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A Day in the Life: The Federal Communications Commission

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"I read the news today, oh boy!"—The Beatles "A Day in the Life"

For seven years I have struggled with the FCC in an effort to inject some rationality into its decision-making process and to reveal its workings to the public. There is reason enough to assert that everything the FCC does is wrong.¹ But, like contributions to the literature detailing disasters in given areas of Commission responsibility, such assertions are almost universally dismissed as exaggerations.

And so it is that I have come to try to describe the agency one more time, but from a unique perspective: "A day in the life" of the Federal Communications Commission.² The day—Wednesday, De-

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This article reflects the opinion and experience of one FCC Commissioner and is written in the first person. It represents the work, however, of many people. Commissioner Johnson was assisted in the preparation of the weekly agenda by his permanent office manager and economic and legal assistant, Robert S. Thorpe, and by his other legal assistant for the 1972-1973 term, Larry S. Gage, who also assisted the authors in the preparation of this article. The idea of a "dissent" to an entire Commission agenda was initially discussed with Tracy A. Westen, the Commissioner's legal assistant for the 1969-1970 term. The authors also thank Mrs. Mary Ann Tsucalas of Commissioner Johnson's staff for editorial assistance and manuscript production.

1. There are many who have bemoaned what may aptly be described as the FCC's analytical void. For example, Newton Minow, a former FCC Chairman, complained upon leaving the Commission that the FCC is "a quixotic world of undefined terms, private pressures and tools unsuited to the work." Drew, *Is the FCC Dead?* ATLANTIC, July 1967, at 29. For a somewhat different view, however, see Cox, *Does the FCC Really Do Anything?* 11 BROADCASTING 97 (1967).

2. Numerous books, articles, and government reports have been written about the FCC. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); J. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, SENATE COMM. ON THE JUDICIARY*, 86th Cong., 2d Sess. (1960); Drew, *supra* note 1; Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Zeidenberg, *Is the FCC Obsolete?* TELEVISION, Oct. 1966, at 27, 51.

ember 13, 1972—was selected from the Commission's meeting days in 1972. It is neither better nor worse than any other day during the past seven years. It is typical. This article is an effort to describe what the FCC did on that typical Wednesday.

Professors and students of administrative law tend to concentrate on a particular agency decision—usually one that has gone to the appellate courts. But a look at one day's events may well be more instructive than a close examination of a single event in determining why an agency is failing at its job or why it acts in a consistently unprincipled manner.³

The seven FCC Commissioners meet weekly, on Wednesdays,⁴ to vote on the items brought to their attention by the Commission's various bureaus.⁵ It is not clear who decides what matters will be considered. The agenda is the product of industry pressures, staff idiosyncrasies, and political judgments. If he chooses, however, the Chairman is in a position to control the flow of items to the Commission.

Most matters are not handled at FCC meetings but are delegated by the Commission to the staff for action. In theory these items are in areas of settled Commission policy but, in fact, the Commission has not so limited the scope of its delegations. During my term the majority has been unwilling to examine its delegation orders or to enunciate what standards control the delegation of decision-making authority.

Those issues which do reach the Commissioners each week often take them by surprise. Opening a new agenda (the stack of mimeographed staff memos and accompanying recommended opinions for a Wednesday meeting) is like Christmas morning. All too often the

3. There are some shortcomings in this expository device. Considerable background material must be included in order to analyze the Commission's actions. Moreover, although one day does include a range of Commission activities, such concentration runs the risk inherent in any evaluation based on a random sample.

4. Most Commission meetings last for a day or less. If several important matters must be resolved, however, the meetings may last as long as two days. The meeting which constitutes the subject matter of this article began on Wednesday, December 13, and ended the following day. These meetings are closed to the public.

5. The FCC has a number of major regulatory responsibilities including regulation of broadcast and cable television (CATV), allocation of the nongovernmental portion of the radio spectrum, regulation of interstate telephone, telegraph, miscellaneous radio common carriers, *e.g.*, land mobile radio users, domestic satellites and international communications services.

To deal with these primary areas of concern, the Commission is divided into four substantive bureaus: the Broadcast Bureau, the Cable Bureau, the Safety and Special Radio Services Bureau, and the Common Carrier Bureau. The Chief Engineer's Office and General Counsel's Office are comparable to bureaus. Each bureau, in turn, has various divisions to which I shall refer throughout this article.

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agenda includes a long, detailed staff document dealing with a controversial and complicated matter in which: (1) numerous alternatives are presented (or excluded) after extensive staff work, (2) the proposed resolution is endorsed by all of the Commission's bureau chiefs, (3) an immediate decision is required, and (4) any alteration in the proposed resolution will mean considerably more staff work and costly delay. As a result, rational decision-making suffers.

On December 13, 1972, the Commission was presented with fifty-nine items.⁶ In each case the staff made a recommendation to the Commissioners. If a majority votes to approve the staff's recommendation, it adopts the proposed Commission opinion as well. If one of the Commissioners questions a particular item, there is a discussion with the staff prior to a vote. On December 13, twenty-eight of the fifty-nine items were discussed.⁷

Each week's agenda is divided into thirteen substantive categories: Hearing, General, Safety and Special, Common Carrier, Personnel, Classified, CATV, Assignment and Transfer, Renewals, Aural, Television, Broadcast, and Complaints and Compliance—in that order.⁸

Briefing for Commissioners

In recent months the Commissioners have scheduled briefings during regular agenda meetings by each Bureau and Office on its work, resources, and problems. Such briefings often consist of a superficial review of an organizational chart or may deteriorate into a discussion of a pending case. They seldom involve consideration of any innovative changes and amount to little more than the Commissioners' collective nod toward fulfillment of their management responsibilities.

Measured by past briefings the Cable Bureau's December 13 brief-

6. Fifty-seven of these items had been distributed to each Commissioner's office at the close of the preceding week. Two, however, did not reach the Commissioners until just prior to the meeting. These latter items are called "walk-in items," and because they are rushed to the Commission for resolution, the Commission's analysis is often extremely superficial.

7. Twenty-four of the remaining items were adopted without discussion in what is called the "consent agenda." On December 13, the consent agenda lasted one half hour. The remaining seven items were simply passed over for future consideration. Of the twenty-eight items which the Commissioners discussed eleven were deferred for future resolution.

8. There is a final category of agenda materials which can be called information items. Some are copies of previous agenda items which were acted upon before a regular distribution of materials could be completed. Others are matters acted upon by circulation: The item is passed from one Commissioner's office to the next for the recording of votes. Some are staff memos (or occasionally Commissioner memos) that contain important information—among them staff papers on major policy proceedings underway at the Commission, reports on meetings attended by staff, or reports on work underway in the Commission.

ing was excellent. It focused on the growth and geographic distribution of the CATV industry, developments in the industry's ownership structure, bureau backlog problems,⁹ reports filed with the Commission but as yet unprocessed, and bureau organization.

The Cable Bureau's Chief noted, "The trouble we are in now will only deepen." Backlogs were growing, the toughest certification cases were yet to come, and time lost due to inadequate staff could not be recouped. The Commissioners were advised that there was no staff to process and analyze the annual reports from CATV systems.¹⁰

The discussion turned to mergers within the Cable industry. The Cable Bureau saw no harmful effects from growing concentration of control within the industry¹¹ and attempted to rationalize recent mergers by analogy to companies in other communications industries which serve more subscribers than the largest cable corporation. No rule yet governs multiple ownership of cable systems by a single corporation¹² and adoption of such a rule now would probably be too late.¹³

The Bureau presented no written recommendations on any of these issues and the Commission gave no orders, designated no one to study the problems further, and scheduled no future meetings;

9. See p. 1596 *infra*.

10. 47 C.F.R. §§ 76.401 (annual report), 76.405 (financial report), 76.406 (annual fee), 76.409 (equal employment), 76.205 (political cablecasting) (1972).

11. In the past two years five major cable television mergers and one pending merger have produced a cable television oligopoly. Teleprompter Corporation, the largest cable company in America, was formed by a combination of H & B American Corp., Teleprompter, and Reeves Telecom Corporation, and serves 685,483 subscribers. Warner Communications (375,000 subscribers) was formed from Cypress Communications Corporation and TV Communications Corporation. Community Tele-Comm., Inc. (309,935 subscribers), was formed by a merger of Community Tele-Comm., Inc., and Rust Craft Cable Comm., Inc. Viacom International, Inc. (184,500 subscribers), is also the result of a recent merger, and Sammons Communications, Inc. (183,000 subscribers), was formed from National Trans-Video, Inc., and the Jerrold Corp. The Justice Department did not resist any of these mergers but has brought an antitrust action against a proposed merger between Cox Cable and American TV & Communications, which would produce a corporation serving 530,000 subscribers—fewer subscribers than Teleprompter now serves. See pp. 1598-99 *infra*.

12. The Commission has adopted, however, a rule against "cable cross-ownership," that is, ownership by a single individual or institution of a cable system and a television station in the same market, 47 C.F.R. § 76.501 (1972)—to insure that access to a community's media outlets is not controlled by a single party. For a discussion of the problems inherent in the cross- and multiple-ownership of cable systems, see Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221 (1970). The Commission has also announced, however, a liberal policy of waiving the rule for cross-owned systems existing prior to the rule's adoption. *Cable Television Cross-Ownership*, 39 F.C.C.2d 377 (1973).

13. FCC rules against cross- and multiple-ownership of communications systems are ordinarily applied prospectively only. Networks have been required to divest Cable systems, 47 C.F.R. § 76.501 (1972), and to divest themselves of certain rights to television programming syndication and other residuals, 47 C.F.R. § 73.658(j) (1972). See also FCC, REPORT ON CHAIN BROADCASTING (1941); 47 C.F.R. § 63.54 (1972).

nothing, in short, has been done. Some of these matters will come before the Commission again only if the briefings continue and the Bureau Chief thinks it worthwhile to mention them.

Finally, the Bureau Chief and the Commissioners discussed some consulting work on Bureau resource needs performed by Harbridge House, Inc. It is common practice to pay consultants to "recommend" that an agency do what it wants to do anyway, the report being used only to convince the budgeting authority. Based on a draft report and the Cable Bureau's recommendation, the Commission proposed large increases in the Cable Bureau Budget for Fiscal Year 1974.

The Hearing Agenda

During the Hearing Agenda the FCC functions as an appellate court. The process begins earlier with hearings presided over by Administrative Law Judges who write initial decisions. The Commission's Review Board and its staff act as an intermediate appellate body and also rule on interlocutory matters.¹⁴ The seven Commissioners sit as the highest tribunal.¹⁵ They are assisted by an Office of Opinions and Review, which writes the few opinions issued by the full Commission, and occasionally by the Chief Engineer and the General Counsel. The Commission itself, ordinarily a party in adjudicatory proceedings, is represented by trial staff in the various bureaus.¹⁶

The Commission adjudicates formal complaints lodged against communications common carriers,¹⁷ petitions for cease and desist orders, and applications for broadcast licenses. Based on recommendations from the relevant operating bureau, the Commission may order a hearing,¹⁸ in which case the staff of Opinions and Review assumes control. If the Commission decides not to order a hearing, the appropriate operating bureau instead handles the case.¹⁹ The Com-

14. 47 C.F.R. §§ 0.151, 0.152, 0.161 (1972).

15. 47 C.F.R. §§ 1.271, 1.273, 1.274, 1.276, 1.277, 1.279, 1.282 (1972). Appeals of FCC decisions are governed by 47 U.S.C. § 402 (1970).

16. For example, where the Commission has designated a license renewal application for hearing on the basis of allegations sufficient to suggest that the licensee has not served the public interest, the Broadcast Bureau's trial staff may argue for or against denial of the renewal application—depending upon the precedents, evidence, and value choices of the Bureau Chief and his advisors.

17. 47 C.F.R. §§ 1.721-1.735 (1972).

18. 47 U.S.C. § 309 (1970). Whenever possible, the FCC majority avoids hearings, thus saving industries it is supposed to regulate much time and money.

19. For example, where the Commission declines to grant a hearing on a petition to deny, a motion to reconsider that decision would be processed by the Renewal Branch of the Broadcast Bureau and not the Office of Opinions and Review.

mission has broad discretion in deciding whether to order hearings, though that discretion is, at least in theory, limited by the bounds of reason.

On December 13, the Commissioners acted on three Hearing Agenda items, adopting without discussion the recommendations of the Office of Opinions and Review. All three cases were quite old, having begun respectively in 1964, 1965, and 1966. Five to eight months had passed between the parties' last filing and Commission action, in each case the delay working to the advantage of some parties.

In *Radio Nevada*²⁰ the Commission was asked to reconsider its earlier decision granting an AM radio license in Las Vegas to a licensee whose principal owners were operating other stations under one year probationary renewals²¹ as the result of earlier rule violations with respect to the operation of those stations. The Commission concluded for the second time that the probationary renewals had not cast such serious doubt on Radio Nevada's qualifications as to warrant denial of the Las Vegas application. Any probation violations could be handled in renewal proceedings for the other stations or in later action on the Las Vegas application.²² The Commission did not want to delay initiation of a new broadcast service in Las Vegas until termination of the probationary period. Thus, after seven years, Radio Nevada was able to begin constructing broadcast facilities. Time, however, had benefited the party petitioning for reconsideration—an existing licensee for whom Radio Nevada will be a competitor.

The Commission next set oral argument for a case in which it had to choose between two applicants for a new AM license.²³ One applicant proposed a new station in Jackson, Mississippi, the other an improved station in Carthage, Mississippi. Both the Administrative Law Judge and the Review Board had preferred the Carthage applicant, but after consultation with the Office of General Counsel, the staff recommended full Commission review and oral argument on two issues: (1) whether the Carthage applicant had adequately served Carthage's black population, and (2) which community had the greater need for the new station. The Commission's subsequent

20. *Radio Nevada*, 38 F.C.C.2d 576 (1973). The initial decision in this case is reported at 33 F.C.C.2d 589 (1972).

21. The Commission grants probationary renewals more frequently than it denies renewal applications. This latter sanction is rarely imposed. See pp. 1604-08 *infra*.

22. The Commission subsequently concluded that full renewal could be granted. F.C.C. 73-104 (Jan. 23, 1973).

23. F.C.C. 72-1119 (Dec. 13, 1972).

pro forma affirmance of the Carthage grant, even after oral argument, raises a serious question whether anything had been gained by not relying, in the first instance, on the Review Board's decision.²⁴

In the final hearing action the Commissioners denied reconsideration of an earlier remand order in a common carrier proceeding.²⁵ The predecessor of Hughes Sports Network had filed a complaint in 1965 alleging that AT&T's tariffs for network interconnection of television stations discriminated in favor of fulltime networks as against networks put together for special purposes.²⁶ The Commission had earlier affirmed a finding by both the Administrative Law Judge and the Review Board that the rates were discriminatory,²⁷ but it had remanded the case, requiring Hughes to prove its damage.²⁸ On December 13, the Commission reaffirmed its decision and AT&T filed notice appealing this decision.²⁹

The *Hughes* case illustrates a number of problems with the Commission's approach to common carrier rate regulation. The case is in its eighth year. The remand order came on a split vote, and changes in the Commission's composition may change the ultimate outcome. Further, pending resolution of the damages issue, AT&T filed tariff revisions, subject to wholly separate proceedings,³⁰ attempting to correct its unlawful rates. The FCC *could* consider all of these issues in a single proceeding—either adjudicatory or rulemaking—but the majority chooses, instead, to consider such issues in separate proceedings.

24. Meredith C. Johnson, 39 F.C.C.2d 782 (1973). Neither the Office of Opinions and Review nor the Commissioners considered whether the expenditure of resources required for the review process was warranted by the issues raised in the Jackson petition. Indeed, the Office of Opinions and Review saw little merit in the Jackson petition and both the Administrative Law Judge and the Review Board had reached similar conclusions. While adequate ascertainment of community needs is obviously important in determining whether a proposed licensee will serve the public interest, *see, e.g.,* City of Camden, 18 F.C.C.2d 412 (1962), and p. 1604 *infra*, it is also important for the Commission to employ its scarce resources in an intelligent fashion.

25. Hughes Sports Network, Inc., 38 F.C.C.2d 1052 (1972).

26. Network interconnection of local stations is one of the interstate services offered by AT&T and regulated by the Commission. Programs are transmitted from network origination points to local stations over Bell system facilities. AT&T's rates for "eight hour" service, the package purchased by fulltime networks, are cheaper than those for "occasional" service, the package for networks put together for special purposes.

27. 3 F.C.C.2d 618 (1966) (Hearing Order); 25 F.C.C.2d 560 (1968) (Initial Decision); 25 F.C.C.2d 550 (1970) (Review Board Decision).

28. 34 F.C.C.2d 691 (1972).

29. A.T.&T. v. F.C.C., Civil No. 73-1216, 2d Cir., filed Feb. 9, 1973.

30. F.C.C. Docket No. 18684. Proposed interstate telephone company rates often go into effect at the very time the Commission is considering the reasonableness of such rates. *See* note 56 *infra*.

The General Agenda

The General Agenda consists of matters not contained in other substantive agenda categories.³¹ On December 13, the Commissioners considered twelve such matters. Resolution of at least one required a level of expertise which the Commissioners lack. On other matters, the majority, presumably capable of comprehending the issues, reached bizarre conclusions or no conclusions at all.

Routine matters come first. The staff raised one such item verbally—the appointment of the General Counsel as the FCC's representative to the United States Administrative Conference. The Commissioners approved the appointment without discussion.³² The Executive Director then briefed the Commissioners on the FCC's responsibilities under the new Federal Advisory Committee Act.³³ The Commission designated the Executive Director as the Commission's Advisory Committee Management Officer with responsibility for ensuring FCC compliance.³⁴

The Commissioners also adopted a notice of proposed rulemaking³⁵ to elicit comments on a rule which would raise the fees the Commission charges to parties seeking action on certain applications and authorizations.³⁶ After years of resistance, the Commission finally committed itself to a policy of charging fees sufficient to repay the agency's costs. Thus, cost increases mean fee increases. The staff drafted its proposed fee schedule during a series of inter-bureau committee meetings.

The Notice of Proposed Rulemaking raised two problems. First, the proposed fees would yield \$42 million per year—the amount sought by the Commission in its budget request. The Commissioners

31. During the Discussion portion of the General Agenda, staff members occasionally raise miscellaneous items or Commissioners may ask for an impromptu discussion of some matter. Two such matters arose during the December 13 meeting. The Executive Director explained the effect on the FCC of a recently imposed hiring freeze, and he also discussed a recent FCC health and safety survey, particularly with respect to the problem of evacuating the FCC building in the event of fire.

