

The Struggle to Define Character in FCC License Renewal Decisions: *RKO General, Inc.*¹ —

The Communications Act of 1934 requires that broadcast licensees apply for license renewal every three years.² When a licensee applies for renewal, its application can be challenged by any person desiring to take over the license.³ When such a challenge occurs, the Federal Communications Commission (FCC) is charged with the responsibility of determining which applicant will best serve the "public interest, convenience, and necessity."⁴ This process is essentially accomplished in two steps. First, the Commission must determine which applicants are minimally qualified to be licensees. Second, if there is more than one minimally qualified applicant, the FCC must compare the applicants to decide which one is most qualified.

In making the first determination, the Commission must decide whether the applicants possess certain basic financial and technical qualifications.⁵ In addition, the Communications Act specifically requires that the FCC determine, as a threshold matter, whether applicants meet minimal standards of character.⁶ The Communications Act, while establishing a character qualification, does not define "character." In making such a determination, then, the FCC relies on its interpretation of that requirement, as reflected in prior FCC decisions and policy statements.

The procedure for challenging a renewal applicant is as follows. First, an administrative law judge (ALJ) takes evidence on the issues designated by the FCC for the purpose of evaluating the minimum qualifications and relative merit of the applicants.⁷ The ALJ then makes findings of fact and a recommendation as to the disposition of the case.⁸ This decision of the ALJ, known as the Initial Decision, becomes final unless exceptions are filed with the FCC.⁹ Upon such an appeal to the FCC, the full Commission may rely on the ALJ's findings or reopen the record for further evidence in order to make a decision.¹⁰

¹ *RKO General, Inc.*, 78 F.C.C.2d 1 (1980).

² 47 U.S.C. § 307(d) (1976).

³ 47 U.S.C. § 308 (1976). Competing applicants for the same frequency in the same community are known as "mutually exclusive applicants." Only one applicant can be granted the license. See Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, printed in *ACTIVITIES OF REGULATORY AND ENFORCEMENT AGENCIES RELATING TO SMALL BUSINESS: HEARINGS ON H. RES. 13 BEFORE SUBCOMMITTEE NO. 6 OF THE SELECT COMMITTEE ON SMALL BUSINESS*, 89th Cong., 2nd Sess. A87, A112 (Part 1 Appendix 1966).

⁴ 47 U.S.C. § 307(d) (1976). This casenote will not discuss the *RKO* case from the comparative renewal standpoint. For a review of comparative renewal procedures, see Comment, *FCC Comparative Renewal Hearings: The Role of the Commission and the Role of the Court*, 21 B.C. L. REV. 421 (1980); Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings*, 43 U. CHI. L. REV. 573 (1976); Anthony, *Towards Simplicity and Rationality in the Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971).

⁵ 47 U.S.C. § 308(b) (1976) provides: "All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station:" *Id.*

⁶ *Id.*

⁷ 47 C.F.R. §§ 1.241, 1.243 (1979).

⁸ 47 C.F.R. § 1.267 (1979).

⁹ 47 C.F.R. § 1.276 (1979).

¹⁰ *Id.*

Decisions of the FCC may be appealed to the United States Court of Appeals for the District of Columbia Circuit and, from there, to the United States Supreme Court.¹¹

In accordance with these procedures, RKO General, Inc. (RKO), on December 31, 1968, filed an application for renewal of its license covering station WNAC-TV, Channel 7, in Boston.¹² Two challengers, Community Broadcasting Company (Community) and the Dudley Station Corporation (Dudley), subsequently filed competing applications for permits to operate on Channel 7.¹³ On December 11, 1969, the FCC designated for hearing the applications of RKO, Community, and Dudley.¹⁴ Among the issues designated against RKO was the matter of character qualifications. Specifically, the Commission sought to determine whether RKO was qualified to remain a broadcast licensee in view of evidence of alleged anticompetitive conduct by RKO and its parent corporation, General Tire and Rubber Co. (General Tire).¹⁵

At the subsequent series of hearings before an ALJ, extensive evidence was adduced revealing that RKO and General Tire had engaged in allegedly anticompetitive reciprocal trade practices in the 1960's.¹⁶ General Tire, for example, was found to have conditioned its dealings with certain trucking companies upon the truckers' purchase of General Tire products.¹⁷ RKO's par-

¹¹ 47 U.S.C. § 402(a)-(j) (1976).

¹² RKO General, Inc. entered the radio broadcasting field in 1942, and in 1947 became one of 37 television stations in the United States by acquiring WNAC-TV, Channel 7 (Boston), which it has held continuously since then. RKO General, Inc., 78 F.C.C.2d 1, 152 (1974) (initial decision). RKO has since acquired 16 broadcasting stations: KHJ, KRTH(FM), KHJ-TV (Los Angeles, California); WRKO, WROR(FM) (Boston, Massachusetts); WOR, WXLO(FM), WOR-TV (New York, New York); WHBQ (Memphis, Tennessee); KFRC, KKEE(FM) (San Francisco, California); WGMS (Bethesda, Maryland); WGMS(FM) (Washington, D.C.); WAXY(FM) (Ft. Lauderdale, Florida); and WFYR(FM) (Chicago, Illinois). *Id.* at 150-51.

¹³ On February 28 and July 8, 1969, respectively, Community Broadcasting Company and The Dudley Station Corporation filed separate applications for a construction permit to operate on Channel 7, pursuant to 47 U.S.C. § 308(a) (1976). 78 F.C.C.2d at 6.

¹⁴ RKO General, Inc., 20 F.C.C.2d 846, 848 (1969). See note 3 *supra*.

¹⁵ 78 F.C.C.2d at 6-7; RKO is a wholly-owned subsidiary of General Tire. M.G. O'Neil is chief executive officer of General Tire, and T.F. O'Neil, his brother, serves as Chairman of the Board of Directors of both companies. *Id.* at 61. The anticompetitive issue arose as a result of alleged illegal trade relations practices by RKO and General Tire whereby General Tire was using its buying power to induce its suppliers to advertise on RKO stations. These dealings began with the establishment of a trade relations program in 1961 by General Tire. John G. Ragsdale was director of the new trade relations division. While RKO did not have a formal trade relations program, Robert Wilke, hired by RKO in 1960 to serve as a "goodwill ambassador or missionary salesman," functioned as RKO's liaison with Ragsdale and had the title of Director of Corporate Relations. *Id.* at 8. As a result of trade relations matters, the Department of Justice filed a civil action against General Tire, RKO, and other General Tire and RKO subsidiaries, alleging violations of sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1,2. *Id.* at 8-9. The Department of Justice action resulted in a court-approved consent decree, issued October 21, 1970, precluding General Tire and its subsidiaries from engaging in such practices for a period of ten years. No judicial finding of guilt was made. *Id.*

¹⁶ *Id.* at 9-10. Such practices may be defined as the allocation of a firm's purchase of goods and services in order to promote the sale of its products. *Id.* at 33.

¹⁷ *Id.* at 9, 262-64.

ticipation in reciprocal dealings involved an effort by RKO and General Tire to pressure companies to advertise on RKO stations in exchange for doing business with General Tire.¹⁸ Despite this evidence, the ALJ held that under the policy of the FCC as established in prior cases, RKO still not only possessed minimal character qualifications for license renewal, but also was the best qualified of the applicants on a comparative basis.¹⁹

The initial decision by the ALJ, however, did not end the matter. Following the ALJ's decision, evidence of other RKO and General Tire wrongdoing came to light. Consequently, on December 10, 1975, Community filed a petition to reopen the record and remand the case for further hearings, based on this new evidence.²⁰ The Commission granted the petition.²¹ As a result of these further proceedings, the FCC adopted the ALJ's findings of fact relating to the reciprocal trade practices engaged in by RKO and General Tire, and found other broadcast-related misconduct by RKO as well as extensive non-broadcast misconduct by General Tire.²²

The additional broadcast misconduct, the Commission found, consisted of RKO's filing of inaccurate annual financial reports with the FCC²³ and RKO's general lack of candor with the Commission.²⁴ The inaccuracies in the financial reports related to RKO's accounting for barter and trade transactions.²⁵ Such transactions, common in the broadcasting industry, consist of exchanges of a station's broadcast time at something other than normal advertising rates. In return, the broadcaster generally receives goods and services from the advertiser.²⁶ While the FCC does not regulate such transactions, it does require that barter and trade matters be entered on the licensees' annual financial reports.²⁷ The FCC found that RKO improperly reported barter and trade transactions during the 1970's.²⁸ This matter involved RKO's method of accounting for these transactions. RKO had always accounted for barter by memorandum, rather than by entering them on its general ledger.²⁹ Following a notice issued by the Commission in February, 1972, reminding licensees to

¹⁸ *Id.* at 10, 289-90, 299-302. See note 15 *supra*.

¹⁹ 78 F.C.C.2d 147 (1974). The decision was issued on June 13, 1974 and released June 21, 1974. *Id.* The ALJ found that the trade relations practices of General Tire and its subsidiaries and related candor questions did not warrant a comparative demerit; a moderate comparative demerit was assessed for inadequate supervision by RKO in the production of two shows: The Della Reese Show and Dark Shadows. *Id.* at 347. The ALJ found RKO's record to be one of superior performance, a factor outweighing the comparative demerit as well as the merits of the competing applicants. *Id.* at 347-48.

²⁰ Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearings (Petition to Reopen). 78 F.C.C.2d at 13-14.

²¹ *Id.* at 21-23.

²² *Id.* at 38-43, 63, 80-81, 92-93.

²³ *Id.* at 80.

²⁴ *Id.* at 92-93.

²⁵ *Id.* at 80-88.

²⁶ *Id.* at 81.

²⁷ *Id.*

²⁸ *Id.* at 86.

²⁹ *Id.* at 81.

report all barter transactions annually to the Commission by general ledger method, RKO continued to account for such transactions in its traditional manner.³⁰

Aside from the inaccurate financial reports, the FCC found that RKO had exhibited lack of candor in dealing with the Commission throughout the renewal proceedings.³¹ The Commission pointed to three specific instances of RKO's lack of candor. First, the Commission referred to RKO's opposition brief to a 1977 Community petition to order RKO to comply with FCC disclosure rules with respect to accounting of barter and trade transactions.³² In its opposition to this petition, RKO referred to Community's allegations of incomplete reporting of the transactions as "sheer speculation."³³ The Commission considered this characterization of Community's allegations as RKO's official statement that the financial reports were complete and accurate.³⁴ Because RKO was aware of inaccuracies in 1977, the Commission found the opposition lacking in candor.³⁵ A second matter found by the FCC to be evidence of RKO's lack of candor was RKO's failure to make a timely report to the FCC of an SEC investigation of General Tire and its subsidiaries, including RKO.³⁶ Third, the Commission pointed to RKO's opposition brief to Community's petition to reopen the record, in which RKO asserted that Community had no basis for its allegations.³⁷ Community's petition had alleged extensive nonbroadcast-related misconduct by General Tire and a lack of candor by RKO in failing to inform the FCC of this misconduct.³⁸ The SEC investigation of General Tire later revealed that these allegations were substantially accurate, and the FCC concluded that RKO probably was aware of these matters at the time it filed its opposition.³⁹

³⁰ *Id.* at 81-82.

