

THE FEDERAL COMMUNICATIONS COMMISSION

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The record of the Federal Communications Commission for the decade of the 1960s, despite some actions which in the judgment of the author were completely wrong, stands in sharp contrast to that of the 1950s. The Commission began the latter decade with three very significant actions: the determination of color standards for television,¹ the development of its 1952 allocations table for television,² and its approval of the ABC-Paramount merger.³ Thereafter, however, its record was one of inaction on the problems of cable television and translators, inability or unwillingness to resolve the problems of UHF television, some very questionable decisions in the comparative proceedings which awarded VHF television franchises, and the *ex parte* cases and payola and quiz scandals which probably brought the agency to its lowest repute.

Hopefully this article will demonstrate that the Commission has just gone through a period of more sustained action and accomplishment than is to be found in any prior period in its history. In the late

¹ 20 FCC Ann. Rep. (1954).

² 18 FCC Ann. Rep. 107-11 (1952).

³ Paramount Television Prods., Inc., 17 F.C.C. 264 (1953).

1920s the predecessor of the FCC, the Federal Radio Commission, brought order out of chaos in radio by eliminating many of the stations which had overcrowded the spectrum prior to effective regulation. Shortly after the FCC was established in 1934,⁴ it embarked on a comprehensive telephone inquiry⁵ which was to have no counterpart until the institution of the hearing into the rates and practices of the American Telephone and Telegraph Company in October, 1965.⁶ In the late 1930s and early 1940s the Commission was deeply involved with problems of radio network competition and network-affiliate relations, culminating in the adoption of the chain broadcasting regulations which, with minor modifications, are still in effect. In the late 1940s the agency concerned itself with programming, producing the ill-fated Blue Book; flirted with a proceeding for more effective control of license transfers; inaugurated television and began work on an expanded allocation for the service; adopted the Fairness Doctrine; and made the first comprehensive frequency allocation to the land mobile radio services, which the Commission is now trying to supplement for the first time in over twenty years. Certainly these actions were all of great importance, as were other actions over the years. But the last ten years have seen more action on more important matters than ever before.

It is, of course, extremely difficult to present within the confines of a single article even the major developments in the Commission's regulation of the dynamic industries subject to its jurisdiction over ten years of the greatest technological and social change in our history. Some matters of substance have been omitted and others may seem to be treated too cavalierly. The article is organized as follows: Part I gives an overview of changes in organization and in the level of funding Congress has made available to the Commission over the past ten years—the latter a matter the importance of which cannot be overstressed since, like all the regulatory agencies, the FCC has been sharply limited in its ability to deal currently and in depth with some of its problems by restrictions on its budgets.

Part II deals with frequency allocations, which, in its simplest form, is the process by which the Commission has parceled out that portion of the radio frequency spectrum which it controls among the various claimants to this valuable natural resource, including broadcasters, amateurs, common carriers, aviation and marine interests, and the many land mobile radio users. The Commission has authority over only about half of the usable radio spectrum, the rest being controlled

⁴ Communications Act of 1934, 47 U.S.C. § 151 et seq. (1964).

⁵ 1 F.C.C. 54 (1934).

⁶ American Tel. & Tel. Co., 2 F.C.C.2d 871 (1965).

by the President, through various officials to whom he has delegated this authority. In recent years, principal responsibility has resided in the Director of Telecommunications Management, working through the Interdepartmental Radio Advisory Committee. President Nixon has proposed a reorganization of this structure which, however, does not effect the FCC's authority in this field.

There were no significant changes in basic non-government allocations in the 1960s. However, the Commission did act to modify or better effectuate some of its broadcast allocations, taking steps to promote implementation of the very substantial allocation to UHF television, to enhance the development of the frequencies allotted to FM broadcasting, and to get more effective use out of the rapidly filling AM frequencies. Since radio waves do not respect international boundaries, the Commission's activities regarding frequency allocation often involve negotiations with other countries, particularly our nearest neighbors, Canada and Mexico.

There was one basic major allocations problem before the Commission all during the decade. That involved urgent claims by the users of land mobile radio—a wide range of public safety, land transportation, and business and industrial entities who have found radio a vital tool in their operations—that they need much more than the 42 megahertz of spectrum space which were allocated to them in the late 1940s. Just as the decade ended, the Commission was moving, though haltingly, toward action on this matter. At the same time, in part because of charges that the Commission had mismanaged its responsibilities, as evidenced by the land mobile problem, there were suggestions made in a number of quarters that allocations authority should be taken away from the Commission. Two sections deal with this challenge and with the land mobile problem itself.

The remainder of the article is organized around the work of the four substantive or industry-related bureaus—the Broadcast Bureau, the Cable Television Bureau (just recently elevated to bureau status, but dealing with one of the most difficult areas of Commission concern), the Safety and Special Radio Services Bureau (which deals with, among other non-broadcast uses of radio, the land mobile services), and the Common Carrier Bureau. The only bureau not included is the Field Engineering Bureau. This omission should not be taken as denigrating the importance of that bureau's work, which is vital to much of the Commission's activities. But its functions have not changed greatly in recent years, so that the developments in its areas of responsibility in the 1960s were not as great as for the other bureaus. It continued to monitor the airwaves to detect unauthorized operations and to locate strayed or missing planes or vessels. It ex-

amined millions of applicants for radio operator licenses. It inspected ships, broadcast stations, and land mobile installations by the thousands. It sought to cope with the enforcement problems in the exploding Citizens Band, where everyone with a legitimate need can get a radio authorization—but which has been abused by many who want to use their radios only for hobby purposes, and by others who use them principally to spew out obscenities and castigate Field Bureau inspectors. In other words, the Bureau has continued to perform its vital supportive role, fully justifying its status as the largest staff unit within the Commission.

Part III deals with Broadcast Regulation. It concentrates on activities in the programming area (which some of us regard as too limited and ineffective); on policies as to station ownership; on political broadcasting and the Fairness Doctrine; on commercial policy, network regulations, and that peculiar FCC phenomenon, the comparative case; on educational broadcasting and pay television; on certain broadcast enforcement problems, and on recent steps to promote fair employment in the broadcast industry.

Part IV deals with CATV. It reflects the Commission's early reluctance to enter this field, its decisions to exercise jurisdiction first over microwave-fed cable systems and then over the entire industry, the steps it has felt are necessary to preserve and promote over-the-air television service, its actions to channel cable television into a truly constructive role of providing added program diversity, and certain actions in the area of CATV—common carrier relationships.

Part V is concerned with the non-broadcast uses of radio, the domain of the Safety and Special Radio Services Bureau. It concentrates, however, on a single aspect of the Bureau's responsibility—the growing problem of land mobile radio. Again this does not reflect on the importance of the Bureau's work in connection with aviation and marine matters (involving, among other things, two important international conferences in the 1960s), or with the amateur service (where it has developed a new incentive licensing system), or with its share of the Citizens Band problem.

Part VI deals with common carrier regulation, both domestic and international. The former involves the rapid growth in common carrier services during the 1960s, the problems of Western Union, the use of Commission techniques of continuing rate surveillance, a number of special proceedings, the first general telephone rate case in nearly 30 years, problems of interconnection and foreign attachments, and the growing inter-relationship between communications and computers. The look at the international field reflects the inauguration of satellite communications (which, of course, also has domestic implications) and

the continued growth of underwater cables—developments which bear importantly on each other.

I. ORGANIZATION AND BUDGET DEVELOPMENTS

The Commission underwent significant, but not major, changes in organization in the 1960s. The principal changes, which will be discussed below, were the conversion of the Office of Administration into the Office of Executive Director, with certain added functions; the establishment of a new Review Board to serve as an intermediate reviewing agency for adjudicatory cases; and the creation of the CATV Task Force (just recently redesignated the Cable Television Bureau) to administer the Commission's new CATV rules.

Similarly, there were no major changes in personnel or budgetary levels. In the fiscal year ending June 30, 1960, the Commission had an average employment of 1,223.8, with 1,403 on its rolls at the year's end. For the fiscal year ending June 30, 1969 (statistics for the full current fiscal year not being available), the corresponding figures were 1,458 and 1,467. The breakdowns for the various units within the Commission were as follows:

	<i>Fiscal Year 1960</i>	<i>Fiscal Year 1969</i>
Commissioners' Offices	45.7	41
Review Board	—	23
Office of Opinions and Review	31.2	21
Office of Hearing Examiners	29.4	23
CATV Task Force	—	24
Office of Information ⁷	4.0	9
Office of Executive Director ⁸	86.8	195
Office of Secretary	57.8	35
Office of General Counsel	36.6	44
Office of Chief Engineer	75.0	87
Common Carrier Bureau	130.5	152
Safety and Special Radio Services Bureau	153.3	158
Broadcast Bureau	207.8	243
Field Engineering Bureau	360.2	403
ADP Group ⁹	5.5	—
	<u>1,223.8</u>	<u>1,458</u>

While the Commission's budget allowances increased slowly during the decade, most of the additional funding simply permitted the agency to cover periodic pay increases authorized by Congress. When the Commission asserted jurisdiction over cable television and created the CATV Task Force, it sought funds for this new regulatory function. However, no such increase was ever approved and the Task Force

⁷ In 1960, designated as Office of Reports and Information.

⁸ In 1960, designated Office of Administration.

⁹ Forerunner of Data Processing Division in Office of Executive Director.

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had to be created by shifting new funding received by the Commission during this period, approximately \$500,000, for an expanded research program first authorized in fiscal year 1968. Although the Commission has requested more money for research in the ensuing years, its allowance has been held at approximately this level. However, the President has approved an increase of some \$900,000 for fiscal year 1971 to finance a pilot regional assignment facility to experiment with improved techniques for assigning land mobile frequencies. The Commission's budget allowances during this period were as follows:

<u>Fiscal Year</u>	<u>Budget Authorization¹⁰</u>
1960	\$10,550,000
1961	13,789,000
1962	12,525,000
1963	14,951,000
1964	15,600,000
1965	16,985,000
1966	17,338,000
1967	17,852,000
1968	19,170,000
1969	20,720,000

The Commission has taken one step of great significance in connection with its budgetary situation; it has adopted schedules of fees to be paid by applicants and licensees. Initially, these were strictly filing fees in rather nominal amounts¹¹ (for example, \$50.00 and \$100.00 respectively for applications for new radio or television stations and for applications for renewal or transfer of licenses; \$5.00 for applications for amateur licenses). Minor changes were later made in the schedule, and in fiscal year 1969 the Commission collected \$4,737,497. As the decade came to a close, the Commission was considering a different approach, designed to raise a sum approximately equal to its entire budget. This culminated early in 1970 in the issuance of a notice proposing substantially higher fees.¹² This proposed schedule involves greater emphasis upon the value of the franchise to the applicant or licensee, imposes filing fees on all broadcast applicants, with much higher grant fees to be paid only by those who are successful, requires transferees of broadcast licenses to pay 2 percent of the transfer price, specifies fees based on the cost of construction of common carrier facilities, and for the first time imposes fees on CATV operators and on manufacturers seeking type-approval or type-acceptance for their equipment. The proposed schedule is expected, at current levels of activity, to produce a total of approximately \$25,000,000.

¹⁰ See 26-35 FCC Ann. Reps. (1960-1969).

¹¹ 28 Fed. Reg. 10911 (1963).

¹² 35 Fed. Reg. 3815 (1970).

These funds, like the Commission's current collections, are not retained by the agency but are turned over to the Treasury. However, it is hoped that Congress will take account of the Commission's self-supporting status and will approve substantially higher appropriations for its future operations. While other agencies collect varying amounts in fees, the FCC is probably the first, without congressional action, to propose fees which will produce revenues sufficient to cover its costs.

In 1961 President Kennedy issued a proposed plan for the reorganization of the Commission. This was one of a number of plans for reorganization of certain of the administrative agencies resulting from a report prepared for the President by a task force headed by James M. Landis.¹³ The report was quite critical of the performance of the FCC and proposed to strengthen the administrative powers of the chairman, to delegate more final authority to panels of agency members, single members, hearing examiners, or employee boards, and to create an Office of Oversight of Regulatory Agencies with authority to develop reorganization plans for regulatory agencies, including the Federal Communications Commission. The FCC plan was supported by Chairman Newton Minow, but was opposed by the other Commissioners and was defeated by Congress.

Under Chairman Minow's leadership, the Commission contracted, in 1961, for a management survey by Booz-Allen & Hamilton, Inc. This firm of management consultants filed a report¹⁴ suggesting increased authority for the Chairman, establishment of an executive director, with greatly enhanced powers, to serve as the Chairman's principal deputy, internal agency reorganization, more effective staff delegations, increased field enforcement, and increased social and economic analyses and policy recommendations by the Commission's operating bureaus. The report also emphasized the Commission's need for substantial budget increases in order to permit it to expand its staff.

In 1961 Congress, at the Commission's request, amended the Communications Act¹⁵ to authorize the creation of a Review Board consisting of senior staff members to relieve the Commission of a substantial part of its work in reviewing the decisions of trial examiners. The Board and its staff handle most interlocutory matters (for example, motions to enlarge issues, motions to dismiss one or more competing applications where the parties have reached a settlement) and review all examiners' decisions except those in cases involving revoca-

¹³ J. Landis, Report on Regulatory Agencies to the President-Elect, Senate Comm. on the Judiciary, 86th Cong. 2d Sess. (Comm. Print 1960).

¹⁴ Booz-Allen and Hamilton, Inc., Organization and Management Survey of the FCC for the Bureau of the Budget (1962).

¹⁵ 47 U.S.C. § 155 (1964).

tion or non-renewal of licenses and other special situations where the Commission finds it desirable to review directly the initial decision itself. Parties do not have an automatic right to Commission review, as was formerly the case. Instead, they must petition for review of Review Board decisions, in much the same way that litigants petition the Supreme Court for writs of certiorari to review decisions of the courts of appeals. The Office of Opinions and Review analyzes the full record in all cases where review is sought¹⁶ and reports to the Commission, recommending either the grant or denial of the petition. In by far the greater number of cases the Commission denies review in brief, one page orders. If a party wishes, it can appeal the Review Board's decision directly to the court of appeals. In those few cases where the Commission finds apparent error in the decision below, it grants review and renders its own decision, usually after permitting oral argument. This change in structure and procedure has worked very well, substantially relieving the Commission of its appellate responsibilities in quasi-adjudicatory proceedings. Over a recent three-year period, the Commission gave full consideration and issued opinions in approximately 9 of the 86 cases decided by the Review Board.

The Commission did not fully adopt Booz-Allen's proposal that it create an Executive Director with powers over the operating bureaus comparable to those in other agencies. However, it did redesignate the Administrative Officer as Executive Director and substantially increase his staff. Certain functions were transferred to him from the Office of Secretary. He is responsible for coordinating matters involving two or more staff units, but does not have substantive authority over their work. In recent years he has played an important role in planning and implementing the Commission's research program.

The Office of Executive Director now includes a Data Processing Division¹⁷ which processes most routine Safety and Special Radio applications, performs complicated broadcast engineering computations, and otherwise expedites the Commission's work. Economic models of aspects of the broadcast and common carrier industries are now being developed to enable the Commission to test the impact of possible courses of action which it may from time to time consider. The Commission is also considering a highly computerized approach to land mobile radio assignments, although this operation will probably not be a part of the Office of Executive Director. These activities are

¹⁶ This office also examines decisions by examiners and the Review Board as to which the parties have not sought review. If it finds a matter of particular policy importance which has been decided in a manner which it believes raises a significant question, it calls the case to the Commission's attention.

¹⁷ The Commission's preliminary planning in 1960 for employing data processing techniques culminated in 1962 with the purchase of a Univac III computer.

part of a general effort of the Commission to develop an improved long range planning capability, set apart from its daily routine.

The third change in organization came with the Commission's assertion of jurisdiction over cable television in February, 1966. At first, the rules were administered through the Broadcast Bureau, since the Commission's authority over CATV had been predicated on its possible impact on the maintenance and expansion of free television service. But when Chairman Rosel Hyde assumed that post for the second time, he decided to create a new staff unit to handle cable matters.¹⁸ As indicated above, the Commission was not able to get additional budget funds for this purpose, so it could only put together a small group drawn from the other bureaus and offices in the Commission. The unit was titled the CATV Task Force, reflecting, probably, Chairman Hyde's hope that it would be of temporary duration, lasting until Congress adopted copyright legislation which would resolve the difficult issues posed by cable operations. Congress has not yet acted; indeed, the bill reported out by the Senate Subcommittee on Copyright seems to the Commission not a fully satisfactory approach to the problem.¹⁹

The Commission has now been regulating all CATV operations for four years, and the record of that regulation is probably unique in the history of the administrative process. It is often said—with more conviction than truth—that regulatory commissions eventually come under the domination of the industries they were created to control. But it is doubtful that ever before an agency has adopted comprehensive rules for a new industry, created a staff organization to administer those rules, and then found that staff immediately embarked on what seemed to be a calculated effort to erode the Commission's policies. The Task Force, from the very beginning, recommended substantial waivers of the distant signal rules, delayed enforcement of the carriage and nonduplication rules, so that the dribble of orders effectuating those rules could be offset by actions favorable to the cable industry, and engaged in a very selective process of interpreting and citing the Commission's decisions with the result that it effected a very substantial weakening of the Commission's rules and policies. The deliberations on cable matters became, by a wide margin, the most acrimonious in the author's experience at the Commission. The CATV Task Force took a consistently pro-cable posture—so much so that by the time of Chairman Hyde's retirement, he looked to the General Counsel's office for the drafting of all major policy actions regarding cable TV.

¹⁸ The author dissented to the action.

¹⁹ See letter (FCC 70-270) to Senator Warren G. Magnuson, Chairman, Senate Commerce Committee, Mar. 11, 1970.

Despite the fact that the author views all this with the greatest of distress, it is nonetheless clear that the Commission is going to be engaged in the regulation of the cable industry for some time to come. The author therefore concurred in the recent action redesignating the Task Force as the Cable Television Bureau.²⁰ This recognizes not only its continuing role, but also its need to expand, though this expansion should not be at the expense of other hardpressed bureaus and offices. As will be indicated below, cable technology has a great potential. The Commission should organize itself to deal with its possibilities and the problems it poses, hopefully with staff support for, rather than disregard of, the Commission's policies in this important area.

II. ALLOCATIONS

A. *Ultra High Frequency Allocations and the All-Channel Legislation*

In the late 1950s and early 1960s the Commission considered steps to increase the utilization and viability of the ultra high frequencies (UHF) it had allocated to television, channels 14 to 83. One was a proposal to deintermix UHF and very high frequency (VHF) television assignments to create all-UHF or all-VHF areas of service, as a measure to equalize the competitive situation and to improve the chances for additional local UHF outlets in certain markets where one or two dominant VHF stations were blocking such growth. A few markets, including Peoria and Springfield, Illinois (1957) and Fresno and Bakersfield, California (1961), were made all-UHF areas under this policy.

As another aid to UHF the Commission recommended legislation in 1960, and again in 1961, to require that all TV receivers be capable of receiving both UHF and VHF channels. All-channel TV sets would create an impetus for increased use of UHF in VHF-dominated areas, as well as provide an incentive for technical and service improvements in UHF technology and operations. In response to congressional inquiry, the Commission expressed its judgment that if the all-channel receiver legislation were enacted, the Commission's then pending proceedings to create eight additional all-UHF areas should be stayed, since an all-channel bill might relieve the root problem of UHF's inability to compete successfully with VHF stations.²¹ On July 10,

²⁰ Effective January 28, 1970. FCC Pub. Notice No. 44197 (Jan. 29, 1970).

²¹ The author was Chief of the Commission's Broadcast Bureau from April 10, 1961 to March 22, 1963. He had helped develop the allocations package consisting of the all-channel legislation, the proposed deintermixture of 8 communities, and the drop-in of a third VHF channel at reduced channel spacing in 8 other major markets to afford the American Broadcasting Company more nearly competitive outlets. He tried to persuade Chairman Minow not to agree to this proposition, but without success. He was similarly unsuccessful, after he became a Commissioner, in preserving the drop-in concept, except for the move-in of a channel from Enit to Oklahoma City. For the different

1962, the Communications Act was amended to require that all TV receivers shipped in interstate commerce be capable of adequately receiving the 70 UHF channels, as well as the 12 VHF channels.²² On November 21, 1962, the Commission adopted rules implementing the new law and allowing manufacturers until April 30, 1964, to switch over to all-channel receiver production. As a result of the all-channel legislation, the eight additional deintermixture proposals were terminated in September, 1962.²³ TV sets capable of receiving UHF as well as VHF channels have increased from 15 percent in 1964 to 60 percent in mid-1969.

In 1965 and 1966 the Commission issued revised tables of UHF channel allocations formulated with the assistance of the Commission's new computer. With the computer it was possible for the first time to assess accurately the impact of each assignment on other potential channel assignments and to choose assignments for each city which would leave the largest number of channels available for assignment to other cities. The new tables provided a framework of commercial and educational assignments on a national basis which created opportunity for all areas to receive a multiple choice of commercial programs, plus at least one educational service. Two channels were reserved for educational use in 43 of the largest cities and three or more commercial assignments were provided in the top 150 television markets. No commercial assignments were made in cities of less than 25,000 population, except where there was an existing station or where an active interest in inaugurating UHF service had been shown. The new table included only two assignments to accommodate operating stations, and did not include assignments on any of the upper UHF channels from 70 to 83. The Commission postponed a decision regarding these channels pending consideration of various proposals for their use. One such proposal, which is still outstanding, would allocate these channels for low power "community" educational or commercial television broadcast stations, to meet needs for local outlets in medium and small communities which may lack the means to support a regular TV station. Also under consideration is a proposal to reserve the upper UHF channels for translator use.²⁴

positions of the various Commissioners, see the majority and dissenting opinions in Memorandum Opinion and Order, 25 P&F Radio Reg. 1687 (1963); Memorandum Opinion and Order, denying reconsideration, 1 P&F Radio Reg. 2d 1573 (1963).

²² 47 U.S.C. § 303(s) (1964).

²³ 28 FCC Ann. Rep. 59-61 (1962).

²⁴ 31 FCC Ann. Rep. 110-12 (1965); 32 FCC Ann. Rep. 102-04 (1966). Also being considered, as discussed below, is a proposal to share these channels with the land mobile radio services in the 25 largest metropolitan areas. A translator, it should be noted, is a low power broadcast repeater which receives a distant signal, converts or "translates" it

In the last ten years the number of commercial UHF stations has increased from 74 to 175 and that of educational UHF stations from 43 to 109. Most of the UHF channels assigned to the top 50 markets are in use, or in hearing, or have been applied for. Some of them are doing well, but they still suffer from the facts that the all-channel legislation has not yet produced 100 percent compatibility, that tuning is not as easy on UHF as on VHF channels (a problem the Commission is now trying to solve by requiring comparability of tuning devices), and that new independents sometimes have trouble in developing attractive program formats and necessary advertiser support. But the only hope for developing a more adequate over-the-air television service depends on use of these channels. As a consequence, many of the Commission's CATV policies are designed to permit healthy UHF growth.

*B. Stereophonic FM—FM Allocation—The 50 Percent
Nonduplication Rule*

On June 1, 1961, the Commission amended its rules to authorize the transmission of stereophonic programs by frequency modulation (FM) broadcast stations on a multiplex basis. In addition to enhancing the reception of live broadcasts, stereophonic broadcasting can accommodate the many stereophonic tapes and records available. Stereophonic broadcasts have greatly increased the popularity of FM as an alternate aural broadcast service.²⁵ As of November, 1969, over 600 FM stations were broadcasting stereophonically.

In June, 1961, the Commission instituted a proceeding to determine what changes in the FM allocation rules and technical standards were necessary for the optimum development of this broadcast service. In June, 1962, a first report was issued creating three classes of commercial FM stations based on antenna height and power, and making assignments based on minimum mileage separation between co-channel and adjacent channel stations to insure protection against interference between such stations. In July, 1963, the Commission adopted a report assigning the 80 commercial FM channels to stations and communities in a manner similar to television channel assignments. Approximately 2,830 channels were assigned to 1,858 communities in the 48 contiguous states.²⁶

to another channel to reduce the danger of interference, amplifies it, and rebroadcasts it on the new channel. The Commission authorizes both VHF and UHF translators. Some are supported by local tax districts, a few are operated for profit, but most of them are cooperative community enterprises supported by voluntary contributions or are maintained by broadcasters trying to fill in or extend their coverage areas.

²⁵ 27 FCC Ann. Rep. 54-55 (1961).

²⁶ 29 FCC Ann. Rep. 74 (1963).

