

THE FEDERAL COMMUNICATIONS COMMISSION AND COMPARATIVE BROADCAST HEARINGS: WHDH AS A CASE STUDY IN CHANGING STANDARDS

I. INTRODUCTION

A recent decision¹ of the Federal Communications Commission,² concerning WHDH-TV (Channel 5, Boston, Massachusetts) may mark the beginning of the end of a 15-year legal battle, the longest in Commission history, over the right to operate a commercial VHF television station in Boston. More significantly, the case may also mark the beginning of a new activism on the part of the FCC in the area of commercial broadcast licensing. The current decision, which takes the license away from the present operators of the station, seems to indicate that the Commission has undertaken a re-examination of the numerous guidelines employed in comparative broadcast hearings. A comparative broadcast hearing is the procedure used by the Commission for determining which of several competing applicants should receive a license to operate a station. Involved in the case are questions concerning which guidelines should be used in such hearings, the weight to be accorded to the various standards, and whether the same criteria should be used for original applicants (those applying for a new or unused frequency) and those who presently possess a license and are being challenged at a renewal proceeding. The decision has also focused upon the specific standard of diversification of the mass media of communication, and the relative importance of such diversification in FCC policy and its decision-making process.

The case began in 1954 with an FCC decision to grant a license for an additional commercial VHF television station in Boston. At that time, two commercial stations, both network affiliates, were operating in the Boston area.³ The initial decision to grant an additional license drew five applicants, including WHDH, then an AM and FM radio station, owned by the Boston Herald-Traveler newspaper. For 15 years these applicants and others have fought before FCC examiners, the Commission, the Court of Appeals for the District of Columbia, and in extra-judicial competition to secure the right to operate a television station in Boston, the nation's fifth largest market for commercial television.⁴ The battle has involved issues ranging from character analysis of the applicants to a congressional investigation of ex parte contacts between the license applicants and FCC Commissioners; from local control of broadcast facilities to the need for experience and operating ability by the applicants; from diversification of the mass media of communication to the need for editorializing on television.

The decision has produced over 40,000 pages of record to date,⁵ and serves

¹ WHDH, Inc., 16 F.C.C.2d 1 (1969).

² Hereinafter referred to as the FCC or the Commission.

³ In 1957, at the time of the first comparative decision in the WHDH case, six other television channels were allocated to Boston. One of these was held by a VHF educational station, and three were UHF stations not in operation at the time. See WHDH, Inc., 22 F.C.C. 767, 769 (1957).

⁴ Broadcasting, Feb. 3, 1969, at 21.

⁵ An FCC examiner, Herbert Sharfman, who made several preliminary determina-

to illustrate the typical problems faced by the Commission in comparative broadcast hearings. Further, the case involves numerous "unique" problems for the FCC. It can be read as a fascinating history of "low visibility decision-making" within a federal administrative agency,⁶ as an examination of an FCC search for criteria in the conferral of broadcast licenses, or as an example of the relation between administrative agencies and the political policy orientations of the executive branch of the national government.

The actual direction and thrust of federal policy toward commercial broadcasting licensing is extremely difficult to assess at this time, for the *WHDH* case has had several separate opinions, is still being litigated, and has been interpreted by various groups along several distinct lines in recent months. The broadcasting industry, for example, has read the case as a major decision jeopardizing television licenses valued at three billion dollars and influencing almost every television license in the country.⁷ Boston Broadcasters Inc., the winning applicant, has recently attempted to have the case read in a very different manner.⁸ Only future decisions in the *WHDH* case, and Commission decisions in other cases involving similar issues, will indicate the ultimate significance of the case.

This comment will first present a brief analysis of the role of the FCC in comparative broadcast hearings. Next, the history of the *WHDH* case, and the January, 1969, decision of the Commission will be discussed. Third, the specific issue of diversification of communications media as an FCC policy will be analyzed. Finally, the question of original as opposed to renewal proceedings will be examined. Throughout the comment, an attempt will be made to show those aspects of the case reflective of Commission thinking at a particular time and to examine the trends developing within the present Commission.⁹

tions in the *WHDH* case, commented in his decision of 1966 upon the case record.

In this case transcript and exhibit volumes, if piled up would reach a mark higher than the Inca Atahualpa's when he indicated to Pizarro the amount of gold to be delivered for his ransom. Unfortunately, not all the contents of these volumes are of metaphorical gold. But this less noble admixture is inevitable in a long hearing in which an incumbent licensee, like the priests of Diana of the Woods at Aricia (Frazer, *The Golden Bough*, Ch. 1) was shielding itself from lethal attack by aspirants to its place.

⁶ This phrase was used in conjunction with decisions related to United States government allocation of the radio spectrum between various types of users, i.e., military, commercial, airlines, etc. The topic of allocation of the radio spectrum is beyond the scope of this comment. See Rosenbush, *Low Visibility Decision-Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 *Ad. L. Rev.* 19 (1965). The categorization as low visibility decision-making, however, seems equally applicable to decisions concerning the allocation of frequencies within one area of use, between competing applicants, such as in licensing for commercial television.

⁷ See the discussion at pp. 965-66 *infra*.

⁸ See the discussion at p. 969 *infra*.

⁹ In tracing these trends, the discussion will be limited to the *WHDH* case and, generally, other Commission decisions, although they may involve similar issues, will not be discussed.

II. THE FEDERAL COMMUNICATIONS COMMISSION

The first major legislation concerned with the regulation of radio broadcasting was the Radio Act of 1927.¹⁰ This enactment was followed by the more comprehensive Communications Act of 1934,¹¹ creating the Federal Communications Commission. Both Acts appear to have been the direct result of experience in the early part of the century with a basically unregulated radio industry.¹² Two factors in particular moved Congress to act in this area. The rapid expansion of radio broadcasting had produced chaotic conditions. Coupled with these conditions was the unique nature of the industry to be regulated. Unlike other industries, the broadcasting field does not deal in a generally available product or service subject to a free economic market and the laws of supply and demand.¹³ The number of radio frequencies usable for commercial broadcasting is highly limited, and the problems concerned with the allocation of this resource became apparent even in the early days of broadcasting.

Related to the limited nature of the radio broadcast band was a fear on the part of the legislators examining licensing problems that powerful radio stations would develop in the major cities at the expense of stations in smaller communities and rural areas if the field remained unregulated.¹⁴ High power broadcast facilities in Boston, for example, might preclude the development of lower power facilities in the surrounding area because of the electronic interference that the Boston stations would produce.

The legislators examining these problems also displayed concern over possible monopolistic tendencies in the industry. As one article has commented,

[p]robably the hottest issue politically has been that of control, and from the point of view of time consumed in hearings and debates, Congress has been more concerned with the problems of monopoly than with any other aspect of the radio industry. Competition has always been considered desirable in the American economy, but particularly in radio has Congress been vigilant to preserve competition because of the nature of radio as a mold of public opinion and an instrument of political power.¹⁵

The combination of these fears, and the recognized importance of the

¹⁰ 44 Stat. 1162 (1927), repealed, Act of June 19, 1934, ch. 652, § 602(a). The Act was clearly stop-gap in nature.

¹¹ 47 U.S.C. § 151-609 (1964).

¹² For a more complete analysis of the background of the 1934 Act, see W. Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission* (1962), reprinted in *Hearings on Federal Communications Commission, Part I, Before Subcomm. No. 6 of House Select Comm. on Small Business, 89th Cong., 2d Sess. at A87* (1966); Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use*, 4 *Duquesne L. Rev.* 1, 3-14 (1965).

¹³ For a general discussion of the economics of the radio spectrum, see Meckling, *Management of the Frequency Spectrum*, 1968 *Wash. U.L.Q.* 26 (1968); W. Jones, *Use and Regulation of the Radio Spectrum: Report on a Conference*, 1968 *Wash. U.L.Q.* 71 (1968), and articles cited therein.

¹⁴ Jones, *supra* note 12, at A89.

¹⁵ Friedrich and Sternberg, *Congress and the Control of Radio Broadcasting*, 37 *Am. Pol. Sci. Rev.* 797, 809 (1943).

radio industry; led to an almost unlimited power of regulation, far exceeding that which had previously existed in any federal agency. One writer has concluded:

The electronic chaos of the nineteen-twenties led to federal regulatory legislation as yet unparalleled in the expansiveness of its scope, and the emphasis placed upon retention of government control, and the virtual absence of guidelines to direct the exercise of the broad governmental powers asserted.¹⁶

The extent of the regulation encompassed by the 1934 Act can readily be seen by examination of the introduction to the section of the Act dealing with radio broadcasting:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of inter-state and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . .¹⁷

The Act goes on to specify the powers and duties of the Commission,¹⁸ to limit the term of licenses issued to a maximum of three years,¹⁹ and to provide a series of complex procedures to be used in Commission proceedings for license selection.²⁰ While the procedural guides for the Commission are reasonably specific within the Act, substantive guidelines are lacking. The Act states that the Commission is required to distribute licenses among the states and communities so "as to provide a fair, efficient, and equitable distribution of radio service to each of the same."²¹ It further requires that such distribution be in the "public convenience, interest, or necessity,"²² but at no point does the Act elaborate on or expand these vague criteria.²³ Professor Jones of Columbia has analyzed the congressional effort:

¹⁶ Jones, *supra* note 12, at A90.

