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Diversity Ownership in Broadcasting: Affirmative Policy in Search of an Author

McNeill Watkins

DIVERSITY OWNERSHIP IN BROADCASTING: AFFIRMATIVE POLICY IN SEARCH OF AN AUTHOR*

When in 1965 the International Telephone and Telegraph Company (ITT) announced its plans to acquire the American Broadcasting Company (ABC),[1] it gave as its chief purpose a desire to "improve its image in the United States."[2] ITT wasted no time in attempting such "improvement." Evidence adduced at Federal Communications Commission hearings revealed that during FCC consideration of the merger, ITT pressured reporters from the Associated Press, the United Press, and the *New York Times* to give favorable coverage of the merger.[3] Nevertheless, a majority of FCC Commissioners found that the ABC-ITT merger would serve the "public interest, convenience, and necessity,"[4] and approved the transfer, relying in part upon the "solemn assurances" of the parties that ABC's independent editorial function would remain inviolable.[5] When the Justice Department subsequently took the merger issue to court on antitrust grounds,[6] ITT quietly dropped its plans for acquisition.[7]

The importance of broadcast media is reflected in part by the fact that ninety-seven per cent of American homes have at least one television set.[8] Broadcast media are primary sources of public information, and play an increasingly active role in affecting public events and behavior.[9] Because of the vital role it plays, the communications industry's trend toward concentrated ownership in recent decades has given rise to a continuing debate on ownership diversity.[10]

In the top fifty broadcast markets, eighty per cent of radio and television

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1. Wall St. J., Dec. 8, 1965, at 32, col. 1 (merger plan announced); *id.*, April 28, 1966, at 10, col. 3 (ABC stockholders approve merger).

2. Rucker, *Let's Protect Our Dying First Freedom,* in M. EMERY & T. SMYTHE, READINGS IN MASS COMMUNICATION 363, 365 (1972).

3. ABC-ITT Merger, 9 F.C.C.2d 546, 573-74, 586-87 (1967).

4. *Id.* at 576. The Commission is required by statute to find that license transfers will meet the "public interest" standard. 47 U.S.C. §310(b) (1970).

5. 9 F.C.C.2d at 576.

6. *See* 1967 BNA ANTITRUST & TRADE REG. REP. No. 315, A-13.

7. A lively account of the episode appears in M. MINTZ & J. COHEN, AMERICA, INC. 26-29 (1971). *See also* Bradbury & Champy, *Corporate Acquisition of Broadcast Facilities,* 8 B.C. IND. & COM. L. REV. 903 (1967).

8. 1974 BROADCASTING YEARBOOK 68.

9. *See, e.g.,* REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS (Kerner Report) 201-23 (1968) (effect of television coverage on localized riots).

10. *E.g.,* Johnson & Hoak, *Media Concentration: Some Observations on the United States' Experience,* 56 IOWA L. REV. 267 (1970); Nixon & Ward, *Trends in Newspaper Ownership and Inter-media Competition,* 38 JOURNALISM Q. 3 (1961); Roberts, *Antitrust Problems in the Newspapers,* 82 HARV. L. REV. 319 (1968); Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC,* 66 YALE L.J. 365 (1957); Note, *Newspaper-Radio Joint Ownership: Unblest Be the Tie That Binds,* 59 YALE L.J. 1342 (1950).

stations are newspaper or group-owned.[11] Of the forty VHF-TV stations in the top ten markets (serving over one-third of the nation's households), only one station is owned independently of all other media.[12] Newspapers or broadcast chains own over eighty per cent of all VHF television stations in the United States.[13] At the same time, there has been a steady decline in the number of daily newspapers, one-half of which are chain-owned.[14] Of a total of 1,750 daily papers, over 1,300 of them enjoy monopolies in the cities they serve, and in 167 of the remaining cities two newspapers either have the same publisher or share joint production arrangements.[15]

The FCC plays a critical role in diversity policy. Because the number of available broadcast channels is limited,[16] the Commission controls entry into the field. Broadcast licensees are not immune from antitrust liability.[17] Since the FCC issues licenses and must approve their transfer, the Commission bears the primary responsibility for licensing in such a way as to promote competition.[18] This responsibility is especially important in the communications industry because desirable first amendment goals depend on the vitality of the commercial market.[19] If one party dominates several media outlets, especially in the same community, the opportunity for "the widest possible dissemination of information from diverse and antagonistic sources"[20] is limited.[21]

Overt examples of news management are rare, however, and journalists are

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11. *Hearings on Broadcast License Renewal Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 1st Sess., ser. 35, pt. 1, at 62 (1973) (testimony of Dean Burch, FCC Chairman) [hereinafter cited as *Hearings on License Renewal*].

12. *Id.,* pt. 2, at 1071 (testimony of Charles O. Blaisdell).

13. In 1967 newspapers or broadcasting chains owned 81.3% of the country's VHF television stations. B. RUCKER, THE FIRST FREEDOM 196 (1968). In 11 states all VHF stations were owned by newspapers or chains, or both. *Id.* at 295, n.21.

14. E. EMERY, THE PRESS AND AMERICA 621, table 3 (1972).

15. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess., pt. 1, at 63-65 (1957).

16. The scarcity of frequencies originally led to regulation of the airwaves. See text accompanying notes 57-59 *infra.* The "public domain" theory of airwaves is a later development, used primarily to sustain regulation of program content. *E.g.,* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 378 (1969).

17. 47 U.S.C. §313(a) (1970).

18. United States v. Radio Corp. of America, 358 U.S. 334, 351 (1959); United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956); National Broadcasting Co. v. United States, 319 U.S. 190, 222-24 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

19. *See* Hale v. FCC, 425 F.2d 556, 561-62 (D.C. Cir. 1970) (concurring opinion).

20. Associated Press v. United States, 326 U.S. 1, 20 (1944).

21. The concept of a "marketplace of ideas" was first expressed by Justice Holmes in Abrams v. United States, 250 U.S. 616 (1919) (dissenting opinion). If a true commercial marketplace exists, the competition of ideas is thereby guaranteed. *Id.* at 630. This first amendment rationale has been accepted by the Court. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Red Lion Bradcasting Co. v. FCC, 395 U.S. 367 (1969); Wieman v. Updegraff, 344 U.S. 183 (1952); Associated Press v. United States, 326 U.S. 1 (1944); Thornhill v. Alabama, 310 U.S. 88 (1940); Whitney v. California, 274 U.S. 357 (1927). *But see* Miami Herald Publishing Co. v. Tornillo, 94 S. Ct. 2831, 2835-38 (1974) (marketplace of ideas may be illusory but nevertheless first amendment guarantees protect publishers).

by nature independent and sensitive to outside pressure.[22] But media managers are businessmen, not journalists,[23] which sharply focuses the "public interest" issue. A broadcaster may owe a positive duty to stockholders quite distinct from first amendment responsibilities owed to the general public.[24] Thus, mergers and acquisitions of broadcast properties are often prompted exclusively by the economic interests of the parties involved, without regard to first amendment or other public interest considerations.[25] Similarly, actions by a station that may jeopardize the financial standing of the parent company will be discouraged. If, to cite one example, the parent owner of a local station is RKO General (a subsidiary of General Tire and Rubber Company), to what extent will RKO's broadcast stations[26] report any failure of General's tires to pass minimum safety standards? In 1969 two such tire models failed the

22. *See, e.g.*, Blume & Lyons, *The Monopoly Newspaper in a Local Election: The Toledo Blade*, 45 JOURNALISM Q. 186 (1968). *But see* Kansas City Star Co. v. United States, 240 F.2d 643, 655-56 (8th Cir. 1957) (news dissemination manipulated to monopolize advertising market).

23. The first of the big chain owners, Frank Munsey, dreamed of a great cross-country enterprise that would bring order into what he saw as the chaos of the newspaper business at the end of the 19th century. Instead, he ended up single-handedly killing over six newspapers, including three in New York City. William Allen White's obituary of Munsey read: "Frank A. Munsey contributed to the journalism of his day the talent of a meatpacker, the morals of a money-changer, and the manners of an undertaker. He and his kind have about succeeded in transforming a once-noble profession into an eight per cent security. May he rest in trust!" E. EMERY, *supra* note 14, at 449-53.

24. In the broadcasting field, the first amendment responsibilities of licensees can be as important as their first amendment rights. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 (1969) (public interest language of the Communications Act authorizes the FCC to require licensees to use their stations for discussion of public issues). Section 314(a) of the Act, after stating the equal-time requirement for political candidates, notes: "Nothing in the foregoing . . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, new interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. §315(a) (1970). The public interest responsibilities of licensees are relevant in the licensing process, where their performance is analyzed or compared to that of competing applicants. The analysis and comparison center around the licensee's programming, including its degree of responsiveness to community needs and interest as reflected in news, local, and public service programming. *See Hearings on License Renewal, supra* note 11, at 109-16.

25. *See* M. MINTZ & J. COHEN, *supra* note 7, at 77-91. The trading practices of one owner, George B. Storer, have been described as: "[The Storer group] were constantly selling and buying stations, strengthening their line-up. Profits from the sale of stations were taxed at the low capital-gains rate, whereas profits from station operation were taxed at a higher rate. The buying and selling of stations could therefore be a quicker path to riches. The Storer group seemed to think of its stations as 'properties' to be nursed for profitable sale." 2 E. BARNOUW, THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES 220 (1965), *quoted in* Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COM. B.J. 1, 3 (1974).

26. In 1969 RKO owned the maximum allowable number of broadcast stations: in Los Angeles, New York, Boston, and Detroit it had AM-FM-TV combinations; in Memphis TV and AM, and in Hartford, Conn. a TV station. Additionally, RKO owned 99 cable TV systems, 121 movie theaters, 1 newspaper, and 2 common carrier systems. *Hearings on License Renewal, supra* note 11, pt. 2, at 1071.

National Highway Safety Bureau standards; at the same time General Tire and RKO General were defendants in a Justice Department antitrust suit, accused of conspiring to coerce dealers into buying products and services, including advertising time on RKO stations.[27] The FCC that year routinely approved the license renewals, without hearings, of all but one of RKO's six California radio and TV stations.[28]

Current FCC licensing procedures do little to assure diversity. Where private parties assign their licenses (the usual mode of acquisition), media or corporate concentration is rarely an issue because proposed licensees are subject to only minimal scrutiny.[29] In comparative renewal proceedings[30] involving competing applicants, the doctrine announced over twenty years ago in *Hearst Radio, Inc.*[31] permits renewal of incumbents with mediocre programming records regardless of the licensee's media affiliations.[32] There has been only one significant example of divestiture by FCC order in the industry's history,[33] and refusals to renew broadcast licenses are extremely rare.[34]

It is easy to conclude, as many commentators have, that the FCC is simply dominated by the industry it is supposed to regulate.[35] In reality, however, the lack of affirmative action in this area is substantially due to confusion regarding the FCC's role as a regulatory agency. The Commission is empowered by the Communications Act of 1934 to issue licenses only when the "public in-

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27. The suit was filed in 1967 in Cleveland. *See* 1967 BNA ANTITRUST & TRADE REG. REP. No. 295, A-1. A consent decree was obtained Aug. 24, 1970, *after* the FCC had approved the license renewals. 1970 BNA ANTITRUST & TRADE REG. REP. No. 476, A-8.