In October, 1965, the Commission's AM-FM "nonduplication rule" went into effect, requiring FM stations in cities of 100,000 or more population to devote no more than 50 percent of their average broadcast week to duplication of programming broadcast by a commonly-owned AM station in the same local area. The rule was adopted to end this waste of scarce frequencies, to increase the number and diversity of programs, and to help FM to develop as a truly separate service, now that FM set saturation in such cities is sufficient to provide economic support for separate programming.²⁷ As of November, 1969, 65 percent of all homes have at least one FM receiver, and in the top 30 markets FM set saturation is roughly 70 percent of all homes. However, of the 242 million estimated radio sets in homes, only 27 percent can receive FM, and of the 78 million cars with radio only 6 percent can receive FM. During the past 10 years commercial FM stations have increased in number from 737 to 2050 and educational FM stations from 165 to 418.

C. *The Clear Channel Decision*

In September, 1961, the Commission moved toward a final resolution of the complex clear channel proceeding which had been underway since the mid-1940s. Of the 25 Class I-A clear channels,²⁸ 11 were designated for "duplication" to permit unlimited time operation on each of them by one station other than the Class I-A dominant station. Two other Class I-A clear channels were to be duplicated in specific communities to solve special problems arising out of the United States-Mexico broadcasting agreement. These new stations, called Class II-A, which were to be applied for only in certain states, can operate with from 10 to 50 kw power, and must meet minimum requirements of service to areas not now receiving primary nighttime AM service.²⁹ The other 12 Class I-A clear channels were retained unchanged pending further studies. It was recognized that should power in excess of the present limit of 50 kw be authorized at some future date, the 12 reserved channels would permit provision of four satisfactory skywave or secondary services throughout most of the nation.³⁰

²⁷ 32 FCC Ann. Rep. 108-09 (1966).

²⁸ A Class I-A or clear channel station is one which, by international treaty and domestic rule, is the only station in a broadcast region (e.g., North America) operating on its channel at night.

²⁹ "Primary service" in AM is ground-wave service rendered by a station. In the absence of interference such service is regarded as furnished out to a station's .5 millivolt per meter (mv/m) contour in rural areas, and to the 2.0 mv/m contour in urban areas. However, in the case of these II-A assignments, the stations are subject to nighttime interference from the co-channel dominant I-A station, so that their nighttime primary service areas are limited to values from about 2.8 to about 4 mv/m.

³⁰ 28 FCC Ann. Rep. 69 (1962). "Skywave service" is the service rendered at night by a Class I, clear channel station through its "skywave" signal, that portion of its

D. Revision of AM Assignment Standards—Pre-Sunrise Decisions

Between 1945 and 1962 the number of standard radio (AM) stations grew from 1,000 to nearly 4,000.³¹ Because of the problems generated by the nature of AM growth, the Commission, on May 10, 1962, placed a freeze on the further acceptance of most standard broadcast applications pending rule-making. In issuing the freeze order, the Commission acknowledged that its previously stated aim of fostering local outlets and encouraging competition had often worked at cross purposes with the objective of eradicating "white" areas, that is, areas lacking acceptable primary service. Therefore, the Commission concluded that it was time to reexamine its allocation policies. Subsequently, on July 10, 1964, after extensive rule-making proceedings, new AM standards were adopted and the freeze was lifted. The so-called "go-no go" rules then put into effect were designed to prevent further erosion of the existing services through interference from new radio grants and to encourage service in under-served areas.³² The new rules were quite successful in preventing additional interference to existing stations, but met with only limited success in eliminating both day and night "white" areas. Even as AM radio was undergoing rapid growth, the "white" area problem remained practically unchanged. Despite the impact of the freeze, the number of authorized stations reached 4,300 by July, 1968. Therefore, in an order effective July 19, 1968, the Commission instituted a further freeze on the acceptance of most new applications pending a new study of the aural services.³³ In a Notice of Rule Making issued in September, 1969, the Commission proposed additional rules governing the acceptance and consideration of applications which would be substantially more restrictive than the present rules.³⁴ For the first time exist-

signal which is radiated into the atmosphere but, at night, is reflected back to earth by the ionosphere. This service is rendered over great distances, the 0.5 mv/m 50%-of-the-time skywave contour of a 50 kw Class I nondirectional station lying about 750 miles from its transmitter. However, it is also somewhat intermittent in character, being subject to fading, and therefore is termed "secondary" in the Commission's AM engineering standards.

³¹ The standard broadcast (AM) radio band extends from 535 to 1605 kHz and is divided into 107 channels of 10 kHz each, with operating frequencies assigned in the area from 540 to 1600 kHz. The 107 channels include 62 Class I-A and I-B clear channels. These are used by one to three Class I stations with high power, wide ground-wave and, at night, skywave service. They are also used by Class II (secondary) stations. On some Class I-A and I-B channels North American countries other than the United States have Class I priority of use. The AM band also includes regional channels, on which Class III (regional) stations operate, and 6 local channels, with low-power Class IV (local) stations. Unlike the FM and TV services, specific channels are not assigned in the Rules to particular communities but are allocated on the basis of individual applications.

³² 29 FCC Ann. Rep. 75-76 (1963).

³³ 13 F.C.C.2d 866 (1968).

³⁴ 19 F.C.C.2d 472 (1969).

ing FM as well as AM service would be considered in determining whether a proposed AM station would provide a first primary aural service.

In 1941 the Commission adopted a rule which allowed certain classes of stations to commence operation, on a permissive basis, with their daytime facilities as early as 4 a.m. local standard time,³⁵ subject to summary termination by the Commission, usually on complaint of a station with primary rights on the frequency. By 1960 serious early morning conflicts began to develop, resulting in the issuance of an increase in termination notices. In December, 1961, the Commission proposed new rule-making looking towards regularizing pre-sunrise operation. The Commission sought a realistic balance between the need for early morning service and the interference which such service would cause to fulltime stations assigned to the same frequency. Further, international agreements were required to work out resulting border interference problems. The first such agreement, effective in June, 1967, was negotiated with Canada and provided for pre-sunrise operation starting no earlier than 6 a.m., local standard time, with power reduced as necessary to provide protection to unlimited time stations in the other country. In June, 1967, the Commission adopted a different set of pre-sunrise rules.³⁶ These provided generally for operation from 6 a.m., local standard time, to local sunrise with a maximum of 500 watts power. As to Class II stations on United States Class I-A clear channels, the new rules permitted pre-sunrise operation by such stations located west of the dominant Class I-A station limited to 6 a.m. or local sunrise at the dominant station, whichever was later. By an order adopted in July, 1969, the Commission imposed the 500 watt limit on the pre-sunrise operation of Class II stations.³⁷ Several petitions for reconsideration of this order are pending. There are now approximately 1,600 stations operating in accordance with the pre-sunrise rules.

E. *United States—Mexican Agreements*

The new agreements concerning the use of the standard broadcast band were negotiated between the United States and Mexico during the 1960s. The first agreement, which is the basic broadcasting agreement, governs use of the various channels, establishes classes of sta-

³⁵ Unlike FM and TV, the propagation characteristics of AM stations are different day and night, with the changes taking place about sunrise and sunset. Therefore many stations have different powers and antenna configurations day and night. The Rule, therefore, permitted use of more powerful daytime facilities under nighttime conditions, with resulting increased interference.

³⁶ 8 F.C.C.2d 698 (1967).

³⁷ 13 F.C.C.2d 705 (1969).

tions, and describes technical standards, priorities, and procedures designed to minimize interference problems between the two countries. In general, it is very similar to the 1957 broadcasting agreement which expired June 9, 1966. The second agreement permits daytime stations to operate for certain limited periods before sunrise and after sunset. This will allow a uniform pre-sunrise sign-on time for stations in the United States, including stations which operate daytime only on the Mexican clear channels. On June 19, 1969, the United States Senate ratified the two agreements. At the present time the agreements are before the Mexican Senate. They will become effective shortly after ratification by that body.

There is no outstanding FM agreement with Mexico. However, in November, 1969, members of the Commission's staff met with a delegation from Mexico and reached a tentative agreement on a proposed FM agreement for assignment of stations within 200 miles of the common border. Additional discussions will be held with the Mexicans looking toward final agreement, together with an allocation table.

There are two separate agreements between the United States and Mexico concerning television. The VHF agreement covers an area within 248.6 miles of the common border, and the UHF agreement covers an area within 200 miles of the border. Both agreements include technical specifications and procedures to minimize interference between stations operating in the respective countries, together with specific channel allocation tables.

F. *Antenna Farms*

In July, 1967, as a result of a rule-making proceeding begun in June, 1965, the Commission adopted rules establishing a procedure under which the Commission would, in response to requests or on its own motion, establish antenna farm areas.³⁸ The purpose of these rules is twofold: to reduce the potential menace of tall towers to air navigation by grouping such towers; and to obtain improved service, particularly in television broadcasting, by obtaining greater height safely as a result of such grouping. Another benefit sometimes obtained is improved reception due to the possibility of orienting antennas toward a common signal source. These rules were proposed and adopted after extensive discussion and coordination with the Federal Aviation Administration, and provide for complete coordination with that agency in the consideration of specific antenna farm proposals. It is hoped that these procedures will permit more effective use of television allocations.

³⁸ 8 F.C.C.2d 559 (1967).

G. *Land Mobile Allocations*

The only really basic domestic allocations problem the Commission faced in the 1960s involved the need of the land mobile radio services for more spectrum space. In the general allocations proceedings of the late 1940s, they had been given a total of 42 MHz, which seemed adequate for their expected needs. However, the demand for mobile radio for both public safety and business purposes far outstripped the projections which had been made. At the beginning of the decade, therefore, the Commission was engaged in Docket 11997, an overall look at the allocations from 25 to 890 MHz. What happened in that proceeding—and later—will be discussed in Part V below. Reference is made to the matter here only in order to round out the discussion of the Commission's allocations functions, since it seems more appropriate to treat it at length in considering activities in the major substantive areas.

H. *The Challenge to the Commission's Role in Allocations*

As the 1960s ended, the Commission had been under criticism for several years because of alleged ineffective discharge of its basic allocations functions. For even longer, there had been objection to the cleavage between government and non-government frequency allocations, the former controlled by the President and the latter by the Commission. Several proposals were made in Congress for unitary regulation of the spectrum, and a number of legal scholars urged that kind of basic change in the allocations machinery.³⁹ However, nothing came of any of these proposals.

In 1966 a study of the use of the spectrum was made under the aegis of the Department of Commerce. This resulted in the publication of a report⁴⁰ which was critical of existing allocation of the spectrum and which proposed a heavily budgeted research program to develop an improved allotment of frequencies among the different interests competing for the use of this valuable resource. It is worth noting, of course, that the Commission has never had even a small fraction of the sums contemplated for its allocations research, and could presumably have done a better job if it had been funded at a higher level.

³⁹ See H.R.J. Res. 381, 85th Cong., 1st Sess. (1957); H.R.J. Res. 292, 86th Cong., 1st Sess. (1959). See also Doyle, *Do we Really Need a Federal Department of Telecommunications?*, 21 Fed. Com. B.J. 3 (1967); Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use*, 4 Duquesne L. Rev. 1 (1965); Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform*, 53 Minn. L. Rev. 1179 (1969); Rosenblum, *Law Visibility Decision Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 Ad. L. Rev. 19 (1965).

⁴⁰ Telecommunications Science Panel, Dep't of Commerce, *Electromagnetic Spectrum Utilization—The Silent Crisis* (1966).

Perhaps the major grounds for dissatisfaction with the Commission's record regarding allocations arises out of its handling of the land mobile radio services, the matter touched on briefly in the preceding section and discussed at length in Part V below. Commission critics say, with the benefit of hindsight, that the agency should have made more ample provision for mobile radio in the 1946 allocations. With somewhat greater justification, they complain that since it became apparent that these services were approaching saturation in certain congested areas, Commission reaction has been inadequate, that it has considered the problem for ten years or more, but has done nothing to correct the situation. As a consequence, there have been rumors of plans to transfer allocations responsibilities to the Department of Commerce, the Department of Transportation, or perhaps even a new Department of Communications. Commissioner Robert T. Bartley has suggested that this function should be given to an office attached directly to the Congress.⁴¹ More recently, the Bureau of the Budget has considered where the authority to allocate the spectrum should be placed, but its conclusions, if any, have not been made public. The administration of President Nixon, which has taken great interest in communications matters, apparently has no present plans for significant changes in this field.⁴² Action is probably being withheld in large part because most of the recent proposals have contemplated shifting the responsibility for allocations to the Executive branch. This would require the concurrence of Congress, which is likely to be inhospitable to any proposal to transfer this authority away from its own creature, the FCC. Congress regards all the independent agencies as arms of Congress, over which it can exercise ultimate control; it is likely to prefer to keep things that way.

The author has always argued that the Commission can do as good an allocations job, or better, than any other agency now existing or likely to be created, assuming that it will be given as much money as would any alternative allocations authority. The Commission has the experience, and a small but capable staff of allocations experts. Indeed, if the Commission's powers were transferred elsewhere, it seems likely that these very same people would form the nucleus of the new organization. Furthermore, there is value in having the allocation of frequencies among the broadcasters, common carriers, amateurs, marine and aviation users, and others who require spectrum done by the same agency which regulates these various services. The Commission's familiarity with their modes of operation helps in

⁴¹ Let's Abolish The FCC, address by Commissioner Robert T. Bartley before the Illinois Broadcasters Association, Quincy, Ill., May 23, 1968.

⁴² Message from the President of the United States, transmitting Reorganization Plan No. 1 of 1970, H.R. Doc. No. 222, 91st Cong., 2d Session (1970).

appraising their estimates of need, comparing them with the requirements of others, and determining what frequencies will be most suitable for each service. Having control of the day to day administration of all services, the Commission can make any rule changes which may be needed to help effectuate shifts in allocations. A separate allocations agency would have many problems which the Commission can avoid.

Furthermore, the author does not think that the Commission's record in the allocations field has been as bad as some suggest. All things considered, its judgments have generally been sound at the time they were made. The Commission's ability to discharge this important responsibility is now being tested in connection with its proposals for relieving the growing congestion within the land mobile services. If it can evolve prompt, fair, and adequate reallocation plans, then it will probably be allowed to continue to exercise this important power. On the other hand, if it refuses to act or provides only grudging and inadequate relief, then Congress, which has properly become concerned about this situation, may indeed strip it of its authority over frequency allocations. The Commission's control of the non-governmental spectrum is in the balance.

III. BROADCASTING REGULATION

A. *Programming*

1. The 1960 Program Policy Statement

In July, 1960, the Commission issued its report on broadcast programming, culminating a general inquiry designed to determine whether the standards laid down by the commission for the guidance of broadcast licensees in the selection of programs and other material intended for broadcast were currently adequate. Hearings had been held before the Commission en banc, 90 witnesses testifying during 19 days of hearings. In this report the Commission placed great emphasis on the importance of broadcast licensees serving community needs. The Commission pointed out that the principal ingredient of a licensee's obligation to serve the public interest, convenience and necessity⁴³ is the responsibility to make a diligent and continuing effort to discover and fulfill the tastes, needs and desires of his service area. Stressing that it did not intend to guide the licensee in the formulation of his programming, the Commission stated instead that licensees and applicants for stations would be expected to submit documented program submissions prepared as a result of planning

⁴³ 47 U.S.C. §§ 307-09 (1964).

and consultation covering two main areas: first, a canvass of the listening public who will receive the broadcast service; second, consultation with leaders in community life who are most aware of the needs of the community.⁴⁴

2. Program Forms

Consistent with this new emphasis on meaningful licensee surveys of community needs, the Commission initiated rule-making in February, 1961, looking toward amending the broadcast application forms to require a definitive statement by applicants as to measures taken to determine the needs and interests of the community served and the manner in which they proposed to meet those needs and interests.⁴⁵ The new policy emphasizing community surveys was implemented in June, 1961, when the Commission for the first time denied an uncontested application for a new broadcast station solely on the ground that the applicant had failed to survey and determine the needs of the community intended to be served.⁴⁶

The Commission's rule-making proceedings on the proposed new program forms underlined their importance. The proceedings involved a number of separate proposals by the Commission, extensive testing of experimental program and logging forms by selected broadcasters, discussions with the industry and Bureau of Budget representatives, and oral argument before the Commission. In July, 1965, the Commission adopted its new program reporting form for AM and FM commercial broadcast applications.⁴⁷ A similar form was adopted for television stations in October, 1966.⁴⁸ The main purpose of both forms was to secure needed information from which the Commission could evaluate applicants' efforts to ascertain and serve the broadcast needs and interests of their communities. Both forms also restructured the data to be submitted on the licensee's past and proposed programming to place more emphasis on news, public affairs, and other non-entertainment programming (that is, agricultural, instructional, and religious programming) since it is in these program categories that licensees treat with community needs and problems,⁴⁹ and these are the areas where competition and profit are not so effective as motivating factors.

⁴⁴ 20 P&F Radio Reg. 1901 (1960).

⁴⁵ 27 FCC Ann. Rep. 41-42 (1961).

⁴⁶ *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd*, sub nom. *Patrick Henry v. FCC*, 302 F.2d 191 (D.C. Cir.), cert. denied, 371 U.S. 821 (1962).

⁴⁷ 1 F.C.C.2d 439 (1965).

⁴⁸ 5 F.C.C.2d 175 (1966).

⁴⁹ 32 FCC Ann. Rep. 99 (1966); 33 FCC Ann. Rep. 54 (1967).

3. Renewal Procedures

In the processing of renewal applications, the major emphasis in the programming area has turned to a review of the efforts of licensees to ascertain community needs and interests. To give licensees a better understanding of survey requirements, a public notice was issued in August, 1968, spelling out in detail the steps which an applicant must take. Licensees were reminded that applications must reflect consultations with community leaders, must list the significant suggestions received as to community needs, and, after licensee evaluation of such suggestions, must indicate programming proposed to meet such needs.⁵⁰

A second facet of the Commission's review of licensee programming is the assessment of a licensee's promises against his performance. In July, 1961, the Commission issued a one-year renewal, instead of one for the usual three-year term, to station KORD, Pasco, Washington, because of substantial departures from the station's program proposals. The Commission emphasized that the program proposals made by an applicant are expected to be substantially carried out. A licensee may not disregard his proposals without adequate justification in the hope that he will be permitted to improve his performance when called to account.⁵¹

The seriousness with which the Commission treats program proposals is also reflected in the reports adopting the new program forms. Licensees were there reminded that programming proposals are relied upon by the Commission, and that they are expected to advise the Commission whenever substantial changes occur.⁵²

In other respects the Commission has not, in the author's judgment, employed its renewal processes effectively. It has abandoned requirements as to local live programming which were applied to television applications in the author's early days as Chief of the Broadcast Bureau, has failed to develop minimum standards for news, public affairs and other programming, and has not evaluated much of the data collected in the new renewal forms. Because of this, Commissioner Nicholas Johnson and the author have dissented to certain

⁵⁰ 33 Fed. Reg. 12113 (1968). For an exhaustive discussion of the requirements for an adequate community survey, see *City of Camden*, 18 F.C.C.2d 412 (1969). See also the proposed primer on ascertainment of needs put out for comment on December 19, 1969. 34 Fed. Reg. 20282 (1969).

⁵¹ *KORD, Inc.*, 31 F.C.C. 85, 88 (1961).

⁵² 1 F.C.C.2d 439 (1965); 5 F.C.C.2d (1966). Concurrent with its revision of the program forms, the Commission also revised its logging rules so that, for the first time, they clearly required the logging of all information required to complete the renewal forms (using 7 days, one for each day of the week, selected at random from the year preceding). The new logging rules also authorized automatic logging under certain safeguards.

renewals in each bi-monthly group over the past several years, proposing that the staff report in detail as to those stations proposing less than 5 percent news, 1 percent public affairs, and 5 percent public affairs and "other" programming combined.⁵³

In the spring of 1968 another approach was attempted; a rather detailed study of certain selected radio and television stations in Oklahoma was made.⁵⁴ Ownership patterns, other media available in the communities, the stations' news, public affairs, and other local programming, their record of clearing for network news and public affairs programming (if affiliated with a network), their revenues and profits, and other similar data were examined. It was concluded that the stations in Oklahoma were probably no worse and no better than most others in the country, but that they were doing so little in the way of local programming, particularly in prime time, that they were undercutting the Commission's basic theory of trying to build a system of many locally oriented stations. It was recommended that the staff be instructed to process renewals in accordance with such criteria and to bring the stations with the least satisfactory proposals to the Commissioners' attention. However, no support could be obtained for this approach to renewals.

Since 1968, studies of all the television stations in the State of New York⁵⁵ and in the October 1, 1969 renewal group (Maryland, District of Columbia, Virginia and West Virginia) have been made.⁵⁶ These studies attempted to rank the stations in order of their comparative performance in such areas as news, public affairs, numbers of people involved in the news operation, local programming, clearance of network news and public affairs (if affiliated), public service announcements and level of commercialism. Through this process 16 stations in the New York group were identified which it was thought

⁵³ Public notices of July 8, 1966 (New Jersey and New York renewals) and March 7, 1967 (Florida renewals). In the absence of serious complaints, the only information as to programming which is furnished to the Commissioners by the staff is a brief list of those stations which fall below the 5-1-5 processing standard. The majority have made it clear for some time that they do not want any more information than that—indeed, they have not been concerned about the limited data furnished to the Commissioners and have routinely voted to renew the licenses of the stations on the lists. Commissioner Johnson and the author have made it clear that they are not saying that all the stations on the lists should be denied renewal, because there may be reasonable explanation for the apparent deficiencies. But they do believe that stations falling below these levels should be subjected to closer study.

⁵⁴ Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968). Oklahoma was selected simply because it was one of 3 states whose stations fell into the next upcoming group of renewal applications.

⁵⁵ See New York State License Renewals, 18 F.C.C.2d 268, 269 (1969).

⁵⁶ 18 F.C.C.2d 268 (1969). This was based, in part, on a study of these stations by the Institute for Policy Studies, *Television Today: The End of Communication and the Death of Community* (1969).

should be studied further. In the mid-Atlantic group further inquiry was suggested as to 5 stations. Nothing came of these proposals. In March, 1970, however, the Commission agreed to review the methods employed by the staff in processing renewal applications. Perhaps this will result in modification of those procedures.

One of the two most celebrated renewal cases decided during the 1960s was that involving WLBT, in Jackson, Mississippi. In 1965 the Commission (with Chairman Henry and the author dissenting) granted the station a one-year renewal despite allegations by the United Church of Christ and the National Association for the Advancement of Colored People that it had violated the Fairness Doctrine in its treatment of the racial integration issue, that it had systematically ignored the programming needs and interests of some 47 percent of its audience which is black, and that its on-the-air newsmen regularly refused to accord Negroes courtesy titles.⁵⁷ The order also denied formal standing to the two protesting groups on the ground that they would not be affected economically by a grant of the application. They appealed and won a reversal of the Commission's decision.⁵⁸ The Court of Appeals for the District of Columbia (in an opinion written by now Chief Justice Burger) ruled that the Commission cannot exclude organized groups which represent the public in the area served by the station, and that the allegations of the parties were of such a serious character that they should be explored in a formal hearing. The Commission then designated the case for hearing.⁵⁹ After that hearing, the majority granted the station a regular renewal, over the dissent of Commissioner Johnson and the author.⁶⁰ On its second review, the court of appeals issued a decision which was sharply critical of the Commission's handling of the case and which took the unusual step of ordering the agency to open up the channel to other applicants, with the licensee of WLBT to be treated as an applicant for a new station rather than for renewal.⁶¹ The Commission complied by issuing a notice that it would accept applications for a period of sixty days.⁶² The ultimate disposition of the matter at this writing is still undecided.

The other major renewal case of the decade involved WHDH-TV

⁵⁷ *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965).

⁵⁸ *United Church of Christ v. FCC*, 359 F.2d 994, (D.C.Cir. 1966).

⁵⁹ *Lamar Life Broadcasting Co.*, 3 F.C.C.2d 784 (1966).

⁶⁰ *Lamar Life Broadcasting Co.*, 14 F.C.C.2d 431 (1968).

⁶¹ *United Church of Christ v. FCC*, No. 19,409 (D.C.Cir., June 20, 1969).

⁶² *Lamar Life Broadcasting Co.*, 20 F.C.C.2d 635 (1969). Later the Commission indicated that it would allow Lamar Life to operate temporarily, pending designation for comparative hearing and subsequent action regarding interim operation.

in Boston, Massachusetts. This station was one of a group whose original grants had been challenged because of allegations that they had been won by virtue of *ex parte* approaches to some members of the Commission.⁶³ The court of appeals concluded that the principals of WHDH-TV had engaged in *ex parte* activities, but that these were not so serious as to require their disqualification.⁶⁴ The Commission thereupon accepted competing applications and designated the matter for hearing. After an initial examiner's decision which would have renewed WHDH's license, the Commission reached the opposite result, denying renewal and granting one of the competing applications.⁶⁵ This result, in and of itself, would have been disturbing to the industry, but the impact of the decision was compounded by the fact that the majority based its decision largely on the ground that the licensee of WHDH-TV was the publisher of a daily newspaper in Boston and also held AM and FM licenses there.⁶⁶ This, coupled with a concurring statement by Commissioner Johnson suggesting that the decision opened the licenses of those holding multiple media in the same community to successful attack, caused great concern to the many broadcasters who felt that their holdings were threatened. As was to be expected, the ensuing months saw the filing of a number of competing applications which challenged the license renewals of television stations in major markets.