¹⁷ 47 U.S.C. § 301 (1964).

¹⁸ 47 U.S.C. § 303 (1964).

¹⁹ 47 U.S.C. § 307(d) (1964).

²⁰ 47 U.S.C. § 401 et seq. (1964).

²¹ 47 U.S.C. § 307(b) (1964).

²² 47 U.S.C. § 307(a) (1964).

²³ The Act does provide specific directions for the preservation of competition in the broadcast industry, and for the applicability of antitrust laws to the industry. See 47 U.S.C. § 314 (1964). This section also fails, however, to draw any specific guidelines which could be utilized by the Commission.

The Commission has adopted a regulation concerning multiple ownership of television broadcast stations and other media form. The television regulation, while setting a maximum limit upon station concentration, does little to clarify the Communications Act. The regulation reads as follows:

(a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if: . . .

(2) Such party, or any stockholder, officer or director of such party; directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of

Having established the power of the federal agency over all radio transmissions . . . and having foreclosed the creation of private property rights to the use of the radio spectrum, the Congress gave but slight illumination on how this expansive federal authority should be exercised. To be sure, the Communications Act intimates that licensees must meet minimum requirements. . . . But on the more general level of determining the uses to which the nation's radio waves should be put, and selecting among qualified applicants to perform such uses, the Act states merely that radio licenses shall be issued "if the public convenience, interest or necessity will be served thereby". . . . Perhaps this is as much specification as was practicable in 1927 in view of the undeveloped state of the art and the urgency created by rampant confusion on the airways. But the substantive standards have not been further refined by the Congress since that date.²⁴

The Supreme Court also has examined the problem with regard to the total lack of substantive standards in the FCC legislation. In 1940, Justice Frankfurter, in *FCC v. Pottsville Broadcasting Co.*,²⁵ also recognized the general vagueness of the Act. Unlike Professor Jones, however, he viewed the situation in a more favorable light:

Underlying the whole law [the Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for

such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience, or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

47 C.F.R. § 73.636 (1968). See also 47 C.F.R. § 73.240 (establishing a similar regulation for FM radio); and 47 C.F.R. § 73.35 (establishing a similar regulation for AM radio). These regulations also preclude common ownership or control of two stations in the same service area (the so called duopoly policy). The Commission has recently proposed an additional regulation which would limit ownership in any given market to an AM station, and FM station, or a TV station. Thus, multiple ownership of full time stations would not be allowed. See Notice of Proposed Rule Making in Docket No. 18110, 33 F.R. 5315 (1968). The proposal would not require divestiture of existing facilities. See Cox, Competition in and Among the Broadcasting, CATV, and Pay-TV Industries, 13 Antitrust Bull. 911 (1968).

²⁴ Jones, *supra* note 12, at A90-91.

²⁵ 309 U.S. 134 (1940).

more than three years; and in deciding where to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.²⁶

The debate concerning the need for more specific directives from Congress to the Commission is still taking place.²⁷ It continues with special vigor in the area of comparative hearings. In comparative broadcast hearings, or when a present license is up for renewal, each applicant presents his case and "selling points" in one hearing, and the Commission compares the applicants to each other to determine which would best serve the "public interest, convenience, and necessity." Problems arise in the attempt to develop and weigh criteria for decision. With little instruction from Congress, the Commission has had great difficulty in the formulation and application of enduring standards.²⁸

The first decision in the *WHDH* case illustrates the problem inherent in a comparative hearing. At the same time it demonstrates the common decisional criteria used by the Commission in the comparative hearings of the mid-1950s.²⁹ In some respects, the subsequent history of the case can be viewed as merely a series of attempts to shift the weight accorded to these factors and to set forth in specific form those guidelines which Congress has failed to provide.

²⁶ *Id.* at 138.

²⁷ See Symposium, Antitrust and Monopoly Policy in the Communication Industries, 13 Antitrust Bull. 871 (1968), where a full discussion of the present problems facing the FCC is presented.

²⁸ See the 1956 letter from FCC Chairman McConnaughey to Senator Warren Magnuson setting forth the comparative criteria followed by the Commission, Investigation of Regulatory Commission and Agencies, Hearing before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pt. 8, at 2874 (1959). The Chairman points out that the Commission may examine factors not included in these criteria. On the issue of weighting the criteria, Mr. McConnaughey stated:

Turning to your second request—the relative importance of the criteria—we point out that a precise delineation is even more inappropriate on this score. . . . We are firmly of the opinion that the only proper approach is to look to the facts of each case.

Id. at 2875-76.

²⁹ For one vehement reaction to these standards and decisions of the mid-1950s, see the remarks of Professor Jaffe of Harvard Law School in an article entitled *The Scandal in TV licensing*, *Harper's*, Sept., 1957.

In recent months the air in Washington, New York, and Boston has been thick with rumors of political favoritism in the Federal Communications Commission. Some of them have been circulated by disgruntled losers, but the case against the FCC does not rest on these. It rests on the records of the Commission's decisions in licensing television stations, and the reaction of the bench and bar. On the basis of this record, it seems clear that the FCC is dealing a heavy blow to good government.

Id. at 77.

THE WHDH CASE

III. HISTORY OF THE WHDH CASE

A. *The 1957 Decision of the Commission*³⁰

The first official decision of the Commission in the *WHDH* case was released in 1957. It reviewed the applications of the four parties (*WHDH*, Greater Boston Television (*GBT*), Massachusetts Bay Television (*MBT*), and DuMont Laboratories) who had applied for the license to operate Channel 5 in Boston. The case had been heard previously by an FCC hearing examiner who had recommended issuance of the license to *GBT*.³¹ Reviewing this decision, the Commission proposed:

To determine on a comparative basis which of the operations proposed in the above-entitled applications would best serve the public interest, convenience, and necessity in the light of the record made with respect to the significant differences among the applications as to:

(a) The background and experience of each of the above-named applicants having a bearing on its ability to own and operate the proposed television station.

(b) The proposals of each of the above-named applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the above-entitled applications.³²

The Commission examined the applicants on several distinct factors which it considered evidence of the broader criteria outlined above. It analyzed the four parties as to the background and personnel of the applicants, their previous experience in radio and television, their degree of local residence, the degree of civic participation displayed by the parties, the diversification of occupations of the principals, the proposed integration of ownership with management, the past broadcast records which the parties may have accumulated, their proposed program policies, proposed studios and equipment, proposed staff, and diversification of media of mass communication. These various factors were all to be considered, although the weight to be accorded to each factor varied, and although specific means were lacking for measuring relative strength and weakness from factor to factor.³³ In effect, the Commission took the general record of each applicant and compared it with the records of the others, and attempted to determine which factors would best achieve a decision in the "public interest, convenience, or necessity."

The Commission found *WHDH* to be the only applicant then broadcasting directly in Boston, operating both a 50,000-watt AM radio station and an FM radio station. It further determined that *WHDH* was wholly owned by the Boston Herald-Traveler newspaper, one of eight newspapers published in the city of Boston at that time. It found *MBT* to be organized entirely for the

³⁰ 22 F.C.C. 767 (1957).

³¹ *Id.* at 768-79.

³² *Id.* at 768.

³³ See Irion, FCC Criteria for Evaluating Competing Applicants, 43 Minn. L. Rev. 479 (1959), for a discussion of each of these factors.

attempt to achieve the Channel 5 license. It reached a similar conclusion in regard to GBT, although several of the individuals involved with that applicant were then involved with the operation of a 5,000-watt AM station in Boston. DuMont was found to be a national corporation which was owned by Paramount Pictures. It was active in the production of broadcasting equipment and owned several radio and television stations in other cities.