28. RKO General, Inc., 16 F.C.C.2d 989 (1969). The sixth RKO California station, WHJ-TV, had been challenged by a competing applicant in 1966 and was still in hearing.

29. Proposed transferees are required by statute to be treated as if they were the sole applicants for a license, notwithstanding that there may be interested parties with superior qualifications. 47 U.S.C. §310(b) (1970). See text accompanying notes 116-119 *infra*.

30. *See generally* for discussion of the comparative criteria: Anthony, *Toward Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971); Friendly, *The Federal Administrative Agencies: The Need for a Better Definition of Standards*, 75 HARV. L. REV. 1055, 1055-72 (1962).

31. 15 F.C.C. 1149 (1951); *accord*, Wabash Valley Broadcasting Corp., 35 F.C.C. 677 (1963).

32. In *Hearst*, the FCC had to choose between an incumbent with a mediocre programming record and a highly qualified newcomer. Although the Commission found the newcomer superior on major comparative criteria, including the newcomer's lack of affiliation compared with the incumbent's control of vast media resources, the FCC renewed because of the "clear advantage of continuing the established party." *Id.* at 1182.

33. In 1943 the FCC ordered NBC, which owned two radio networks, to divest itself of one of them. Radio Corp. of America, 10 F.C.C. 212, 213 (1943). The new network became the American Broadcasting Corp. (ABC).

34. Grounds for refusal to renew a broadcast license are usually quite extreme: misrepresentation to the Commission, falsification of station logs, or participation in unlawful lotteries. *See, e.g.*, FCC v. WOKO, Inc., 329 U.S. 223 (1946); United States Broadcasting Corp., 2 F.C.C. 208 (1955); Eleven Ten Broadcasting Corp., 22 P & F RADIO REG. 699 (1961). The renewal process is descried in W. JONES, REGULATED INDUSTRIES 1067-69 (1967).

35. *See, e.g.*, Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 272 (2d Cir. 1967); M. MINTZ & J. COHN, *supra* note 7, at 76-123; *Hearings on License Renewal, supra* note 11, at 147 (testimony of FCC Comm'r Nicholas Johnson); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 873-85 (1971).

terest, convenience, or necessity" will be served thereby.[36] Faced with this vague mandate, the FCC has been left to develop the exact meaning of "public interest" in the diversity context. That development has been variously tentative[37] and fumbling,[38] and is marked by the FCC's reliance on various groups that attempt to influence regulatory policy.[39] The purpose of this note is to examine the nature of the FCC's role as a regulatory agency, focusing on the evolution of diversity policy, and to analyze functionally the institutional groups that influence that policy. Reference will be made to the probable effects of broadcast license renewal legislation now before Congress,[40] and the FCC's recently terminated multiple ownership rulemaking in Docket No. 18110.[41]

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36. 47 U.S.C. §303 (1970).

37. *E.g.,* Interim Policy Concerning Acquisition of Broadcast Stations, 5 P & F RADIO REG. 2D 271 (1965), 6 P & F RADIO REG. 2D 66 (1965). The policy proposed to limit group acquisitions of VHF-TV stations in the top fifty markets to two. The order was rescinded in 1968 after it was found that (1) the policy unduly favored entrenched incumbents who already owned more than two stations because the policy operated prospectively only and did not require divestiture; (2) it discouraged capital ventures; and (3) it stagnated the economic atmosphere because few prospective buyers did not already own two stations in the top fifty markets. With no growth incentive, buying by others was discouraged. *See* Levin, *Competition, Diversity, and the Television Group Ownership Rule,* 70 COLUM. L. REV. 791, 814-18 (1970).

38. *E.g.,* the Commission's *Uniform Policy on Law Violations,* issued in 1951, which stated that the FCC would consider violations of the antitrust laws to the extent that they reflect upon the applicant's qualifications to serve as a licensee. For a descripion of how the Commission almost immediately came to approve a license transfer to a party that had 198 antitrust actions pending against it, see Perry, *Current Antitrust Problems in Broadcasting,* 27 OHIO ST. L.J. 1, 6-7 (1966).

39. Aside from the generality of the Communications Act, it has been suggested that, as with other regulatory agencies, a major problem with the FCC in developing affirmative policy is the lack of quality personnel. *See* Elliott, *The Regulators,* Wall St. J., Oct. 25, 1974, at 1, col. 1 (FCC Commissioner Charlotte Reid's lack of apparent qualifications). This problem is perpetuated by the exodus from agencies to lucrative private employment. As one commentator noted, the trend is for "the mature administrative agency [to] drift into the hands of people, able and devoted indeed, but of the second level of competence or initiative. Often they will be men who find congenial the routine security of office and the reliable deference of the small group of important businessmen and counsel who regularly appear before them." Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 HARV. L. REV. 474, 475 (1954).

40. Over 100 bills to amend the Communications Act were submitted to the 93d Congress. The two most important are reproduced in 42 GEO. WASH. L. REV. 67 (1973), and discussed in Goldberg, *A Proposal To Deregulate Broadcast Programming, id.* at 73; Kramer, *An Argument for Maintaining the Current FCC Controls, id.* at 93.

A compromise bill, H.R. 12993, passed the House on May 1, 1974, 120 CONG. REC. H3413-33 (daily ed. May 1, 1974), and the Senate passed a substitute measure on Oct. 8, 1974, 120 CONG. REC. S18498-523 (daily ed. Oct. 8, 1974). H.R. 12993 died at the end of the session because Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, refused to send the bill to conference. 32 CONG. Q. 3437 (1974).

Nevertheless, a number of identical or substantially similar bills were introduced early in the 1st session of the 94th Congress, and will be considered in that session. *See, e.g.,* H.R. 243, H.R. 448, H.R. 545, H.R. 669, H.R. 972, H.R. 1525, H.R. 1737, H.R. 1778, 94th Cong., 1st Sess. (1975).

41. Second Report and Order, Docket No. 18110, 32 P & F RADIO REG. 2D 954 (1975).

CONGRESSIONAL DELEGATION: THE COMMUNICATIONS ACT OF 1934

In the early days of the New Deal, Congress passed a number of statutes delegating, either to the Executive or to various administrative agencies, an array of powers cast in very general terms.[42] In the act creating the National Recovery Administration,[43] for instance, the Executive was given almost uncontrolled discretion to formulate regulations for industry. The Act's only limitations were that such measures should "rehabilitate industry," "relieve unemployment," "eliminate unfair trade practices," and otherwise "provide for the general welfare."[44]

The Communications Act of 1934,[45] which created the FCC, generously delegated the power to license broadcasters, including original license grants[46] and their sale,[47] renewal,[48] and revocation.[49] The standard for the use of this power is that all licensing be in the "public interest."[50] Two provisions of the Act relate to diversity. Section 313 declares that antitrust laws are applicable to broadcasters and that parties whose licenses have been revoked by a court in an antitrust action are thereafter to be denied a license.[51] Section 314 proscribes the purchase or other acquisition of broadcast facilities if "the purpose and/or the effect thereof may be to substantially lessen competition or to restrain commerce . . . ."[52] The FCC's authority to promulgate and enforce diversity ownership policy must be explored against this statutory backdrop.

Narrow Versus Broad Legislative Delegation

Two schools of thought have developed concerning the appropriate scope of power granted by Congress to regulatory agencies. Ernst Freund summarized one of these in 1928 when he wrote: "With regard to major matters the appropriate sphere of delegated authority is where there are no controverted is-

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42. *See* F. BLACHLEY & M. OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 21-27 (1934). The Roosevelt Administration sought to solve the country's depression-induced problems by vesting regulatory agencies with the power to act decisively. *See generally* 2 A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL (1964).

43. National Industrial Recovery Act, 48 Stat. 195 (1938).

44. *See* Note, *Some Legal Aspects of the National Industrial Recovery Act,* 47 HARV. L. REV. 85, 94-95 (1933).

45. 47 U.S.C. §§151 *et seq.* (1970).

46. *Id.* §307(a).

47. *Id.* §310(b).

48. *Id.* §307(d).

49. *Id.*

50. "Public interest" was first held to be an adequate standard in a case interpreting the Interstate Commerce Act, Avent v. United States, 266 U.S. 127 (1924). The "public interest, convenience, and necessity" standard was upheld in a construction of the Radio Act of 1927. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933); *accord,* National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (Communications Act of 1934).

51. 47 U.S.C. §313 (1970). *See* United States v. Radio Corp. of America, 358 U.S. 334 (1959) (doctrine of primary jurisdiction not applicable to broadcasting).

52. 47 U.S.C. §314 (1970).

sues of policy or of opinion."[53] "Hence," he continued, "direct statutory regulation may be preferred, if the subject matter . . . has a strong public appeal . . . ."[54] Freund's narrow-delegation approach would favor detailed statutory definition of prohibited media combinations, to avoid the possibility of regulatory abuse. Such abuse, in his view, is inherent wherever Congress delegates discretionary power.[55]

In theory, there is no reason why Congress cannot prescribe detailed provisions regarding the ownership of media properties; the complexity of the tax and social security codes is proof that Congress can legislate with great specificity when it considers a matter sufficiently important.[56] Two major factors have combined to produce the generality of the Communications Act: historical accident and congressional preference for the theory of broad legislative delegation.

The specific ill that the Communications Act and its predecessor, the Radio Act of 1927,[57] were designed to remedy was the chaos caused by broadcasters' interference with one another in the limited radio spectrum.[58] The assignment of frequencies and other technical aspects of broadcast regulation has from the beginning constituted a major part of the agency's work.[59] Once the basic sorting out of frequencies had been accomplished, however, the Commission faced the task of defining the "public interest" by developing policy to deal with the myriad nontechnical aspects of regulation.

The FCC received little guidance in this task from Congress. The legislative history of the Act reveals that Congress never addressed itself specifically to problems in the industry other than the proper allocation of channels.[60] There were fears that a broadcaster might abuse his exclusive broadcast

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53. E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 218 (1928).

