Commission "consider the advisability of making public the network affiliation contracts filed with it." Also it noted the Staff Report of the Senate Committee on Interstate and Foreign Commerce[3] recommending that affiliation contracts should be a matter of public record to improve competitive conditions in the industry and promote "fair and

uniform treatment for all affiliates." The House Committee stated that its study of affiliation agreements:

> ". . . reveals widespread, arbitrary and substantial differences in the terms accorded by each network to its individual affiliates, particularly in respect to station compensation for network broadcasting services, which differences primarily favor large multiple station licensees vis-a-vis the small independent operators."

Finally the Notice included the Commission's Network Study Staff Report[4] in 1967, suggesting that the Commission enact a rule making the network affilation contracts public.

Most commentators feared that public disclosure of affiliation contracts, particularly network rates, would result in competitive injury to licensee-affiliates without any compensating benefit to the public. They pointed out that such information is normally confidential and saw no reason for treating it differently in broadcasting. In effect, they argued that the same tests should be applied, *ipso facto*, to the retention and disclosure of information in the field of broadcasting as in ordinary commercial enterprise.

As to the "confidentiality" argument, the Commission found that business aspects of broadcasting, including rates, are established by private initiative and regulated by the interplay of competitive forces rather than by government fiat. However, a broadcaster's responsibility as a licensee is not discharged merely with adequate commercial competition. The Commission concluded that, while an ordinary commercial entrepreneur may withhold information from his competitor and the public at his "whim or caprice," a broadcaster may be required to disclose information which he considers to be competitive—if the public interest (of which he is trustee) will be served by such action. Publication of affiliation contracts will serve public interest by making "a major contribution towards fostering and maintenance of a national competitive broadcast structure. It will enhance and intensify competition

among broadcasters and equip licensees as well as the public with additional information."

As to such information as details of the network-station compensation arrangements, including percentage returned to the station and "free hours" (if any), the Commission's Network Study Staff concluded in 1957 that disclosure would be in the public interest. It would aid stations in their bargaining with the networks by making information available to both sides instead of just one. Also, *it would tend to decrease unjustified variations in compensation arrangements*—for example, variations based on a no-longer existing scarcity of facilities.

Furthermore, opening this type of information to the scrutiny of informed persons may help the Commission remove unfair competitive barriers and adopt appropriate regulations. The Commission (exercising its "expertise") believes these matters are related to the nature and quality of broadcast service. For instance, if the decision by a licensee to affiliate with a particular network (or to present a particular network program) were made solely on the basis of the compensation received, the public interest would not be served. Indeed, a broadcaster who chooses a network *solely on the basis of a clearance auction among networks* ". . . abandons his responsibility and violates his trust as a community broadcaster. The public is entitled to have access to information bearing on the extent to which this may be a consideration in program selection."

An affiliation contract contains other terms and conditions which may materially affect the broadcast service provided to a particular community. These include (1) means of interconnection and the delivery of programs to the community, (2) the acceptance or rejection of programming by licensees as well as the use of sustaining programs, (3) presentation of national and local commercial messages, (4) delayed broadcast arrangements, (5) provision for preemption of programming under certain conditions and (6) a number of other matters which have a direct

bearing on the amount and type of network service which the community will receive. Also, in the radio field, these contracts define the amount and placement of option time being used by a particular station. The Commission believes the public has a legitimate interest in knowing the terms upon which its network service is provided.

The basic public right of access to information kept by government agencies (unless there are very substantial reasons to the contrary) was emphasized by Congress in adopting the 1966 "Public Information" amendments to the Administrative Procedure Act. The particular importance of an informed public in broadcast regulation has been emphasized recently in decisions such as United Church of Christ v. FCC,[5] as well as by Congress in adopting the 1960 amendments to the Communications Act concerning legal notice. In light of these principles, the Commission did not find the arguments raised in favor of confidentiality substantial enough to be controlling here.

Finally, incidental, competitive or commercial injury resulting from exercise of the Commission's duty to protect the public interest in broadcasting cannot be pleaded as a bar to the Commission's exercise of its statutory authority to make public information deemed essential or relevant to the public interest. This is in accord with long established principles of administrative law.

Practical Effects of New Rules

In any event, it does not seem that making these contracts public will unduly damage networks and licensees in their legitimate competitive contest. The "competitive advantage" which will be gained by smaller affiliates through disclosure of "preferred" affiliates' rates and arrangements appears exaggerated. A principal argument is that "less-advantaged" affiliates, seeing the "preferred" terms, would demand equal treatment and net-

works would be materially injured. However, it is doubtful that the legitimate competitive bargaining ability of affiliates will be affected to the public harm by disclosure of rate and compensation arrangements. It is well known in the industry that in some markets—so-called two-VHF communities, for instance—licensee affiliates enjoy favorable bargaining positions and can command "premium compensation," fewer or no "free hours," *etc.* The Commission has commented at length on this situation in various opinions and these markets have been identified. In fact, within the industry there is a "kinship" among affiliates and broadcasters, and they can tell "pretty accurately" what happens. Affiliates are reasonably well informed as to one another's compensation arrangements. Hence, disclosure of some affiliates' premium rates and freedom from free hours will not (except, perhaps, as to the detail) be a shock, or even "news," to their competitors. Competitive advantage based on physical restrictions on the spectrum cannot be removed by publicity.

Conclusion

The Commission decided *not* to make public, retroactively, the material already filed under the safeguard of the former rules. Nonetheless, every contract initially filed after the effective date (May 1, 1969), *must be composed of one document without reference to other papers by incorporation or otherwise.* Subsequent filings may simply set forth renewal, extension, amendment, as the case may be, of any prior one-document contract filed after May 1, 1969.

Section 0.455(b) of the Commission's Rules and Regulations was thus amended by adding a new subparagraph (3) as follows:

"§0.455 Other locations at which records may be inspected.

"(b) Broadcast Bureau . . .

"(3) Contracts relating to network service filed on or after the 1st day of May 1969, under §1.613 of this chapter."

Section §1.613 of the Commission's Rules and Regulations was amended by striking out the first sentence of paragraph (a) thereof and substituting the following:

"§1.613 Filing of contracts:

"(a) Contracts relating to network service: All network affiliation contracts, agreements or understandings between a station and a national, regional or other network shall be reduced to writing and filed. Each such filing on or after May 1, 1969, initially shall consist of a written instrument containing all the terms and conditions of such contract, agreement, or understanding without reference to any other paper or document by incorporation or otherwise. Subsequent filings may simply set forth renewal, extension, amendment, or change as the case may be, of a particular contract previously filed in accordance herewith . . ."

The requirement that network contracts be included in the Commission's *public* files from May 1, 1969 forward should help reduce the unequal treatment of network affiliates and should raise the competitive position of smaller affiliates. For details, consult your attorney.

1. Formerly §1.342. By Order August 2, 1945 in Docket 6572 the Commission ordered that "network and transcription contracts" should not be open to public inspection. All other contracts and agreements required to be filed under the section (now §1.613) are public.
2. Report of Antitrust Subcommittee of House Committee on the Judiciary 85th Cong., 1st Sess., March 13, 1957, page 141.
3. The Television Inquiry Staff Report Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., June 26, 1957, page 95.
4. Network Broadcasting, Report of the Network Study Staff to the Network Study Committee, FCC, Washington, D.C., 1957, printed as House Report No. 1297, 85th Cong., 2nd Sess., Report of the Committee on Interstate and Foreign Commerce (page 467).
5. Office of Communication of the Church of Christ v. FCC, 359 F 2d 994,123 U.S. App. D.C. 328, 337, 7 R R 2d 2001 (1966).

Nondiscrimination in Employment Practices

The Federal Communications Commission became the first federal agency to adopt formal rules designed to assure nondiscrimination in employment practices.

Under the new rules, *each* licensee (with five or more full-time employees) must file an *Annual Employment Report* (FCC Form 395)—the first being due May 31, 1971. Also, as of January 4, 1971, an exhibit delineating specific practices, to be followed to insure nondiscrimination in employment, must be completed and filed by applicants for (1) a new broadcast facility (FCC Form 301); (2) renewal of license (FCC Form 303); and (3) an assignment of license or transfer of control (FCC Form 314 or 315).

Background

In early 1967 the United Church of Christ filed a petition asking the Commission to adopt a rule precluding grant of a license to any station which discriminated in employment practices on the basis of race, color, religion, or national origin.

In establishing a rulemaking proceeding (Docket No. 18244) to consider adopting such a rule, the Commission noted that "there is a national policy against discrimination in employment on the basis of race, religion, sex or nationality." The Commission recognized that Title VII of the Civil Rights Act of 1964 made it unlawful for employers of 25 or more persons in an industry affecting interstate commerce to discriminate

against potential employees. The Act is administered by the Equal Employment Opportunities Commission (EEOC).

The Commission noted that "a significant number of broadcast licensees" (by their estimate, 80% of the TV and 10% of radio stations) came within the nondiscriminatory requirement of the Civil Rights Act, thus falling under the jurisdiction of EEOC. Nonetheless, the Commission believed that it, too, had a duty to insure against discrimination by broadcast licensees; that it could grant an application for a broadcast authorization *only* after finding that the "public interest, convenience and necessity" would be served;[1] that its decision as to issuing a license must take into account whether an applicant has violated the laws of the United States. The Commission's conclusion: There would be "full exploration" of any Petition or Complaint raising substantial issues of fact concerning discrimination in employment practices in a particular station before granting a license.

In an order issued July 3, 1968, the Commission officially recognized the "serious national problem" of discrimination in employment practices, declaring that in passing on broadcast applications, it would consider complaints alleging such discrimination. The Commission recognized, however, that such action would not sufficiently alleviate the problem of discrimination in broadcast employment. Therefore, it proposed rulemaking to establish *a positive program of reporting and planning by licensees of equal employment opportunities.*

New rules have become effective now to require each broadcast licensee, with five or more full-time employees, to (1) file an Annual Employment Report and (2) prepare exhibits (when filing appropriate applications) delineating specific equal employment opportunities, plans and programs.

Annual Employment Report

On or before May 31 of 1971 and of every year thereafter, *each* licensee or permittee of a

commercial or noncommercial AM, FM, or TV broadcast station (with five or more full-time employees) is required to file an Annual Employment Report on FCC Form 395.

A *separate* Annual Employment Report must be filled for *each* AM, FM, or TV station; however, a *combined* report may be filed for an AM-FM combination if both stations are owned by the same licensee and both stations are assigned to the same community. A separate report must be filed for *each* "Headquarters Office" of multiple station owners, where employees perform duties solely related to the operation of more than one broadcast station.

The Report is designed to provide statistical data relating to the number of minority-group employees on the staff of each broadcast station. Its announced purpose is to detect discrimination in employment. Statistical data are expected to provide a clear initial indicator of discrimination. For example, if a station, in a community with a population 30% Black and 20% Oriental, files an Annual Employment Report showing that no Black and Orientals are employed, then serious questions would arise as to the station's policy of recruiting and hiring members of minority groups.

The new FCC Form 395 has tables designed to ascertain the number of minority-group employees in each of several job categories that cover the entire range of positions from officials to service workers.

The job categories are the same as those used in EEO-1 forms. Thus many of the categories do not specifically relate to uniquely broadcast positions (e.g. "comboman," "on air talent"); however, the Commission is including full instructions with each Form 395 to ease the broadcaster's burden of specifically categorizing broadcast positions.

Full statistical data are what the Commission wants from each broadcast station (with five or more full-time employees) regarding employment of minority-group individuals. Citing the "urgent

national need" in eliminating discrimination in employment the Commission intends to insure that broadcasters do their share—hence the decision to get statistical information. This information will give the Commission a profile of the broadcasting industry, and will be useful in indicating noncompliance with rules forbidding discrimination in employment. In adopting its new rules, the Commission quoted portentiously from *State of Alabama v. United States*[2]: "In the problem of racial discrimination, statistics often tell much, and courts listen."

New application forms

In all applications filed on or after January 4, 1971, for construction permit, assignment or transfer of license, or renewal, the applicant will be required to complete a *new Section VI.* The new Section VI will require that applicants adopt an *affirmative written program* designed to remove any vestiges of discrimination in employment practices, and to show specifically:

> The applicant's equal employment opportunitv program, indicating specific practices to be followed in order to assure equal employment opportunity for Negroes, Orientals, American Indians and Spanish Surnamed Americans, in each of the following aspects of employment practice: recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff and termination. . . .

There are *two exceptions* to the preparation of such an exhibit. The exhibit need not be submitted if (1) the station has less than five full-time employees or (2) the station is in an area where the relevant minorities are represented in such insignificant number that a program would not be meaningful; in the latter situation, however, a statement of explanation should be filed.

Assignors, transferors and renewal applicants must submit *two additional exhibits:*

I. Submit a report as Exhibit ___ indicating the manner in which the specific practices undertaken pursuant to the station's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members.

II. Submit as Exhibit ___ a brief description of any complaint which has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

Guidelines for nondiscrimination

To assure nondiscrimination in (1) recruiting, (2) selection and hiring, (3) placement and promotion and (4) all other areas of employment practices, the Commission has established the following guidelines *which must be reflected in appropriate exhibits in the new Section VI.*

1. **To assure nondiscrimination in recruiting:**
   a. Post notices in station employment offices informing applicants of their equal employment rights and their right to notify the Federal Communications Commission or other appropriate agency if they believe they have been the victim of discrimination.
   b. Place a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion or national origin is prohibited and that they may notify the Federal Communications Commission or other appropriate agency if they believe they have been discriminated against.
   c. Place employment advertisements in media which have significant circulation among minority-group people in the recruiting area.
   d. Recruit through schools and colleges with significant minority-group enrollments.
   e. Maintain systematic contacts with minority and human relations organizations, leaders and spokesmen to encourage referral of qualified minority applicants.

f. Encourage present employees to refer minority applicants.

g. Make known to all recruitment sources that qualified minority members are being sought for consideration whenever the station hires.