32. F.C.C. Minute No. 516-A-72 (December 13, 1972).

33. Pub. L. No. 92-463, 86 Stat. 770, Oct. 6, 1972. See Exec. Order No. 11686, 37 Fed. Reg. 21421 (1972).

34. F.C.C. Minute No. 516-A-72 (Dec. 13, 1972).

35. Parties can petition for rulemaking, and if a private petition is granted, the petition is the basis for the notice of proposed rulemaking. Alternatively, the Commission can issue its own notice, as it did here. Comments and replies are then solicited from and filed by interested parties. The significance of the issuance of a given notice of proposed rulemaking is unclear. Sometimes it means that the Commission has informally concluded that the proposed rules are ready for adoption. In other circumstances, it is a device for securing comments on a particular matter though nobody is committed to the new rules. Occasionally the Commission will issue a notice of inquiry alone, asking for information that might lead to later rulemaking. See Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1970).

36. 37 Fed. Reg. 28574 (1972).

expressed concern that their actions would be a premature public release of the agency's budget request.³⁷ Because they wished to begin the fee schedule rulemaking, however, the Commissioners adopted the Proposed Notice.

Second, one Bureau Chief expressed concern about cost allocation and the relationship of fees to certain services. The Commission sets fees by estimating division expenses, and although accurate cost allocation is important, in the end the FCC must make some guesses.

In another routine matter, the Commission waived some FCC equipment standards for public coast radiotelegraph stations.³⁸ The Commission had recently begun an inquiry into the future of these stations, which are located on the seacoast and operated by common carriers to provide ship-to-shore service. Because the industry is declining, the inquiry considered whether the Commission should revise its policies. During the period of the inquiry, however, certain new equipment standards were to go into effect. Since the new standards would increase costs, the Commission issued an order "grandfathering" existing noncomplying equipment.³⁹

In another matter that only appeared routine, the Commission authorized the resumption of tests of the Emergency Broadcast System (EBS).⁴⁰ EBS is designed to provide the President access to radio and television in the event of nuclear attack or other national emergency. Emergency situations are often simulated to test the system. In 1971 one such simulation produced odd results: The "real" emergency message rather than the "test" message was broadcast, but few listeners paid attention. The FCC halted the tests in October 1971.

The Commission was concerned both because the wrong message had been broadcast and because nobody had paid any attention to it.

37. Although the Commission's fee program is geared to the agency budget, there is no direct relationship between fee collections and the budgeting process. The budget is determined by the Office of Management and Budget and the Congress. Fees, as they are collected, are turned over to the Treasury. Fee collections are not supposed to exceed the agency budget, and there has been extensive litigation about the authority of agencies such as the FCC to collect budget-recouping fees. Compare *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313 (D.C. Cir. 1972), *cert. granted sub nom. National Cable Television Ass'n v. United States*, 41 U.S.L.W. 3608 (U.S. May 14, 1973), with *New England Power Co. v. F.P.C.*, 467 F.2d 425 (D.C. Cir. 1972), *cert. granted*, 41 U.S.L.W. 3608 (U.S. May 14, 1973).

38. *Public Coast Radiotelegraph Stations*, 38 F.C.C.2d 571 (1972). The Commission issued this order during the pendency of a rulemaking on the matter because the compliance date, January 1, 1973, was imminent. Had the FCC followed its routine procedures, effective relief would have been denied.

39. "Grandfathering" is an old and sometimes useful tactic used by the FCC to apply new rules prospectively only. Existing noncomplying licensees are "grandfathered," *i.e.*, allowed to operate equipment that was purchased before the new FCC rules disqualifying it were adopted.

40. *Closed Circuit Tests*, 38 F.C.C.2d 513 (1972).

On December 13, the Commission, assured by the staff that the system's "bugs" had been worked out and apparently of the view that nobody heeds these broadcasts in any case, decided to resume testing.

Since the majority's consideration of communications matters deemed "routine" is cursory, when the Commission passes on matters beyond its "expertise" the results can be shocking. On December 13, for example, the majority accepted the staff's analysis of an environmental question. AT&T proposed to build a 350 foot tower near a residential area in Finksburg, Maryland. Several citizens groups opposed this request and demanded that the Commission prepare an environmental impact statement before considering AT&T's request.

The National Environmental Policy Act (NEPA)⁴¹ requires the preparation of an impact statement before any federal agency approves a project that will substantially affect the environment. In *Goosehollow Foothills League v. Romney*,⁴² the federal district court for Oregon held that approval of projects such as high-rise buildings which affect the "human" or "physical" environment, must be preceded by agency preparation and consideration of appropriate impact statements. In the Finksburg case, however, the Commissioners ignored the proposed tower's effects on the "human environment" and followed the General Counsel's advice that no statement was required. Even if a statement were necessary, added the majority, AT&T had completed its own study, had found no environmental harm, and had discovered no adequate alternative sites. Yet courts have made it clear that federal agencies cannot rely upon environmental impact statements prepared by interested parties.⁴³ The majority refused to acknowledge this well-established body of law.

The majority's treatment of the remaining items on the December 13 General Agenda raises serious questions concerning the FCC's competence to deal with complex, specialized communications questions and its capacity to engage in informed policy planning.

One of the Commission's most important functions is "spectrum management"—deciding who can use the radio spectrum for what purposes. Historically the FCC has "managed" the spectrum by assigning parts of it to particular radio services on an exclusive or shared basis. Spectrum management rules are nationwide in applica-

41. 42 U.S.C. §§ 4321-47 (1970).

42. 334 F. Supp. 877 (D. Ore. 1971).

43. See, e.g., *Calvert Cliffs Coordinating Comm. v. A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971).

tion, despite geographical variations in the demand for frequencies.⁴⁴ Further, spectrum allocations are difficult to alter even if use and frequency patterns demand change.⁴⁵ When the Commission grants shared rights to a particular portion of the spectrum, it requires new licensees to avoid interfering with existing licensees.

In the past two years the Commission has undertaken an experiment to alter the process of spectrum management. Using Chicago as a test case, the Commission is experimenting with a regional approach. The plan involves establishing a pool of frequencies for the region and monitoring their use, resorting to systems engineering to maximize their efficient allocation. If successful, the experiment would significantly alter the Commission's organization, policies, and procedures.⁴⁶

Two items on the December 13 agenda were designed to advance the Chicago Project. First, the Commission delegated greater authority over the project to the Chief Engineer.⁴⁷ Second, it prescribed the procedures, criteria, and operational aspects of the project in what it calls a Second Report and Order.⁴⁸

The Commissioners, however, questioned their own commitment to regionalism. Some Bureau Chiefs also alleged that regional offices might not produce work of the same quality as is currently produced in Washington. In fact, the two orders considered on December 13 had been debated extensively by staff members and the "Spectrum Commissioner."⁴⁹ What emerged from these discussions was a compromise⁵⁰ which offered no commitment to regionalism and even

44. I have discussed spectrum management in Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROB. 505 (1969).

45. The FCC has begun to ease its rigid eligibility and sharing requirements to better reflect geographical variation, but the pattern of spectrum management remains as described in the text.

46. If the FCC were to adopt a full regional system, regional offices would do most of the regulating, while policy would still be set in Washington. Such a reorganization would undoubtedly spawn new management problems of its own.

47. Spectrum Management—Delegation of Authority, 38 F.C.C.2d 622 (1972).

48. Spectrum Management—Land Mobile Allocations, 38 F.C.C.2d 625 (1972). "Second Report and Order" is part of the FCC's jargon. Proceedings at the Commission are known not by the names and subjects involved in the proceedings, but, rather, by the numbers. For example, *The "Second Report and Order"* is the 1966 FCC decision which severely restricted the growth of the cable television industry. *The "Fourth Report and Order"* is the FCC's final decision with respect to pay-television issued in 1968.

49. Commissioners may be assigned primary responsibility for some specific area of Commission regulation. Such designation does not mean the Commissioner has any delegated authority to act for all the Commissioners.

50. There is a strong tendency to compromise on major Commission decisions. This tendency is the result of efforts to secure a four-vote majority, to placate industry opposition, to satisfy the White House or Congress, to make haste slowly so that nothing embarrassing happens, and to mollify strongly-held staff views. While the Commissioners profess to encourage the staff to take divergent views, it is my impression that they prefer the staff to work out differences before coming to them.

seemed to contemplate reconsidering the advisability of the Chicago Project. In view of these circumstances it is unlikely that the FCC will set a firm course for the project.

While the Commission did not act decisively on the Chicago Project, on other important matters it simply refused to act.⁵¹ Two other items also related to spectrum management were "passed over" to be considered at a special meeting which was finally held in April 1973.⁵² These items involved the possible allocation of part of the spectrum to a new class of citizen band radio users.⁵³ Seven different staff papers from five different bureaus or offices accompanied these two items on the December 13 agenda. The Chief Engineer commented on spectrum allocation and the Safety and Special Radio Service Bureau discussed the licensing process involved. The Field Engineering staff spoke as the Commission's primary inspection and enforcement arm, the Executive Director spoke on budgetary impact, and the General Counsel commented on litigation.

There was considerable disagreement among the bureaus on allocating the new spectrum uses and ultimate reconciliation of their divergent views seems highly unlikely. Such problems reveal how difficult it is for the FCC to resolve important matters where numerous staff inputs are involved. The Commissioners, often the victims of staff bickering, not uncommonly agree in the end to a compromise assembled by the interested parties.

An item involving common carrier issues⁵⁴ appeared on the Gen-

51. The FCC's indecision is most pronounced when it is asked to adopt proposals which would offer the public information about the agency. For example, on December 13 the Commission squirmed when asked to consider a proposal which would allow radio and television broadcasts of those FCC proceedings which are already open to the public, subject to a witness' right to prevent the broadcast of his testimony. Three Commissioners dissented from the majority's document which was, itself, a compromise. *Audio Visual Coverage of Agency Proceedings*, 39 F.C.C.2d 373 (1972). The majority rejected the suggestion that Administrative Law Judges' rulings on witness requests for broadcast blackouts be made appealable to the full Commission.

52. The earliest staff memo on these items is dated March 23, 1972. The Commission had held one special meeting on these matters on November 16, 1972. The items were on the November 29 agenda and were passed over to the December 20 meeting and were then passed to a future special meeting.

53. The Citizens Band Service makes radio communication available to the average citizen. The service is characterized by low power operation, ease of licensing, and minimum requirements for equipment. Licensees use citizen band for a great variety of purposes—business, recreational, and personal. Despite the fairly lenient rules applicable to this service, the Commission has a serious enforcement problem—some believe it is the agency's experiment with "prohibition." See *Hearings on HUD-Space-Science-Veterans Appropriations for 1973 before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 280-82, 356-58, 418-20 (1972).

54. A common carrier is a company, ordinarily under federal or state regulation, which is required to offer services to all customers willing to pay the established price. Often the carrier is a monopoly whose service is "affected with the public interest"—the normal justification for regulation. See *Munn v. Illinois*, 94 U.S. 113 (1877).

eral rather than Common Carrier Agenda because more than one bureau was involved. For years the FCC has struggled with the problem of whether a customer has the right to attach his own accessory equipment to the common carriers' communications networks. Customers prefer to use their own equipment and independent equipment manufacturers are happy to supply it, but common carriers, particularly if they own very profitable equipment manufacturers, oppose such arrangements.

The FCC has furthered the carriers' interests in this controversy by delay and selective approval of the carriers' tariffs. Tariffs describe the rates and practices which govern the services offered by the carrier. In 1968 the Commission struck down AT&T's tariffs on the ground that they were an unreasonable barrier to the connection of customer equipment.⁵⁵ Bell then filed new tariffs and the lengthy review process began again. The Commission has still not resolved this matter, though the tariffs have gone into effect. Delay has obviously worked to the carriers' benefit.⁵⁶

The Commission has also delayed taking affirmative action to assist customers in the exercise of their right to connect personally owned equipment. The Chief Engineer's report on that subject (recommending a program for customer-interconnection) was considered by the Commission at the December 13 meeting.⁵⁷ The majority, obviously sympathetic to AT&T's interests, temporized, assuring those of us concerned about further delay that the Chief Engineer's proposals would receive consideration within thirty days. Four months later, when the Commission issued a further notice,⁵⁸ no action had been taken, and it seems clear that final resolution of this question will take several more years.

A further major item on the December 13 General Agenda—which

55. *Carterfone*, 13 F.C.C.2d 420 (1968).

56. The FCC can reject a carrier's tariff as unlawful (47 C.F.R. § 61.69 (1972)) or take no action and let the tariff go into effect. In between these extremes there are two other possibilities. First, the tariff can be suspended for up to ninety days and a hearing on its lawfulness ordered. The implementation of the tariff is thus merely delayed ninety days since there is almost no possibility that the Commission can complete hearings in that period. Second, the Commission can require carriers to ask permission to file additional tariff changes which could affect existing proceedings that have been underway for a long period of time. This permission may be withheld if the tariff filing would disrupt the Commission's deliberations. *A.T.&T.*, 33 F.C.C.2d 522, *aff'd*, 36 F.C.C.2d 484 (1972). My own view is that the Commission has the authority to suspend tariffs for as long as is necessary to litigate major issues raised by them. *A.T.&T.*, 37 F.C.C.2d 754, 761 (1972). On rare occasions a carrier will "voluntarily" postpone a tariff at the Commission's request. Usually, however, a new carrier tariff goes into effect ninety days after the carrier scheduled it to become effective.

57. F.C.C. OCE Technical Division Rep. No. T-7202 (Nov. 8, 1972).

58. *Interstate & Foreign MTS & WATS*, 40 F.C.C.2d 315 (1973).

was also passed over—eventually took three special meetings for full consideration and was only partially resolved at that point. This item, actually a series of items consolidated into one, involved many issues: allocation of spectrum, regulation of Cable and various forms of pay TV, the extent of the Commission's jurisdiction over common carrier service, and the regulation of various competing types of television program transmission. The item proposed that the Commission take several actions, each dealing with the distribution of pay-as-you-watch television-type programming, in most cases movies. The FCC had already placed restrictions upon the types of programming that could be offered for pay by the broadcasting and cable television industry.⁵⁹

In a number of cities Columbia Pictures proposed the use of microwave frequencies for point-to-point transmission of movies to hotels. Viewers would pay to watch such movies in their hotel rooms while other frequencies in the system would advertise Columbia's movies and other services of interest to out-of-towners. Remaining frequencies could be rented for conventions and other purposes.

One Columbia subsidiary was already offering pay movies to hotel customers over the communications facilities of the New York Telephone Company, an AT&T subsidiary. Sterling Manhattan Cable Television, a New York City CATV system, objected and filed a complaint with the FCC alleging that the services furnished by New York Telephone to Columbia Pictures were interstate in nature and thus required FCC authorization. The Commission consolidated the Sterling complaint and the more general Columbia Pictures request into one "hotelvision" proceeding.

Finally, the Commission also had to consider whether its newly established Multipoint Distribution Service (MDS), a service which uses microwave frequencies to distribute television-type programming, was intrastate or interstate in nature. If intrastate, there would have to be state authorization before an application could be filed with the FCC.⁶⁰

Confronted with these complex, interrelated matters, the FCC had little choice but to resort to rulemaking. Several bureaus had agreed upon a proposed notice of inquiry and rulemaking, but on December 13, the Commission declined to rule on the proposed notice, ordering instead a series of special meetings.

59. 47 C.F.R. §§ 73.643, 76.225 (1972).

60. 47 C.F.R. § 21.15(c)(4) (1972).

These subsequent meetings were confused and prolonged, but the Commissioners finally identified the crucial issue raised by the new technologies: Should the FCC restrict the pay operations of these technologies in the same manner as it had already restricted the pay operations of both commercial broadcasting and cable television?

The product of the special meetings was an incoherent Notice of Proposed Rulemaking,⁶¹ the purpose of which was to initiate *still another proceeding* to consider all the issues. In the meantime, to protect the heavily regulated cable industry from “unfair” competition, the Commission agreed to suspend its regulations where cable systems faced unregulated competition from the new technologies.⁶²

The Commission also concluded that MDS was an interstate service,⁶³ contrary to the staff’s recommendation. The Commission permitted Columbia Pictures to use the Business Radio Service to transmit pay movies, but not to provide coverage of conventions and meetings since that would amount to common carrier communications service.⁶⁴ The Commission further concluded that New York Telephone’s provision of facilities to interconnect hotels was intrastate and hence not subject to FCC jurisdiction.⁶⁵ This last decision, however, was carefully hedged, the Commission announcing that future developments might lead it to assert jurisdiction in this area.

The Commissioners’ deliberations in this proceeding illustrate the problems inherent in FCC policy formulation. The Commission lacks data, makes no independent analysis, relies heavily on information provided by interested parties, considers broad questions piecemeal, defers to industry interests, postpones difficult decisions, hopes for compromises that the agency can ratify, and fails to anticipate major problems before they arise. Had the FCC been more prescient, it might have been prepared to handle the massive “hotelvision” problem that presented itself on December 13. Instead, the Commission simply drifted.

The Safety and Special Agenda

The vast majority of FCC licenses are granted for uses other than radio and television broadcasting. Taxicab radios, police and fire de-

61. Transmitting Program Material to Hotels, 38 F.C.C.2d 527 (1973).

62. *Id.* at 530.

63. Midwest Corp., 38 F.C.C.2d 897 (1973). Reconsideration of this decision has been sought by a number of parties, including representatives of the interests of state regulatory commissions.

64. Columbia Pictures Industries, 39 F.C.C.2d 411 (1973).

65. Sterling Manhattan Cable Television Inc., 38 F.C.C.2d 1149 (1973).

partment radios, other business uses of mobile radios, amateur radios, citizens' band radios, and radios from one fixed point to another are examples. All such uses are licensed by the Commission's Safety and Special Bureau. Most of these licenses are granted by staff under delegated authority.⁶⁶

The majority of items on the Safety and Special Agenda fall into two major categories: petitions for rulemaking and license applications. The other items involve applications for uses which are at variance with the rules.

The Bureau could handle many of these agenda items itself if the Commission would promulgate clear policies for the staff's guidance. The Commission's delegation policies remain vague,⁶⁷ however, and, as a consequence, the Commissioners labor at tasks which could be within the competence of the staff. The single item on the December 13 Safety and Special Agenda illustrates this well.

A mobile oil drilling vessel called the SEDCO 702 requested a waiver of certain FCC rules. By international convention and the Communications Act,⁶⁸ cargo vessels are required for safety purposes to carry both radiotelephone and radiotelegraph equipment. SEDCO 702, despite its design, was classified as a cargo vessel but has only radiotelephone equipment. Since the vessel obviously would be useless in any rescue operation, the Commission waived the radiotelegraph equipment requirement.⁶⁹

Irritated by the SEDCO matter, the Commission delegated to the staff authority to act on similar requests in the future. The scope of the Commission's delegation thus typically is the result of frustration with current practices rather than a careful review of issues and bureau capabilities. SEDCO 702 exemplifies this troublesome ad hoc process.

The Common Carrier Agenda

One of the major functions of the FCC is the regulation of interstate and foreign communications services. Interstate telephone and telegraph services, private line services, international communication

66. 47 C.F.R. §§ 0.331-0.333 (1972).