³¹ *Id.* at 92-93.

³² *Id.* at 101-03.

³³ *Id.* at 102.

³⁴ *Id.*

³⁵ *Id.* at 103.

³⁶ *Id.* at 99-101.

³⁷ *Id.* at 93, 95.

³⁸ *Id.* at 93. Specifically, Community pointed to violations of the Commission's rules, sections 1.514 and 1.65.

Section 1.514(a) provides, in pertinent part: "Each application shall include all information called for by the particular form on which the application is required to be filed." 47 C.F.R. § 73.3514(a) (1979). Community alleged that RKO violated this rule by failing to disclose its secret interest in a foreign bank account (Fructal) through which it was concealing funds related to Chilean operations. 78 F.C.C.2d at 13-14.

Section 1.65 states, in pertinent part:

Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate . . .

47 C.F.R. § 1.65 (1979). Community alleged that RKO failed to comply with section 1.65 by not informing the Commission of the SEC's investigation of General Tire. 78 F.C.C.2d at 13-14.

³⁹ *Id.* at 93-97. Since RKO had requested extra time to prepare its opposition and had been in possession of documents relating to the General Tire misconduct, the FCC found that

In addition to the broadcast-related issues of reciprocity, inaccurate financial reports, and lack of candor, the FCC made extensive findings regarding General Tire's nonbroadcast misconduct. These findings were based largely on evidence adduced as a result of the SEC investigation. That investigation ended in May, 1976, with General Tire entering into a consent decree which, among other things, established a Special Review Committee to investigate the alleged General Tire misconduct. The investigation produced a Special Report which was accepted into evidence by the FCC in the RKO license renewal proceedings.⁴⁰ Among the findings by the Commission as a result of the report were that General Tire had engaged in extensive wrongdoing since the 1960's. These activities included making improper domestic political contributions, defrauding corporate affiliates, making improper foreign payments, and keeping improper accounts.⁴¹

Having found the above described broadcast and nonbroadcast misconduct by RKO and General Tire, the Commission considered facts in mitigation of that misconduct. The Commission reviewed in some detail RKO's past broadcast record at WNAC-TV. Although comparison with other Boston area television stations revealed to the Commission that RKO was deficient with respect to several categories, including news, local programming and public affairs,⁴² the Commission placed RKO's performance "within the bounds of average performance of all licensees."⁴³

Other mitigating factors were considered. For example, RKO and General Tire had taken certain corrective measures to counteract the misconduct and to assure that it would not recur in the future. With respect to the reciprocal trade agreements discovered by the ALJ, for instance, the Commission noted that both companies had entered into a consent decree prohibiting such practices through 1980.⁴⁴ On the subject of barter and trade transactions,

RKO must also have known that Community's allegations were not unfounded. *Id.* at 95 & n.408.

⁴⁰ The history of this investigation began in 1975. On December 5, 1975 and January 22, 1976 the SEC submitted letters of inquiry to General Tire officials regarding certain of the alleged activities. 78 F.C.C.2d at 12, 15. These inquiries resulted in a formal order of investigation against General Tire in late February, 1976, and a complaint for injunctive and certain ancillary relief against General Tire and M.G. O'Neil on May 10, 1976. *Id.* at 16. The complaint cited substantially all of the allegations made by Community in its December 10, 1975 Petition to Reopen, along with other allegations. *Id.* at 16. These actions resulted in a court-approved final judgment of permanent injunction incorporating the consent and undertaking of General Tire and the consent of M.G. O'Neil (May 10, 1976). *Id.* at 17. The permanent injunction, prohibiting the concealment of the misconduct alleged in the SEC complaint, did not admit or deny any of the allegations in the complaint, including "unlawful political contributions, unlawful payments to foreign government officials, and the overbilling of affiliates and subsidiaries." *Id.* The decree also established a Special Review Committee which was to conduct a thorough investigation of the matters in the complaint and issue a written report on the findings, later called the Special Report. *Id.* RKO informed the FCC of the SEC matter and the consent decree on May 14, 1976. *Id.* The Special Report, issued on or about July 1, 1977, was submitted to the FCC on July 19, 1977. *Id.* at 19. It was formally accepted into evidence on July 20, 1979. *Id.* at 22.

⁴¹ 78 F.C.C.2d at 63.

⁴² *Id.* at 107.

⁴³ *Id.*

⁴⁴ *Id.* at 110.

the Commission found that in 1977, RKO converted to the general ledger method of recording in order to comply with FCC rules and formed committees to assure adequate accounting controls in the future.⁴⁵ In mitigation of the non-broadcast misconduct by General Tire, the FCC noted that General Tire had instituted a remedial program even prior to the issuance of the Special Report, and subsequently had adopted all of the recommendations of the Special Review Committee.⁴⁶

In summary, the FCC considered numerous findings of fact in assessing RKO's fitness as a broadcast licensee. First, the Commission found that RKO and General Tire had engaged in reciprocal trade practices in the 1960's. In this respect the FCC relied on the facts revealed in the Initial Decision by the ALJ. The final decision, however, was based, in addition, on matters revealed when the case was reopened. Those additional matters were RKO's filing of inaccurate annual financial reports, lack of candor with the Commission, and extensive nonbroadcast misconduct by RKO's parent corporation, General Tire and Rubber Co. After considering this new evidence and taking into account RKO's past broadcast record, as well as corrective measures by both companies, the FCC, in a 4-3 decision, held that RKO lacked the requisite character qualifications to remain the licensee of WNAC-TV.⁴⁷

The decision to disqualify RKO based on these facts potentially marks a significant shift in FCC policy as it relates to character evaluation of renewal applicants. The Commission, in *RKO*, diverged from the standards applied in prior cases involving broadcast-related misconduct. In addition, while the Commission in the past has taken a nominally negative view toward nonbroadcast business misconduct by licensees and corporate parents,⁴⁸ in prior cases such misconduct has been overlooked or outweighed by other factors, such as the applicants' longstanding, excellent or superior service in the public interest.⁴⁹ In *RKO*, however, the Commission denied license renewal by giving

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 120. The decision, announced on January 24, 1980, adopted June 4, 1980, and released June 6, 1980, has the effect of disqualifying RKO from retaining licenses in Boston (WNAC-TV), Los Angeles (KHJ-TV), *id.* at 355-56 (1980), and New York (WOR-TV), *id.* at 358 (1980). The Los Angeles and New York cases had been conditioned on the outcome of the Boston proceeding. See *RKO General, Inc. (KHJ-TV)*, 44 F.C.C.2d 123, 137-38 (1973), *aff'd sub nom. Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975), where the United States Court of Appeals affirmed the Commission's decision to grant RKO renewal for KHJ-TV, conditioning renewal on the outcome of the Boston proceeding. See also *RKO General, Inc. (WOR-TV)*, 69 F.C.C.2d 461 (1978) (Commission grant of license renewal for WOR-TV, subject to resolution of the Boston proceeding, which would have the effect of *res judicata* on the New York license renewal).

The decision, in addition to stripping RKO of television licenses in three major cities, may affect RKO's retention of its other 13 broadcast licenses. 78 F.C.C.2d at 118.

⁴⁸ See Report on Uniform Policy as to Violation by Applicants of the Laws of United States, 42 F.C.C.2d 399 (1951).

⁴⁹ See text at notes 98-108 *infra* for a discussion of General Electric and Westinghouse license renewals (misconduct outweighed by outstanding broadcast record). See also text and notes at notes 173-74, 224-29 *infra*, for a discussion of Miami Valley Broadcasting Corporation where the Commission failed to take negative action with respect to a licensee despite evidence of extensive nonbroadcast misconduct.

"substantial weight" to nonbroadcast misconduct, while discounting previous service by the licensee.⁵⁰ Thus, *RKO* suggests that in the future the Commission intends to use its licensing powers more aggressively to discourage misconduct by companies engaging in broadcasting.

This casenote will analyze the FCC's failure in *RKO* to articulate a workable standard for evaluating character in broadcast renewal applicants. To accomplish this, the casenote will first review the development of FCC policy concerning character qualifications. This historical review will demonstrate that prior to *RKO* the FCC had effectively minimized character as a factor in assessing renewal applicants by applying its criteria too flexibly. Having traced the history of the FCC's treatment of character, the casenote will describe the Commission's reasoning in *RKO*. The analysis following the description will show that *RKO*, although nominally following established policy, is in fact a departure from the Commission's approach in earlier cases. Finally, it will be suggested that this departure may serve to undermine the reasonable expectations of renewal applicants without providing them with a foundation on which to build new expectations.

I. HISTORY OF THE FCC'S ATTEMPT TO FORMULATE A CHARACTER STANDARD

The Communications Act of 1934 made "character" a basic qualification for a broadcast license.⁵¹ The statute, however, did not define "character," but left the issue for the FCC to develop. Since the enactment of the Communications Act, that task has been especially difficult for the FCC to accomplish. At first the Commission attempted to define character on an *ad hoc* basis, but no intelligible standard emerged.⁵² Subsequently, the FCC issued a policy statement in an effort to summarize the Commission's position on character and to indicate how character would be assessed in future cases.⁵³ Even after the policy statement, however, the Commission continued to experience difficulty in applying the character standard uniformly. While reserving for itself very broad powers in its earlier cases and in the policy statement, the FCC in recent practice has exercised those powers very sparingly.

A. *Early Decisional Law: 1940-1950*

In its earliest cases, the FCC was somewhat lenient concerning a range of misconduct it deemed permissible by broadcast licensees.⁵⁴ In the early 1940's, however, a shift towards more critical evaluation of licensee conduct became

⁵⁰ 78 F.C.C.2d at 71.

⁵¹ 47 U.S.C. § 308(b) (1976).

⁵² See text at notes 54-66 *infra*.

⁵³ Report on Uniform Policy as to Violation by Applicants of the Laws of the United States, 42 F.C.C.2d 399 (1951).

