Impact of Quality Programming On FCC Licensing

David S. Bell
Quality and content of program service have long been the primary criteria for issuing broadcast licenses. Shortly following its creation by the Communications Act of 1934, the Federal Communications Commission officially recognized its duty to consider the "character and quality of the service to be ren-

---

1. Quality and content of program service have been emphasized as criteria for issuing new or renewal broadcast radio licenses since the Radio Act of 1927. Unity School of Christianity v. FRC, 69 F.2d 570, 571 (D.C. Cir. 1934) ("as grounds for its decision, the Commission held that Station KFH had rendered good public service"); Brahy v. FRC, 59 F.2d 879, 880 (D.C. Cir. 1932) ("there was not a sufficient showing made as to the character of the service being rendered by the applicant station"); Woodman of The World Life Ins. Ass'n v. FRC, 57 F.2d 420, 422 (D.C. Cir. 1932) ("the respective stations have performed useful public service, and doubtless can continue to do so"); Chicago Federation of Labor v. FRC, 41 F.2d 422, 423 (D.C. Cir. 1930) ("it has always rendered and continues to render admirable public service"); Great Lakes Broadcasting Co. v. FRC, 37 F.2d 993, 995 (D.C. Cir. 1930) ("WCBD's application was rightly denied. This conclusion is based upon the comparatively limited public service rendered by the station."); City of New York v. FRC, 36 F.2d 115, 117 (D.C. Cir. 1929) ("the latter station ... has won the public esteem by the high character of its service").

2. 47 U.S.C. § 151 (1958): "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

47 U.S.C. § 154(a) (Supp. III, 1958): "The Federal Communications Commission ... shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman." 47 U.S.C. § 154(b), (c) (1958), as amended, 47 U.S.C. § 154(b), (c) (Supp. III, 1958) pertain to qualifications and terms of office of the Commissioners. 47 U.S.C. § 155(a) (1958) enumerates the chairman's duties and prescribes the procedure to be followed in the event of a vacancy in the office of the chairman.

3. In re McGlashan, 2 F.C.C. 145, 149 (1935): "Section 309(a) of the Communications Act of 1934 is an exact restatement of Section 11 of the Radio Act of 1927. ... The United States Court of Appeals for the District of Columbia in the case of KFH Broadcasting Association Inc. v. Federal Radio Commission, 60 App. D.C. 79 [1931], held that under Section 11 of the Radio Act of 1927 the Radio Commission was necessarily called upon to consider the character and qual-
dered” before issuing licenses to broadcasters. The Commission is authorized to grant licenses to broadcast stations for a period not to exceed three years if it finds that the “public interest, convenience, and necessity would be served thereby”; however, it is prohibited from censoring communications or interfering with the right of free speech. The Commission is also authorized to revoke licenses or construction permits and to issue cease and desist orders when certain provisions of the act or any of the Commission’s rules or regulations authorized by the act are violated.

ity of the service to be rendered and that in considering an application for renewal an important consideration is the past conduct of the applicant.

“Among other reasons why the Commission designated each of the foregoing applications for hearing was the following: ‘To determine the nature and character of program service rendered by this station . . . .’”

4. 47 U.S.C. § 301 (1958): “It is the purpose of this chapter, among other things, to maintain control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under . . . this chapter.”

5. 47 U.S.C. § 307(d) (1958), as amended, 47 U.S.C. § 307(d) (Supp. III, 1958): “No license granted for the operation of a broadcasting station shall be for a longer term than three years . . . . [T]he Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.”

See In re Kord, Inc., 30 U.S.L. WEEK 2038 (U.S. July 21, 1961), (license was granted for a one-year period to a license renewal applicant).

6. 47 U.S.C. § 307(a) (1958): “The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.” Id. § 308(a): “The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it.” 47 U.S.C. § 309(a) (1958), as amended, 47 U.S.C. § 309(a) (Supp. III, 1958): “Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as [it] may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.” (Emphasis added.) Note that “public convenience, interest, or necessity” is used in Section 307(a), supra. See note 59 infra.

7. 47 U.S.C. §§ 326 (1958): “Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

8. 47 U.S.C. § 312(a) (1958), as amended, 47 U.S.C. § 312(a) (Supp. III, 1958) authorizes the Commission to revoke station licenses and construction per-
Although the Commission has stated it does not wish to formulate any policy violative of the Communications Act censorship provision or the first amendment guarantee of free speech, it clearly intends to fulfill its responsibility for quality programming. Chairman Minow of the FCC has unequivocally voiced his dissatisfaction with the caliber of programming, particularly in the television industry. In view of broad new permits. Subsection (b) authorizes the issuance of cease and desist orders. In certain instances the Commission is empowered to suspend licenses. 47 U.S.C. § 303 (m) (1958). Id. § 303(a), (b), (c), (g), (i), (m), and (r) deal with the more important powers and duties of the Commission.

9. FCC, Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (July 29, 1960) [hereinafter cited as 1960 Report]: “Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. To do so would ‘lay a forbidden burden upon the exercise of liberty protected by the Constitution.' [Quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)].”