2. **To assure nondiscrimination in selection and hiring:**
   a. Instruct personally those of your staff who make hiring decisions that minority applicants for all jobs are to be considered without discrimination.
   b. Where union agreements exist:
      (1) Cooperate with our unions in the development of programs to assure qualified minority persons of equal opportunity for employment;
      (2) Include an effective nondiscrimination clause in new or re-negotiated union agreements.
   c. Avoid use of selection techniques or tests which have the effect of discriminating against minority groups.
3. **To assure nondiscriminatory placement and promotion:**
   a. Instruct personally those of the station staff who make decisions on placement and promotion that minority employees are to be considered without discrimination, and that job areas in which there is little or no minority representation should be reviewed to determine whether this results from discrimination.
   b. Give minority group employees equal opportunity for positions which lead to higher positions. Inquire as to the interest and skills of all lower-paid employees with respect to any of the higher-paid positions, followed by assistance, counselling, and effective measures to enable employees with interest and potential to qualify themselves for such positions.
   c. Review seniority practices and seniority clauses in union contracts to insure that such practices of clauses are nondiscriminatory and do not have a discriminatory effect.
4. **To assure nondiscrimination in other areas of employment practices:**
   a. Examine rates of pay and fringe benefits for present employees with equivalent duties, adjusting any inequities found.
   b. Advise all qualified employees whenever there is an opportunity to perform overtime work.

Conclusion

These new rules relating to nondiscrimination in employment practices are of extreme impor-

tance to all broadcasters. However, many small stations will undoubtedly believe that the task is impossible. The Commission has disclosed that small stations need not formulate elaborate or formal programs in hiring, promotion, and the like. "All that is required is that where the small station is operating in an area with a substantial minority, it takes appropriate and practical steps . . . to assure that it does afford an equal opportunity to minority groups to obtain employment and advance."

Each broadcaster (whose station employs more than five full-time employees) must (1) prepare and file an Annual Financial Report on or before May 31 of each year, and (2) prepare and file exhibit data relating to nondiscrimination in employment with each renewal, transfer or assignment, or construction permit application.

Obviously many problems will arise in this troublesome area; consult legal counsel.

1. 47 USC 307; 47 USC 309.

2. 304 F. 2d at 586.

FCC Fees

After being in effect for several months the Federal Communication Commission's new fee schedule has resulted not only in substantial fees on all broadcasters and CATV operators, but also in many questions as to the new rules' applicability in certain situations.

Background

The Commission first adopted a schedule of fees in 1963. Delegation to the Commission of legislative power to impose fees was held constitutional in 1964.*

The only unresolved question regarding the Commission's authority to require fees is whether the new fee schedule is arbitrary or exceeds the Commission's authority under the empowering statute, the Independent Authorization Act of 1952. However, it is doubtful that a challenge to the legality of the fees would be successful.

The first Commission fee schedule produced revenues of about 25% of the FCC's annual budget. The new fee schedule, however, "reflects estimated fee revenues which generally approximate our budgetary request for fiscal year 1971. . . ." The fees are expected to bring in nearly $25,000,000—the total FCC budget for fiscal 1971.

The FCC described the rationale behind the new schedule as giving recognition to the "value to the recipient" of the privileges granted, "as well as the public interest served and the direct

and indirect cost to the Government." This rationale has resulted in (1) fees for CATV systems; (2) separate fees for the *grant* of broadcast CPs; (3) fees for filing and approval of assignments or transfers of control; and (4) *annual license fees* for all broadcasters.

Broadcast fees

Annual License Fee. With the adoption of its 1963 Fee Schedule, the Commission required all license renewal applicants to file a nominal filing fee with the renewal application. This filing fee has now been abolished.

Instead each broadcast licensee is required to pay an *Annual License Fee.* This *yearly* fee is based on the station's rate card. For AM and FM stations it equals *24 times the highest one-minute rate.* If the station's highest priced one-minute commercial announcement is $100, then the yearly license fee would be $2400. For television stations the annual license fee equals *12 times its highest 30-second spot rate.* A television station with a top-priced spot of $1000 would pay $12,000.

In place of the abolished "license renewal" filing fee, therefore, will be total annual license fees of *three times* the above figures over a regular renewal period.

Annual operating fees for broadcast stations are now payable on the anniversary date of the expiration of the license. If your station's license was issued on February 1st of a given year, your annual fee will be due *each* February 1st. During the first year under the new fee schedule, the fee is to be prorated over the number of full months of operation beginning on August 1, 1970, until the next payment date. If your total annual operating fee is $1200, and the next anniversary date of your license is February 1, 1971, you would have to pay $600 for the six-month period of operation between August 1, 1970 and February 1, 1971.

Licensees are required to file with the Commission a copy of their rate card in effect on the preceding June 1. *The rate card must be filed yearly, at the time the annual operating fee is payable.*

There are certain *minimums* to the Annual License Fees which must be paid. For AM and FM stations the Annual License Fee must not be less than $52, regardless of the "highest one-minute rate." For television stations, the minimum fee is $144.00.

What about Annual License Fees for joint AM-FM operations, where a substantial amount of programming is duplicated? *Joint AM-FM operation annual fees are 24 times the highest one-minute JOINT rate.* The FCC does not propose that any allocation be made between the AM and FM stations. Similar provisions apply to satellite television stations.

Assignments and Transfers. All applications for assignments and transfers (FCC Form 314 and 315) now require an *initial application fee of $1000*—plus an additional grant fee to be paid *after the transaction is consummated.* This fee will equal *two percent (2%) of the total consideration paid.* A sale price of $500,000 would result in a $10,000 fee upon consummation.

Obviously, many problems will arise in the area relating to grant fees. Many station sales contracts make provisions for services rendered, promises not to compete and the like. To establish an exact dollar value for such provision will be difficult; yet the Commission will make the attempt.

With these substantial new grant fees, sellers and buyers of broadcast facilities should consult legal counsel early during negotiations. Critical terms of a sales contract can result in substantial savings on fees.

Who is responsible for paying the grant fee of 2% to the FCC? The Commission has declared that the financial burden of the fee may

be allocated between the parties by contract; however, *the assignee/transferee is liable to the Commission for payment.*

What would the grant fee be in a situation where an assignment or transfer is made by *gift?* This is a question that has yet to be answered by the Commission. Normally, in a gift situation, no money or other consideration is involved. Just how the Commission intends to levy a grant fee under these circumstances remains to be seen.

Construction Permits. The new FCC Fee Schedule provides for an enormous "jump" in fees. For example, construction permits for new facilities now consist of a *filing fee* and a *grant fee.* The filing fee is to be paid when an FCC Form 301 is submitted to the Commission; the grant fee is to be paid *within 45 days after the Commission* authorizes construction. The new fees are scaled for (1) vhf and uhf television stations in the Top 50 Markets, (2) vhf and uhf television stations in the Next 50 Markets, and (3) vhf and uhf television stations in the remainder of the television markets. Similarly, rates are scaled for Class A, and Class B and C FM stations, as well as for daytime and unlimited-time AM stations, according to power. Filing fees plus grant fees range from a total of $50.000 for a vhf television station in the Top 50 Markets to total fees of $250 for a 250-W AM daytimer.

If a construcion permit for a standard broadcast station is filed requesting a different power for day and night operation, *the applicable fee will be for the highest power requested.* For example, if the application requests 250 W nighttime and 1 kW daytime, the fee for the 1 kW operation would be assessed.

Other Applications. All other applications (that is, for modifications, other than *major* changes in facilities and other general applications) will

require a filing fee of $50—an increase of $20 over the old fee. Applications for "short form" (FCC Form 316) assignments or transfers require a filing fee of $250.00; there is no grant fee. An application to replace an expired construction permit (FCC Form 316) requires a single filing fee of $500.00. Applications for a change of call letters require a one-time fee of $100.

CATV fees

All CATV systems must now pay an annual fee on April 1 of each year for the preceding calendar year (or a prorated fee for part thereof). This fee is 30 cents per subscriber during the calendar year. The number of subscribers, for fee-computation purposes, is the *"average number of subscribers" on the last day of each quarter of the calendar year.* For example, if on March 31 your system had 5600 subscribers; on June 30 6000 subscribers; on September 30 6200 subscribers; and on December 31 7000 subscriber connections—then you would have an "average number of subscribers" of 6200, and your annual fee would be $1860.

Explanation: *This fee is determined by averaging the number of subscribers on the last day of each quarter of the calendar year.* For the example above, add 5600, 6000, 6200 and 7000; divide by four; this equals an average of 6200 subcribers. Then, multiply 6200 by 30 cents to arrive at the annual fee (payable on April 1) of $1860.

Remember, the annual fee payable on April 1 is for *the preceding calendar year.* Since the CATV annual fee schedule went into effect on August 1, 1970, the amount payable on April 1, 1971, *will be prorated to apply only to the last five months of 1970.* The fee that you must pay on April 1, 1971, will be for the five-month period between August 1, 1970 and December 31, 1970. *To determine this fee, you must determine the annual fee for all four quarters of 1970 by*

the procedure outlined above; then, a total of five-twelfths (the prorated fee) of your computed 1970 "Annual Fee" must be filed with the Commission on or before April 1, 1971.

The Federal Communications Commission initially proposed to exempt from the annual fee all CATV systems with less than 200 subscribers. However, in adopting its final order the Commission *has eliminated this exemption; the annual fee is now required of all CATV systems.*

Similarly, in view of the administrative burden entailed by Petitions For Special Relief filed pursuant to Section 74.1109 of the Rules, the FCC originally proposed a filing fee of $300 per petitioner. *That fee has now been reduced to $25 per petition.*

*Aeronautical Radio, et al. v. FCC. 2 RR 2d 2073 (1964).

Amendments to the "Program Log" Rules

AMENDMENTS TO Sections 73.112, 73.282, and 73.670 (the a-m, fm and TV program log rules) were released by the Commission on March 15, 1968[1], amending the a-m and fm rules to conform to provisions of the TV rule, and, additionally, clarifying the basic intent of certain parts of the TV rule. Because of frequent Commission challenges to licensee classifications as to program type and source, many readers will probably need a review of the basic elements of program logs—program type and source.

Program Types

(a) **Agricultural** (A) includes market reports, farming, and other information specifically related to the agricultural population. (Too many licensees improperly place agriculture-type fare in the public affairs category.)

(b) **Entertainment** (E) includes all programs intended primarily as entertainment, music, drama, variety, comedy, quiz, etc.

(c) **News** (N) includes reports dealing with current local, national, and international events, including weather and stock market reports; and commentary, analysis and sport news, when an integral part of a news program.

(d) **Public Affairs** (PA) includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concern-

ing local, national, and international public affairs. *A public affairs program is one which deals with public ISSUES.* The licensee should expect the Commission to challenge the PA classification of a program which does not have this essential characteristic.

(e) **Religious** (R) includes sermons or devotionals, religious news, and music, drama, and other types of programs designed primarily for religious purposes.

(f) **Instructional** (I) includes programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) which deal with the discussion or appreciation of literature, music, fine arts, history, geography, and the national and social sciences; and programs devoted to occupational and vocational instruction, and hobby programs. (Here again, too many licensees erroneously classify "instructional" fare as "public affairs.")

(g) **Sports** (S) includes play-by-play and pre- or post-game related activities, as well as separate programs of sports instruction, news or information—fishing opportunities, golfing instructions, etc.

(h) **Other** (O) includes all programs not falling within categories (a) through (g).

(i) **Editorials** (EDIT) includes programs presented for the purpose of stating opinions of the licensee.

(j) **Political** (POL) includes those which present candidates for public office or which express (except in station editorials) views on candidates or on issues subject to public ballot.

(k) **Educational institution** (ED) includes any program prepared by, on behalf of, or in cooperation with educational institutions, educational organizations, libraries, museums, PTAs or similar organizations. Sports programs are not included.

Program Type Definitions

The definitions of the first eight types of programs (a) through (h) are intended *not* to overlap each other and will normally include all the various programs broadcast. Definitions (i) through (k) are *sub*-categories, and programs falling under one of these three sub-categories will also be classified appropriately under one of the first eight categories. There may be further duplication within types (i) through (k)—a program presenting a candidate for public office, prepared by an educational institution, for instance, would be within both Political (POL) and Educational Institution (ED) sub-categories, as well as within the Public Affairs (PA) category.

Program Source Definitions

A Local Program (L) is any program originated or produced by the station (or which the station is primarily responsible for producing), *employing live talent more than 50% of the time,* even if taped or recorded for later broadcast. A local program fed to a network will be classified by the originating station as local. All nonnetwork news programs may be classified as local. Programs primarily featuring records or transcription will be classified as recorded programs (see below) even though a station announcer appears in connection with such material. However, within such recorded programs, identifiable units which are live and separately logged as such may be classified as local. If during the course of a program featuring records or transcriptions, for example, a nonnetwork two-minute news report is given and logged as a news program, the report may be classified as local. More local programming is expected of TVs than a-ms, the amount varying with the size of the station, its profitability and the vicissitudes of FCC policies (check with your lawyer periodically).

A network program (NET) is any program furnished to the station by a network (national, regional or special). This includes delayed broadcasts of programs originated by networks.

A recorded program (REC) is any program not otherwise defined—including, without limitation, those using recordings, transcriptions, or tapes.

ANALYSIS OF AMENDMENTS

The Commission adopted new logging rules for a-m and fm, effective December 1, 1965[2], and at the same time adopted a new a-m and fm program form (Section IV-A, statement of program service.) This form is to be filed as part of applications for renewal, for assignment and transfer of control, for new stations, and for major changes in facilities[3]. Because certain requirements of the a-m and fm logging rules were found unnecessary for the preparation of the program reporting form or for other Commission purposes, the logging rules for TV (effective December 1, 1966) differed from those previously adopted for a-m and fm[4].

Meanwhile, unsure of the intent of the television logging rules, a number of licensees raised questions about paragraph (b) of Section 73.670 (dealing with network fare) and subpart (ii) of Section 73.670 (a) (2) (logging of commercials).

Network Fare

Under paragraph (b) of Section 73.670, TV stations carrying network programs needed to log only the name of the program and time the station joined and left the network (along with whatever nonnetwork matter had to be logged). Licensees generally relied upon the networks to supply other information necessary for the composite week, such as number and length of commercial messages. This section also required the station to save information furnished by the net-

work and attach it to the related pages of the program log. In adopting this rule, the Commission intended that only the information a network furnished its affiliates for completion of their composite weeks should be associated with the pertinent logs submitted with the application for license renewal. Licensees are not required to attach all the information furnished almost daily by the network.