67. If delegated matters reach the Commissioners at all, they come as a result of petitions for review filed by a party affected by staff action. 47 C.F.R. § 1.115 (1972). At one time staff decisions were written such that only persons familiar with FCC rules and operating procedures could determine whether the decision was by the Commissioners or by the staff. The Commission has changed this by requiring the staff member responsible to sign the document, adding a phrase noting that the action had been taken by the staff and that procedures for full Commission review are available.

68. 47 U.S.C. §§ 351-360 (1970).

69. SEDCO, Inc., 38 F.C.C.2d 620 (1972).

services, special microwave carriers, and common carrier land mobile services are all subject to common carrier regulation by the FCC. The Commission's regulatory activities, in most respects quite like public utility regulation, are complicated by the fact that the FCC shares intrastate jurisdiction with the states.⁷⁰

Common carrier matters have been step-children at the FCC, where broadcasting enjoys the most attention. Commissioners find common carrier items boring and complicated.⁷¹ AT&T dominates the industry and repeatedly assures the Commissioners that all is well. Industry domination by a single, vertically integrated company⁷² means that the Commission generally does not receive diverse points of view necessary to the resolution of common carrier matters.

On December 13 the Commissioners considered seven substantive common carrier items. The Commission ruled on exceptions to the Initial Decision of the Administrative Law Judge in an AT&T rate case.⁷³ It prescribed depreciation rates for the New England Telephone Company.⁷⁴ It also denied petitions for a stay and reconsideration of a previous decision⁷⁵ to permit Western Union to close some of its public message telegraph offices in New York City.⁷⁶ The Commission granted a partial waiver of its requirement that a "beep tone" be used to warn a calling party that his telephone conversation is being recorded.⁷⁷ This waiver was made available only for broadcast stations recording conversations for over-the-air broadcast.⁷⁸

One of the December 13 common carrier items involved the "cut-off" procedure, one of the FCC's internal control techniques. In order

70. 47 U.S.C. §§ 3, 221(b) (1970).

71. Perhaps because of the complicated nature of this aspect of regulation, the FCC has set up two sub-panels of Commissioners to act on certain common carrier matters. The Telephone Committee and the Telegraph Committee each consist of the same three Commissioners and an alternate. 47 C.F.R. § 0.4 (1972). These panels have authority to act in certain circumstances defined by Commission rules. 47 C.F.R. §§ 0.214 (Telegraph), and 0.215 (Telephone) (1972).

72. AT&T is vertically integrated from research (Bell Laboratory) through manufacturing (Western Electric) to retailing (Bell operating companies).

73. A.T.&T., 38 F.C.C.2d 492 (1972). The Commission's November 1972 decision on rate of return for AT&T and my dissent are reported at A.T.&T., 38 F.C.C.2d 213, 269 (1972). That decision permitted AT&T a 9 percent rate of return, up from 7.5 percent, at a probable cost to consumers of more than \$1 billion per year.

74. F.C.C. 72-1125 (Dec. 13, 1972). Decisions on depreciation rates for Bell subsidiaries appear regularly on the Commission agenda. Normally the majority relies on the staff presentation. The staff consults with state public service commissions which regulate the Bell subsidiaries involved. See *Chesapeake and Potomac Telephone Co.*, 40 F.C.C.2d 286, 287 (1973).

75. *Western Union Telegraph Co.*, 37 F.C.C.2d 813, 817 (1972).

76. *Western Union Telegraph Co.*, 39 F.C.C.2d 290 (1972). The closings in New York City are part of Western Union's program to cut back on public office telegraph service. Western Union believes this type of service is no longer necessary or profitable.

77. *Recording Devices*, 38 F.C.C.2d 579 (1972).

78. Commission rules already require stations to inform callers that the conversation is being recorded. 47 C.F.R. §§ 73.126, 73.296, 73.592, 73.664, 73.1206 (1972).

to consider all competing applicants for the same authorization in a single proceeding, the Commission establishes a cut-off date (after the receipt of the first application) before which all others must be filed.⁷⁹ The Commission previously had attempted to define the parameters of the new MDS service, mentioned earlier, in several obscure orders.⁸⁰ Interested parties applied for authorizations, the Commission established cut-off dates, and the dates passed. Some parties, especially minority groups, heard about the new service too late to apply. Despite the confusion about the parameters of MDS, the Commission had resolved not to relax the cut-off rules.⁸¹ Logically, one would think, this confusion should have led the majority to suspend or at least extend its cut-off dates,⁸² but logic is rarely the prevailing consideration at the FCC. On December 13 the majority denied a Miami MDS applicant's petition to review an earlier staff decision precluding that applicant from filing for MDS service due to the tardiness of the application. The majority denied review based on a recommendation from the same staff that had issued the original ruling.⁸³

Two items on the December 13 agenda illustrate FCC regulation of international common carriers. Western Union has a monopoly of domestic telegraph service.⁸⁴ Telegraph service between the United States and foreign countries is provided by several international carriers. A customer in the interior of the United States (called the "hinterland") who wants to send an international message usually must deal with both Western Union and the international carrier. The international carriers requested that they be allowed to establish free, direct "hinterland" customer connections and, not unexpectedly, they were opposed by Western Union, which, like all monopolies, dreads competition.

The Commission's response was a Notice of Inquiry and Proposed Rulemaking. A briefing and oral argument schedule was set and the Chief of the Common Carrier Bureau met with the parties to clarify the issues.⁸⁵ A subsequent notice was promised, but the matter has not been resolved.

The most important common carrier agenda item concerned Comsat, the quasi-public corporation authorized to provide international

79. 47 C.F.R. §§ 1.227, 1.571(c) (1972).

80. See *Multipoint Distribution Service*, 37 F.C.C.2d 444 (1972); *Notice of Proposed Rulemaking: Multipoint Distribution Service*, 34 F.C.C.2d 719 (1972).

81. *Multipoint Distribution Service*, 37 F.C.C.2d 444 (1972).

82. See Commissioner Hooks' dissenting opinion, 37 F.C.C.2d 444, 446 (1972).

83. *Miami Business Properties*, 25 P & F RADIO REC. 2d 1215 (1972).

84. 47 U.S.C. § 222 (1970).

85. *International Record Carriers Communications*, 38 F.C.C.2d 543 (1972).

communications satellite service. Comsat receives instructions from the United States government on the position it is to take at meetings of Intelsat, the consortium of countries participating in the international satellite system. The FCC, the Department of State, the Department of Defense, and the White House Office of Telecommunications Policy (OTP) share responsibility for formulating those instructions. At issue on December 13 were Comsat's instructions for an upcoming Intelsat meeting which would consider Comsat's request to operate three new satellites for Atlantic basin traffic. Comsat's request presented three problems for the FCC. The first was procedural. Cables built by AT&T and Comsat's satellites are alternative communications facilities in the Atlantic basin. FCC consideration of AT&T's applications for new international cables involves an elaborate proceeding in which the Commission hears from all parties affected by the decision.⁸⁶ In contrast, Comsat's request for an Intelsat instruction was to be decided privately, and, indeed, Comsat had not yet filed an application. A decision to instruct Comsat to press for a favorable Intelsat determination, however, would commit the Commission to approving the satellite applications when later filed.⁸⁷

The second problem was whether these new satellites were needed. Controversies over building cables and satellites have been vigorous and prolonged.⁸⁸ There is little agreement on how to define the need for, or even the costs of, such new facilities. The Commissioners had been briefed by Comsat on the basis of inadequate economic data. The materials before the Commissioners at the December 13 meeting failed to address traffic projections, alternative facilities, or costs, and the failures provoked a number of questions.

It became apparent, as a result of the ensuing discussion, that current needs did not require an immediate FCC decision on the need for new satellites and, indeed, that reconfiguration of existing facilities could satisfy immediately foreseeable future requirements. Further, NASA advised the Commissioners that development and construction of a new generation of higher capacity satellites would be a time-consuming and costly course.

Finally, the Commission had to determine whether it had any real alternative to instructing Comsat to seek approval of the new satellites.

86. See, e.g., A.T.&T., 35 F.C.C.2d 301 (1972); A.T.&T., 11 F.C.C.2d 957 (1968). (Fifth and Sixth Trans-Atlantic Cables.)

87. The Commission has moved recently to rectify this inequity. Cables and satellite authorizations will receive roughly similar treatment, with full opportunity for all parties to be heard.

88. See decisions cited note 80 *supra*.

If the member nations of Intelsat refused to reconfigure the present facilities and firmly supported a new set of satellites, it would be difficult for Comsat to oppose going ahead—particularly in view of the concern about United States domination of Intelsat. If the other governmental agencies participating in instruction formulation—the Department of State, the Department of Defense, and OTP—supported the new satellites, a contrary FCC view would carry little weight.

Their uncertainty in all these matters led the Commissioners once more to temporize. The Commission recommended instructions which could not be interpreted as a recommendation on the new satellite program, but would urge Comsat's Intelsat partners to use existing facilities efficiently.⁸⁹

When Intelsat later opted for new satellites, the FCC still did not know whether they were necessary. Having failed to resolve the procedural issue, the Commission nevertheless capitulated to external pressures and granted instructions which had the effect of authorizing Comsat to go ahead with its new satellites.⁹⁰

The Personnel Agenda

The head of any institution must manage personnel. Because the administrative "head" of the FCC is a committee of seven Commissioners, the task has become almost impossible. To the extent the job is done at all, it is accomplished during consideration of the Personnel Agenda. Most items involve personnel in grades GS-14 or above. Typically a transfer or promotion is placed on the agenda after the Bureau Chief, Personnel Chief, and Executive Director have all approved it. There is little left for the Commissioners besides approval of the recommendation.

The single personnel item on the December 13 agenda was atypical: the reappointment of a former professor of mass communications who has been a valuable consultant to the Commission on proposed changes

89. F.C.C. 72-1142 (Dec. 13, 1972).

90. F.C.C. 73-107 (Jan. 18, 1973). The Commission has never explained its decision authorizing this new investment of more than \$100 million. State Department and OTP support for these new satellites was premised on foreign policy considerations and not the need for new facilities. It had been represented to the Commission that Intelsat supported the new satellites, Intelsat-IV-A, and on January 30, 1973, Intelsat approved the program. But at the time of the FCC's decision, serious reservations were expressed about the cost of the IV-A program and about contract problems with the satellite supplier.

It should be noted that the FCC's deference to the competing interests of AT&T and Comsat has resulted in chronic excess capacity in international facilities, bitter controversy at the FCC, and higher prices to consumers.

in broadcast renewal procedures.⁹¹ This matter was rushed to the Commission as a late item and was approved.⁹²

The Classified Agenda

There were no items on this agenda on December 13.⁹³

The Cable Television Agenda

Cable television, a new industry, could have an impact upon the American people rivaling that of the telephone or the automobile. The Commission, however, very solicitous of the interests of the commercial broadcasting industry, and hence, of that industry's fear of cable television, has for years been antagonistic toward Cable.⁹⁴ Such bureaucratic intransigence cannot last forever—especially in view of the broadcast industry's rush to buy cable systems. In February 1972, the Commission "opened up" the cable industry by promulgating a set of complex rules⁹⁵ which, while allowing cable to begin operating on a national scale, nevertheless prevented the industry from fully developing.

These rules—the product of what has euphemistically been called a "compromise" between the cable industry, broadcasters, copyright owners and the White House⁹⁶—now allow cable systems to carry local and some distant broadcast signals and require most systems to provide free and open access channels for the public, educational authorities, and local governments.⁹⁷ Before a cable system may commence operations, however, the rules demand that it receive local

91. See F.C.C. Docket No. 19153 (Dec. 13, 1972).

92. F.C.C. Minute No. 43-P-72 (Dec. 13, 1972).

93. On rare occasions the Commissioners have matters before them which are classified for national security reasons. For example, certain aspects of planning for restoration of communications in the event of war, the use of certain frequencies by government agencies concerned with national security, or the licensing of aliens would be on the classified agenda.

94. See, e.g., First Report and Order for Cable Television, 1 F.C.C.2d 524 (1965), wherein the FCC asserted jurisdiction over microwave-fed CATV systems; Second Report and Order, 2 F.C.C.2d 725 (1966), in which the Commission took jurisdiction over all CATV systems and placed severe restrictions on carriage of distant signals in the top 100 markets; Notice of Inquiry and Proposed Rulemaking, 15 F.C.C.2d 417 (1968), wherein the Commission continued limitations on CATV development. For a thorough history of the FCC's approach to cable television, see *CABLE TELEVISION IN THE CITIES* 113-22 (The Urban Institute 1971).

95. Cable Television Report and Order, 36 F.C.C.2d 143 (1972). See Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326 (1972).

96. For a discussion of the political intrigue surrounding the adoption of the current cable television rules, see my concurring and dissenting opinions in Cable Television Report and Order, 36 F.C.C.2d 143, 306, 320-23 (1972), and Chairman Dean Burch's response, *id.* at 287.

97. 47 C.F.R. § 76.251 (1972).

authorization (a franchise)⁹⁸ and FCC sanction (a certificate of compliance).⁹⁹ Systems which were operating¹⁰⁰ or were authorized to operate by local governments¹⁰¹ prior to promulgation of the new rules are currently less stringently regulated than new systems. All cable systems, however, will have to conform to the rules by 1977.¹⁰²

The FCC's Cable Bureau is the cable industry's most vociferous advocate. Because a majority of the Commissioners are thought by the Cable Bureau to favor the broadcast industry, it is apparently of the view that it must be an advocate for the other side. Compromise no doubt results from such an adversary process, but the best solution (in terms of the public interest) may not.

The Cable Bureau's current efforts are designed to ensure that hundreds of cable system certificates of compliance pass without interference through the Commission bureaucracy. To secure the Commissioners' approval, the Bureau strategically barrages them with numerous applications. The Bureau's analyses of these applications are often very facile; minor rule waivers one week become the precedents for major infractions presented to the Commission the week following, and the Commission is frequently asked to approve certificates of compliance without adequate information.

On December 13, the Commissioners were presented with ten cable matters. The first was a request by a Manhattan company for permission to distribute sports programs to nonaffiliated cable systems in upstate New York. The applicant sought a permit to construct microwave relay facilities to connect with the upstate cable systems.

Because microwave relay is a significantly less expensive means of system interconnection than laying additional cable, the Commission permits cable operators to construct and operate "cable relay stations" (CARS), but CARS may not be licensed to relay one cable system's signals to a nonaffiliated system.¹⁰³ This licensing limitation is designed to prevent cable operators from using CARS licenses to exclude competitors from the use of the relay service. The Manhattan company requested a waiver of this rule and the Cable Bureau concurred.

The Commission majority expressed displeasure with the Cable Bu-

98. 47 C.F.R. § 76.31 (1972).

99. 47 C.F.R. § 76.11 (1972).

100. See generally Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972). While these systems need not comply with the rules limiting distant signal importation, they must comply with the public access rules by March 1977. 47 C.F.R. § 76.251(c) (1972).

101. See CATV of Rockford, 38 F.C.C.2d 10 (1972); Reconsideration of Cable Television Report and Order, 36 F.C.C.2d 326, 366 (1972).

102. See CATV of Rockford, 38 F.C.C.2d 10 (1972).

103. 47 C.F.R. § 78.13 (1972).

reau's approach, arguing that the staff had failed to demonstrate that the applicant had no other means of reaching upstate markets. As a result the Commissioners returned the case to the staff for further study.

The dialogue on this case was healthy. The Commissioners demanded justifications for a waiver of the CARS rules. The majority is rarely so reluctant to relax its rules, and its reluctance in the instant case may well have resulted from the National Association of Theater Owners expression of apprehension that the interconnection of sports events might eventually lead to the interconnection of first-run movies. In any event, subsequent items on the December 13 agenda reveal that rule waivers are readily granted when only public, as opposed to industry, interests are at stake.

In another item, for example, the Cable Bureau asked Commission approval for Video International's request to initiate cable operation in certain unincorporated areas of Leon County, Florida. Since most unincorporated communities lack organized franchising authorities, they pose serious problems under the rules. The rules do not demand local franchises in such circumstances but they *do* demand some "appropriate authorization."¹⁰⁴ If there is neither a franchising authority nor other appropriate means of authorization, the FCC must determine on a case-by-case basis whether the applicant has endeavored to fulfill the intent of the regulations.¹⁰⁵

Leon County, unlike most unincorporated communities, *does* have a governing body—the County Board of Commissioners—which could have issued a franchise to Video International. Instead, it chose to issue a "right of way" permit for which public hearings of the sort required by FCC rules governing franchises¹⁰⁶ may not have been held. Professor Leroy of the University of Florida argued that the County Commission's refusal to issue a franchise after public hearings violated Commission rules, but the Bureau and the Commissioners were unconvinced. The majority concluded that a "right of way" permit was an "appropriate authorization" within the meaning of the rules¹⁰⁷—a bizarre conclusion since the County Commission could have complied with the procedural requirements but declined to do so solely as a means of avoiding a public hearing. The effect of this ruling is

104. 47 C.F.R. § 76.31 (1972).

105. See Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326, 366 (1972).

106. 47 C.F.R. § 76.31(a)(1) (1972).

107. Video Int'l, 38 F.C.C.2d 966 (1972).

that a cable system can avoid the public hearing requirement in some situations simply by obtaining a right-of-way permit.¹⁰⁸ In short, the majority offered its blessing to new cable systems which, with local governing bodies, purposefully choose to circumvent its rules.

The FCC tends to countenance such rule violations so long as the public is the only victim. Recently, for example, the majority waived public access rules which bestow substantial benefits on the public but impose financial burdens on the cable industry.¹⁰⁹ These access channel requirements provide the public a forum, currently denied them by commercial broadcasting,¹¹⁰ wherein they can express controversial points of view. On December 13, the Cable Bureau suggested that the Commissioners significantly undercut this potential.

At issue was a proposed merger by two of America's largest cable corporations: Cox Cable, and American Television and Communications (ATC).¹¹¹ In order to defuse opposition to their merger—and, no doubt, to increase the number of minority group subscribers—Cox and ATC had agreed with several minority groups to lease, at a nominal fee, several access channels to blacks and Chicanos on a first-come, first-served basis, thus offering minorities an important communications forum in California.

108. *Id.* The majority did condition the grant upon a later submission of a franchise, in effect casting the Commission's rules into the form of a contractual promise. Such corrective action should not obscure the fact that this certificate was granted absent a public proceeding. The cable staff suggested that Professor Leroy's opportunity to speak before the Board of Commissioners constituted the requisite hearing. Absent some form of factual inquiry, however, there can be no determination whether a public hearing was held. Since no inquiry was made here, it can only be assumed that the certificate was granted on the theory that the hearing (and by implication due process) was not necessary.