⁵⁴ Note, *Broadcast License Revocation for Deception and Illegal Transfer*, 15 GEO. WASH. L. REV. 425 (1947), reviews cases prior to 1946 where the FCC had been more lenient in such matters. See also Brown, *Character and Candor Requirements for FCC Licenses*, 22 LAW & CONTEMP. PROB. 644 (1957), for a summary of some of the cases between 1946 and the mid-1950's.

evident. In *WOKO, Inc.*⁵⁵ the FCC asserted its power to invoke the character standard to deny renewal for misconduct directly related to a licensee's status.⁵⁶ In this case the licensee, WOKO, had concealed for 12 years the true ownership of the station's capital stock.⁵⁷ The Commission denied license renewal, holding that these recurring misrepresentations by WOKO precluded the applicant from meeting the standards of candor under the Communications Act.⁵⁸ Having failed to meet these standards, the Commission reasoned, WOKO could not be trusted to remain a broadcast licensee.⁵⁹ Thus, in *WOKO* the FCC took its first step in developing a character standard.

In the late 1940's and early 1950's, the Commission extended the scope of its evaluation of character qualifications beyond an assessment of an applicant's honesty and candor in dealings with the Commission. In *Arde Bulova*,⁶⁰ for example, the FCC included in its character evaluation an examination of the licensees' nonbroadcast business misconduct.⁶¹ The applicants in that case were denied a broadcast license because of their repeated violations of state and federal laws in conducting their edible oil business.⁶² The FCC reasoned that such nonbroadcast business misconduct deserved considerable weight in judging whether the applicants possessed the "sense of public responsibility" essential for a broadcast licensee.⁶³ The license denial, affirmed subsequently by the United States District Court,⁶⁴ represented a significant extension of FCC licensing power into areas not directly related to broadcast regulation.⁶⁵

As the early history shows, the Commission carved out fairly broad powers with respect to character evaluation. In addition to establishing its authority to deny a license for activity directly related to broadcasting or to broadcast regulation, the FCC assumed the power to disqualify an applicant

⁵⁵ *WOKO, Inc.*, 10 F.C.C. 454 (1944), *rev'd*, *WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir.), *rev'd*, *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

⁵⁶ 10 F.C.C. at 466-68.

⁵⁷ *Id.* at 466-67.

⁵⁸ *Id.* at 468.

⁵⁹ *Id.* In affirming the Commission's license denial, the United States Supreme Court held that the FCC need not be entirely consistent in deciding apparently comparable cases. *FCC v. WOKO, Inc.*, at 228. The Court made clear that it is the Commission, not the courts, that must be satisfied that the public interest standard has been met. *Id.* at 229.

⁶⁰ 11 F.C.C. 137 (1946).

⁶¹ *Id.* at 142-47.

⁶² *Id.* at 148-49. In particular, the applicant had been involved as a defendant in proceedings concerning illegal conduct such as false and misleading labelling, weight shortages, and other deceptive practices. *Id.* at 143-47.

⁶³ *Id.* at 149.

⁶⁴ *Mester v. United States*, 70 F. Supp. 118 (E.D.N.Y. 1947).

⁶⁵ *Mansfield Journal Co.*, 13 F.C.C. 23 (1948), was another case where the FCC denied a license because of illegal conduct by the applicants. The applicants in *Mansfield*, owners of the sole newspaper in Mansfield, Ohio, had engaged in anticompetitive practices by coercing its advertisers into exclusive contracts which prohibited them from advertising on what was then the only broadcast station in Mansfield. *Id.* at 30-32. The decision was affirmed by the appeals court, which held that the FCC had broad discretionary power to consider unconvicted antitrust violations in evaluating character. *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33-34 (D.C. Cir. 1950).

for nonbroadcast-related activity that the FCC believed was indicative of potential future broadcast-related misconduct. The early cases, however, did not indicate clearly what kind of misconduct the Commission considered relevant to predicting an applicant's behavior as a licensee.⁶⁶

B. *The Uniform Policy*

In an effort to define how it would use its broad power under the character standard, the FCC in 1951 attempted to synthesize its various holdings in a single policy statement. In the *Report on Uniform Policy as to Violation by Applicants of Laws of United States (Uniform Policy)*,⁶⁷ the Commission asserted its authority to consider violations of law other than breaches of the Communications Act as a character factor in licensing decisions.⁶⁸ While noting that any violation of federal law would raise a character question worthy of examination, the Commission stated that misconduct would be viewed along with mitigating factors that might outweigh the negative effect of the violation.⁶⁹ In devising a test for evaluating unlawful behavior by an applicant, the Commission isolated three factors. These factors were: (1) whether the misconduct was willful or inadvertent; (2) whether it involved an isolated incident or a pattern of behavior; and (3) whether it occurred recently or in the remote past.⁷⁰

Regarding the first factor, the Commission considered of prime concern the practice of willful violations of law.⁷¹ In taking this position, the Commission stated that deliberate unlawfulness by an applicant raises a presumption adverse to that applicant.⁷² This factor was of particular importance to the

⁶⁶ In the *Mansfield* case, two dissenters, Commissioners Jones and Sterling, doubted that nonbroadcast misconduct realistically could serve as a prospective predictor of broadcast misconduct. 13 F.C.C. at 41. In addition, the dissenters expressed concern about the Commission's failure to take into account the affirmative qualifications of applicants with character defects. *Id.*

⁶⁷ 42 F.C.C.2d 399.

⁶⁸ *Id.* at 400-01. The situations addressed in the *Uniform Policy* were:

- (a) Whether the finding of the violation is in a civil or criminal case.
- (b) Whether the finding of violation is by the United States Supreme Court or by a lower federal court.
- (c) Where, after the finding of violation, a decree is entered by an appropriate court which results in the elimination of the practice which was a violation of federal law.
- (d) Where there has been no finding of violation but a suit has been filed alleging a violation.
- (e) Where there has been no finding of violation or no filing of suit, but the Commission is in possession of information which shows that there has been a violation of federal law.

42 F.C.C.2d at 400. With respect to the first two situations, the Commission concluded that neither the type of suit brought nor the level of the tribunal issuing a decree was a factor in determining whether the Commission would consider the violations in making licensing decision. *Id.* at 403. The FCC also reserved for itself the power to evaluate misconduct in situations (c)-(e), above, "insofar as it may relate to matters entrusted to the Commission." *Id.*

⁶⁹ 42 F.C.C.2d at 402.

⁷⁰ *Id.* at 402-03.

⁷¹ *Id.* at 402.

⁷² *Id.*

Commission because the FCC considered willful misconduct fundamentally inconsistent with service as a public trustee.⁷³

The second and third factors — pattern and recency of conduct — were related to the Commission's predictive function. Recurrent offenses, establishing a continuing pattern of misconduct, the Commission stated, would be evidence that an applicant could not be trusted to serve as a responsible licensee.⁷⁴ Cases where an applicant was engaged in unlawful behavior for a long period of time or was currently engaged in such behavior would raise a particularly strong presumption against the applicant and impose a heavy burden of proof on the applicant to show it is qualified.⁷⁵ Conversely, isolated instances of misconduct, or violations occurring in the distant past, followed by a long period of adherence to law would be of less concern to the Commission.⁷⁶ Having devised this three factor test for evaluating misconduct by applicants, the FCC added that facts "in extenuation of the violation of law"⁷⁷ or "other favorable facts and considerations" might outweigh a record of unlawful conduct.⁷⁸ In such a case, an applicant could qualify to operate a station in the public interest.⁷⁹

In addition to setting forth a test for evaluating character, the FCC expressed particular concern for violations of antitrust laws.⁸⁰ The Commission stated that because of the difficulty of detecting monopolistic behavior and because of the potentially negative effect of monopoly on broadcasting, any such known practices by an applicant, whether or not broadcast-related, must be considered in evaluating qualifications for a license.⁸¹ In this regard, the Commission established its authority to examine fully an applicant's history of unlawful conduct, including unconvicted violations of law.⁸² By considering violations of antitrust laws, the Commission continued, its purpose was not to impose penalties for the transgression itself, but was to look at such violations, along with other pertinent factors, to determine whether licensing the applicant was in the public interest.⁸³ Such decisions, the Commission concluded, would be reviewed on a case-to-case basis.⁸⁴

The *Uniform Policy* was the FCC's first formal articulation of a character standard. In this policy statement, the Commission assumed broad authority to consider unlawful conduct by license applicants. This authority was not restricted to violations of the Communications Act, but included the power to investigate unconvicted violations of other laws. Such unlawful conduct, the Commission noted, would be evaluated based on three factors: whether it was

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 402-03.

⁷⁶ *Id.* at 402.

⁷⁷ *Id.*

⁷⁸ *Id.* The *Uniform Policy* did not spell out what specific factors would serve to mitigate misconduct. In practice, however, these factors have included broadcast record and remedial measures. See, e.g., *General Electric and Westinghouse* in text at notes 98-108 *infra*.

⁷⁹ 42 F.C.C.2d at 402.

⁸⁰ *Id.* at 403-04.

⁸¹ *Id.* at 404.

⁸² *Id.* at 403.

⁸³ *Id.* at 401.

⁸⁴ *Id.* at 402.

willful, whether it occurred repeatedly, and whether it was recent. Illegal activity might be mitigated, however, by favorable evidence. Having assumed these powers, the Commission concluded that character matters would be evaluated on a case-to-case basis.

C. *The Post-Policy Cases*

In the early cases following the adoption of the *Uniform Policy*, the Commission took a lenient approach in applying the *Policy's* criteria. Although the FCC had carved out extensive powers for itself, it chose to exercise them sparingly. With respect to both broadcast and nonbroadcast misconduct, the Commission was reluctant to disqualify an incumbent licensee. The following discussion will illustrate this trend through a review of three post-policy FCC decisions.

In *National Broadcasting Co.*⁸⁵ the Commission ignored alleged improper broadcast-related misconduct by NBC and its parent corporation, RCA,⁸⁶ and granted license renewal. The misconduct related to the acquisition of the stations for which renewal was sought. In 1955, NBC and Westinghouse Broadcasting Company applied for and were granted approval for a broadcast station exchange.⁸⁷ In this transaction NBC acquired from Westinghouse radio and television stations located in Philadelphia. In return, Westinghouse received NBC's Cleveland radio and television stations, plus \$3 million.⁸⁸ In 1957, the FCC, without a hearing, granted NBC renewal of the Philadelphia licenses.⁸⁹ Philco Corporation, a challenger for the licenses, filed a protest to the renewal and requested a hearing, alleging character deficiencies because of flagrant anticompetitive conduct by NBC and RCA.⁹⁰ Philco pointed particularly to pending civil antitrust actions instituted against NBC and RCA by the Department of Justice in connection with coercive behavior by NBC and RCA in the acquisition of the Philadelphia stations from Westinghouse. Specifically, the suit alleged that NBC had threatened to withhold network affiliation from Westinghouse unless it agreed to the exchange.⁹¹ The evidence also revealed that NBC and RCA had engaged in other broadcast-related anticompetitive conduct since the mid-1940's, resulting in patent licensing suits as well as government and private antitrust actions.⁹² Nevertheless, Philco's request for a hearing on these character matters was denied.⁹³

⁸⁵ *National Broadcasting Co.*, 37 F.C.C. 451 (1963).