After examining the specific factors outlined above, the Commission formed its conclusions on the comparative aspect of the decision. First, on the issue of local residence, it found all the applicants equal, with the exception of DuMont, which ranked poorly on this issue.³⁴ Second, the Commission weighed the civic participation of the parties, a criterion which it used to help determine the "identity of the applicant with the community to be served."³⁵ Here, MBT and GBT finished slightly ahead of WHDH, with all three leading DuMont.³⁶ Third, it examined diversification of occupations of principals. This factor was determined to be a "lesser guide factor, but one which gives some indication of representation of various community interests. . . ."³⁷ Again, MBT and GBT were found to be slightly superior to WHDH, with all three leading DuMont.³⁸ Fourth, the Commission examined the experience of the applicants, a factor to be given "substantial importance"³⁹ as it indicated to the Commission the likelihood "of effectuation of proposals through the demonstrated reliability, competency, and efficiency which may be brought to bear"⁴⁰ by the applicant. DuMont was found to be first in this category, holding a slight lead over WHDH, with both parties outdistancing MBT and GBT.⁴¹ Next considered was integration of ownership with management, a criterion seen indicative of the assurances of "continuing effective action in the carrying out of its [the applicant's] proposals and of a continuous operation in the public interest."⁴² It found that no applicant proposed "substantial" integration of ownership with management, but MBT and WHDH were more highly regarded than GBT, and all three were to be favored over DuMont.⁴³ The next factor examined was past broadcast record which the Commission determined to be "as persuasive evidence as can be marshalled by an applicant" but no "guarantee that the applicant's present promises will be fulfilled."⁴⁴ This factor is to be distinguished from broadcast experience in that past broadcast record encompasses the actual operating record of specific stations controlled by the applicants, while the experience guideline is related to the individual personnel of an applicant and their previous work in station

³⁴ 22 F.C.C. at 860.

³⁵ *Id.*

³⁶ *Id.* at 861.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 862.

⁴¹ *Id.* at 864.

⁴² *Id.* at 865.

⁴³ *Id.* at 866.

⁴⁴ *Id.* at 866-67. "A past broadcast record in the community is regarded as the best indication of the applicant's awareness of and responsiveness to local programming needs and interests and of the reliability which may be placed on him to effectuate his proposals." *Id.* at 867.

operations. Both WHDH and DuMont were found to have significant past broadcast records, but that of WHDH was considered more important since it involved a record in the same community to be served by Channel 5. DuMont also was given a highly favorable rating on this factor and, unlike WHDH, it had achieved its past record in the field of television.⁴⁵ Neither MBT nor GBT were found to have past broadcast records sufficient to be considered by the Commission.⁴⁶

Examining planning and preparation for television, the Commission stated that "WHDH has engaged in, by far, the greatest amount of advance planning and preparation for its proposed television operation."⁴⁷ MBT was found to be second, and GBT and DuMont were considered equal and in last place.⁴⁸ On the factors of proposed program policies, program proposals, studios and equipment, and staff, the Commission could find no substantial differences among the applicants.⁴⁹

One factor of some significance which the Commission did examine in relation to the staffs of the individual applicants concerned a Mr. Henry, one of the principals of GBT. During the hearings it came to light that Mr. Henry had been an attorney fifteen years before the present proceeding, and had been disbarred for professional misconduct. He had not reported this fact on the GBT license application.⁵⁰ The hearing examiner had minimized the significance of this fact because of the record that Mr. Henry had achieved in the broadcasting industry subsequent to his disbarment. The Commission, however, accorded more weight to Mr. Henry's failure to report the matter and gave GBT a "demerit" for his lack of candor.⁵¹

The final factor examined by the Commission was the question of diversification of media of mass communication. This criterion was grounded in the belief that "the widest possible dissemination of information from diverse sources and the promotion of competition are in the public interest."⁵² The Commission went on:

It [diversification] remains, however, a comparative, not a disqualifying factor. To hold otherwise would be to disqualify an applicant solely for the reason that it is otherwise engaged in the dissemination of news and views. This we believe would not only be contrary to our law, but as we have frequently assured the Congress, in our view contrary to public interest.⁵³

The Commission found MBT to be connected with Springfield Television Broadcasting Corporation, a UHF licensee in Springfield, Massachusetts, and

⁴⁵ Id. at 869.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id. at 870-71.

⁴⁹ Id. at 871-75. The inference arises that these factors are not to be given substantial weight in the ultimate decision.

⁵⁰ Id. at 782-83. This fact assumes added significance in light of subsequent events. See p. 955 *infra*.

⁵¹ Id. at 880-81.

⁵² Id. at 875.

⁵³ Id.

WORL, a 5,000-watt AM radio broadcasting station in Boston. It found that DuMont directly controlled two television stations in other cities and was connected, through a separate company which it controlled, with a third television station. WHDH was found to own an AM and an FM station in Boston and to be wholly owned by a newspaper which published a morning, an evening and a Sunday paper in Boston. After examining the connections which affected the Boston Herald-Traveler's control over WHDH, the Commission concluded that no preference should be awarded between MBT and GBT but that "*these two applicants are entitled to a distinct preference over DuMont, and a stronger preference over WHDH.*"⁵⁴ (Emphasis added.)

In summary, the Commission stated that "WHDH emerges with a strong showing on all of the local factors."⁵⁵ DuMont, on the other hand, was found to be weak on these grounds.⁵⁶ MBT and GBT were determined to be leaders in the area of diversification of mass media but

[t]he overall strength of showing by WHDH, including the local factors, the program proposals, and the assurance of effectuation which is gathered from its superior broadcasting record over a period of years in the community concerned and the experience qualifications which its principals demonstrate, persuade the Commission that this applicant is the most qualified to provide programming service on a continuing basis in the interest of the population of the coverage area, *notwithstanding that the diversification policy of the Commission would be better served by a grant to either Greater Boston or MBT.*⁵⁷ (Emphasis added.)

This decision drew two dissenting opinions. Commissioner Hyde dissented on the ground that a policy favoring WHDH's experience in the operation of their AM station and the "local" strength gained through their newspaper operation conflicts sharply with the Commission policy favoring diversification of media of communications. He resolved the conflict by favoring diversification in the conviction that "public interest, convenience, and necessity would be served best by selecting an applicant *which would offer a higher degree of diversification.*"⁵⁸ (Emphasis added.) Commissioner Bartley also dissented on the ground of diversification and its relationship to the WHDH past broadcast record.⁵⁹

The 1957 WHDH decision illustrates the Commission's quest for criteria to govern the allocation of broadcast licenses. At the same time, it demonstrates the essential subjectivity of the determination, both in regard to the rating of the applicants on the factors used, and in the weight attached to the various factors. A large part of the subsequent decisions in the WHDH case can be viewed as a shifting of these weights, especially those relating to

⁵⁴ Id. at 879.

⁵⁵ Id. at 881.

⁵⁶ Id.

⁵⁷ Id. at 882.

⁵⁸ Id. at 883.

⁵⁹ Id.

past broadcast record and diversification. Although numerous other factors were to enter into the *WHDH* case, these criteria still remain important in an analysis of the significance of the decision.

B. *The 1958 Court of Appeals Decision*⁶⁰

The next major decision in the *WHDH* case was the result of an appeal from the Commission decision to the Court of Appeals for the District of Columbia.⁶¹ After discussion of several preliminary issues, the court addressed the loose standards for review of administrative agency decisions, and specifically those standards as applied to FCC license hearings. Quoting an earlier decision, the court observed that

[t]he controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary.⁶²

Despite its avowed judicial restraint, the court did feel obliged to examine the diversification question, perhaps because of the significance attached to that criterion by the dissenting commissioners. The court decided that the importance of diversification of the various communications media within a community would turn on many factors requiring scrutiny of the local setting in each case. After examining the communications picture in Boston, it held that the Commission had exercised "permissible judgment" on the issue.⁶³ The court's judgment, it was felt, should not be substituted for that of the Commission.

In short, the diversification factor is important, but may be counter-balanced by other factors. Our test lies in whether or not in the Commission's performance of its duty of determining which applicant will better serve the public interest, it is shown to have considered diversification of control in connection with all other relevant factors, and that such significance as may attach has reasonably been

⁶⁰ *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958), cert. denied, 366 U.S. 918 (1961).

⁶¹ The Communications Act of 1934 makes specific provision for direct appeal from Commission decisions to this court, 47 U.S.C. § 402(b) (1964).

⁶² 261 F.2d at 62, quoting *Pineallas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir.), cert. denied, 350 U.S. 1007 (1956).