109. In *Stark County Communications*, 38 F.C.C.2d 1147 (1973), 39 F.C.C.2d 274 (1973), the majority certified a cable operator for five separate cable systems in five neighboring communities even though the cable company refused to provide each community with the three separate access channels required by the rules. The majority reasoned that these communities were so small (less than 2,000 people altogether) that there would be no demand for these channels. As I pointed out in my dissent, however, there was no way to measure such demand. 39 F.C.C.2d at 276. In *Saginaw Cable TV Co.*, 38 F.C.C.2d 496 (1973), the majority extended *Stark County* to a cable company desirous of operating four separate systems in four Michigan communities. The total population of these communities was over 120,000, illustrating that today's bad precedent begets tomorrow's body of law.

110. *See Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970), where the FCC majority gave its blessing to a station's refusal to sell time to groups desiring to express controversial points of view. That decision was reversed by the Court of Appeals, *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F.2d 642 (D.C. Cir. 1971), but the Supreme Court upheld the Commission by reversing the Court of Appeals, 41 U.S.L.W. 4688 (U.S. May 29, 1973).

111. This case also presented significant cross-ownership problems because it would result in one corporation owning cable and broadcast operations in the same market. *See* 47 C.F.R. § 76.501 (1972). The Commission, however, has often waived cross-ownership rules. *See Warner Communications, Inc.*, 37 F.C.C.2d 260 (1972); *TelePrompter, Inc.*, 25 F.C.C.2d 469 (1970).

The Cable Bureau charged that the agreement was the product of coercion, suggesting that the Commission was confronted with an abuse of its process.¹¹² The Bureau argued that because Commission rules preclude local franchising authorities from insisting upon access rights more extensive than the FCC requires,¹¹³ private minority groups and cable companies could not agree to such an arrangement. Thus were minority groups elevated to the status of municipalities.

The Commissioners probably would have agreed to waive the cross-ownership rules, but, as it turned out, they did not reach any of the issues presented in this case. Negotiations between the Bureau and the attorneys for the minority groups¹¹⁴ were interrupted by a Justice Department suit to block the merger on the grounds that it violated anti-trust laws.¹¹⁵ The issues, therefore, remain unresolved.

The point, however, is that the Cable Bureau, when confronted with a privately-arrived-at agreement which would have *benefited* long powerless groups, sought desperately to make that agreement appear unlawful. When confronted with private agreements that benefit industry, the staff strains to justify waivers.

The Assignment and Transfer Agenda

FCC rules prohibit broadcasters from purchasing stations for the sole purpose of profiting from their resale, a practice known as "trafficking."¹¹⁶ Broadcasters nevertheless purchase and sell stations. These

112. The staff has tolerated such abuse of our process when the abuser is a broadcaster. For example, in *Saginaw Cable TV Co.*, 39 F.C.C.2d 496 (1973), a cable system had initially proposed as part of its programming to carry the distant broadcast signal of WJIM, Lansing, Michigan. When a broadcaster in the Saginaw market objected, the applicant dropped its WJIM proposal and the objector dropped its challenge to the system's application for a certificate of compliance. The Cable Bureau made nothing of this series of events.

113. 47 C.F.R. §§ 76.251(a)(11)(IV), 76.251(b) (1972).

114. The Cable Bureau was not—at least until the last minute—clear on the intent of the various minority groups in entering into these agreements with Cox and ATC. It was also afraid that public access facilities provided by the system would lie dormant while various minorities used the leased access channels, thus defeating the purpose of the public access rules. There is considerable question whether the staff's position was well taken, however, since these were private agreements and since most of the cable systems involved did not provide any access channels prior to the agreement. In any event, the intriguing point is that the Cable Bureau, absent full understanding of the facts, rushed to validate the merger and to invalidate the agreements because the cable companies wanted an immediate decision.

115. *United States v. American TV & Communications Corp.*, Civil No. 17573 (N.D. Ga. April 20, 1973). Cox and ATC recently announced cancellation of their merger plans.

116. *See, e.g., Folkways Broadcasting Co. v. F.C.C.*, 375 F.2d 299 (D.C. Cir. 1967). Assignment of a station within three years after purchase is prohibited. 47 C.F.R. § 1.597 (1972). A licensee selling a station within the three-year limit is presumed to have "trafficked." *Crowder v. F.C.C.*, 399 F.2d 569 (D.C. Cir. 1968). As one might expect, the majority has waived this rule even when the evidence of trafficking was strong. *See, e.g., my dissenting opinion in Twin States Broadcasting Co.*, 39 F.C.C.2d 835 (1973).

transactions, considered during the "Assignment and Transfer Agenda," are often approved despite actual or potential rule violations. And in many cases the FCC majority approves a broadcaster's addition to its already burgeoning media empire.

On December 13 the Commission was presented with an application by RKO General, Inc., to purchase its *seventh* FM radio station—WAXY-FM, Ft. Lauderdale, Florida. The application was remarkable not only because the FCC has promulgated rules against excessive multiple ownership of stations,¹¹⁷ but more importantly because RKO General's applications to renew its licenses to KHJ-TV, Los Angeles, and WNAC-TV, Boston, had earlier been designated for hearings to determine whether RKO was qualified to own *any* broadcast interests.¹¹⁸

Before approving the grant of an assignment application, the Commission must determine that the grant will serve the public interest, convenience, or necessity.¹¹⁹ While such a determination may be made on the basis of the pleadings filed by the parties in some cases, if the challenging pleadings reveal that approving the application would be *prima facie* inconsistent with the public interest, the Commission must designate the contested factual issues for a hearing.¹²⁰ Though RKO's application to purchase its seventh FM facility had not been challenged, the facts of the case demanded the designation of such a hearing.

First, the acquisition would do violence to the FCC's rules prohibiting undue concentrations of media control. These rules are designed to foster program diversity by preventing any single individual or corporation from acquiring disproportionate local, regional, or national control over broadcast facilities. Whether a particular acquisition will result in undue media concentration depends upon "the facts of each case," but ownership of more than seven AM, FM, or TV stations constitutes undue media concentration *per se* and is absolutely prohibited.¹²¹

The Commission majority, however, has converted this *per se* maximum into the presumptively permissible number.¹²² Without the requisite rulemaking proceeding,¹²³ the majority has, in effect, re-

117. 47 C.F.R. §§ 73.35, 73.240(a)(2), 73.636 (1972).

118. The KHJ renewal application was designated for hearing in 1966. The WNAC renewal application was designated for hearing in 1969. Both applications had been challenged by competing applicants. *See* p. 1606 *infra*.

119. 47 U.S.C. § 309 (1970).

120. 47 U.S.C. § 309(e) (1970). *See* *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

121. 47 C.F.R. §§ 73.35, 73.240(a)(2), 73.636 (1972).

122. *See, e.g.,* WDSU TV, Inc., F.C.C. Minute No. 501-A-72, Mimco No. 92413 (1972); *Twin States Broadcasting Co.*, 39 F.C.C.2d 835 (1973).

123. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970), requires that administrative agencies promulgate and amend their rules pursuant to certain rulemaking procedures and not through adjudicative decree.

pealed the regulations governing those cases where an acquisition will result in ownership of seven or fewer AM, FM, or TV stations. In the RKO case, neither the staff nor the majority even alluded to the multiple ownership rules, and no investigation was initiated.

The RKO case is also noteworthy for a different reason. At the time the majority approved this assignment, RKO was involved in license renewal hearings on applications for KHJ and WNAC-TV. The KHJ proceeding, which was initiated in 1966, involved a comparative hearing between RKO and a competing applicant, Fidelity Television of Norwalk, California. Fidelity Television challenged the incumbent's license and filed a competing application. Pursuant to provisions of the Communications Act of 1934, the Commission held comparative hearings to determine which broadcaster would best serve the public interest.¹²⁴

The Administrative Law Judge presiding over the comparative hearing found that a renewal of RKO's KHJ license would be inconsistent with the public interest.¹²⁵ He found that RKO and its corporate parent, the General Tire and Rubber Company, had engaged in reciprocal trade agreements with respect to the sale of advertising on KHJ and concluded that Fidelity was the preferred licensee.

The seven FCC Commissioners considered these findings in the Chairman's office on October 19, 1972. Without discussing the merits of those findings, five Commissioners decided not to act upon them. They could not, however, simply renew RKO's license to KHJ, for RKO's license renewal application for WNAC-TV in Boston had *also* been designated for a comparative hearing.¹²⁶ A competing applicant in that case had charged RKO with misrepresenting facts to the Commission during the KHJ proceeding. Misrepresentation, at least until recently, has been a certain ground for the revocation of a broadcast license.¹²⁷

124. 47 U.S.C. § 309(a) (1970). *See* Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945). Renewal applications may also be challenged by concerned citizens or groups through petitions to deny. 15 U.S.C. § 309 (1970). Hearings must be held on such petitions when they allege material facts which indicate that a grant of the renewal application would be *prima facie* inconsistent with the public interest. *See* Stone v. F.C.C., 466 F.2d 316 (D.C. Cir. 1972).

125. Initial Decision, F.C.C. 69 D-43 (Aug. 13, 1969).

126. *See* note 118 *supra*. Ultimately, of course, the law catches up with the Commission's delaying tactics. On June 11, 1973, in connection with a petition for a writ of mandamus, the Court of Appeals for the District of Columbia ordered the Commission to file comments, within thirty days, stating what action they had taken with regard to the KHJ renewal application. *Fidelity Television, Inc. v. F.C.C.*, No. 73-1313 (D.C. Cir. June 11, 1973) (per curiam).

127. *See, e.g.*, Nick J. Chaconas, 28 F.C.C.2d 231, 233 (1971). *But see* Grenco, Inc., 39 F.C.C.2d 732 (1973), in which the majority renewed a license after one of the licensee's principals had misrepresented facts to the Commission's Chief Administrative Law Judge.

The Commissioners simply resolved to take no official action in the KHJ case. However, the majority agreed with the staff that RKO's KHJ license could not be renewed until certain other issues were resolved by the Administrative Law Judge on remand. As a procedural matter, then, it would have made sense for the majority to reverse the Administrative Judge on his initial findings (assuming a majority wished to do so) and remand for resolution of the remaining issues. The majority's decision to delay resolution was nonsensical unless viewed as a means of denying dissenting Commissioners an opportunity to write opinions which might have been the basis for judicial reversal on appeal.

The Assignment and Transfer Branch advised the Commission that prior to resolution of the antitrust and misrepresentation issues in the KHJ and WNAC proceedings and in view of an adverse finding against RKO by the KHJ Administrative Law Judge, the Commission could not allow RKO to purchase still another broadcast station (WAXY). Indeed, if a broadcast owner's basic qualifications are in doubt as to one of its licenses, the Commission's decisions hold that those qualifications are in doubt as to all of them.¹²⁸ The Commission majority was so eager to let RKO continue building its broadcast empire, however, that it nevertheless approved RKO's acquisition of WAXY one week later.¹²⁹

Though the Assignment and Transfer staff had recommended *against* the immediate grant to RKO, the staff was not free from blame for the majority's result, for in the very next agenda item the staff reached the opposite conclusion in a similar case. Kops-Monahan Communications had petitioned to assign its licenses for WTRY-AM (Troy, New York) and WTRY-FM (Albany, New York) to Scott Broadcasting of Pennsylvania. This assignment would allow Scott to acquire its seventh AM and fourth FM broadcast stations.¹³⁰ As in RKO's case, neither the staff nor the majority recognized any multiple ownership problems. This time, however, the staff urged approval of this assignment notwithstanding a petition to deny Scott's pending renewal application for WFEC-AM (Harrisburg, Pennsylvania) filed by a coalition of black

128. See WOIC, Inc., 39 F.C.C.2d 355 (1973); Friendly Broadcasting Co., 35 F.C.C.2d 84 (1972); Vinita Broadcasting Co., 30 F.C.C.2d 458 (1971).

129. RKO General, Inc., 26 P & F RADIO REG. 228 (1972).

130. At the time of this assignment, Scott's holdings were all in the mid-Atlantic portion of the country. The proposed acquisition of WTRY-AM and FM increased this regional concentration. Regional concentration of media control warrants even closer Commission scrutiny than such holdings in widely separated parts of the country. See my opinion in Twin States Broadcasting Co., 39 F.C.C.2d 835 (1973).

community leaders. That petition charged, among other things, that Scott had engaged in discriminatory programming and employment practices.

Why did the staff take the view that there were no problems with respect to Scott's application when, at the same meeting, it had urged the Commission to delay ruling on RKO's application? It might be argued that Scott's qualifications with respect to WFEC (and, hence, with respect to all its licenses) had not been cast into substantial doubt because the Commission had not yet set the WFEC application for hearing. In such a circumstance, however, it would make little sense to approve this acquisition until *after* the FCC had disposed of the WFEC petition to deny. The second possible rationale for the staff's inconsistent approaches may lie in its belief that licensee misrepresentation (RKO's case) is a graver fault than racial discrimination (Scott's case). This distinction suffers from obvious difficulties. The Commission majority resolved the staff's inconsistent approaches by granting both assignment applications. The result should have been the reverse.

The Commission's disposition of the final item on the December 13 Assignment and Transfer Agenda illustrates still another form of FCC capriciousness. This time the majority, without a hearing, granted Zenith Radio's application to assign WEFM-FM (Chicago) to GCC Communications.¹³¹ GCC advised the Commission that, for purely financial reasons, it would be forced to change WEFM's format from classical to contemporary music. The Citizens Committee to Save WEFM challenged GCC's application in a petition to deny which charged that Zenith's alleged financial losses were not the result of WEFM's classical format and that Chicago's other classical music stations would not adequately serve the city's classical music devotees. In spite of these allegations and, without a hearing, the majority granted the assignment application.

This action flew in the face of *Citizens Committee v. F.C.C.*,¹³² where the Court of Appeals had reversed the Commission's approval of a license transfer without a hearing on the impact of a similar proposed change in music format. The Court of Appeals held that a hearing was necessary to make factual determinations about the format change.

131. *Zenith Radio Corp.*, 38 F.C.C.2d 838 (1972).

132. 436 F.2d 263 (D.C. Cir. 1970). *See also* *Citizens Comm. to Preserve the Present Programming of WONO (FM) v. F.C.C.*, 436 F.2d 262 (D.C. Cir. 1971); *Joseph v. F.C.C.*, 404 F.2d 207 (D.C. Cir. 1968). *But see* *Hartford Communication Comm. v. F.C.C.*, 467 F.2d 408 (D.C. Cir. 1972).

The *Zenith* majority attempted to limit the *Citizens* holding to situations in which the format being extinguished was the only one of its sort available to the community. In fact, however, the *Citizens* case did not involve the loss of the only station of its type.

The Renewal Agenda

The Communications Act provides that broadcasters' licenses shall terminate every three years, that they are not "property" of licensees,¹³³ and that the station owners are, in effect, using public property (the spectrum) for private profit and have a responsibility to program "in the public interest." The FCC makes renewal decisions for all licenses in a given state on the same day. The states are separated into groups and renewal applications for groups of states are presented to the Commission at two-month intervals. Each broadcast license runs for a period of three years.

To avoid making the renewal process an effective screening procedure, the Commission majority has declined to clarify the parameters of licensee responsibility.¹³⁴ Those meager public interest "standards" which it has adopted are so vague and loosely enforced that they impose no burden upon licensees. Broadcasters must ascertain the needs of their communities and program to meet those needs. The ascertainment requirement is easily satisfied by pro forma interviews with public officials, community leaders, and a randomly selected segment of the general public.¹³⁵ If a broadcaster somehow fails to ascertain the community's "needs," it does not risk denial of its renewal application; the FCC gives it another bite of the ascertainment apple.¹³⁶

Although ascertainment is the *sine qua non* for satisfying a licensee's public interest responsibility,¹³⁷ the Commission imposes other re-

133. Communications Act of 1934, 47 U.S.C. § 301 (1970), makes it clear that broadcast licenses are not property. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969), in which the Supreme Court said: "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."

134. For example, I have suggested repeatedly that a licensee must broadcast at least five percent news, one percent public affairs, and five percent other nonentertainment programming per week in order to satisfy the most minimum "public interest" requirements. See the dissent in *Oklahoma Renewal Group*, 14 F.C.C.2d 1, 126 (1968) (Commissioners Johnson & Cox dissenting).

135. See *Primer on Ascertainment*, 27 F.C.C.2d 650 (1971). This "random selection" requirement is very loosely enforced. If a licensee operating in a community which has a fifty percent black population interviews a sample of whom only fourteen percent are black, the majority has ruled that the survey is acceptable. *Twin States Broadcasting Co.*, 39 F.C.C.2d 835 (1973).

136. See, e.g., *Great Trails Broadcasting Co.*, 39 F.C.C.2d 39 (1972).

137. See *City of Camden*, 18 F.C.C.2d 412 (1969).

quirements. There are, of course, technical rules, and the Commission requires that licensees abide by the vague and loosely enforced fairness doctrine. Further, the Commission has rules against discriminatory programming and employment practices.¹³⁸ In general, however, licensees may violate FCC rules with impunity so long as they do not misrepresent facts to the Commission.¹³⁹

Renewal applications may be contested or uncontested. The staff renews uncontested applications after little, if any, investigation¹⁴⁰ except in the area of equal employment opportunity. Even here the staff's efforts are half-hearted. If a licensee's employment records indicate a pattern of declining or limited employment for women and minorities, the staff inquires about the matter by mail. The letters are harmless, and the Commission arbitrarily exempts some stations from these weak inquiries.¹⁴¹

On December 13 the staff matched its contempt for its own equal employment opportunities program with a new-found contempt for efforts by state regulatory agencies. The Pennsylvania Human Rights Commission (PHRC) had requested that the FCC defer action on the uncontested renewal applications of several radio and television licenses in the Pennsylvania renewal group. The PHRC was investigating allegations of discriminatory employment practices against these stations, although none had received equal employment opportunity letters of inquiry from the FCC. The renewal staff had initially acquiesced to the PHRC request, but on December 13 it advised the Commission that these renewals should no longer be delayed. Because the question

138. Nondiscrimination Employment Practices of Broadcast Licensees, 23 F.C.C.2d 430 (1970); Nondiscrimination Employment Practices of Broadcast Licensees, 13 F.C.C.2d 766 (1968).

139. The rule against misrepresentation is no longer firm. In the small number of cases where the Commission has denied a license renewal application, the licensee was found to have purposefully misrepresented the facts to the Commission. See Abel, Clift & Weiss, *Station License Revocation and Denials of Renewals* (1934-1969), 14 J. BROADCASTING 411 (1970). Under this approach, generally the small, poorly informed and poorly represented broadcaster suffers the most. See my dissenting opinion in *Grecco, Inc.*, 39 F.C.C.2d 732, 739 (1973).

140. In theory, the staff does question those licensees failing to conform programming performance in one license term to the programming promises made in a prior renewal application. Though the rules do not require that applicants promise any news or public affairs programming, licensees often make such promises in order to ward off public complaints. In order to determine whether licensees satisfy programming promises, the staff examines the licensee's performance for one "composite" week of randomly selected days during the three year renewal period. If there is a discrepancy between the week's performance and the earlier promise, the staff sends a letter of inquiry to the station. Licensees generally respond that the composite week's performance was not typical of programming during the renewal period.