Logging of Commercials

Section 73.670 (a) (2) (ii) called for *an entry showing the total duration of commercial matter* in each hourly TV time segment beginning on the hour. But this did not mean that a licensee should stop logging the duration of each commercial. It is sufficient to log the length of each commercial message rather than logging an hourly total. The provision for logging an hourly total was intended as a convenience to licensees; however, they are free to do it in another way. The subparagraph was amended to clarify the requirement. However, *the log should be devised and kept so that it can be accurately divided into hourly segments for composite-week reporting purposes.* Paragraph (a) (2) (ii) of Sections 73.112 and 73.282 (a-m and fm commercial logging) were amended to conform to the language of Section 73.670 (TV commercial logging). Similarly, Paragraph (b) of Sections 73.112 and 73.282 (a-m and fm network fare) were conformed to TV's Section 73.670 as revised. Thus, the a-m, fm and TV logging rules on these points are now the same.

Sponsored Political and Religious Programs

In adopting the Report and Order amending the lodging requirements for TV broadcast stations (Docket No. 14187), the Commission noted that *a special problem in logging commercials is raised by certain (e.g. political and religious) sponsored programs in which it is difficult to measure*

the exact length of what would be considered commercial continuity. For such programs, *the Commission decided not to require licensees to compute the commercial matter.* The programs could be logged and announced as sponsored. This exception is also applicable to a-m and fm broadcast stations. The exception does not, of course, apply to any program advertising commercial products or services; nor is it applicable to any commercial announcements.

No single log form exists that will meet the needs of all licensees. In fact, FCC staff members are the first to admit that the Commission has not adopted a uniform logging system. You are permitted to include in the log any information necessary. However, it is most important to review your logging procedures to determine whether it meets the Commission's requirements. For example, the log should include information concerning your own purpose (e.g., billing of accounts) in separate columns. The columns devoted to the Commission's logging rules should be maintained in the Commission's language as reviewed above.

Finally, of course, when you find it difficult to classify any of your programs, consult with your communications counsel.

1. Memorandum Opinion and Order, RM-1242, FCC 68-291.
2. Report and Order in Docket No. 14187, 1 FCC 2d 449.
3. Report and Order in Docket No. 13961, 1 FCC 2d 439.
4. Report and Order in Docket No. 14187, 5 FCC 2d 185; see also Report and Order in Docket No. 13961, 5 FCC 2d 175, dealing with the television program form (Section IV-B).

Financial Qualification Form Revisions

The Commission has revised the Financial Qualifications Section (Section III) which must be submitted as part of FCC Forms 301 (application for new station or change in existing station), 314 (transfer application) and 315 (assignment application.)[1] Effective since October 15, 1969, the Commission no longer accepts applications accompanied by the old Section III Form. *Applicants should therefore destroy all old forms and secure new FCC Forms 301, 314 and 315.*

Ultravision Revisited

Revised Section III is the Commission's latest attempt to ascertain an applicant's financial ability to operate a broadcast facility in the public interest.

During the 1930's and 1940's the Commission merely required applicants to meet costs of construction and expenses for operation of the station over "a reasonable extended period of time."[2] With the phenomenal growth of TV and fm in the 1950's, the Commission found it necessary to make the reasonable period of time more explicit by changing it to *the first three months' cost of operation.*[3] Then, as fm went stereophonic and the all-channel TV receiver legislation insured uhf reception on all new television sets, the Commission extended the period for meeting costs.

The famous decision in Ultravision[4] and subsequent actions by the Commission[5] established

strict financial standards requiring new-station applicants (whether a-m, fm, vhf or uhf) to demonstrate "their financial ability to operate for a period of one year after construction of the station."[6] This strict standard, however, confused applicants and increased the already burdensome administrative workload. Many applicants unfamiliar with the Ultravision standard, or unable to meet it, had their applications delayed in the administrative process as the Commission was forced to write and rewrite applicants for additional financial information. The Commission therefore revised Section III to break the log jam. The new form was adopted February 26, 1969, subject to approval by the Bureau of the Budget. This approval was granted by the Bureau, and *the revised Section III is now effective.*

Section III Revisions

The most dramatic change in the three-page Section III revision is the striking "tabular format." The form has taken on the salient features of a regular balance sheet, requiring explicit and specific information about all items of construction costs, all possible sources of funds, as well as means and methods of financing the station.

The Commission believes that the new form (when properly executed) will *quickly tell the applicants whether or not they are financially qualified.*[7] This, the Commission hopes, should reduce the number of Commission requests for additional financial information from applicants.

Specific Item Analysis

On page one of revised Section III, *separate* cost figures must be entered for each of the following: *Transmitter, antenna system, rf generating equipment, monitoring and test equipment, program originating equipment, land cost, building cost, legal fees, engineering fees, installation costs* and *other costs.*

Obviously, the revised form requires applicants to break down construction costs carefully. No longer may "lump-sum" amounts be entered under "miscellaneous costs." The *basis of estimates* (as entered in the appropriate portions described above) must be sufficiently explained in *exhibit form*. New station applicants must also submit an exhibit showing *the complete itemization of cost of operation for the first year, including cost of proposed programming.*

Proposed Financing

Comparing the new and old Section III, applicants will readily see that much more complete information is now required as to *proposed financing*. The new provisions request not only available capital and loan information, but also specific details on deferred credit from equipment suppliers. The applicant must answer a series of direct questions about the specific amount of *down payment, first-year payments to principal* and *first-year interest.*

As in the past, applicants must submit exhibits setting forth the names of those individuals who will (or have) furnish funds for the operation and/or construction of the station.

Moreover, to get succinct information as to assets, the Commission now asks applicants to identify specific securities held, *the market or exchange on which they are traded, and their current market value.*

Accounts receivable may be treated as liquid assets; provided that such accounts have been aged and *certified collectable* within 90 days by a Certified Public Accountant. *However, only three-fourths of these certified-collectable accounts receivable may be treated as liquid assets.*

Conclusion

The Commission's new Section III is the latest refinement of the Ultravision doctrine and clarifi-

cation of applicant financial requirements. Applications may now be granted without the delay caused by searching questions from the Commission. By properly executing the new section, an applicant should be able to avoid having a financial issue designated against his application if it is designated for hearing. Careful preparation should minimize many of the problems inherent in filing an application before a regulatory agency, as well as make the Commission's task of ascertaining financial qualifications relatively simple.

As in the past, the applicant must show that adequate funds are available to construct and operate the facility for *one full year without income.* If the applicant intends to rely on *projected revenues,* he must still provide accurate estimates and demonstrate the soundness of the figures submitted. All applicants (or potential applicants) for (1) a new station, (2) a change in existing station (especially where contemplated expenditures will exceed $5000) or (3) transfer or assignment, should familiarize themselves with the new Commission revisions relating to financial qualifications. The revised Section III (and FCC forms incorporating it) is now available from the FCC's Forms Distribution Office, Room B-10, 1919 M Street, N.W., Washington, D.C. 20554, or from your counsel.

1. Rpt. No. 8472, September 18, 1969.
2. Radio Enterprises, Inc., 7 FCC 169 (1939).
3. Sanford A. Schafitz, 24 FCC 363; 14 RR 582 (1958).
4. Ultravision Broadcasting Co., 5 RR2d 343 (1965).
5. Clarification of Applicability of new Financial Qualifications Standard Concerning Broadcast Applications, FCC 65-659 (July 7, 1965).
6. Id.
7. Id., at Fn. 1.

Ownership Reports

The Federal Communications Commission requires that every broadcast licensee file, at specified times, an Ownership Report (FCC Form 323).

The purpose of the Report is to fully disclose ownership of the broadcast station. Complete data is required regarding officers and directors, stock transactions and the like. Many licensees have a difficult time understanding and complying with these Commission requirements.

When should the report be filed?

First, Section 1.615 of the Commission's Rules requires that an Ownership Report must be filed *at the time the application for renewal of station license is required to be filed*—generally, every three years. In situations where licensees own more than one TV, FM or AM station, only *one* Ownership Report must be filed at three-year intervals. Thus Corporation X, owning an FM and AM in one market, and a TV and AM in another market, must file only one Ownership Report every three years. The information reflected in the Report will be data regarding individuals constituting Corporation X.

Second, in addition to the above, *within 30 days of the grant of a construction permit* the permittee must file an Ownership Report.

Third, *upon grant of a transfer or assignment of a station*, the new operator must file an Ownership Report with the Commission.

Fourth, and perhaps most significantly, an Ownership Report must also be filed by each li-

censee or permittee *within 30 days after any change occurs in the information required by the Ownership Report.* It is in this category that many broadcasters neglect their duties as Commission licensees. Often minor stock transfers or other changes in ownership are not properly reported or disclosed. The failure to report such changes is clearly contrary to the Rules and the offending licensee can be subjected to substantial fines.[1]

What data is required?

In the unusual situation where an individual or partnership is the licensee, the names and interests of the various parties must be fully disclosed on the Ownership Report. Because no shares of stock are involved, the Report is fairly uncomplicated.

More often, however, broadcast stations are owned by corporations. Limited liability and tax advantages usually dictate this commonly-accepted mode of ownership. In this case full disclosure of the individuals who constitute the corporate licensee is required.

The name, residence, citizenship and stockholdings of officers, directors and stockholders (as well as trustees, executors, administrators, receivers and the like) are required. Full information as to *family relationships or business associations between two or more officials and/or stockholders must be disclosed.*

Remember, however, that if the corporation has *more than 50 stockholders,* the information listed above need be filed only concerning stock holders who are officers or directors of the corporation *or* concerning other stockholders who have *one percent or more* of either the voting or non-voting stock. Information on stock held by stockholders must be filed only if shares are held in the stockbroker's name for more than 30 days.

Full information on capitalization of the corporation is required. A description of the *classes*

and voting power of stock authorized by the corporate charter, as well as a listing of the number of shares of *each* class of stock issued and outstanding, must be noted in the Ownership Report. Data must also be fully disclosed as to the *extent of interest and identity of any person* having any direct, indirect, or other interest in the licensee corporation or any of its stock.

How much information is to be filed? Consider the following example: Suppose Corporation X is the licensee of a broadcast station. However, Corporation X is controlled by Corporation Z. What ownership information regarding Corporation Z must be filed with the Commission? The FCC requires that where Corporation Z controls the licensee corporation (Corporation X), or holds 25% or more of the number of issued and outstanding shares of Corporation X's stock, the *same information* (that is, capitalization, officers, directors, stockholders, and the like) *must be filed for Corporation Z.*

Contracts

Each licensee is required to *file* certain contracts with the Commission. A *list* of all contracts in effect at the time of filing of the Ownership Report, showing date of execution and expiration, must be included in the Ownership Report.

Here is a brief refresher of the types of contracts that Section 1.613 of the Rules requires each licensee to file with the Commission:

(1) Contracts relating to network service (affiliation agreements and the like);

(2) Contracts relating to ownership or control (articles of incorporation, bylaws, agreements for transfer of stock, proxies running for longer than one year, mortgages and similar agreements);

(3) Contracts relating to the sale of broadcast time to "time brokers" for resale;

(4) SCA contracts;

(5) Time sales contracts with the same sponsor for four or more hours per day;

(6) Certain personnel agreements.

Each licensee should keep his contract file current. Pertinent data required by the Ownership Report should be extracted and kept for ready reference in Ownership Report matters. Since it is not necessary to report some contracts that are common to the day-to-day operation of a broadcast station, a periodic review of Section 1.613 of the Rules would help.

Transfer of control

A secondary purpose of Ownership Reports is to notify the broadcaster of possible transfers of control. Careful completion of all portions of the Report, before contemplated changes in stock ownership occur, may indicate that a transfer or assignment *requiring prior FCC approval* is being effectuated.

The Ownership Report cannot, of course, be used for reporting or requesting a transfer or assignment. It is the prime responsibility of the broadcaster to determine if a proposed transaction will constitute a prohibited transfer and, if so, to file a transfer or assignment application.

Consider the following situations: (1) X owns 51% of the licensee corporation's stock. He sells 1% to Y. Is this a transfer? *Yes,* and *prior* Commission consent is required.

(2) X Corporation, owned by A, B, C, and D (all members of one family), wants to reduce its outstanding stock by the purchase of treasury shares. This results in family member A's individual holdings being increased to more than 50% of the total number of issued and outstanding shares. Is this a transfer? *Yes,* a transfer has been effected and prior Commission approval is required.

(3) A and B, husband and wife, each own 50% of the licensee corporation stock—of a total

of 4000 issued and outstanding shares of stock, A holds 2000 and B holds 2000. A sells 10 shares to his wife, B. Is this a transfer? Is prior Commission consent required? *Yes.*

(4) Similarly, if A and B are partners in the ownership of their station, and A sells any part of his interest to B, or to a newcomer, C, *an assignment has been effected,* and prior FCC approval is necessary.

(5) Suppose you and B are partners, each owning an equal share in a station. You wish to limit your liability by incorporating. Would this be an assignment? *Yes;* when a partnership incorporates, an assignment is effected and prior Commission approval is necessary.

Particular attention should be given to page 3 of the Ownership Report. Although confusing on its face, its three columns (each divided into 17 separate lines) provides a clear indicator, when properly filled out, of transactions that may require prior FCC approval. Specific facts in the examples above can be applied to the Ownership Report and provide the licensee with an indication of possible FCC notification and/or application.

Conclusion

Careful consideration of the information required by the Ownership Report will aid the broadcaster in evaluating proposed sales of stock and other transactions. Broadcasters are cautioned to report all applicable changes in the ownership structure of their facilities. The following checklist should prove helpful in determining such changes and should be consulted from time to time. *Have there been any of the following?*

(1) Any change in the effective ownership of the station?
(2) Any change of partners?
(3) Any change in capitalization?
(4) Any change in organization?

(5) Any change in officers and directors? (Have new elections taken place?)

(6) A transfer of stock?

(7) An issuance of new stock?

(8) Purchase of treasury stock by the corporation?

As to stock changes in corporations with more than 50 shareholders, information need be filed only with respect to changes involving

(a) officers or directors *or*

(b) shareholders who own one percent or more of voting or non-voting stock in the licensee corporation.

If you have doubts or questions regarding the troublesome area of Ownership Reports, be sure to consult your counsel.

1 See, for example, Tri-County Broadcasting Co., 1 RR 2d 57 (1963); Carol Music Inc., 3 RR 2d 477 (1964); Shamrock Broadcasting, Inc., 6 RR 2d 964 (1966); Lester & Alice Garrison, 9 RR 2d 241 (1967).

Fraudulent Billing

In 1965, the Federal Communications Commission adopted rules specifically prohibiting fraudulent billing practices by AM, FM, and TV station licensees.[1] As then formulated, the rules were directed specifically at "double-billing." The practice consists of misrepresentations to a manufacturer, distributor, advertising agent, or other party, that the quantity, content, or amount charged for cooperatively sponsored advertising was different from that actually agreed upon by the station and the local advertiser.