⁶³ 261 F.2d at 65.

weighed and is rationally supported by the record, as the Commission finally evaluated the effect of this factor.⁶⁴

The final issue discussed by the court concerned a contemporary congressional investigation of regulatory agencies. The investigation had illumined a broadcasting license battle waged for a television station in Miami, Florida. During the investigation charges were leveled at a member of the FCC stating, in effect, that the member should not have participated in the Miami case because of contacts which that member had made with various applicants for the license.⁶⁵ Further evidence from this investigation had revealed that two of the parties in the *WHDH* case, WHDH and MBT, had conferred with this same member of the Commission in reference to legislation, and possibly in reference to the actual *WHDH* case, while the matter was still under consideration by the Commission. Mr. Robert Choate, president of WHDH, and Mr. Clark, a principal of MBT, had both conferred with Mr. McConnaughey, then Chairman of the FCC.⁶⁶ These contacts took place in 1954, and the court of appeals, upon learning of them, felt obliged to return the present case to the Commission for hearings on the issue of these "ex parte" contacts.

The court, feeling that the misconduct discovered might cause the award to be void ab initio, and further determining that after-discovered evidence should be considered where ignorance of it may have precluded a "proper and just result," remanded the case to the Commission.⁶⁷ Specifically, the court ordered the Commission to determine whether any member of the Commission should have disqualified himself from the case and, further, to determine the influence of the contacts upon the decision reached below. Despite the remand, the court decided to maintain the status quo during reconsideration of the case by the Commission.⁶⁸ Thus, WHDH, which had begun operation in 1957 under the original Commission decision, would continue to operate on Channel 5 during the remand.

C. The 1960 Commission Decision⁶⁹

Pursuant to the order of the court of appeals, the FCC held additional hearings on the *WHDH* case, and released a further decision in July, 1960. This decision, accepting the facts of the 1954 contacts between Robert Choate of WHDH and Mr. McConnaughey, Chairman of the FCC, found it "unrealistic to conclude that he [McConnaughey] was influenced by Choate's contacts or that the grant was actually secured as a result of improper activities."⁷⁰ The Commission did conclude that Choate "demonstrated an attempted pattern of

⁶⁴ Id. at 64.

⁶⁵ Id. at 65.

⁶⁶ Id. at 66. For the actual testimony of Mr. McConnaughey concerning this matter, see Investigation of Regulatory Commissions and Agencies, Hearing Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pt. 6, at 2335-39 (1958).

⁶⁷ 261 F.2d at 67.

⁶⁸ Id.

⁶⁹ WHDH, Inc., 29 F.C.C. 204 (1960).

⁷⁰ Id. at 211.

influence.”⁷¹ Although such activities “reflect adversely on WHDH,” the Commission went on to declare that “such conduct, . . . does not demonstrate such a complete lack of character as to require absolute disqualification.”⁷² The Commission reached similar conclusions regarding the ex parte contacts and general conduct of MBT.⁷³

The ex parte issue, however, was considered sufficiently important for the Commission to declare that the original grant of the license to WHDH should be voided,⁷⁴ and that an entirely new comparative decision should be made in light of these additional findings. Like the court of appeals, it concluded that WHDH should continue to operate the station during new hearings, so as not to deprive the people of Boston of an existing service.⁷⁵

*D. The 1962 Commission Decision*⁷⁶

The 1962 decision, unlike that of 1957, considered only three applicants, for DuMont, having suffered a poor rating on the “local” factors in the original hearing, decided to withdraw from the case. At the outset, the Commission stated that both WHDH and MBT should be assessed “equal impairment of their comparative status,” because of the ex parte contacts of WHDH’s Robert Choate and the similar ex parte contacts of MBT.⁷⁷ At the same time, the Commission assessed some degree of demerit against GBT for the misrepresentation made by Mr. Henry in his testimony before the original examiner. While it conceded some differences between his conduct and that of Mr. Choate and MBT, the Commission managed to equate the conduct of the parties to some extent, and determined that the parties deserved equal treatment in a comparative decision.⁷⁸ However, such terms as “equal impairment” or “comparative demerit” do not signify standards of any established content. Thus, an appraisal of their significance remains difficult, especially in relation to the total criteria used in comparative decisions, for in the ultimate determination the applicants are considered as a whole, not as the specific total of their records on individual factors.

The Commission next determined that the case should turn on the “conventional criteria” used in the 1957 decision, and adopted the findings and conclusions reached at that time.⁷⁹ It did re-examine, however, the issue of diversification, and concluded:

[T]he ultimate significance of this preference [for GBT, on the issue of diversification] is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM, and

⁷¹ *Id.*

⁷² *Id.* at 212.

⁷³ *Id.*

⁷⁴ *Id.* at 212.

⁷⁵ *Id.* at 213-14. Petition for rehearing of the case was denied. See 29 F.C.C. 986 (1960). The decision was affirmed by the court of appeals sub nom. *Massachusetts Bay Telecasters, Inc. v. FCC*, 295 F.2d 131 (D.C. Cir. 1961).

⁷⁶ WHDH, Inc., 33 F.C.C. 449 (1962).

⁷⁷ *Id.* at 450.

⁷⁸ *Id.* at 451-52.

⁷⁹ *Id.* at 452.

television stations unassociated with the applicants. . . . Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentration of media control which the Commission's diversification policy is designed to avoid. Therefore, although Greater Boston is entitled to a substantial preference on the diversification criteria, the decisional impact of that preference is far less than it might be if the competing applications were for a community possessing fewer existing media.⁸⁰

Thus, the Commission concluded that the public interest would best be served by granting the Channel 5 license to WHDH because of its past broadcast record and experience.⁸¹

However, the Commission did depart from the normal practice of granting licenses to operate for a three-year period, and instead gave WHDH the license for a period of only four months. This result, in effect, invited challenges at the license renewal proceeding.⁸²

The 1962 Commission decision elicited one dissenting and two concurring opinions. Chairman Minow dissented:

[I]n any event, there is no justification on this record for preferring WHDH, an applicant who has engaged in ex parte attempts to influence the Commission's decisional process over Greater Boston, the only present applicant who has not. *Nor is there any reason to dilute to the point of insignificance the important policy of diversification of ownership of mass communication media to reach that result.*⁸³ (Emphasis added.)

The Chairman continued by saying that he would further reopen the record to new or amended applications and would allow WHDH to continue to operate the Channel 5 station only as an interim trustee. This dissent strongly emphasized the ex parte contacts of Robert Choate and, to a lesser extent, those contacts of MBT. Chairman Minow felt that these contacts were considerably more significant than the activities of Mr. Henry of GBT, and that the Commission miscalculated in its equation of the acts of the two parties.

Chairman Minow then examined the diversification issue with attention to the other sources of communication in Boston, and accepted the premise that the weight to be accorded this issue should rest partially on the extent of the control over local media which a grant to WHDH would afford to the Boston Herald-Traveler newspaper. The Chairman pointed out that while at the 1957 hearing the Boston Herald-Traveler operated only two of eight newspapers in the area, one of Boston's six other dailies had meanwhile ceased publication and that the other five competitors consisted of the morning and

⁸⁰ Id. at 453.

⁸¹ Id.

⁸² Id. at 454.

⁸³ Id.

evening Boston Globe, the morning and evening Boston Record-American, and the Christian Science Monitor. Thus, the Herald-Traveler actually faced only three competitors, not six as had been stated in the earlier opinion. But in one respect the Chairman was mollified:

However, the majority, by granting only a 4 months' license to WHDH, does provide the opportunity for the filing of competing applications at an early date. *So far as I am concerned, the existing temporary licensee will not enjoy a preferred position in any such proceeding.* (Emphasis added.)⁸⁴

The concurring opinion by Commissioner Ford merely stated that the ex parte contacts of Mr. Choate were not such as to require a change in the 1957 decision. Commissioner Cross also concurred. He viewed his decision as a "Hobson's choice in favor of the least undesirable of the three demerited applicants."⁸⁵ Further, he agreed with the short four-month term for the license, "after which time there will be an opportunity for other applicants to file against the WHDH renewal."⁸⁶

E. The 1964 Court of Appeals Decision⁸⁷

The 1962 Commission decision produced appeals by both GBT, as a losing party, and by WHDH, as the recipient of a license to last only four months. Following oral argument of these appeals, but before a decision was reached by the court, Mr. Choate, president of WHDH, died. In response, the court of appeals remanded the proceeding to the Commission for reconsideration of the 1957 and 1962 decisions in light of the change in WHDH policy likely to result from the death. The court noted that Mr. Choate had been weighed favorably for WHDH on the factors of civic participation and integration of ownership with management. At the same time, his ex parte contacts had weighed against WHDH. The court concluded this segment of the opinion by stating that "[o]bviously the resultant net assay is initially for the Commission. The case will therefore be remanded for such reconsideration."⁸⁸

⁸⁴ Id. at 465.

⁸⁵ Id. at 467.