⁸⁶ NBC was a wholly-owned subsidiary of RCA. *National Broadcasting Co.*, 44 F.C.C. 1114, 1118 (1957).

⁸⁷ 37 F.C.C. at 452-54.

⁸⁸ *Id.* at 453.

⁸⁹ *Id.*

⁹⁰ 44 F.C.C. 1114, 1116-18 (1957).

⁹¹ *Id.* at 1115 & n.6.

⁹² *Id.* at 1115-17. NBC, for example, had been engaged in a series of quiz-show rigging schemes during the 1950's which led to an investigation by the House Committee on Interstate and Foreign Commerce in 1959. 37 F.C.C. at 481-83. RCA's misconduct in the patent licensing area resulted in criminal charges and the imposition of a fine upon RCA's plea of *nolo contendere* in 1958. *Id.* at 461. The judgment entered in the criminal action described the RCA offense as unlawful restraint of trade and monopolization in the manufacture, distribution and sale of radio equipment and in the licensing of radio patents. *Id.*

⁹³ 44 F.C.C. at 1123.

While acknowledging these allegations, the Commission, in denying a hearing, stated that it would not act on "unresolved complaints" filed in the courts until they were resolved by those courts.⁹⁴ In so deciding, the Commission did not address fully either the pattern of broadcast-related anti-competitive conduct by the licensee and its parent corporation, or the recency of that conduct. Thus, in *NBC*, the Commission refrained from taking an active part in assessing these unconvicted violations of law as it had indicated that it would in the *Uniform Policy*.⁹⁵ Rather, the evaluation of character in *NBC* illustrates the FCC's reluctance to deny license renewal to an incumbent licensee. Although the Commission asserted broad powers, it shied away from using them.

NBC represents the Commission's post-policy treatment of broadcast-related misconduct by an incumbent licensee. If possible the FCC tended to minimize the significance of broadcast-related wrongdoing as an indicator of character deficiencies. Not surprisingly, two cases decided in the early 1960's show that the Commission took a similar view regarding nonbroadcast misconduct.

*Westinghouse Broadcasting Co.*⁹⁶ and *General Electric Co.*⁹⁷ reflect the Commission's lenient approach to nonbroadcast misconduct. *Westinghouse* and *General Electric* involved extensive anticompetitive conduct by nonbroadcast subsidiaries of Westinghouse Electric Corporation and General Electric Company.⁹⁸ As a result of this misconduct, in 1961 employees of both companies were convicted on charges of bid-rigging and price-fixing in the amount of \$1.75 billion annually.⁹⁹ When Westinghouse and General Electric applied for license renewals, the FCC was aware of the history of illegal activity that led to these convictions. Despite this anticompetitive conduct, however, the Commission granted renewal without hearings in both *Westinghouse* and *General Electric*.¹⁰⁰

In granting renewals in these cases, the Commission, in keeping with the *Uniform Policy*, acknowledged its duty to scrutinize anticompetitive behavior by owners of broadcast subsidiaries.¹⁰¹ In *Westinghouse* the FCC stated that the

⁹⁴ *Id.* The Commission also concluded that Philco was not a "party in interest." *Id.*

⁹⁵ The court of appeals vacated the dismissal of Philco's request and ordered a hearing. *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961). Even when forced to confront the issue, however, the FCC continued to try to sidestep it. On remand, the FCC still granted renewal, but it also directed NBC to return the Philadelphia stations to Westinghouse in exchange for the Ohio stations it had given up, and to forfeit the \$3 million it had paid Westinghouse. 37 F.C.C. 427 (1964). In taking this action, the Commission noted that it was not holding that NBC lacked the basic qualifications to be a broadcast licensee. *Id.* at 448. The Commission stated that NBC's longstanding and generally meritorious broadcast history and its contributions to American broadcasting constituted the overriding factor. *Id.* Unconditional renewal, however, would be contrary to the public interest in the face of the misconduct, the Commission added. *Id.* Therefore, the Commission fashioned a remedy to fit the specific misconduct in the Philadelphia-Cleveland exchange. *Id.* at 449-50.

⁹⁶ 44 F.C.C. 2778 (1962).

⁹⁷ 45 F.C.C. 1592 (1964).

⁹⁸ See 44 F.C.C. at 2779 and 45 F.C.C. at 1592.

⁹⁹ See 44 F.C.C. at 2779 and 45 F.C.C. at 1593. Then Attorney General William P. Rogers remarked that the misconduct constituted "as serious instances of bid-rigging and price fixing as have been charged in the more than half-century of the Sherman Act." *Id.*

¹⁰⁰ See 44 F.C.C. at 2785 and 45 F.C.C. at 1598.

¹⁰¹ See 44 F.C.C. at 2783 and 45 F.C.C. at 1593.

misconduct in question was willful, recurring, and recent, a background that militated against renewal.¹⁰² In *General Electric*, the Commission noted that the misconduct was substantially identical to the wrongdoing found in *Westinghouse*.¹⁰³ In both cases, however, the Commission found that mitigating factors overrode the negative behavior of the licensees. The FCC noted that remedial measures had been taken by both parent companies in order to prevent a recurrence of the questionable conduct.¹⁰⁴ The Commission was also impressed by the lack of horizontal connection in the corporate structure between the wrongdoers and the broadcast operations.¹⁰⁵ This corporate structure, the Commission reasoned, insulated the broadcast division from the misconduct.¹⁰⁶ Finally, the FCC noted that the misconduct, although criminal, was outweighed by the longstanding "uncommonly good" (*Westinghouse*)¹⁰⁷ and "meritorious" (*General Electric*)¹⁰⁸ broadcast records of the applicants.

Thus, Commission decisionmaking concerning character qualifications of broadcast license applicants and their parent corporations reveals a complex history. While experiencing difficulty in formulating a character standard, the Commission, in its *Uniform Policy* and through later adjudication developed three basic considerations. First, the seriousness of nonbroadcast misdeeds was to be measured in part by the degree to which personnel engaged in broadcast operations were involved. If broadcast functions were divorced completely from the illegal activity, the misdeeds' impact on renewal would be slight. Second, the willfulness, persistence, and recency of the misconduct in question were to be weighed as factors on a case-by-case basis. Third, nonbroadcast and broadcast misconduct may be counterbalanced by longstanding high-quality service in the public interest. Cases such as *NBC*, *Westinghouse*, and *General Electric*, however, show that in practice, the Commission has been lenient in applying the standards developed through the earlier case law and set forth in the *Uniform Policy*. In so acting, the FCC focused more on continued service in the public interest than on taking punitive measures. It is against the background of this approach that *RKO General, Inc.* was decided.

II. *RKO GENERAL, INC.*: THE FCC'S DECISION

*RKO General, Inc.*¹⁰⁹ presented to the Commission character issues similar to those encountered in prior cases. Like *NBC*, *RKO* involved broadcast-related misconduct by the licensee.¹¹⁰ The facts of *RKO* also revealed non-broadcast misdeeds by the licensee's parent corporation, General Tire.¹¹¹ In this respect, *RKO* resembled *Westinghouse* and *General Electric*. In assessing the

¹⁰² 44 F.C.C. at 2783.

¹⁰³ 45 F.C.C. at 1593.

¹⁰⁴ See 44 F.C.C. at 2784-85 and 45 F.C.C. at 1594-95.

¹⁰⁵ See 44 F.C.C. at 2780 and 45 F.C.C. at 1593.

¹⁰⁶ *Id.*

¹⁰⁷ 44 F.C.C. at 2780.

¹⁰⁸ 45 F.C.C. at 1594, 1596.

¹⁰⁹ 78 F.C.C.2d 1 (1980).

¹¹⁰ *Id.* at 3-4.

¹¹¹ *Id.* at 4-5.

character issues raised by *RKO*, however, the Commission applied the character standard more stringently than it did in these earlier cases. This section of the casenote will describe the Commission's opinion in *RKO* as it relates to the character standard set forth in the *Uniform Policy*. Specifically, the discussion will address the FCC's handling of broadcast-related misconduct, nonbroadcast-related misconduct, and mitigating factors.

A. Broadcast-Related Wrongdoing

The direct licensee misconduct addressed in *RKO* involved reciprocal trade practices, the filing of inaccurate annual financial reports, and a general lack of candor on the part of *RKO* in dealing with the Commission. Because of the prospective nature of licensing, the Commission considered an examination of these matters important because past broadcast-related misconduct is an especially good predictor of future licensee misconduct. In examining *RKO*'s broadcast-related misconduct, the Commission reviewed three matters: reciprocal trade practices, inaccurate annual financial reports, and lack of candor.

The FCC first examined the issue of reciprocal trade practices as evidenced by General Tire's efforts in the 1960's to induce General Tire suppliers to advertise on *RKO* stations.¹¹² The Commission found these practices to be a willful violation of law.¹¹³ In support of this conclusion, the FCC noted that coercive reciprocity has been clearly illegal since the 1930's¹¹⁴ and that the practices engaged in by General Tire included coercive measures.¹¹⁵ The Commission observed further that while the law was less clear on noncoercive reciprocal dealings than coercive reciprocity,¹¹⁶ such activity probably would be illegal if the specific aim were to exclude competitors.¹¹⁷ Finally, the FCC expressed the view that even to the extent that General Tire's activities were not coercive or unlawful, such practices were clearly contrary to the public interest standard and constituted a willful violation of FCC policy.¹¹⁸

In addition to finding that the reciprocal trade activities constituted willful licensee misconduct, the Commission noted also that the practices were not isolated incidents.¹¹⁹ The FCC found, on the contrary, that during the period 1960-1967 General Tire sought to induce companies to advertise on *RKO* stations by making it a condition for doing business with General Tire.¹²⁰ The formal establishment of the "trade relations" division at General Tire in 1961

¹¹² *Id.* at 40.