The Commission noted that most "double-billing" is designed to deceive and defraud manufacturers into paying a larger share of a local dealer's cooperative advertising expenditure than that originally stipulated in agreements with local dealers. But the Commission also stated that some manufacturers have reimbursed a dealer for a cooperative advertising bill which the manufacturer *knew* to be inflated or ficticious. Such a scheme violates the Clayton and Robinson-Patman Acts.[2] These acts make it unlawful for a manufacturer or distributor engaged in commerce to give discriminating discounts, rebates, or advertising allowances to its dealers. If such violations are found to exist, the Federal Communications Commission will refer its findings to the Federal Trade Commission for appropriate action. It is obvious that participation by a broadcast licensee in a scheme to violate a Federal statute reflects seriously upon the licensee's qualifications.

1965 Rules

In essence, the 1965 rules provided that "No licensee or . . . station shall knowingly issue to any local . . . advertiser any affidavit . . . which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such affidavit . . . is issued, or which misrepresents the nature, content or quantity of such advertising."

1970 Amendment

To make the rule more clearly applicable to *all* fraudulent billing situations, an amendment has recently been adopted.

Prior to May 1970, the fraudulent billing rules were primarily directed, as noted above, to "double-billing" situations. However, early in 1970 a broadcast licensee filed a petition for rule-making to amend the fraudulent billing rules. The intent was to prohibit the issuance of "bills" or statements by licensees misrepresenting (a) the time or the day on which spot announcements were broadcast or, (b) the number of announcements which were broadcast. It was asserted that such provisions were necessary to cover *all* situations and ban the issuance of *any* fraudulent bills.

In adopting the amendment, the Commission declared:[3]

> We agree with . . . the strong public interest factors supporting the prohibition of misrepresentation by licensees in any and all billing practices. Any such misrepresentation certainly reflects adversely on the qualifications of a licensee and, to a degree, on the industry as a whole. The public interest, convenience and necessity clearly require reasonable ethical business practices . . . specifically on the part of individual broadcasters.

The new rule and its sanctions

The amended rule regarding fraudulent billing practices is found in Section 73.1205 of the Commission's Rules, and reads as follows:

Fraudulent billing practices—No licensee of a standard, FM or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any document which would violate this section if issued by the licensee.

The Commission has imposed harsh sanctions on those broadcasters who violate this rule. For example, stations WPGA and WPGA-FM, Perry, Georgia, were recently ordered to forfeit $7,500 for willful and repeated violations of the fraudulent billing rule.[4]

A $10,000 forfeiture was imposed on another licensee for fraudulent billing practices, broadcasting a lottery, and several other violations. However, the Commission ominously noted that the fraudulent billing violations alone justified the forfeiture.[5]

Licensees also face the possibility of license revocation for fraudulent billing practices. Therefore, all broadcasters are admonished to carefully avoid any billing practices which might be construed as fraudulent.

The Commission, in Public Note FCC 70-513, has set forth examples of various (but not all-inclusive) fraudulent billing practices. Some of these examples follow:

1. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at a rate of $5 each for a total of $250. In connection with the same 50 commercial spots, the station also supplies the local dealer or an advertising agency, jobber, dis-

tributor; or manufacturer of products sold by the local dealer, another affidavit, memorandum, bill, or invoice. The latter document indicates that the amount charged the local dealer for the 50 spots was greater than $5 per spot.

Interpretation: This is fraudulent billing. The inflated bill tends to deceive the manufacturer, jobber, distributor or advertising agency as to the amount actually charged and received by the station for the advertising.

2. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at $5 each. The bill, invoice or accompanying affidavit indicates that the 50 spots were broadcast on behalf of certain cooperatively advertised products. However, some of the spots did not advertise the specified products. Instead, they were used by the local dealer solely to advertise his store, or to advertise products for which cooperative sponsorship could not be obtained.

Interpretation: This is fraudulent billing, even though the station actually received $5 each for the 50 spots. By falsely representing that the spots advertised certain products, the licensee has enabled the local dealer to obtain reimbursement from the manufacturer, distributor, jobber or advertising agency for advertising which was not actually broadcast.

3. A licensee sends, or permits its employees to send, blank bills or invoices bearing the licensee's name or call letters, to a local dealer or other party.

Interpretation: A presumption exists that the licensee is tacitly participating in a fraudulent scheme which enables a local dealer, advertising agency or other party to deceive a third party as to the advertising rate actually charged by the licensee. The local dealer can thereby collect more advertising reimbursement than that specified by the agreement between the third party and the local dealer. It is the licensee's responsibility to maintain control over the issuance of bills and in-

voices in the licensee's name, to make sure that fraud is not practiced.

4. A licensee submits bills or invoices to an advertising agency, station representative, or other party indicating that licensee's rate per spot is $50. However, the licensee actually receives only $5 or $10 per spot in actual payment from the agency, representative or other party. The licensee claims that the remaining 80 or 90 percent of its original invoice has been deducted by the agency as "commission" and therefore no "double billing" is involved.

Interpretation: This is fraudulent billing. The agency discount does not customarily exceed 15 percent. Therefore, supplying agencies with bills and invoices which indicate that the licensee is charging several times as much for advertising as he actually receives, constitutes participation in a fraudulent scheme.

5. A licensee submits a bill or invoice to a local dealer or other party for 50 commercial spots at $5 each for a total of $250. However, the bottom of the bill or invoice carries an addendum, so placed that it may be cut off without leaving any indication that it had been attached. The addendum specifies a "discount" to the advertiser based on volume, frequency or other consideration, so that the amount actually billed at the bottom of the page is less than $5 for each spot.

Interpretation: The preparation of bills or invoices in such manner seems designed primarily to enable the dealer to deceive a cooperative advertiser as to the amount actually charged for cooperative advertising. This practice raises a presumption that the licensee is participating in a "double billing" scheme.

6. A licensee submits a bill or invoice to a local dealer for 50 spots involving cooperative advertising of a certain product or products at a rate of $5 each, and actually collects this amount from the dealer. However, as a "bonus" the licensee "gives" the dealer 50 additional spots in which the product or products named on the original invoice

are not advertised. Thus the dealer actually obtains the benefit of 100 spots in return for payment to the station of the $250 billed for the 50 cooperative spots.

Interpretation: If the 50 "bonus" spots were broadcast as the result of any agreement or understanding, expressed or implied, that the dealer would receive such additional advertising in return for contracting for the first 50 spots at $5, the so-called "bonus" spots were, in fact, a part of the same deal. This means that the licensee, by his actions, is participating in a scheme to deceive and defraud a manufacturer, jobber, distributor or advertising agency.

7. A local appliance dealer agrees to purchase 1,000 spots per year from a station and thereby earns a discount which reduces his rate per spot from $10 to $5. During the course of the year, the dealer purchases from the station 100 spots which advertise both the dealer and "Appliance A" and for which the dealer pays $5 per spot. Since the station's 100-spot rate is $10 per spot, the dealer asks the station to supply him with an invoice for the 100 spots on behalf of "Appliance A" at $10 per spot. The dealer claims that if the appliance manufacturer had purchased the 100 spots, or if the dealer himself had purchased only these 100 spots within the course of a year, the $10 rate would apply. Therefore the dealer argues that the manufacturer should be required to reimburse the dealer at the $10 rate.

Interpretation: This practice constitutes fraudulent billing unless the dealer can provide satisfactory evidence that the manufacturer of "Appliance A" is aware that the dealer actually paid only $5 per spot because of the volume discount.

8. A licensee issues a bill or invoice to a dealer for commercial spots which were never broadcast.

Interpretation: This practice, prima facie, involves fraud, either against the dealer or against a third party which the dealer expects to provide

partial reimbursement for the non-existing advertising.

9. A licensee knowingly issues a bill or invoice to a local or national advertiser which shows broadcast of commercial announcements one minute in length, whereas in fact some of the announcements were only 30 seconds in length.

Interpretation: This is fraudulent billing. The invoice misrepresents the length of some commercials, a highly important element of the price charged for them.

10. A licensee knowingly issues a bill or invoice to a local or national advertiser which sets forth the time of day or the date on which commercial announcements were broadcast. But in fact they were presented at a different time or on a different day, or were not broadcast at all.

Interpretation: This is fraudulent billing. Time of broadcast is often highly important in its value and the price charged for it. Charging for advertising not broadcast is clearly fraudulent.

1. Report and Order, Docket No. 15396, October 20, 1965.
2. 15 U.S.C. 13.
3. Memorandum Opinion and Order, RM-103, May 13, 1970; 19 RR 2d 1506.
4. Perry Radio, Inc. 16 RR 2d 524 (1969).
5. Lawrence Broadcasters, Inc. 14 RR 2d 1 (1968).

Provisional Radio Operator Certificates

DURING THE PAST YEARS, the Commission became aware that there was a shortage of licensed commercial radio operators in small market broadcast areas. Part of the difficulty appeared to stem from the inability of prospective operators to travel to the nearest FCC field office to be examined. Although the Commission schedules examinations at places away from the field office, such examinations are given infrequently and may not coincide with the immediate needs of the broadcast station or the financial circumstances of the prospective operator.

The holder of a Provisional Certificate for a Radiotelephone Third Class Operator Permit endorsed for broadcast use may be responsible for routine operation of (1) standard broadcast station with authorized power of ten kilowatts or less, and employing a nondirectional antenna; (2) an fm broadcast station with a transmitter power output not in excess of 25 kilowatts; or (3) a noncommercial educational fm broadcast station of 25 kilowatts or less output power. Small business should benefit from the new procedure since licensed radio operators will be more readily available and local people may find employment in the broadcasting industry, as operators.

Accordingly, after its September 1967 Notice of Proposed Rule Making, *on January 17, 1968, the Commission adopted a Report and Order (FCC 68-61) amending Parts 1 and 13 of the Rules.*

The new rules provide for the issuance (by mail) of Provisional Radio Operator Certificates to applicants for Radiotelephone Third Class Operator Permits, endorsed for broadcast use, prior to the fulfillment of the examination requirements. The permit is to be valid for a period of twelve months only and will not be renewed. Before expiration of the permit, the holder is expected to appear at a regularly scheduled examination point and fulfill the examination requirements by successfully completing an examination before an authorized Commission employee.

The new rules were made effective as of March 15, 1968, and the amendments adopted were as follows:

1. In §1.1117, a new type of application is added at the end of paragraph (a) to read as follows:
"§1.1117 *Schedule of fees for commercial radio operator examinations and licensing.*

(a) * * *

"Application for provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use . . .

2. §13.3 is amended to read as follows:
"§13.3 *Dual holding of licenses.*

"(a) Except as provided by paragraph (b) of this section, a person may not hold more than one radiotelegraph operator license or permit and one radiotelephone operator license or permit at the same time.

"(b) A person may at the same time hold (1) both a temporary limited radiotelegraph second-class operator license and a radiotelegraph third-class operator permit, (2) both a provisional certificate for radiotelephone third-class operator permit endorsed for broadcast use and a radiotelephone third-class operator permit not so endorsed, (3) both a provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use and a restricted radiotelephone operator permit.

3. §13.8 is amended to read as follows:
"13.8 Provisional Radio Operator Certificate.

"(a) In circumstances requiring immediate authority to operate a radio station pending submission of proof of eligibility or of qualifications or pending a determination by the Commission as to these matters, an applicant for a radio operator license may request a Provisional Radio Operator Certificate.

"(b) Except as provided by paragraph (3) of this section, a request for a Provisional Radio Operator Certificate may be in letter form and shall be in addition to the formal application.

"(c) Except as provided by paragraph (3) of this section, if the Commission finds that the public interest will be served, it may issue such certificates for a period not to exceed six months with such additional limitations as may be indicated.

"(d) Except as provided by paragraph (3) of this section, a Provisional Radio Operator Certificate will not be issued if the applicant has not fulfilled examination or service requirements, if any, for the license applied for.

"(e) A request for a Provisional Radio Operator Certificate for a radiotelephone third-class operator permit endorsed for broadcast use shall be made on FCC Form 756C, which provides for a certification by the holder of a radiotelephone first-class operator license that he is responsible for the technical maintenance of a radio broadcast station, and that he has instructed the applicant in the operation of a broadcast station and believes him to be capable of performing the duties expected of a person holding a radiotelephone third-class operator permit with broadcast endorsement. If the Commission finds that the public interest will be served, it may issue such certificates under the following conditions:

"(1) the certificate is valid for a period not to exceed twelve months.

(2) the certificate is not renewable.

(3) the certificate may be issued to a person only once.

(4) additional limitations may be specified, as necessary.

(5) the certificate may be issued prior to the fulfillment of examination requirements for the radiotelephone third-class operator permit endorsed for broadcast use.

4. In the Appendix to Part 13, in §1.1117, a new type of application is added at the end of paragraph (a) to read as follows:

"§1.1117 *Schedule of fees for commercial radio operator examinations and licensing.*

"(a) * * *

"Application for provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use . . . "

Clearly, the Commission relaxation of requirements for operator permits and experimental fm operation will prove beneficial to many operators and totally in the public interest.

Multiple Ownership Rules

In March 1970, the Federal Communications Commission adopted far-reaching rules designed to restrict multiple ownership of broadcast facilities. Broadcaster reaction to these rules was swift. The Commission received a barrage of Petitions requesting the FCC to reconsider its actions.

In response to the hue and cry of the nation's broadcasters, the Commission modified its initial order restricting multiple ownership and adopted new, important rules.

Since all licensees are affected by the rules on multiple ownership, the following data should be carefully read and analyzed.

Background of New Rules

The FCC's multiple ownership rules (§73.35, §73.240, and §73.636) are essentially divided into two parts: (1) the "duopoly" rule and (2) the "concentration of control" rule.

In effect, the "concentration of control" rule attempts to foster maximum competition in broadcasting and to promote diversification of programming sources and viewpoints by limiting one party's ownership of broadcast facilities to seven AM, seven FM, and seven TV stations (with no more than five VHF stations). The "duopoly" rule attempts to promote additional diversification and

competition by forbidding ownership of identical facilities (e.g., two AM's) with overlapping contours. For example, a party cannot own an AM station in community "A" if he already owns an AM station in community "A," or in an adjacent community if the two 1 mV/m contours overlap. More broadly, the duopoly rules prohibit the same party from owning, operating, or controlling more than one station *in the same broadcast service* in the same area. However, this rule has not prevented the ownership of stations of a *different* service in the same area; hence, many communities have an AM, FM, and TV facility owned by the same licensee. It is this latter situation that the Commission's *Order* of March 1970 was designed to restrict.