⁸⁶ Id. A petition for reconsideration was denied. 34 F.C.C. 537 (1963). Shortly after the grant of the four-month license to WHDH, a major change in the composition of the parties to the case took place. First, MBT dropped out of the case. Second, GBT dropped out, but re-entered as Greater Boston II. The re-entered applicant, however, never prosecuted the case with its earlier vigor and failed to pass two qualifying tests in the final consideration. 16 F.C.C.2d 29, 258.

At the same time, two new applicants filed for the licensee. One, Charles River Civic Television, Inc. (CRC) was controlled by a prominent group of Boston business and civic leaders. CRC was to be under the control of a charitable trust organized for that purpose. 16 F.C.C.2d 29, 105-62. The second new applicant was Boston Broadcasters Inc. (BBI), also involving a group of prominent Boston business and civic leaders. BBI was not organized as a charitable trust, but had gathered together numerous educational and cultural leaders to assist in their proposals and to agree to play an active part in the station should the license be secured. BBI proposed such ideas as twenty-four hour per day operation, numerous local programs, a large cultural and educational operation, and an active political information program. 16 F.C.C.2d 29, 163-217.

⁸⁷ Greater Boston Television Corp. v. FCC, 334 F.2d 552 (D.C. Cir. 1964).

⁸⁸ Id. at 554.

This determination was reached before the court actually rendered any opinion on the appeal from the Commission decision giving WHDH the four-month license.

During the course of appeal from the Commission decision of 1962, but also before the rendering of the court of appeals decision, a further complication entered the *WHDH* case. While WHDH and GBT were appealing the four-month license grant, the four-month period expired and renewal hearings were begun by the Commission. This development was examined by the court, which stated:

Of course the renewal proceedings assume an initial license to WHDH. If on reconsideration upon this remand the Commission decides not to award the initial license to WHDH, the renewal proceedings lose their appropriateness.⁸⁹

The court continued:

Clearly whatever changes may be wrought in the affairs and prospects of WHDH by the death of Mr. Choate may be pertinent both to the reconsideration of the initial awards and to the renewal proceedings.⁹⁰

The court then pointed out that while new parties were involved in the renewal hearing, the Commission might find some procedural manner to combine, either entirely, or in part, the two separate hearings, since much of the evidence to be heard would be pertinent to both decisions. The court concluded by stating that it would retain jurisdiction over the cases.

F. *The 1965 Policy Statement*⁹¹

Less than one year after the second court of appeals remand, the FCC further complicated the *WHDH* case by issuance of a Policy Statement on Comparative Broadcast Hearings. The Statement was not issued in connection with the *WHDH* case, but was to have a strong impact upon future opinions in the case. The Statement was issued to clarify the Commission's criteria governing the disposition of comparative broadcast hearings, and was released while the *WHDH* case was under reconsideration by the Commission.

At the outset, the Commission declared that the statement was *not* to deal with the "somewhat different problems" related to hearings for the renewal of broadcast licenses.⁹² Thus, the degree to which it should have influenced the *WHDH* decision is open to debate. It has, however, assumed a high degree of importance in the more recent Commission considerations of the *WHDH* case, and especially in the Commission decision of January, 1969.

The Policy Statement recognized two basic objectives "toward which the process of comparison should be directed."⁹³ The two goals were: (1) best practicable service to the public and (2) maximum diffusion of the media of

⁸⁹ Id. at 554 n.5.

⁹⁰ Id. at 554.

⁹¹ Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

⁹² Id. at 393 n.1.

⁹³ Id. at 394.

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mass communication. On the second point the Commission stated, "the less the degree of interest in other stations or media, the less will be the significance of the factor."⁹⁴ In further clarification of the issue, the Statement explained additional criteria.

Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

(a) are larger, i.e., go towards complete ownership and control; and to the degree that the existing media:

(b) are in, or close to, the community being applied for;

(c) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;

(d) are significant in terms of regional or national coverage; and

(e) are significant with respect to other media in their respective localities.⁹⁵

The Policy Statement then turned to an examination of the value of full-time participation in station operation by the owners of the station, the value of past participation in local affairs by the individuals associated with an applicant, and other factors mentioned as comparative criteria in the 1957 decision of the *WHDH* case. The first major change proposed by the Statement, however, sought increased significance for the diversification factor. Previously, diversification had been an important factor, but still only one of many. The Policy Statement appears to elevate diversification to a position of higher importance, and possibly to make diversification the most important single factor in comparative hearings.⁹⁶

The second thrust of the Policy Statement related to the value to be attributed to the past broadcast record of an applicant. "This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant," declared the Commission.⁹⁷ This broadcast record can apply only to individuals involved with stations distinct from the station proposed for the license, as the Policy Statement was not to involve the problems of renewal hearings. The past record could involve separate stations in the same city as that for which the license was being sought, or could involve stations in geographical areas distinct from that for which the license was being sought. Further, it would apply to all forms of communications media. Thus, an applicant holding a radio license in one city would be influenced in an application for a television license in a second city. Concerning the issue of past broadcast record, the Commission declared that

[a] past record within the bounds of average performance will be disregarded, since average future performance is expected. . . .

⁹⁴ *Id.*

⁹⁵ *Id.* at 395.

⁹⁶ See pp. 963-64 *infra*.

⁹⁷ 1 F.C.C.2d at 398.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future.⁹⁸ (Emphasis added.)

This statement strongly reduces the value attributed to past records by previous Commission statements. Thus, the Policy Statement might be read as reducing the weight to be accorded to past records as it increased the weight to be accorded to diversification. The diversification policy would favor those applicants not involved with other media, while the statement concerning past broadcast record would remove any advantages previously given to applicants with an average past broadcast record. In short, the Commission may have been responding to the paradox mentioned in the dissenting opinions by Commissioner Hyde and Commissioner Bartley in the 1957 decision of the *WHDH* case. At that time, the dissenters had confronted the Commission with the contradiction inherent in the effort to diversify communications media and to weigh favorably an applicant's past broadcast record.

It is noteworthy that, despite this fact, Commissioner Hyde dissented to the Policy Statement. He felt that it would neither simplify nor expedite comparative cases. He anticipated that "[the Policy Statement] would press applicants into a mold in order to meet the Commission's preconceived standards, thus deterring perhaps better qualified applicants from applying. . . ."⁹⁹ Applicants, continued Commissioner Hyde, should be compared with each other, not with abstract theories prepared in a vacuum by the Commission. In his view the Commission case law should be more than sufficient to apprise the applicants of the general views of the Commission and its individual members.

With regard to limiting the Policy Statement to new license hearings and excluding renewal hearings, Commissioner Hyde could find neither "a logical [nor] a legal basis . . . for making a distinction. . . ."¹⁰⁰ He anticipated substantial problems in the treatment of new applicants on the same basis as renewal applicants. The "filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process."¹⁰¹

G. *The 1969 Commission Decision*¹⁰²

The most recent decision in the *WHDH* case was issued in January, 1969. At that time, in a three-to-one decision, the Commission vacated the

⁹⁸ *Id.*

⁹⁹ *Id.* at 400.

¹⁰⁰ *Id.* at 403.

¹⁰¹ *Id.* at 404. Commissioner Bartley also dissented to the Policy Statement on the ground that decisions should be made entirely on a case-by-case basis. He felt that the Commission should avoid becoming "static" by developing fixed principles, prior to hearing the actual case. *Id.* at 404.

Commissioner Lee wrote a concurring opinion to the Policy Statement. He concurred with "considerable reluctance" and stated, "It may be that there is no better selection system [in comparative hearings] than the one being followed. If so, it seems like a 'hell of a way to run a railroad. . . .'" *Id.* at 404, 406.

¹⁰² *WHDH, Inc.*, 16 F.C.C.2d 1 (1969). The gap of four and one-half years between the release of the 1964 court of appeals decision and the January, 1969 opinion was filled

1967 decision of an FCC examiner and awarded the Channel 5 license to Boston Broadcasters Inc. The examiner, using many of the traditional standards for comparative hearings, had awarded the license to WHDH. The Commission's reversal involved several basic issues, ranging from the possible effect of Robert Choate's death upon WHDH policies, to the propriety of applying the 1965 Policy Statement to this case. The traditional comparative criteria used in the 1957 decision also came under scrutiny as the Commission restated, to some extent, the 1965 Policy Statement, and the changes wrought by the Statement upon these older criteria.