The broadcasters took their case to Congress, and a substantial

⁶³ Two of the cases involved stations in Miami, Florida. In each of these it was held that all of the applicants but one were disqualified for *ex parte* activities, so the original grants were cancelled and the innocent parties were given 4-month licenses. Biscayne Television Corp., 31 F.C.C. 237 (1961); WKAT, Inc., 29 F.C.C. 216 (1960). At the end of these short terms, competing applications were filed for each channel, but the short term licensees prevailed in the ensuing comparative hearings. Two other cases involved stations in Jacksonville and Orlando, Florida. The Commission concluded that the prevailing parties in these cases had not been disqualified and authorized them to continue to operate on the channels in question. City of Jacksonville, 23 P&F Radio Reg. 682 (1963); WORZ, Inc., 22 P&F Radio Reg. 125 (1963). The court of appeals reversed, ordering the Commission to accept competing applications. Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75 (D.C. Cir.) cert. denied, 382 U.S. 893 (1965); WORZ, Inc. v. FCC, 345 F.2d 85 (D.C. Cir. 1965). This was done, and the channels are now involved in comparative hearings. Florida-Georgia Television Co., 10 P&F Radio Reg. 2d 846 (1967); Orange Nine, Inc., 7 F.C.C.2d 788 (1967).

⁶⁴ Greater Boston Television Corp. v. FCC, 334 F.2d 552, (D.C. Cir. 1964).

⁶⁵ WHDH, Inc., 16 F.C.C.2d 1 (1969). Chairman Hyde and Commissioner H. Rex Lee elected not to participate in the case, and the author was barred from taking part because he had been a party to the proceeding when Chief of the Broadcast Bureau. This left a bare quorum which split 3 to 1, with Commissioner Robert E. Lee dissenting.

⁶⁶ The majority based its ruling in part on the Commission's Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). This announced that in comparative proceedings for new facilities major emphasis would be put on diversity in the control of mass media and on the integration of ownership into the management of the proposed station. However, the policy statement expressly said that it would not apply to comparative renewal hearings.

number of bills to provide for "orderly procedures" for the renewal of licenses were introduced in both houses. The major proposal was S. 2004,⁶⁷ introduced by Senator John O. Pastore, the Chairman of the Subcommittee on Communications of the Senate Commerce Committee, who held hearings on the matter. His bill would have barred the Commission from accepting competing applications for occupied channels in connection with the renewal application of the existing licensee unless the Commission had first found, independently, that renewal would not serve the public interest. This proposal was widely supported by broadcasters but was sharply opposed by a number of viewer groups. The Commission itself was split 4 to 3 on the matter, Commissioners Bartley, Johnson, H. Rex Lee and the author opposing the legislation and Chairman Burch and Commissioners Robert E. Lee and Wells favoring it.

With matters in that posture, the Commission adopted a new Policy Statement on January 15, 1970,⁶⁸ which sought a balance between the need for reasonable stability in broadcasting and the need for the spur to quality performance provided by the possibility of competing applicants. The Commission announced that if the existing licensee, in the hearing with a competing applicant, established that he had substantially served his community, his license would be renewed even though his opponent was more diversified, proposed to integrate ownership in management to a greater degree, and promised even better programming. If he failed to meet that standard, however, his opponent would be entitled to comparison on all aspects of his proposal. This represents a reasonable compromise, and hopefully will obviate any need for the proposed legislation.

Other significant renewal or revocation cases of the 1960s involved fraud or misrepresentation, either as to the Commission or the public.⁶⁹ In only one case, that of WDKD in Kingstree, South

⁶⁷ S. 2004, 91st Cong., 1st Sess. (1969).

⁶⁸ Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 35 Fed. Reg. 822 (1970).

⁶⁹ *KWK Radio, Inc. v. FCC*, 337 F.2d 540 (D.C. Cir. 1964) (license revoked because of a fraudulent contest); *Immaculate Conception Church v. FCC*, 320 F.2d 795 (D.C. Cir. 1962) (renewal denied because of fraudulent contests and misrepresentation as to programs); *Star Stations, Inc.*, 19 F.C.C.2d 991 (1969) (renewal granted (4 to 3) for a 6-month period despite fraudulent billing practices and questionable contests during a one-year renewal period previously imposed because the licensee had hypoed the station's ratings by running unusual promotions during a rating period); *Continental Broadcasting, Inc.*, 15 F.C.C.2d 120 (1968), petition for reconsideration denied, 17 F.C.C.2d 485 (1969) (renewal denied because of misrepresentation as to time brokerage contracts and failure to maintain adequate supervision of the station's operations (case now pending on appeal)); *WMOZ, Inc.*, 36 F.C.C. 202 (1964), 3 F.C.C.2d 637 (1966), 3 F.C.C.2d 835 (1965), 4 F.C.C.2d 369 (1966) (renewal denied because of false logging

Carolina was non-renewal based on programming grounds,⁷⁰ and even there the Commission found that the licensee had been guilty of misrepresentations in the course of the investigation.

4. Licensee Programming Freedom

The *Pacifica* cases⁷¹ reflect the line drawn between acceptable program regulation and the statutory prohibition that the Commission must not act as a censor.⁷² Under the public interest standard⁷³ the Commission must review the overall performance of an applicant for license renewal; however, it is not concerned with individual programs, except to the extent that the recognized exceptions to censorship apply (for example, obscenity, incitement to riot, and lotteries). With regard to the highly controversial, and to some persons offensive, programming carried by *Pacifica*, the Commission has emphasized that, although licensees might offend a number of listeners by the nature of some of their programming, these matters must be left essentially to licensee discretion. The Commission may not rule out programming which some listeners find offensive. Otherwise only the inoffensive and the bland could be broadcast. The licensee's judgment on programming is entitled to very great weight and the Commission, under the public interest standard, will take action against the licensee at renewal time only where the facts flagrantly call for such action. The Commission is charged with promoting the larger and more effective use of radio in the public interest⁷⁴ and must avoid inhibiting broadcast licensees' efforts at experimenting or diversifying their programming.⁷⁵

B. Station Ownership

1. The Multiple Ownership Rules

Spurred by its long standing policy of seeking to promote maximum diversification of program and service viewpoints and to and misrepresentation to the Commission); *Television Co. of America, Inc.*, 1 F.C.C.2d 91 (1965) (renewal denied because of unauthorized transfers and misrepresentation).

⁷⁰ *E. G. Robinson, Jr.*, 33 F.C.C. 250 (1962), 34 F.C.C. 101 (1963), *aff'd*, 334 F.2d 534 (D.C. Cir. 1964).

⁷¹ *Pacifica Foundation*, 36 F.C.C. 147 (1964).

⁷² "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

⁷³ 47 U.S.C. §§ 307, 308, 309 (1964).

⁷⁴ 47 U.S.C. § 303(g) (1964).

⁷⁵ For a discussion of the *Pacifica* cases, see 36 F.C.C. 147 (1964), 6 P&F Radio Reg. 2d 570 (1965); *United Fed'n of Teachers*, 17 F.C.C.2d 204 (1969). But see *E. G. Robinson, Jr.*, 33 F.C.C. 250 (1962), 34 F.C.C. 101 (1963), 2 P&F Radio Reg. 2d 2001 (1964). For the Commission's strong statements recognizing broadcasters' right to freedom in handling the news, see section D3, *infra*.

prevent undue concentration of economic power contrary to the public interest, the Commission in the 1960s began a number of proceedings dealing with the multiple ownership of broadcast facilities. In a report in May, 1964, the Commission amended the multiple ownership rules as they dealt with local and regional concentrations.⁷⁶ When two stations in the same broadcast service are so close that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. In the first place, in a system of broadcasting based upon free competition, it is reasonable to assume that stations owned by different people will compete more effectively with each other. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have "an inordinate effect in political, editorial, or similar programming sense, on public opinion at the regional level."⁷⁷ Concerned about the steady decline in the number of cities with daily newspapers under competing ownership and the concurrent rise in the number of stations which, with Commission encouragement, have undertaken to editorialize, the Commission reappraised its multiple ownership rules. In the May, 1964 report, the Commission adopted rules to prohibit defined radio service overlap between commonly owned broadcast stations. The rules replaced previous Commission policy which had attempted to assess the impact of common service areas by stations under common ownership in the same broadcast service on a case by case basis.

The growth of mutual funds and their substantial investments in publicly traded stock of broadcast licensees in the 1960s presented the Commission with a new policy problem regarding multiple ownership. Under the Commission's multiple ownership rules, a single entity cannot hold interests in more than 7 AM, 7 FM and 7 TV stations (only 5 of which may be VHF). However, stockholders with less than 1 percent interest in a licensee with over 50 stockholders were exempt from these limitations. In 1967 the Commission initiated a proceeding to deal with the accretions of broadcast ownership made by the mutual funds which, while relatively new to investment in broadcast companies and unaware of Commission policies, had in many instances exceeded the 7-station limitation and the 1 percent exemption. After considering the oral and written presentations of the funds, the Commission liberalized its rules to allow mutual funds an exemption up to 3 percent in widely held broadcast licensees where it was shown that the stockholding was for investment purposes only, and the mutual funds held no offices or directorships in the broadcast licensees. The

⁷⁶ 2 P&F Radio Reg. 2d 1558, 1591 (1964).

⁷⁷ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

mutual funds were given a reasonable period of time to divest themselves of broadcast holdings in excess of the rules, as amended.⁷⁸

Because multiple ownership of television stations had increased significantly in recent years, particularly in the largest markets, the Commission initiated a proceeding in June, 1965, to consider new limits on station ownership. The rules proposed would have limited common ownership of UHF and VHF stations in the top 50 markets to a total of 3, only 2 of which could be VHF. However, in a decision in February, 1968, the Commission decided, by a 4 to 3 vote, not to adopt a fixed rule, but announced instead that proposed acquisitions by multiple owners wishing to acquire more than 3 TV stations (2 VHF) in the top 50 markets would be considered on a case by case basis, but that such applicants would be expected to make a showing that a compelling public interest justified acquisitions beyond this bench mark.⁷⁹

After closing out the top 50 market proceeding, the Commission almost immediately, in March, 1968, instituted a rule-making proceeding contemplating the adoption of a rule prohibiting acquisition of more than one unlimited-time station in different services in the same market, for example, the acquisition by a licensee of a full time AM station or an FM station or TV station in the same city. The rule as proposed would not have required the divestiture of existing holdings, but if the licensee were to sell two stations in the same market, it would have to assign them to two different parties.⁸⁰ This proceeding was resolved just as this article was being put into final form, and at the same time the Commission issued a new proposal to limit ownership of the mass media in any given market to radio or television or a newspaper, calling for divestiture of non-complying holdings over a five-year period. This proposal, which is certain to be bitterly opposed, is consistent with the indication in the January, 1970 policy statement on comparative renewal proceedings⁸¹ that if the ownership structure of broadcasting is to be revised, it should be done through general rule-making rather than in individual renewal cases.

⁷⁸ 13 F.C.C.2d 357 (1968). The American Bankers Association thereafter petitioned for rule-making to amend the rules (1) to remove any limitation on the holding of broadcast stocks by banks if they disclaim any intention to control the management of the broadcast company, and (2) to permit banks, when they have the right to vote such stocks, either not to aggregate their holdings or to hold up to a new ceiling of 10% with a 5% limitation on any single trust account. The Commission issued a Notice of Proposed Rulemaking on November 25, 1969, to inquire into this matter. 34 Fed. Reg. 19032 (1969).

⁷⁹ 34 FCC Ann. Rep. 27 (1968).

⁸⁰ *Id.* at 27-28.

⁸¹ 35 Fed. Reg. 822 (1970).

2. Station Sales—The Three-Year Rule

Reflecting both Commission and congressional concern with the frequent turnover of a large number of broadcast stations, the Commission issued a rule-making notice in December, 1960, looking toward obligatory hearings on sales where the station had been held by the seller less than three years and a finding could not be made that changed circumstances justified the sale.⁸² In March, 1962, the Commission adopted the three-year ownership rule, with exceptions for cases involving financial inability to continue operation, death or disability of station principals, or other special hardship circumstances. In the years since, this policy has worked very satisfactorily to reduce the frequency of transfers, thereby minimizing the disruptive effects which usually accompany station sales.

3. The Conglomerate Inquiry

In February, 1969, the Commission issued a Notice of Inquiry into the problems posed by conglomerate merger trends in the broadcast field and by the ownership of broadcast stations by entities with large-scale business interests outside of broadcasting. This subject had been treated in only a few cases in the past, most recently, the proposed American Broadcasting Company-International Telephone and Telegraph Company merger proposal, which the parties aborted during the process of the litigation which ensued.⁸³ In its conglomerate study, the Commission is examining the nature of the interests held by conglomerate and other large-scale business entities, with particular emphasis on multi-media owners. The Commission will evaluate the possible benefits, as well as the detriments, which may accrue from such ownership. It will look for evidence that such combined ownership contributes to technical innovation, stability, greater programming efforts, either locally or on a syndicated basis, or to the formation of additional networks. It will also look for possible hazards to the fair and free broadcast presentation of material by the stations owned by conglomerates or entities with large-scale business interests because of concern for those other interests, for reciprocal arrangements in advertising, for lack of licensee responsibility due to inadequate supervision by top officials, for siphoning of broadcast profits for other operations or acquisitions, for increased leverage either in the broadcast or nonbroadcast fields, and for possible impediments to technological developments. Thus this broad-ranging inquiry will

⁸² 27 FCC Ann. Rep. 46-47 (1961).

⁸³ American Broadcasting Co., 7 F.C.C.2d 245 (1966), 9 F.C.C.2d 546 (1967). For an earlier case presenting some of the same problems, see *Powel Crosley, Jr.*, 11 F.C.C. 3 (1945).

encompass the possible social, economic and political consequences to broadcasting of the conglomerate trend which has become so significant in business generally in recent years.

C. *Political Broadcasting*

1. General Developments

Political broadcasting and the broadcasting of controversial views on issues of public importance are two of the most important functions to be served by broadcast licensees, and both the Commission and the courts have recognized the obligation of stations to carry out the critical task of informing the American public in these areas.⁸⁴ Indeed, one of the most important reasons justifying the Commission's allocation of so much valuable spectrum space to broadcasting is the contribution which broadcasting can make to an informed electorate.

With respect to the use of broadcast facilities by candidates themselves, the basic provision of the governing statute states:

If any licensee shall permit any person who is a legally qualified candidate for a public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.⁸⁵

Thus, Section 315 of the Communications Act of 1964, as amended, provides a precise standard—equal opportunity—when a candidate himself uses a broadcast facility. It also includes a ban on licensee censorship of programs broadcast pursuant to the section, and a requirement that the charges made by any station for broadcasts governed by section 315 shall not exceed the charges for comparable commercial use of the station.⁸⁶ Moreover, in an effort to prevent the equal time provision from inhibiting licensees in fulfilling their journalistic responsibilities, Congress in 1959 amended section 315 to provide that candidates' appearances on any bona fide news cast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of bona fide news events would be exempt from the equal time provision.⁸⁷ This exemption has the effect of permitting licensees to give exposure to major party candidates on these categories of programs without the necessity of providing equal opportunities to all other candidates, no matter how insubstantial their support might

⁸⁴ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959); FCC Report and Statement of Policy on Programming, 20 P&F Radio Reg. 1901 (1960).

⁸⁵ 47 U.S.C. § 315 (1964).

⁸⁶ *Id.*

⁸⁷ *Id.*

be. However, in making these exemptions, Congress expressly provided that the Commission's Fairness Doctrine would be applicable to the program covered by the exemptions.

The Commission has issued rules and regulations to carry out the provisions of section 315,⁸⁸ and has issued a series of rulings and interpretations with respect to various aspects of the section. In an effort to insure that both broadcasters and candidates are fully advised with respect to their rights and obligations in this critical field, the Commission has periodically put out a series of political broadcast primers.⁸⁹ These contain the statute, the Commission's rules, suggested complaint procedures, and digests of all significant section 315 rulings.⁹⁰

The Commission's rulings and interpretations involving section 315 have been legion, but a sampling of some of the significant actions will serve to illustrate their breadth and importance. The 1959 "news" exemptions, for example, have received considerable attention. In 1962 the Commission held that a televised debate between the two major party candidates for Governor of California, designed by them to serve their respective candidacies, was not exempt as an "on-the-spot coverage of a bona fide news event" pursuant to section 315(a)(4).⁹¹ The Commission pointed out that the bona fides of the licensee's news judgment could not be the sole criterion, since a contrary interpretation would mean that Congress, instead of adopting four limited exemptions, had in effect largely repealed the equal opportunities provision of the law.⁹²

In 1964 the Commission ruled that presidential press conferences held during campaigns cannot qualify as being within the exemption accorded bona fide news interviews⁹³ because they are not held at regular intervals but rather at the discretion of the candidates, and the scheduling, content, and format are not under the control of the

⁸⁸ 47 C.F.R. §§ 73.120 (AM), 73.290 (FM), 73.590 (non-commercial educational FM), 73.657 (TV) (1970).

⁸⁹ These are officially entitled "Use of Broadcast Facilities by Candidates for Public Office." The most recent was issued April 27, 1966, 31 Fed. Reg. 6660 (1966).

⁹⁰ It is Commission policy to encourage licensees and candidates to negotiate § 315 questions, and the Commission's primer accordingly recommends that complaints not be filed until there has been a good faith effort to settle differences. Since time is often of the essence in these disputes, the complaint procedure is designed to facilitate expeditious handling, recommending, *inter alia*, that candidates and licensees exchange copies of all documents they file with the Commission. To the author's knowledge, the Commission has never failed to make a timely ruling on a § 315 complaint.

⁹¹ Letter to CBS & NBC, 40 F.C.C. 370 (1962). (Volume 40 of the F.C.C. Reports containing hitherto unpublished materials is in the process of printing).

⁹² In a different facet of the debate situation, the Commission has held that § 315 does not require that all legally qualified candidates be included on the same debate program, if the excluded candidates are offered comparable though separate time.

⁹³ 47 U.S.C. § 315(a)(2) (1964).

station or network.⁹⁴ It further held that they did not fall within the exemption for "on-the-spot coverage of bona fide news events" for the reasons set forth in the 1962 *Letter to CBS and NBC*.

In another 1964 ruling, the Commission held that opposing candidates were not entitled to equal opportunities under section 315 when the President broadcast a report to the nation concerning Premier Khrushchev's removal from office and Red China's explosion of a nuclear device.⁹⁵ The Commission concluded that when Congress enacted section 315 it did not intend to grant equal time to all presidential candidates when the President uses the air waves in reporting to the nation on an international crisis. It found its 1956 determination in a similar situation⁹⁶ to be controlling, since that decision had been reported to Congress, which subsequently amended section 315 without altering or commenting adversely on the 1956 ruling. The Commission further held that the networks could reasonably conclude that this report on specific, current international events affecting the nation's security fell within the "on-the-spot coverage of bona fide news events" exemption.

While the Commission encourages licensees to make time available to political candidates, it has made clear that licensees should negotiate with the affected candidates to reach mutually acceptable terms.⁹⁷ In any event, a licensee cannot force a candidate to accept a certain format, such as a debate or joint appearance, by making a "take-it-or-leave-it" offer of time. A candidate is free to reject such an offer and still receive unrestricted equal time if his opponent or opponents appear. Such an offer, dictating the format of the program, runs afoul of the no-censorship provision of section 315.⁹⁸

2. Legislative Proposals

As indicated above, the 1959 amendments to section 315 exempted newscasts, news documentaries, news interviews and on-the-spot coverage of news events from the statute's equal opportunities requirement. Thus freed of the requirement to provide equal opportunity to "fringe" candidates, the broadcaster in his role as journalist is

⁹⁴ Letter to CBS, 40 F.C.C. 395 (1964). The criteria cited were those expressly set forth by Congress in defining "bona fide news interview" at the time the 1959 exemptions were enacted. H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959). See also statement of Senator Pastore, floor manager of the amending legislation, 105 Cong. Rec. 17829 (1959).

⁹⁵ Letter to Republican Nat'l Comm., 40 F.C.C. 408 (1964), aff'd per curiam, by an evenly divided court sub nom. Goldwater v. FCC, No. 18963 (D.C. Cir. Oct. 27, 1964), cert. denied, 379 U.S. 893 (1964).

⁹⁶ Telegrams to CBS, NBC & ABC, 40 F.C.C. 276 (1956).

⁹⁷ Section 315 Primer, 31 Fed. Reg. 6660 (1966).

⁹⁸ Letter to Senate Commerce Comm., 40 F.C.C. 357 (1962); cf. Letter to Hon. Robert Wilson, 40 F.C.C. 300 (1958).

enabled to make a significant contribution to an informed electorate by giving wide exposure to major party candidates.⁹⁹

However, in the equally important category of political broadcasts—where the candidate himself presents the issues completely free of supervision or interference by the broadcaster—the statutory requirement for equal opportunity to all legally qualified candidates, however insubstantial their support, has remained intact.¹⁰⁰ The Commission has concluded that some revision in section 315 is necessary in order to facilitate free time for use by the candidates themselves.¹⁰¹

Broadcasters have long claimed that section 315, in its present form, discourages affording such free time because of the necessity of then making time available to fringe candidates. While it is not clear that this equal time requirement is the sole impediment,¹⁰² the Commission strongly believes this particular obstacle can be appropriately and simply removed without any detriment to the public interest,¹⁰³ and has offered legislation to Congress to achieve this objective.¹⁰⁴ In brief, the Commission has proposed that, when free time is provided to candidates in any general election¹⁰⁵ other than non-partisan ones, the equal opportunities requirement would be applicable only to major party candidates, with fringe candidates coming under the general fairness requirement. It would define major candidates very liberally so as to include any significant candidate.¹⁰⁶ The figures included for determining major candidate status were set

⁹⁹ Examples of such coverage include the major party conventions and such network news interview programs as "Meet The Press," "Face The Nation," and "Issues and Answers."

¹⁰⁰ The only exception was the suspension of the equal opportunity provision during the 1960 general election for president and vice president, J. Res. of Aug. 24 1960, Pub. L. No. 86-677, 74 Stat. 554, which resulted in the Kennedy-Nixon debates. Efforts failed in 1964 and 1968 to enact similar suspensions, although backed by the Commission.

¹⁰¹ The sale of time is generally not inhibited by the presence of fringe candidates, since the latter seldom have funds to purchase appreciable amounts of time.

¹⁰² The Commission's biennial Surveys of Political Broadcasting (1960, 1962, 1964, 1966 & 1968) indicate that broadcasters have not generally offered more free time in senatorial and gubernatorial campaigns where there have been only 2 candidates, as compared to those where there are multiple candidates.

¹⁰³ The Commission has continued to oppose repeal of § 315, advocated by many broadcasters, on grounds that repeal is unnecessary to achieve the desired public interest objectives and that retention of the precise equal opportunity standard for other than the fringe candidates is clearly desirable.

¹⁰⁴ See Hearings on the Campaign Broadcast Reform Act of 1969 Before the Communications Subcomm. of the Senate Commerce Comm., 91st Cong., 1st Sess. 67-76 (1969) (testimony of Chairman Rosel H. Hyde).

¹⁰⁵ The proposal leaves § 315 fully applicable to primaries since the formula proposed for determining eligibility for equal opportunity is largely keyed to success in previous elections and is thus not readily applicable to primaries.

¹⁰⁶ E.g., Henry Wallace as the candidate of the Progressive Party in 1948, Strom Thurmond of the Dixiecrats in 1948, or George Wallace in the last election.

forth only as possible guidelines, namely that the candidate's party had garnered 2 percent of the vote in the state in the last election or, if the candidate represents a new party, that petitions be submitted, signed by a number of voters equalling 1 percent of the total votes cast in the last election. For a presidential or vice-presidential candidate to obtain time, he would be required to show that his party appeared on the ballot in at least 34 states in the preceding presidential election and received 2 percent of the total vote, or that the party is on the ballot in 34 states in the present election and the candidate has petitions with signatures equalling 1 percent of the vote in the last election, or that, in any particular state, he met the 2 percent or 1 percent requirements set forth first above.

In short, section 315 appears to inhibit broadcasters from affording free time, and does so without any significant practical compensating benefits. The Socialist Labor or Vegetarian candidate does not now get free time; rather, no candidate gets any free time for political broadcasts. Further, and most important, there would appear to be little, if any, public benefits from insuring such equal treatment for candidates whose public support is wholly insignificant. It is important, however, that in defining a major party candidate, numerical figures be selected designed to insure equality to any candidate who has some significant public support, regardless of what his chances of actually winning might be.