The new provisions adopted by the Commission in March 1970 retained all the preceding standards, but proscribed future acquisitions of common ownership interests in different broadcast facilities in the same area or "market."

As initially set forth, the new rules would not allow an additional grant of a license to a party who already owned one or more full-time stations in the same "market" as the proposed new station. Thus, a party owning an FM station in a community, for example, would not be allowed to construct or purchase an AM and TV station in the same "market" or community.

Initially, there were exceptions to the new rule, but they were highly restrictive and affected only a minute number of licensees.

The basic exception involved Class IV AM stations (those assigned to 1230, 1240, 1340, 1400, 1450 and 1490 kHz) in communities of less than 10,000 population. The Commission in its initial *Order* said that, in these areas, AM licensees would be allowed a license for an FM station *even though the two stations would be in the same market.* However, the converse was not permitted: an FM licensee in a community of less than 10,000 population could *not* obtain an AM station or con-

struction permit for a new AM station in the same "market."

Certain other Commission "exceptions" were directed to the many AM-FM combinations that now operate throughout the country. One exception covered facilities in which an FM station has been constructed as an integral part of the AM station: the same tower has been utilized, the same studios are used for production, and the like. This exception allowed a broadcaster to receive a license for an existing AM-FM combination in the same market or a "proper showing;" that is, a demonstration that economic or technical considerations preclude separate sale and operation of the AM-FM combination.

March 1971 Rules

The Commission's rule to prohibit common ownership of AM-FM combinations in the same community received the greatest comment from broadcasters. Strong opposition was received. The opponents strenuously argued that the restrictive new rules would hinder FM development, that in many communities independent FM operation is not viable, that FM channels would lie fallow as the result of the rules, and that in selling AM-FM combinations often there would be no buyer for the FM station separately and the result would be that the FM station would go off the air. It was also argued that the AM-FM non-duplication rule recognized that AM-FM combinations in small markets are not in a position to program even 50 percent separately, yet the rules would not only require 100 percent separate programming, but separate ownership as well.

In response to the deluge of broadcaster petitions, the Commission reconsidered its rules with respect to common ownership of AM-FM combinations in the same community. By *Memorandum Opinion and Order* (FCC 71-211) released in March 1971, the Commission declared:

. . . [T]here will be no rule barring the formation of new AM-FM combinations.

In arriving at its 1970 decision to preclude future common ownership of such AM-FM combinations, the Commission acknowledged the fact that in most cases existing AM-FM combinations in the same area may be economically and/or technically interdependent, and that financial data submitted to the FCC by independent FM stations indicated that they are generally losing money. Therefore, the Commission initially adopted rules permitting the assignment or transfer of combined AM-FM stations to a single party *if* a showing was made that established the interdependence of such stations and the impracticability of selling them and operating them as separate stations. In so doing, the Commission observed that although "this would not foster our objective of increasing diversity, it would prevent the possible closing-down of many FM stations, which could only decrease diversity." However, in reconsidering its initial *Order,* the Commission declared:

The matter of common ownership of AM and FM stations in the same market is raised again in the petitions for reconsideration. Having consequently reviewed the subject once more, we are now of the opinion that although it is a close question, it is the better course to delete the rules pertaining thereto. Hence, there will be no rule barring the formation of new AM-FM combinations. And there will be no requirement of a special showing on the sale of such combinations. In other words, applications involving such matters will be treated in the same fashion as before the institution of this proceeding. The so-called one-to-a-market rules will thus apply only to combinations of VHF television stations with aural stations in the same market. (As indicated hereafter, combinations of UHF stations with aural stations will be handled on a case-by-case basis.) As a consequence, all conditional grants of applications for assignment of licenses, or transfer of control of licensees, of AM-FM combinations in the same market made since this proceeding began will have the condition deleted.

Obviously, the new rule is a boon to all licensees who are contemplating the sale of their

commonly-owned AM-FM facilities. So too, the prospective purchaser may realize he is receiving a more economically-sound package. However, there may be an ominous cloud on the horizon. As the Commission further declared in its new rule:

> We are deleting the rules concerning common ownership of AM and FM stations, partly because we intend to examine the matter further. Thus, attention is called to the fact that in the *Further Notice of Proposed Rulemaking* issued in this proceeding, we stated, as we have on other occasions in recent years, that FM should not be an adjunct or supplement of AM, but that both AM and FM should be integral parts of a total aural service.

Noting that its initial *Order* invited comments on possible forced divestiture of commonly-owned stations, the Commission said that the record compiled as a result "may prove helpful in dealing with the AM-FM problem." Additionally, the Commission declared that it will soon institute a rule-making proceeding to explore the question of whether broadcasters should provide *additional* hours of non-duplicated programming on the FM facility of commonly-owned AM-FM stations.

What will the future bring? It is difficult to forecast in light of the Commission's sudden reversal of its policy; however, it is safe to assume there has been a substantial relaxation of the previously restrictive rules governing common ownership, and there will be lengthy future studies before new rules are again adopted.

Conclusion

In sum, there is currently no rule barring the existence of present, or formation of new, AM-FM combinations.

Additionally, the multiple ownership rules have been somewhat relaxed concerning common ownership of UHF and radio stations. Under the March 1971 *Order*, UHF licensees (or transferees

or assignees) may file applications to build or acquire radio stations (AM, FM, or AM-FM combinations) in the same market; however, such applications will be handled on a case-by-case basis by the Commission.

It should be noted that the rules prohibiting VHF television licensees from acquiring AM and/or FM facilities in the community still apply. Conversely, AM and/or FM licensees may not acquire a VHF television facility in the same market.

Existing licensees, and those who desire to acquire broadcast facilities, should be intimately aware of the Commission's rule governing common ownership of broadcast facilities; in case of doubt, your counsel should be contacted.

Amended Multiple Ownership Rules: Part I

By *its Report and Order,* released June 17, 1968, in Docket No. 15627 (FCC 68-627), the Commission *revised Sections 73.35 (a-m), 73.240 (fm) and 73.636 (TV) of the Commission's Rules relating to multiple ownership of a-m, fm and TV broadcast stations.*

As has been stated on numerous occasions, the multiple ownership rules of the Commission have the twofold purpose of promoting (1) maximum competition and (2) diversity of programming sources and viewpoints. Sections 73.35, 73.240 and 73.636 of the Rules govern multiple ownership of standard, fm, and television broadcast stations respectively. In these three sections, the language of the provisions is identical except for variations appropriate to each service. The pertinent provisions, with underscoring added, read as follows:

§73.34)
§73.240) Multiple Ownership
§73.636)
No license for a standard [fm or television] broadcast station shall be granted to any party (including all parties under common control) if:
[Duopoly Rule]
(a) Such party directly or indirectly owns, operates or controls one or more standard [fm or television] broadcast stations and the grant of such license will result in any *overlap* of (specified service contours) of the existing and proposed stations; or
[Concentration of Control Rule]
(b) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls or has any interests in, or is an officer or director of any other standard [fm or television] broadcast station if the grant of such license would result in broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether

there is such a *concentration of control*, consideration will be given to the facts of each case with particular reference to *such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service* to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, *more than seven standard* [fm or television] *broadcast stations.*" [No more than seven a-m's, seven fm's, five vhf and two uhf television stations.]

[One-Percent Rule]

The word control as used above is not limited to majority stock ownership, but includes actual working control in whatever manner exercised. Additionally, in applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock. [Headings and emphasis supplied.]

Parts of the multiple ownership rule have come to have their own designations. Thus, paragraph (a), which prescribes cross-interests in stations in the same broadcast service serving substantially the same area, is the so-called "duopoly rule." Paragraph (b) is often referred to as the "concentration of control" rule. The seven-station aspect of that rule is sometimes known as the "seven station" rule. Note 2 is generally called the "one-percent" rule. In connection with the subsequent discussion, it may be noted that under the one-percent and seven-station rules, *stock holdings of less than 1 percent in each of more than seven broadcast stations in the same broadcast service are not considered excessive.*

I. The Problem of Investment Entities

Section 1.613 and 1.615 of the rules require that specified information concerning ownership

or control of broadcast stations be filed with the Commission. The information required by Section 1.615 must be filed on FCC Form 323—the Ownership Report. One of the purposes of these sections is to supply the Commission with information concerning multiple ownership.

In recent years, the possibility that full achievement of the objectives of the multiple ownership rules was being thwarted was brought home to the Commission by information at hand which suggested the following:

(a) Some investment entities, such as mutual funds, brokerage houses, and trusts had acquired stock in each of two or more large, publicly held, corporate broadcast licensees with the result that they had interest in stations in the same broadcast service serving substantially the same area—*acquisitions apparently inconsistent with the duopoly rule;*

(b) Such entities had acquired one percent or more of the stock of each of two or more large, publicly held corporate broadcast licensees with resulting interests in more than seven stations in the same broadcast service—*acquisitions apparently inconsistent with the seven-station rule;*

(c) Apparently, because the Commission has not provided machinery necessary for obtaining it, large, publicly traded, corporate broadcast licensees were not submitting full and complete information about *beneficial and record ownership of their stock by investment entities* (and were thus not complying with Sections 1.613 and 1.615 of the rules and the instructions accompanying FCC Form 323). Consequently, the Commission has insufficient ownership information about stock acquisitions that might be inconsistent with the multiple ownership rules.

Before discussing the modifications of the rules as adopted, it is necessary to examine the way in which the various investment entities function so that licensees will understand the basis for establishment of the revised rules. Additionally, comprehension of the entities' functioning methods will also have a bearing on other questions such as ownership reporting requirements and enforcement of the rules.

Since the mutual funds may vote stock as beneficial owners, they may be presumed to be

in a position to influence or control management of the corporations in which they are shareholders; and, under the provisions of the Investment Company Act of 1940, they could exercise control—if they so desired. However, the record indicates that, as a matter of general policy, they do not hold stock for the purpose of exercising or influencing such control. *More than 90 percent of the prospectuses of mutual funds state that the fund may not under any circumstances invest in securities for the purposes of management or exercise of control.*

Virtually all mutual funds vote at annual elections of portfolio companies by proxies given to the proxy committee of the portfolio company management committee. Generally, mutual funds are supporters of the management of portfolio companies. Their investments in such companies presuppose confidence in them, and any disaffection with management of such companies is usually indicated by selling some or all of the company's stock rather than by intervening in the company's affairs.

Finally, it is noted that the characterization of mutual funds as the beneficial owners of portfolio company stocks with the power to direct how the stocks should be voted, while correct, needs amplification. Under the provisions of the Investment Company Act of 1940, as many as 60 percent of the board of directors of a mutual fund may be managers of the fund or persons affiliated with managers. It is the practice of managers to have the full 60-percent representation on the fund board. Thus, although technically it is the mutual funds that are the beneficial owners of the portfolio stock held by bank nominees, *it is the managers who control how it should be voted.*

A. Stockbrokers

In accordance with rules and policies of the SEC, the recognized stock exchanges require that

when brokers receive proxy material for stocks held in the "street name" for benefit of their customers, it must be forwarded to the customer without comment. The broker then votes the stock as instructed by the beneficial owner. If the customer does not respond, the broker may vote the stock if the question is routine, but not otherwise. These practices apply whether or not the stock involved is listed on the exchange of which the broker is a member.

B. Trusts

Unlike mutual funds and brokerage houses, trusts are of so many kinds and the duties and the voting powers conferred on trustees by trust investments are so varied that it is difficult to make generalizations in this area.

II. Conclusion as to Investment Entities Problem

It is important to note that in describing the functioning of investment entities, the Commission used *the terms "record owner" and "beneficial owner"* to describe certain aspects of stock ownership with regard to the investment entities. Consequently, for purpose of administering the multiple ownership rules, the Commission decided that *ownership of stock in a corporate broadcast licensee should be attributed to the party or person who possesses the right to determine how the stock will be voted.*

Accordingly, the multiple ownership rules were amended to attribute ownership of corporate broadcast stock as follows:

(a) *Mutual funds: Ownership of stock held by a bank nominee for the benefit of a mutual fund will be attributed to the manager of the fund.* Since the fund manager generally holds 60-percent control of the board of directors of the fund and thus can control the voting of broadcast stock in the fund portfolio, when more than one fund

is managed by a single manager, the Commission shall, because the funds are under common control, *aggregate the holdings of the group of funds for purposes of the multiple ownership rules.* Since bank nominees, which hold record title to the stock for the funds cannot vote the stock, ownership will not be attributed to them.

(b) *Brokerage Houses: Ownership of voting stock held in street name for the benefit of the customers will be attributed to the customer.* It is true that the case of the stockbroker is unique because, as previously described, in some cases he may vote the stock held for a customer without instructions from the customer. However, this may only be done in routine matters. With publicly traded corporate broadcast licensee, the stock may only be voted under the direction of the customer. *Ownership of stock held by brokers for their own accounts will be attributed to the broker.*

(c) *Trusts: Ownership will be attributed to those having the power to vote the broadcast stock.* Naturally, this will vary from trust to trust.

(d) *Other cases: In other cases where record owners hold stock for beneficial owners (e.g.* the executor of an estate holding for legatees), *ownership will be attributed to those having the power to vote the stock.*

Amended Multiple Ownership Rules: Part II

The one-percent rule. ("Note 2" of the multiple ownership rules) constitutes an exception to the multiple ownership rules. That is, as to corporate licensees with more than 50 shareholders, the multiple ownership rules are not applied to stockholders with less than one percent. That exception, under the new rules, has been expanded.

As to the 1-percent rule and its application to mutual funds, the Commission faced a difficult decision, because some mutual funds (unlike brokerage houses) are permitted to vote stock concerning matters of importance. The Commission realized that the practical facts of life must be faced. Generally, funds are passive investors, and they are not interested in controlling licensees. Furthermore, the Commission relied heavily on a study which disclosed that adherence to the 1-percent standard for mutual funds would require divestiture of holdings by numerous funds—thereby depressing the market for broadcast stocks. Consequently, as to mutual funds, the Commission raised the standard from 1 to 3 percent. By doing so, only three funds would be required to divest some of their broadcast holdings, and this would not appreciably affect broadcast stock prices. Therefore, broadcast licensees (with 50 or more shareholders) need not report stockholdings of mutual funds in the Ownership Report, unless the fund holds 3 percent or more.