54. *Id.*

55. *See* 47 U.S.C. §303(r) (1970) (statutory authority to promulgate rules and regulations).

56. *See also* the Interstate Commerce Act, 49 U.S.C. §5(2)(c) (1970), which mandates that the ICC consider railroad mergers in light of the following considerations: "(1) The effect . . . upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

57. Act of Feb. 23, 1927, ch. 169, §§1 *et seq.*, 44 Stat. 1162 (now Communications Act of 1934, 47 U.S.C. §§151 *et seq.*).

58. *See* National Broadcasting Co. v. United States 319 U.S. 190, 210-13 (1943).

59. There are many who believe that the FCC's role should be limited to that of "traffic policeman," particularly those who object to FCC regulation of program content. *E.g.*, 1973 ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, FINAL REPORT: THE FIRST AMENDMENT AND THE NEWS MEDIA recommendations 7-9 and text, at 21-26 [hereinafter cited as WARREN CONFERENCE REPORT]; Goldberg, *A Proposal To Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73 (1973); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 97-150 (1967) (FCC Commissioner Glen Robinson).

60. *See, e.g.*, 68 CONG. REC. 2556-80, 2869-82, 3025-39, 3117-24, 4109-55 (1926-1927) (Radio Act of 1927); 67 CONG. REC. 5473-504, 5555-86, 5645-47, 12335-59, 12497-508 (1926) (Radio Act of 1927).

franchise by denying access to disfavored politicians.[61] On the whole, however, there was no specific elaboration of problem areas of regulation, and the phrase "public interest" was repeatedly used without definition.[62] Thus, the statutory history reveals that Congress had little idea of the precise nature of the authority it was delegating.

That Congress should have legislated so generally in this area is not surprising, for, as the Supreme Court stated in *National Broadcasting Co. v. United States*,[63] "Congress was acting in a field which was both new and dynamic."[64] Unlike the railroad and securities industries, which were relatively well developed at the time federal regulation was asserted over them, the radio industry was in its infancy in 1927.[65] Accordingly, Congress enacted provisions requiring all broadcasters to be licensed by the Commission, providing the framework for issuing, renewing and revoking those licenses, and delegating the detail of administration to the FCC.

In his 1938 lectures on administrative law,[66] Dean Landis described an aggressive, idealistic model of the administrative agency under this broad definition of authority.[67] The administrative agency, in his view, embodied the best of executive, judicial, and legislative functions,[68] and was a response to congressional and judicial inadequacies in public regulation.[69] Congress has neither the expertise nor the time to spare for the details of everyday administration.[70] Partisan conflicts, which occur regularly on sensitive issues, further

61. *See* 76 CONG. REC. 3768, 5038 (1933); 68 CONG. REC. 2589 (1927); 67 CONG. REC. 12501-03 (1926); Felix v. Westinghouse Radio Stations, 186 F.2d 1, 2-5 (3d Cir. 1950). The product of these fears was the "equal time" provision for political candidates. *See* 47 C.F.R. §§73.123, .300, .598, .679 (1973) (all identical). The equal time regulations were sustained against first amendment attack in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

62. *E.g.*, 68 CONG. REC. 3027-29 (1927) (remarks of Sen. Dill, floor manager of the Radio Act of 1927).

63. 319 U.S. 190 (1943).

64. *Id.* at 219.

65. *See* W. JONES, *supra* note 34, at 1019-28 (1967).

66. J. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

67. *Id.* at 18-19.

68. Originally, confusion was generated by the doctrine of separation of powers concerning whether Congress could constitutionally delegate legislative power. The case of Field v. Clark, 143 U.S. 649 (1892), stated: "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Id.* at 692. However, congressional delegation to an independent agency has never been held invalid on this basis. *See* K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE 64-74, 76-81 (1958).

69. J. LANDIS, *supra* note 66, at 46. Not everyone shared Dean Landis' enthusiasm. The American Bar Association, for instance, actively opposed the establishment of administrative agencies, beginning in 1933. In 1940 the ABA sponsored the Walter-Logan bill, which in Landis' words would have "cut off here a foot and there a head, leaving broken and bleeding the processes of administrative law." Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1102 (1940). An account of the interplay between proponents and opponents of the developing system of administrative law, which culminated in passage of the Administrative Procedure Act, appears in K. DAVIS, *supra* note 68, at 27-30.

70. In support of this conclusion compare the legislative output of administrative agencies with that of Congress. The Code of Federal Regulations is considerably larger than the United States Code, and the Federal Register is similarly larger than the Statutes at Large.

render congressional supervision unwieldy. A general delegation of power ideally allows Congress to outline a broad social policy and at the same time to avoid the inflexibility of detailed legislative enactments. Such legislation also permits the agency to respond to changing conditions, unforeseen at the time of enactment. For the FCC, this means that policy can be promulgated or amended through the hearing process, with the advice of its bureaus, without resort to the cumbersome legislative process.

In terms of diversity regulation, the FCC unfortunately has not lived up to the promise of Landis' broad delegation model. The most significant action taken by the FCC to limit concentrated ownership has been its adoption of multiple ownership rules.[71] At present, the rules prohibit the licensing of a party who owns an identical broadcast facility in the same primary service area.[72] The rules also discourage undue concentration of control in any single individual or corporation. Although a finding of such undue concentration depends on "the facts in each case," there is a conclusive presumption of undue media concentration where the owner seeks more than seven AM, FM, or TV stations.[73]

Multiple ownership rules tend to become the only measure of concentration because inquiry into a proposed licensee's ownership qualifications generally stops at the ascertainment of the number of stations owned by that party.[74] Notwithstanding the rules' caveats that concentration is to be determined by the facts in each case, the Commission rarely inquires whether the acquisition will result in undue regional concentration where a proposed licensee owns fewer than seven stations of the type sought.[75]

The FCC's duopoly rules[76] limit a single owner to no more than one AM, FM, or TV station in the same market. Until 1970 the rules applied only to intra-media ownership, thus permitting common control of an AM, FM, and TV station in the same area. The 1970 "one-to-a-customer" rule[77] proposed to limit all future broadcast acquisitions to only one AM, FM, or TV facility per licensee. The new rule would not disturb existing combinations, although if a combination owner were to transfer one license he could not thereafter acquire another of the same type.[78] The "one-to-a-customer" rule suffered immediate

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71. 47 C.F.R. §§73.35 [AM], .240 [FM], .636 [TV] (1973). *See generally* Howard, *supra* note 25.

72. *Id.* §§73.35(a), .240(a)(1), .636(a)(1) (1973).

73. *Id.* §§73.35(b), .240(a)(2), .636(a)(2) (1973). Until recently, ownership of more than the maximum number was considered undue concentration per se and was absolutely prohibited. However, the Commission seems to have converted the absolute prohibition into a presumption. *See* Twin States Broadcasting Co., 39 F.C.C.2d 835 (1973).

74. *See* Beaumont Broadcasting Corp., 17 F.C.C.2d 577, 581-82 (1969) (dissenting opinion).

75. *See, e.g.,* Muskegon Heights Broadcasting Co., 39 F.C.C.2d 475 (1973); Assignment of Station WNUL, 21 P & F RADIO REG. 2D 77 (1971).

76. 47 C.F.R. §§73.35(a) [AM], .240(a)(1) [FM], .636(a)(1) [TV] (1973).

77. First Report & Order, Docket No. 18110, 22 F.C.C.2d 306 (1970); *see* 47 C.F.R. §§73.35, .240, .636 (1971).

78. 22 F.C.C.2d at 309.

erosion, however. In 1971 the FCC excepted UHF-TV facilities,[79] and later the same year the Commission announced that AM-FM combinations would no longer be prohibited.[80]

Newspaper-Broadcasting Cross-Ownership: Docket No. 18110

In 1970 the FCC proposed a rule that would reduce the common ownership, operation, or control of daily newspapers and broadcasting stations in the same market.[81] The rule would have required divestiture within five years of commonly-owned newspaper or broadcast properties.[82]

The Commission released its findings and conclusions on January 31, 1975,[83] after four years of comments, replies, studies, staff reports, and oral arguments.[84] The Commission endorsed the idea that promoting diversity by prohibiting common ownership of local newspapers and broadcast facilities[85] is in the public interest. Finding, however, that divestiture of existing combinations would result in "losses or diminution of service to the public," the Commission ordered that the rule would apply to require separation of commonly-owned facilities only in communities where the only daily newspaper owned the only raido or television station.[86] Otherwise, the rule will operate prospectively only.

The effectiveness of the new rules in reducing concentrated ownership is purely illusory. As Commissioner Robinson noted in dissent to the *Second Report and Order:*

> In most of the markets involving newspaper-television station ownerships the stations have been commonly owned since the time of original license. Very few of the common ownerships that have been created have been dissolved by transfer of control or assignment of license. . . . [T]he very stability of ownership proves the point that we cannot realistically rely on future transfers to dissipate the concentration of ownership.[87]

Thus, the grandiose statement of policy embodied in the *Second Report and Order* is rendered nugatory by the FCC's failure to require divestiture in ex-

79. Multiple Ownership of Standard, FM, and Television Broadcast Stations, 36 Fed. Reg. 4288 (1971).

80. Memorandum Opinion and Order, Docket No. 18110, 28 F.C.C.2d 662 (1971).

81. Further Notice of Proposed Rulemaking, Docket No. 18110, 22 F.C.C.2d 339 (1970).

82. *Id.* at 346.

83. Second Report and Order, Docket No. 18110, 32 P & F RADIO REG. 2D 954 (1975).

84. *See id.* at 1032-42 (apps. C-G).

85. The Commission defined "daily newspaper" as one published four or more times a week. *Id.* at 984, n.21. For the geographic market within which newspapers and broadcast stations are deemed co-located, the Commission adopted the Grade A service contours of television stations and the service area counterparts for radio. *Id.* at 984.

86. *Id.* at 986-94.

87. *Id.* at 1024 (dissenting opinion). Commissioner Robinson also pointed out that the number of newspaper applications for new licenses over the last decade has been negligible. *Id.* at 1025. His argument gains additional force due to the fact that the rule itself will operate to chill future sales or transfers of newspaper-owned licenses, See note 37 *supra* (negative effect of the group ownership rules).

isting combinations. The irony of the Commission's application of the rule is emphasized by the divestiture requirement imposed on the handful of owners who enjoy pure media monopolies in their respective markets.[88] The stations and newspapers in these localities are likely to be small, marginal operations where independent ownership may not be possible. The Commission emphasized this fact by anticipating waiver requests and exempting two stations from divestiture by its own motion.[89]

Broad delegation theory, as the Supreme Court has recognized, may help to define the quality and limits of the power granted the FCC.[90] But the lack of clearly articulated, anticipatory policy planning exemplified by the Commission's vacillation in the one-to-a-customer and newspaper cross-ownership rulemakings indicates that the FCC has failed to take advantage of the statute's delegation in regulating ownership.