141. See my separate opinion in *Equal Employment-Pennsylvania/Delaware Renewals*, 36 F.C.C.2d 515, 518-20 (1972), where I have discussed present FCC criteria and proposed alternative and more stringent standards for when a letter of inquiry should be sent.

of FCC deference to such state agency investigations was new, the staff sought Commission approval of its proposed action.

The complaints against these stations had been filed with the PHRC by the same individual. Although the staff conceded that the PHRC had discerned merit in them, it claimed that the complainant's allegations did not suggest a "pattern" of discrimination. There was thus no reason to delay the renewal applications, argued the staff, because even if the PHRC's investigation uncovered isolated instances of discrimination, such discrimination would not merit FCC disapprobation.¹⁴² The Commission, paying no homage to traditional notions of comity, approved the staff's recommendation.¹⁴³

Contested applications pose more of a challenge to the Commission, but the outcome is the same. Renewal applications may be contested by competing applicants, in which case a comparative hearing must be held. They may also be challenged by citizens filing petitions to deny, in which case a hearing must be held if the petitioners allege material facts indicating that renewal of a license would be prima facie inconsistent with the public interest.¹⁴⁴ The Commission is particularly hostile to petitions to deny. Competing applications are generally brought by entrepreneurs; petitions to deny are brought by broadcast consumers who are concerned with improving service to the community.¹⁴⁵

Because the statute does not mandate hearings on all petitions to deny, because such hearings are viewed as a threat to broadcasters, and because both the staff and the majority are hostile to consumer groups, the Commission's general approach to petitions to deny is to avoid hearings.¹⁴⁶ The staff resorts to three basic approaches in determining that a petition to deny has failed to allege material and substantial facts indicating that the grant of a renewal application would be prima facie inconsistent with the public interest. First, it may conclude that the allegations in a petition to deny are too "general." This approach

142. The FCC has attempted to distinguish between isolated instances of discrimination and patterns of discrimination. *See* 1969 Report and Order, 18 F.C.C.2d 240, 241-42 (1969).

143. Letter to Homer C. Floyd, 39 F.C.C.2d 77 (1972).

144. *See* *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

145. *See* my dissenting opinion in *Great Trails Broadcasting Co.*, 39 F.C.C.2d 39, 45 (1972).

146. Even when hearings are held the station's license invariably is renewed. On March 7, 1973, the Chief of the Complaints and Compliance Division of the Broadcast Bureau advised the Commissioners that Administrative Law Judges tend to choose the monetary forfeiture penalty rather than the sanction of denying a renewal application. He suggested that in designating a particular item for hearing, the FCC should not specify to the Administrative Law Judge that the sanction could be a monetary fine rather than a license denial or revocation. The Commissioners rejected this suggestion.

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is frequently used to thwart petitions alleging failure to ascertain adequately community needs and failure to broadcast programming to meet those needs.¹⁴⁷

Since a staff ruling that a petition to deny is too "general" is analogous to a judicial ruling that a complaint is inartfully drawn, logic suggests that the staff should permit amendments.¹⁴⁸ The staff, however, does not allow petitioners to amend their complaints. It is not nearly so harsh on licensees: An inadequate ascertainment survey may be amended.¹⁴⁹

The staff's second approach to petitions to deny is simply to resolve disputed facts in the licensee's favor without holding a hearing. This approach, admittedly less subtle than the first, enabled the staff on December 13 to dispose of a petition to deny filed by the Columbus Broadcasting Coalition (CBC) against the renewal applications of RadiOhio, Inc., licensee of WBNS-AM-FM-TV in Columbus, Ohio.¹⁵⁰

CBC argued that RadiOhio had utilized its media power in the Columbus market for anticompetitive purposes. Such allegations, if "specific" enough, would warrant a hearing.¹⁵¹ CBC argued that, aside from its substantial broadcast interests in Columbus, RadiOhio also owned two daily newspapers and a Sunday paper. CBC alleged further that the licensee's newspapers favored the licensee's broadcast interests (specifically, WBNS-TV's program listings) over its competitors. CBC also argued that the licensee had used its media power to attempt to censor the Urban League's Housing Director when he charged, during a WBNS-TV broadcast, that the licensee's principals were racist.

RadiOhio denied all of the CBC allegations. Thus, each of these matters was in dispute. Rather than set the case for hearing to investigate the factual disputes, however, both the staff and the majority simply resolved them in the licensee's favor and renewed its license.

The staff's third method of avoiding hearings on petitions to deny is to accept the facts as alleged, but assert that, even if true, such facts

147. See, e.g., Mahoning Valley Broadcasting Corp., 39 F.C.C.2d 52 (1972). Taft Broadcasting, 38 F.C.C.2d 770 (1972), and RadiOhio, Inc., 38 F.C.C.2d 721 (1972), were originally on the December 13 agenda and decided on December 20.

148. A decision to deny a complaint on the grounds that it is too "general" is not analogous to a judicial decision to grant summary judgment. Summary judgment follows discovery, whereas there is no opportunity for a complainant to engage in discovery until a hearing is set on a petition to deny.

149. See *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

150. RadiOhio, Inc., 38 F.C.C.2d 721 (1972).

151. See, e.g., *Hale v. F.C.C.*, 425 F.2d 556, 559-60 (1970); *Michiana Telecasting Corp.*, 26 F.C.C.2d 21, 25 (1970). The Commission has been considering the problem of media concentration, especially with respect to newspaper cross-ownership, for three years. Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339, 346 (1970).

do not warrant denial of the renewal application. On December 13 the staff resorted to this approach twice.

In addition to challenging RadiOhio's licenses, CBC had also challenged the renewal applications of Taft Broadcasting Company, licensee of WTVN-AM and TV and WBUK-FM, all in Columbus.¹⁵² CBC argued that Taft had engaged in discriminatory hiring practices, but once again the staff resolved disputed facts in the licensee's favor. With respect to the one specific allegation of employment discrimination, however, the staff reiterated its earlier position that one instance of employment discrimination does not warrant a hearing and denial of a renewal application, nor even justify delaying that application.¹⁵³

The next case involved a petition to deny filed by the Colorado Committee on Mass Media and Spanish Surnamed, Inc. (Committee) against Fort Collins Broadcasting Company, licensee of KIIX, Fort Collins, Colorado. The petitioners charged that the licensee had harassed them during the preparation of their complaint. Specifically, the Committee alleged that the licensee had refused to make its public file available for inspection, had threatened the petitioners with a defamation suit, and had broadcast an editorial against the Committee.

The staff, while it acknowledged the serious public interest problems inherent in licensee harassment of citizens groups, avoided these problems by concluding that the licensee's conduct did not amount to an attempt to discourage the public from filing petitions to deny.¹⁵⁴

A licensee's attempts to discourage a petition to deny through unfair means obviously undercuts the citizen's statutory right to file such petitions. In a very real sense, the institutionally harassing behavior of the staff and Commission majority undercuts that right every week.¹⁵⁵ On December 13, the Federal Communications Commission successfully scuttled three petitions to deny and declined to defer to a state agency which was attempting to tackle a problem the Commission had long ignored. That task completed, the December 13 license renewal ritual concluded.

152. Taft's licenses were renewed on December 20. Taft Broadcasting, 38 F.C.C.2d 770 (1972).

153. *Id.*

154. Fort Collins Broadcasting Co., 38 F.C.C.2d 707 (1972). This item was actually passed until the following week. A dialogue between the Commissioners and the staff resulted in some changes with respect to the staff's treatment of the harassment issue. The staff had initially said nothing about the Commission's policy against harassment. In its final decision, the majority noted that harassment of this sort, e.g., threats of legal action, should be avoided in the future. *Id.* at 712.

155. *Cf. Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

The Aural Agenda

The FCC considers applications for new or altered services¹⁵⁶ during the Aural Agenda (for radio) and the Television Agenda (for television). Thus, while radio licenses are renewed or assigned in other agendas, applications to begin or improve radio operations are considered during the Aural Agenda.

Applications for new facilities go through a process the importance of which is not ordinarily appreciated by the casual observer. It includes the acceptance of the application for filing,¹⁵⁷ the acceptance of a request for modification,¹⁵⁸ the grant of a permit to begin construction or alter the technical configuration of the station,¹⁵⁹ the grant of "temporary" operating authority,¹⁶⁰ and finally the grant of the license itself.¹⁶¹ While the broadcaster is not declared "qualified" to broadcast until completion of the procedure, the formal grant of the license is a foregone conclusion at a much earlier point in time.¹⁶²

"Accepting the application for filing" is no mere formality. It is a term of art describing an evaluation tantamount to Commission approval of the applicant's barebones technical specifications. Such approval implies that the operation of the station will serve the public interest. Yet it is at this stage that the Commission tends to be most lenient in waiving its technical rules.

Even if the FCC were to abdicate every other aspect of its regulatory

156. When applying for a major technical modification of its service, the broadcast licensee must go through the same procedure as though it were applying for a new license. Such modifications have been elevated to the level of importance of new licenses by statute, 47 U.S.C. § 307(b) (1970). Examples of such modifications include a higher antenna, more powerful transmitter, night-time authorization, or alteration of the directional pattern, all of which require new filings because they extend the licensee's listening audience. Certain classes of modifications do not entail so detailed a filing. 47 C.F.R. §§ 1.61-1.68 (1972).

157. An acceptable application must meet the requirements of 47 C.F.R. §§ 1.531-1.550 (1972). These include demonstrating compliance with a variety of technical requirements, such as the ones found in 47 C.F.R. §§ 73.33, 73.37, 73.39-73.50 (1972) (for AM stations) or 47 C.F.R. §§ 73.250-73.258 (1972) (for FM). If these requirements are met, the application is formally "accepted," 47 C.F.R. § 1.564 (1972); if they are not, it is considered deficient and may be summarily rejected, 47 C.F.R. 1.565 (1972).

158. 47 C.F.R. §§ 1.522, 1.578 (1972).

159. 47 C.F.R. § 1.598 (1972).

160. 47 C.F.R. § 1.542 (1972). This authorization is often used to test constructed equipment prior to the grant of a final license.

161. 47 C.F.R. § 1.63 (1972).

162. Although 47 C.F.R. § 1.68(b) (1972) requires a hearing in the event the Commission should find "that all the terms, conditions, and obligations set forth in the application and permit have not been fully met," such hearings are rare. Indeed, the majority is loath to hold hearings in any area of regulation. See, e.g., the discussion of hearings on renewal applications at pp. 1606-07 *supra*. On those rare occasions when the Commission *does* hold a hearing in this area, it is because two or more applications have been made for the same frequency or the applicant's qualifications to hold a permit are in question. In either case hearings occur at an early stage of the licensing process. See 47 C.F.R. §§ 1.592-1.594 (1972).

responsibility, the public interest standard would demand at a minimum that the Commission regulate the technical aspects of broadcasting,¹⁶³ particularly in view of the increased number of assigned frequencies today. Yet, although the FCC occasionally has been struck with regulatory fervor in this area,¹⁶⁴ its standards are poorly enforced and erratically applied.

Preventing interference is one of the Commission's most important responsibilities in the area of technical regulation. On December 13, the Commission was presented with but one Aural Agenda item involving this responsibility. At issue was a request by Eastern Broadcasting Corporation, licensee of WLHN-FM (Anderson, Indiana), for a waiver of the Commission's rule against "shortspacing."¹⁶⁵ While repeated waivers of "shortspacing" rules long ago resulted in intolerable interference on the AM band, FM problems are relatively new.¹⁶⁶ The FM rules against "shortspacing" are clear,¹⁶⁷ and at times the Commission has adhered to them with admirable resolve.¹⁶⁸ Treatment of the WLHN item on December 13's Aural Agenda, however, reflected a trend toward the same degradation of FM signals that has long characterized AM regulation.

The WLHN decision, a good example of the Commission's Aural Agenda regulation, illustrates two disturbing facets of FCC procedure. The first is the process by which the majority undermines the integrity of broadcasting regulation through the granting of waivers.¹⁶⁹ The second is the ease with which an applicant can manipulate FCC licensing procedures in order to obtain concessions during the lengthy processing period, concessions which would have been denied him had he indicated his intentions at the initial stage.

163. See generally Johnson, *supra* note 44.

164. See, e.g., Revision of FM Broadcast Rules, 33 F.C.C. 309 (1962).

165. 47 C.F.R. § 73.213 (1972).

166. For a discussion of the then-infant FM industry, see Revision of FM Broadcast Rules, 33 F.C.C. 309 (1962).

167. See 29 Fed. Reg. 14116 (1964).

168. See, e.g., Broadcasters, Inc., 23 F.C.C.2d 155 (1970); FM Channel Assignment in Lafayette, Georgia, 4 F.C.C.2d 887 (1966).

169. The Commission indicated quite early that it would follow a business-as-usual approach to the integrity of its FM shortspacing rules. Either self-destruction was inherent in the system, as suggested by Marin Broadcasting Co., 1 F.C.C.2d 633 (1965), or the majority manufactured frivolous justifications in order to waive its new rules, as in Campbell & Sheftall, 5 P & F RADIO REG. 2d 491 (1965), and Central Connecticut Broadcasting Co., 4 F.C.C.2d 650 (1966). The *Marin Broadcasting* case is particularly noteworthy. The majority allowed an already short-spaced FM facility to increase its power, thus cutting into the "legally protected" coverage of another station. These later compromises are in sharp contrast to the strong and stirring language used by the FCC in support of the short-spacing rule where the waiver requested was gross, FM Channel Assignment in Lafayette, Georgia, 4 F.C.C.2d 887 (1966), or there was an easy remedy available, Broadcasters, Inc., 23 F.C.C.2d 155 (1970).

Eastern applied for a "shortspacing" waiver so that it could "modify" the terms of its previously granted construction permit for a new FM station on Channel 250.¹⁷⁰ Eastern's original construction permit had specified a site that met all the technical requirements of the rules. The modification was requested, however, because Eastern later "discovered" that it could profit by locating its new FM transmitter at the site of its already-existing AM antenna.¹⁷¹ The waiver was required because the site involved shortspacings with two FM services—one of slightly less than a mile and the other of seven miles.¹⁷²

Having commendably put the Commission on notice of the significance of the waiver requested,¹⁷³ the staff then tried to justify it on the dubious theory that the channel's previous operator had utilized this same tower "with power much in excess of that now proposed." The staff's proposed order added the curious statement that "[w]e do not believe that grant of this waiver would constitute a precedent for like waivers of co-channel spacing requirements in other cases."¹⁷⁴ In approving the staff's waiver,¹⁷⁵ the majority thereby suggested that unlawful shortspacing will be condoned so long as it is not as egregious as previously existing shortspacing violations.

The Aural Agenda also reveals how the industries that the FCC is supposed to regulate manipulate its process. A cursory examination of a broadcast applicant's numerous filings in any given case reveals how cleverly these applicants with their attorneys succeed in this effort.¹⁷⁶ Such manipulation, however subtle, constitutes an abuse of the Commission's process that should not be tolerated. More important, such manipulation often leads the Commission down extremely dangerous paths, as the WLHN case suggests. Yet the majority of my

170. "250" is the number assigned to the channel located at 97.9 Megahertz. For an explanation of the Commission's system of numerical designation of FM broadcast channels, see 47 C.F.R. § 73.201 (1972).

171. The FCC has no rules precluding a single broadcaster from owning both an AM and FM facility in the same market. See pp. 1600-03 *supra* and the rules against broadcast-cable cross-ownership, p. 1598 *supra*.

172. The proposed FM site would create a short-spacing problem with a first adjacent channel station some 64.2 miles away, and with a co-channel station some 143 miles away. The minimum spacings permissible under the rules for a Class C station such as this are 65 miles for a first adjacent channel and 150 miles for a co-channel. 47 C.F.R. § 73.208 (1972).

173. Internal Staff Memorandum, Dec. 6, 1972, prepared for Agenda Meeting of December 13, 1972.

174. *Id.*

175. Eastern Broadcasting Corp., F.C.C. Minute No. 523-A-72 (Dec. 13, 1972).

176. Other areas of FCC regulation are subject to licensee manipulation. In the common carrier area, for example, it is an accepted practice for large corporations to swamp the Commission with filings so that we are unable to regulate any other aspects of their operation. See my dissents in A.T.&T., 38 F.C.C.2d 213, 269 (1972), where the majority allowed Bell a higher rate of return, and A.T.&T., 32 F.C.C.2d 691, 694 (1971), where the majority ended its regulation of the company's rate structure altogether.

colleagues, who are themselves manipulated every day by bureau staffs,¹⁷⁷ either do not know or will not acknowledge that they are being manipulated.

In presenting its application for Channel 250 at Anderson, Eastern had specified a transmitter site that presented no technical problems. Had the shortspacing problem originally been suggested, it is unlikely that Commission staff, acting under delegated authority,¹⁷⁸ could have "accepted" the application in the first instance.¹⁷⁹ Nor would the staff, in all likelihood, have suggested that the Commission approve such a sizeable shortspacing rule waiver for an applicant having nothing at stake except an initial filing. The probable result would have been the applicant's agreement to transfer the proposed antenna from its AM location to another available site.¹⁸⁰ And even if the application for the shortspaced site had been accepted, the presence of so glaring a deficiency in the publicly disclosed application notice might have encouraged other Indiana groups or individuals to "compete" for the new service.¹⁸¹ By waiting until it had received an FCC construc-

177. The Commission staff ostensibly is responsible for analyzing each item it brings before the full Commission and then making a recommendation. Some staff members, of course, are equal to the task, and others have become adept at second-guessing the proclivities of the Commission majority. Some staffers, however, make policy on their own, knowing that the Commission majority will not grasp all that is presented to it on an average day. For example, the Cable Bureau, the independence of which is, in part, due to the enormous complexity of the cable television rules, has attempted to manipulate the FCC Commissioners by building precedents which tend to lock the majority into certain results desired by the industry but not necessarily preferred by all, or even most, of the Commissioners.

178. 47 C.F.R. § 1.564 (1972). The areas in which the Commission has delegated authority to its staff are set out in Subpart B of Part O of Title 47 of the Code of Federal Regulations. In particular, delegations to the Broadcast Bureau are set out at 47 C.F.R. § 0.281 (1972). See 47 C.F.R. § 1.566 (1972).

179. Commission policies are relatively flexible regarding the return of a partially defective application to an applicant prior to formal "acceptance." Had Eastern specified the short-spaced site to begin with, it could have accompanied its application with an initial request for waiver, pursuant to 47 C.F.R. § 1.566(a) (1972), which would have been processed through to the full Commission for action *prior* to "acceptance."

180. 47 C.F.R. § 1.580 (1972). Once an application has been filed, the rules require that the applicant publish a notice of his filing at least twice a week for two consecutive weeks within the three week period immediately following the filing. The notice must be published in "a daily newspaper of general circulation in the community in which the station is located or proposed to be located." Further this notice must include a description of the facilities sought, and interested parties have thirty days to file a petition to deny that application.