Another area attracting legislative interest involves proposals to require licensees to afford paid time to political candidates at reduced rates. Concern in this area has resulted from the continued escalation of political campaign costs in general, and political broadcast costs in particular.¹⁰⁷ The Commission's views on reduced rates for political broadcasts were presented at recent Senate hearings on two proposals: S. 2876,¹⁰⁸ and "Voters Time," as proposed in the *Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era*.¹⁰⁹

Senate 2876 would require broadcast stations to offer congressional candidates a specific amount of prime time for programs and spot announcements at reduced rates. The Commission did not support this proposal, pointing out that it was limited to congressional con-

¹⁰⁷ The Commission's Survey of Political Broadcasting for the 1968 campaign showed total costs of \$58.9 million for all political broadcasting activities as compared to a \$14.2 million total reported by the corresponding survey for the 1960 campaign. See also Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, Voters Time (1969).

¹⁰⁸ Hearings on S. 2876 Before the Subcomm. on Communications of the Senate Commerce Comm., 91st Cong., 1st Sess. (1969) (testimony of Chairman Rosel H. Hyde).

¹⁰⁹ Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, Voters Time (1969):

tests, and that licensees should have discretion to determine the particular campaigns holding greatest significance to their communities and thus warranting reduced rates.¹¹⁰ As an alternative the Commission suggested that licensees be required to offer a substantial specified amount of prime time, at a specified reduced rate, over each two-year period to candidates in those campaigns which the licensee deems to be most significant in his area.¹¹¹

Another objection to S. 2876 raised by the Commission is of particular importance. The Commission questioned whether reduced rates should be required for spot announcements, varying from 8 to 60 seconds, on the ground that such announcements could hardly be said to contribute to serious discussion of the issues and the goal of an informed electorate.¹¹² Rather, it was suggested that Congress should seek to promote longer program presentations, at least five minutes in length.

The "Voters Time" proposal would require all stations simultaneously to provide a specified amount of prime time at specified reduced rates to presidential and vice-presidential candidates. The Commission questioned the necessity for such legislation, pointing out that when broadcasters have been freed from the constraints of affording equal opportunities to fringe candidates, they have provided substantial amounts of *free* time for the major presidential candidates,¹¹³ and stand ready to do so in any future presidential campaign in which the equal opportunities provision does not apply. The Commission therefore urged that Congress enact legislation along the lines of the Commission proposal to amend section 315, discussed above, or, in lieu thereof, suspend the equal opportunities provision for the next presidential campaign.¹¹⁴ Hopefully, Congress will enact legislation similar to that suggested by the Commission. It is extremely important

¹¹⁰ The presidential campaign is, of course, always of greatest importance to all the people and requires separate treatment.

¹¹¹ Consultation would also be required among licensees, so that they could better serve their areas by taking into account each other's plans.

¹¹² There is a continuing trend towards increased use of such spot announcements. The Commission's Surveys of Political Broadcasting show that spot announcements accounted for 74.1% of political charges by stations in 1962, 81% in 1964, and 91% in 1968. More than 5 million political spot announcements were broadcast by stations in 1968.

¹¹³ Thus the Commission's Survey of Political Broadcasting shows that when the equal opportunities provision was suspended during the 1960 presidential campaign, the television networks afforded the candidates 39 hours and 22 minutes of free time, including the 4 hours for the Kennedy-Nixon debates. AM radio broadcasters provided the 1960 presidential candidates 43 hours and 14 minutes of free time.

¹¹⁴ The author concurred in the Commission's statement, but attached a separate statement supporting the "Voters Time" proposal, with one modification. He suggested that the appearances of the candidates be carried simultaneously by all the radio and television networks, leaving carriage by independent stations at such stations' option.

that every effort be made to insure that the broadcast media make the fullest possible contribution toward the vital goal of an informed electorate.¹¹⁵

D. *The Fairness Doctrine*

1. General Description

The Fairness Doctrine is based upon the public's right to be informed, and is designed to insure that conflicting views on controversial issues of public importance have access to the broadcast media. The principle underlying the Fairness Doctrine was recognized at the very outset of broadcast regulation by the Federal Radio Commission,¹¹⁶ and was fully articulated in the Communication Commission's *Report on Editorializing by Broadcast Licensees*.¹¹⁷

In the *Report on Editorializing* the Commission stated its policy that licensees have a general obligation (1) to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance, and (2) in doing so, to be fair, that is, affirmatively to endeavor to make their facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.¹¹⁸ However, the Fairness Doctrine does not apply with the precision of the "equal opportunities" requirement. Rather, under the Fairness Doctrine licensees are called upon to make reasonable, good faith judgments in each situation as to whether a controversial issue of public importance is involved, the shades of opinion to present, the format, the appropriate spokesmen, the amount of time to be afforded, and other facets of such programming.¹¹⁹ And, as noted previously,¹²⁰ the proviso added to section 315(a) when the 1959 news-type exemptions to the equal oppor-

¹¹⁵ It should be noted that congressional promotion of a noncommercial educational broadcast system can also contribute substantially to achieving this goal, since that system is available for the presentation, on a free basis, of political candidates in important campaigns. Community antenna television (CATV) systems, with their large channel capacities, can also make significant free time available for political candidates. In its recent First Report and Order in Dkt. No. 18397, 20 F.C.C.2d 201 (1969), the Commission authorized local origination of programs by all CATV systems and required such origination after January 1, 1971 by systems with 3500 or more subscribers, 47 C.F.R. § 74.1111 (1970). At the same time the Commission made the equal opportunity requirement, 47 C.F.R. § 74.1113 (1970) and the Fairness Doctrine, 47 C.F.R. § 74.1115 (1970), applicable to such local originations.

¹¹⁶ *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), rev'd, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930). See also *Chicago Fed'n of Labor*, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, 41 F.2d 422 (D.C. Cir. 1930).

¹¹⁷ 13 F.C.C. 1246 (1949).

¹¹⁸ *Id.* at 1249-52.

¹¹⁹ *Id.* at 1251.

¹²⁰ See pp. 625-26 *supra*.

tunities requirement were enacted constituted a congressional "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasting under the Communications Act of 1934."¹²¹

After the Fairness Doctrine had thus been expressly sanctioned and approved by Congress, the Commission continued to enforce and give content to the principle in individual cases. In 1964 a *Fairness Primer* was issued which was designed to enhance enforcement of the Fairness Doctrine by compiling and categorizing all previous rulings of significance and making them a matter of public record.¹²² Enforcement has always been limited, however, by the fact that the Commission has relied essentially on complaints to trigger examination of the practices of particular licensees. This has resulted in Commission rulings tending to stress the duty to broadcast conflicting views on request rather than the obligations of licensees to devote reasonable time to controversial issues and to act affirmatively to insure that both sides of issues are fairly presented.

The most significant developments concerning the Fairness Doctrine have occurred in connection with the personal attack and political editorializing issues, culminating in the recent landmark decision in *Red Lion Broadcasting Co. v. FCC*.¹²³ In the *Report on Editorializing* the Commission indicated that a personal attack on an individual or group might give rise to a more specific obligation to afford time for response to the individual or group attacked.¹²⁴ In a series of cases commencing in 1962, the Commission spelled out the personal attack doctrine, ruling that when an attack is made on an individual's or group's integrity, character, honesty, or like personal qualities, in connection with a controversial issue of public importance, the licensee must transmit a script or tape (or, where they are unavailable, an accurate summary) of the program to the person or group attacked, with a specific offer of his station's facilities for an adequate response.¹²⁵

In 1965 the Commission decided the *Red Lion Broadcasting Co.* case, holding that Red Lion had failed to comply with the personal attack doctrine.¹²⁶ In so doing, the Commission expressly rejected Red Lion's contention that it was required to provide free time for response

¹²¹ H. Rep. No. 1069, 86th Cong., 1st Sess. 5 (1959).

¹²² The full title of the Fairness Primer was "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 29 Fed. Reg. 10415 (1964). The Primer also included suggested complaint procedures and background material.

¹²³ 395 U.S. 367 (1969).

¹²⁴ 13 F.C.C. at 1252.

¹²⁵ Clayton W. Mapoles, 40 F.C.C. 510 (1962); Billings Broadcasting Co., 40 F.C.C. 518 (1962); Times-Mirror Broadcasting Co., 40 F.C.C. 531, 538 (1962).

¹²⁶ 1 F.C.C.2d 1587 (1965).

only if the person attacked was financially unable to pay for the time, holding that the paramount right of the public to be informed and elemental fairness to the person attacked could not be denied simply because sponsorship was not forthcoming.¹²⁷ The Court of Appeals for the District of Columbia affirmed the Commission's ruling, rejecting, *inter alia*, attacks on the constitutionality of the Fairness Doctrine.¹²⁸

In 1967 the Commission, after appropriate rule-making proceedings, codified the personal attack doctrine in its rules without substantive change.¹²⁹ In addition, the rules contained provisions implementing an earlier Commission decision with respect to political editorials.¹³⁰ The latter provisions require licensees who editorially endorse or oppose a candidate to notify the disfavored candidates, provide them with a script or tape of the editorial, and offer them a reasonable opportunity to respond. The Court of Appeals for the Seventh Circuit set aside both the personal attack and political editorializing rules, holding that they unreasonably restricted free speech in violation of the first amendment.¹³¹

The dispute over the constitutionality of the Fairness Doctrine and the Commission's personal attack and political editorializing rules came to an end in the Supreme Court's *Red Lion* decision.¹³² Mr. Justice White's sweeping opinion not only upheld the validity of the rules and of the order against *Red Lion*, but also appears to have laid to rest a number of other questions as to the Fairness Doctrine and, perhaps even more significantly, as to the Commission's authority to consider programming generally. Some of the most important aspects of the Court's opinion and their significance for the future, call for particular attention.

First and foremost, the Court accepted fully the view, long-held by the Commission¹³³ and long-contested by much of the industry, that in the broadcast field the first amendment protects not merely the right of the broadcaster to air what he pleases but also the "col-

¹²⁷ The Commission's ruling regarding the furnishing of free time was based on its prior decision in *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1953).

¹²⁸ *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967).

¹²⁹ Memorandum Opinion and Order, 8 F.C.C.2d 721 (1967). Sections 73.123 (AM), 73.300 (FM), 73.598 (non-commercial FM) and 73.679 (TV); 47 C.F.R. §§ 73.123, 73.300, 73.598 & 73.679 (1970). The rules have been twice amended, first to exempt bona fide newscasts and on-the-spot coverage of bona fide news events from the ambit of the rule, Memorandum Opinion and Order, 9 F.C.C.2d 539 (1967), and, second, to exempt bona fide news interviews and commentary or analysis in the course of bona fide newscasts, Memorandum Opinion and Order, 12 F.C.C.2d 250 (1968).

¹³⁰ *Times-Mirror Broadcasting Co.*, 40 F.C.C. 531, 538 (1962).

¹³¹ *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968).

¹³² 395 U.S. 367 (1969).

¹³³ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

lective right" of the public to "an uninhibited market place of ideas."¹³⁴ Consonant with this view, the Court found that the Fairness Doctrine and the rules "enhance rather than abridge the freedoms of speech and press protected by the First Amendment."¹³⁵ The Court emphasized the continuing "two-fold duty" that licensees "must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views."¹³⁶

The Court went on to describe the obligations of a broadcaster in attaining fairness:

This must be done at the broadcaster's own expense if sponsorship is unavailable. . . . Moreover, *the duty must be met by programming obtained at the licensee's own initiative if available from no other source.*¹³⁷ [Emphasis added.]

The Court not only rejected as speculative the contention that the rules would inhibit coverage of controversial issues and force broadcasters into self-censorship, but stated that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues."¹³⁸ This is a plain and resounding declaration of the public's right of access to the broadcast media. Moreover, it would seem that the obligation of licensees to give "suitable time and attention"¹³⁹ to matters of general concern applies not just to the typical "controversial issues of public importance." As "proxies" or "fiduciaries" for the entire community,¹⁴⁰ broadcasters would appear subject to a wide range of program obligations. Thus the responsibilities outlined by the Commission in the 1960 *Report and Statement of Policy on Programming*,¹⁴¹ and the underlying rationale of that policy find support in

¹³⁴ 395 U.S. at 390.

¹³⁵ Id. at 375. Indeed, the Court seems to have pointed up the constitutional necessity for the Fairness Doctrine in the broadcast field: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C." Id. at 390.

¹³⁶ Id. at 377.

¹³⁷ Id. at 377-78 (citations omitted). In the underscored statement the Court appears to go beyond the Commission decisions cited, which are based on the language in the Report on Editorializing that licensees have "an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues" and must play "a conscious and positive role in bringing about balanced presentation of the opposing viewpoint." 13 F.C.C. at 1251. The Court states the obligation in terms not of the licensee's efforts but of the result of those efforts and would require the licensee to seek out and obtain opposing views.

¹³⁸ 395 U.S. at 393.

¹³⁹ Id. at 394.

¹⁴⁰ Id. 389.

¹⁴¹ 20 P&F Radio Reg. 1901 (1960).

the *Red Lion* opinion. Furthermore, the opinion constitutes ample legal authority for the Commission, pursuant to Sections 303(b), 303(r), 4(i), 307 and 309 of the Communications Act,¹⁴² to specify minimum percentages of time to be devoted to various programming categories, provided a reasonable public interest basis is demonstrated for the specification. Under *United States v. Storer Broadcasting Co.*¹⁴³ and *FCC v. American Broadcasting Co.*,¹⁴⁴ and the above cited sections, the Commission can prescribe by rule what constitutes "adequate" attention to public issues to obtain a permit grant or renewal. Furthermore, there would appear to be no reason why the Commission's authority to act would be restricted to the single category of public issues, particularly in view of the Court's statement upholding the Commission "in interesting itself in general program format and the kinds of programs broadcast by licensees."¹⁴⁵ Such authority would thus seem to extend to other program categories, if the requirements specified were reasonably related to the public interest. Whether it is wise or feasible to attempt the formulation of more standards is a policy question for the Commission to decide, but, in light of *Red Lion*, arguments against such a course based on first amendment grounds would seem to have little validity, provided there is a reasonable public interest basis for any requirements imposed.

The *Red Lion* decision does not, of course, resolve all questions concerning programming in general, or the Fairness Doctrine in particular. However, by firmly disposing of many of the challenges advanced over the years concerning Commission authority, it provided the Commission with a sound legal base from which to consider what further action is required in these areas to insure that broadcasters are fully serving the public interest.

2. Cigarette Advertising

The 1960s saw one novel application of the Fairness Doctrine. In a letter to WCBS-TV, New York, dated June 2, 1967, the Commission ruled that the Fairness Doctrine was applicable to cigarette advertising.¹⁴⁶ The Commission based this ruling on the view that cigarette smoking, however pleasurable, may be a hazard to the smoker's health and as such is a controversial issue of public

¹⁴² 47 U.S.C. §§ 303(b), 303(r), 4(i), 307, 309 (1964).

¹⁴³ 351 U.S. 192 (1956).

¹⁴⁴ 347 U.S. 284, 289-90 n.7 (1954).

¹⁴⁵ 395 U.S. at 395, citing *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹⁴⁶ 8 F.C.C.2d 381 (1967).

importance which, under the Fairness Doctrine, requires the provision by the broadcaster of a significant amount of time to the other side.

Petitions to reconsider and rescind that ruling were filed by the major networks, the National Association of Broadcasters, the Tobacco Institute, broadcast organizations, and an advertising trade association. Among the arguments set forth against the ruling were: (1) the Fairness Doctrine violates the first and fifth amendments and therefore cannot serve as a basis for delineation of licensee responsibilities under the Communications Act; (2) even if the Fairness Doctrine is constitutional, it can apply only to programming in the nature of news, commentary on public issues, or editorial opinion, and does not extend to advertising; and (3) the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to congressional policy.

On September 8, 1967, the Commission issued a *Memorandum Opinion and Order* denying reconsideration.¹⁴⁷ It rejected the contentions based on the Constitution, and also the arguments that the ruling was outside the scope of the Fairness Doctrine, saying in part:

The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest, which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy."¹⁴⁸

The Commission recognized advertising as being within the public interest responsibilities of a licensee,¹⁴⁹ stating:

The licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by Congress and Government reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time . . .¹⁵⁰

¹⁴⁷ Television Station WCBS-TV, 9 F.C.C.2d 921 (1967).

¹⁴⁸ *Id.* at 925.

¹⁴⁹ See *Head v. Board of Examiners*, 374 U.S. 424, 437-41 (1963) (Brennan, J., concurring).

¹⁵⁰ 9 F.C.C.2d at 927.

Responding to the congressional preemption argument, the Commission stated that the ruling was within the legislative policy of the Cigarette Labeling Act¹⁵¹ since it did not require a health warning in or adjacent to the advertisement of cigarettes, nor prevent or curtail stations from carrying cigarette advertising.¹⁵² The Commission also held that, even beyond the requirements of the Fairness Doctrine, there was a duty to inform the public of an important issue of public health. The Commission left to the licensee the nature of the programming to be presented and the time to be devoted to it. It also limited its ruling to cigarette advertising. Only in this area have there been accumulating governmental and private reports and congressional action, and these reports and this action asserted, in common, that normal use of this product can be a hazard to the health of millions of persons. The Commission believes this distinguishes cigarettes from other products which may have mildly undesirable consequences, or which produce bad results only when misused. The Commission's rulings were sustained by the Court of Appeals for the District of Columbia in *Banzhaf v. FCC*.¹⁵³

3. News Distortion or "Staging"

In recent months television as a mass news medium has become the object of much critical scrutiny. This has been engendered largely as a result of charges of news "staging." News staging charges were first considered in connection with the networks' coverage of the 1968 Democratic National Convention in Chicago.¹⁵⁴ Among the claims advanced regarding the networks' coverage were contentions that some of the events covered did not occur spontaneously, but were "acted out" at the direction of television news personnel.¹⁵⁵ In dealing with these charges the Commission sought to distinguish two classes of cases. On the one hand, the conduct of people with whom television comes in contact may be affected by the presence of the cameras, lights, and other gear the medium requires. This can be true of a

¹⁵¹ Cigarette Labeling Act of 1965, 15 U.S.C. § 1331 et seq. (Supp. I, 1966).

¹⁵² But see Notice of Proposed Rule-making, Dkt. No. 18434, FCC 69-95, adopted February 5, 1969 which proposed to ban the broadcast of cigarette commercials by radio and television stations. The proceeding was terminated on April 15, 1970, because Congress had enacted Public Law 91-222, banning the broadcast of cigarette advertising after January 1, 1971.

¹⁵³ 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 395 U.S. 973 (1969).

¹⁵⁴ Letter to ABC, 16 F.C.C.2d 650 (1969).

¹⁵⁵ Other allegations concerned violations of the Fairness Doctrine with respect to coverage of opposition to the war in Vietnam, biased coverage of alleged "brutality" of the Chicago police, and the spreading of rumors concerning the possibility of a draft of Senator Edward Kennedy. With respect to the fairness allegations, the Commission found "no substantial basis for concluding that the networks failed to afford 'reasonable opportunity for presentation of contrasting viewpoints' on the issues at the Chicago convention, such as the Vietnam War and the civil disorders which occurred there." Id. at 658.

press conference, a demonstration, or a scene in a television documentary since television's accompanying lights, cameras, and action instructions, can, to some extent, modify the "message". On the other hand, there are the quite different cases where news personnel deliberately represent an event to have occurred when, in fact, what the viewer is shown is a playlet. This latter type of staging is not within the area of a licensee's journalistic judgment which the Commission traditionally declines to review, but rather amounts to a fraud upon the public and is inconsistent with the licensee's obligations to operate his facilities in the public interest.¹⁵⁶

While the Commission considers news staging, distortion, or deliberate slanting as beyond the pale of protected freedom of the press, a difficult problem was presented when the Commission undertook to articulate its standard for initiation of review of such matters. On the one hand, the public has a constitutionally protected right to be fairly informed,¹⁵⁷ and broadcast licensees have a concomitant obligation to inform as accurately as possible. On the other hand, constant governmental interference, or threat of interference, with the broadcaster's journalistic function would both invade his first amendment freedoms and act as a deterrent to the innovative, energetic news gathering and presentation which would best serve the public.

In the *Letter to ABC*,¹⁵⁸ the Commission adopted the following standard for future Commission inquiry or investigation in the sensitive area of news coverage: Commission action will not be deemed appropriate unless there is material indication, in the form of extrinsic evidence, that a news event has been staged. In adopting this criterion, the Commission cautioned licensees that, while licenses would not be placed in jeopardy for isolated errors, a licensee is "responsible for the integrity of news operations and must clearly inform its employees of its policy against staging news events and be diligent in taking appropriate steps, either prophylactic or remedial, to implement that policy."¹⁵⁹

Since the issuance of the *Letter to ABC*, the Commission has considered similar problems of news coverage in different contexts. In May, 1969, the Commission issued a report concerning the results of its investigation of two telecasts of a marijuana party by WBBM-TV,

¹⁵⁶ Although the charges of news staging by television personnel are of recent vintage, the Commission has previously held that news slanting is a fraud on the public. *KMPC, Station of the Stars, Inc.*, FCC 49-1021 (1949); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254-55 (1949).

¹⁵⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁵⁸ 16 F.C.C.2d 650 (1969).

¹⁵⁹ *Id.* at 657.

a CBS owned and operated station in Chicago.¹⁶⁰ The Commission found that a young reporter employed by the station had induced experienced marijuana smokers to hold a "pot party" for the purpose of filming it for television broadcast. In this case, the management of WBBM-TV was not shown to have been aware of the staged nature of the event. However, the Commission found that the supervision and control exercised over a young employee were insufficient and ordered CBS promptly to set forth appropriate guidelines (including supervisory responsibilities) for its personnel concerning investigative journalism.

While broadcast journalism is entitled to the same first amendment protection as the print media, the broadcast licensee has the additional obligation of operating in the public interest. Under this public interest standard, a Commission licensee is precluded from encouraging or inducing the commission of a crime. But beyond that injunction, in the *WBBM-TV* "pot party" report, the Commission sought to distinguish between those situations where the news personnel may proceed with a journalistic investigation and those where the police must first be notified. The licensee may cover a violation of law without first notifying the police when the journalist holds up a mirror to the flouting of a particular law, for example, "The Biography of a Bookie Joint,"¹⁶¹ an expose on the numbers racket, or showing widespread violations of prohibition in certain states. However, when the investigative or documentary subject involves violence which endangers a person's life or safety or someone's significant property interest, the broadcaster's first obligation is to notify the appropriate authorities. Thus, in the case of the "pot party" the subject did not involve a significant danger to life or property and, under the Commission's criteria, would have constituted an appropriate subject for investigative reporting, absent the impermissible acts of inducement. Again, as in its opinion dealing with the charges growing out of the Democratic National Convention, the Commission emphasized that licensees have the responsibility of setting forth written guidelines for their employees regarding investigative journalism and of establishing procedures for supervising and implementing such policies.

The Commission's recognition of the care which must be exercised whenever a governmental agency seeks to oversee any aspect of the news function was further illustrated in the disposition of complaints against CBS's documentary "Hunger in America"¹⁶² and

¹⁶⁰ Inquiry into WBBM-TV's Broadcast on Nov. 1 & 2, 1967, of a Report on a Marijuana Party, 18 F.C.C.2d 124 (1969).

¹⁶¹ FCC 62-779 (1963).

¹⁶² "Hunger in America." FCC 69-1135 (Oct. 17, 1969).

that network's coverage of the Poor People's Campaign of 1968.¹⁶³ In these cases the Commission further refined its policies. In considering the assertions that CBS's "Hunger in America," which included a sequence involving a newborn infant who was described as dying of starvation, contained errors of fact and, specifically, that the death of the infant shown was due to complications of prematurity, the Commission reiterated the position it had previously expressed in the *Letter to ABC* that "we do not consider it appropriate to enter the area [of news coverage] where the charge is not based upon extrinsic evidence but rather on a dispute as to the 'truth' of the event (i.e., a claim that the true facts of the incident are different from those presented). The Commission is not the national arbiter of the 'truth'."¹⁶⁴ The Commission made clear that it would not hold up renewals unless there was extrinsic evidence of deliberate distortion by the licensee or its top management, and that improper action by newsmen would be inquired into where there is extrinsic evidence of bribery or "indication of extrinsic evidence readily establishing whether or not there has been a rigging of news (for example, an out-take or a written memorandum)," but that improper actions by newsmen without the knowledge of the licensee would not ordinarily raise an issue of qualification where the licensee is adequately supervising its employees.

In balancing the obligations imposed on the broadcaster to implement the public's right to be fully and fairly informed as against the traditional freedom of the journalist from review by the government, the Commission has concluded that to protect the journalist from governmental interference is, in the final analysis, to protect the public's right to be fully informed. In a democracy, no government agency can authenticate the news, or should try to do so. The Commission has therefore eschewed the censor's role, including efforts to prove news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself.

The Commission maintained this position in the face of the public complaints which were received in the wake of Vice President Agnew's speeches in Des Moines and Montgomery in the fall of 1969.¹⁶⁵ While some of the Vice President's criticisms of the media were valid, many of his comments seemed based on errors of fact. In any event, his speeches and the response thereto illustrate the dangers of injecting governmental power into the sensitive area of the performance of the free press. This is especially true as to the broadcast

¹⁶³ Letter to CBS, adopted by the Commission on Oct. 31, 1969.