¹¹³ *Id.* at 43-44. On this issue the Commission disagreed with the ALJ's conclusion that the reciprocal trade practices were not clearly illegal in the 1960's and, therefore, did not constitute a willful violation of law. 78 F.C.C.2d at 379-80.

¹¹⁴ 78 F.C.C.2d at 34, 43-44.

¹¹⁵ The Commission cited, for example, the case of Equitable Life Assurance Society, where certain evidence indicated that that company felt compelled to advertise on *RKO* stations in order to continue selling insurance to General Tire. *Id.* at 44.

¹¹⁶ *Id.* at 34.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 38, 43-47.

¹¹⁹ *Id.* at 38-43.

¹²⁰ *Id.* at 38-39.

showed that the practice was an integral part of the company's business.¹²¹ While the conduct itself occurred fifteen to twenty years ago, the Commission continued, the program terminated only after the Department of Justice filed an antitrust suit against General Tire.¹²² In conclusion, the Commission stated that this misconduct, while not recent, constituted such a willful and persistent pattern of wrongdoing, that its remoteness was immaterial.¹²³ Consequently, the FCC held that the reciprocal trade practices were "unequivocally improper" and constituted an independent disqualifying factor in the license renewal decision.¹²⁴

In addition to finding that RKO had engaged in reciprocal trade practices, the Commission found that RKO had knowingly filed inaccurate annual financial reports with the Commission during the 1970's.¹²⁵ In this context, the Commission focused on RKO's improper reporting of barter and trade transactions.¹²⁶ This matter involved RKO's disregard of a 1972 Commission directive to account for such transactions by general ledger method.¹²⁷ It was not until 1977 that RKO changed its accounting system in accordance with that requirement.¹²⁸ The Commission found that RKO knew the barter transactions were not being accounted for in the manner required by the FCC and that RKO willfully continued to file inaccurate reports.¹²⁹ Additionally, the Commission noted that the RKO's practices showed a persistent lack of control over barter transactions, constituting "reckless indifference to [RKO's] responsibilities as a licensee."¹³⁰ The Commission concluded that RKO had displayed willful and repeated misconduct through 1976 by submitting false financial reports. As with reciprocity, the FCC found this misconduct to be an independent disqualifying factor.

The Commission also addressed RKO's lack of candor with the FCC.¹³¹ This matter was considered important because licensee honesty is crucial to the protection of the public interest.¹³² The Commission was concerned especially with RKO's misleading statements and its pattern of minimal disclosure throughout the licensing proceedings. First, the FCC criticized RKO's denial of allegations concerning RKO's inaccurate reporting of barter and trade transactions.¹³³ The Commission found that by referring to these charges as "sheer speculation,"¹³⁴ RKO had compounded its initial deception.¹³⁵ A sec-

¹²¹ *Id.* at 39.

¹²² *Id.* at 46. The suit was filed in March, 1967. *Id.* at 8. See note 15 *supra*.

¹²³ 78 F.C.C.2d at 46-47.

¹²⁴ *Id.* at 32-33, 46-47.

¹²⁵ *Id.* at 80. The fact of the inaccuracies was conceded by RKO, although willfulness was not. *Id.*

¹²⁶ *Id.* at 88.

¹²⁷ *Id.* at 80.

¹²⁸ *Id.* at 86-87.

¹²⁹ *Id.* at 88.

¹³⁰ *Id.* at 89.

¹³¹ *Id.* at 92.

¹³² *Id.* at 97-98.

¹³³ *Id.* at 101-03.

¹³⁴ *Id.* at 102.

¹³⁵ *Id.* at 103. The Commission rejected RKO's contention that the FCC had failed to designate the lack of candor issue for hearing in contravention of § 309(e) of the Communications

ond matter reflecting lack of candor, the Commission noted, was RKO's failure to disclose the SEC investigation of General Tire and its subsidiaries.¹³⁶ FCC rules require disclosure of formal investigations.¹³⁷ In failing to comply with Commission rules, the FCC concluded, RKO once again had willfully misled the Commission.¹³⁸ Finally, the Commission found that in 1976 RKO denied allegations of the General Tire wrongdoing which resulted in the SEC investigation when RKO officials must have known them to be true.¹³⁹

Having considered the broadcast-related misconduct, the Commission found it to be willful, repeated, and, except in the case of the reciprocal trade practices, recent. In view of the standard set forth in the *Uniform Policy*, the Commission concluded that this wrongdoing served to disqualify RKO on the basis of character deficiencies. Broadcast-related misdeeds, however, were not the only flaws the FCC found in RKO's character.

B. *Nonbroadcast Misconduct*

In addition to considering the broadcast-related issues of reciprocal trade practices, inaccurate financial reports and lack of candor, the Commission examined the nonbroadcast misconduct of RKO's parent corporation, General Tire.¹⁴⁰ The Commission considered this misconduct relevant because it had found the relationship between RKO and General Tire to be a close one.¹⁴¹ Due to this close corporate relationship, the FCC found that General Tire can and has controlled the operations of RKO.¹⁴² Thus, the Commission concluded, General Tire's trustworthiness was an important factor in RKO's license renewal.¹⁴³

The Commission found that General Tire had been engaged in a pattern of serious misconduct over a long period of time.¹⁴⁴ This misconduct involved making improper domestic campaign contributions, defrauding corporate affiliates, making improper foreign payments, and maintaining improper foreign accounts.¹⁴⁵ In assessing the seriousness of General Tire's wrongdoing, the FCC noted that it was not only willful and repeated, but that many of the practices persisted until the filing of a complaint by the SEC against General Tire in 1976.¹⁴⁶ Furthermore, the Commission noted General Tire's failure to remove top management officials who had been involved in the wrongdoing.¹⁴⁷

Act, claiming that RKO clearly had "actual notice that its candor was in issue." *Id.* at 104.

¹³⁶ *Id.* at 99.

¹³⁷ *Id.* See note 38 *supra*.

¹³⁸ 78 F.C.C.2d at 98-99.

¹³⁹ *Id.* at 95. The Commission stated that RKO must have consulted top General Tire officials in order to prepare its opposition to Community's petition since that petition concerned General Tire misconduct. *Id.* at 95 & n.408.

¹⁴⁰ *Id.* at 47.

¹⁴¹ *Id.* at 56, 58.

¹⁴² *Id.* at 62.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 63.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 69.

¹⁴⁷ *Id.* at 110.

Because of these extensive incidents and the close corporate relationship between General Tire and RKO, the Commission concluded that although the General Tire misconduct was not grounds for disqualification in and of itself, it must be given "substantial weight" in evaluating RKO's character qualifications.¹⁴⁸

C. Mitigating Factors

In conformity with the *Uniform Policy*, the Commission measured the record of misconduct against two mitigating factors: (1) RKO's broadcast record and (2) corrective action taken by RKO and General Tire to prevent a recurrence of the misconduct. On both counts, the Commission found that these factors were insufficient to outweigh the wrongdoing by the licensee and its parent.

First, the Commission considered RKO's broadcast history.¹⁴⁹ While extolling RKO for its contributions to educational broadcasting and the development of new program sources,¹⁵⁰ the Commission nevertheless found that RKO's record as a whole could not counterbalance its serious character deficiencies.¹⁵¹ In comparison with other Boston area television stations, for example, the Commission found RKO to be deficient with respect to news, public affairs, and local programming.¹⁵² RKO's performance, the FCC concluded, was "within the bounds of average performance of all licensees,"¹⁵³ a status insufficient to outweigh the adverse findings made against RKO and General Tire.¹⁵⁴

Second, the Commission addressed the remedial measures taken by RKO and General Tire regarding their misconduct. These measures included entering into consent decrees with the SEC and Department of Justice, and the subsequent proper recording of barter and trade transactions.¹⁵⁵ The Commission concluded that General Tire's and RKO's adherence to the Department of Justice consent decree enjoining them from engaging in reciprocal trade practices through 1980 was an inadequate remedial measure, because such compliance gave no assurance that the licensee would act with propriety in the future.¹⁵⁶ With respect to the issues raised by the SEC investigation, the FCC concluded that efforts by RKO and General Tire to remedy the misdeeds revealed by the *Special Report* were of little significance because they came only after the SEC had initiated a formal investigation.¹⁵⁷ Furthermore, these

¹⁴⁸ *Id.* at 71. The Commission claimed that "parental tolerance (and sometimes encouragement) of improper behavior and fiduciary neglect could well infect any of General Tire's subsidiaries, including RKO." *Id.*

¹⁴⁹ *Id.* at 105.

¹⁵⁰ *Id.* at 105-06.

¹⁵¹ *Id.* at 106.

¹⁵² *Id.* at 107.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 109.

¹⁵⁵ *Id.* at 110-11.

¹⁵⁶ *Id.* at 46-47.

¹⁵⁷ *Id.* at 110.

remedial measures were offset by General Tire's retention of the corporate officers responsible for the wrongdoing.¹⁵⁸ Regarding the barter and trade records, the Commission was not impressed by RKO's 1977 compliance with FCC rules.¹⁵⁹ In dismissing this later compliance as a mitigating factor, the Commission noted that RKO did not institute this corrective program soon enough, since the licensee was clearly on notice of FCC requirements as of 1972.¹⁶⁰

In summary, the Commission concluded that RKO lacked the requisite character qualifications to remain the licensee of WNAC-TV. The FCC based its conclusion, in part, on findings that RKO had exhibited willful, repeated and, in some cases, recent misconduct directly related to its status as a Commission licensee. In addition, the Commission concluded that the extensive nonbroadcast misconduct of the licensee's parent corporation, General Tire, was a substantial negative factor in assessing RKO's character qualifications because of the close corporate connection between the two companies. Finally, neither the "average" broadcast record of RKO, nor the remedial efforts by RKO and General Tire were sufficient to mitigate these adverse findings and conclusions.

III. THE SHORTCOMINGS OF *RKO GENERAL, INC.*

In *RKO*, the Commission departed from its prior lenient approach to character evaluation in renewal cases, yet failed to replace the abandoned standards with workable guidelines. This section will discuss the Commission's departure from prior FCC decisions that set out FCC policy and construed the Communications Act with respect to character. The discussion will demonstrate the Commission's failure in *RKO* to fashion a workable standard to guide both licensees and the Commission in future cases. It will be argued that in contrast with earlier cases, in *RKO* the Commission gave greater scrutiny to the misconduct and less weight to the mitigating factors.