181. It is this "incremental legitimizing" in the FCC decision-making process that is perhaps most difficult to describe because it is mandated by no rules or statutory grant. Rather it is a product of constant Commission contact with the same "players" in the regulated industries, a contact that makes objectivity difficult. Rulings or decisions in favor of a given party over the history of a case somehow build up the impression that that party is qualified in some respects. The question then becomes: Why deny him his ultimate goal, which is no more than a sum of his qualified "parts"? In addition to this "vertical legitimizing," there is the "horizontal legitimizing" afforded to parties whose other communications interests have been legitimized by the FCC in prior proceedings. The most graphic illustration of this phenomenon is the *RKO-WAXY* case discussed at pp. 1599-1602 *supra*. See *Sumter Broadcasting Co.*, 39 F.C.C.2d 518 (1973) (Commissioner Johnson dissenting).

tion permit for its initially proposed non-shortspaced site, however, Eastern took advantage of the Commission's natural proclivity to sympathize with Eastern's subsequent request.

The Television Agenda

The technical requirements for television are more complex than those for radio.¹⁸² The process of applying for new or modified television services is more time-consuming¹⁸³ and is likely to involve larger groups of people or corporate entities, greater financial outlays, and weightier social considerations. Moreover, concerned members of the public are more likely to voice their concerns over television.¹⁸⁴

Because of television's importance among the media,¹⁸⁵ the Commission is rather careful about enforcing its rules and policing the technical integrity of potential licensees.¹⁸⁶ Thus special conditions are often attached to television construction permits—conditions precluding the potential licensee from pursuing certain activities or re-

182. 47 C.F.R. §§ 73.606-73.640, 73.651-73.699 (1972).

183. 47 C.F.R. § 1.572 (1972). Because television licenses have enormous financial value, license proceedings very often involve competing applications or petitions to deny. The hearings for such application are more time-consuming and complex than those for radio facilities.

184. Competitive stakes are larger; other broadcasters will be quicker to find fault. Minority groups and others concerned about programming or patterns of employment are likely to monitor carefully the proposals of a potential broadcaster who may lay claim to the community's last available television frequency.

185. Despite the attempts of a few scholars to dismiss the impact of television, see, e.g., Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769 (1972), the evidence adduced by the advertisers who spend billions of dollars each year demonstrates its importance. See F.C.C. Docket No. 19154, established pursuant to Notice of Inquiry and Proposed Rulemaking in Children's Programming, 28 F.C.C.2d 368 (1971). Particularly important are the transcripts of oral argument and panel discussion in F.C.C. Docket No. 19154, held October 2, 3 & 4, 1972, and January 10, 1973. For additional evidence, there is the Surgeon General's now-famous report and accompanying staff reports on the effects of televised violence, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE, REPORT TO THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, DHEW Publication No. HSM 72-9090 (1972); TELEVISION AND SOCIAL BEHAVIOR, A TECHNICAL REPORT TO THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR (Comstock, Rubinstein & Murray eds. 1972). See generally MASS MEDIA AND VIOLENCE, A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (R. Baker & S. Ball eds. 1969).

186. The priority given to maintaining the technical integrity of the FCC's television rules does not mean, however, that those rules have not been waived. Indeed, prior to the adoption of the all-channel receiver legislation, 47 U.S.C. §§ 303(s), 330 (1970), which requires that all television receivers manufactured in the future contain UHF as well as VHF tuning devices, the Commission had adopted an interim policy of shortspacing television frequencies in order to provide extra television services to certain markets. Report and Order, Interim Policy on VHF Channel Assignments, 21 P & F RADIO REG. 2d 1695 (1961). Although it later abandoned this policy in favor of longer range UHF planning, Assignment of Additional UHF Channel to Eight Communities, 41 F.C.C. 119 (1963), the entire plan was not dropped until the congressionally-encouraged development of UHF made those frequencies viable alternatives. Recent Commission policy has generally been to deny unlawful television shortspacings. See *West Michigan Telecasters, Inc. v. F.C.C.*, 460 F.2d 883 (D.C. Cir. 1972).

quiring him to pursue others—which are not to be found in radio permits.

Aside from problems of cross-ownership and concentration of media control,¹⁸⁷ the most serious problems in this area relate to the process by which the FCC gathers—or fails to gather—the information necessary to resolve what are often very complicated questions. The FCC cannot successfully regulate the actions of proposed television licensees or of those seeking major modifications without independently-gathered information regarding the applicant's operational plans and their effect upon the technical, social, and even physical environment. The Commission, however, relies all too often upon the statements and filings of the parties themselves.

The two items on the December 13 Television Agenda illustrate the problems that arise when the Commissioners' actions are based upon the applicant's distorted submissions and the staff's rationalizations for approval.¹⁸⁸ The Commission's first action was to modify a condition it had previously imposed upon its grant of a construction permit to Mountain State Radio and TV Corporation.¹⁸⁹ Mountain State initially had applied for a construction permit to build a new commercial television broadcast station which would utilize UHF Channel 22 in Fort Collins, Colorado. In granting that permit, the Commission had required that an individual who was a Director and twenty-six percent stockholder of Mountain State

resign as a member of Mountain State[s] . . . board of directors, refrain from voting his stock in that corporation, and be effectively separated from participation in the affairs of that corporation until such time as the Commission affirmatively acts to dissolve these restrictions.¹⁹⁰

187. One area in which Commission regulatory "integrity" is not greater for television than for radio is ownership and control. For example, the "duopoly" rules, 47 C.F.R. § 73.636 (1972), forbid any individual from directly or indirectly owning or exercising control over two stations whose Grade B contours overlap (as computed in accordance with 47 C.F.R. § 73.684 (1972)). Those rules, however, are waived as often for television as the radio ownership rules are waived for radio. *See, e.g.,* Liberty Television, 26 F.C.C.2d 760 (1970). For a look at another form of current television ownership nonregulation, see *Chris-Craft Industries*, 24 P & F RADIO REG. 2d 729 (1972), in which Metromedia was granted its fifth VHF station in the top fifty markets without a hearing into the public interest ramifications of that action.

188. In fairness to the staff, it should be noted that budgetary restrictions do not permit the type of analysis upon which the Commissioners should insist. The Broadcast Bureau employs only five program analysts to review some 400 renewal applications every two months. Independent investigation is out of the question in ninety-nine percent of the cases, and the staff must rely on the data supplied by the parties.

189. Granted June 1, 1972, BPCT-4355.

190. The language cited is part of the permit mailed to Mountain State and appears in the staff document describing the item for the June 1, 1972 Agenda meeting, Inter-Office Memorandum No. 79159, and in the Minutes of the June 1 meeting, F.C.C.

The condition was added because questions had been raised regarding the stockholder's "truthfulness and candor"¹⁹¹ in connection with testimony in another Commission proceeding.¹⁹²

Mountain State then asked that it be allowed to "hire" this stockholder "to provide expert advice and assistance in making the station operational."¹⁹³ The stockholder was to be "an employee or consultant . . . subject, at all times, to the orders of the officers and board members." The applicant argued that this particular stockholder had "far more experience and know-how than the other stockholders and that his assistance was essential to constructing and operating the station."¹⁹⁴ The Broadcast Bureau staff urged approval of the modification and the Commission agreed by a vote of five to two.¹⁹⁵

This resolution was nonsensical. First, the staff and the majority ignored the observation of the Administrative Law Judge in the earlier proceeding that the stockholder's "truthfulness and candor" are doubtful.¹⁹⁶ Second, the staff accepted without investigation Mountain State's claim that there were no other "experienced television consultants" available to help "put the station on the air."¹⁹⁷ Finally, neither the staff nor the Commission majority bothered to ask what this stockholder would do as a "consultant."

The next item on the TV Agenda is another illustration, albeit more subtle, of what happens when the Commission is partially informed. The petition appeared reasonable. United Television, Inc., licensee of KMSP-TV (Minneapolis), previously had been granted a construction permit for a new antenna, subject to the condition that it make this facility "available for use by present *and future* permittees and licensees of television facilities in the Minneapolis-St. Paul areas who have already made requests, or make requests thereafter, on a fair and equitable basis"¹⁹⁸ The purpose of this caveat was to

Minute #226-A-72 (June 20, 1972). It was also cited, though not quoted directly, in the dissenting statement of Commissioner H. Rex Lee in *Mountain State Radio & TV Corp.*, 38 F.C.C.2d 1076 (1972).

191. *Mountain State Radio & TV Corp.*, 38 F.C.C.2d 1076, 1077 (1972).

192. F.C.C. Docket No. 18852, *Application of Harvest Radio Corp.*, Fergus Falls, Minnesota, designated for hearing by Memorandum Opinion and Order, F.C.C. 70-477 (May 11, 1970).

193. Staff Inter-Office Memorandum No. 89412 (November 28, 1972). This memo was before the Commission on December 13, 1972, having been passed over from the previous week.

194. *Id.*

195. *Mountain State*, 38 F.C.C.2d 1076 (1972).

196. Initial Decision, F.C.C. 72D-70 (November 1, 1972).

197. A glance at the classified ads and employment notices in *BROADCASTING MAGAZINE*, *TV-RADIO AGE* and other trade press publications refutes such a claim.

198. *WTCN Television, Inc.*, 14 F.C.C.2d 870 (1968). *United Television, Inc. (UTI)*, had asked permission to construct an "antenna farm" with four other television stations in the area: Noting that television antenna towers are quite expensive to con-

prevent United's use of its tower for anticompetitive purposes. Thus, the United Television tower¹⁹⁹ was soon occupied by three TV stations and unoccupied space was reserved for the two remaining UHF frequencies assigned to Minneapolis-St. Paul, Channels 23 and 29.

On December 13, the Commission granted United Television's petition to delete the "reserved-space" condition, premising its decision upon two considerations.²⁰⁰ The staff advised the Commissioners first that the outstanding construction permit for Channel 29 had been cancelled in 1970 and that no new applications for that channel had been filed and second that the applicant for Channel 23 had decided to build its own tower and would therefore not need the United Television facility.²⁰¹ The majority accepted the staff's assertions at face value, made no independent investigation, and granted United's request in order to permit four FM radio licensees to make immediate use of the tower space reserved for television.

Two months later the implications of this decision became painfully apparent. On January 18, 1973, Midwest Radio-Television, Inc. (licensee of WCCO-TV), and Viking Television, Inc. (permittee of KTMA-TV, Channel 23), filed petitions for reconsideration²⁰² and stay of the December 13 order, alleging that Viking had *not* yet declined use of the United Television tower²⁰³ and that there was no certainty that Channel 29 would remain idle.²⁰⁴ Since the factual basis for the Commission's December 13 order deleting the condition appeared to have been in error,²⁰⁵ the staff recommended, and the

struct and that joint operations are far more efficient for the "TV community," UTI had requested permission to consolidate existing TV facilities with the proviso that UTI not discriminate against future licensees operating on UHF frequencies assigned but not yet utilized. The Commission accepted this arrangement in 1968.

199. The Commission's 1968 decision authorized the construction of two towers on the "farm," but the accompanying condition had been attached only to the East Tower, belonging to UTI. *Id.*

200. United Television, Inc., 39 F.C.C.2d 655 (1972).

201. In analyzing the Bureau Staff's December 13 analysis in Inter-Office Memorandum No. 89591, December 5, 1972, my staff recommended that I inquire further into the status of Channel 29 in order to discover whether there were any new applicants for that channel and whether the Commission was correct in accepting the applicant's word that the permittee of Channel 23 had decided to "build its own tower." The Bureau staff hastened to reassure me on both points. I felt myself to have been adequately "reassured."

202. United Television, Inc., 39 F.C.C.2d 622 (1973).

203. *Id.* Viking stated that constructing its own tower depended upon the availability of a site; if no site could be located, Viking claimed it intended to use the UTI tower.

204. *Id.* Although at the time the stay was requested no additional evidence was presented regarding the potential use of Channel 29, it is clear that the FCC had given insufficient thought to the question whether another UHF station was likely to locate in Minneapolis-St. Paul, which is the 13th largest television market in the country.

205. *Id.*

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Commission agreed, that a stay was warranted pending the resolution of the petitions for reconsideration.

That the United Television case did not culminate in a disaster for Channel 23 is a tribute not to the FCC but rather to the parties who petitioned for reconsideration. Given the record before the Commission on December 13, neither the staff nor the majority possibly could have adequately resolved the factual questions presented by United's application. The staff and the majority simply "found" those facts most conducive to a grant of United's request. Two television operators who were not parties in the original proceedings were forced to assume the burden of correcting the resulting errors.

The Broadcast Agenda

Once a radio or television station begins operating on a fixed frequency, any further matters concerning the regulation of that station—except for renewals and assignments—are considered during either the Broadcast or the Complaints and Compliance Agenda. During the latter agenda the Commission considers allegations that a licensee has violated various FCC rules. During the Broadcast Agenda licensees frequently seek, and invariably receive, rule waivers.

In the first two items on the December 13 Broadcast Agenda, ABC and NBC sought and obtained waivers of one of the FCC's most controversial programming regulations—the prime time access rule²⁰⁶—which bars television stations in the nation's top fifty television markets²⁰⁷ from carrying more than three hours of network programming during the four-hour high-density viewing period between 7:00 p.m. and 11:00 p.m.²⁰⁸

Increasing network domination of the broadcasting industry led to the promulgation of this rule. As the Commission stated in adopting it:

The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.

206. 47 C.F.R. § 73.658(k) (1972), promulgated in Report and Order, 23 F.C.C.2d 382 (1970).

207. The top 50 markets are determined on an annual basis as of September 1 according to the standards of the American Research Bureau (ARB), 47 C.F.R. § 73.658(k)(4) (1972).

208. The hours between 6:00 p.m. and 10:00 p.m. are considered "prime time" in the central time zone. 47 C.F.R. § 73.658(k)(1) (1972).

In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anticompetitive" where the market is being opened through a limitation upon supply by three dominant companies.²⁰⁹

By reducing the networks' iron grip on prime time programming, the rule's proponents hoped to stimulate independent programming. Such programming could only be forthcoming if the FCC indicated a firm commitment to its new policy, a commitment it has been unwilling to make. The majority undercut the rule during its first year of operation by permitting local stations to fill their "access" time with such "off-network" material as "I Love Lucy." Further, the statements of some Commissioners encouraged local stations to "prove" that they could not come up with programming more stimulating than network fare.²¹⁰ Perhaps most damaging, the FCC majority adopted a loose and inconsistent policy of waiving and, hence, emasculating the rule.

When networks win a waiver of the prime time access rule for a particular program, local stations present that program *plus* the networks' regular fare. If the networks were really intent upon presenting a "special" program, of course, they could simply substitute that program for some of their regular programming. The networks, however, want the best of all worlds, and the FCC has capitulated.

The prime time access waivers granted on December 13 were typical. In the first case, NBC sought a "one-time-only" waiver (for the second year in a row) in order to broadcast the Academy Awards. In the second case, ABC and NBC requested blanket waivers for "various sporting events." The Commission granted the "Academy Awards" waiver by a four-to-three vote after having passed that item from the previous week.²¹¹ The majority reasoned that 1972 should be no different from 1971 when it had granted the same waiver.²¹² The majority was not troubled by the fact that the 1971 waiver had been granted due to the transitional nature of the 1971-72 prime-time access season, an ex-

209. Report and Order, 23 F.C.C.2d 382, 394-95 (1970).

210. FCC Chairman Dean Burch, among others, has often said in public what he wrote in his dissent to the denial of the Summer Olympics waiver to ABC:

I opposed the prime-time access rule from the start. I did so not because of any quarrel with its objective—to provide non-network programming sources with a few more hours each week to market their product—but rather because I felt that it wouldn't work.

Request of American Broadcasting Companies, Inc. (ABC) for Waiver of Prime Time Access Rule to Permit 3½ Hours of Summer Olympic Coverage, 35 F.C.C.2d 320, 322 (1972).

211. Prime Time Access Rule, 38 F.C.C.2d 569 (1972). When it appeared on December 6 that the vote would be 3-3 (with Chairman Dean Burch absent), Acting Chairman Robert E. Lee moved that the item be passed over. On December 13, with the Chairman present, a majority adopted the waiver.

212. National Broadcasting Co., 33 F.C.C.2d 743 (1972).

ceptional circumstance which did not exist in the 1972-73 season.

In granting waivers for ABC's and NBC's "various sporting events," the majority followed another line of bad precedent²¹³ by agreeing to waivers where the sporting events *might* run over into the local stations' "access" segment of prime time. The majority has never stopped to consider whether in such cases the network should simply be required to delete some of its later prime-time programming, thus preserving one hour of local access. This approach to greater flexibility in programming has been impeded, however, by the networks' insistence that the hour of local access be uniform, *i.e.*, that all local stations on all networks have access only between 7:00 and 8:00 p.m.²¹⁴

As the foregoing suggests, the Commission has "enforced" its prime time access rule as if it regretted having adopted it. The networks repeatedly appear with last-minute requests for waivers that must be hastily granted to avoid "disruption" of programming "plans."²¹⁵ And the Commission majority, evidently moved by such brinkmanship, simply does the networks' bidding, thus muzzling its own rule.²¹⁶

The prime time access rule was not the only FCC rule to suffer from unprincipled nonenforcement on December 13. In the next item the majority disregarded its long-standing rule against simultaneous network operation in the same market.²¹⁷ WAAM-AM (Ann Arbor, Michigan) requested permission to affiliate with the "ABC Contemporary Radio Network." Two of the five Ann Arbor AM stations were already

213. Prime Time Access Rule, 38 F.C.C.2d 1096 (1972). The majority followed a long line of earlier rule waivers. *See, e.g.*, American Broadcasting Companies, 37 F.C.C.2d 568 (1972); Prime Time Access Rule Waivers, 36 F.C.C.2d 617 (1972); Prime Time Access Rule, 30 F.C.C.2d 577 (1971). The majority has drawn the line, however, at waivers for sports programs which would run over into prime time "as a matter of plan and regular course, rather than more or less fortuitously," Prime Time Access Rule, 32 F.C.C.2d 58, 60 (1971). This qualification led to the controversial denial of the ABC request for a waiver for the Summer Olympics. American Broadcasting Companies, 35 F.C.C.2d 320 (1972).

214. The Commission endorsed the networks' request for inflexibility in prime time access rule scheduling. *See* Letter, Prime Time Access Rule, 21 P & F Radio Rec. 2d 1586 (1971). The networks then obtained a waiver allowing them to present one half hour of network news between the hours of 7:00 p.m. and 8:00 p.m. (6:00 p.m. and 7:00 p.m. Central time) while preserving the other three hours of permissible prime-time programming. Prime Time Access Rule, 30 F.C.C.2d 577 (1971).