¹⁶⁴ *Hunger in America*, FCC 69-1135 (Oct. 17, 1969).

¹⁶⁵ Letter to Mr. J.R. Paul, FCC Mimeo No. 41437, Nov. 20, 1969.

media which, because of their licensed status, may since have held back, consciously or unconsciously, in commenting on news developments affecting the interests of the Nixon Administration.

In opting against the censor's role, the Commission has relied heavily upon the Fairness Doctrine, which is fully applicable to news presentations, to assure that the public's right to full information will be protected. The balanced approach of the Commission can only be maintained if the critics of the media, the academic community, and the public continually exercise their private rights of review of the journalist, and if the broadcaster remains responsive to legitimate criticism and vigilantly protects the integrity of his news operation.

E. Commercial Policy

1. Excessive Commercialization

Concerned with excessive commercialization by broadcast stations, the Commission initiated a proceeding in May, 1963, to limit by rule the amount of time which may be devoted to commercials. The radio and television codes of the National Association of Broadcasters (NAB) were used as a basis for the proposed rules. The NAB codes specified limitations of commercial minutes in a single hour, for example, in radio, 18 minutes in any single hour.¹⁶⁶ This notice of rule-making evoked a very strong response from broadcasters, and an expression of concern from Congress,¹⁶⁷ questioning the wisdom of setting precise numerical standards on commercials by rule. Following oral argument before the Commission, the proceeding was terminated without the adoption of rules. The Commission emphasized, however, that it would continue to give close attention to excessive commercialization by stations on a case by case basis, and would take whatever steps were necessary to prevent abuses.¹⁶⁸

The next step taken by the Commission on an industry-wide basis was its October, 1966 inquiry into proposed commercial practices.¹⁶⁹ Licensees were requested to state the maximum amount of commercial matter they would allow in any 60-minute program segment. Where normal maximums exceeded 18 minutes for AM or FM stations, or 16 minutes for television, the licensee was requested to "state the basis on which licensee concluded that such proposed commercial practices will be consonant with the needs and interests of the

¹⁶⁶ 29 FCC Ann. Rep. 62 (1963).

¹⁶⁷ The House of Representatives actually passed a bill which would have barred the Commission from fixing time limits for commercials by rule. However, the Senate never held hearings on the legislation, perhaps because the Commission abandoned its proposal, as noted below.

¹⁶⁸ 36 F.C.C. 45 (1964).

¹⁶⁹ FCC Pub. Not. 66-923 (Oct. 24, 1966).

community which the licensee serves."¹⁷⁰ The Commission noted that the 18 and 16 minute bench marks were in accordance with the generally accepted industry standards as expressed by the NAB codes, and stated: "The Commission gives great weight to such industry judgments, without denying the right of each broadcaster to make his own different judgment on any reasonable basis in terms of his particular situation."¹⁷¹

Subsequently filed renewal applications reflecting a proposed normal maximum ceiling of 20 minutes on commercial matter were granted with the requirement that at the end of an 18-month period a report be filed containing information on complaints received by the stations concerning commercial practices, the total number of hours exceeding 18 minutes of commercial time, the total commercial time in each such hour, a general statement of the reasons therefor, and, finally, a statement of station commercial policy, including the steps taken to determine that such policy was consistent with the needs and interests of the community and with the public interest. The Commission advised each of these applicants that the reporting requirement was being imposed because "the statement supporting your policy raises a doubt as to whether it was in fact developed in terms of service to your community."¹⁷² Similar reporting requirements were placed on other stations where normal maximum ceilings of over 18 minutes were found to be based on doubtful public interest justifications.

The Commission recently considered a group of the 18-month reports submitted in accordance with the above procedures. It instructed the staff to write letters to four categories of respondents, spelling out its policies with respect to commercial levels as follows:

- (a) Those with pending applications for renewal of license who exceeded 18 minutes of commercial content in over 10 percent of their total hours of operation and who had not modified their commercial policies, either in the report itself or in the pending renewal of license application, to specify a normal ceiling of 18 minutes of commercial matter per hour which would not be exceeded more than approximately 10 percent of the total weekly operating schedule were given a final opportunity to amend their application.
- (b) Those without pending applications for renewal of license who exceeded 18 minutes of commercial content

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 9 P&F Radio Reg. 2d 639 (1967).

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in over 10 percent of the total hours of operation and who had not modified their commercial policies in the report, to specify a normal ceiling of 18 minutes of commercial matter per hour which would not be exceeded more than approximately 10 percent of the total weekly operating schedule were advised that the commission could not conclude that this had been justified and were put on notice that unless they revised their commercial policy or provided additional support for it, their next renewal application might be set for hearing.

- (c) Those without pending applications for renewal of license, who exceeded 18 minutes of commercial content in over 10 percent of the total hours of operation but who have modified their commercial policy to specify a normal ceiling of 18 minutes of commercial matter per hour which will not be exceeded more than approximately 10 percent of the total weekly operating schedule were advised that this had obviated any problem with the commercial aspects of their operations.
- (d) Those without pending applications for renewal of license who have a stated policy involving a normal hourly ceiling in excess of 18 minutes of commercial matter but who did not exceed this latter norm during the total hours of operation involved in the reporting period were advised that the Commission contemplated no further action, but that this was not to be construed as approval of the stated policy.¹⁷³

2. Policy on Loud Commercials

After over two years of study, the Commission, in July, 1965, issued a statement of policy concerning loud commercials. It set forth station practices which contribute to objectionable loudness in television and radio commercial announcements, and made explicit the obligation of licensees to minimize or avoid them by adequate control room procedures and by previewing pre-recorded commercials before broadcast use. It stated that licensees are also expected to take reasonable steps to enlist the recording industry's cooperation. Practices causing loudness in commercials are excessive modulation, excessive use of volume compression, presentation of voice commercials in a rapid-fire, loud and strident manner, and presentation of commercials at modulation levels much higher than adjacent program

¹⁷³ See FCC Rep. No. 8842 (Feb. 13, 1970).

content.¹⁷⁴ The industry appears to have responded to this policy statement, but the Commission still receives complaints concerning commercials which create a subjective impression of excessive loudness. Broadcast engineers are trying to develop more sensitive instruments for dealing with the problem.

3. Miscellaneous Issues as to Commercials

The very special problem of the content of cigarette commercials has been considered above in the section on the Fairness Doctrine. Broadcast licensees are responsible for the content of all commercials. Questions of false or deceptive advertising are primarily within the jurisdiction of the Federal Trade Commission. During the 1960s the FCC established liaison with the FTC on such matters. One of the results has been improved efforts to advise broadcasters of the identity of advertisers against whom the FTC has brought proceedings.

Just as the decade ended, NBC and CBS advised their affiliates of certain increases in commercial levels in the prime time and late night periods, in part to offset increased charges for program transmission imposed by the Bell System. These were objected to by Westinghouse Broadcasting Company, despite the fact they would have increased its revenues, because it felt such actions aggravated the trend toward greater program interruption and increased clutter of non-program elements. The Commission held an informal conference on the matter in early 1970.

F. *Networks and Programming*

1. CBS Compensation Plan

In 1961 CBS put into effect a new affiliate compensation plan under which the amount of money a station received for carrying each unit of CBS programming varied sharply with the total number of CBS programs carried. In 1962 the Commission held that this plan violated the Commission's network rules in that it tended to restrain affiliates from carrying the programs of other networks and placed monetary pressure on the affiliates to carry the full line of CBS network programs. The compensation plan achieved this goal by making the carriage of CBS programs comparatively less profitable unless the affiliate took all, or practically all, of the network's programs. CBS submitted a revised plan which was also found to be in violation of the network rules. A subsequent court test by CBS was dismissed and the compensation plan was abandoned.¹⁷⁵

¹⁷⁴ 32 FCC Ann. Rep. 92-93 (1966).

¹⁷⁵ 30 FCC Ann. Rep. 72 (1964).

2. Option Time

In September, 1960, the Commission amended its television option time rules and reduced from 3 to 2½ hours the amount of time an affiliate station could option to a network in each time segment of the broadcast day. While this decision was on appeal, the Commission requested and obtained a remand for further proceedings. On remand the Commission vacated its 1960 action and held further rule-making proceedings. After a study of the expanded record, the Commission in May, 1963, concluded that option time is not essential to successful TV network operation, that it restrains licensees' freedom of choice as to what programs to present and when to present them, and restricts access by non-network groups to desirable evening time on the most popular stations. A rule was adopted prohibiting this and any other practice having a like restraining effect on television programming.¹⁷⁶ This action complemented the Commission's action in the late 1950s, obtaining abandonment of the networks' must-buy policies, under which CBS and NBC had required advertisers to order a specified minimum list of stations. Both of these practices were involved in the hearings the author conducted for the Senate Commerce Committee in 1956. However, the economics of networking have changed to such a degree that the elimination of option time and the must-buy list have had relatively little impact.

3. Network Control of TV Programs

In a study of the television industry begun in 1959, the Commission has examined network TV program procurement policies and practices and their effect upon the program service the public receives. This involved the option time practice, but went well beyond it. Among other things, it dealt with charges that the networks insist on financial participation in programs as a condition of acceptance for network use, as well as the statistical facts that the networks' domination of the programs in their schedules has increased in recent years and that the syndication of new programming has virtually come to a standstill. This means that three tightly knit groups not only control the programming carried by the networks but thereby control the programming going into syndication for use in non-network periods and on independent stations.

To meet the problem of possible undue concentration of control over programming in the hands of the three networks, the Commission, in March, 1965, proposed adoption of rules to lessen network domination of TV programming and to promote increased independent production of programming. The proposed rules would limit network

¹⁷⁶ 29 FCC Ann. Rep. 71 (1963).

proprietary rights in programs produced by others, bar networks from domestic or foreign syndication of programs not wholly network produced, and allow no more than 50 percent of prime time (6:00 to 11:00 p.m.) on a station to be filled with network-produced or network-owned programs.¹⁷⁷ In an order of September 20, 1968, inviting further comments and setting oral argument, the Commission also invited comment on a proposal by Westinghouse Broadcasting Company, to adopt a rule which would prohibit stations in the top 50 markets from presenting more than 3 hours of prime time programming per day from any one network (excepting news, public affairs, and similar programs). Oral argument on the proposed network program rules was held in the summer of 1969 and the matter is now pending decision by the Commission. If the Commission acts favorably on either of these proposals, a broader market will be opened for programming in the production of which the networks will have had no part.

4. ABC's New Radio Network Plan

In December, 1967, the Commission approved the American Broadcasting Company's new multiple network proposal for radio, whereby ABC originated four different network program services, instead of one, for separate lists of affiliates. The Commission concluded that ABC's new approach to radio network programming merited encouragement and did not violate the network rules, since the programming of the separate networks was not carried simultaneously by separate ABC affiliates in the same market.¹⁷⁸ On request for reconsideration of its ruling filed by the Mutual Broadcasting System, the Commission held that ABC must limit affiliations in smaller markets to no more than 1 or 2 in 3 or 4 station markets, and no more than 2 in a 5 station market. ABC was requested, in addition, to tighten its control to prevent simultaneous broadcast of programs resulting from their carriage by some affiliates on a delayed basis. In April, 1970, the Commission waived the restriction on affiliation in a number of markets where it appeared that network competition was not being impaired and no undesirable concentration of outlets for news and opinion would result.

G. Comparative Cases

1. Policy Statement on Comparative Cases—The WHDH Decision

On July 28, 1965, the Commission issued a policy statement on comparative broadcast hearings designed to expedite cases and to

¹⁷⁷ 33 FCC Ann. Rep. 43 (1967).

¹⁷⁸ 11 F.C.C.2d 163 (1967), 17 F.C.C.2d 508 (1969).

clarify Commission policy on comparative criteria. The Commission stated that diversification of control over mass media was to be a primary factor in comparative hearings. Fulltime participation in station operation by owners and local residence by owners were to be given substantial weight. Past broadcast records of applicants were to be considered only if notably good or notably poor. Previous broadcasting experience as such was to be a factor of minor significance inasmuch as the entry of newcomers into broadcasting would be discouraged by a contrary policy. Character questions involving matters not requiring disqualification issues would be considered only if a specific issue were included. Except where significant differences are revealed, programming plans and policies would not be considered.¹⁷⁹

The *WHDH* decision of January 22, 1969,¹⁸⁰ has been discussed above in the section on renewal policy.¹⁸¹ The Commission favored a new applicant over the existing television licensee, *WHDH, Inc.*, and over two other new applicants. Channel 5 had been occupied by *WHDH* since its original grant in 1957, but the channel had been the subject of continuing litigation ever since. In 1962 the Commission affirmed the 1957 grant, but issued only a 4-month license. *WHDH* and the losing applicant in the original hearing both appealed. When *WHDH* applied for renewal, three competing applications were also filed, so that all were designated for comparative hearings.

In its decision the Commission determined that one of the new applicants should be preferred over *WHDH* on grounds of diversification of media and integration of ownership and management. *WHDH* is the licensee of *WHDH-AM* and *FM* in Boston, and is owned by the Boston Herald Traveler which then published two dailies and a Sunday newspaper in the city. *WHDH* was also assessed a comparative demerit for an unauthorized transfer of control.¹⁸² As indicated above, the Commission regards the *WHDH* case as unique and has specified different policies to apply generally in comparative renewal cases.

2. Suburban Community Policy

Reacting to attempts by applicants to serve large cities from locations in suburban communities, the Commission in December, 1965, issued a policy statement providing that, unless proven otherwise, it would be presumed that when the signal from a proposed station (its 5 mv/m contour) penetrates a city of at least 50,000

¹⁷⁹ 1 F.C.C.2d 393 (1965).

¹⁸⁰ 16 F.C.C.2d 1 (1969).

¹⁸¹ See pp. 618-20 *supra*.

¹⁸² 16 F.C.C.2d 1 (1969).

population, which is at least twice as large as the suburban community specified in the application, the intent is to serve the larger city. The policy is designed to discourage proposals which would eventuate into substandard central city stations to the detriment of suburban communities which could make legitimate use of a first local transmission service.¹⁸³ In a very real sense, therefore, this is an addition to the Commission's policies governing the allocation of AM frequencies.

H. *Educational Broadcasting—CPB—ITFS*

The past decade was marked by the emergence of educational broadcasting as a significant part of American communications. Although the FCC first reserved educational television channels in 1952, at the beginning of 1960 only 44 ETV stations were on the air. However, the passage of the Educational Television Facilities Act of 1962,¹⁸⁴ making available matching grants for station facilities, and the Public Broadcasting Act of 1967,¹⁸⁵ extending facilities funding and setting up the Corporation for Public Broadcasting (CPB) provided educational broadcasting with special impetus. At the beginning of 1970, 180 ETV stations were on the air. The Corporation for Public Broadcasting had been involved in establishing live interconnection among ETV stations, an action brought about on an interim basis through the good offices of the FCC, and still being pursued. CPB had also set up a system for providing program grants to individual television and radio stations, and had worked out plans for an educational network distribution system.

Educational radio stations had been the leaders in the early development of that medium. By 1941, however, when the FCC reserved FM frequency space for educational purposes, only a handful of educational AM stations remained. The growth of FM after 1941 was rapid, and in less than 20 years, at the beginning of 1960, 159 educational FM stations were in operation. The 1960s saw an even greater rate of growth and by the beginning of 1970 more than 400 educational FM stations were on the air. For some years past, the Commission has been engaged in a rule-making proceeding looking toward revision of the educational FM allocations in order to get greater use out of the available channels.

A new service, the Instructional Television Fixed Service (ITFS), was authorized by the FCC in 1963, providing point-to-point transmission for formal educational purposes only. In the next few years there was immediate saturation in some cities, with all available

¹⁸³ 2 F.C.C.2d 190 (1965); 2 F.C.C.2d 866 (1966).

¹⁸⁴ 47 U.S.C. § 390 et seq. (1964).

¹⁸⁵ 47 U.S.C. § 390 et seq., as amended, (Supp. III, 1968).

channels gone and many students deprived of the service. In order to prevent such preemption, the FCC established a national Committee for the Full Development of the ITFS, with subcommittees in individual cities to plan cooperative and efficient use of the available channels. This has resulted in effective reservation of frequencies for all students in a given area. Even with this slow-planning growth to serve the broader public interest, ITFS has grown rapidly. Without any direct federal funding, by the beginning of 1970 there were about 100 systems with about 300 channels on the air, with approximately 60 systems and 200 channels authorized, also doubling the figures of the previous year. Recently the Commission authorized experienced two-way transmission on these frequencies in order to enhance their usefulness.

I. *Pay Television*

1. Early History

Just as educational television has been looked to as a source of programming substantially different from that offered by our commercial system, pay TV or subscription television also has been urged as providing the potential for program diversity. In the early years of television, Commander Eugene MacDonald, the president of Zenith Radio Corporation, became convinced that the costs of programming for television would be too great to be borne by advertisers. He therefore initiated experimentation with methods for scrambling a television signal in such a way that the public could receive the broadcasts only by renting a decoding device and entering into arrangements to compensate the station for each program they chose to view. Others became interested in this prospect, notably Skiatron Electronics and Television Company and International Telemeter Corporation, a subsidiary of Paramount Pictures Corporation. Tests were run in Chicago, Palm Springs, and elsewhere, and it was soon established that such operations were technically feasible.

The proponents of subscription television argued that while advertiser-supported television had to aim for the mass audience in order to offer the sponsor a low cost per home reached, a subscription service could program for diverse audiences of varying size simply by adjusting the charges for the different programs offered. They said they would offer sports events, plays, operas, motion pictures, lectures and other educational programs, and a variety of other services, contending that these were all of box-office character, the kind of things the public was accustomed to pay to see. All of this was to be offered without interruption for commercials.

In 1955 the Commission instituted an inquiry into the possibilities

of pay television in a Notice of Proposed Rule Making.¹⁸⁶ It attracted wide comment from the public, as well as from the parties having an economic interest in the outcome. Support for the concept came from those who had developed technical systems for providing such a service, from performers and others interested in the possibilities for additional programming, and from cultural groups and individual members of the public who felt that commercial television was not fully serving their needs. However, the networks and individual stations opposed authorization of a subscription service, contending that it was undesirable and unnecessary to use scarce frequencies to provide such specialized programming, and that pay television would accumulate such enormous sums that it could siphon off the most popular programs from free television, with the result that the people would be required to pay for what they had been getting free—or go without. This position was supported by certain large organizations, such as the AFL-CIO, various farm groups, and veterans' organizations, because they feared their members would, indeed, be forced to pay for programming they had been enjoying without any direct charge. But by far the strongest and most persistent opposition came from the organized theater owners who feared that this new type of programming would compete not only for the attention of the public, but for its entertainment dollars as well, to the financial detriment of the theaters.

2. Early Congressional Involvement

One of the author's assignments when he joined the staff of the Senate Commerce Committee in January 1956 was to conduct hearings on subscription television. These were held in April, 1956, and resulted in the compilation of a very complete and compact record on the matter.¹⁸⁷ About a year later, with the assistance of Nicholas Zapple, then, as now, the very able communications counsel to the Committee, the author submitted a report for adoption by the Committee. It called for controlled tests of the various proposed systems in a number of markets and specified the conditions under which they should be conducted. However, the Committee found the issue a very controversial one and chose not to adopt the proposed report.¹⁸⁸ Instead, they advised the FCC that they expected it to resolve the matter as promptly as possible.

¹⁸⁶ 20 Fed. Reg. 988 (1955).

¹⁸⁷ Television Inquiry, Hearings Before the Senate Comm. on Interstate and Foreign Commerce, 84th Cong., 2d Sess., pt. III (1956).

¹⁸⁸ Portions of it found their way into the trade press. See, e.g., 52 *Broadcasting Telecasting*, Feb. 18, 1957, at 27.

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When the Commission did begin to move ahead,¹⁸⁹ it ran into trouble with the House Committee on Interstate and Foreign Commerce. Chairman Oren Harris and certain members of that Committee expressed concern about the Commission's plans. The Commission, in 1958, issued a *Second Report* which announced that applications for trial subscription operations would not be processed until after the adjournment of the 85th Congress because of the interest and activity of that Congress with regard to the issue.

3. The Log Jam Is Broken

In early 1959, Chairman Harris apparently indicated that his Committee would no longer object to a carefully designed test of subscription television. The Commission issued its *Third Report*,¹⁹⁰ spelling out the terms for such a test, including the proviso that each system could be tested in but one market, which complicated the problems of getting programming and sharply limited the data ultimately derived. Zenith and RKO General promptly sought authorization for a test over the latter's station in Hartford, Connecticut. Teleglobe applied for permission to test its system on an independent station in Denver, but had to modify its approach because film suppliers objected to the fact that it proposed to broadcast the video portion of the signal, distributing the audio signal by telephone lines. Before it could make the necessary changes, the owner of the Denver station cancelled Teleglobe's contract and sold its station. A third application, for Sacramento, California, was never accepted by the Commission because of technical and financial deficiencies.

However, the Hartford experiment was inaugurated. The theater owners challenged the authority of the Commission to permit such tests, but the Commission's position was sustained by the court.¹⁹¹ Meanwhile, the test in Hartford was extended from time to time at the request of the participants and to give the Commission further time to consider the matter.

4. The Commission Finally Acts

In 1965 the Commission established a committee, consisting of Commissioner Wadsworth (Chairman), Commissioner Robert E. Lee and the author to develop a proposal for final disposition of this long-pending matter. On July 3, 1967, the committee submitted a report recommending that the Commission authorize an over-the-air sub-

¹⁸⁹ The Commission issued a First Report in 1957, 23 F.C.C. 532 (1957) announcing the conditions under which operation for trial operations would be accepted.

¹⁹⁰ 26 F.C.C. 265 (1959).

¹⁹¹ Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir.), cert. denied, 371 U.S. 816 (1962).

scription television service under careful safeguards.¹⁹² This report was made public, and on October 2 and 3, 1967, the Commission held oral argument on the proposal.

On December 13, 1968, the Commission issued its *Fourth Report and Order*.¹⁹³ This followed the lines of the committee's recommendations, with minor changes. It provided that a licensee could apply for a subscription authorization only if his community will receive five over-the-air commercial signals (including his own), and that only one such operation will be permitted in a single market. It required that a subscription station must also provide free programming for at least the minimum number of hours specified in the rules. Both of these rules are designed, of course, to insure that subscription television will offer the potential of diversified programming for those willing to pay for it, but with minimum impact on the public's free service.

In order to meet the broadcasters' siphoning argument and to protect the public from having to pay for programming it has been receiving free of direct charge, the Commission's rules prohibit a subscription operator from broadcasting for pay (1) movies which have been in general release for more than two years, (2) sports events which have been carried in the market on free television during the preceding two years, and (3) program series with a continuing cast of characters, the kind of format developed for, and typical of, commercial television. In order to stimulate at least minimal efforts to offer more widely varied programming, the rules specify that a subscription operator may not devote more than 90 percent of his subscription schedule to motion pictures and sports, those being conceded to be the features upon which such a new service will primarily rely. The Commission believes that the kind of operation spelled out in its rules will allow the proponents of subscription television to try to develop a supplemental, diversified program service for those who want something more than is offered by the commercial service. At the same time, the Commission believes the restrictions it has imposed will prevent serious injury to the commercial broadcasters or the public they serve.

5. Further Action by Congress and the Courts

As indicated above, the House Committee on Interstate and Foreign Commerce had seemingly given clearance for the testing and eventual disposition of the proposals for subscription television service. However, when the work of the three man committee was reported

¹⁹² 10 P&F Radio Reg. 2d 1617 (1967).

¹⁹³ 15 F.C.C.2d 466 (1968).

to the House Committee in March, 1967, during general hearings on regulatory agencies under jurisdiction of the Committee, Chairman Harley Staggers expressed strong opposition to this development.¹⁹⁴ The Committee held hearings in 1967 and adopted a resolution requesting the Commission to defer action on the matter for a year in order to permit further congressional consideration. The Commission complied, but no further hearings were held by Congress. Shortly before the expiration of the year specified in the Committee resolution, Chairman Hyde wrote to Chairman Staggers indicating that the Commission felt obliged to dispose of the matter at long last, but that there would be an interval before applications could be received and acted on, during which Congress and the courts could consider any action the Commission might take. Shortly thereafter the house committee adopted another resolution requesting further deferral of the pay television question, though the action this time was by a narrow margin.

It was with affairs in this state that the Commission released its *Fourth Report and Order* on December 13, 1968. The theater owners again appealed, but the courts sustained the Commission.¹⁹⁵ During 1969, the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce held hearings on the whole issue.¹⁹⁶ In early 1970, the Subcommittee, by a split vote, reported a resolution generally approving the Commission's action, but asking that the rules be changed to bar the carriage on pay television of any sports event broadcast on commercial television during the preceding *five* years, and suggesting other minor actions consistent with the Commission's position. However, it is reported that the full Committee, by another sharply divided vote, rejected that proposal. It is now apparently considering what, if any, further steps to take on this long disputed issue.