The Jaffe Model

Professor Louis Jaffe has postulated an essentially passive model of the FCC's administrative process, rejecting both the narrow and broad-delegation models.[91] In his view, the FCC has adequately performed *"what Congress in-*

88. Divestiture will be required within five years in seven cities where the only daily newspaper is co-owned with the only local television station: Anniston, Ala.; Albany, Ga.; Mason City, Iowa; Meridian, Miss.; Watertown, N.Y.; Texarkana, Tex.; and Bluefield, W. Va. 32 P. & F RADIO REG. 2D 1040 (app. D).

89. *Id.* at 994-96. The question of waiver will doubtless also arise in future transactions that would otherwise violate the cross-ownership rules. For instance, Joe L. Allbritton, the tentative purchaser of the Washington Star Comunications Co., has asked for a waiver of the rule on the grounds that the company's local TV operation subsidizes the otherwise unprofitable daily newspaper, The Washington Star-News. 33 CONG. Q. 230 (1975). Even assuming that the subsidy allegations are true, a waiver of the rules is not a desirable remedy. The capital realized from sale of the broadcast property can easily be reinvested to yield the same subsidy provided by the station. Second, it may be more appropriate to devote broadcast profits to subsidize normally unremunerative broadcast services. Third, continued cross-ownership of newspapers and broadcast station may pose the very first amendment problems that the rule was designed to avoid. *Cf.* S. UNGER, THE PAPERS AND THE PAPERS 139-47 (1972) (*Washington Post's* hesitation in publishing Pentagon Papers for fear the paper might lose its station licenses).

If waiver is to be considered, the appropriate standard should be the "failing company" antitrust doctrine, which would require (1) that the resources of the newspaper are "so depleted and the prospect of rehabilitation so remote" that the paper faces "the grave probability of a business failure"; and (2) that there be no prospective purchaser for the paper. *See* Intenational Shoe Co. v. FTC, 280 U.S. 291, 302-03 (1930). *See also* Citizen Publishing Co. v. United States, 394 U.S. 131, 136-37 (1969).

90. *E.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 379-80 (1969) (rulemaking power broad enough to cover all aspects of the public interest); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (although a new communications development, intent of Congress broad enough to include CATV); National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943) (FCC mandate "not niggardly, but expansive").

91. *See generally* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973) [hereinafter cited as Jaffe, *Ideal Administration*]; Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969) [hereinafter cited as Jaffe, *WHDH*]; Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

tended and still intends it to do," and has occasionally "pushed into ventures somewhat beyond congressional expectations."[92] Professor Jaffe disposes of the Freund ideal of detailed legislative delegation[93] by concluding that it would make modern administration impossible. Paradoxically, however, he also concludes that because Congress could have enacted detailed legislation, its failure to do so limits FCC action to the few areas in compelling need of regulation. Drawing on the legislative history of the Communications Act,[94] Professor Jaffe finds that Congress simply did not intend for the FCC to handle any but the most severe problems outside of technical regulation.[95] The FCC's reluctance to define or supervise concentrated ownership is thus fully justified, in his view, by congressional acquiescence in the broadcast industry's development. Negative congressional reaction to FCC policy overtures are cited in support of this conclusion.[96]

Reliance on the legislative history of the Communications Act for this proposition is unjustified. Cross-ownership of radio stations did not become a factor until the late 1930's when newspapers, realizing they could not beat the new medium in the competition for advertising, decided instead to join them.[97] At that point the merger of newspaper and broadcast interests began in earnest, so that by 1941 the FCC was fearful that newspapers would enjoy nationwide control of the radio industry.[98]

A second reason for lack of congressional concern over diversity of ownership was that broadcasting had just begun its development. In 1935 there were only 605 AM radio stations; television and FM radio did not become commercially feasible until after 1940.[99] Because these radio stations tended to cluster around major population centers, resulting in highly diversified ownership structures in major markets, there was little perception of the potential for single-market domination.[100]

Professor Jaffe finds the problem of defining the "public interest" standard

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92. Jaffe, *Ideal Administration, supra* note 91, at 1191 (emphasis in original).

93. See text accompanying notes 53-55 *supra.*

94. *See* notes 60-62 *supra.*

95. Jaffe, *Ideal Administration, supra* note 91, at 1191-95.

96. *Id.* at 1195.

97. During the Depression newspaper advertising fell 45%, while radio advertising doubled. For a time, newspapers attempted to stifle the new medium by such means as withholding news items in advance of publication so that radio stations could not broadcast the news. Thus, in 1933 the Associated Press membership voted not to furnish wire service to radio networks. The collapse of this effort came in 1935 when newspapers began to buy into the radio industry. *See* E. EMERY, *supra* note 14, at 588-96, 618-20.

98. In hearings held that year it was found that newspapers owned 30% of AM stations, were heavily interested in newly-developed FM stations, and had applied for nearly half of the first 60 television licenses. *Id.* at 609. Similar fears were later voiced about radio dominance of the emerging television industry. *See generally* Weaver & Cooley, *Competition in the Broadcasting of Ideas and Entertainment—Shall Radio Take Over Television?,* 101 U. PA. L. REV. 721 (1953).

99. *See* U.S. DEP'T OF COMMERCE, 1972 STATISTICAL ABSTRACT OF THE UNITED STATES 498, table 806 (1973).

100. In 1927 Chicago had 40 radio stations within a 25-mile radius, New York had 38, and Philadelphia and San Francisco had 22 each. W. JONES, *supra* note 34, at 1025.

insurmountable.[101] Instead, he posits a political model in which the FCC responds, in its rulemaking, to various constituencies, which include the industry, Congress, and the Executive.[102] Critics of the FCC, he points out, are guilty of personally defining the Commission's broad delegation and then condemning it for acting contrary to that definition.[103]

In the diversity context, Professor Jaffe's assertion that a passive Commission role is the only legally appropriate one seems unfounded. Congress manifested its desire that competition be maximized in the communications industry in vague terms; but with the Sherman and Clayton Acts it has indicated a firm desire that competition shall be a fundamental national policy.[104] Although the FCC does not have the power to adjudicate antitrust issues as such,[105] the Supreme Court has held that antitrust considerations alone might keep the "public interest" standard from being met.[106] A clear example is when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities.[107] Such consideration of antitrust principles inevitably requires the evolution of consistent policy if the Commission is to grant licenses fairly in the public interest.

Professor Jaffe's fundamental observation that the FCC has become a passive regulator remains vital, however, regardless of his belief in the appropriateness of this role. Because the "public interest" standard is not self-executing, an intense political process takes place in and around the agency in which various interest groups attempt to produce desired results by proposing self-serving definitions of the "public interest."[108] To the extent that the Commission is available to all interested parties, the process is a healthy one, for ultimately the "public interest" may mean no more than the balancing of all legitimate competing interests. In this respect regulation of ownership diversity has been distorted at the FCC, because of the disparity of access to the administrative process.[109]

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101. In fairness to Professor Jaffe it should be pointed out that FCC Commissioners themselves seem unable to arrive at a satisfactory general definition. *Compare Hearings on License Renewal, supra* note 11, at 61-68 (testimony of Dean Burch, FCC Chairman), *with* Johnson, *A New Fidelity to the Regulatory Ideal,* 59 GEO. L.J. 869 (1971) (former FCC Commissioner Nicholas Johnson).

102. Jaffe, *Ideal Administration, supra* note 91, at 1188-90.

103. Apparently Professor Jaffe is not above such criticism himself. *See generally* Jaffe, *WHDH, supra* note 91.

104. *See* Gulf States Util. Co. v. FPC, 411 U.S. 747, 759 (1973) (antitrust law represents fundamental national policy in favor of competition). The language of the Sherman Act is significant in this respect, for the essential prohibition of trade restraints and monopolies is stated in no more than 75 words. 15 U.S.C. §§1-7 (1970). Congress thus eschewed detailed legislation in favor of a mandate to federal courts to develop a common law of antitrust. *See* P. AREEDA, ANTITRUST ANALYSIS 22-24 (1967).

105. United States v. Radio Corp. of America, 358 U.S. 334, 346 (1959).

106. *Id.* at 351-52. *See also* Mansfield Journal Co. v. FCC, 180 F.2d 28, 33-34 (D.C. Cir. 1950).

107. United States v. Radio Corp. of America, 358 U.S. 334, 351-52 (1959).

108. *See* Jaffe, *Ideal Administration, supra* note 91, at 1187.

109. *See* CENTER FOR STUDY OF RESPONSIVE LAW, WORKING ON THE SYSTEM 259-64 (J. Michael ed. 1974).

THE DYNAMICS OF FCC REGULATION

The "public interest, convenience, or necessity" standard is obviously broad enough to cover a variety of regulatory contingencies. Congress, said the Supreme Court in *National Broadcasting Co. v. United States:*

> [D]id not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of . . . general problems. . . . That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding . . . .[110]

The FCC can encourage diversity by considering antitrust and concentration of control issues in license proceedings and by the use of the rulemaking authority.[111] Whether, and how, the Commission acts in these contexts is proportional in diversity regulation to the pressure exerted from constituent groups.

Congress

As noted above, the inference to be drawn from antitrust law and various provisions of the Communications Act is that Congress intended broadcasting to be a field of free competition.[112] The Supreme Court has endorsed this view.[113] But mere inference is not helpful when the Commission attempts to promulgate policy limiting newspaper[114] or conglomerate licensing.[115]

On occasion, Congress has spoken clearly to FCC diversity policy. In 1945 the Commission announced that it would limit the free transfer of licenses by requiring proposed buyers to enter a comparative proceeding with whoever chose to offer the seller similar terms.[116] The FCC found the rule unworkable and abandoned it.[117] Nevertheless, Congress passed the McFarland Act in 1952,[118] insuring that transferees would be considered as if they were the sole applicants. The effect of the Act is to minimize scrutiny of the buyer's media affiliations. With no one to whom he can be compared, a buyer's holdings must

110. 319 U.S. 190, 219 (1943).

111. Section 303(r) of the Communications Act enables the Commission to make "such rules and regulations . . . as may be necessary to carry out the provisions of this Act." 47 U.S.C. §303(r) (1970). *See* 47 C.F.R. §§1.401 *et seq.* (1973) (rulemaking procedure).

112. See notes 104-107 *supra* and accompanying text.

113. *E.g.,* United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

114. See notes 81-89 *supra* and accompanying text.

115. The Commission began an inquiry into conglomerate ownership in 1969; apparently the study has become dormant. *See* Inquiry Into the Ownership of Broadcast Stations by Persons or Entities with Other Business Interests, Docket No. 18449, 16 F.C.C.2d 436 (1969).