The issues relating to Choate's death, and those involving his ex parte contacts, were dismissed by the Commission as unnecessary to the actual determination of the case. The questions concerning the Policy Statement, however, presented more difficult problems. WHDH had argued that since the Statement was not released until after the record of the present case had been closed, it could not apply without a reopening of the record. The Commission held otherwise, declaring that

[n]o element of surprise affecting the fairness of the hearing exists inasmuch as we did not adopt new criteria in the Policy Statement which would call for the introduction of new evidence; rather, we restricted the scope somewhat of existing factors and explained their importance more clearly.¹⁰³

The Commission's basic disagreement with the examiner's conclusions and his recommendation of WHDH, however, related to the "preferred status" which he had granted to WHDH in the case. The examiner had stated that this status was conferred, "[n]ot because it [WHDH] is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk."¹⁰⁴ Further quoting the examiner, the Commission observed that "WHDH's prognosis would be poor unless it could rely for a clincher on its operating record unabated by any substantial 'character' or other defects."¹⁰⁵ The Commission briefly examined the past cases upon which the examiner had grounded this favorable posture toward presently operating stations. It compared these cases with the Policy Statement's indication of Commission disregard for a station's past record when such a record was "within the bounds of average performance."¹⁰⁶ To do so the Commission was forced to equate the records of individuals applying for a new license with those of individuals applying for renewal. It did so despite the fact that the Policy Statement had specifically declared that it was not to apply to license renewal proceedings.

We believe that this approach is sound, for otherwise new applicants

mainly by hearings on the case. The Examiners' Report for the latest decision was filed in August, 1966. Following came oral argument before the Commission (Sept., 1967), petitions for leave to amend, and the actual decision in January of 1969.

¹⁰³ Id. at 8.

¹⁰⁴ Id.

¹⁰⁵ Id. at 9.

¹⁰⁶ Id.

competing with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, *the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset.*¹⁰⁷ (Emphasis added.)

In many respects, this paragraph has served as the center of the controversy over the WHDH decision, as the attempt to reduce the importance of a present operating record has caused deep insecurity among present license holders.¹⁰⁸

The Commission gave close examination to the diversification issue. It found WHDH to be a "poor third" because of the Herald-Traveler newspaper and the operation by WHDH of AM and FM radio stations. The Commission referred to the "numerous other" communications media in Boston, but despite these, concluded that a grant to either Charles River Corporation (CRC) or Boston Broadcasters (BBI) would better achieve "maximum diffusion" of control of such media.¹⁰⁹

Next, the Commission analyzed the integration of ownership with management, a factor viewed as an influence upon a station's sensitivity to a local area's needs. Again, WHDH was placed in third position, with BBI leading CRC.

With regard to proposed program service, the Commission found both CRC and BBI to have reasonably good proposals. Specifically, they found that BBI had proposed an exceptionally large amount of local programming, a fact which the Commission usually rates highly. Here, however, the percentage proposed may have been too high, for the Commission chose to determine the likelihood that such proposals would be carried out in practice. In effect, it attempted to determine whether some of the BBI proposals were too good to be true. It related the question to an applicant's ability to support and substantiate proposals, and, in this light, BBI received a "slight demerit" for failure to substantiate its proposals.¹¹⁰ CRC, however, also received a slight demerit, but on separate grounds. The Commission felt that its organization as a charitable corporation might prevent it from editorializing on political matters.¹¹¹

The general conclusions of the Commission were that Boston Broadcasters, "[b]ecause of its superiority under the diversification and integration criteria"¹¹² would best serve the public interest, convenience, and necessity.

The 1969 Commission decision drew one abstention (Commissioner Hyde), one non-participation (Commissioner Cox), and one absence (Com-

¹⁰⁷ Id. at 9-10.

¹⁰⁸ See notes 123 & 124 *infra* and the accompanying text.

¹⁰⁹ 16 F.C.C.2d at 12-13.

¹¹⁰ Id. at 16.

¹¹¹ Id. at 16-17. The Commissioner also examined several other factors, including a question concerned with an unauthorized transfer of de facto control by the Herald-Traveler. This issue further harmed the WHDH position. See *id.* at 17-19.

¹¹² Id. at 19.

missioner H. Rex Lee). Commissioner Robert E. Lee, on the other hand, dissented. He disagreed with the majority opinion on several points. First, he felt that the majority had failed to rule on the ultimate significance of WHDH's ex parte contacts 15 years earlier. This failure, determined Commissioner Lee, leaves WHDH charged with a serious offense, but with its "guilt or innocence forever left in limbo."¹¹³ A second major point of disagreement was the majority's failure to grant some preference to WHDH for its status as an operating station.

The majority here holds in effect that the weight to be afforded the comparative factors in a renewal application is the same as a new application. I believe that the weight to be given such evidence is substantially reduced in view of the renewal applicant's existing track record. To hold otherwise would permit a new applicant to submit a "blue sky" proposal tailor made to secure every comparative advantage while the existing licensee must reap the demerits of hand-to-hand combat in the business world, and the community it serves A real question is raised in my mind whether the new applicant in this situation is seeking to satisfy the needs of the community or the policy of the Commission.¹¹⁴

The questions raised by Commissioner Lee are very similar to the issues pinpointed by Chairman Hyde in his dissent to the 1965 Policy Statement, the Statement to which Commissioner Lee had "reluctantly" concurred, and which was intended to cover original hearings only.

Commissioner Lee also departed from the majority on the issue of diversification. Accepting diversification as an important factor in comparative hearings, he went on to examine the Boston Herald-Traveler's circulation figures and the alternative communications media available to the public in the Boston area. He concluded that sufficient competition existed to minimize the weight to be accorded to diversification as a factor in the comparative hearing. "To hold otherwise would mean that certain categories of applicants (such as newspapers) would be automatically precluded [from holding broadcast licenses]."¹¹⁵ The dissenting Commissioner feared that the majority opinion could be read as an absolute disqualification of newspapers as license holders, even when such newspapers presented themselves for renewal of their licenses.

The 1969 decision also drew a concurring opinion from Commissioner Johnson. He stressed the diversification issue which Commissioner Lee felt should be minimized. He pointed out that in the eleven largest American cities not a single network-affiliated VHF station is independently and locally owned. Moreover, if one were, it would constitute

a step, however small, back toward the Commission's often professed but seldom evidenced belief in the benefits of local ownership and media diversity. . . . *The door is thus opened for local citizens to*

¹¹³ Id. at 26.

¹¹⁴ Id. at 24-25.

¹¹⁵ Id. at 25.

*challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder.*¹¹⁶ (Emphasis added.)

IV. CONCLUSIONS

A. *Diversification Within the Mass Media*

The problem concerning diversification of mass media deserves special mention because of the increased importance attached to this factor as the *WHDH* case has progressed. The 1965 Policy Statement had seemingly increased the significance of the criterion in comparative hearings, and the *WHDH* case presented the Commission with the opportunity to implement the policy in a major case. Further, if the Commission regarded the 1969 decision as a normal renewal proceeding rather than a unique one, the factor of diversification becomes even more significant since most television stations now operating are directly involved with other communications media.

The diversification problem involves two distinct issues. The first is the issue of national corporate control of various media in separate geographical areas, and the related question of national network influence on the radio and television markets. The second is the issue of control of several communications media within one market, as was the case with *WHDH* television, radio and the Boston Herald-Traveler newspaper. This comment is primarily concerned with the second problem of diversification, although much of the discussion below will be equally applicable to the first issue, and often the two issues blend where a group or corporation may control several different forms of media in one area and the same forms in different areas.¹¹⁷

1. *The Diversification Issue.*—As Commissioner Johnson stated in his concurring opinion to the 1969 decision,¹¹⁸ the present degree of diversification across the country is extremely low, although wide variation does exist from one city to another. Illustrative of one extreme is the situation in Cheyenne, Wyoming, where the Justice Department has recently instituted an anti-trust suit against the sole owner of the city's only television station, its two daily newspapers, and a leading AM radio station, one of only four in the market. In addition, the owner's family has a construction permit for an FM station, a franchise for a cable TV system, and numerous interests in radio

¹¹⁶ *Id.* at 28.

¹¹⁷ A separate aspect of the diversification issue involves transfer of control or ownership in broadcast facilities. All such transfers require Commission approval and must be in the "public interest, convenience and necessity." 47 U.S.C. § 310(b) (1964). Antitrust policies also enter where mergers are taking place, but the difficulties encountered by both the Commission and the Justice Department in limiting such transfers to further the diversification policy are numerous. See, for example, MaHaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 *Antitrust Bull.* 297 (1968); Comment, *Corporate Acquisition of Broadcast Facilities: The "Public Interest" and the Antitrust Laws*, 8 *B.C. Ind. & Com. L. Rev.* 903 (1967).

¹¹⁸ See note 115 *supra*.

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stations and newspapers elsewhere.¹¹⁹ At the other extreme, some large cities have five or six VHF television stations, UHF television stations, eight or ten AM radio stations, FM radio stations, and several newspapers. Even these cities, however, usually have less diversification than would appear on the surface, for often the majority of the various media forms are still controlled by a limited number of groups and individuals. Writing for general publication, Commissioner Johnson has called attention to this concentration of media ownership.