Meanwhile, the Commission rounded out its December 13, 1968 action by specifying technical standards for subscription systems and spelling out the information to be included in applications for subscription authorizations. It is prepared, finally, to accept applications for subscription operations, after having considered the matter for some fifteen years. The proponents of over-the-air service still seem optimistic, and hopefully they can successfully implement the plans they have been nurturing for so long. However, there is some reason for concern that the time taken in resolving the matter may have

¹⁹⁴ Hearings Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess., ser. 90-1, at 637-43 (1967).

¹⁹⁵ *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

¹⁹⁶ Hearings Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-37 (1969).

worked against them. In the first place, the national television networks are now providing much more sports programming than they did in the early days of television, and they have for the last several years been carrying motion pictures in their prime time schedules, now presenting at least one feature film every night. This may make subscription television's principal attractions less appealing than they would have been had the service won approval in the 1950s, although the prospect of uncut current movies at convenient times and without commercial interruptions may still have sufficient pull to make the service a success. Secondly, in the intervening years cable television has become a major factor in the future of television service. Its technology offers significant potential for expanded service, as will be discussed in the next section. Among these is the possibility of providing several channels of wired pay television,¹⁹⁷ without the expense of encoding and decoding the signals.¹⁹⁸ So at least in urbanized areas, over-the-air pay television may not be the only means for supplementing the commercial service with direct payment techniques. But in any event, the proponents of the over-the-air technology are finally free to try to exploit it, although they may be reluctant to do so until the still viable threat of congressional interdiction is resolved.

J. Broadcast Enforcement Problems

1. Forfeitures, Renewals and Revocation Proceedings

The Commission has made constantly increasing use of monetary forfeitures since Congress amended the Communications Act in 1960

¹⁹⁷ There have been earlier efforts to provide programming on a subscription basis by wire, without the advantages of support from the other services a CATV system can provide. In the late 1950s, Bartlesville, Okla., was wired for a service offering a variety of motion pictures for a flat monthly charge; it was discontinued after a rather brief test. A system offering more varied fare on a per-program charge basis was operated for some years in Etahicoke, a suburb of Toronto. It, too, was terminated in 1965. The most ambitious effort was that of Pat Weaver, formerly president of NBC, in Los Angeles, and projected for San Francisco and elsewhere. He installed a 3-channel system, offering his subscribers a choice of sports, motion pictures, or cultural programming. While the plan might have failed in any event, it was doomed by a referendum, sponsored by the indefatigable theater owners, which made such operations illegal in California. The referendum was later voided as unconstitutional, but that came too late to do Mr. Weaver any good.

¹⁹⁸ On the other hand, of course, the costs of wiring a large city are much greater than those for an encoder, and decoders need be supplied only to actual users of the service while a CATV system's cables may pass many non-subscribing homes. But the incremental cost of otherwise vacant channels on a CATV system is very small, so that cable economics may be favorable in densely populated areas. But as with the basic commercial service, those who live in sparsely settled areas can expect the diversification which pay television may make possible only by way of a broadcast system. Cable pay television would have the further competitive advantage of being able, in theory at least to offer several subscription programs simultaneously, while the Commission's rules limit the over-the-air service to a single station in a community, which can, of course, broadcast only one program at a time.

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to permit imposition of such sanctions on broadcast licensees. The number of notices of apparent liability issued has increased from 23 in fiscal year 1964 to 167 in 1968. Forfeitures have ranged from the statutory maximum of \$10,000 to \$25 for tardy filings of renewal applications. They have been issued for fraudulent billing practices, lottery advertisements, rigged contests, and a wide range of violations of station operating rules.¹⁹⁹ The use of forfeitures is a necessary supplement to the only remedies which the Commission had prior to 1960, that is, the cancellation of a license through revocation or renewal proceedings.

During the fiscal year 1968, the Commission designated 11 applications for renewal of license for hearing and took final action to revoke the licenses of two additional stations. All of these cases involve one or more serious charges of derelictions, going to the basic qualifications of the licensee or reflecting on whether it would be in the public interest to allow it to continue station operation.²⁰⁰ During the decade the Commission either revoked or denied the renewal of the licenses of at least 30 stations,²⁰¹ all but 5 of them radio. This represents a sharp increase in enforcement activity over the preceding decade, and involved adverse action on more licenses than during any other period except the early days of the Federal Radio Commission.

2. Fraudulent Advertising

A licensee has the responsibility to take all reasonable measures to eliminate any false, misleading or deceptive matter in advertising material. This responsibility is personal to the licensee and may not be delegated.²⁰² In November, 1961, the Commission began a joint program with the Federal Trade Commission to aid broadcasters in avoiding fraudulent and deceptive advertising matter. Under this program all licensees receive by mail a new FTC publication entitled "Advertising Alert" which informs them of FTC complaints and final orders relating to deceptive advertising schemes and which sets out problem areas in advertising of concern to the FTC.

3. Double Billing

On October 20, 1965, the Commission adopted rules to prohibit "double billing" and other fraudulent billing practices by broadcast stations, and issued a public notice describing examples of the prohibited practices. The new rules were aimed at such fraudulent prac-

¹⁹⁹ 34 F.C.C. Ann. Rep. 45 (1968).

²⁰⁰ Id. at 44-45.

²⁰¹ An additional 11 renewals were dismissed after they had been designated for hearing.

²⁰² Report and Statement of Policy on Programming, 20 P&F Radio Reg. 1901, 1912-13 (1960).

tices as a station's submitting two bills to a local advertiser, one in the amount agreed upon for advertising matter broadcast, and the other in a larger amount for submission to the manufacturer or national advertiser to support a claim for reimbursement pursuant to a cooperative advertising arrangement.²⁰³ In essence, this scheme involves use of the mails for fraudulent purposes. Broadcasters often claim they are forced into such practices by their newspaper competitors. The Commission has been on the alert for a case of newspaper double billing which it could present to the Post Office Department for prosecution, but has not found a good one as yet.

4. Broadcast of Horse Race Information

On November 22, 1961, the Commission issued a public notice addressed to all licensees reminding them that the broadcast of horse racing information which would be of substantial use to persons engaged in illegal gambling is not in the public interest. Examples of the type of material useful to illegal gambling would be detailed horse race information broadcast prior to, during, or shortly after the running of particular races on an afternoon's racing program.²⁰⁴ To the author's knowledge, the Commission has not had a serious complaint about such broadcasts since that time.

5. Combination Rates

In January, 1963, the Commission issued a public notice stating that the practice of offering combination rates by two or more independently owned stations in the same service serving substantially the same area is anti-competitive and contrary to the public interest.²⁰⁵ On the same basis, the Commission also struck down the use of forced combination rates by a single licensee of television stations in two different cities which required national advertisers to purchase time on both stations in order to obtain time on either, when the stations are programmed simultaneously.²⁰⁶ However, the Commission, over the author's dissent, approved a sales plan evolved by a sales organization which wished to represent several FM stations in a given market and sell them jointly to national advertisers.²⁰⁷

6. Improper Use of Ratings

In October, 1965, the Commission called attention to the issuance by the Federal Trade Commission of a statement on deceptive claims

²⁰³ 6 P&F Radio Reg. 2d 1540, 1548 (1965).

²⁰⁴ 36 F.C.C. 1571 (1964).

²⁰⁵ 24 P&F Radio Reg. 930 (1963).

²⁰⁶ 11 P&F Radio Reg. 2d 1081 (1967).

²⁰⁷ FM Group Sales, Inc., 2 P&F Radio Reg. 2d 1110 (1964).

of broadcast audience coverage, setting forth guidelines to be followed in order to avoid such deception. Investigations by the Federal Trade Commission had disclosed widespread misuse of audience survey results, use of unreliable survey data, and tampering with, or distortion of survey data resulting in deception as to the size, composition, and other characteristics of radio and television audiences. The Commission stressed that deceptive practices in this area would be considered in determining whether a licensee was operating in the public interest.²⁰⁸ In at least two cases the Commission has imposed one-year renewals for improper use of ratings.²⁰⁹ All of the activities referred to in this subsection indicate increased aggressiveness on the part of the Commission during the 1960s in defining and enforcing the obligations of licensees in certain problem areas.

K. *Equal Employment Opportunity*

The Commission has recently moved for the first time to insure that broadcast stations will afford equal opportunity to all persons in their hiring and employment practices. On July 3, 1968, in response to a petition filed by the United Church of Christ, and after receiving comments thereon from many groups and individuals, the Commission determined that the public interest in the use of the airwaves encompassed the national policy against discrimination. It adopted a *Memorandum Opinion and Order*²¹⁰ concluding that a complaint raising substantial issues of fact concerning discrimination in employment practices would call for full exploration before the grant of a broadcast application. At that time the Commission did not believe that the adoption of a specific rule would make a substantial contribution to enforcement of the policy. However, in the same document it requested further comments on whether the basic policy should be embodied in a rule, and whether a showing to the Commission should be required as to the licensee's equal employment program.

Upon consideration of the comments received, the Commission concluded that the adoption of a specific rule in this area would be useful, both to emphasize the policy and make it specific, and also to make available the remedy of forfeitures under Section 503 of the Communications Act²¹¹ where non-compliance is found. Such a remedy, the Commission stated, would be useful as an alternative to the severe sanctions of denial of a license renewal for such contravention of the public interest. The Commission was also convinced by the comments

²⁰⁸ 1 F.C.C.2d 1078 (1965).

²⁰⁹ *Star Stations, Inc.*, P&F Radio Reg. 2d 745 (1964); *Western Broadcasting Co.*, 14 P&F Radio Reg. 2d 335 (1968).

²¹⁰ 13 F.C.C.2d 766 (1968).

²¹¹ 47 U.S.C. § 503 (1964).

from interested groups that the equal employment opportunity policy could not be effectively implemented by reliance upon individual complaints, and that affirmative compliance programs by licensees were necessary to cope with past patterns of discrimination, whether they arose out of indifference or bias. Therefore, the Commission adopted a *Report and Order*²¹² on June 6, 1969, in which it promulgated the following rule:

Equal Opportunity in employment shall be afforded by all licensees or permittees of commercially or non-commercially operated standard, FM, television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, or national origin.²¹³

The Commission adopted a requirement that each station establish a positive, continuing program of practices designed to assure equal opportunity in every aspect of employment. These rules were modeled closely upon the equal opportunity program requirements of the Civil Service Commission for government agencies.

At the same time the Commission issued a *Further Notice of Proposed Rule Making*²¹⁴ requesting additional comments on proposals to obtain statistical information on the employment of particular minority groups (Negro, Oriental, American Indian, Spanish Surnamed American) and to require the submission licensees of more detailed equal opportunity programs concerning these significant minority groups. That proposal is now pending.

In its opinions in these proceedings the Commission emphasized that the requirements of the general rule it adopted, and the further equal opportunity programs it was proposing, did not cover certain areas which it believed were more appropriate for what it termed "an appeal to conscience." In its June 6, 1969, *Report and Order* it stated:

The need for such further affirmative action along the lines suggested in the Kerner Report is, however, strongly urged as a voluntary supplement to the requirements of the proposed rules. Thus, broadcasters might consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to

²¹² 18 F.C.C.2d 240 (1969).

²¹³ The new rules are 47 C.F.R. §§ 73.125 (AM), 73.301 (FM), 73.599 (non-commercial educational FM), 73.680 (TV) and 73.793 (international broadcast) (1970).

²¹⁴ 34 Fed. Reg. 9288 (1969).

the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.²¹⁵

The Commission's efforts in this area, which should also be extended to common carriers,²¹⁶ will produce real results. Beyond the adoption of specific enforceable requirements, much progress should result from calling the attention of the industry to the problem of discrimination. Broadcasting occupies such a central place in America that its good example can have wide influence on other aspects of national life.

IV. CATV²¹⁷

Historically, the Commission has exercised jurisdiction to regulate CATV in response to changing events and has asserted jurisdiction only to the minimum extent deemed necessary to deal with the particular situation of the moment. The Commission's initial area of concern was with the potential impact of CATV operations on broadcast television service. In 1959, when the Commission first looked into this question, it expressed doubts as to its jurisdiction and concluded that, in any event, there was no indication that such impact would be serious enough to threaten the continued existence or quality of service by television broadcast stations or to justify Commission regulation.²¹⁸ However, upon subsequent re-examination in light of the growing proliferation of CATV systems throughout the country and the proposed new entry of CATV into major television markets, the Commission changed its view on both counts. It asserted limited jurisdiction and began by imposing certain requirements on CATV operations. It did so first in connection with a specific application for microwave relay facilities to serve a CATV system.²¹⁹ Next it extended its jurisdiction through the adoption of rules governing all microwave authorizations for the relay of television signals to CATV systems.²²⁰ Finally,

²¹⁵ 18 F.C.C.2d at 245.

²¹⁶ This has been proposed in a Notice of Proposed Rule Making, Dkt. No. 18742, adopted Dec. 4, 1969, 34 Fed. Reg. 19200 (1969).

²¹⁷ For a more personalized view, stating the reasons for the Commission's actions in the CATV field at greater length, together with the author's opinions on the issues posed by cable television, see his articles in *Television Age*, Vol. XVI, No. 16, at 68; Vol. XVI, No. 17, at 32; Vol. XVI, No. 18, at 30; Vol. XVII, No. 17, at 66 (1970); and one published in the July, 1970, issue of the *Proceedings of the IEEE*.

²¹⁸ CATV and TV Repeater Services, 26 F.C.C. 403, 421-424 (1959).

²¹⁹ *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), cert. denied 375 U.S. 951 (1963).

²²⁰ 38 F.C.C. 683 (1965).

it adopted rules governing all CATV systems, whether or not they use microwave relay facilities.²²¹

In essence this last set of regulations imposed three basic requirements: (1) that the CATV system, upon request, carry the signals of all local television stations (that is, Grade B or higher priority contour); (2) that the CATV system, upon request, refrain from duplicating the programs of a local station carried on the cable by a lesser priority or distant signal on the same day as the local broadcast; and (3) that the CATV system not bring a distant signal (that is, a signal carried beyond the Grade B contour of the distant station) into the Grade A contour of any station in the 100 largest television markets except upon a showing, in a hearing, that the operation would be consistent with the public interest and, particularly, the establishment and healthy maintenance of television broadcasting service in the area.²²² These rules contained no provision precluding carriage of an unlimited number of distant signals in smaller television markets. The Commission provided a procedure for seeking a waiver of the rules, or additional or different requirements, as well as a procedure for obtaining interim relief pending determination of case-by-case proceedings.²²³

The provisions for top-100 market hearings and for waiver or special relief petitions resulted in a very substantial case load, a heavy administrative burden, and a series of ad hoc decisions which both varied substantively among themselves and also eroded the provisions of the rules and their underlying policies. The first major market hearing (in the San Diego area),²²⁴ was the subject of the Supreme Court's decision in *United States v. Southwestern Cable Co.*,²²⁵ in which the Court sustained the Commission's jurisdiction and interim relief procedures with respect to CATV.

The Commission's subsequent decision on the merits in the San Diego case was to the effect that CATV operations carrying Los Angeles signals in the San Diego market would be contrary to the public interest because extension of the degree of CATV subscriber penetration (found to approximate 50 percent in areas already served by cable) would be likely to have an adverse impact on the establishment and maintenance of local UHF independent television broadcast service.²²⁶ The Commission "grandfathered" the existing Los Angeles signal service, but barred any extension of such service in the San

²²¹ 2 F.C.C.2d 725 (1966).

²²² See §§ 74.1103 & 74.1107 of the Commission's Rules & Regulations, 47 C.F.R. §§ 74.1103 & 74.1107 (1970).

²²³ See §§ 74.1107 & 74.1109, 47 C.F.R. 74.1107 & 1109 (1970).

²²⁴ Commenced pursuant to § 74.1109 rather than § 74.1107.

²²⁵ 392 U.S. 157 (1968).

²²⁶ *Midwest Television, Inc.*, 13 F.C.C.2d 478 (1968), 15 F.C.C.2d 84 (1968).

Diego area (with two minor exceptions). It also authorized a test of CATV program origination without advertising. The Commission's decision was affirmed by the Court of Appeals for the District of Columbia on February 4, 1970.²²⁷

On December 13, 1968, the Commission issued its *Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397*,²²⁸ looking toward broader CATV regulation which would affirmatively promote the potential of CATV to serve the public interest, as well as continue efforts to avoid adverse impact on broadcast television service. In Part III of the rule-making, the Commission proposed to: (a) require program origination by all but small systems as a condition for the carriage of broadcast signals, (b) regulate the economic basis therefor, (c) encourage or require CATV systems to lease channels to others for origination by them, (d) prescribe measures to further diversification of control over communications media (that is, in the area of cross-ownership of CATV systems, and the number of channels on which origination under the control of the CATV operator would be permitted), (e) require annual reports, and (f) prescribe technical standards.

In Part IV of the rule-making, the Commission proposed to substitute definitive rules for the evidentiary hearing procedure in major television markets. In essence it proposed to preclude carriage of distant signals within 35 miles of the designated cities of license in the top 100 markets, unless the CATV operator has express retransmission authorization from the originating station on a program-by-program basis. In smaller television markets, the Commission proposed to limit the number of distant signals to those needed to provide three full network services, one independent service, and educational services. It also proposed to prohibit "leap-frogging," that is, carriage of a more distant station in place of a nearer station providing the same kind of service. The Commission also adopted interim procedures which have the effect of staying action, pending the outcome of the rule-making, on major market evidentiary hearings and on petitions for waiver, additional requirements, and microwave applications, where a grant would be inconsistent with the proposed rules. The Commission indicated that a decision on the Part IV aspect would be deferred to afford a reasonable period for the enactment of legislation in the copyright-CATV field.²²⁹

²²⁷ *Midwest Television, Inc. v. FCC*, No. 22,077 et al. (D.C. Cir. Feb 4, 1970).

²²⁸ 15 F.C.C.2d 417 (1968); see also *Further Notice of Proposed Rule Making*, 34 Fed. Reg. 7981 (1969).

²²⁹ In December, 1969, the Copyright Subcommittee of the Senate Judiciary Committee reported out a general copyright bill, S. 543. Section 111 of the bill deals with CATV, proposing detailed provisions as to signal carriage and specifying a rather

In Part V of the rule-making and inquiry, the Commission proposed to explore the potential and appropriate future role of CATV in providing the public other communications services besides television, including such factors as the "wired city," CATV's relationship to other communications entities, diversification of control, the provision of cable service to sparsely settled areas, the appropriate division of regulatory functions among local, state and federal authorities, and the possible need for amendments to the Communications Act. The Commission anticipated that Part V of the proceeding might continue for a number of years, with further notices and rule-making action and legislative proposals at appropriate stages.

On October 27, 1969, the Commission issued its *First Report and Order in Docket No. 18397*,²³⁰ which resolved some of the issues in Part III of the rule-making. The Commission determined that program origination, or "cablecasting," by CATV operators, and by others on leased channels on cable systems, is in the public interest. It required cablecasting by systems with 3,500 or more subscribers on and after January 1, 1971, and indicated that there would be further proceedings to explore the question of whether this floor should be lowered. The Commission authorized advertising at the beginning and end of each cablecast program, and at natural breaks or intermissions within a program that are beyond the control of the CATV operator. It made applicable to cablecasting requirements similar to those imposed on broadcasters by Sections 315 and 317 of the Communications Act,²³¹ that is, equal time for political candidates, the Fairness Doctrine for controversial issues of public importance, and sponsorship identification.

The *First Report* sets forth the Commission's present belief that the public interest would be served by encouraging, and perhaps requiring, CATV systems to operate as common carriers on some channels in order to afford an outlet for others to present programs of their

nominal level of compensation for the blanket use of copyrighted programming authorized by the section. On March 11, 1970, Chairman Burch wrote to Senator Pastore, Chairman of the Subcommittee on Communications of the Senate Commerce Committee, advising him that the Commission felt that S. 543 was too detailed in its provisions as to CATV, and that it would be sounder policy for Congress to adopt copyright legislation which would simply grant cable systems a compulsory license for such signals as the Commission, by rule or order, might authorize them to carry, specifying the appropriate amounts and method of payment and perhaps exempting existing small systems. The letter further proposed that, at the same time, Congress should amend the Communications Act to confirm, in broad terms, the Commission's authority over CATV operations. On March 24, 1970, in response to a request from Senator Pastore, Chairman Burch forwarded a draft of a bill to accomplish the latter objective. Senator Pastore has introduced this as S. 3635, at the request of the Commission.

²³⁰ 20 F.C.C.2d 201 (1969).

²³¹ 47 U.S.C. §§ 315, 317 (1964).

own choosing, free from any control of the CATV operator as to content (except as required by the Commission's rules or applicable law). It stated, however, that rule-making action toward this end would require further study. The Commission also came out in favor of regional and national interconnection of CATV systems for distribution of cablecasting, on the ground that this might bring significant new diversity of programming and other services to the American people. Finally, the Commission did not bar "pay-TV" operations by CATV systems. It stated:

While we believe that the subscribing public should not be required to pay extra fees in order to obtain access to local public service programming or presentations by political candidates on the CATV's origination channel, we do not presently contemplate any prohibition against higher monthly fees or per program charges for other minority interest programming ²³²

The Commission has also acted in the area of common carrier service to CATV systems. It has asserted jurisdiction over the provision of leased channel service to CATV systems by telephone companies under Title II of the Communications Act.²³³ The Commission presently has pending before it a proceeding as to the lawfulness of the tariffs filed in accordance with this decision.²³⁴ On January 28, 1970, the Commission adopted rules prohibiting independent telephone companies from retailing CATV service to the public or furnishing channel service to affiliated or related CATV systems, with a four-year grace period for existing service.²³⁵ The Bell System companies are precluded from engaging in CATV business by the terms of a consent decree.²³⁶ The Commission has declined to hold that CATV systems are common carriers within the meaning of Section 3(h) of the Communications Act²³⁷ and subject to Title II regulation, insofar as they are engaged solely in the carriage of broadcast signals.²³⁸

²³² 20 F.C.C.2d at 216.

²³³ 47 U.S.C. §§ 201-22 (1964). *General Tel. Co.*, 13 F.C.C.2d 448 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

²³⁴ Dkt. Nos. 16928, 16943 *et al.* (1970).

²³⁵ Final Report and Order in Dkt. No. 18509, FCC 70-115 (1970). Petitions for review of this action have been filed in various United States courts of appeals. The Government has moved to consolidate them with a case pending before the Fifth Circuit, *General Tel. Co. v. United States*, No. 29,246 (5th Cir. 1970).

²³⁶ *United States v. Western Electric Co.* Civil No. 17-49 (D.N.J., Jan. 24, 1956).

²³⁷ 47 U.S.C. § 153(h) (1964).

²³⁸ *Philadelphia Television Broadcasting Co.*, 1 F.C.C.2d 765, (1965), *aff'd*, 359 F.2d 282 (D.C. Cir. 1966); *cf.* First Report and Order in Dkt. No. 18397, 20 F.C.C.2d 201 (1969).

V. NON-BROADCAST RADIO—THE LAND MOBILE PROBLEM

The non-broadcast uses of radio, while not so visible publicly as radio and television, have also become extremely important to the American people. New uses for radio are being found constantly, so that its contributions to the public welfare have grown much more rapidly than was anticipated when the Commission made its last major allocation in the late 1940s. Radio had its beginnings in the maritime service and continues to contribute greatly to safety of life at sea. Quite expectably, the same has been true in the development of commercial aviation, which depends on radio frequencies in many aspects of its operations. The Commission recently authorized regular use of frequencies in the 450 MHz band for air-to-ground communications to tie planes into the landline telephone network,²³⁹ and plans are being developed for a satellite system to serve the special needs of the marine and aviation industries.

The administration of these important radio services is the responsibility of the Commission's Safety and Special Radio Services Bureau. It also supervises the very important amateur radio service, which has made important contributions to the radio art,²⁴⁰ and which serves as an important person-to-person link to men and women of similar interests in all the major countries of the world.

But as is indicated above, the major concern of the Bureau and of the Commission in this area throughout all of the 1960s was the land mobile radio problem. From very small beginnings, the public safety, land transportation, and industrial radio services²⁴¹ have literally exploded, now involving 3,142,052 licensed transmitters.²⁴² The importance of mobile radio in the ever more difficult and crucial battle against crime is self-evident and has been documented by a number of recent major studies.²⁴³ Only slightly less important are the contributions which radio makes to our railroad, bus, and truck services, to our vital utilities, to agriculture and those who serve it, to materials

²³⁹ Dkt. No. 16073, FCC 69-1391 (Dec. 17, 1969).

²⁴⁰ In December, 1961, United States amateur radio operators built and saw launched the world's first successful non-government orbiting satellite which became known as OSCAR, the international communications good-will messenger.