116. Powel Crosley, Jr. (AVCO case), 11 F.C.C. 2, 26-28 (1945).

117. *See* Statement of the Commission, 17 U.S.L.W. 2412 (March 8, 1949).

118. 66 Stat. 716 (1952), 47 U.S.C. §310(b) (1970).

be extensive for the FCC to find the transfer not in the "public interest, necessity, or convenience."[119]

In most cases, however, congressional policy expressions take the form of committee reports and bills that fail to pass.[120] The latter category includes bills that would prohibit the FCC from discriminating against owners of other mass media in the license process;[121] prevent an applicant's newspaper ownership from being a discrediting factor;[122] and command that the renewal process consider only the incumbent's programming record without reference to diversity.[123] On the average, unenacted bills and committee reports favor the security of existing licensees, without regard to the social cost of vesting owners with perpetual franchises. But the FCC should not have to divine congressional policy by "averaging out" the attitudes of individual congressmen. Legislation is introduced in reaction to affirmative steps on the FCC's part to encourage diversity. Some reaction is to be expected, but the FCC should not be swayed by the minority views expressed in unsuccessful legislative enactments. The Commission might be thought undemocratic in the institutional sense; its members are not elected, its actions are not subject to strict judicial review and, until recently, television and radio consumers had no standing to intervene in Commission licensing proceedings.[124] Surely, however, when Congress fails to legislate affirmative policy, that failure should not have a substantive impact on Commission policy.

The most recent example of congressional policymaking in this vein followed *WHDH, Inc.*[125] The FCC declined to renew the license of a Boston

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119. An example of the inequitable result of this statutory approach is found in Aladdin Radio & Television, 10 P & F RADIO REG. 773 (1954). After a long and close comparative proceeding between Aladdin, Inc. and Denver Television, a Denver TV license was awarded to Aladdin on the basis of its broadcast experience (it owned AM and FM stations in Denver) and local ownership (58% of Aladdin was locally owned, compared to Denver's 51%). The FCC did not think it relevant that Aladdin not only owned broadcast stations in Denver, but also a number of other Colorado stations. Aladdin Radio & Television, Inc., 9 P & F RADIO REG. 1, 4-19. Barely four months after it had been awarded the license, Aladdin applied to transfer its license to Time, Inc. Although Denver Television intervened, under the provisions of the 1952 amendment it could not be compared, favorably or otherwise, with Time, Inc. Since the Commission found no evidence of fraud in the previous proceeding, it awarded the license to Time, Inc. finding that it would not render service inferior to that of Aladdin. 10 P & F RADIO REG. at 772-75.

120. *See, e.g.*, Bryant, *Regulation of Broadcast Networks*, 15 ST. LOUIS U.L.J. 3, 43-44 (1970) (comprehensive list of bills introduced relating to network regulation, 1950-1969).

121. H.R. 2326, 82d Cong., 2d Sess. (1952).

122. H.R. 6968 (84th Cong., 1st Sess. (1955).

123. S. 2004, 91st Cong., 1st Sess. (1969). Not all bills favor the industry. *See, e.g.*, H.R. 9486, 86th Cong., 2d Sess. (1960) (amendment to the Clayton Act to prohibit ownership by one interest of substantial portions of broadcast and newspaper facilities in any one section of the country).

124. See text accompanying notes 180-187 *infra*.

125. 16 F.C.C.2d 1 (1969), *noted in* Goldin, *"Spare the Golden Goose" — The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Jaffe, *WHDH, supra* note 91; Tish, *The Federal Communications Commission's License Renewal Policies — A Turn of Events, Some Unanswered Questions, and a Proposal*, 15 ST. LOUIS U.L.J. 94 (1970); Note, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L.

television station owned by the *Herald-Traveller,* one of the city's daily newspapers. The grounds for denial included mediocrity in programming,[126] concentration of local media ownership,[127] and improprieties in the original licensing process.[128] Although the opinion was not entirely clear,[129] and irregularities in WHDH's original licensing made the case unique, Senator Pastore immediately filed legislation that would have prohibited FCC consideration of diversity and other criteria in license renewals.[130] The bill was never reported out of committee. Nevertheless, a year later the Commission, influenced by the Senator's interest in the question, issued its *Policy Statement on Comparative Hearings on Renewal Applicants,*[131] which declared that before competing applicants would be compared on relevant criteria, the incumbent's programming must be found "minimal" as opposed to "substantial."[132] The policy statement reached a result remarkably similar to that contemplated by Senator Pastore's bill.[133] One year later *Citizens Communication Center v. FCC*[134] held that not only was the policy statement contrary to the hearing requirement established by *Ashbacker Radio Corp. v. FCC,*[135] but that the FCC was completely without statutory authority to adopt the policy.[136]

Congress is generally sensitive to property interests in commercial broadcasting.[137] To the extent that diversity policy promises to threaten existing broadcasting investments, the reaction of both Congress and the industry is volatile.[138] For this reason ownership rules are rarely retroactive,[139] and the

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REV. 854 (1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?,* 118 U. PA. L. REV. 368 (1970).

126. 16 F.C.C. at 8-11.

127. *Id.* at 12-13.

128. *Id.* at 7-8.

129. As Representative Torbert Macdonald stated in opening hearings on License Renewal legislation, *WHDH* is "light years away from being a clear precedent." *Hearings on License Renewal, supra* note 11, at 2.

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

131. 22 F.C.C.2d 424 (1970).

132. *Id.* at 425-26.

133. In fact, the Commission took note of the bill in the policy statement. *Id.* at 424.

134. 447 F.2d 1201 (D.C. Cir. 1971).

135. 326 U.S. 327 (1945) (articulating the requirement of a comparative proceeding where there are two or more mutually exclusive applications).

136. 447 F.2d at 1211-12.

137. At odds in any renewal proceeding are the incumbent, with his substantial economic investment, and the applicant, who can only hold out the ephemeral promise of his program proposals. Thus, it is understandable that in almost any comparative proceeding the incumbent will be favored, even with only minimal performance over the license period.

138. *Cf.* the industry reaction to *WHDH: WHDH Decision Has Widespread, Costly Implication—$3 Billion Down the Drain,* BROADCASTING, Feb. 3, 1969, at 19. Much of the testimony at the License Renewal bill hearings centered around the effect of *WHDH. See, e.g., Hearings on License Renewal, supra* note 11, at 63-65, 162-64, 203-06.

139. For instance, when the Commission announced the multiple ownership rules in 1953 (limiting AM and FM licenses to seven each), it stated: "[W]e have concluded that any proposal to limit multiple ownership on the basis of such factors as class of station or geographical location, is either unsatisfactory or unworkable. For a formula, which we believe would reasonably limit ownership on such bases, would require extensive divestment of holdings by licensees; it is felt that this would be unduly disruptive." Amendment of

ownership status quo is maintained.[140] This attitude does not comport with either the Communications Act or with Supreme Court interpretations. By statute, licenses are limited to a stated term of years and the "license shall not vest in the licensee any rights to operate the station . . . beyond the term thereof."[141] As the Supreme Court stated in *FCC v. Sanders Brothers Radio Station:* "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. . . . Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public."[142]

License renewal legislation considered by the 93d Congress was substantively neutral concerning concentrated ownership. Section 2(b) of the House bill would amend the Communications Act to permit FCC consideration of licensees' ownership interests only where rules prohibiting specific ownership interests have been adopted.[143] A spokesman for the Justice Department testified at Senate hearings on the bill that Congress should either prohibit consideration of media ownership issues entirely, or in clear and certain terms direct the Commission "to adopt rules requiring dissolution of existing local media cross-ownership situations over a reasonable period of time."[144] Instead, the Senate decided to delete the provision entirely,[145] on the assumption that the FCC's longstanding construction of the Communications Act made it superfluous.[146]

Justice Department

Until recently, the Justice Department was an infrequent participant in FCC proceedings. Beginning in the late 1950's, the Antitrust Division went to court to protest several mergers or acquisitions approved by the Commission.[147]

Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953). *See* notes 86-89 *supra* and accompanying text.

140. The Commission has given great weight to licensees' investments in the past, thus giving preference to existing licensees over newcomers. *See* Wabash Valley Broadcasting Corp., 35 F.C.C. 677 (1963); C. Bruce McConnell, 6 F.C.C. 167 (1938). *Cf.* South Florida Television Corp. v. FCC, 349 F.2d 971 (D.C. Cir. 1965), *cert. denied,* 382 U.S. 987 (1966).

141. 47 U.S.C. §309(h) (1970).

142. 309 U.S. 470, 475 (1940).

143. H.R. 12993, 93d Cong., 2d Sess. §2 (1974).

144. *Hearings on the Broadcast License Renewal Act Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 93d Cong., 2d Sess., ser. 93, pt. 1, at 134-35 (1974) [hereinafter cited as *Senate Hearings*].

145. *See* 120 CONG. REC. S18502-04 (daily ed. Oct. 8, 1974).

146. In defining "longstanding construction" of the Act, Senator Moss cited with approval Hearst Radio, Inc., 15 F.C.C. 1149 (1951). 120 CONG. REC. S18503 (daily ed. Oct. 8, 1974). See note 32 *supra.*

147. In 1958 the Commission held hearings on the subject of network option time arrangements, made findings on the nature of option time, and transmitted its report to the Justice Department for an opinion on its legality. Findings of Commission on Option Time, 18 P & F RADIO REG. 1809 (1959). Justice Department concluded that option time arrangements violated the Sherman Act as exclusive dealing or tying devices. Applicability of Antitrust laws to Option Time Practice, 18 P & F RADIO REG. 1801 (1959). Nevertheless, the FCC determined that the practice could continue. Option Time Rules, 20 P & F RADIO REG. 1568

In 1956, for example, the Radio Corporation of America (RCA) and Westinghouse Broadcasting Corp. proposed to exchange VHF stations in Philadelphia and Cleveland. The FCC approved the transaction, notwithstanding evidence of coercion on the part of the dominant party, RCA.[148] Subsequently, the Justice Department filed an antitrust action charging RCA with a conspiracy to acquire VHF stations in five of the country's eight largest markets.[149] A consent decree was entered[150] after the Supreme Court held that FCC approval did not immunize the transfer from separate antitrust attack.[151]

Although it would seem that the Antitrust Division is an ideal advocate for competition in the industry, its role is limited by its jurisdiction, prosecution under antitrust laws, and the policy goals of current Administrations. The first of these factors has been described by an attorney for the Justice Department:

> While there is obvious social harm in a merger which removes a diverse editorial voice from its community and from the nation, the Antitrust Division must make an analysis which is essentially economic. In the media business, as in all other businesses, if we cannot find a provable economic effect in an identifiable market, there is no action we can take . . . to prevent a merger.[152]

Thus, while the FCC can consider the deleterious first amendment effects of a merger, the Antitrust Division is limited to the economic issues under the Sherman or Clayton Acts.[153] It is ironic, then, that the Justice Department has successfully fought mergers on antitrust grounds, which the FCC had already approved as consistent with the public interest. In fact, it is anomalous that the antitrust and regulatory approaches should conflict, since both the antitrust laws and the Communications Act share the common purpose of assuring that business serves the public interest.[154]

The second limitation on the Justice Department is more subtle. The Antitrust Division cannot monitor all abuses in the commercial sector; because

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(1960). Following an appeal supported by the Justice Department the Commission reconsidered and prohibited option time entirely. Television Option Time, 25 P & F RADIO REG. 1651, 1686 (1963).