A. *Broadcast-Related Wrongdoing*

The relevance of broadcast-related misconduct by a licensee in license renewal proceedings is undisputed. In *RKO*, the Commission correctly examined evidence of unlawful reciprocal dealings, false financial reports, and lack of candor with the Commission. The FCC's conclusions, however, diverged from the Commission's treatment of such behavior in other cases.¹⁶¹

For example, in *RKO* the FCC held that the RKO and General Tire trade relations activities in the 1960's¹⁶² constituted a willful violation of law by the licensee and was, therefore, an independent disqualifying factor.¹⁶³ This conclusion stands in contrast to Commission decisions such as *NBC*¹⁶⁴ and an

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See note 168 *infra*.

¹⁶² 78 F.C.C.2d at 9.

¹⁶³ *Id.* at 33.

¹⁶⁴ 37 F.C.C. 451 (1963) and 44 F.C.C. 1114 (1957). See text at notes 85-95 *supra*.

earlier case involving RKO, *RKO General, Inc. (KHJ-TV)*.¹⁶⁵ In *NBC* the licensee had acquired broadcast stations through coercive use of its power to grant network affiliation.¹⁶⁶ Nevertheless, licensee was not found to lack the requisite character qualifications to remain a broadcast licensee despite its clearly anticompetitive broadcast-related conduct.¹⁶⁷ In the *KHJ-TV* case, where RKO applied for renewal of its Los Angeles television station, the Commission reviewed the very same trade relations practices at issue in the Boston proceeding and came to the opposite conclusion.¹⁶⁸ In granting renewal for *KHJ-TV*, the Commission decided that the reciprocal dealings in question did not constitute a willful and knowing violation of law because the antitrust law on reciprocity was in flux at the time of the alleged wrongdoing.¹⁶⁹ This interpretation of the law was later affirmed by the appeals court, which rejected a competing applicant's argument that the 1960's trade relations practices required disqualification of RKO.¹⁷⁰ Although additional evidence was revealed in the Boston proceedings, the Commission relied largely on the activities already assessed in the *KHJ-TV* hearing to support the finding of improper, coercive, reciprocity in the Boston case.¹⁷¹ Thus, it was on the basis of conduct already found by the FCC and the appeals court not to be in willful violation of law that reciprocity was adjudged an independent disqualifying factor.

In addition to changing significantly its own assessment of the law concerning reciprocal trade practices, the Commission in *RKO* also failed to show how that misconduct might bear upon RKO's ability to operate *WNAC-TV* in the future. Because these practices ended some time ago, it is unlikely that they are indicative of future conduct. In the *Uniform Policy* the Commission stated that violations of law which occurred in the distant past, followed by a period of good conduct, would be of minimal importance in the FCC's evaluation of character.¹⁷²

This standard was applied recently in a 1980 FCC decision, *Miami Valley Broadcasting Corp.*¹⁷³ In that case, the Commission discounted numerous violations of law on the part of the licensee's parent corporation because the pattern

¹⁶⁵ 44 F.C.C.2d 123 (1973).

¹⁶⁶ See text at notes 85-95 *supra*.

¹⁶⁷ 37 F.C.C. at 448.

¹⁶⁸ 44 F.C.C.2d at 130. While the composition of the Commission has changed since 1973, it is suggested that standards should survive such changes in order to preserve fairness towards licensees as a whole. The Commission itself stated that despite the need for some flexibility to accommodate changes in FCC membership, "... it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

¹⁶⁹ 44 F.C.C.2d at 129-30. Trade relations programs were prevalent between the end of World War II and the 1960's in many industries. Indeed, in 1962 a national Trade Relations Association was formed. 78 F.C.C.2d at 256-57.

¹⁷⁰ In *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir. 1975), the appeals court noted that RKO's role in the reciprocal dealings was substantially less than that of General Tire's other divisions. *Id.* at 697 n.23.

¹⁷¹ 78 F.C.C.2d at 136 & n.1.

¹⁷² 42 F.C.C.2d at 402.

¹⁷³ 47 R.R.2d 445.

of violations ceased eight years prior to the date of the decision.¹⁷⁴ In *RKO*, however, the FCC did not comply with the recency requirement set forth in the *Uniform Policy*. The facts showed that General Tire not only complied with the Department of Justice consent decree, but, even prior to that suit the company had dismantled its trade relations division. Yet the Commission, on the basis of arguably legal activity, which occurred 10 to 20 years ago, concluded that the practices in question indicated that RKO could not be trusted to operate in the public interest.¹⁷⁵

Regarding inaccuracies in RKO's annual financial reports and its lack of candor, the Commission displayed similar inconsistency. The Commission held that some of these alleged deceptions alone could have resulted in RKO's disqualification.¹⁷⁶ This holding, however, seems incongruous with other cases where such deceptive practices resulted in disqualification.¹⁷⁷

With respect to the inaccurate accounting of barter and trade transactions, the Commission correctly noted that RKO delayed until 1977 the conversion to the general ledger method as required by the FCC in 1972.¹⁷⁸ The Commission not only found that the resulting errors amounted to willful misrepresentation but also discounted RKO's later willingness to reveal its accounting errors to the Commission and take corrective action.¹⁷⁹ In finding this violation an independently disqualifying factor, the FCC failed to conform to prior rulings, and to its assessment of its own financial disclosure forms. For example, in prior decisions, a finding of willful misrepresentation in reporting barter and trade revenues required a showing of intent and of lack of good faith.¹⁸⁰

The facts of *RKO* are unclear on this issue. When licensees were first notified in 1972 that they would be required to report these transactions by general ledger method, much latitude was given to them with regard to the manner and timing of reporting items.¹⁸¹ In fact, the Commission itself had noted, just prior to the *RKO* decision, that there were problems with the design

¹⁷⁴ *Id.* at 487. While *Miami* involved nonbroadcast misconduct in the form of numerous securities laws violations, the case is relevant also to illustrate the FCC's reluctance to view misconduct in the distant past as a disqualifying factor. *Id.*

¹⁷⁵ 78 F.C.C.2d at 46-47.

¹⁷⁶ *Id.* at 81.

¹⁷⁷ In *WOKO, Inc.*, 10 F.C.C. 454 (1944), for example, a corporation was denied license renewal because it had misrepresented the true ownership of its capital stock for 12 years. *Id.* at 466, 468. In his dissenting statement in *RKO*, Commissioner Robert E. Lee commented that the *RKO* misconduct "hardly reaches the proportions of the 'deception' in [*WOKO*] . . . [and] also fails to reach the proportions of a disqualifying lack of control such as that found in *United Broadcasting Co.*, where control problems led to serious programming abuses." 78 F.C.C.2d at 137 (citations omitted).

¹⁷⁸ *Id.* at 86-87.

¹⁷⁹ *Id.* 81, 110.

¹⁸⁰ *Taft Broadcasting Corp.*, 76 F.C.C.2d 45 (1980), illustrates this point. The Commission in that case approved an application to assign a license to Westinghouse Broadcasting Corporation despite criminal convictions of the parent corporation on charges of numerous false certifications to government agencies. *Id.* at 46, 51. The Commission relied, in part, on a showing that top management of the parent company was not aware of the improper conduct, and, therefore, lacked the requisite intent. *Id.* at 48.

¹⁸¹ Notice of Proposed Rule Making, BC Docket No. 80-190, 45 Fed. Reg. 35370,

of the forms, and that stations using them might not be faulted for encountering difficulty.¹⁸² Due to this admitted confusion regarding the form, it is reasonable to doubt that this violation was willful.¹⁸³

Just as with the issue of the annual financial reports, the Commission also failed to show that RKO acted willfully with respect to the candor issues. These matters concerned RKO's opposition to Community's petition demanding that RKO comply with FCC disclosure rules concerning barter and trade matters, RKO's failure to make a timely report of the SEC investigation of General Tire, and RKO's opposition to Community's petition to reopen.

Concerning the first matter, RKO's April, 1977, pleading in opposition to Community's petition to reveal the inaccuracies in the financial reports does not appear to approach disqualifying proportions. At the time the opposition was filed by RKO, the Special Review Committee established by the SEC consent decree had not yet completed its investigation of this matter. The pleading by RKO pointed out that the FCC would have complete information regarding any possible inaccuracies when the Committee issued its report in June, 1977.¹⁸⁴ Given the timing, RKO's response to Community's pleading does not rise to the level of intentional misrepresentation, and indeed seems quite reasonable.

35372 (1980). A month prior to the *RKO* decision the Commission made the following comment with respect to the annual financial report forms:

[T]he current form and instructions allow considerable latitude for licensee judgment in allocating revenue and expense accounts to the various line items

[T]he current financial data are neither reliable in terms of what economic characteristic is measured by specific line items, nor are they consistent across different stations in the sense that the financial data are not allocated to the various line items in the same manner by different stations. We believe that these problems are principally due to inadequacies of the design of the form itself and are not the fault of the stations that file the reports.

Id.

¹⁸² *Id.*

¹⁸³ In his dissenting statement, Commissioner Robert E. Lee viewed the barter and trade inaccuracies as "sloppiness" at worst. 78 F.C.C.2d at 137. See note 177 *supra*. The majority opinion itself contains language which indicates the FCC's own hesitation on the subject of willfulness:

Plainly, if disclosed to the Commission, these persistent errors on RKO's annual financial reports would have revealed the licensee's continued *inability* — or *unwillingness* — to carry out procedures necessary for compliance with the Commission's reporting requirements. That kind of finding could have had serious consequences in a renewal or comparative proceeding. Consequently, RKO *may have* had sufficient motivation to willfully conceal these errors. In any event, RKO's conduct with respect to these matters was simply unacceptable.

78 F.C.C.2d at 89 (emphasis added). RKO raised procedural objections to the Commission's consideration of several matters, including the reporting of barter and trade transactions and lack of candor. *Id.* at 91, 103. With respect to the barter and trade issue, RKO claimed that it had not been given sufficient notice that the matter would be of such decisional significance, and that the FCC had not given this issue a full hearing, as required by § 309(e) of the Communications Act. *Id.* at 89. While it is possible that the procedural issues may enter into the decision by the United States Court of Appeals, these matters will not be considered in this casenote.

¹⁸⁴ Opposition to Petition for Order Requiring RKO General, Inc. to Comply with Section 1.65 of the Commission's Rules at 3 (April, 1977).