²⁴¹ These three major groupings breakdown as follows: (1) Public Safety: local government, police, fire, highway maintenance, treaty conservation, special emergency, state guard, (2) Land Transportation: motor carrier, railroad, taxicab, automobile emergency, (3) Industrial: power, petroleum, forest products, motion picture, relay press, special industrial, business, industrial radio location, manufacturers, telephone maintenance. The beleaguered Citizens Radio Service does not fall into any of these categories but is a land mobile service nonetheless.

²⁴² 35 FCC Ann. Rep. 78,212 (1969).

²⁴³ Reports by the President's Commission on Law Enforcement and Administration of Justice including: *The Challenge of Crime in a Free Society* (1967); *The Police* (1967); *Science and Technology* (1967).

handling and control of operations in manufacturing plants, to testing rockets, to distribution of all kinds of products, and to a wide range of service businesses. The use of radio significantly promotes efficiency, convenience, and economy in all these fields.

The consequences of this growth began to become apparent in the late 1950s and led to requests for new services and for new spectrum space in addition to the 42 MHz (the equivalent of 7 television channels) allocated to the land mobile services in the late 1940s. In response the Commission began an inquiry²⁴⁴ into the existing and future uses of the spectrum between 25 and 890 MHz, the portion in which the existing land mobile²⁴⁵ and television allocations are found. This proceeding elicited voluminous filings from the land mobile interests and culminated in two days of oral argument before the full Commission on January 22 and 23, 1970. However, the proceeding then languished for several years and was finally terminated by a rather brief order in 1964²⁴⁶ which recited the renewed commitment of the Commission and the Congress to the development of UHF television, and concluded that no action could then be taken with respect to the nearly half of this band occupied by the 70 UHF channels.

At the same time the Commission announced the creation of an Advisory Committee for the Land Mobile Radio Services (ACLMRS) and charged it with the task of examining all methods which had been suggested for the more efficient use of the land mobile services' existing frequencies.²⁴⁷ It was the author's privilege to serve as Chairman of the Committee for the three and a half years of its existence, working with some 200 representatives of user groups, individual users, equipment manufacturers, and professional societies who contributed a great deal of time to the study of such possibilities as tighter control of signal radiation, application of computer techniques to radio frequency assignment, expanded interservice sharing, reallocation within the land mobile bands, non-voice systems, variable power systems, locating base stations together in groups, and others. After a sincere and thorough effort to find ways of getting a little more out of their present allocations, the ACLMRS submitted its final report to the Commission in

²⁴⁴ Notice of Inquiry in Allocation of Frequency Between 25-890 Mc/s, Dkt. No. 11997, FCC 57-365, 22 Fed. Reg. 2684 (1957).

²⁴⁵ The land mobile services in three bands: 12.7 MHz in the 25-50 band, 9.7 MHz in the 150.8-173.4 band, 20 MHz in the 450-470 band. This reflects development of the art, which has permitted use of even higher frequencies with the passage of time. However, it is generally agreed that frequencies below 500 MHz are best suited for land mobile purposes in the present state of the art.

²⁴⁶ Report and Order in the Allocation of Frequencies Between 25-890 Mc/s, Dkt. No. 11997, FCC 64-264, 29 Fed. Reg. 4820 (1964).

²⁴⁷ Pub. Not., FCC 64-216 (Mar. 27, 1964).

1967.²⁴⁸ The report noted a number of minor improvements which could be made and a number of these have been put into effect. It concluded, however, that the only two suggestions which had any real potential for substantially increasing the usefulness of the 42 MHz already assigned to land mobile radio were: (1) reduction of the bandwidth of channels in the 450 MHz band from 50 to 25 kHz, and (2) increased inter-service sharing.

The Commission had for some time been considering the former course,²⁴⁹ because it had already ordered several such channel splits in the various land mobile bands as a means of crowding new users and, indeed, new uses into the limited allocations for these services.²⁵⁰ It therefore concluded its pending proceeding in rather short order²⁵¹ and has since made the necessary sub-allocation of the new channels to the respective services,²⁵² which are now making substantial use of them.

As to its other major recommendation, the ACLMRS had suggested some rather informal procedures for increased inter-service sharing. For administrative convenience the Commission has thus far employed so-called block allocations for the land mobile services, which means that the same blocks of frequencies are allocated to the police, manufacturers, railroad and other services everywhere in the United States. These allocations are generally exclusive, though some sharing has been built into the system where two services operate, for the most part, in different geographical areas; for example, the forestry and petroleum services have long shared certain frequencies.

²⁴⁸ See Report of the Advisory Committee for the Land Mobile Radio Services (1967).

²⁴⁹ Notice of Proposed Rulemaking, Dkt. No. 13847, FCC 60-1350, 25 Fed. Reg. 11010 (1960).

²⁵⁰ The land mobile users point to this as demonstrating that they have been required to spend millions of dollars for new equipment from time to time in order to adjust to these splits, while television broadcasters are still using 6 MHz per channel, although it is generally agreed that the intelligence broadcast could be accommodated in a narrower bandwidth. But land mobile users control both ends of their communications systems and can therefore replace both the base station and mobile equipment involved. The Commission would similarly require broadcasters to tighten up their use of the spectrum if it were feasible, but the public's investment in television receivers far exceeds the cost of the broadcasters' transmitting gear and there is no way to effectuate a reasonably prompt changeover of the millions of receivers now in the hands of the public. However, if demands on the spectrum continue to increase, it may be necessary to order the use of new equipment requiring a narrower channel. This could be done by setting an effective date some 10 years in the future in the expectation that virtually all members of the public would have purchased new, compatible receivers at some time during that period.

²⁵¹ First Report and Order, Dkt. No. 13847, FCC 66-1084, 31 Fed. Reg. 15577 (1966).

²⁵² Second Report and Order, Dkt. No. 13847, FCC 68-128, 33 Fed. Reg. 3114 (1968).

In addition, the Commission has granted police departments limited authorizations to use frequencies allocated to other services and has made a number of other similar departures from the basic block allocation. The ACLMRS felt that there were situations in which the allocation of a particular service might be relatively lightly loaded in a particular area, while another service might have exhausted its spectrum space in that area. It therefore recommended that the FCC formalize methods of working out such shared use, relying on the local frequency coordinators who recommend assignments to the Commission, volunteers, usually employed by a user, who have contributed materially to the assignment processes because the Commission has never been given the funds to do the job itself.

The Commission concluded, however, that it needed further help in resolving this matter. It therefore contracted with the Stanford Research Institute (SRI) for a study looking toward the development of the required procedures. In 1969 SRI submitted its report²⁵³ which concluded that the Commission's assignment records are inadequate and, based on rather limited automatic monitoring in Detroit, New York City, and Los Angeles, that there is very uneven distribution of stations among the different channels allocated to a particular service, with some channels being very lightly used.²⁵⁴ It therefore recommended that the Commission should first develop better intra-service sharing as a pre-requisite to inter-service use of channels allocated to others.

To accomplish this, the report recommended a system of some ten or eleven regional assignment centers, all coordinated by a national center in Washington, D.C. It stated that the regional centers should employ sophisticated automatic monitoring equipment to determine channel occupancy, that the data developed in this way should be fed into a complex computer system which would then be able to take an application, specifying more precisely the applicant's communications needs, and find the best available channel to be assigned in response thereto. Admittedly this system will be very expensive; indeed it seems that costs per assignment may be much higher than anything the Commission has experienced thus far. But the need is so great that the effort must be made. Early in 1970 the Commission established a small Task Force on Spectrum Management in the Office of the Chief Engineer to begin planning for the first regional center. The Commis-

²⁵³ Stanford Research Institute, *A Study of Land Mobile Spectrum Utilization* (Interim and Final Reports).

²⁵⁴ There are some unresolved questions about the conclusions drawn from this monitoring. The fact that a police channel is lightly occupied much of the day does not mean that more channels may not be needed during periods of peak demand. In addition, some of the apparently unoccupied channels may not be locally assignable.

sion hopes to get an increase in appropriations in the amount of \$900,000 for fiscal 1971 to finance the development of a prototype unit in Washington, D. C. with the objective of moving it to Chicago and beginning operations there by mid-1972.

The ACLMRS also concluded that even if all its recommendations were implemented, they would not solve the critical congestion problems already existing in certain areas and certain to spread to others. It therefore noted that a long range solution could be found only through the allocation of additional spectrum to the land mobile services. On July 26, 1968, the Commission issued two notices of proposed rule-making, one designed to produce relief in the near future²⁵⁵ and the other intended to provide additional usable spectrum space at a later point in time.²⁵⁶ The first proposed that the land mobile services be allowed to share the lowest seven UHF television channels in the 25 largest metropolitan areas. The second proposed to permit sharing, in these cities, of the top 14 UHF channels now used almost exclusively for low-power television translators, combining this 84 MHz with 26 MHz of space recently released by the government and 5 MHz to be taken from an allocation for broadcast auxiliary use to provide a nearly contiguous band of 115 MHz. Of this, 40 MHz is proposed for use by private land mobile systems and 75 MHz is intended for a broad band, high capacity common carrier system serving land mobile needs, a project which has interested the Commission for years.

As was to be expected, broadcasters have objected strongly to these proposals. While much of the UHF allocation is unused, the lowest seven channels are in substantial use in the largest markets. Those operating on or adjacent to these channels are concerned about the possibility of interference with the reception of their signals and are also afraid that shared use may evolve into allocation of the channels to land mobile use exclusively. Translator licensees are concerned about sharing their channels, although most of their operations are remote from the 25 largest metropolitan areas involved in the proposal. And broadcasters generally, including radio operators, are concerned about the loss of 5 MHz from their allocation for broadcast studio-transmitter links in the 942-952 MHz band. In their view the land mobile users have not demonstrated any real need for additional spectrum and should be required to make better use of the frequencies they

²⁵⁵ Notice of Proposed Rulemaking, Dkt. No. 18261, FCC 68-743, 33 Fed. Reg. 10943 (1968).

²⁵⁶ Notice of Proposed Rulemaking, Dkt. No. 18262, FCC 68-745, 33 Fed. Reg. 10807 (1968).

already have. If relief must be afforded, they prefer some use of the frequencies around 890 MHz.

On the other hand, while the land mobile interests favored both proposals, they regard the plan for sharing the lowest seven UHF channels as inadequate, since rather restrictive standards were proposed for the protection not only of operating UHF stations and outstanding permits, but also of paper allocations for which no applications have been filed. The standards provided for rather low operating powers and heights for many of the channels to be shared, some of which would be of relatively little use for land mobile operations. The land mobile users therefore proposed more limited protection for broadcasting, disregard for two of the UHF taboos which limit allocations of channels up to seven channels above and below a specified channel, elimination of unused low UHF channels which would block substantial land mobile use of channels 14 through 20, and the eventual exclusive allocation of these channels to the land mobile services. They strongly favor the proposal for 115 MHz in the top UHF channels and above, but contend that no equipment will be available for practical and economical operation at these frequencies for from 7 to 10 years.

These views and others were presented to the Commission during two days of oral argument in January, 1970. The Commission considered the matter in late March, 1970 and, surprisingly, indicated a disposition not to allow sharing of the lowest seven UHF channels on any basis. This is startling in view of the long delay in resolving this problem and the clear indications that those in Congress who have studied this issue want the Commission to provide additional spectrum for the mobile services, especially public safety.²⁵⁷ The author does not favor eventual exclusive allocation of these channels for land mobile radio but is convinced that these services can be permitted substantial sharing rights on these 7 channels without significant impact on the development of UHF television. The need for such development and the values it can provide for the public is clear, but the public interest also urgently requires an expansion of land mobile radio which can come only with the opening of new frequencies for mobile use. The Commission has been considering the problem for at least 13 years; it must act in the near future. As indicated above, if it does not act promptly and responsibly, the Commission may lose its vital allocation function.

²⁵⁷ Independent Offices and Department of Housing and Urban Development Appropriation Bill, 1970, S. Rep. No. 91-521, 91st Cong., 1st Sess. 6 (1970). Subcomm. No. 5 of the Select Comm. on Small Business, *The Allocation of Radio Frequency and Its Effect on Small Business*, H.R. Rep. No. 1978, 90th Cong., 2d Sess. (1969).

VI. COMMON CARRIER REGULATION

A. *General Developments*

In the field of common carrier communications the last decade was marked by unprecedented growth in the demand for services and facilities, by vast technological changes which affect or alter almost every aspect of telecommunications, and by aggressive Commission initiative to meet and resolve the resulting problems. Regarding domestic telecommunications, the major impact came from the requirements of the computer industry and from the emerging concept of the wired city. The major development concerning international telecommunications came from the emergence of satellite technology into a commercial reality. The burgeoning demand for high quality and high capacity facilities sparked the introduction of new services²⁵⁸ and different tariff offerings.²⁵⁹ This growth and radical change in both telecommunications technology and demand required careful surveillance and review, detailed planning, and prompt affirmative action designed to insure that the benefits potentially available through technological change were translated into needed and useful services at fair, reasonable and nondiscriminatory rates.

In the decade between 1959 and 1968, total Bell System revenues increased from \$7.4 billion to \$14.1 billion. In the same period gross plant doubled from some \$22.2 billion to \$45 billion. The number of telephones operated by the Bell System increased from 58 million to 88 million. Bell System revenues from interstate communications subject to the Commission's jurisdiction increased from \$1.9 billion in 1959 to \$4.9 billion in 1968. Average net plant more than doubled, going from \$3.7 billion to \$10.3 billion. The number of *interstate* messages handled increased from 977 million to 2.186 billion. There was an even more startling growth of international telecommunications services. Overseas telephone messages increased from slightly over 3 million to more than 15 million, or a five-fold growth in a ten-year period. The revenues of the international telegraph carriers also showed vast increases. Thus, total revenues in 1959 were \$84 million and in 1968 were \$154 million. The major portion of this growth in international telecommunications revenues resulted primarily from two important and growing services. The first of these was international Telex, from which, in 1959, the

²⁵⁸ E.g., AT&T's Picturephone (Tariff F.C.C. No. 263), 50 kc Service (Tariff F.C.C. No. 263), Series 8,000 Channel Service (Tariff F.C.C. No. 260), Supergroup Offering (Tariff F.C.C. No. 260), WATS (Tariff F.C.C. No. 259), Data-Phone (Tariff F.C.C. Nos. 260 & 263), Customer Interconnections (Tariff F.C.C. Nos. 259, 260 & 263), and Western Union's INFOCOM Service (Tariff F.C.C. 252), Sicom (Tariff F.C.C. 251), and Mailgram Service (Tariff F.C.C. 256).

²⁵⁹ E.g., AT&T's TELPAK Provisions (Tariff F.C.C. No. 260), and Western Union's Postalized Rates (Tariff F.C.C. No. 255).

carriers realized \$5.2 million, or 6.2 percent of their total revenues. By 1968 the dollar amount of the revenues had increased to \$44.3 million, and the percentage amount of total revenues had increased to 28.8 percent. The second fast growing service was the international leased circuit service, which in 1959 yielded the carriers \$8.4 million and accounted for 10 percent of their total revenues. By 1968 the dollar revenue amount had increased to \$36 million and accounted for 23.8 percent of their total revenues.

B. *The Domestic Telegraph Industry*

Only one entity, The Western Union Telegraph Company, which provides record communications services within the United States, did not share in the general prosperity and growth enjoyed by the other telecommunications entities in the period. Thus, in the years between 1945 and 1964, total revenues from all telecommunications services increased by some 430 percent and the number of telephones increased by some 215 percent. However, the number of telegraph messages handled by Western Union declined some 60 percent, its public offices decreased by about 55 percent, and public message telegraph rates were increased by more than 160 percent. At the time Western Union suffered a series of financial crises which it alleged were due, at least in part, to the fact that AT&T was underpricing those of its services in which it competed with Western Union.

In view of the above described atypical behavior by Western Union and the allegations of unfair competitive practices, the Commission, on its own motion, instituted an investigation into the domestic telegraph industry by *Memorandum Opinion and Order* of May 23, 1962.²⁰⁰ The order directed investigation into 16 specific matters which may be grouped as follows:

- (a) Public requirements for domestic message telegraph service;
- (b) Western Union's performance in determining and fulfilling the nation's domestic message requirements;
- (c) The effects of institutional restrictions associated with Western Union's dependence on telephone company facilities and patents;
- (d) Whether it would be in the public interest for Western Union to acquire Bell's teletypewriter exchange and other record services;

²⁰⁰ Domestic Telegraph Service, Dkt. No. 14650, *Memorandum Opinion and Order*, FCC 62-533 (May 23, 1962).

- (e) The effects of intra-modal and inter-modal competition in communication;
- (f) An analysis of alternative programs for meeting the nation's message telegraph requirements.

The hearings in this matter began on July 9, 1963, and continued, with interruptions and recesses, to January 13, 1966. The report of the Telephone and Telegraph Committees in this proceeding was issued on April 29, 1966.²⁶¹ This report recommended the establishment of an integrated record message service, consideration of the introduction of promotional pricing for message telegraph service, and the establishment of intercarrier relationships sufficient to afford Western Union a reasonable opportunity to compete.

One of the long-standing Western Union complaints had been that its recurring problems were due in large part to the fact that AT&T was underpricing those services in which it competed with Western Union, was earning very low and uncompensatory returns on them, but was subsidizing such services by imposing higher charges on non-competitive services, particularly message toll telephone service, so that AT&T on the overall earned a fair rate of return. Western Union, which did not have a highly profitable, growing, and non-competitive service like message toll telephone, was required to meet the low Bell System charges for competitive services, particularly in the leased line field, and could stay viable only by continuous and massive increases in charges for message telegraph services, which were suffering substantial declines in volume from year to year. To acquire the necessary data to evaluate and test this complaint of Western Union, the Commission, over serious and repeated objection from AT&T, required that company to make a study of the cost of providing each of its several services on a fully allocated basis, giving the company permission to submit any data it felt pertinent regarding the cost of providing these services computed on such other bases as the company deemed appropriate.²⁶² This allocation study, known as the *7-Way Cost Study*, was prepared and submitted by AT&T and showed that on a fully allocated basis the company was, in fact, earning very low returns on most of the services competitive with Western Union, and very high, if not substantially excessive, returns on at least some non-competitive services.

²⁶¹ Report of the Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation, FCC Dkt. No. 14650 (April 29, 1966).

²⁶² By letters adopted July 30, 1963, and January 3, 1964, sent to AT&T by direction of the Telephone and Telegraph Committees.

C. *The AT&T Rate Investigation*

As a result of the *7-Way Cost Study*, the continuing problems with respect to the separation of plant commonly used by them in both interstate and intrastate jurisdictions, as well as the continued high overall earnings of the Bell System, the Commission, by order adopted October 27, 1965,²⁶³ instituted a broad investigation into the charges of the American Telephone and Telegraph Company and its associated Bell System companies for interstate and foreign communications service. This investigation was the first overall investigation undertaken by the Commission into this subject since the original telephone investigation instituted in 1935, some 30 years earlier.

While the overall investigation is still continuing, the Commission, on July 5, 1967, adopted an *Interim Decision and Order*²⁶⁴ addressed primarily to the company's allowable rate base, proper rate of return, and the overall question of separations of plant equipment expenses between the interstate and intrastate jurisdictions. In this decision, and its subsequent *Memorandum Opinion and Order on Reconsideration* adopted September 13, 1967,²⁶⁵ the Commission allowed in AT&T's rate base the capital devoted to the business, consisting of paid-in equity capital, funded debt and reinvested retained earnings. The Commission also allowed plant under construction because the amounts committed for this purpose have been relatively consistent over a long period of years, and individual construction projects are generally of short duration, averaging from 5 to 6 months. Requirements for cash working capital and material and supplies were found to have been met by rate-payer-supplier funds, and claims in this respect were therefore disallowed because the monies involved were not furnished by investors and no return could properly be given to them. Insofar as rate of return was concerned, the Commission found a return ranging between 7 and 7½ percent to be just and reasonable on the basis of the data of record. The Commission made it clear, however, that under its policy of continuing surveillance it would periodically review relevant circumstances, and when the return deviated from the allowable range (either upwards or downwards) it would take such conditions into consideration before determining what action, if any, should be taken to adjust rates and earnings.

As a result of the Commission's decision, AT&T filed interstate message telephone schedules which, in total, resulted in rate reductions in excess of \$120 million. The first portion of the reductions

²⁶³ 2 F.C.C.2d 87 (1965).

²⁶⁴ 9 F.C.C.2d 30 (1967).

²⁶⁵ 9 F.C.C.2d 960 (1967).

totalling \$100 million was effective November 1, 1967. The second portion, totalling \$20 million became effective August 1, 1968. Despite these substantial reductions and the recent inflationary pressures, reports by AT&T indicate that the company's earnings have continued to climb. Thus AT&T's earnings from its interstate operations were 7.6 percent for the year 1968. During 1969 earnings were still higher and were estimated to be in excess of 8 percent.

D. Continuing Surveillance

In view of these increasing earnings the Commission on June 5, 1969, addressed a letter to AT&T requesting it to furnish detailed data with respect to its revenues, expenses and earnings requirements so that the Commission could determine whether rate adjustments might be justified in accordance with its policy of continuing surveillance. Continuing surveillance involves an ongoing review of the carrier's revenues, expenses, earnings and revenue requirements, with periodic discussions between company representatives and the Commission looking toward appropriate rate adjustments if justified. After the discussions the company may file, on statutory notice, new tariff schedules normally embodying rate adjustments. These schedules are subject to comment or objection by any interested party. If there is merit to the comments or objections, the Commission may, if the facts warrant, institute formal proceedings to determine on the basis of a hearing record whether it should require or prescribe different rate levels or structures. In essence continuing surveillance is specifically designed to provide a rapid and informal means of procuring rate reductions for the benefit of the public, when conditions justify such, without the need for expensive and time-consuming hearings. In general the Commission had relied upon this method of regulation of AT&T during most of the years of its existence. In the decade between 1959 and 1968 this process of continuing surveillance resulted in three series of rate adjustments. The first, in 1959, resulted in reductions in interstate message telephone rates of approximately \$50 million. In 1963, as a result of continuing surveillance, there were further deductions in interstate message toll rates which saved the users \$80 million. In 1965, again as a result of continuing surveillance, there were rate reductions which saved the consumer \$100 million.

After the telephone company filed the rate reductions at the close of the 1964 continuing surveillance discussions, the State of California objected to this procedure. It alleged, in essence, that the discussions, which took place at closed sessions between the Commission and

AT&T, precluded other interested parties, including the State of California, from participation and deprived them of a voice in the final outcome, contrary to the requirements of law and concepts of due process. The Commission rejected the objections and defended its procedures on both practical and legal grounds. As a practical matter the rates filed after continuing surveillance discussions resulted in prompt and substantial savings to users of interstate services. The Commission argued that no one was bound as a matter of law by the continuing surveillance discussions. The company filed tariffs on statutory notice. These tariffs, as already noted, were subject to comment or objection by any interested party, including the State of California, just as any other tariffs which the company might file. If there is merit to objections, the Commission could in appropriate circumstances set the entire matter for hearing, at which time all interested parties could participate in the formal proceedings and appropriate orders prescribing authorized rates could be issued. The State of California appealed the Commission's rejection of its objections to the Court of Appeals for the Ninth Circuit. In its decision the court upheld the Commission's decision and dismissed the appeal.²⁶⁶ Certiorari was denied by the Supreme Court.²⁶⁷

As has been set forth above, the Commission again engaged in continuing surveillance activities in the summer and fall of 1969. As a result of these discussions the telephone company filed, effective January 1, 1970, revised tariffs designed to save the users of message telephone toll service in excess of \$150 million through rate reductions. In addition, it filed other tariff revisions, effective February 1, 1970, reducing rates by another \$87 million to offset increases in other interstate services provided by the Bell System companies.

E. Other Rate Cases

In addition to instituting the general investigation, the Commission also reviewed numerous AT&T tariff offerings. A formal hearing procedure was held with respect to Wide Area Telephone Service (WATS). This is a service under which, for a fixed payment, a customer may use his special telephone for a given number of hours a month to dial either anywhere in the United States or to a particular number of points in given areas. He is also offered an option of 24-hour toll service to given areas or nationwide. The Commission determined that this service was proper and appropriate under the statute, but required that adjustments be made with respect to certain

²⁶⁶ Public Util. Comm'n v. United States, 356 F.2d 236 (9th Cir. 1966).

²⁶⁷ 385 U.S. 816 (1966).

of the charges.²⁶⁸ The charges were adjusted, and AT&T also offered a companion service whereby incoming calls can be made to a designated telephone from particular areas or from anywhere in the United States for a flat charge at the inbound end. This service has found wide acceptance and has proved extremely useful to businesses which require numerous calls to or from widely separated points.