148. *See* Perry, *Current Antitrust Problems in Broadcasting*, 27 OHIO ST. L.J. 1, 3-4 (1966).

149. United States v. Radio Corp. of America, 158 F. Supp. 333 (E.D. Pa. 1958).

150. United States v. Radio Corp. of America, 186 F. Supp. 776 (E.D. Pa. 1960).

151. United States v. Radio Corp. of America, 358 U.S. 334 (1959).

152. Mehaffie, *Mergers and Diversification in the Newspaper, Broadcasting, and Information Industries*, 13 ANTITRUST BULL. 927, 931 (1968).

153. Significantly, however, the Justice Department used a broader policy argument in support of its petitions to deny the licenses of newspaper-owned stations in 1974: "[P]lainly, [substantial cross-ownership] implies a . . . domination of the sources of local news and opinion in a community of over a million and a half [St. Louis], a domination whose renewal cannot be said to be in the public interest." 1974 BNA ANTITRUST & TRADE REG. REP. No. 645, A-14.

154. One commentator suggests that antitrust issues should be tried in all licensing proceedings to avoid the waste of separate actions and duplication of effort. *See* Barrow, *Antitrust and the Regulated Industry, Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282, 283.

manpower is limited, policy implementation is maximized by selective enforcement.[155] This problem is aggravated by the degree to which antitrust policy is controlled by the White House.[156] Obviously, an Administration with close ties to a particular area of business will not strictly enforce antitrust laws in that area.[157] The Nixon Administration had few ties with the communications industry,[158] and that has been suggested as a reason for recent Antitrust Division activity in that field.[159] Justice's involvement has centered around newspaper-broadcasting cross-ownership, as in 1969 when the owner of KFDM-TV in Beaumont, Texas proposed to transfer his license to the owner of Beaumont's only daily newspaper.[160] The Justice Department intervened and protested on antitrust grounds.[161] The FCC scheduled a hearing on the proposal,[162] and the parties involved withdrew their application.[163]

In 1973-1974 Justice filed objections with the FCC against the license renewals of five newspaper publishers who held local broadcast properties.[164] Each case involved common ownership of a newspaper or television station, or both, within the same city.[165] Apparently Justice's interventions were motivated

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155. This fact is shown by the few antitrust proceedings instituted by the Justice Department each year. For instance, during the years 1965-1969, the Department filed only 195 antitrust actions, an average of 39 per year. Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. LAW & ECON. 365, 366, table 1 (1970).

156. Legislation was introduced in the 93d Congress to create an independent Justice Department. *See Hearings on Removing Politics from the Administration of Justice Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 93d Cong., 2d Sess. at 249-81 (1974).

157. One of the reasons for the passage of the Federal Trade Commission Act (1914) was because "[t]he actual enforcement of the [Sherman Act] did not inspire public confidence either in the adequacy of the law or in the zeal of the Attorney General in prosecuting those who violated it." P. AREEDA, ANTITRUST ANALYSIS 24-25 (1967).

158. *See* Whiteside, *Annals of Television,* THE NEW YORKER, March 17, 1975, at 41 (Nixon Administration and television); *cf. Hearings on License Renewal, supra* note 11, at 301-02 (remarks of Rep. Macdonald); *id.* pt. 2, at 809-14 (testimony of Clay Whitehead); Addresses by then-Vice President Spiro T. Agnew to the Iowa Republicans in Des Moines, Iowa, Nov. 19, 1969, and to the Chamber of Commerce in Montgomery, Alabama, Nov. 20, 1969, in M. EMERY & T. SMYTHE, *supra* note 2, at 309, 346.

159. *But see* 1974 BNA ANTITRUST & TRADE REG. REP. No. 654, A-13 (remarks of Ass't Att'y Gen. Bruce Wilson). Wilson defended the Justice Department against charges that its policy was being used for political purposes. His position is supported by the fact that the White House Office of Telecommunications Policy (OTP) supported the five-year proposal and other provisions favorable to the industry, at the same time that the Justice Department was pressuring the FCC to adopt rules restricting cross-ownership. The relationship of the OTP to the Commission is discussed in Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications,* 43 U. CIN. L .REV. 291 (1974).

160. *See* Beaumont Broadcasting Corp., 13 F.C.C.2d 989 (1968).

161. 1968 BNA ANTITRUST & TRADE REG. REP. No. 357, A-12.

162. Beaumont Broadcasting Corp., 13 F.C.C.2d 989 (1968).

163. *See* Beaumont Television Corp., 17 F.C.C.2d 577, 581 (1969) (dissenting opinion). KFDM was subsequently transferred to the owner of even greater media interests than those of the originally proposed transferee, though not in the Beaumont area. *Id.* at 579-82.

164. *See* 1974 BNA ANTITRUST & TRADE REG. REP. No. 645, A-14.

165. 1974 BNA ANTITRUST & TRADE REG. REP. No. 662, A-11; *see Senate Hearings, supra* note 144, at 126-27 (testimony of Bruce Wilson, Deputy Ass't Att'y Gen., Justice Department).

by the FCC's reluctance to proceed with the enlarged issues proposed in Docket No. 18110 by the 1970 *Further Notice of Proposed Rulemaking*.[166] Following Justice's renewal interventions in March 1974, the Commission reactivated the rulemaking, narrowing the scope of its inquiry to the question of co-located newspaper and VHF television ownership.[167]

The Justice Department's objections to license renewals might have done more than revive the rulemaking in Docket No. 18110. Its actions were cited in the House debate on H.R. 12993 as further evidence of the need for stability in the license renewal process.[168] The House bill would have amended section 307(d) of the Communications Act to prohibit, in a license renewal proceeding, FCC consideration of a licensee's ownership interests in "other stations or other communications media or other businesses," unless the FCC had adopted rules prohibiting such ownership and given the licensee an opportunity to comply.[169] Stated differently, under this amendment there would be no consideration of local media concentration in individual cases unless the FCC had first adopted a general rule. The rationale for this provision, as stated in the Committee Report, was that to consider concentrated ownership on a case-by-case basis "would result in restructuring the broadcast industry in a haphazard, subjective, and oft-times inconsistent manner which . . . would be unfair and undesirable."[170]

Were this the sole purpose of the amendment, it would not even be necessary. The Commission has stated that it does not intend to "restructure" the industry through the renewal process.[171] In a license proceeding, a party raising a concentration of control issue must allege specific abuses resulting from ownership structure to be granted a hearing on the issue.[172] In *Hale v. FCC*[173] the court affirmed this strict approach, partly because of the Commission's ongoing rulemaking in Docket No. 18110.[174] The House Bill would have

166. 22 F.C.C.2d 339 (1970). See notes 81-89 *supra* and accompanying text.

167. Memorandum Report and Order, Docket No. 18110, F.C.C. 74-222 (March 7, 1974). *See Senate Hearings, supra* note 144, at 126-27.

168. 120 CONG. REC. H3414 (daily ed. May 1, 1974) (remarks of Rep. Staggers).

169. H.R. 12993, 93d Cong., 2d Sess. §2(b) (1974). The legislative history of the bill indicates that Congress does not disapprove of FCC rulemaking limiting cross-media ownership. The Committee Report, for instance, merely states that the Commission should take whatever action in Docket No. 18110 it deems appropriate, without jurisdictional limitations. Since the new cross-ownership rules specifically prohibit newspaper and broadcasting cross-ownership, *see* text accompanying notes 81-89 *supra*, the legislation would render moot the decision in Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942), that the FCC has no authority under the Communications Act to make a rule prohibiting newspaper ownership of radio stations because the FCC has no jurisdiction over newspapers. The events leading up to *Stahlman* are described in Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 FED. COMM. B.J. 44, 47-50 (1966).

170. H.R. REP. No. 961, 93d Cong., 2d Sess. 19 (1974).

171. *See Senate Hearings, supra* note 144, at 87-88 (testimony of FCC Chairman Richard Wiley); *Hearings on License Renewal, supra* note 11, at 62-63 (former FCC Chairman Dean Burch).

172. Midwest Radio-Television, Inc., 16 F.C.C.2d 943, 17 F.C.C.2d 290 (1969); Chronicle Broadcasting Co., 16 F.C.C.2d 882, 17 F.C.C.2d 245 (1969).

173. 425 F.2d 556 (D.C. Cir. 1970).

174. *Id.* at 560; *accord*, Stone v. FCC, 466 F.2d 316, 330-31 (D.C. Cir. 1972).

eliminated even this strict approach in license renewals unless the licensee were in violation of multiple ownership rules.

The Senate Commerce Committee deleted this provision on the ground that the Commission has never considered ownership affiliations per se to disqualify a licensee, and thus the amendment would be superfluous.[175] The Committee made clear its intent that it favored the narrow approach to consideration of ownership interests in the licensing process represented by *Hearst Radio, Inc.*[176] The problem with the policy favored by the House and Senate is that it would preclude FCC consideration of concentrated ownership even where a licensee's control would otherwise amount to a violation of the antitrust laws. In such a case the Justice Department would be limited to court action, because even a clear demonstration of unlawful concentration in an individual market is not a "specific abuse" within the meaning of FCC policy.[177]

A second drawback to the current congressional attitude is that it would discourage FCC consideration of *any* ownership interests. The rulemaking in Docket No. 18110 dealt only with newspaper ownership of broadcast facilities. Other significant ownership relations – for example, conglomerate ownership of licensed facilities – could not be weighed by the FCC in renewal proceedings. Thus, if the Commission does not adopt rules regarding ownership structure,[178] and such issues cannot be raised in individual proceedings, they will not be raised at all. The fate of Justice Department, and to some extent private party, participation in FCC proceedings involving ownership interests hangs in the balance.