Turning to the second candor issue, the Commission noted that RKO failed to report the SEC inquiry in February, 1976.¹⁸⁵ Such nondisclosure, the Commission found, displayed RKO's failure to comply with FCC rules¹⁸⁶ and evidenced lack of candor by RKO in dealing with the FCC.¹⁸⁷ It is not clear, however, that RKO had an obligation to make the report at that time. Prior FCC decisions, most notably *Lake Erie Broadcasting Co.*,¹⁸⁸ do not support the FCC's conclusion that RKO violated FCC rules. In *Lake Erie* it was held that investigations, unlike formal charges, did not trigger the reporting requirement.¹⁸⁹ When RKO filed its opposition, no formal charges had been filed against RKO or General Tire by the SEC. Thus, under *Lake Erie*, the disclosure rule does not apply. Moreover, even if it is assumed that RKO committed a violation of the disclosure rules, RKO, relying on *Lake Erie*, reasonably could have concluded that disclosure was not required. Under such circumstances, the violation could not be considered willful. In addition, the FCC's 1976 revision of its renewal application form pointed in the direction of requiring less, rather than more, disclosure of pending suits by renewal applicants than by applicants seeking to construct or acquire a broadcast station.¹⁹⁰ Therefore, in view of prior case law,¹⁹¹ the FCC's decision to disqualify RKO seems unwarranted.

Finally, the Commission used hindsight in order to show willfulness on the part of RKO with respect to the opposition to Community's petition to reopen. While many of Community's allegations regarding General Tire misconduct later turned out to be true, the FCC opinion does not hold that RKO officials had actual knowledge of that misconduct when the opposition was filed.¹⁹² This fact tends to undermine the Commission's finding that RKO acted in intentional disregard for truth.

With respect to RKO's broadcast-related misconduct, the Commission's conclusions generally were not in keeping with prior decisions and FCC policy. The alleged violations of law and FCC rules lose their force when examined in conjunction with earlier FCC opinions. For example, the FCC failed to show clearly that RKO's reporting and candor violations were willful, as required by the *Uniform Policy*. Furthermore, with respect to reciprocity, the Commission

¹⁸⁵ 78 F.C.C.2d at 99. RKO reported the inquiry on May 14, 1976, four days after the SEC filed its formal complaint. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Lake Erie Broadcasting Co.*, 33 F.C.C.2d 1009 (1972).

¹⁸⁹ *Id.* at 1011-12.

¹⁹⁰ In Revision of FCC Form 303, Application for Renewal of Broadcast Station License and Certain Rules Relating Thereto, 61 F.C.C.2d 27, 29-30 (1976), the Commission noted that the reporting of litigation involvement required by renewal applicants is not as extensive as that required from new applicants. Thus, the Commission revised the new television renewal forms to pertain to matters such as felonies, unlawful lotteries, antitrust violations, and certain other misconduct reasonably related to the applicant's ability to operate its station in the public interest, such as fraud, unfair labor practices and discrimination. *Id.* at 30.

¹⁹¹ In *Southern Broadcasting Co.*, 57 F.C.C.2d 891 (1976), for example, the Commission renewed a license despite the licensee's violation of Commission disclosure rules by failure to report antitrust actions against companies where its stockholders had interests. *Id.* at 895-96.

¹⁹² 78 F.C.C.2d at 95.

disqualified RKO for questionable conduct which occurred in the remote past, again departing from the *Uniform Policy* and other post-policy cases.

While the Commission's action in *RKO* may induce licensees to act with more vigilance in adhering to antitrust laws and in reporting questionable matters to the FCC, the Commission's inconsistent application of FCC policies and rules is disturbing. As a result of *RKO* licensees are now aware that they stand to lose their licenses for a broad range of misconduct, but because of the Commission's failure to address discrepancies between *RKO* and earlier cases, it is unclear how the FCC will determine that conduct has reached disqualifying proportions. The FCC's unpredictable approach to these issues undermines faith in the Commission's adjudicatory process as a means for determining who will best serve the public interest.

B. Nonbroadcast Misconduct

The Commission gave substantial weight to nonbroadcast misconduct by General Tire in disqualifying RKO. In this regard, the Commission gave lengthy consideration to the relationship between RKO and General Tire. The significance of this corporate connection, in the Commission's view, stemmed from a legitimate concern that broadcast-related wrongdoing might result from the nonbroadcast misconduct. The FCC's analysis of this problem, however, does not comport with its reasoning in prior cases.

In considering nonbroadcast misconduct in its evaluation of RKO's character qualifications, the Commission reviewed the severe and extensive nature of the misconduct revealed in the SEC investigation of General Tire.¹⁹³ The focus of the Commission's concern was the close RKO-General Tire relationship.¹⁹⁴ The Commission pointed to RKO's status as a wholly-owned subsidiary of General Tire and to the ability of General Tire to control RKO.¹⁹⁵ The FCC's heavy reliance on this relationship, however, raises the question whether the existence or absence of close corporate connections between a parent company and a broadcast subsidiary requires that the transgressions of the parent must be attributed to the subsidiary in assessing character. Prior decisions indicate that the answer to this question is negative. For example, some of the most important officers of Westinghouse Electric Corporation, the parent of Westinghouse Broadcasting Co., sat on the board of directors of the broadcast subsidiary.¹⁹⁶ Yet in *Westinghouse*, the Commission renewed 14 Westinghouse licenses despite criminal convictions of the parent corporation on charges of bidrigging and price-fixing.¹⁹⁷ By contrast, in *RKO*, the Commis-

¹⁹³ *Id.* at 63.

¹⁹⁴ *Id.* at 50-53.

¹⁹⁵ *Id.*

¹⁹⁶ Westinghouse Broadcasting Company is also a wholly-owned subsidiary and the parent company plays a major role in the operation of the broadcast subsidiary. 44 F.C.C. at 2787-88. Furthermore, Westinghouse has a long history of antitrust involvement. *Id.* at 2781. Cf. Microband Corp. of America, 44 R.R.2d 1490, 1492 n.4 (1978) (no FCC action despite involvement of overlapping officer in SEC violations).

¹⁹⁷ 44 F.C.C. at 2779.

sion concluded on the basis of a single overlapping officer, that the potential for "infection" of the broadcast subsidiary by the aberrant parent warranted substantial negative weight in the licensing decision.¹⁹⁸ This conclusion signals a significant change from prior application of the *Uniform Policy*, as evidenced in *Westinghouse*. The *RKO* decision failed, however, to explain the reasons for this change in approach. Thus, companies investing in broadcast subsidiaries are without a guide as to how their general operations might affect the subsidiaries' retention of broadcast licenses.

One effect of the FCC's treatment of nonbroadcast misconduct in *RKO* might be that companies will reorganize their corporate structure to insulate the broadcast subsidiary from the operations of the parent company. This type of corporate reorganization, however, would be merely a change in form, not substance. It is unlikely that eliminating overlapping officers and directors will alter the basic nature of the corporate structure. The parent-subsidiary relationship itself precludes autonomy for the broadcast subsidiary no matter who is nominally in charge.

In *RKO*, the Commission's application of the *Uniform Policy* to nonbroadcast misconduct extends beyond earlier cases, such as *Westinghouse*. The decision indicates that the Commission will scrutinize more extensively the activities of a parent corporation. In establishing this stricter approach, however, the Commission failed to provide guidelines as to how it will exercise it.

C. Mitigating Factors

The *Uniform Policy* provided that a licensee's unlawful behavior might be outweighed by mitigating factors.¹⁹⁹ Factors considered in the past and in *RKO* included broadcast record²⁰⁰ and acts consistent with promises of future compliance.²⁰¹ In *RKO*, however, the Commission weighed mitigating factors differently than it did in prior cases.

The Commission discussed *RKO*'s broadcast record in some detail, comparing its Boston performance to that of other local broadcasters.²⁰² In doing so, the Commission concluded that *RKO*'s "average" performance was not "sufficiently meritorious to overcome the negative impact of the misconduct."²⁰³ This conclusion diverges from the Commission's prior statement concerning *RKO*'s broadcast record. In the 1973 KHJ-TV case, the FCC considered "RKO's unblemished record as a broadcaster covering more than 25 years" as a mitigating factor with respect to the allegedly illegal

¹⁹⁸ 78 F.C.C.2d at 71. The Commission's inconsistency is further illustrated by comparing *RKO*'s emphasis on corporate relationship with more recent cases. For example, in *Cowles Florida Broadcasting*, 60 F.C.C.2d 372 (1976), the FCC granted license renewal despite common ownership by the parent corporation both of the broadcast facility and the subsidiary branch involved in the illegal activity.

¹⁹⁹ 42 F.C.C.2d at 402.

²⁰⁰ See, e.g., *General Electric*, 45 F.C.C. at 1595-96; *Westinghouse*, 44 F.C.C. at 2783-84.

²⁰¹ See, e.g., *General Electric*, 45 F.C.C. at 1594-97; *Westinghouse*, 44 F.C.C. at 2782.

²⁰² 78 F.C.C.2d at 106-07.

²⁰³ *Id.* at 105.

reciprocal trade practices.²⁰⁴ In discounting this assessment with respect to the misconduct revealed in the Boston proceeding, the Commission engaged in a rather cursory quantitative comparison of WNAC-TV's performance with that of two other Boston stations.²⁰⁵ Given the complexities of comparative analyses of broadcast performance and, more important, the Commission's own rejection of quantitative analysis as a proper means for reaching comparative licensing decisions,²⁰⁶ the discounting of RKO's past broadcast record appears unwarranted.²⁰⁷

Comparison with other FCC decisions also illustrates the Commission's inconsistent approach in evaluating RKO's broadcast record as a mitigating factor. For example, *Teleprompter Cable Systems, Inc.*²⁰⁸ stands in contrast to *RKO* with respect to the application of the balancing test. In *Teleprompter* the president of the company had been convicted of bribery in the acquisition of local cable television franchises.²⁰⁹ In renewing Teleprompter's license, the Commission stated that this broadcast-related misconduct, serious as it was, was outweighed in large part by the applicant's leadership in the development of cable television.²¹⁰ RKO's 38-year history of pioneering in broadcasting, however, was given much less consideration.

In addition to discounting RKO's broadcast record, the Commission gave little weight to RKO's remedial actions as a mitigating factor.²¹¹ This judgment further demonstrated the FCC's departure from standards applied in prior cases. The Commission did not credit RKO's revision of the barter and trade accounts, or its compliance with the SEC and Department of Justice consent decrees because these actions were taken only *after* the institution of proceedings against RKO and General Tire.²¹² This disregard for remedial action, however, is inconsistent with the Commission's predictive function as reflected in decisions such as *Westinghouse*²¹³ and *General Electric*.²¹⁴ In those cases, the Commission credited remedial measures commenced after criminal convictions.²¹⁵

²⁰⁴ 44 F.C.C.2d at 130.

²⁰⁵ 78 F.C.C.2d at 106-07. Specifically, the Commission noted the percentage of time devoted to entertainment and sports, news, local programming and "all other categories." *Id.* at 106.