Most American communities have far less "dissemination of information from diverse and antagonistic sources" . . . than is available nationally. Of the 1500 cities with daily newspapers, 96 percent are served by single-owner monopolies. Outside the top 50 to 200 markets there is a substantial dropping off in the number of competing radio and television signals. . . .

Most of the top fifty television markets (which serve approximately 75 percent of the nation's television homes) have three competing commercial VHF television stations. There are about 150 such VHF stations in these markets. *Less than 10 percent are today owned by entities that do not own other media interests.* In 30 of the 50 markets at least one of the stations is owned by a major newspaper published in that market—a total of one third of these 150 stations. . . . Moreover, half of the newspaper-owned stations are controlled by seven groups—groups that also publish magazines as popular and diverse as *Time*, *Newsweek*, *Look*, *Parade*, *Harper's*, *TV Guide*, *Family Circle*, *Vogue*, *Good Housekeeping*, and *Popular Mechanics*. *Twelve parties own more than one third of all the major-market stations.*¹²⁰ (Emphasis added.)

Consequently, the adverse reaction of the broadcasting industry to the WHDH decision is easily understood. The industry, through *Broadcasting*, a trade journal, read the WHDH opinion as a renewal hearing which would jeopardize nearly every television station license in the country's major cities. In an article entitled "\$3 Billion in Stations Down the Drain?" *Broadcasting* listed all the radio stations, and their estimated fair market value, that could be affected by the WHDH decision and the diversification policy which it seems to espouse.¹²¹ The article pointed out the harmful effects of such a policy upon stations and their investors. It speculated that the WHDH case might draw large corporate conglomerates into the communications field, since these would be the only groups able to afford the risk of the loss of the license of a presently operating station. Quoting an industry-initiated study, *Broadcasting* stated: "Thus, whatever effect it might have on the objective of increased diversification of intra-market ownership of communications media, . . . the adoption of the approach urged by the Department of

¹¹⁹ Business Week, Jan. 26, 1969, at 102.

¹²⁰ Johnson, *The Media Barons and the Public Interest: An FCC Commissioner's Warning*, Atlantic Monthly, Aug. 1968, at 44, 47-48.

¹²¹ Broadcasting, Feb. 3, 1969, at 19.

Justice (and the FCC) will, in the long run, concentrate the industry's initiative in the hands of the largest firms."¹²²

Here, the magazine was referring to the desire on the part of the Department of Justice and some individuals within the FCC to apply a strong diversification policy to all renewal hearings. The industry's view is that compulsory diversification would result in widespread license forfeiture, costing vast sums invested in operating stations. The industry may even favor a policy of forced divestiture to further diversification over the possibility of license loss at renewal proceedings, for a divestiture policy would at least allow station owners to recover some of their losses through the sale of intact stations.¹²³ The basis for the industry's fears will come to light only through subsequent Commission decisions.¹²⁴ The possibility is strong that the industry is merely trying to bring congressional or executive pressure to bear upon the Commission in order to discourage its diversification policy. The fears expressed about the *WHDH* decision could be viewed as one means of generating such pressure.

2. *The Need for Diversification.*—In light of the extremely low level of diversification within the mass media, and of the problems latent in an active effort to increase diversification, it remains to examine the need for diversification. The Supreme Court has stated that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ."¹²⁵ The empirical evidence available tends to support this view, although the entire debate over the impact of the mass media is a vigorous and ongoing dialogue.¹²⁶ Most research indicates that mass media serve several basic social functions.¹²⁶ First, the media dispenses information and education by presentation of news and current events. Communication once performed on a personal basis or entirely on a community level is now accomplished through the mass media. While this function creates a more informed population and electorate, it also introduces numerous problems. Now, the degree of concentration over information control is higher and the power of those controlling the information is commensurately greater. Diversification comprises one means of checking and limiting this power. In totalitarian societies, the government's first activities to secure power are usually attempts to gain control of the country's mass media and to exclude conflicting sources of information.¹²⁶ It belabors the obvious to conclude, as one writer has, that "[l]ogic strongly suggests that something which governments have so frequently tried to suppress, control, or use, to which individuals and organized

¹²² *Id.* at 22.

¹²³ *Id.* at 19. Any policy of divestiture would require Commission supervision for determining which groups will be eligible to purchase the stations offered for sale.

¹²⁴ Recent evidence indicates that these fears may be justified. The FCC is presently conducting two renewal hearings in which the operators of the stations may also lose their licenses on issues of diversification. See *Newsweek*, March 31, 1969, at 90. See also *Broadcasting*, Jan. 13, 1969, at 42.

¹²⁵ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹²⁶ C. Friedrich & Z. Brzinski, *Totalitarian Dictatorship and Autocracy* 107-17 (1963).

groups so zealously try to gain access, and which circulates so widely and is read so persistently must have considerable influence."¹²⁷

The significance of the mass media in the dissemination of information becomes most apparent, however, when one realizes the inherent subjectivity of news reporting. The collection, selection, presentation and distribution of news are all processes unmanageable in an entirely "objective" manner.¹²⁸ However, diversification is one means to insure some check upon the individuals engaged in these processes. The "subjectivity" of the communications media is also apparent in television, the prime source of public and political information.

A second social function of the mass media, and one integrally related to their "news" function, is opinion formation. While it is generally conceded that the media do not alter existing opinions strongly held, they can and do change opinion not strongly held, influence opinion formation on topics about which no opinion is yet formed, and reinforce opinions already held by an audience.¹²⁹ Moreover, the media serve to increase interest in political activity,¹³⁰ and to generate a higher level of personal communication among those that are exposed to the media.¹³¹ Here too a strong argument arises for diversification, for it is generally agreed that the reinforcing function of the media is strengthened when reinforcement comes from separate sources. Thus, a resident of Boston would sense a stronger degree of reinforcement from a restatement of his opinion by WHDH-TV and by the Boston Herald-Traveler than he would by either source alone. The fact that both expressions emanate from the same ultimate source might not be apparent to him. Even if he were aware of the joint ownership of the two diverse media, that fact might not be driven home each time he receives information or opinions from the two sources.

The feasibility of effective diversification, however, must remain unanswered. While two sources of information and opinion are better than one, the major goal of diversification is furthered only by a difference of view between the sources. Here, it is arguable that, because of operating cost, major media will inevitably attract those of similar business structure, background and public view. This may be the case despite competition between stations or newspapers. The FCC could act to further diversification through higher degree of regulation of program content, station editorials and news coverage. Such regulation, however, only risks the substitution of another set of views for those of the station owners.

3. *Possible Solutions to the Diversification Issue.*—Within the limits of UHF

¹²⁷ H. Childs, *Public Opinion: Nature, Formation and Role* 180 (1965).

¹²⁸ See generally *Public Opinion and Propaganda* (D. Katz ed. 1954). See also Pool & Shulman, *Newsman's Fantasies, Audiences and Newswriting*, in *People, Society, and Mass Communications* 141 (L. Dexter & D. White eds. 1964); White, *The "Gatekeeper": A Case Study in the Selection of News*, in *id.* at 160; Gieber, *News Is What Newspapermen Make It*, in *id.* at 173.

¹²⁹ See, for example, *People, Society, and Mass Communications*, *supra* note 128, at 12-14.

¹³⁰ H. Bone, *American Politics and The Party System* 32-37, 542 (1955).

¹³¹ See E. Katz and P. Lazarsfeld, *Personal Influence* 309 (1955).

television licensing, several alternatives are available to foster a policy of diversification in the mass media. First, the FCC can extend the course of action taken in the *WHDH* case. It could examine the degree of competition within a given geographical area, with an eye to such criteria as the number of television stations, both UHF and VHF, the number of newspapers, and the number of radio stations both AM and FM. According to the degree of competition, the Commission could determine the weight to be accorded to the diversification factor. It could then compare the applicants for the highest degree of diversification within the relevant community. This approach is applicable both to renewal hearings and to the rapidly disappearing original hearings, although application to renewals would probably produce the result feared by the broadcasting industry, that is, the elimination of many present license holders.

Alternatively, the Commission could adopt a policy prohibiting control of more than one media by a single group or individual. This approach could be coupled with a policy of divestiture for existing license holders; the latter policy would allow the license holders to minimize the losses resulting from the Commission's nonrenewal of licenses. The second solution to the problem is preferable since it will eliminate the uncertainty over the weight to be attached to the diversification criterion. A standard eliminating control of more than one communication source answers the complaint that the Commission standards are subjective and indefinite, and it promotes the highest possible degree of diversification. Further, allowing present operators to divest themselves of existing holdings should reduce their losses and their opposition.