Citizens' Groups

In 1916 Elihu Root, then President of the American Bar Association, stated: "If we are to continue a government of limited powers, agencies of regulation must themselves be regulated. . . . The rights of citizens against them must be made plain."[179] It is surprising that members and representatives of a broadcast station's audience – the most numerous consumers of the station's "product" – were not accorded standing to protest license renewals until the 1966 decision of *Office of Communication of the United Church of Christ v. FCC.*[180]

The standing issue revolves around whether the objecting party is a "party

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175. 120 CONG. REC. S18502-04 (daily ed. Oct. 8, 1974).

176. 15 F.C.C. 1149 (1951).

177. Such an approach would contradict the philosophy of Gulf States Util. v. FPC, 411 U.S. 747 (1973). In holding that the FPC is required to consider antitrust issues under the public interest standard of the Federal Power Act, the Court stated: "Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." *Id.* at 760. *See* text accompanying notes 213-217 *infra.*

178. See note 115 *supra.*

179. 41 A.B.A. REP. 355, 368-69 (1916).

180. 359 F.2d 994 (D.C. Cir. 1966).

in interest."[181] Much litigation has centered around standing in the FCC context, because while anyone can file informal objections to action on a license,[182] only a party in interest can demand a hearing and participate as a matter of right.[183] Prior to *Church of Christ,* almost anyone who could allege economic injury enjoyed standing.[184] This group was generally limited to other broadcasters and newspaper owners.

In *Church of Christ,* members and representatives of WLBT-TV's viewing audience in Jackson, Mississippi protested the renewal of WLBT's license because it had failed to operate in the public interest. The protest was primarily aimed at the station's discriminatory programming.[185] Although the FCC issued stern warnings to WLBT, it found a need for continued broadcast service, renewed the license without a hearing, and dismissed the petition to intervene.[186] On appeal, the D.C. Circuit Court of Appeals reversed, holding that an evidentiary hearing was required under the circumstances revealed by the record. The court observed that "a history of programming misconduct of the kind alleged would preclude, as a mater of law, the required finding that renewal of the license would serve the public interest."[187]

Church of Christ has enhanced the potential for citizen participation in the licensing process, as shown by the proliferation of petitions to deny filed against renewal applicants.[188] There is evidence that the FCC treats citizen

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181. 47 U.S.C. §309(d)(1) (1970) provides in part: "Any party in interest may file with the Commission a petition to deny any application . . . ."

182. *See* 47 C.F.R. §1.587 (1973).

183. Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960); Elm City Broadcasting Corp. v. United States, 235 F.2d 811 (D.C. Cir. 1956).

184. *See, e.g.,* Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955) (newspaper faced with loss of revenue from advertising); Greenville Television Co. v. FCC, 221 F.2d 870 (D.C. Cir. 1955) (loss of expected advertising revenues to noninterfering station); Metropolitan Television Co. v. United States, 221 F.2d 879 (D.C. Cir. 1955) (loss of audience beyond normally protected contours).

185. The specific claims were that the station had violated the fairness doctrine by denying equal time to WLBT's critics, violated the fairness doctrine by not providing for the dissemination of opposing views on racial issues, discriminated against local black citizens by not giving them adequate exposure, though almost half of the station audience was black, similarly discriminated against the Catholic Church, and devoted a disproportionate amount of time to entertainment and commercials. 359 F.2d at 994, 997-99.

186. *See* Lamar Broadcasting Corp., 1 F.C.C.2d 1482 (1965).

187. 359 F.2d at 1007. In a second decision following the FCC's remanded treatment of the renewal proceedings, Office of Communications of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) (*Church of Christ II*), the court held that the Commission had placed an unreasonable burden of proof upon the intervenors, which reflected a "curious neutrality in favor of the licensee." The court stated that providing a forum for the expression of public views is not enough: the FCC has "an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest." *Id.* at 548. *See* Volner, *Broadcast Regulation: Is There Too Much "Public" in the "Public Interest"?,* 43 U. CIN. L. REV. 267, 272-75 (1974) (analysis of *Church of Christ I & II*).

188. Petitions to deny filed against applicants for renewal of broadcast licenses:

interventions as gratuitous harassment,[189] but as the Commission indicated in *Midwest Radio-Television, Inc. (WCCO)*[190] and *Chronicle Broadcasting Co. (KRON-FM),*[191] well-drafted objections to a licensee's ownership qualifications will at least result in an inquiry into specific abuses resulting from alleged concentrated ownership. *Church of Christ* thus permits the infusion of social rather than purely economic or mechanical perspectives into the licensing process.[192]

The standing allowance to citizens' and public interest groups has had an impact on ownership diversity, especially in the transfer area. In 1969, for instance, the owners of WFMT-FM (Chicago) applied to transfer the station to WGN Continental Broadcasting Co., a wholly-owned subsidiary of the Chicago Tribune.[193] The ad hoc Citizens Committee To Save WFMT intervened on the concentration of control issue,[194] and a hearing was scheduled. Following the intervention, WFMT amended its transfer application to propose transfer not to Continental, but to the nonprofit Chicago Educational Television Association.[195] When the Citizens Committee approved, the FCC granted the transfer.[196]

Congress is apparently uneasy about the increased number of petitions to

Fiscal Year	No. of Stations Filed Against	No. of Petitions
1967	2	2
1968	3	3
1969	2	2
1970	15	16
1971	38	84
1972	68	103
1973	50	150

H.R. REP. No. 961, 93d Cong., 2d Sess. 20 (1974).

189. In *Church of Christ II* the court stated: "The record now before us leaves us with a profound concern over the entire handling of this case . . . . The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict burden of proof, plain errors in rulings and findings lead us . . . to the conclusion that [the] administrative conduct reflected in this record is beyond repair." 425 F.2d at 550. *See also Hearings on License Renewal, supra* note 11, at 132 (testimony of FCC Commissioner Nicholas Johnson); M. MINTZ & J. COHEN, *supra* note 7, at 112 (petition to deny raising serious questions about incumbent's programming rejected because a letter was not on "double-spaced typewritten pages").

190. 16 F.C.C.2d 943 (1969).

191. 16 F.C.C.2d 882 (1969).

192. 359 F.2d at 1002-04. *See generally* Note, *Standing of Television Viewers To Contest FCC Orders: The Private Action Goes Public,* 66 COLUM. L. REV. 1511 (1966). *But see* Volner, *supra* note 187 (critical of "public interest" approach to broadcast regulation).

193. An account of the procedure employed by the Committee appears in Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens,* 66 NW. L. REV. 159, 166-69 (1971).

194. Gale Broadcasting Co., 17 F.C.C.2d 391 (1969).

195. Gale Broadcasting Co., 20 F.C.C.2d 924 (1969).

196. Gale Broadcasting Co., 21 F.C.C.2d 401 (1969).

deny filed by community groups.[197] The House License Renewal bill proposed to limit their impact with two provisions. The bill would amend the Communications Act to require the FCC to abide by strict time limits within which petitions to deny may be filed.[198] Although the present Act does not prescribe time limits, FCC rules allow ten days for petitions to deny to be filed in opposition to applications for transfer or renewal.[199] Petitions to intervene must be filed within thirty days.[200] The bill denies the FCC the discretion to allow late interventions, however compelling the reason. The effect will be to blunt the attack of many citizens' interventions because the complex issues involved require time to prepare,[201] and the notice provisions prescribed by FCC rules are in most cases inadequate to inform local audiences of proposed action concerning their stations.[202] The Justice Department itself claimed lack of notice when it intervened beyond the deadline in the ABC-ITT merger.

A second amendment proposed by H.R. 12993 to some extent mitigates the harshness of the compulsory deadline by encouraging broadcast licensees to respond to community complaints. Section 4 of the House bill would require the Commission to prescribe procedures by which "persons raising significant issues regarding the operations of [local broadcast] stations" may enter "negotiations" with such stations to resolve complaints.[203]

The Senate approached citizen participation in the renewal process in a subtler manner. The Senate version would have required licensees to ascertain community needs and views throughout the license term, rather than just before renewal as in current practice.[204] At renewal time, if the licensee had properly conducted the ascertainment and met the problems, needs, and interests thus discovered, a presumption in favor of renewal would be established if there were no other serious deficiencies in station operation.[205] Debate on the effect of the presumption centered on the comparative renewal context, without mentioning the effect on petitions to deny.[206] Clearly, however, if the licensee has met the bill's requirements and thus gains a presumption, the intervenor will have a heavy burden in showing that the licensee is unfit for renewal. Objections to renewal in the first instance will no doubt be limited

197. *Cf.* 120 CONG. REC. H3415 (daily ed. May 1. 1974) (remarks of Rep. Dorn).

198. Section 3 of the bill provides: "Any party in interest may file with the Commission, within such time limits as may be prescribed by the rules of the Commission, a petition to deny applications to which subsection (b) [47 U.S.C. §309(b)] applies." H.R. 12993, 93d Cong., 2d Sess. §3 (1974). The statute in its present form does not mandate strict time limits. *See* 47 U.S.C. §309(d)(1) (1970).

199. 47 C.F.R. §§1.45 (opposition to transfers must be filed within 10 days), 1.223 (oppositions to renewal must be filed within 30 days) (1973).

200. *Id.*

201. See, for example, the complex analysis suggested in Bennett, *supra* note 193, at 173-79.

202. *See* 47 C.F.R. §§1.580, .594 (1973).

203. H.R. 12993, 93d Cong., 2d Sess. §4 (1974).

204. H.R. 12993, 94th Cong., 2d Sess. §2(a) (Senate substitute 1974).

205. *Id.* §2(b).

206. *See* 120 CONG. REC. S18500-01 (daily ed. Oct. 8, 1974). The Committee did not reveal the exact nature of the presumption, except that it would be a "plus of major significance." *Id.* at S18500.

to the categories established by the bill – that is, whether the licensee's ascertainment is an accurate reflection of community views.

The apparent philosophy of both versions of license renewal legislation is to minimize the jeopardy to broadcast licenses, which are formally challenged at renewal time, while providing a forum for local groups with good faith complaints.[207] The House bill would resolve these complaints by requiring "negotiations" between the licensee and the complainants; the Senate bill assumes that complaints will be discovered, and deficiencies remedied, during the licensee's ongoing ascertainment of community problems and views. The House approach is more desirable from the standpoint of consumer participation, for the Senate formula could virtually foreclose consideration of issues unrelated to the ascertainment procedure. Even so, there are drawbacks to the House bill: the "negotiations" provision has no penalties for a station's refusal to enter negotiations, nor does it specify which issues are worthy of resolution.[208] The Committee Report on H.R. 12993 states the rationale for the "negotiations" provision: "It is in the interest of all to avoid disruptive confrontations and, whenever possible, the time, expense, and acrimony which result from the filing of a petition to deny against a broadcast station if the issue can be more efficiently resolved."[209]

It should be pointed out that petitions to deny usually result from the frustration that local groups encounter in trying to get broadcasters to amend their program standards.[210] When the station owner is not a local resident, or the station is chain-owned (or conglomerate owned), the conflict becomes more acute, as absentee owners are apt to be less responsive to the community.