The Duopoly and Concentration of Control Rules Interpreted

As adopted initially in the 1940's, Sections 73.35(a), 73.240(a), and 73.636(a) of the Commission's Rules provided limitations on the common ownership or control of stations in the same service and/or serving substantially the same area. These duopoly (overlap) and concentration of control provisions of the Rules were intended to promote competition and maximize diversification of program viewpoints. The duopoly rule restricts common ownership of broadcast stations, in the same service, based upon the degree of overlap of the signal contour (1 μV/m for a-m or fm and Grade B for TV). The concentration of control rule prohibits common ownership in more abstract terms—i.e., the size, extent, and location of areas served, the number of people served, the classes of stations involved, etc. Significantly, "Note 2" of these rules provides that the duopoly and concentration of control rules will not be applied in cases where the licensee involved has 50 or more stockholders and the stockholder(s) violating the duopoly or concentration of control rules own less than one percent of the stock. In sum, the new rules have not changed the duopoly and concentration of control rules.

The one-percent rule—which is "Note 2" of the duopoly and concentration of control rules—is generally discussed in connection with Ownership Reports and the requirements thereon to detail stock holdings. However, it also has great bearing upon the multiple ownership rules—duopoly and concentration of control in particular. Prior to the advent of the new rules discussed herein, the multiple ownership rules were not applied to a stockholder with less than one percent in licensee-corporations with 50 or more stockholders. That is still the case today, and the new rules ease these requirements somewhat—particularly as to mutual-fund stockholders, stockholders, stockbrokers, and trusts, etc., where such legal

entities do not have the power to vote their stock holdings.

When the Commission adopted its June 1968 Report and Order in Docket 15627 it reaffirmed the rules described above. While the new rules do not really alter the old duopoly and concentration of control rules, they serve to explain and interpret them. The exception relates to mutual funds. In summary, the interpretation of greatest significance may be recapped as follows:

(1) a mutual fund may hold up to 3 percent of the voting stock of each two television stations (with more than 50 voting stockholders) in the same city;

(2) a stockbroker may hold unlimited quantities of stock in those stations for the benefit of its customers; and,

(3) a trust may only hold up to 1 percent.

If any of the foregoing be violated, the duopoly and concentration of control rules will be applied.

Ownership Reporting

Section 1.613 and 1.615 of the Rules, and the Ownership Report (FCC Form 323) together with its instructions, require broadcast permittees, and broadcast licensee's to file with the Commission complete ownership information. As mentioned earlier, in the case of corporations with more than 50 stockholders, this information must be submitted with regard to all stockholders holding 1 percent or more of the voting or nonvoting stock of the corporation.* Among other things, the information required of corporate permittees or licensees includes identities of record owners, beneficial owners, and those having the

*Do not confuse the reporting requirements discussed herein with the modification of the duopoly and concentration of control percentages discussed above. Even though a nonvoting shareholder (such as a mutual fund or a brokerage house) may hold more than 1 percent of the stock and not contravene the duopoly and/or concentration of control rules, the licensee's responsibilities under the reporting rules have not changed.

power to vote the stock. Section 1.613 requires filing with the Commission any agreement, document, or instrument affecting directly or indirectly, the ownership or voting rights of the licensee's or permittee's stock. This includes trust agreements and proxies. Supplemental ownership reports must be filed within 30 days after any change occurs in the ownership information previously reported.

Publicly traded corporate permittees and licensees with more than 50 voting stockholders do not generally submit the required information about beneficial ownership or, insofar as investment entities are concerned, the holders of one percent or more of the voting stock. In addition, proxies have often not been filed. Lack of information about these matters has weakened the Commission's administration of the multiple ownership rules. The U.S. Congress has publicly criticized the FCC for its laxity in these areas.

The Commission decided that permittees and licensees shall promptly submit to the Commission full and complete information in accordance with the provisions of Sections 1.613 and 1.615 of the Rules and the instructions on FCC Form 323 "Ownership Report." However, if a permittee or licensee is unable to obtain complete ownership information for reporting to the Commission, it shall file on the FCC Form 323 whatever information is available to it together with a detailed explanation of why the omitted material is not available.

Since information concerning trust instruments has often been lacking in the Commission's files, it amended Section 1.613 (b) (3) of the Rules to make compliance therewith easier. As opposed to the present requirements that trust instruments be filed, the Commission requires only the filing of an abstract of the instrument setting forth the following information: (1) the name of the trust; (2) the duration of the trust; (3) the name and number of shares of stock held by the trust.

The amendments adopted to Sections 1.613 (Filing of Contracts), 1.615 (Ownership Re-

ports), and 73.35, 73.240, 73.636 (Multiple Ownership Rules) codify what the Commission's staff has followed as policy during the past few years.

Summary

In summary, the Commission has amended the rules as follows:

Duopoly, Concentration of Control and one-percent Rule. (1) Any amount of ownership will be interpreted as a violation of the duopoly (overlap) rules [73.35(a), 73.240(a), and 73.636(a)]. Thus, even where a stockholder would hold less than one percent, of two broadcast facilities with prohibited signal overlap, such could not be accomplished without filing and receiving a grant of a petition of waiver of the duopoly rule.

(2) For corporations with more than 50 voting stockholders, both the duopoly and concentration of control rules will be applied to (a) officers, (b) directors, and (c) stockholders owning 1 percent or more of the voting stock; however as to investment companies (e.g., mutual funds), the said rules will not be applied unless the funds own (directly or indirectly) 3 percent or more of the voting stock. Stock holdings by investment companies under common management shall be aggregated. Furthermore, if an investment company directly or indirectly owns 50 percent or more of the voting stock of a company which in turn owns directly or indirectly 50 percent of a corporate broadcast licensee, the investment company shall be considered to own the same percentage of outstanding shares of the broadcast corporation as it owns of the outstanding share of the corporation between it and the licensee corporation. If the intermediate company owns less than 50 percent of the licensee corporation's outstanding stock, the investment company's holdings need not be considered under the 3-percent rule; however, officers and/or directors of the licensee-corporation (who are representatives of

the intermediate company) shall be considered to be representatives of the investment company.

(3) Further, in determining whether the duopoly and concentration of control rules have been contravened, where there are more than 50 voting stockholders and the record and beneficial ownership of voting stock are not identical, the party having the right to determine how the stock will be voted will be considered as the owner. Examples of the foregoing include bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, and so forth.

Ownership Reporting

(4) Corporations with 50 or more stockholders still are required to submit ownership information as to all stockholders holding 1 percent or more of the voting or nonvoting stock.

(5) If all the information required by Sections 1.613 (contracts) and 1.615 (ownership) cannot be ascertained, whatever information is available must be submitted with an explanation disclosing why omitted material is unavailable.

(6) Trust instruments need not be submitted; however, abstracts of same disclosing the trusts' name, duration, number and names of stock, name(s) of beneficiary, name(s) of record owner, name(s) of party exercising vote or control of stock, and, any conditions on power of voting stock as well as other unusual characteristics of the trust must be filed. (If the Commission deems it necessary, it can require the filing of the trust instrument.)

(7) Information as to brokerage houses need not be reported until their ownership of stock is at least 30 days old.

Thus, the June 1968 amendments to the multiple ownership rules have made no major changes but, rather, have relaxed the rules as to

investment entities and have served to explain and interpret the application of those rules to investment entities. In so doing, minor changes have been made in the ownership reporting requirements of 1.613 (contracts) and 1.615 (ownership).

Main Studio Moves

IT IS ALWAYS SURPRISING to find that many broadcasters are not familiar with Federal Communications Commission requirements governing the relocation of main broadcast studios.

The Commission has recently adopted new rules concerning the relocation of main FM studios. It is therefore appropriate to discuss and review the rules pertaining to main studios for all services—FM, AM and TV.

New FM Rules

In September 1970, the Commission initiated rule-making proceedings designed to clarify licensee questions as to when Commission authorization is required for FM main studio moves to points outside the community of license. Section 73.210 of the Commission's rules formerly indicated that FM licensees could relocate their main studios at the authorized transmitter site, wherever it may be, without prior Commission approval. A simple reading of this former rule would seem to indicate that if an FM station had its main studio in its community of license, City A, and its transmitter in adjacent City B, the main studio could be moved from City A to City B without Commission approval. Not so. The Commission has admitted that the old rule was "misleading." Actually, Section 73.257 of the Rules would govern such a situation. Section 73.257 provided that FM licensees "must obtain specific authority for a main studio move to a different city from that specified in the license." Thus, in

spite of the supposedly "clear" language of Section 73.210 noted above, licensees who moved their main studios from the city of license to the transmitter site (located in another city) incurred the wrath of the Commission for violating another section of the Rules.

In its February 1971 *Report and Order*,[1] the Commission, with obvious understatement, declared that the rules mentioned above "have . . . been a basis for uncertainty by some FM licensees. . . ."

In its *Order* designed to remove this confusion, the Commission reiterated the policy underlying the main studio rules:

> The main studio rules . . . are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve, and they constitute one of the essential ways we have for insuring that stations realistically meet their obligation to serve their communities of license as outlets for local self-expression. Since location of a station's main studio within the corporate limits of the principal community it is licensed to serve can reasonably be expected to be consistent with those goals and the public interest, we consider it unnecessary in the public interest to require prior Commission approval for main studio relocation within the community, whether this involves a move from one location to another within the community or from a location outside the community to one within it. For such main studio relocation within the community of license, it is sufficient, we believe, that the Commission be notified when the move is made. We are, however, of the view that the location of a station's main studio outside the community of license does raise a question as to whether it can, in fact, meet its primary obligation to the city of license. We therefore consider it important to require prior Commission approval of main studio moves to points outside the principal community before they are made.

It is therefore clear that prior Commission approval is not necessary for the relocation of the main FM studio within the corporate limits of the city of license. However, if an FM licensee desires to relocate his main studio outside the corporate limits of the city of license, prior Com-

mission approval must be obtained. This rule applies even if the proposed relocation is to the transmitter site, if the transmitter site is situated outside the community of license. Similarly, Commission approval must be obtained if the proposed move is from an existing main studio location outside the city of license to another site outside the corporate limits of the city of license.

These new rules will also eliminate a rather circuitous route used by some licensees to move their suburban FM station to an adjacent large city. Much like the proverbial "camel with his nose in the tent," some FM broadcasters had sought permission from the Commission to relocate their transmitting antenna on top of a tall building in a large city adjacent to their suburban community of license. As soon as this construction had been completed, the FM licensee would, without seeking approval, move his main studio to the transmitter site—the tall building in the large city! Clearly, such practices have been eliminated by the adoption of the new FM main studio rules.

There is one exception in the new rules. The exception is for commonly-owned AM and FM stations licensed to serve the same community. If an AM station is licensed to serve City A, and has its studios located outside the corporate limits of the city of license, then the commonly-owned FM facility may move its main studios from inside the city of license to the AM studio site without prior Commission approval. However, where commonly-owned AM and FM stations in the same area have different communities of license, prior Commission approval must be obtained to relocate the main FM studios at the AM studio site.

In sum, under the new rules, *prior Commission approval of all proposed FM main studio relocations must be sought, except for relocation within the city of license, or relocation to the main studio site of a commonly-owned AM facility licensed to serve the same area.* It should

be noted that if prior approval is not necessary, licensees must promptly notify the Commission of the relocation. More specifically, the pertinent provisions of revised Section 73.210 of the Commission's Rules now read as follows:

> (2) The main studio of an FM broadcast station shall be located in the principal city to be served. Where the principal community to be served is a city, town, village or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village or other political subdivision. Where the principal community to be served does not have specifically defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served.
>
> (3) Where an adequate showing is made that good cause exists for locating a main studio outside the principal community to be served and that to do so would be consistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in subparagraph (2) of this paragraph. No relocation of a main studio to a point outside the principal community to be served, or from one such point outside the community to another, may be made without first securing a modification of construction permit or license, except for relocation at the AM main studio location of a commonly-owned AM station licensed to the same community. FCC Form 301 shall be used to apply therefor. The main studio may, however, be relocated within the principal community to be served, or be moved from a location outside the community to one within it, without specific authority, but the Commission shall be notified promptly of any such relocation.

AM Studio Relocation

The long-standing rules governing the relocation of AM main studios have not been affected by the February 1971 *Order*. Declared the Commission:

> We are not, however, similarly amending the AM main studio rules to require prior Commission approval for main studio relocation at a transmitter site outside the community of license, since technical considerations governing AM transmitter site selection usually place such sites in close proximity

to the community of license and not in another larger city. For this reason, AM's studio relocations at the authorized transmitter site have seldom raised questions of studio accessibility or de facto station relocation.

Therefore, AM licensees may relocate their main studios at the transmitter site, regardless of location, without prior Commission approval. However, as in the FM and TV rules, an AM licensee may not move its main studio location outside the limits of its community of license without first securing Commission approval. Section 73.31 of the Rules provides that . . .

> The licensee of a station shall not move its main studio outside the borders of the borough or city, state, district, territory, or possession in which it is located, unless such move is to the location of the station's transmitter, without first securing a modification of construction permit or license. The licensee shall promptly notify the Commission of any other change in location of the main studio.

The rules governing television main studio moves have remained essentially the same; however, certain changes have been made in the February 1971 *Order*. Specifically, the major change involves the removal of language which could be construed as requiring prior Commission approval for a main studio move from a location outside the principal community to one within the community. No such prior approval is necessary. However, as with FM facilities, no relocation of a television main studio to a point outside the community of license, or from one such point outside the community to another, may be made without prior Commission approval. More specifically, the newly-amended Section 73.613 of the *Rules* provides as follows:

> The main studio of a television broadcast station shall be located in the principal community to be served. Where the principal community to be served is a city, town, village, or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village, or other political subdivision. Where the principal community to be served does not have specifically

defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served.

Where an adequate showing is made that good cause exists for locating a main studio outside the principal community to be served and that to do so would be consistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in paragraph (a) of this section. No relocation of a main studio to a point outside the principal community to be served, or from one such point outside the community to another, may be made without first securing a modification of construction permit or license. FCC Form 301 shall be used to apply therefor. The main studio may, however, be relocated within the principal community to be served or be moved from a location outside the community to one within it without specific authority, but the Commission shall be notified promptly of any such relocation.

Conclusion

As the Commission has repeatedly declared, the main studio rules are intended to make broadcast facilities readily available and accessible to the people in the communities which they are primarily licensed to serve.