215. The Broadcast Bureau staff noted in the instant case, for example, that the last-minute waivers sought for the New Year's Day bowl games were required because "it would be difficult to rearrange the scheduling of these traditional and popular events" to suit the access rule. Not a word was mentioned about the possibility of rearranging other network programming scheduled for those evenings in the event of a runover. Inter-Office Memorandum No. 89587, November 30, 1972.

216. In October 1972, the Commission issued a Notice of Inquiry and Proposed Rulemaking designed to elicit comments on the advisability of revising or repealing the prime time access rule. Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule," Petitions of N.B.C. and others, Notice of Inquiry and Notice of Proposed Rulemaking, 37 F.C.C.2d 900 (1972). *See* American Broadcasting Companies, 35 F.C.C.2d 320, 326 (1972).

217. 47 C.F.R. § 73.137 (1972).

ABC affiliates. In granting the WAAM request²¹⁸ the majority not only sanctioned common programming for sixty percent of the Ann Arbor AM outlets, but it did so in direct contravention of FCC rules and policies.

In late 1967 the American Broadcasting Company announced the formation of four new "American Radio Networks," featuring "entertainment," "information," "contemporary programming," and a specialized FM format. The Commission reviewed ABC's new "networks" pursuant to its rule barring the same network from programming on more than one AM facility in the same market.²¹⁹ At ABC's request the Commission decided to waive that rule for a one year "trial" period.²²⁰ In 1969, after reviewing its policy,²²¹ the Commission recognized again the dangers inherent in excessive programming control by a single source in a single market²²² and adopted a formula allowing ABC one affiliate in markets with four or fewer AM stations and two affiliates in markets with five or more.²²³

ABC moved to comply with the new formula,²²⁴ but a number of the affected stations sought waivers on their own. The Commission required a showing that additional primary AM services not counted under the "formula"²²⁵ were available to the markets and that other networks were available on other stations or at least unavailable to the station requesting the waiver. The FCC granted a majority of these

218. ABC Contemporary Network, 38 F.C.C.2d 485 (1972).

219. Ironically, there would never have been an ABC in the first place but for this rule. RCA's operation of "Red" and "Blue" radio networks gave rise to the FCC's original order that RCA divest itself of one of these networks. FCC REPORT ON CHAIN BROADCASTING (1941). It did. The spin-off became ABC.

220. American Broadcasting Companies, 11 F.C.C.2d 163 (1967). The Commission decided that radio network power had generally declined in recent years. The networks, said the majority, no longer dominated radio programming and should therefore be encouraged to innovate. *Id.* at 164-65.

221. Mutual Broadcasting System, 17 F.C.C.2d 509 (1969). Mutual urged the Commission to find that the ABC mini-networks were in violation of everything from the FCC's duopoly rules, 47 C.F.R. § 73.35(a) (1972), to §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970) and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). After the FCC rejected its complaints, Mutual started mini-networks of its own. 17 F.C.C.2d at 509, 513.

222. "Market" was defined, for network radio purposes, as the Standard Metropolitan Statistical Area (SMSA) or any community outside such an area. *Id.* at 514 n.10.

223. *Id.* Since the news and commentary programs for all ABC networks originated from one company, the FCC held that the public interest would not be served by having "all, or nearly all, of the stations in a market affiliated with commonly owned networks." *Id.* at 514.

224. It is clear that the formula was not wholly successful since in the following year ABC increased its AM affiliations to 795, almost one fifth of the AM outlets in the country. ABC's single FM network had affiliated with approximately one-tenth of the FM stations in the country. *Id.* at 510.

225. For example, a "community" not considered part of an SMSA might nevertheless be served by AM stations assigned to nearby communities, thus bringing the total number of AM stations serving a two- or three-city area above the maximum allowable for multiple affiliations. *See, e.g.,* American Broadcasting Companies, 22 F.C.C.2d 241, 243 (1970).

requests in April 1970.²²⁶ In every case of FCC approval, the affiliation agreement had been entered into prior to the FCC's 1969 order.²²⁷

By granting a waiver to WAAM in December 1972, however, the majority completely upset the delicate balance created by the 1969 formula. Two of Ann Arbor's five AM stations had been ABC affiliates prior to April 1970, when ABC entered into a third affiliation agreement with WNRS-AM. To comply with the FCC's new policy ABC sought to cancel its affiliation with one of its older affiliates, WSDS-AM. When WSDS sought a waiver of the new policy the Broadcast Bureau granted a "temporary" waiver pending full Commission consideration. The Bureau, however, never requested such full consideration due to what the staff termed "pressure of other matters."²²⁸

ABC terminated its WNRS affiliation in July 1972 and then affiliated with WAAM-AM. The latter requested and, on December 13, 1972, received, yet another FCC waiver of the 1969 "formula." The majority granted the waiver on the tenuous theory that it was merely placing ABC in the same situation that had existed—but that had never been officially approved—prior to the WNRS cancellation. The Bureau reasoned that, had it presented the WSDS waiver request to the full Commission, such request surely would have been granted.²²⁹

The errors are obvious. First, the majority treated WAAM as if it had entered into its ABC affiliation agreement prior to the 1969 "formula" ruling. The Commission had granted waivers in such cases more readily than in cases where affiliation agreements had been arranged *after* the 1969 ruling.²³⁰ The WAAM decision simply erased that distinction in the FCC's waiver approach.

Second, there was no logical basis for the Bureau's "certainty" that the full Commission would have granted the waiver. The Bureau had never raised that waiver before the Commission. Further, even if the full Commission *had* granted the WSDS request in 1970, a partial emasculation of the rule would not warrant complete emasculation at a later time.

The next item on the Broadcast Agenda is one of current broadcast concern: the "re-regulation of radio." The staff presented a Notice of Proposed Rulemaking to amend the television translator rules.²³¹

226. *Id.*

227. *Id.* at 248.

228. F.C.C. Inter-Office Memorandum No. 89589, at 3 (December 1, 1972).

229. *Id.* at 4. See ABC Contemporary Network, 38 F.C.C.2d 485, 487 (1972).

230. See American Broadcasting Companies, 22 F.C.C.2d 241, 248 (1970).

231. 47 C.F.R. §§ 74.701-74.790 (1972). A translator is generally used to retransmit the signal of a nearby television station to an area not reached by any clear, over-the-air signal and with too small a population to support a primary station of its own.

Translator "stations" pick up and retransmit a mother station's TV signal. Some add local announcements of interest to the audience in the translator's signal area. The proposed rule would expand the FCC's time limit on locally-originated announcements from twenty seconds per hour to thirty seconds per hour.²³² The Broadcast Bureau reasoned that modern television announcements are ordinarily thirty seconds (or longer).²³³ The proposed rule was approved unanimously and illustrates the FCC's occasional desire to rid itself of obsolete regulations.²³⁴

The final three items on this agenda exemplify the process of "spectrum housekeeping"—a task generally performed by the FCC's Chief Engineer and Broadcast Bureau staffs. Each item involved requests for assignment of new FM frequencies to various communities. The Commission generally adheres to a policy of giving priority to requests that would afford a community its first FM frequency.²³⁵ In one item, for example, the staff urged approval of requests to assign first FM frequencies to seven communities. These requests are normally the first step taken by a party intending to apply for a license to use the frequency later.²³⁶ Ordinarily the Commissioners do not concern themselves with the fact that when a frequency is assigned to one community, other nearby communities lose this frequency forever. Although these frequency assignments are granted in rulemakings in which notice must be issued to "interested parties,"²³⁷ the listening public of a nearby community is rarely aware that it may be losing its only chance for a local station.²³⁸

This lack of community input was evident in another item on the December 13 Broadcast Agenda involving the requested reassignment

232. The specific rule which was to be amended by this rulemaking is 47 C.F.R. § 74.731(f) (1972).

233. Generally 47 C.F.R. § 74.731(f) is used to screen cards or slides to "identify contributors" (in the words of the rule) who help defray "the costs of installing, operating and maintaining the translator." The problem which the FCC sought to resolve on December 13 had arisen in the context of synchronizing translator announcements with station breaks or commercial announcements.

234. Commissioner Wiley is leading an effort to eliminate out-dated and meaningless technical regulations. Originally called "radio de-regulation," this effort is now incorrectly labeled "radio re-regulation." The desire to de-regulate can get out of hand, however. For example, some members of the Commission now propose eliminating the ascertainment requirement. See Notice of Inquiry into the Ascertainment of Community Problems by Broadcast Applicants, 3 Current P & F RADIO REG. 53:361 (March 22, 1973).

235. See Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, 33 F.C.C. 309 (1962).

236. FM Table of Assignments, 38 F.C.C.2d 532 (1972).

237. 47 C.F.R. § 1.405 (1972).

238. In the instant proceedings, for example, no opposing comments had been filed, even though seven regions of the country were involved. See FM Table of Assignments, 38 F.C.C.2d 532 (1972). Opposition generally comes from existing applicants or competing licensees. See, e.g., FM Table of Assignments, 38 F.C.C.2d 525, 526-27 (1972).

of a Class A FM frequency to Terrell Hills, Texas. That frequency had been vacated by its previous licensee in favor of a more powerful Class C frequency in nearby San Antonio. The Commission initially voted against the Terrell Hills Class A assignment because of a shortspacing problem between it and an unused frequency assigned to Gonzalez, Texas.²³⁹ However, two prospective applicants indicated an interest in the Terrell Hills frequency and argued that they could employ a transmitter site that would avoid the shortspacing problem. The Commission reversed itself, but issued a notice inviting comments as to whether the available frequency might be put to better use in a community more removed from the suburbs of San Antonio.²⁴⁰ No additional comments were filed, of course, because there was no adequate means of communicating to potential listeners the significance of obtaining a local FM station of their own. The Commission returned the frequency to Terrell Hills, solemnly declaring that "there has been no demonstrated need for Channel 292A outside the San Antonio urbanized area."²⁴¹

The Complaints and Compliance Agenda

Except for violations arising in the context of broadcasters' applications for new, renewed, or modified licenses,²⁴² the Commission considers violations of the regulations during the Complaints and Compliance Agenda.

The Complaints and Compliance Division of the Broadcast Bureau has the monumental task of ensuring that the more than 8,000 licensees comply with all FCC regulations.²⁴³ Although the Division must process more than 40,000²⁴⁴ complaints each year, it is woefully understaffed. A staff of five lawyers and five field investigators decides which complaints to pursue, conducts field investigations, makes preliminary

239. FM Channel Assignment at Terrell Hills, Texas, 38 F.C.C.2d 528 (1972).

240. FM Table of Assignments, 35 F.C.C.2d 482 (1972).

241. FM Table of Assignments, 38 F.C.C.2d 528 (1972).

242. Other December 13 cases, discussed in the context of the Assignment and Transfer, Renewal, and Aural Agendas, are illustrative of the Commission's reluctance to apply sanctions against errant broadcasters, especially large ones, in the course of transactions involving the sale, acquisition or renewal of the license. Perhaps this reluctance is due to the severe nature of those sanctions—denial of a proposed assignment, license renewal hearings, or "short term" (one-year) renewals. See the *RKO-WAAY* case discussed at pp. 1599-1601 *supra* and the *Mountain State Broadcasting Co.* case at pp. 1614-15 *supra*.

243. Technical compliance is more carefully policed in the Complaints and Compliance agenda than any other type of potential violation, notwithstanding Justice Frankfurter's famous dictum that the Commission must be more than a mere technical traffic policeman, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

244. Report of Mail Received in Complaints and Compliance Division for Fiscal Year 1972, Public Notice of September 13, 1972, F.C.C. Document No. 80526.

findings of both fact and law, and processes appeals from those findings.²⁴⁵ Problems which are not easily resolved through the imposition of simple sanctions (such as fines²⁴⁶ or renewal denials) thus receive inadequate staff attention.

As a broadcaster's misdeeds become more complex, so do FCC sanctions. Violations of the Commission's technical rules may lead to letters of warning or "Notices of Apparent Liability."²⁴⁷ On the other hand, violations of the fairness doctrine²⁴⁸ or licensee refusals to grant access²⁴⁹ could engender more complex Commission sanctions. The gray area between these extremes includes egregious technical violations, fraud,²⁵⁰ and misrepresentation.²⁵¹

The December 13 Complaints Agenda contained examples of each point on the continuum—from minor technical matters to extremely serious breaches of FCC policy. Technical violations are usually discovered in the course of the Field Engineering Bureau's routine field examinations. That Bureau, the FCC's largest, is responsible for the integrity of the millions of signals in the spectrum.²⁵² It often uncovers minor deficiencies in the course of unannounced investigations.²⁵³ On occasion technical or log-keeping violations are discovered by competing broadcasters, by a station's disgruntled employees, or by members of the public. The FCC deals with virtually all of these violations

245. Delegations of authority to the Broadcast Bureau, in which the Complaints and Compliance Division is located, are found in 47 C.F.R. § 0.281 (1972).

Complaints that come to the full Commission for resolution are rarely less than six months old and many have been around for more than a year.

246. Title V of the Communications Act of 1934, as amended, 47 U.S.C. §§ 501-510 (1970), provides statutory authority for the imposition of fines (called "forfeitures") of up to \$1,000 per violation to a maximum of \$10,000 against offending broadcasters. 47 U.S.C. § 503 (1970).

247. 47 C.F.R. § 1.621 (1972). A licensee may challenge a "notice of apparent liability" if it feels it should not be held liable, 47 C.F.R. § 1.621(a)(2) (1972), or that the amount of forfeiture is excessive. 47 C.F.R. § 1.621(a)(3) (1972). Since a licensee's financial condition is taken into account when the Commission prepares the notice, the latter argument is rarely accepted as a mitigating factor. The former defense is used when the party can prove it was not the licensee at the time of the violation.

248. See p. 1627 *infra*.

249. See pp. 1631-32 *infra*. I would estimate that, in the course of a typical year, ninety-eight percent of all fairness or access complaints are denied outright.

250. Licensee fraud includes double billing and network clipping, both of which have recently "graduated" from mere fine offenses to serious violations. The majority no longer excuses licensee's outright fraud, as it did in *WKKO, Inc.*, 24 F.C.C.2d 889 (1970). See Public Notice Concerning Double Billing, 38 F.C.C.2d 1051 (1972); Clipping of Network Programs, 26 P & F RADIO REG. 2d 1253 (1973).

251. Misrepresentation is clearly the most serious error a licensee can commit. See note 127 *supra*.

252. The Field Engineering Bureau has a staff of about 400 located in offices around the country. Most licensee deficiencies uncovered in the field are minor and are corrected informally.

253. Though unannounced, such investigations are more likely to take place when broadcast licenses are up for renewal because the logs submitted with renewal applications often indicate errors.

through the imposition of fines the extent of which is determined by reference to fines imposed for similar violations in the past and the licensee's ability to pay.²⁵⁴

The items in this category on the December 13 agenda were typical. In one case the staff determined that station WTLK (Taylorsville, North Carolina) had violated FCC rules requiring that licensees make equipment-performance measurements within a specified time period,²⁵⁵ inspect transmitters and associated equipment five days each week,²⁵⁶ and keep maintenance logs.²⁵⁷ Although the staff noted that a \$250 forfeiture was customary for *each* of these violations, the Commission imposed a total fine of \$500 because the station had suffered financial losses during the previous two years. The licensee in this case had attempted to attribute the errors to inept station personnel, but the Commission does not accept such defenses.²⁵⁸

The other technical infraction on this agenda involved a serious "overpower" violation²⁵⁹ by station WILE (Cambridge, Ohio). WILE is authorized to operate at 1,000 watts, except in the months of December and January when it is limited to 500 watts between its 6:00 a.m. sign-on hour and sunrise.²⁶⁰ The station's operating logs revealed that on ten days it had exceeded its authorized power. The licensee argued that the cause was the transmitter's "creeping up" in the course of the station's operation, but the Bureau staff, replying that this defense indicated improper transmitter supervision, recommended a forfeiture of \$1,000, which the Commission adopted.

The vague words "investigation into the affairs of station WHBI-FM, (Newark, New Jersey),"²⁶¹ characterize the gray middle area of Complaints and Compliance regulation. If the acts may involve serious violations of Commission rules, the FCC tends to punish hardest the small or medium-sized broadcaster.

The Complaints and Compliance Division's determination that a situation warrants its attention initiates the dreaded investigation process. Historically, such investigations, based upon specific allegations,

254. See note 247 *supra*.

255. 47 C.F.R. § 73.47(a) (1972).

256. 47 C.F.R. § 73.93(e) (1972).

257. 47 C.F.R. § 73.114(b) (1972).

258. Notice of Apparent Liability, WTLK, Taylorsville, North Carolina, F.C.C. 72-1136.

259. Notice of Apparent Liability, WILE, Cambridge, Ohio, F.C.C. 72-1135 (1972).

The rule in question is 47 C.F.R. § 73.52(a) (1972).

260. The limitations on daytime-only standard (AM) broadcast stations are in 47 C.F.R. § 73.21 (1972).

261. Item 8 on the December 13 Complaints and Compliance Agenda, Order and Notice of Apparent Liability, Station WHBI (FM) (Newark, New Jersey), F.C.C. 72-1137 (1972).

expand rapidly as field investigators uncover evidence of a host of other serious violations.²⁶² The penalties mount geometrically. The broadcaster hopes for a small fine; more often he finds himself saddled with a short-term renewal or discovers that he must endure dreaded renewal hearings which can on rare occasions lead to revocation of his license.²⁶³

On December 13, after a seemingly routine investigation had uncovered a multitude of violations, the FCC designated the renewal application of WHBI, a medium-size operation, for hearing on fifteen issues. Thus another blow was struck on behalf of what a former Commission General Counsel calls the "three outhouses" policy of broadcast regulation—any broadcaster with three outhouses or fewer will be far more likely to bear the full brunt of Commission regulatory fervor than his larger broadcast colleagues.

It is ironically in the case-by-case and unsystematic atmosphere of the Complaints and Compliance Agenda that the Commissioners engage in their most sensitive and best known form of regulation,²⁶⁴ *i.e.*, regulation of programming content.²⁶⁵ It is therefore at the end of a grueling day that the Commissioners are confronted with questions requiring the most difficult balancing of competing interests. The FCC's regulation of programming content has long been of greatest concern to broadcast licensees. While the broadcaster communicates the same ideas as publishers or private speakers, he finds himself clothed in a different set of First Amendment obligations. He alone must deal with the rights of listeners and speakers who have no financial or corporate interest in his venture.²⁶⁶

262. Such cases get maximum "horror story" coverage in the trade press and tend to strengthen the illusion that broadcasters are oppressively regulated. In point of fact there are no more than a handful of such cases every year.

263. The designation of a renewal application for hearing, while ostensibly announcing a proceeding for gathering and weighing facts, is a major sanction in its own right, for it plunges the broadcaster into a long, costly process during which he may be fatally weakened, notwithstanding an ultimate judgment in his favor. See pp. 1629-31 *infra*.