The bills considered in the last session, and legislation currently before Congress, are responses to the increase in citizen activism spawned by *Church of Christ*. In the diversity context, both bills would to some degree preclude consideration of ownership interests in the renewal process. As to station transfers, it is apparent that the approach taken by the House bill would require increased sophistication on the parts of local citizens or public interest groups to have any effect on preventing concentrated ownership through merger or acquisition. The bill's stringent limitations on periods during which to petition or intervene would require monitoring of licensees' proposals in order that the time allotted for preparations of the groups' objections may be maximized. An ad hoc approach to citizen intervention would not be possible under the House legislation.

The Judiciary

One commentator has noted that "Delegation of regulatory power to ad-

207. *See* H.R. REP. No. 961, 93d Cong., 2d Sess. 13-16, 20-21 (1974); 120 CONG. REC. S18500 (daily ed. Oct. 8, 1974) (remarks of Sen. Pastore).

208. It would remain for the FCC to define the nature of these provisions. Because the Commission's ascertainment standards have evolved through case law, the probable result will be adoption of general policy into specific rules. *See, e.g.*, Policy Statement on Comparative Broadcast Hearings, 5 P & F RADIO REG. 2D 1901 (1965).

209. H.R. REP. No. 961, 93d Cong., 2d Sess. 20 (1974).

210. *See, e.g.*, Lamar Broadcasting Corp., 1 F.C.C.2d 1482 (1965).

ministrative agencies with little more guidance than 'public interest' comes perilously close to abdication of legislative functions and helps to set the stage for judicial abdication . . . ."[211] The same author urged that, since Congress had indicated a general desire that competition in the business sector be maximized, courts should adopt a general rule of law that an agency cannot act where the effect will be to lessen competition except where the objectives of the agency's enabling statute cannot otherwise be met.[212] The rule would be enforced by judicial review of agency action.

In 1943 in *National Broadcasting Co. v. United States*,[213] the Supreme Court upheld a Commission rule designed to regulate chain broadcasting "in the light of the purposes which the Sherman Act was designed to achieve."[214] Since that time, courts have held in several instances that a legislative "public interest" standard not only permits but requires a regulatory agency to consider antitrust issues in relevant proceedings.[215] Typical is *Gulf States Utilities Co. v. FPC*,[216] in which the Supreme Court interpreted the "public interest" standard of section 204 of the Federal Power Act to require the FPC to consider antitrust issues in section 204 proceedings, despite the FPC's contrary interpretation and practice of many years' standing.[217] In many of these cases the antitrust issues were raised by intervenors, who appealed agency refusals to consider their complaints.

The judiciary has not had so dramatic an impact on the FCC in the antitrust context, primarily because local citizens did not have standing to raise such issues until *Church of Christ*. Thus, for many years the only parties who appealed FCC overtures in limiting ownership or control were broadcasters. Of course, the courts have almost unanimously affirmed Commission rules encouraging diversity; but courts cannot write rules for the FCC, and must be content with dicta announcing what the Commission could do under the Communications Act, if it were so inclined.[218]

Jurisdiction over appeals from FCC decisions in license proceedings is currently vested exclusively in the Circuit Court for the District of Columbia.[219] The House license renewal bill proposed to allow appeals in these cases only to the court of appeals for the circuit in which the broadcast station is located.[220] The reasons given for this provision were the extraordinary length of

211. Schwartz, *supra* note 39, at 475.

212. *Id.* at 464.

213. 319 U.S. 190 (1943).

214. *Id.* at 223.

215. *E.g.*, FMC v. Svenska Amerika Linien, 390 U.S. 238, 242-46 (1968); Denver & R.G.W.R. Co. v. United States, 387 U.S. 485, 492-98 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 585 (D.C. Cir. 1969); Municipal Elec. Ass'n v. SEC, 413 F.2d 1052, 1056-57 (D.C. Cir. 1969).

216. 411 U.S. 747 (1973).

217. *Id.* at 757.

218. *E.g.*, United States v. Radio Corp. of America, 358 U.S. 334, 351-52 (1959) (FCC could deny a license on antitrust principles) (dictum). *See Hearings on License Renewal, supra* note 11, at 66-67 (discussion of dicta in *Citizens Communications Center*).

219. 47 U.S.C. §402(b) (1970).

220. H.R. 12993, 93d Cong., 2d Sess. §5 (1974). The Senate substitute deleted this provision.

time taken for disposition of appeals in the D.C. Circuit,[221] and the savings involved for local parties who will not have to travel to Washington to prosecute their appeals.[222] More important would be the effect of the amendment on the jurisprudence of the Communications Act. The lodging of appellate jurisdiction in other circuit courts will inevitably result in conflicts, as the courts balance competing policy rationales. This, in turn, will generate more adjudication at the Supreme Court level.[223] Ultimately, the judicial impact on the communications industry may thus be enhanced.

CONCLUSION

Regulation of broadcasting creates a basic tension between the freedom of broadcasters and the right of the public to be informed. Exploring this tension, the Supreme Court concluded in *Red Lion Broadcasting Co. v. FCC:*

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[224]

The Commission can approach regulation on behalf of "viewers and listeners" in the first amendment context in two ways. As discussed in this note, the FCC can encourage diverse ownership to insure that as many different persons as possible participate in broadcasting. Such diversity would also foreclose domination in one market by a single party. The second approach involves limited regulation of program content through the fairness doctrine.[225] The doctrine requires the presentation of a wide variety of "controversial issues of public importance"[226] and responsible conflicting views.[227]

As recently construed in *National Broadcasting Co. v. FCC* (*Pensions* case),[228] the fairness doctrine allows broadcasters a wide latitude in determining whether controversial issues of public importance, worthy of the presentation of opposing or contrasting points of view, are involved in a program. The FCC, said the court, can only intervene where the licensee has abused its journalistic discretion or acted in bad faith, and the burden of proving these is

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221. The median time of disposition of appeals in the Court of Appeals for the D.C. Circuit is 11.7 months, the longest of any court of appeals in the country. H.R. REP. No. 961, 93d Cong., 2d Sess. 21-22 (1974).

222. *Id.*

223. *See Senate Hearings, supra* note 144, at 85-86.

224. 395 U.S. 367, 390 (1969).

225. The Fairness Doctrine had its genesis in Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Congress gave statutory recognition to the doctrine with a 1959 amendment to the Communications Act. Act of Sept. 14, 1959, Pub. L. No. 86-274, §1, 73 Stat. 557, *amending* 47 U.S.C. §315(a) (1970). *See* note 24 *supra*. The Commission's present views on the fairness doctrine are expressed in Fairness Doctrine and Public Interest Standards: Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26372 (1974).

226. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

227. *Id.*

228. F.2d (D.C. Cir. 1974).

substantial.[229] The *Pensions* case reflects the current judicial trend of reaffirming the editorial independence of newspapers and broadcasters from governmental restrictions in any form.[230]

The limitation imposed on the fairness doctrine seems well justified. For one thing, it is questionable whether the doctrine has served or impeded a "robust" exchange of ideas. Many broadcasters have no doubt believed that controversial programming would endanger their licenses.[231] More important, however, is the erosion of the "limited airwaves" rationale for programming regulation as technology develops the means for more access to both broadcasting and reception.[232] Cable television holds enormous promise in this context.[233] The result of such a technologically-induced increase in channels should be a concomitant relaxation of programming regulation.

As the fairness doctrine becomes a less useful means of encouraging program diversity, the need to enforce diverse ownership becomes imperative,[234] for only by encouraging competition can the Commission promote the free and uncontrolled dissemination of ideas. The FCC has been unwilling to develop a meaningful affirmative ownership policy, and the regulatory process is becom-

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229. *Id.* at .

230. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (states may not impose strict liability nor assess punitive damages in libel actions); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) ("right to reply" law unconstitutionally intrudes into function of newspaper editors); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcast licensees may impose blanket ban on all editorial advertising); Democratic Nat'l Comm. v. FCC, 460 F.2d 891 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972) (licensee did not abuse discretion in interpreting fairness doctrine obligations generated by radio and TV address by President).

231. Creative programming has gotten some licensees into trouble at renewal time. *See, e.g.,* Eastern Education Radio, 24 F.C.C.2d 400 (1970); Jack Straw Foundation, 21 F.C.C.2d 833 (1970).

232. *See* Note, *The Fairness Doctrine: Time for the Graveyard?,* 2 FORDHAM URB. L. J. 563 (1974).

233. *See, e.g.,* CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE: REPORT TO THE PRESIDENT 34-37 (1974); Foundation '70, *A Cable Is a Very Big Wire,* 2 YALE REV. L. & SOC. ACTION 199 (1972); Freebairn, *Public Access in New York City: An Interview with Theodora Sklover,* 2 YALE REV. L. & SOC. ACTION 227 (1972); Lapierre, *Cable Television and the Promise of Programming Diversity,* 42 FORDHAM L. REV. 25 (1973); Note, *Cable Television for Florida: Plan or Chaos?,* 26 U. FLA. L. REV. 236, 237-38 (1974).

234. This was the unanimous conclusion of the WARREN CONFERENCE REPORT, *supra* note 59. The conferees' recommendations included the following: "In view of the wide spectrum of radio frequencies now available throughout the nation for the expression of a divergency of views, the Federal Communications Act should be amended to remove from the Federal Communications Commission the power to regulate the program content of radio stations. . . . The Federal Communications Commission should suspend, on an experimental basis, program content regulation of television in limited geographical market areas if total deregulation of television content cannot be had." *Id.* at 21-22.

To balance the proposed deregulation, the Conference also recommended: "In order to maximize the diversity of free expression, government should use its anti-monopoly powers to oppose the concentration of medio ownership within all identifiable geographical market areas. This includes taking steps not only to prevent concentration, but to more affirmatively reduce existing concentration of ownership." *Id.* at 23.

There is at least one notable dissent from this approach. *See generally* Barron, *An Emerging Right of Access to the Media?,* 37 GEO. WASH. L. REV. 487 (1969).

ing harder to penetrate for interest groups hoping to affect policy. Nevertheless, the Commission retains the authority to define a consistent diversity policy. The "public interest, convenience, and necessity" should compel it to do no less.

McNeill Watkins, II