²⁰⁶ In 1977 the Commission expressly rejected the application of percentage of time figures as "inherently deficient." Formulation of Policies Relating to the Broadcast Renewal Applicant, Etc., 66 F.C.C.2d 419, 428 (1977).

²⁰⁷ The ALJ in the Boston proceeding found that RKO had exceeded its prior renewal commitment in its overall programming throughout the 1966-69 license period. 78 F.C.C.2d at 341. This fact was disregarded by the Commission in making its final decision.

²⁰⁸ 40 F.C.C.2d 1027 (1973).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1035. The Commission added that if Teleprompter were a new applicant, "other considerations might obtain." The company's long record of leadership, however, constituted evidence that the licensee would play a major role in serving the public interest in the future. *Id.*

²¹¹ 78 F.C.C.2d at 110-11.

²¹² *Id.* at 110.

²¹³ 44 F.C.C. at 2784-85.

²¹⁴ 45 F.C.C. at 1596-97.

²¹⁵ See 44 F.C.C. at 2784-85 and 45 F.C.C. at 1594, 1596.

The FCC's brief consideration of mitigating factors revealed two flaws. First, the Commission did not give RKO the same treatment accorded other licensees that had acted unlawfully, and thus failed to apply with consistency the standards developed in the *Uniform Policy* and later cases. Second, it provided no indication of how much weight was accorded the various factors, nor an explanation for its change in policy. Consequently, the apparently rejected approach was not replaced by a new one.

D. *The Nature of the FCC's Action: A Procedure Without a Purpose*

The statutory role of the FCC is to provide the public with the best possible broadcasting.²¹⁶ Under the Communications Act, the Commission is supposed to further the public interest through the licensing process.²¹⁷ In conformity with its limited purpose, the Commission in the past has not removed or withheld licenses to penalize illegal conduct. Instead, it has denied a license only where the conduct in question indicated that the applicant could not be trusted to operate in the public interest. Thus, the Commission has fashioned remedies other than completely denying license renewal in cases where an incumbent licensee was found to have acted wrongfully.

For example, in *NBC*, a case involving broadcast-related misconduct, the Commission did not strip NBC of the licenses at issue because of character deficiencies. In so deciding the FCC noted that it would not serve the public interest to find that NBC lacked the basic qualifications to own and operate broadcast stations.²¹⁸ Similarly, in *Westinghouse* and *General Electric*, where the parent company had engaged in serious nonbroadcast-related criminal activity, the Commission renewed the licenses. As with *NBC* the Commission decided that it would not be in the public interest to deny the *Westinghouse* and *General Electric* licenses.

Decisions such as *NBC*, *Westinghouse*, and *General Electric* are cases where the Commission defined public interest, in part, by acknowledging a need to maintain stability in the broadcasting industry. That apparent objective was achieved by minimizing character deficiencies and emphasizing the benefits to be gained through continued service by the licensees. The results were also justified by the FCC's conclusion that the misconduct would not affect future broadcasting. In both respects *RKO* represents a new approach. The Commission not only diverged from the notion of industry stability, but also failed to show how the past misconduct of *RKO* and *General Tire* would affect broadcasting prospectively. Thus, the Commission's action was not remedial,²¹⁹ and

²¹⁶ 47 U.S.C. § 151 (1976).

²¹⁷ 47 U.S.C. § 309(a) (1976).

²¹⁸ 37 F.C.C. at 4480. See text at notes 85-95 *supra*. The Commission applied a similar remedy in *Melody Music, Inc.*, a 1966 decision granting renewal to licensees who had engaged in unlawful conduct, on the condition that they divest the station to a qualified applicant within a year. 2 F.C.C.2d 958 (1966).

²¹⁹ Two other FCC decisions illustrate this point. In *Melody Music, Inc.*, 2 F.C.C.2d 958 (1966), the Commission stated that to deny license renewal to the owners who had engaged in allegedly illegal conduct would have constituted a "punishment" beyond that which they had already suffered. *Id.* at 962. The Commission noted further that "[u]nder the statutes applicable

its statement in *RKO* that "denial of a license is not a penalty" appears inconsistent.²²⁰

Such treatment is clearly at odds with the FCC's handling of character cases since the *Uniform Policy*. The FCC neither explained this departure nor defined a practicable approach to character to replace the old one. The result of this action was twofold. First, the decision furnished little explanation for its shift in applying FCC policies, leaving licensees and applicants with no basis on which to predict the outcome of future cases. Second, by taking a punitive, rather than remedial, approach, the Commission apparently has established itself as the enforcer of a variety of laws where the transgressor directly or indirectly holds a broadcast license. Such an extension of power is likely to create new problems for the Commission while leaving old problems unresolved.

IV. *RKO GENERAL, INC.*: THE AFTERMATH

The Communications Act of 1934 authorized the Federal Communications Commission to establish character qualifications to evaluate applicants for broadcast licenses.²²¹ History illustrates that this has not been an easy task for the Commission. In making its decisions, however, the FCC cannot function without standards to predict how applicants might operate in the future. The FCC has not ignored its mandate to develop standards. Through adjudication and policy-making, the Commission developed certain criteria for evaluating character.

Those efforts have resulted in an evaluation of an applicant's misconduct by reference to its willfulness, its repetitiveness, and its recency. These three factors are examined because the FCC perceived them to be the best indicators of future performance. While these guidelines may form legitimate points of departure for Commissioner review, *RKO*, in conjunction with antecedent cases, shows that the FCC has experienced difficulty in applying them with consistency.

The Commission's failure to devise a consistent approach to character issues was pointed out by Commissioners Joseph R. Fogarty and Anne P. Jones in December, 1979, one month prior to the announcement of the *RKO*

here, our function and authority in this case do not encompass punishment." *Id.* at 963-64. Ten years later, in *Cowles Florida Broadcasting*, 60 F.C.C.2d 372 (1976), the Commission expressed a similar view. In that case the renewal applicant's character was questioned because it had been involved in mail fraud and had made an unauthorized studio move. *Id.* at 389-93. The Commission renewed the license, noting that it is not the role of the FCC to punish misconduct by exercising its power to deny license renewal. *Id.* at 405-06.

²²⁰ Even assuming *RKO* was unfit to remain a licensee, the FCC still could have taken far less punitive measures. If the Commission's goal was to see that *WNAC-TV* would be operated by a qualified licensee, it might have granted renewal to *RKO* conditioned upon divestment to a qualified applicant. This was the remedy chosen in *Melody Music*, 2 F.C.C.2d at 964, and *NBC*, 37 F.C.C. 427 (1964). At the time of the *RKO* decision this was a viable alternative because *RKO* had proposed a sale of the Boston license to New England Television, a competing applicant. Instead, the Commission denied renewal of three television stations, and implied that the action might affect *RKO*'s other 13 licenses. 78 F.C.C.2d at 118.

²²¹ 47 U.S.C. § 308(b) (1976).

action.²²² Commissioners Fogarty and Jones objected to the FCC's *ad hoc* approach to character matters and urged that all decisions based on such questions be postponed until a policy statement could be issued.²²³ Nevertheless, the Commission proceeded to a decision in *RKO*. It is evident, however, that the Commission fell short of resolving the character issue through that decision.

Adjudication since *RKO* further illustrates that *RKO* did not produce a workable approach. For example, in *Miami Valley Broadcasting Corp.*²²⁴ the Commission found General Electric qualified to go forward with its proposed merger with Cox Broadcasting Corporation.²²⁵ The application was approved despite General Electric's violation of at least nine government agencies' regulations.²²⁶ The challengers to the merger reminded the Commission of its 1962 warning to General Electric that further significant or widespread violations of antitrust laws or other federal regulations would seriously impair its credibility as a broadcast licensee.²²⁷ Nevertheless, the Commission granted the merger. It based its decision on findings that General Electric neither acted in bad faith nor with willful intent to violate the law. In addition, the FCC relied on the absence of evidence that either broadcast operations or principals were involved in the misconduct.²²⁸ While the *Miami* decision left room for the FCC to "take appropriate action" pending the outcome of certain Department of Justice and grand jury investigations,²²⁹ the decision based on existing evidence was favorable. This result is difficult to reconcile with *RKO*, where the Commission gave substantial weight to nonbroadcast-related violations. In this sense, the *Miami* decision appears to be a return to the more lenient pre-*RKO* standard. As such it indicates that the Commission did not develop a viable approach to character in *RKO*, and it raises questions about what the Commission hoped to achieve through *RKO*.

²²² Central Texas Broadcasting Co., 74 F.C.C.2d 393, 413 (1979) (Fogarty and Jones, Comm'rs, dissenting). The dissenting Commissioners took exception to the majority's designation for hearing on character issues prior to more clearly articulating its governing policy and standards. It is ironic that both Commissioners Fogarty and Jones voted against *RKO* in the renewal decision.

²²³ *Id.* The Commission directed its staff to make recommendations to clarify the FCC's policy in such matters, although no results have been published as of this writing.

²²⁴ 47 R.R.2d 445 (1980).

²²⁵ *Id.* at 509.

²²⁶ The agencies involved were the Nuclear Regulatory Commission, the Criminal and Antitrust Divisions of the Department of Justice, the National Labor Relations Board, the Equal Employment Opportunity Commission, the Environmental Protection Agency, the Securities and Exchange Commission, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. *Id.* at 481. In addition, the challengers cited General Electric's long history of antitrust violations and, among other things, a propensity for withholding information from government agencies. *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 483, 485, 487-88, 491. The character of Cox Broadcasting Corporation was also at issue. The matters in question included a grand jury investigation relating to the sale advertising time at one of Cox's television stations. *Id.* at 475.

²²⁹ *Id.* at 509, 510.

After *RKO* the question remains as to which direction the FCC will take in evaluating future renewal applicants with respect to character. While the *RKO* decision potentially marks a significant shift in the Commission's application of the standards set forth in the *Uniform Policy*, there are hints, such as the *Miami* case, that the Commission is not prepared to follow through in sustaining its more aggressive approach to evaluating character.

CONCLUSION

RKO General, Inc. reveals a shift in FCC policy from favoring renewal applicants to taking a more aggressive approach towards evaluation of license renewals. The Commission, through *RKO*, appears to be putting the broadcasting industry on notice that the FCC will scrutinize more fully all aspects of an applicant's nonbroadcast as well as broadcast business conduct in making a character judgment. This approach, however, raises substantial questions as to the Commission's role as an administrative agency concerned with broadcast matters. While the FCC has the power to establish policy through licensing adjudication, it must do so with consistency and clarity. The *RKO* decision was deficient in both respects.

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