264. It was clear even before the enactment of the Communications Act of 1934 that the federal government had the power to regulate the programming of broadcast licensees. See *Trinity Methodist Church v. F.R.C.*, 62 F.2d 850 (D.C. Cir. 1932); *KFBK Broadcasting Ass'n v. F.R.C.*, 47 F.2d 670 (D.C. Cir. 1932); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 25 (1967). The power to regulate programming was upheld in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and has recently been approved in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

265. See, e.g., *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966); *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), *aff'd sub nom. Brandywine-Main Line Radio, Inc. v. F.C.C.*, 25 P & F RADIO REG. 2d 2010 (D.C. Cir. 1972).

266. Broadcasters have a hard time understanding what they prefer to call the "double standard" of First Amendment protections afforded broadcasters and publishers of print media. Professor Harry Kalven, in a paper written at the request of CBS, bemoaned "the two traditions" of freedom of the press and noted sadly that "we take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication." Kalven, *supra* note 264, at 16.

A Day in the Life: The Federal Communications Commission

The arguments in favor of limiting a broadcaster's rights in favor of listener or speaker rights are based on the scarcity of broadcast resources,²⁶⁷ and remain viable today.²⁶⁸ Although Congress permits broadcasters to use frequencies for private profit, it also attaches conditions to such use,²⁶⁹ conditions which—if they are to be more than verbiage—must apply to program content as well as to technical qualifications.²⁷⁰

Nowhere in the Complaints and Compliance Agenda, however, do the public's rights receive serious consideration: The industry's interests consistently win priority. It is rather ironic, then, that complaints considered in the programming content portion of this Agenda must be initiated and prosecuted by concerned citizens or individuals directly affected by the broadcaster's action.²⁷¹

The fairness doctrine is by no means the only limitation on a licensee's programming responsibilities.²⁷² The personal attack and equal time²⁷³ provisions are treated separately in the statute and the rules.²⁷⁴ Moreover, additional First Amendment rights of programming access have been claimed by the public²⁷⁵ and occasionally granted by the courts.²⁷⁶

267. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), for a discussion of the history of the scarcity doctrine and the origins of the current system.

268. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

269. The Communications Act requires that the Commission "shall grant to any applicant therefore a station license provided for by this Act" only "if public convenience, interest or necessity will be served thereby." 47 U.S.C. § 307(a) (1970).

270. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

271. See, e.g., *Friends of the Earth v. F.C.C.*, 449 F.2d 1164 (D.C. Cir. 1971), *rev'd* *Friends of the Earth*, 24 F.C.C.2d 743 (1970); *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C.2d 921 (1967). See notes 284-92 *infra*.

272. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In 1959 Congress amended § 315 of the Communications Act to read:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them 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.

47 U.S.C. § 315(a)(4) (1970). This provision was sanctioned in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380 (1969).

273. 47 C.F.R. §§ 73.123 (AM), 73.300 (FM) and 73.679 (TV) (1972); 47 U.S.C. § 315 (1970).

274. *Red Lion* arose in the context of a violation of the rules regarding personal attacks. The Court's holding, however, included the entire fairness scheme, 395 U.S. at 330.

275. See, e.g., *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd*, 41 U.S.L.W. 4688 (U.S. May 29, 1973); *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283 (1970); *Boalt Hall Students Ass'n*, 20 F.C.C.2d 612 (1969).

276. The First Amendment rights of the listener and the speaker may transcend the confines of the fairness doctrine in certain areas. The First Circuit recently held that the "public interest" standard alone may require the adoption of general programming

The December 13 Complaints Agenda included four significant programming items: a complaint filed against the Public Broadcasting Service (PBS) by a group called Accuracy-in-Media, a complaint by Action for Children's Television against 133 television stations, and two complaints filed on behalf of Congress concerning the networks' refusal to provide congressional access time to counter presidential TV addresses.

Accuracy-in-Media (AIM)²⁷⁷ complained about two PBS programs—one about sex education and one about the trial of Angela Davis. With respect to the first, which claimed to include "all points of view," AIM argued that that program had presented too "narrow" a range of contrasting views. With respect to the second, AIM alleged that the program had presented a one-sided version of the Davis/Soledad Brothers trial and demanded the right to answer each of its conclusions. The staff recommended that the Commission find against AIM on both complaints.²⁷⁸ The staff examined the wide range of PBS programs and determined that presentation of the subject matter had been "balanced."²⁷⁹

The threshold question—which the staff glossed over in its original write-up—was whether the FCC could regulate PBS at all. The staff argued that it could because: (a) the policy of the Commission was to decide fairness complaints against the *commercial networks*, rather than individual affiliates,²⁸⁰ and (b) PBS had answered the complaint,

guidelines where a broadcaster seeks illegally to "preclude programming which falls within the 'public interest.'" *Alexandra Mark v. F.C.C.*, 468 F.2d 266 (1st Cir. 1972). See Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 U. VA. L. REV. 574 (1971).

277. Complaint by Accuracy-In-Media, on Behalf of Marilyn Desaulniers, 39 F.C.C.2d 416 (1973).

278. The staff document noted that fairness does not require the "line by line balance" sought by petitioners with regard to the sex education program. Under the fairness doctrine, said the staff, "the selection of spokesmen is entirely within the discretion of the licensee and there is no evidence to indicate" that the spokesmen presented had not provided sufficiently contrasting views. The majority opinion followed the staff's language quite closely. *Id.* at 421.

279. The fairness doctrine does not require that a program be "internally" balanced, rather the licensee's overall programming on the particular issue must be fair. The Public Broadcasting Act of 1967, 47 U.S.C. §§ 396-399 (1970), does contain a provision regarding "internal balance" which AIM sought to invoke in its complaint. Section 396(g)(1)(A) authorizes the Corporation for Public Broadcasting to "facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" (emphasis added). Since neither party discussed this provision, the Commission issued a Public Notice, in a footnote, stating that "[i]f AIM or other interested party believes that this issue should be explored further, we will entertain memoranda or briefs directed to it within 30 days, with leave to reply within 20 days after that period." 39 F.C.C.2d at 421 n.1.

280. F.C.C. Inter-Office Memorandum No. 89394 (November 19, 1972), citing Letter to Blair Clark, 11 F.C.C.2d 511 (1968), and Committee for Fair Broadcasting, 25 F.C.C.2d

failing to contest the Commission's jurisdiction. Neither point, however, justified the staff's conclusion, for there are vast differences between PBS and the commercial networks. First, the commercial networks own five of their own affiliates and are in that sense themselves licensees. PBS does not and is not. Second, the networks engage in programming for network-owned and -affiliated stations. PBS, on the other hand, does not program and is strictly a network for transmitting the programs of its member-stations and of independent producers to stations in the public broadcasting system.²⁸¹ Neither the staff nor PBS explored the pitfalls in deciding a fairness complaint against PBS. The Commission did not even ask what sanctions it could impose in the event of "fairness doctrine" violations.

On December 13, the Commissioners expressed sufficient doubts about the AIM complaint to put it off for two weeks, at which time it was withdrawn for further staff analysis.²⁸² The item was relisted on January 23, 1973, and the Commission adopted with little change the staff's earlier analysis.²⁸³ The majority, in its final order, did ask for further comments regarding the question of FCC regulation of both the Corporation for Public Broadcasting and PBS.²⁸⁴ Since the majority was uncertain on this question, it should not have taken jurisdiction in the first place and certainly should not have decided the substantive fairness question until the jurisdictional issue had been resolved.

The complaint by Action for Children's Television (ACT) against some 133 broadcast stations attacked an advertisement prepared by the Television Information Office (TIO) of the National Association of Broadcasters.²⁸⁵ The TIO spot purported to provide an upbeat answer to the question "Do Children Learn from Television?" by portraying five youngsters demonstrating their knowledge of everything from

283 (1970). This argument does not appear in the final Commission document, but appears to be instrumental in the FCC's assumption of jurisdiction over PBS for fairness purposes.

281. PBS was created by the Corporation for Public Broadcasting (CPB), which is *forbidden* by law to "own or operate any television or radio broadcast station, system, or network, community antenna television system, or interconnection or program production facility." 47 U.S.C. § 396(g)(3) (1970).

282. Originally it was the staff's intention that we decide whether the "absolute balance" provisions of § 396(g)(1)(A) (*see note 279 supra*) were applicable in the instant case. We probably would have interpreted that section as being potentially applicable only to the CPB, rather than to individual licensees, thus concluding that since "neither CPB nor PBS is a licensee of the Commission . . . the statute gives the Commission no authority to enforce the provisions of § 396(g)(1)(A)." F.C.C. Inter-Office Memorandum No. 89394 (November 19, 1972).

283. *See* p. 1628 *supra*.

284. *See* note 279 *supra*.

285. Action for Children's Television Inc., 26 P & F RADIO REG. 830 (1973).

fighting pollution to taking drugs. The spot was distributed to broadcast licensees along with a TIO newsletter which stated:

Too often, TV's critics fail to give credit to the medium for positive values it presents. TIO's new 60-second color spot offers a charming, low-key response to some of those critics.²⁸⁶

When ACT questioned the spot after its appearance, TIO¹ responded in its newsletter that the spot did not seem "controversial" to TIO and that "station managers need not be intimidated by vocal critics demanding time for reply."²⁸⁷

ACT then filed a "fairness doctrine" complaint with the FCC, charging that substantial evidence showed that what children "learned" from television was detrimental to their development.²⁸⁸

Because of procedural difficulties in the ACT complaint²⁸⁹ as well as ambiguities in the stations' responses,²⁹⁰ the Commission should not have acted on the substance of the complaint. A staff paper, however, while dismissing the complaint on procedural grounds, also asserted that the TIO spot *was not* a "controversial" editorial announcement, but merely a "promotional announcement on behalf of the industry it represents . . . involv[ing] 'the kind of puffery normally engaged in by an industry or an individual member thereof'"²⁹¹

The five votes in "favor" of the staff document actually represented two votes of "yes" and three "concurrences." Two of the concurring Commissioners, Chairman Dean Burch and Commissioner H. Rex Lee, announced at the time of the vote that while they each maintained "grave reservations" about stating that the TIO spot was not "controversial," they were concurring in the result because the complaint was procedurally deficient. Thus, though a majority of the FCC may have

286. *Id.* at 831.

287. *Id.* at 832.

288. *See, e.g., Television and Growing Up: The Impact of Televised Violence, supra* note 185; *Violence and the Media, supra* note 185.

289. There should be a procedure for reaching the licensees of stations which broadcast a spot as controversial as this one, but under our current procedure there is not. A handful of concerned citizens simply cannot muster enough information against 133 different stations to satisfy procedural rules which require specificity as to date, time, frequency, and other relevant information about the licensee's broadcast of the spot. *See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964).

290. It was not, in fact, clear that any of the licensees named in the complaint had actually refused to run the ACT counterspot or had declared that the TIO spot was not controversial. Each was ambiguous in its response.

291. F.C.C. Staff Recommended Opinion, Document No. 89646, at 3 (presented for Commission consideration December 13, 1973), *citing* Anthony R. Martin-Trigona, 19 F.C.C.2d 620 (1969), which concerned the "uncontroversial nature" of a National Association of Broadcasters' "promotional announcement" designed to praise "free, commercially sponsored television"—at the expense of the infant pay-TV industry.

believed the TIO spot was “controversial” within the meaning of the fairness doctrine, a different majority voted out the staff’s proposed order—an order reaching the opposite conclusion.²⁹²

The final programming items on the Complaints Agenda dealt with significant policy issues. Two groups of Congressmen requested broadcast time to reply to the President’s television appearances and to present another point of view on a number of issues. In one case fourteen members of Congress requested that the networks “sell, or otherwise make available” to them time to present “a contrasting viewpoint to that of the Administration.”²⁹³ In the other, the “Black Caucus” of the House sought (1) a ruling that the networks’ refusal to present unedited documentary programming was “arbitrary, irrational and un-supportive of the public interest,” (2) an FCC directive that the networks provide “an appropriate number of prime time hours” each year, comparable in amount to that given the Executive branch, for unfiltered political speech regarding issues before Congress, and (3) an FCC directive that the networks give the Caucus one-half hour of time to respond to the President’s 1971 prime time State of the Union address.²⁹⁴

The networks refused all of these requests. NBC argued that “use of privately owned broadcast facilities” was “too extraordinary” a remedy for the problem outlined by complainants. It added that “if the constitutional framers had intended that the press provide equal time, they would have said so in the Constitution.”²⁹⁵ In addition the networks claimed that they had satisfied the fairness doctrine by presenting all sides of the issues involved though not by the means sought in the complaint.²⁹⁶ Finally, the networks noted that the complainants represented but a few of the “535 discrete constituencies” that constitute the Congress—and were therefore not entitled to “equality” with the Executive Branch.

The Commission majority, easily and eagerly convinced by the above arguments, decided both cases in favor of the networks. Avoiding all

292. I brought this inconsistency in attitude and result to the attention of the other Commissioners. Because of the potential consequences of this decision, particularly in viewing of the upcoming consideration of the Children’s Television Docket, the majority agreed to relist a compromise resolution of this matter. The compromise specifically states that the Commission declines to comment on the spot’s controversiality. *Action for Children’s Television Inc.*, 26 P & F RADIO REG. 830 (1973).

293. *Congressional Access to TV Time*, 26 P & F RADIO REG. 845, 846 (1973).

294. *Black Caucus of the United States House of Representatives*, 26 P & F RADIO REG. 856 (1973).

295. *Congressional Access to TV Time*, 26 P & F RADIO REG. 845, 849 (1973).

296. *Id.* at 850.

constitutional issues,²⁹⁷ the majority ruled that the Communications Act's "public interest" requirement did not justify Commission action—despite the fact that the Supreme Court had earlier authorized the sort of FCC action requested by the complainants.²⁹⁸ The majority reiterated its holding in a previous case: "[N]either the public interest nor any Congressional enactment requires licensees to sell time to particular groups for discussion . . ." ²⁹⁹ The majority failed to take into account the fact that this was not just another "particular group" but Congressmen complaining about the broadcasting industry's discrimination in favor of another, coequal branch.³⁰⁰ It is not enough to argue that "we should uphold the right of the networks to refuse time to Congress because we would uphold them if they chose to refuse time to the President . . ." ³⁰¹ Such reasoning simply denies the realities of a serious problem of constitutional proportions.³⁰² It is inconceivable that the networks would deny the President free, unfettered prime time access.

Conclusion

Ten years ago I came to Washington as an administrative law professor to find out more about administrative process. A seven-year appointment to the FCC in 1966 has given me more administrative experience than I bargained for and left me with a conviction that

297. Complainants in both cases had relied generally on a separation of powers argument, U.S. CONST. arts. I & II, on the requirement that "Each House shall keep a Journal of its Proceedings . . .," U.S. CONST. art. I, § 5, as well as on the Speech and Debate Clause, U.S. CONST. art. I, § 6, and State of the Union requirement, U.S. CONST. art. II, § 3, to support the novel theory that an imbalance of communications power was something the constitutional framers had sought to avoid. These arguments were shunted aside by the majority because of the then unresolved status of *BEM*. See note 27 *supra*. Congressional Access to TV Time, 26 P & F RADIO REG. 845, 852 n.5 (1973).

298. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 385 (1969). The Court noted that the provisions of § 315 (the fairness doctrine) and the personal attack rules were in fact "far more explicit than the generalized 'public interest' standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before," *id.* at 385-86, citing, *inter alia*, *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In other words, the fairness doctrine and personal attack rules were upheld as not being "beyond the scope of the FCC's congressionally conferred power to assure that broadcast licenses serve 'the public interest,'" and, indeed, the Court implied that the "scope" of the FCC's powers under the "public interest" standard was potentially even broader. *Id.* at 86.

299. *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 286 (1970).

300. See F.C.C. Public Release No. 98564 (March 7, 1973).

301. Curiously, the staff attorney originally assigned to the Black Caucus complaint prepared a carefully researched decision resolving the case in favor of the complainants. He was overruled, of course, by more senior members of the Complaints and Compliance staff.

302. See Public Release No. 98564, *supra* note 128, at 28-29.

administrative law students and professors need more of the raw data on actual agency operation than currently is available. This article is an attempt to provide some of that material.

Several conclusions emerge.

First, it seems evident that the FCC deals each week with an incredibly broad range of communications matters. On December 13, the FCC considered everything from personnel decisions to significant issues of international consequence. The Commission delved into areas surely beyond its expertise and into issues simply beyond its ken.

Second, as the Hearing Agenda reveals, the Commission, burdened with so much work and having so few resources, takes years to resolve important cases.

Third, as both the Cable and Aural Agendas illustrate, the FCC is manipulated daily by the industries it is supposed to regulate and by its own staff. As a result the Commissioners often make precedents which return to haunt them.

Fourth, if the FCC no longer approves of its own rules and precedents, it simply ignores them—either by waiving them to death or otherwise evading them. In short, the concept of principled decision-making does not exist at the FCC.

Fifth, the FCC not only disdains its own administrative principles, but it also ignores those established by the judiciary. Thus, on December 13 the FCC simply turned its back on numerous decisions construing the National Environmental Policy Act and relied on a construction of a recent case involving programming “format changes” not justified by the language of that case.

Sixth, as the General and Common Carrier Agendas show especially well, the Commissioners often decide cases they do not understand.

Finally, the Commission has not developed rational communications policies for governing its day-to-day decisions.

Perhaps it is easier to understand the Commission’s sloppy work, its serious gaffs, when one sees an individual decision in the context of the burdensome “day in the life” on which it was voted. Yet much of the burden is of the Commission’s own making. It is neither necessary nor advisable to divide up the FCC’s workload between a “Broadcasting Commission” and a “Communications Common Carrier Commission.” First semester business school principles would suggest that the Commission should formulate *some* statements of national communications policy for the benefit of itself, its staff, the business community, the Congress, the press, and the public. Having done this, it should prepare precise delegation orders to its staff, allow the staff to

handle individual cases as they come up, and create a management information reporting system whereby the Commission is able to follow the processing of cases, modifying policy and delegation orders as warranted.

Another purpose of this piece is to offer the public some information concerning the operation of one of its administrative agencies, one which has struggled to keep its activities secret. The FCC is a *public* agency, receiving public funds for the purpose of regulating, "in the public interest," communications industries whose services are crucial to the continued vitality of a democratic society. Ironically, though the agency keeps the public in the dark, the communications interests learn all the details of Commission actions through information services provided by lawyers, lobbyists, and the trade press.

Neither the Commission majority nor its staff is troubled by the agency's treatment of the public. Whether because they adhere to notions of "laissez faire" economics or because they sympathize with communications industry interests, a majority of the staff at the FCC exploit the lack of public representation day after day.

Congress has done little to correct problems so apparent at the FCC largely because, as a "generalist" and political body subject to the same sorts of pressures that barrage the Commission, Congress is not terribly competent to supervise.

A final purpose of this article, then, is to offer the judicial branch some idea of how bad things really are, of how tenuous is the basis for the idea that judges should defer to the FCC's "rational and orderly process." Long-range reforms aside, if there is to be any immediate hope for the FCC, it lies with the courts.

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