Failure of a licensee to seek prior Commission approval of proposed main moves can result in serious sanctions being imposed. Similarly, even if a minor move (one not requiring prior approval) is contemplated, it should be remembered that the Commission must be notified promptly following the actual move.

If you have any questions concerning this important area of station operation, your counsel should be consulted.

1. FCC 71-150; 21 RR 2d 1501.

Pay TV Rules

IN DECEMBER, 1968, the FCC issued its *Fourth Report & Order,* 15 F.C.C. 2nd 466 (1968), authorizing virtual nationwide subscription (pay) television.

Soon afterwards, the National Association of Theater Owners petitioned the FCC for a stay in the effective date (June 12, 1969) of the non-technical rules. When this was denied, the petitioners went to the U.S. Court of Appeals for the District of Columbia[1] where the Commission's *Fourth Report* was upheld without reservation.

To petitioner's allegations that the Communications Act precluded the FCC from approving STV, the Court answered: "The Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs."

The Court also dealt swiftly and succinctly with the petitioners' other allegations: that the FCC lacked authority to regulate STV rates, that its failure to give adequate reasons for the decisions in the *Fourth Report* was artibtrary and capricious, and that it acted in restraint of free speech. The Court then cautioned the Commission that "regulations which are vague and overbroad, create a risk of chilling free speech, while rules which are too finely drawn will arouse judicial suspicion that they are designed to suppress uncongenial ideas."

The Court felt convinced, however, that the FCC had acted within proper limits in promulgating rules for STV and, without dissent, affirmed the *Fourth Report* in its entirety on September 30, 1969.

Fifth Report and Order

Pending the Court of Appeals decision, the Commission adopted the first technical standards for STV and also specified procedural requirements for STV applicants *(Fifth Report and Order,* FCC 69-950, Docket No. 11279; released September 11, 1969). In this *Report* the Commission declared that no applications for STV authorizations would be granted until 60 days after the Court's decision, although they would be accepted for filing immediately.

Technical Considerations

As noted in its *Fourth Report,* the Commission had originally intended to issue technical rules before the effective date of June 12, 1969.

But in denying the petition to stay the effective date of the non-technical rules and to withhold grants of new authorizations until the Court rendered its opinion, the Commission decided to issue technical standards "as soon as possible but not necessarily before June 12, 1969." Thus, the initial standards discussed below were adopted September 4, 1969.

Voluminous comments had been filed with the Commission by various manufacturers (e.g. Zenith, Teco, Inc.). At least one manufacturer (Motorola, Inc.) was concerned over the additional power STV transmission would need so that the STV signal would be identical to conventional TV signals reaching the television receiver.[2] To this, the Commission declared:

> "We expect to ascertain the relative amount of extra power, if any, to be transmitted in the STV systems for the encoding information. We anticipate that, in STV stations, the authorized values of peak power for the visual signal, average power for the aural signal, and the effective radiated powers of each, as based on these values, will not be increased above values which would be authorized for the conventional transmission."

If higher average power is actually transmitted by the applicant, the Commission will consider that fact in evaluating the system for approval. Because exact judgments concerning relative interference-causing capability and interference susceptibility of STV systems may not be practicable in type-acceptance applications, the Commission modified the proposed rule on type-acceptance (§73.644) to permit FCC evaluation of actual STV-system performance.

The Commission held that the type-acceptance rules provide authority to request field test information, if necessary, as a prerequisite to approval.

Interim procedures were also adopted for advance approval for STV *systems*—the schemes for generating and decoding STV signals. *But such approvals will not apply to specific items of encoding or decoding equipment.* The Commission will require use of type-accepted TV broadcast transmitters. However, just as type acceptance of conventional synchronizing signal generators or color input signal generating equipment need not now be obtained, no type acceptance will be required for encoding or decoding STV equipment.

Thus, engineering showings in STV authorization applications must identify the STV system to be used, which must have been approved pursuant to §73.644. For STV systems not already approved, the applicant must submit information necessary for approval under the pertinent provisions of §73.644. Applications must also specify, by manufacturer and type number, the proposed STV equipment (encoders and decoders).

General Application Information

STV authorizations will be granted only to licensees or permittees of television broadcast stations. If the licensee grants a franchise (for example, to install and maintain the decoding equipment in the STV subscribers' homes) to a

business entity which is connected with the operation but is nonetheless a separate and distinct entity from the licensee or permittee, authorization goes to the licensee or permittee, and not to the franchise holder—even if the entities are commonly owned.

The Commission does not plan to adopt a specific FCC Form for STV applications. Qualified broadcast licensees or permittees must therefore file a separate STV application, in letter form, in triplicate, with a $150 filing fee. STV applicants without appropriate broadcast authorizations must file an FCC Form 301 for construction permit, also, in triplicate with a filing fee of $150.

The Commission will give public notice of acceptance for filing and will make no grants earlier than thirty days after the issuance of this public notice.

STV applicants must follow rules applicable to local notice of filing set forth in §1.580.

The application must describe definitively the STV's proposed operations, including:

> (1) the methods for disseminating and decoding information needed by subscribers, and for billing and collecting charges, including installation charges, monthly charges, per-program charges, or any other charges payable by subscribers;
>
> (2) the terms and conditions under which contracts will be entered into with subscribers; and
>
> (3) the approproximate number of subscribers it is estimated will be served during the period of authorization. It shall also state whether a franchise holder, which is a separate business entity from the applicant, is to be involved in the proposed operation, and, if so, whether and to what extent the franchise holder and applicant are commonly owned. If a separate entity is a franchise holder, the application shall show exactly what the responsibilities and functions of the applicant and the franchise holder will be: e.g., who will install the scrambling equipment; who will install the unscrambling equipment attached to sets of subscribers; who will service and maintain that

equipment; who will provide information to subscribers so that they will know how to adjust the unscrambling equipment to obtain desired programs; who will collect and disburse revenues obtained from subscribers; who will be charged with the responsibility of obtaining programming; and who will be responsible for promotion and soliciting subscribers. An executed copy of any agreement, arrangement, or unerstanding between the applicant and the franchise holder concerning their respective functions shall be submitted with the application.

Programming

The *Fourth Report* contains an exhaustive study of programming requirements, one of which is that stations engaged in STV operations must broadcast a minimum schedule of non-STV programs in addition to the STV programs.

An applicant simultaneously filing FCC form 301 (construction permit), 303 (renewal), 314 (assignment), or 315 (transfer), must complete Section IV-B of the required Form as to non-STV programming. *Proposed* STV programming must be included (and segregated from non-STV programming) in Part III, *Proposed Programming, Section IV-B.*

Applicants seeking STV authorization for an existing station, but not in conjunction with FCC Form 301, 303, 314 or 315, must similarly respond, but need not complete that portion of IV-B relating to Ascertainment of Community Needs *unless* the *non*-STV programming (i.e., news, public affairs and other fare) will be reduced to a substantial degree.

The new or existing station applicant "shall state the methods used to ascertain the [STV programming] needs and interests of the community . . . [and it] shall also show how the proposed STV programming will fulfill these needs and interests."

The applicant must also show what percentage of STV time per year will be devoted to each type

of STV programming (e.g., ballet, sports, opera, feature films) including a breakdown, by type, of programming shown from the hours of 8:00 a.m. to 6:00 p.m., from 6:00 p.m. to 11:00 p.m., and of programs shown during all other hours devoted to STV programming in a typical week.

Records supporting the representations of proposed STV programming must be kept on file at the station and be open for inspection by the Commission for at least 3 years from the date of filing.

Financial Showing

The Commission has ordered the Ultravision standards applicable to STV applicants.[3] Thus, an STV application must show information sufficient for the Commission to decide that the applicant and franchise holder, whether or not commonly owned, have the financial capacity to operate for one year following construction.

The application must also contain:

> (1) An estimate of costs for installation of STV transmitting facilities, in place and ready for service. This estimate should include labor, supplies, etc.
> (2) A separate notation of installation costs for decoding equipment in the subscriber's home, as well as advertising and promotion costs.
> (3) Estimated costs of operation, on a month-by-month basis during the first year.
> (4) A showing of enough cash and/or liquid assets in excess of current liabilities for any construction of STV transmitting equipment for which it may be responsible (as well as additional expenses). The funds must be sufficient for operation for one year.

Furthermore:

> "If the proposed STV operation involves a franchise holder (whether under common ownership with the applicant or not), the franchise holder must also make a showing like that mentioned in the preceding paragraph. If the franchise holder and the applicant are under common ownership, the showing may be either separate for each or

joint. If the applicant and franchise holder are one and the same entity, or if the applicant intends to carry on all functions of the operation without franchise, the showing will, of course, be a single one.

It will be interesting to watch the growth of subscription television over the next several years. Having received the blessings of the Commission and the U.S. Court of Appeals, a burgeoning new source of television entertainment is likely to become available to the majority of American TV households.

The opponents of STV will probably not let the matter rest at the intermediate Court level. For the moment, however, the road appears clear for a new breed of television broadcaster.

1. National Association of Theatre Owners v. F.C.C., F. 2d (Case No. 22,623 [1969]).
2. The STV encoding information (which "scrambles" the video and aural signals so ordinary TV sets cannot receive them) requires additional power which might increase signal-to-interference ratios with possible co-channel or adjacent channel interference.
3. Ultravision Broadcasting Co., 1 FCC 2d 544, 5 RR 2d 343 [1965].

New Cable Rules: Part I Signal Carriage

In February 1972, the Commission adopted its most extensive CATV rules since February 1966, thus lifting its protracted "freeze" of some six years on cable's growth in the major markets. Numbering over 400 pages of regulations, explanatory material, and appendices, the *Cable Television Report and Order* (FCC 72-108, in Dockets 18397, et al) is necessarily detailed and comprehensive and does not lend itself to quick and easy interpretation. Accordingly, the following treatment of rules pertaining to signal carriage attempts to reduce same to portions for ready application by both cablecasters and broadcasters.

For purposes of determining the parameters of signal carriage, the Commission has divided television markets into the following categories: 1) the top-50 markets, 2) the top 51-100 markets or the second-50, 3) the markets below 100, and 4) those markets not within 35 miles of any television station. The top-100 markets are referred to as "major" markets and those below 100, yet still within 35 miles of a television station, are termed "minor" markets.

Cable systems in communities *partially* within a 35-mile zone are treated as if they are *entirely* within the zone. *Exception:* A system in a top-100 market community is treated as within the zone of a station licensed to a designated community in another major market only if the 35-mile zone of the station covers the entire community of the cable system. In those instances where there is an overlapping of zones to which different carriage rules

are applicable, the rules governing the *larger* market will be followed.

"Significantly viewed" stations are the subject of considerable discussion in the ensuing treatment. For clarification, a "significantly viewed" full or partial network affiliate is one which has at least a three percent share of viewing hours and at least a 25 percent net weekly circulation. An independent station is "significantly viewed" if it has at least a two percent share of viewing hours and at least a five percent net weekly circulation.

In rare cases where the cable system is identified primarily with one major market and some of the local signals come from an overlapping major market (e.g., Washington and Baltimore), the cable operator is permitted and, upon appropriate request, required to carry a signal from one major market to another if he can demonstrate that such signal, regardless of distance or contour, is "significantly viewed" over-the-air in his cable community. Likewise, the rule is applicable to overlap between smaller and major markets. Yet a cable system located in a designated community of a major television market may carry the signal of a television station licensed to a designated community in another major market only if the *designated community* in which the cable system is located is *wholly* within the specified 35-mile zone of the latter, major market station.

Derived from the American Research Bureau's 1970 prime-time households ranking, the list of top-100 markets is a constant and, therefore, is not subject to revision. The Commission further classifies signals according to those *required* to be carried and those *permitted* to be carried, as follows: 1) signals that a cable system, upon request of the appropriate station, *must* carry, and 2) signals that, considering market size, a cable system *may* carry.

Top-50 Market CATVs

Cable systems in the top-50 markets are *required* to carry the following signals: 1) signals of all sta-

tions licensed to communities within 35 miles of the cable system's community, 2) all "significantly viewed" signals, 3) all Grade B ETV's, and 4) all translators of 100 watts or higher power within the cable community.

In addition, systems in the top-50 markets are required to provide a minimum service of three networks plus three independents.

In addition to the authorized complement of signals, operators in the top-50 markets will be permitted to carry two *additional, independent* "bonus" signals. Yet any distant signals that have been imported to meet the authorized complement (a 3-3 service level) will be deducted from the additional signals permitted. For example, market X (a top-50 market) must meet a service requirement of three networks and three independents. If stations are carried, via 1) signals from the same market, 2) signals within 35 miles of the cable system, and 3) those "significantly viewed," and the cable operator reaches a service level of three networks and two independents, he would be permitted to import 1) one distant independent to reach the required 3-3 service level, and 2) one distant independent as a "bonus." *Note:* The one "bonus" independent is determined by subtracting the number of signals imported, i.e. *one*, to meet the mandatory service level from the number of "bonus" signals permitted, i.e., *two*.

Second-50 Market CATVs

Systems in the second-50 markets are required to carry the same basic signals as those in the top-50 (see first paragraph under "Top-50 Markets," above). In addition, they must carry a minimum of three networks plus two independents.

If the above complement of signals is not available via 1) stations within 35 miles, 2) stations from the same market, and 3) stations meeting the viewing test, the cable operator is permitted to carry distant signals to reach the required level of service.

As in the top-50 markets, systems in the second-50 may bring in two additional independent signals, but these are subject to a deduction of signals imported to meet the required 3-2 service level.

Minor Market CATVs

As in the major markets, minor market systems are required to carry the following signals: 1) signals of all stations licensed to communities within 35 miles of the cable system's community, 2) all "significantly viewed" signals, 3) all Grade B ETVs, and 4) all translators of 100 watts or higher power within the cable community.

Minor market systems must meet a minimum service level of three networks plus one independent and are *not* permitted to import distant signals beyond this 3-1 level.

CATVs Outside All Television Markets

Cable systems outside the zones of any TV stations are required to carry 1) all Grade B signals, 2) all translator stations of 100 watts power or greater licensed to the cable community, 3) all ETVs within 35 miles, and 4) all "significantly viewed" signals, even when the station does not provide a Grade B contour signal to the cable community.

There is no minimum service standard, as required for major and minor market systems, for systems outside all TV markets. Such systems are permitted to carry any number of distant network affiliates and independents.