Finally, many commentators favoring maximum diversification of media sources have concluded that it cannot result, to any great extent, through the use of the VHF television spectrum.¹³² It is argued that diversification of station ownership or control will not help to diversify program content, news coverage, or opinions expressed by the media, despite the fact that these comprise a major goal of diversification. It is pointed out that the limited availability of VHF channels, the profit drive for mass audiences, and the extremely high operating cost of a TV station, all work to limit program diversification and to force stations to cluster their programming, news, and opinions around mass audience tastes. Further, these same factors require stations to be extremely careful to avoid offense to audience segments by controversial positions. These critics conclude that the ultimate solution to these problems lie beyond VHF television and will ultimately be found in such areas as UHF television, pay television, public television, community antenna television or "wired city television." While this argument, emphasizing the inherent restrictions of the VHF spectrum, appears sound, it should not serve as reason for abandonment of all attempts to improve this medium. Increased diversification would still produce beneficial results.

B. *Renewal v. Original Hearing*

The most significant issue emerging from the 1969 *WHDH* decision turns on whether the decision governs original hearings, renewal hearings, or both.

¹³² See, for example, Barnett and Greenberg, *The Best Way to Get More Varied TV Programs*, Transaction, May 1968, at 39.

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This determination goes to the question of the new activism within the FCC on the diversification guideline for, prior to the *WHDH* decision, renewal applications were basically automatic, and the probability that a new station would be organized to challenge an existing license holder was very small.¹³³ Thus, a firm diversification policy, standing alone, would not produce any major changes in an already allocated spectrum. To implement the policy of diversification, the probability of successful challenge to an existing license holder had to be increased.

It appears likely that, before the *WHDH* decision, the FCC viewed the removal of an existing license holder as an extreme means for furtherance of Commission policy. One might assume, for example, that while the Commission was not always satisfied with an applicant for renewal, it viewed a failure to renew that applicant's license as a prohibitively harsh sanction. Intermediate sanctions as a means for promotion of Commission policy in the area of diversification, however, are not available. In short, with the vast majority of VHF television frequencies already assigned, the Commission could do little without replacing existing license holders or requiring them to divest themselves of their other holdings in the communications media. It is very possible that the Commission viewed the *WHDH* case, with its numerous unique aspects, as the logical first occasion for removal of an existing operator from the spectrum. By application of Statement standards (especially those which ignored "average" past broadcast records and stressed diversification) to a renewal hearing, the Commission may have undertaken a new role of activism. At the same time, it can always retreat to the unique aspects of the *WHDH* fact pattern to reduce the outcry inevitably produced by that decision.

Apparently the Commission will be given the opportunity to use this response to the industry's alarm. Boston Broadcasters Inc., the *winning* applicant, has filed a petition for rehearing.¹³⁴ This petition asks the Commission to state that the *WHDH* case was an original hearing, or at least an ongoing case from 1957, and not an absolute renewal proceeding. The petitioner argues that the case was actually a continuation of the appeal from the four-month license discussed in the 1964 court of appeals decision. It points to the court's language suggesting consolidation of the two parallel cases (the appeal from the four-month license and the renewal hearing held upon the expiration of this license) and claims that the Commission, in effect, never entirely separated these two questions. Further, Boston Broadcasters stresses the ex parte contacts of Mr. Choate, several issues relating to transfer of control of the Herald-Traveler, and other activities harmful to the *WHDH* application. Thus, it argues that the Commission had numerous grounds, beyond diversification and the failure to weight *WHDH*'s broadcast record, for preferring Boston Broadcasters to *WHDH*.

A Commission decision accepting these arguments would greatly narrow the 1969 decision, would remove the "heat" from the broadcasting industry,

¹³³ Within the last five years the FCC has refused in only one other instance to renew the license of a major TV station. *Newsweek*, Feb. 3, 1969, at 65.

¹³⁴ The petition for rehearing was filed with the FCC on February 20, 1969. A copy of this petition is on file with the Boston College Industrial and Commercial Law Review.

would forestall any possible congressional action on the matter, and would minimize the significance of the *WHDH* case in future renewal proceedings. If, on the other hand, the Commission should stand by its decision of January, 1969, as a renewal hearing based mainly upon the diversification issue, then the automatic quality of renewal hearings will have disappeared. This result, in turn, will provide an open invitation for competition at future renewal hearings throughout the country and will greatly increase the number of challenges.¹³⁵ Further, it might have the result of influencing present license holders to increase their efforts to achieve broadcast records which are above "average" so as to have these records weighed favorably in renewal proceedings. Finally, if the Commission should stand by the decision of January, 1969, it might influence present license holders to divest themselves of other communications media through fear of the FCC's diversification policy. It would appear that any of these results might be desirable, for they would further Commission policy and the public "interest, convenience and necessity."

Objectively, however, it is difficult to imagine that the Commission will continue to allow "average" records of present license holders to go totally unconsidered in renewal hearings. As was pointed out in the *WHDH* examiner's decision of 1966, the operating record of a station achieved under fire of actual competition must have some bearing when comparison to "paper" proposals of newly entered applicants is to be made.¹³⁶ Here, the fear of paper proposals organized to please Commission standards, as expressed by Commissioner Hyde in his dissent to the Policy Statement, appears very reasonable. Under a renewal proceeding which does not weigh past broadcast records heavily, however, a new applicant receiving a license based upon his "paper" proposal would feel some pressure to live up to his proposal, for he too would be subjected to a renewal proceeding in the near future.

This view does not hold that broadcast licenses should become removable at the whim of the Commission, a result with its own set of adverse consequences. A compromise position, making licenses less secure than they are under the present "automatic" renewal system would be a large step to further Commission objectives and generally to improve station operation. The Commission might weigh past broadcast records sufficiently to overcome the adverse affects of "performing under fire" and eliminate the advantages of "paper" proposals. At the same time, the weight would have to be sufficiently low to avoid discouragement of competing applications, and sufficiently high to provide some degree of security to a present license holder. The task, while not easy, does not appear impossible. A trial and error method, with shifting weights applied to the past broadcast record factor would be the best method to achieve optimum weighting of this factor. While this approach

¹³⁵ An example is the recent challenge of WNAC (Channel 7, Boston) in a renewal hearing. Here WNAC, which is owned by RKO General, Inc., is being challenged by a local Boston group. See *Boston Herald-Traveler*, March 5, 1969, at 1, col. 8.

¹³⁶ *WHDH, Inc.*, 16 F.C.C.2d 29, 235. "WHDH, therefore, has a preference, if at all, not because it is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk."

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might work some hardship upon those involved in renewal proceedings in the near future, it will, in the long run, benefit not only the applicants, but the general public as well.

C. *The Future*¹³⁷

This comment has traced the fifteen-year history of the *WHDH* case. It has attempted to examine generally the criteria applied by the FCC to comparative hearings, and specifically the changing standards of "diversification" of the mass media and "past broadcast record." Since the *WHDH* case is still alive this effort is necessarily incomplete. It remains for the final resolution of that case to affirm or to disavow the regulatory activism suggested by the FCC in the most recent decision of this enduring controversy.

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¹³⁷ Beyond the traditional legal analysis of judicial or administrative decisions and decision-making, an entirely distinct mode of analysis applies to the political resolution of the broadcast licensing problem. In the examination of regulatory decisions this approach may assume additional importance, for again in the words of the Court of Appeals for the District of Columbia, "these matters are political in the high sense of that much abused term." (See note 61 *supra* and accompanying text.) This view applies with special force to the issues and circumstances of the *WHDH* case.

One need only realize, for example, that the *WHDH* battle stretched on for 15 years, to know that the FCC has undergone considerable changes in personnel during the course of the case. Of those Commissioners present in 1954 when the original decision to grant an additional station in Boston was made, only three were still present for the January, 1969 decision. Sixteen different individuals have occupied the other four places upon the Commission. The Commission, at various times, has been staffed by members appointed by four Presidents and has inevitably reflected varying political outlooks. To minimize the significance of this fact is to lose sight of the political nature of many aspects of the *WHDH* case. With these factors in mind, one might ask entirely different questions and use a form of analysis separate from that used in this comment. In the effort to predict future Commission action on the diversification question, for example, one might first inquire as to the age and remaining term of those Commissioners presently favoring a strong diversification policy.

In short, the definitive criteria for the issuance and renewal of broadcasting licenses may ultimately be the result of the political decision-making process, as well as or in place of the adjudicative process. To the extent that the former process prevails, the problem becomes less accessible to customary legal analysis.