AT&T also made a tariff offering, called Telpak, which in essence provided for relatively low charges to customers who took or contracted to lease a considerable number of voice-grade circuits. This offering was justified by the company on the grounds that it was necessary to meet competition from private microwave systems which the Commission had authorized and, furthermore, that it resulted in savings to the company because of the alleged lower cost involved in the offering. The Commission, after a formal proceeding, found that AT&T was not, in fact, making a bulk offering but was, instead, providing individual circuits between points, many of which did not necessarily follow the same route. There were therefore no savings in the cost of providing this service as compared with individual leases by numerous persons of the same number of circuits. The Commission further found that there was no justification for two of the four different Telpak offerings made and ordered them discontinued. Insofar as the other two offerings were concerned, the Commission is still in the process of conducting hearings to determine whether there is competitive or other justification for the continuation of these tariff classifications. In the interim, further studies by AT&T indicated to it that the original charges were, in fact, not compensatory and it has proposed very substantial increases. These matters are now pending before the Commission.²⁶⁹

In connection with its Telpak tariff offerings AT&T has included provisions which permit certain users, particularly the government and regulated industries, to share the facilities provided pursuant to the Telpak tariffs, thereby enabling such users to combine their requirements and enjoy the benefits of the lower rates made available, particularly pursuant to Telpak C and Telpak D tariff offerings.²⁷⁰ In 1966 the Commission modified its rules with respect to private usage of the spectrum to permit those entities which installed their own facilities to engage in virtually unlimited sharing. A question then arose as to whether users of Telpak, a service which was justi-

²⁶⁸ 38 F.C.C. 475 (1965), petition for reconsideration denied, Memorandum Opinion and Order, FCC 65-525 (June 16, 1965).

²⁶⁹ Dkt. No. 18128, FCC 68-388 (Apr. 10, 1968).

²⁷⁰ TELPAK Tariff Sharing Provisions of American Telephone and Telegraph Company Tariff F.C.C. No. 260 and the Western Union Telegraph Company Tariff F.C.C. No. 237 (now W.U. Tariff F.C.C. No. 254).

fied primarily by the need to compete with the private usage of the spectrum, should not also be given similar opportunities to share under the Telpak tariffs. When the company failed to file tariffs providing for such shared usage, the Commission instituted a proceeding²⁷¹ to determine whether such shared usage was in the public interest and should, in fact, be required. A recommended decision upholding the shared usage and suggesting that the Commission adopt a final decision to this effect was issued by the Chief of the Common Carrier Bureau on April 25, 1969.²⁷² The final disposition of this matter is now pending before the Commission.

At the same time the Commission is continuing its overall investigation of the Bell System, and is receiving evidence regarding the manner in which the Bell System structures its rates and the justification for such practices. As the investigation proceeds, it is becoming increasingly clear that a great deal of additional information is needed by both the Bell System and the Commission regarding the manner in which prices for services are structured and the manner in which basic determinations with respect to service offerings are made. In view of the fact that Bell's interstate services result in many billions of dollars of revenue, the importance of a sound, rational, and non-discriminatory rate structure is apparent. The need for such structure is now emphasized by the rapidly expanding demand for telecommunications in the data processing field. As data processing hardware becomes relatively less expensive, the interconnection between computers and customers accounts for an increasingly important part of the total cost of data processing. The entire future development of data processing, which carries with it almost incalculable potential benefits in the fields of business, education and health, can be seriously affected by the decisions which are made with respect to the nature of communications offerings and the charges to be made for them.

F. Foreign Attachments and Interconnection

One of the long-standing problems in the field of domestic communications has been that of the extent to which common carriers may be required to interconnect their facilities with those of other entities. Closely related to this has been the question of what type of terminal equipment (foreign attachments) may be attached by users to the facilities of the common carriers. Foreign attachments are terminals of various types manufactured and supplied by entities other than the common carrier providing communications service.

²⁷¹ 8 F.C.C.2d 178 (1967).

²⁷² FCC Mimeo. No. 31517 (Apr. 25, 1969).

This matter came to a head as the result of a complaint filed by Carter Electronics Corporation that its Carterfone was being barred from general use by the telephone company pursuant to its tariffs. After hearing the complaint, the Commission issued a decision²⁷³ which required the Bell System to cancel those tariff provisions which limit the ability of customers to attach their own equipment to the Bell switched network or to interconnect Bell facilities with the customer's own by other non-Bell facilities. As a result of this decision, which established the basic premise that any attachment which is privately beneficial and not publicly harmful may be used, the Bell System has greatly liberalized its pre-existing foreign attachment provision. In essence it now requires the use of relatively inexpensive protection devices to obviate the danger that the foreign attachment or interconnection will seriously and adversely affect the quality of service or the facilities of the Bell System, or endanger its employees or users of the system.

A major problem has arisen, however, with respect to the use of foreign attachments for controlling the switched network in lieu of the dial signaling device in telephone instruments or terminals supplied by the Bell System. In order to explore all of the technical and service implications of this matter, the Commission has authorized the Chief of the Common Carrier Bureau to conduct an investigation.²⁷⁴ To assist in this activity the Commission has entered into a contract with the National Academy of Sciences which, in turn, will make available highly competent scientific and technical personnel to review the entire matter and issue a report to the Commission setting forth their views on the basic technical aspects involved. After the report is received and analyzed, the Commission will determine what further action should be taken.

G. Computers and Communications

Another important area in which the Commission has taken the initiative involves the relationship between the rapidly expanding data processing and computer industry and communication services. Advances in modern technology have tended to blur the distinctions which historically have been considered to exist between common carrier communication services subject to regulation and other busi-

²⁷³ Carterfone Device, 13 F.C.C.2d 420 (1968), petitions for reconsideration denied, 14 F.C.C.2d 571 (1968).

²⁷⁴ On December 24, 1968, the Commission directed the Chief of the Common Carrier Bureau to organize a series of technical and engineering conferences which, together with the National Academy of Sciences' studies, will be used to evaluate and, if possible, resolve questions resulting from revised tariff regulations and practices filed by telephone companies in early 1969 in response to Commission orders in the Carterfone proceeding.

ness activities not subject to regulation. On the one hand, the communications common carriers are implementing a program to convert their central offices to electronic switching. Furthermore, the introduction of the touch tone telephone, which has the potential of serving as a computer input device, moves these carriers in the direction of being able to provide data processing services and facilities. Such processes and facilities have thus far been considered non-common carrier. On the other hand, the computer industry is developing computer, interface terminal, and out-station equipment which can be used not only for data processing, but also for switching and interconnection of different circuits and telephones. These latter activities have heretofore been considered to be common carrier functions. The Commission has instituted an inquiry to determine the exact nature of the facilities and services which are available and will be made available in the foreseeable future, which of these services, presently subject to regulation should be deregulated, and which others, not now subject to regulation, should be regulated.²⁷⁵ In addition, the inquiry is designed to solicit information as to whether the service offerings, classifications and practices, as well as the charges of the common carriers, enhance or hinder the ability of users to take advantage of this new technology, and the nature of any changes which should be required. Finally, the inquiry solicits data with respect to the problem of assuring the privacy of information stored in, or exchanged between, computers, as well as the action, if any, which the Commission should take to insure the privacy and proprietary nature of such data.

The importance of this inquiry is underlined by the number of the filings made in response thereto (62), as well as the detail and volume of the material submitted, totalling over 3500 pages. In order that it have appropriate assistance in summarizing the data, classifying it, procuring additional necessary data, and evaluating the alternatives open to it, the Commission entered into a contract with Stanford Research Institute. The Commission has received the latter's report and has issued its own report in this matter.²⁷⁶ After reviewing the SRI report, as well as the comments thereon from interested parties, the Commission issued a *Tentative Decision and Notice of Proposed Rule Making* on April 3, 1970.²⁷⁷

In this tentative decision the Commission found that data processing services are provided in a highly competitive market which it expected would continue to flourish best in the existing competitive

²⁷⁵ Notice of Inquiry, FCC 66-1004 (1966).

²⁷⁶ 17 F.C.C.2d 587 (1969).

²⁷⁷ Dkt. No. 16979, FCC 70-338, 35 Fed. Reg. 5822 (1970).

environment. It therefore concluded that there was no need at this time to subject non-common carriers who provided such data processing services to regulation. The Commission stated, however, that if significant changes in the data processing industry should develop or "if abuses emerged which require the exercise of corrective action," it would not hesitate to reexamine its policies.

The Commission also addressed itself to the question of what regulatory restraints it should impose upon common carriers who provide non-communication services. It determined, in line with its general conclusion, that common carriers should not be barred from providing data processing services. However, it recognized that there is danger of abuse if such services are provided by common carriers, and therefore proposed to incorporate certain safeguards in its contemplated rules. Specifically, the Commission tentatively concluded that common carriers with operating revenues of \$1,000,000 or more annually which desire to engage in the sale of data processing services may do so only through separate corporate entities, which must maintain separate books of accounts and operate with separate personnel and separate facilities. Carriers with less than \$1,000,000 of annual revenues would be exempt from these requirements. These safeguards, together with the requirements that any services provided by a common carrier to its data processing affiliate must be pursuant to tariffs available equally to all users, and that the carrier shall not otherwise confer any benefits on its subsidiary, would in the Commission's opinion be sufficient to prevent abuses.

AT&T is barred by a 1956 antitrust consent decree from engaging in services not subject to regulation. Accordingly, the Commission's decision not to subject data processing services to regulation, in essence, precludes AT&T from providing such services unless they are incidental to the provision of communications services within the meaning of the consent decree and the Commission's statement of policy.

The Commission also noted that in certain instances there would necessarily be offerings of service which combine data processing with message switching in a single integrated package. Such hybrid service will be evaluated in the context of specific factual situations. In general, however, where the service is primarily a communications or message switching service, and the data processing is essentially additive or incidental, the entire service will be subject to regulation.

H. *Satellite Communications*

In the field of international communications even more far reaching changes have taken place. Early experiments in the field

of satellites indicated that it would be feasible to take advantage of this technology to provide high quality, low cost facilities for international communications. In 1962 the Communications Satellite Act became law.²⁷⁸ In 1963 the Communications Satellite Corporation was established. Since then developments have taken place rapidly. In the spring of 1964 the Communications Satellite Corporation entered into a contract with Hughes Aircraft Corporation for the construction of a communications satellite to operate at synchronous orbit, that is, at a height of about 22,000 miles above the equator where its period of rotation around the earth is exactly equal to a revolution of the earth on its axis so that the satellite appears to hover above a given point on the earth.

In the meantime, because of the great potential in this new technology for international communications, discussions had been instituted with several European countries, Australia, and Japan regarding the best possible method of exploiting this technology. On August 20, 1964, arrangements were concluded by the United States and the aforementioned countries providing for the establishment of an international consortium, Intelsat, to plan, design, construct, and operate communication satellites to provide a global system of communications.²⁷⁹

The arrangements themselves represented an ingenious compromise between conflicting points of view. In most countries of the world communications are, like the United States Post Office, a government monopoly. These countries are, therefore, desirous of establishing an intergovernmental organization to exploit this new technology. In the United States and a few other countries, on the other hand, communications services and facilities are furnished by privately owned companies subject to government regulation. Comsat, the American instrument for international communications by satellite, is such a private company. It would be difficult for it to function in an organization which was totally intergovernmental in nature and structure. Accordingly, the Interim Agreements were subdivided into two parts. The first, or basic, agreement was intergovernmental in nature and set forth the basic terms and conditions under which governments agreed that service should be supplied. The second, or special, agreement was concerned with the basic operating problems. This was signed by private operating entities or by governmental administrations in their proprietary rather than their governmental capacity. Because of the novelty of the technology and the over-

²⁷⁸ 47 U.S.C. § 701 (1964).

²⁷⁹ Agreement Establishing Interim Arrangements for a Global Commercial Satellite System, Aug. 20, 1964, [1964] 2 U.S.T. 1705, T.I.A.S. No. 5646.

whelming superiority held by the United States, it was agreed that the arrangements should be interim in nature and that the United States would convene a conference early in 1969 looking toward the establishment of definitive arrangements on the basis of experience, and taking into account the recommendations made by the governing body under the Interim Arrangements.²⁸⁰

The United States was originally given a 60 percent ownership interest in the satellite facilities to be supplied by the international consortium. This interest, although it was to be reduced as other members joined, was not to fall below 50.6 percent. In addition, Comsat was selected to be the manager of the system on behalf of the consortium. The consortium itself was to be governed by an interim committee which represented those members who individually or collectively had an interest at least equal to 1.5 percent of the total investment by all members of the consortium. The right to invest in the consortium was related to each country's share of present and foreseeable international traffic. Voting rights in the consortium were to be equal to investment shares. To prevent a total United States monopoly, it was agreed that definitive action on other than procedural matters would require a vote of 12½ percent above that of the United States. If such a majority could not be obtained within 60 days, then a vote of only 8½ percent above that of the United States would be necessary for action. In general, however, the agreements anticipated, and actual practice has substantiated, that voting should be avoided and attempts to achieve unanimity should be pursued.

The first satellite (Early Bird) was launched in April, 1965, and has continued to supply service (240 circuits across the North Atlantic) since that date. A second generation of satellites (Intelsat II) was authorized in 1965.²⁸¹ These satellites were launched in late 1966 and early 1967. Three of the four satellites in this series were successfully launched and are now providing service (240 circuits). In all there are two satellites in the Atlantic, one of the first generation and one of the second, and two of the second generation in the Pacific. Together they provide almost 500 commercial circuits, as well as the capability for live television intercontinentally. NASA leases a very considerable amount of the capacity of these satellites in connection with its ongoing space program, particularly the Apollo projects.

The third generation of satellites (Intelsat III), with a capacity of almost 1000 circuits, was launched in the fall of 1968, and a fourth generation of satellites is now on order. When launched as now con-

²⁸⁰ *Id.*

²⁸¹ *Communications Satellite Corp.* 1 F.C.C.2d 1216 (1965).

templated in the first half of 1971, this latter generation (Intelsat IV) will provide approximately 5,000 circuits per satellite. These capacities must be viewed in the context of the demand and supply of international communications in the early 1960s. Prior to 1963 total transatlantic capacity via repeaterized cables was less than the equivalent of 200 voice grade circuits, and transpacific capacity was considerably less than transatlantic capacity. By the early 1970s this capacity should be increased between 25 and 50-fold. In addition, satellites for the first time provide the ability for real time transmission of live television programs.

The introduction of satellite communications brought with it a host of problems which have to be resolved so that the potential for reliable, low cost communications can be realized. The Communications Satellite Act created a new entity, Comsat, which was conceived to be primarily a carriers' carrier.²⁸² Thus a new and different concept was introduced in the field of international communications, that is, an entity whose primary purpose was not to serve the public directly, but rather primarily to supply facilities to the terrestrial carriers which would use these facilities in serving the public. It was necessary under these circumstances to determine exactly what services Comsat should be permitted to supply directly to the public and what services and facilities it would supply to the other carriers. The Commission instituted a proceeding to resolve this question.²⁸³ After reviewing the comments of the interested parties, the Commission, in a *Report and Order* issued February 3, 1967, determined that Comsat should indeed operate primarily as a carriers' carrier and should not, except in unusual circumstances, provide services to the using public.²⁸⁴ This decision was based on the facts that Comsat was given a monopoly with respect to international satellite communications, and that other carriers could not, under existing law, provide themselves with their own satellite facilities. If Comsat, therefore, were permitted to furnish services directly to users at the same charges that it made to the carriers, the latter would be precluded from furnishing services in this market. Furthermore, Comsat did not intend, nor was it in a position, to provide normal message and telex services to the public. Users of these services could be seriously affected if the carriers providing them were precluded from the growing, relatively low cost, leased-circuit market, which is the only one in

²⁸² "[I]t is important to remember that the corporation will, in the main, be a common carriers' carrier; that is, it will make its facilities available to those carriers and foreign entities furnishing service directly to the public." 108 Cong. Rec. 16925 (1962) (remarks of Senator Pastore).

²⁸³ Authorized User Proceeding, Dkt. No. 16058, FCC 65-523 (June 16, 1965).

²⁸⁴ Authorized Entities and Authorized Users, 6 F.C.C.2d 593 (1967).

which Comsat desired, or was able, to provide direct services to the public. The Commission, however, required that the carriers should reflect the economies made possible through satellite facilities in charges to the public for the leased services they provided. As a result of this decision charges for services across the Atlantic and Pacific Oceans were reduced very substantially.

The Communications Satellite Act provided that the ground stations necessary for satellite communications could be owned either by Comsat, by one or more carriers, or by Comsat and one or more carriers, whichever the Commission found would best serve the public interest.²⁸⁵ Here again the Commission instituted a proceeding to determine what its policy should be. After first licensing the initial three stations to Comsat alone,²⁸⁶ the Commission determined that for an interim period through 1969 such stations should be jointly owned by Comsat and the terrestrial carriers. Comsat was given a 50 percent ownership interest and the terrestrial carriers shared the remaining 50 percent under a formula designed to reflect their expected average use during the interim period.²⁸⁷ This decision was designed to give a community of interest to Comsat and the terrestrial carriers and to encourage use of the new technology by such carriers because of their actual investment in facilities.

I. *Satellites vs. Cables*

During the period when satellite technology was being introduced, there were also major advances in cable technology. The trans-oceanic cables laid during the 1950s had a capacity of approximately 36 voice-grade circuits, later increased to 48. The second generation of cables laid in the late 1950s and early 1960s had a capacity of approximately 140 circuits. The third generation now being laid has a capacity of 720 circuits.

Conflict arose, beginning in 1966, between the terrestrial carriers who desired to lay additional cables and Comsat, which took the position that its satellites could by themselves meet foreseeable demand. The issue originally came to a head in connection with a proposal to provide additional facilities to Puerto Rico. The Commission was confronted with conflicting applications between International Telephone and Telegraph Company and Comsat for earth stations in Puerto Rico,²⁸⁸ as well as the proposal by AT&T that a cable of 720

²⁸⁵ 47 U.S.C. § 721 (1964).

²⁸⁶ 38 F.C.C. 1104 (1965).

²⁸⁷ Ownership and Operation of Earth Stations, 5 F.C.C.2d 812 (1966).

²⁸⁸ ITT Application, File No. 8-CSG-P-66 (filed Nov. 23, 1965); Comsat Application, File No. 14-CSG-P-66 (filed Apr. 5, 1966).

circuits be laid between Florida and Puerto Rico.²⁸⁹ There was a growing shortage of facilities to this area which would have been intensified by holding lengthy hearings to determine whether the need should be met by cable or satellite, and if by satellite, which of the two competing entities should be licensed. Furthermore, projections of traffic requirements indicated that both the cable and satellite could be economically viable, as well as provide mutual backup for each other in case of failure or outages. The Commission determined to authorize both facilities and, under the joint ownership interim policy described above, resolved the conflict between ITT and Comsat.²⁹⁰ Both facilities became operational in the fall of 1968. Furthermore, because the high capacity facilities promise more economical operation, the Commission obtained agreement from the carriers that rates and charges to Puerto Rico would be reduced by 25 percent for telephone calls and considerably more for leased circuits.

A second problem arose in the fall of 1967 in connection with the need to furnish additional transatlantic facilities. Here again Comsat alleged that its planned satellites would meet all foreseeable needs. AT&T, on the other hand, argued that there was a need for cable facilities to Southern Europe which heretofore had had no direct access to the transatlantic cables and that its facilities would be more economical. After receiving massive technical and economic data, the Commission determined that, under their existing plans, projected satellite facilities would not be sufficient to meet demand during 1970 and early 1971. It therefore authorized the transatlantic cable, and again procured reduction in rates in excess of 25 percent to reflect the projected economies of the new facilities.²⁹¹

In both the Puerto Rico and the transatlantic cable cases there was danger that Comsat, which under the Authorized User policy did not have access directly to the customer, might not be able to sell its facilities and capacity until the cables were filled. The Commission, therefore, required as a condition of its grant of the cable authorization that the cable users undertake to fill both facilities pursuant to equitable formulas. In the case of the Puerto Rico cable, the formula required that 50 percent of the additional facilities needed to serve the public be taken in the cable and satellite capacity, respectively. In the case of the transatlantic cable, because of the much greater capacity projected for the satellite, the Commission required that the two facilities be filled proportionately so that each would reach 100 percent of capacity at approximately the same time.

²⁸⁹ AT&T Application, File No. P-C-6290 (filed Nov. 16, 1966).

²⁹⁰ ITT Cable & Radio, Inc.-Puerto Rico, 5 F.C.C.2d 823 (1966).

²⁹¹ American Tel. & Tel Co., 13 F.C.C.2d 235 (1968).

J. *Domestic Satellite*

After the first generation of satellites demonstrated their feasibility for providing international service, great interest was generated in the possibility that the satellite technology could be used to provide domestic service as well. Satellites seemed to offer particular advantages for the distribution of television programs. By means of this technology a network program could be transmitted from its source, in either New York or Los Angeles, to all television stations throughout the country by means of a single transmission from the earth station to relatively inexpensive receive-only stations all over the country. Terrestrial distribution, of course, involves interconnection between the source of the program and all television stations by means of coaxial cable or microwave, the cost of which is directly related to the distance over which the program is carried. Accordingly, in September, 1965, ABC filed an application for authorization to install such a domestic satellite system for television use. The Commission felt that this presented a basic policy question which should be resolved in broader terms than action on an individual application. Furthermore, the ABC application was deficient in various respects. The Commission, therefore, returned the ABC application without prejudice to future refiling and instituted a broad-based investigation into this subject.²⁹² Before the investigation could be concluded, the President, on August 14, 1967, created a Task Force on Communications Policy and charged it, among other things, with responsibility for making recommendations with respect to the question of domestic satellites. The Commission deferred action pending review of this matter by the Task Force. After the Task Force completed its study and submitted it to the President, there was a change in administration. The Nixon Administration indicated its desire to review the matter anew, and once again the Commission deferred action. On January 23, 1970, the White House released its comments and recommendations essentially favoring free competition in this field insofar as consistent with applicable law, judicial precedents, and technological constraints.

Upon consideration of this recommendation in light of the entire record before it, the Commission issued a *Report and Order* and *Notice of Proposed Rule Making* in its domestic satellite proceeding on March 24, 1970.²⁹³ In this report the Commission stated it would entertain applications by any qualified entity to establish and oper-

²⁹² Satellite Operation by Nongovernmental Entities, 2 F.C.C.2d 668 (1966).

²⁹³ Report and Order in Dkt. No. 16495, FCC 70-306, 35 Fed. Reg. 5356 (1969); Notice of Proposed Rule Making in Dkt. No. 16495, FCC 70-307, 35 Fed. Reg. 5351 (1969). The author dissented in part to the order and notice.

ate domestic communication satellite facilities for multiple or specialized common carrier services, for lease to other common carriers, for private use, joint cooperative use, or any combination of such services. It specified application procedures and technical guidelines, stating that applicants were expected to file comprehensive system proposals including full and detailed information on all technical and operational aspects. In considering whether the public interest would be served by a grant of any proposal, the Commission said it would be guided by the policies and provisions of the Communications Act of 1934, other relevant statutes, and pertinent judicial authorities. It expressly advised applicants that

while the Commission will welcome submission of applications and will give them all the most serious consideration, the extension of this opportunity to file, and the expenditure involved in preparing an application, do not in any way indicate that the application will be granted in whole or in part.²⁹⁴

Recognizing that the applications may present certain questions which might be resolved by the promulgation of rules, the Commission proposed rule-making on the policies to be followed in the event of technical or economic conflicts between applications, and on policies relating to interconnection with terrestrial facilities, direct user access to earth stations, and procurement. Comments were also requested on "what initial role of AT&T in the domestic satellite field would be appropriate in order to achieve a market environment conducive to innovation and the vigorous exploration and development of the special communications service potentials of the satellite technology."²⁹⁵

CONCLUSION

During the decade of the 1960s, the Federal Communications Commission exercised a much more active regulatory role in the communications industry than ever before in its previous history. In contrast with earlier periods when the Commission had come under frequent attacks for its passive performance and seeming willingness to avoid controversy, the past ten years have witnessed an increasing activism on the part of the FCC, not only regarding areas for which it has traditionally been responsible, but also concerning entirely new and unique activities brought about through technological advances coupled with rapid population growth.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

The Commission began, in the 1960s, what promises to be an in-depth, lengthy reappraisal of its policies concerning radio and television broadcast regulation, with particular emphasis upon the responsibility of the industry to serve the interests of the public. The vital role played by radio and TV in news reporting and commentary was critically examined, as was the increasing importance of broadcasting in political campaigns. Guidelines to aid the industry in meeting these responsibilities were established. Advertising and the multiple ownership of media were scrutinized, and positive initial action was taken in these areas by the Commission.

New technological developments thrust new responsibilities upon the FCC. Most notably, CATV and satellite communications presented new problems which demanded increasing attention by the Commission and which promise to require major regulatory and administrative efforts in the coming years. The fact that the record of the FCC over the past decade is a good one—though by no means perfect—demonstrates that the agency is capable of initiating vigorous action in the public interest, and should be equal to the challenges presented by new technological developments in the 1970s.