Leapfrogging

In selecting signals, major and minor market cable systems will be required to carry the closest *network* affiliates or the closest such in-state station. *Independent* signals, if they come from the top-25 markets, must come from one or both of the two closest markets. If independents are chosen from

stations beyond the top-25, operators may exercise freedom of choice in their selection. Systems carrying a third independent signal will be required to choose a UHF station within 200 miles or, if such a station is not available, a VHF signal from the same area or any independent UHF signal.

Basic leapfrogging restrictions are suspended when 1) because of program exclusivity rules, a program is not available on a regularly carried independent station, or 2) the programming carried on the regularly carried independent is directed primarily to the local interest of viewers in the distant community (e.g., local news or public affairs.) In such cases, the cable operator is permitted to import from *any* other station (including network affiliates) *any* non-protected program and may carry the program to its conclusion.

Educational and Foreign Language Stations

For purposes of fulfilling the needs of what is generally considered a "select audience," the Commission both *requires* and *permits* additional carriage of ETVs and foreign language stations. Specifically, a cable operator *must* carry all ETVs which 1) are located within 35 miles of the cable system, or 2) place a Grade B contour over the cable community. Furthermore, foreign language stations, not counted as part of the distant signal quota, *may* be imported in *unlimited* numbers. If a station broadcasts predominantly in one language, such station may keep out a distant signal broadcasting *in the same language* so long as the former can sustain its burden of proving that it will be affected adversely.

Program Exclusivity

The Commission provided for exclusivity for both 1) network programs, and 2) syndicated programs. Stations with priority (i.e., a stronger grade of off-air signal) would thus be assured of exclusive presentation rights to both network and syndicated progams.

With respect to *network* television programming, a broadcaster of a higher priority station may request a cablecaster to refrain from *simultaneous* duplication of its network programming. Most saliently, the Commission has limited its rule to cover "simultaneous," rather than "same-day," protection. *Note*: Exclusivity does not apply to foreign language stations.

With respect to *syndicated* programming in the top-50 markets, the rules prohibit cable systems from carrying syndicated programs (defined, essentially, as "nonnetwork programming sold in more than one market") on imported stations, if they have been notified by a local station that it is carrying the program. The restriction applies for one year in cases of first-run syndicated programs and for the run-of-the-contract in exclusive contract arrangements for showing by a station licensed to a designated community in the market.

Exclusivity rules pertaining to the second-50 markets are more complicated. Basically permitting greater accessibility of programs and shorter terms of exclusivity, the rules echo those in the top-50 markets which require notification by the broadcaster and restraint by the cablecaster when a station licensed to a designated community in the market runs a syndicated program under an exclusive contract. However, the Commission lists the following exceptions:

(1) For off-network series programs:

(a) Prior to the first nonnetwork broadcast in the market of an episode in the series;

(b) After a first nonnetwork run of the series in the market or after one year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first.

(2) For first-run series programs:

(a) Prior to the first broadcast in the market of an episode in the series;

(b) After two years from the first broadcast in the market of an episode in the series.

(3) For first-run, nonseries programs:

(a) Prior to the date the program is available for broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(b) After two years from the date of such first availability.

(4) For feature films:

(a) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(b) Two years after the date of such first availability.

(5) For other programs: One day after the first nonnetwork broadcast in the market or one year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

Furthermore, a cable system in the second-50 markets may carry any *distant* signal syndicated program unless 1) the operator claiming exclusivity protection has an exclusive contract, and 2) the "syndicated" program is to be broadcast during prime time.

In all cases, the burden of notification is on the broadcaster to assert exclusivity by identifying to the cablecaster, at least 48 hours in advance, 1) the name and address of his TV station, 2) the title of the program or series to be protected, and 3) the dates of the run of exclusivity. The cable operator has the right to request that such information be supplied no later than the Monday prior to the calendar week in which the program is to appear. In addition, the broadcaster is required to contract for *thorough* exclusivity of the syndicated program within his market. He must contract for exclusivity of same against 1) other TV stations within the market, 2) cable carriage of the program via a distant signal, and 3) cable origination of the program via, for example, a leased channel presentation.

Exclusivity requirements in overlapping markets are shrouded in detail. The broadcaster is permitted syndicated program protection of his major market station from another major market only if the latter designated community lies *wholly*, not partially, within 35 miles of the former's designated community. Signals on a "significantly viewed" station are not entitled exclusivity, nor need any of its programming be "blacked out" to protect stations in the designated communities in the market.

Recognizing that exclusivity and market overlap is a most complicated area of the rules, the Commission decided to teach-by-example by presenting the Washington-Baltimore illustration:

> A Washington station, even if significantly viewed in Baltimore, would have no right to preclude carriage of its syndicated programs on a distant signal (e.g. from Philadelphia) carried on a Baltimore cable system, because Baltimore is a designated major market community that does not fall wholly within 35 miles of Washington. A Washington station could preclude carriage of a protected program on a distant signal being carried on a Washington cable system and on other cable systems located within 35 miles of Washington (except on a cable system in Baltimore). In Laurel, Md., which lies between Washington and Baltimore, a cable system could carry both Washington and Baltimore signals, would protect the programming of neither against distant signals. Assuming that a smaller television market community were located wholly or partially within the 35-mile zone of Washington, a Washington station would be entitled to top-50 market exclusivity protection in that community. If a community fell wholly or partially within 35 miles of both a top-50 station and a second-50 station, the one year preclearance period would be applicable, and the cable system could be called on to protect the programming of stations from both markets in accordance with the requirements respectively applicable to those markets."

Where both a top-50 and second-50 market overlap a community, stations from the former would receive top-50 protection (preclearance and run-of-the-contract) while stations from the latter would receive less binding second-50 protection.

Grandfathering

The new rules are not binding to signals carried or authorized to be carried prior to March 31, 1972. Any signals authorized or grandfathered to one system in a community may also be carried by any other system in that community.

The foregoing attempts to bring into clearer focus the salient points of the Commission's recently adopted cable rules. As this treatment serves merely to analyze and interpret the 400-plus pages of prose proffered by the Commission, it, of course, is no substitute for legal counsel.

New Cable Rules: Part II Non-Broadcast Channels, Operating Requirements, and Technical Standards

Operating Requirements

Operating requirements are spelled out for both existing and new cable licensees. *New* cable systems must, before commencing operations, file with the Commission an application for a certificate of compliance. Information contained therein must include:

1) The applicants name and address;

2) The name of the community it plans to serve and starting date of proposed service;

3) A list of broadcast stations expected to be carried. Note: Stations to be carried as "substituted" programming (i.e., those stations carried in lieu of regularly carried independents during times when the programming of same is protected by program exclusivity rules) need not be listed;

4) A statement of proposed use of microwave to import any signals;

5) A copy of revised FCC Form 325 "Annual Report Of Cable Television Systems" which requires (a) ownership data, including all holdings in other CATV systems, and/or other communications media and/or businesses in which the cable owner has a "substantial interest," (b) statistical data concerning all CATV originations and (c) statistical data re all channel services and advertising;

6) A copy of the franchise, license, permit or certificate granted by the local authority. Note: Once a system is certified by the Commission, it need not file numbers 5, above, and 6 (FCC Form 325 and franchise copy) pursuant to an application for a "new" certificate to add local or distant signals;

7) A statement demonstrating that the system's proposal complies with the cable television rules, including, in particular, compliance with (a) signal carriage and exclusivity regulations, (b) rules relating to access to and use of non-broadcast channels and (c) technical standards.

Separate applications for certificates of compliance must be filed for *each* community served by the cable system. However, information pertaining to a number of communities need not be refiled separately for each community, but may be incorporated by reference. Attendant to its filing, the system operator must notify (a) the local franchising authority, (b) all local TVs, (c) the superintendent of schools, and (d) all local educational authorities of such application to the Commission. The Commission will issue a public notice on all applications and interested parties will be permitted 30 days to submit objections. If objections are raised, restrictions on *otherwise permitted* signals will be imposed on the cable operator if the challenger (e.g., the station operator) can sustain his very considerable burden of showing clearly (a) that "the proposed service is not consistent with the orderly integration of cable television service into the national communications structure," *and* (b) that "the results would be inimical to the public interest." On the other hand, the cable system may secure special relief and bring in signals *otherwise not permitted* by the rules only upon a "substantial showing," itself.

Existing systems (those operating as of March 31, 1972) need file an application for certification only if the addition of new signals is proposed. Otherwise, applications need not be filed until either (a) the system's current franchise expires, or (b) March 31, 1977, whichever comes first.

Non-Broadcast Channels

A) Franchises

Operating under a "deliberately structured dualism," the Commission indicated that it would set *minimum* standards for franchises from local authorities (e.g., construction deadlines, franchise duration, handling of service complaints and franchise fees), but that matters peculiarly *local* in nature (e.g., character qualifications for franchise applicants, determination of franchise area and subscriber rates) would continue to be in the hands of the local regulating authority. Included in the Commission's "minimum standards" for franchises are the following.

1) Construction deadlines: The Commission requires that construction "commence" within a year "after a certificate of compliance is issued" by the FCC and that the cable facilities should be completed at a rate of 20 percent per annum with some variance permitted because of local conditions.

2) Franchise duration: The Commission admonished that cable franchises generally should *not exceed* 15 years. Whatever the franchise period, the local franchising authority should provide for a renewal period of reasonable duration.

3) Service complaints: Regulations are set forth by the Commission that require a local business office or agent to handle the investigation and resolution of subscriber complaints.

4) Franchise fees: The Commission imposes a three percent ceiling on franchise fees. Any local government which desires to assess a greater fee must meet a difficult, two-pronged test that (a) requires the *government* to show that its fee is "appropriate in light of the local regulatory program," and (b) requires the

franchisee to "demonstrate that the fee will not interfere with its ability to meet the obligations imposed by the rules."

The three key areas of local jurisdiction (i.e., (a) applicant qualifications, (b) determination of franchise area, and (c) subscriber rates) are subject to Commission standards of "fairness" and "reasonability" only and are, therefore, essentially controlled by the local franchising authority.

B) Use of and Access to Non-Broadcast Channels

The Commission concluded that, despite its intense interest in local programming by CATV systems and despite the present availability of greater channel capacities, it would require a minimum channel-capacity of only 20 channels, and this requirement would pertain solely to systems in the top-100 markets. The Commission also specified that top-100 market systems must make available, *for non-broadcast use*, one signal for each signal carrying an off-air television station.

As to the *public service* use of non-broacast channels, the Commission promulgated the following rules. *They are applicable to all top-100 market systems.* Existing CATVs will have five years from the effective date to comply and waiver requests will be considered.

1) Public access: CATV systems will be required to make one public access channel available on a "free," "non-discriminatory," "first come, first served" basis and maintain production facilities for those using same. "Free" means no charge for use of facilities and no charge for production costs unless the program exceeds five minutes in duration. Cable operators will not be permitted any form of censorship, program content control or discrimination on public access channels. Only lotteries, obscene or indecent matter, political spot announcements, and other forms of advertising would be prohibited. (Advertising *would* be permitted on CATV-controlled local channels at "natural breaks." **Note:** If the public user libels someone, the Commission does not believe that the courts will hold the CATV liable because, "it is doubtful that (actual) malice could be

imputed to a cable operator who has no control over the given program's content." However, prudence would dictate that CATVs carry insurance for same.

2) Educational access: Cable systems will be required to make available to local educational authorities one designated channel "for instructional programming and other educational purposes."

3) Government access: Cable systems will be further required to dedicate one channel for use by the local government.

4) Leased access: Any "unused channels" on the system shall be made available for lease use. "Unused channels" include, besides the remaining bandwidth, all broadcast channels when "blacked out" by the program exclusivity rules and all education and government access channels not in use. Operators must also adopt rules proscribing the presentation of lotteries, obscene or indecent matter and advertising material not containing sponsorship identification on leased channels, as well as others. Unlike other "access" channels, commercials are permitted on *leased* access channels and may be presented at times other than "natural breaks."

We re-emphasize that only systems in the top-100 markets are required to comply with the rules on non-broadcast services. New systems must comply immediately; existing systems have a five-year grace period. In communities outside the top-100, where access channels are *not* required, the Commission permits *local* authorities to require access services so long as such services (a) are based on the above major market standards, and (b) do not exceed said standards.

Cable systems will further be required to make additional channels available as public demand increases. The Commission's test for defining the point in time when additional channels are necessary is somewhat obscure; i.e., whenever the system lacks sufficient unused channel space "to encourage public participation." This standard will likely be more clearly defined in a later rule-making proceeding.

C) Two-Way Capacity

Cable systems will be required to have a capacity "for return communications on at least a non-voice basis." The Commission indicated that this requirement did not extend to "two-way capacity for each subscriber," but, rather, its "return communications" standard was designed to meet the existing state-of-the-art and to provide for future two-way communications without time-consuming and costly system rebuilding.

Technical Standards

The Commission adopted a series of minimal technical standards based on its rules proposed June 24, 1970 (Docket 18894). Most contemporary CATVs already more than meet these technical requirements.

The Commission divided all CATV channels into four classes according to use:

1) Class I: Channels carrying standard TV signals;

2) Class II: Channels carrying CATV-originated programs;

3) Class III: Channels carrying non-TV, miscellaneous services, printed messages, etc.;

4) Class IV: Channels used for return (two-way communications).

Presently, *the precise technical standards apply to Class I (broadcast carriage) signals only.*

Requirements for (a) performance testing, (b) station lists and (c) measurement data apply to all systems and are effective March 31, 1972.

A system operator must check *performance* on his system annually by testing each broadcast signal at three widely separated points, including one point at the extremes of the system input. These tests must be kept in a public file for five years. In addition, each system must keep a current *list* of (a) the

cable channels it delivers and (b) the stations whose signals are delivered. Finally, *measurement* procedures are recommended to be made under "normal operating conditions." Though not mandatory, these measurements must, nevertheless, be authoritative in nature.

The system operator is held responsible for his system's interference with (a) reception of authorized radio signals, and (b) interference generated by a radio or TV receiver. He is not responsible for "receiver-generated interference;" rather, the operator may suspend service to the subscriber to remedy same.

New technical standards, particularly for Classes II, III and IV, will be the subject of future Commission rule-making.

In addition, the Commission will likely promulgate, in separate proceedings, definitive rules to prohibit 1) undue concentration of control and ownership of CATV, and 2) undesirable cross ownership between CATV and other media and businesses (such as newspapers). Furthermore, new rulemaking proceedings relating to local governments, manufacture of special TV sets for CATV, standardized accounting for CATVs and common carrier rules will likely be forthcoming. *Interpreting the FCC Rules* will analyze these myriad, yet related, subjects in future articles.

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