“It must . . . be observed that this Commission conscientiously believes that it should make no policy or take any action which would violate the letter or the spirit of the censorship prohibitions of Section 326 of the Communications Act.” Ibid. In speaking of “fundamental principles which guide” him, the Chairman of the FCC said: “I am unalterably opposed to governmental censorship. There will be no suppression of programming which does not meet with bureaucratic tastes. Censorship strikes at the taproot of our free society.” Address by Chairman Minow, Federal Communications Commission, National Association of Broadcasters Annual Convention 1961, 107 Cong. Rec. 7793 (1961) [hereinafter cited as Address].

10. 1960 Report 7293: “In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity, it follows despite the limitations of the First Amendment and section 326 of the Act, that his freedom to program is not absolute. The Commission does not conceive that it is barred by the Constitution or by statute from exercising any responsibility with respect to programming. It does conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply; for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc.”

At a recent symposium on freedom and responsibility in broadcasting Mr. Minow commented: “When the Commission, in discharging public-interest responsibilities, challenges such operations [those designed “to get the greatest financial return possible out of . . . investment” rather than “to operate in the public interest”] the first, almost reflex reaction is the cry of ‘censorship.’” He then asked: “What shall we do? Surrender to the men who ‘want provocative programs that don’t provoke anybody’?” His answer: “No—we are not going to surrender in our efforts.” Minow, The Public Interest, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 30, 31 (Coons ed. 1961) [hereinafter cited as Public Interest].

In his first public address after becoming Chairman of the FCC, Mr. Minow said: “We intend to move — and as you know, indeed the FCC was rapidly moving in other new areas before the new administration arrived in Washington.” Address 7793.

11. “[W]hen television is bad, nothing is worse. I invite you to sit down in front of your television set when your station goes on the air and stay there without a book, magazine, newspaper, profit and loss sheet, or rating book to distract you — and keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland.” Address at 7792.
cies likely to be asserted by the FCC to correct what the Chairman considers the "vast wasteland" of programming, this Comment will examine the serious and delicate constitutional questions that are imminent, discussing them in terms of present constitutional law and administrative practices.

FCC regulation of radio and television broadcasting embraces denial of licenses by application of rules formulated by the Commission, rule-making, issuance of cease and desist orders, and pronouncements of policy to which broadcasters often conform through fear of losing their licenses.

MODES OF REGULATION

Denial of Licenses

The most direct means of FCC regulation of broadcasting is denial of initial and renewal licenses, based upon rules formulated to determine whether applicants meet the statutory criterion of serving the "public interest, convenience, and necessity." If a license is denied for failure to meet a standard or requirement promulgated by rule, the applicant can obtain judicial review of the Commission's decision.1 Judgment on appeal is reviewable by the United States Supreme Court upon writ of certiorari.18

Rule-making

Regulation of broadcasting is also accomplished by rule-making. Broadcasters must comply with officially promulgated rules or lose their licenses on renewal application. Their alternative is to challenge the rule they choose to disregard before license renewal time, for judicial review is equally available on

---


2 "There are many people in this great country and you [the broadcasters] must serve all of us. You will get no argument from me if you say that, given a choice between a western and a symphony, more people will watch the western. . . . [Y]our obligations are not satisfied if you look only to popularity as a test of what to broadcast. . . . You must provide a wider range of choices, more diversity, more alternatives. It is not enough to cater to the Nation's whims — you must also serve the Nation's needs." *Id.* at 7793. (Emphasis added.)


13. *Id.* § 402(j): "The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section."
challenge of officially promulgated rules. An unsuccessful challenge of a rule in this event does not result in loss of license.

Cease and Desist Orders

While a license is in effect, the Commission may order the broadcaster to cease and desist from any violation of the act, rules and regulations, or from failing "to operate substantially as set forth in a license." If a broadcaster is ordered to cease and desist, he has a right to judicial review by appeal. If the licensee loses on appeal, he may retain his license by adhering to the final judgment, for only if he fails to observe a final cease and desist order will his license be revoked.

The Commission has never issued a cease and desist order for the probable reason that it prefers to deny license renewals to broadcasters who neither challenge nor comply with officially promulgated rules.

Policy Pronouncements

The Commission exerts substantial control over programming by a means more subtle than rule-making or issuance of orders. Policy pronouncements in dicta, speeches, and announcements, recently dubbed "regulation by lifted eyebrow" 

14. Suits to enjoin enforcement of "Chain Broadcasting Regulations" promulgated by the FCC were maintained under id. § 402(a) in National Broadcasting Co. v. United States, 319 U.S. 100 (1943). The Court referred to the holdings of National Broadcasting Co. v. United States, 316 U.S. 447 (1942) and Columbia Broadcasting System v. United States, 316 U.S. 407 (1942). In the latter case, the Court said at 417: "The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees . . . . If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance."

18. Prime examples of the Commission’s broad and comprehensive announcements of policies are FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (March 7, 1946), known as the BLUE BOOK [hereinafter cited as BLUE BOOK] and 1960 Report. These publications contain proposals, some of which have been later made into rules. One can merely speculate as to the effect on programming of the pronouncements which have not been formulated as rules, since it cannot be assumed that broadcasters conform to every policy proposal, or that the FCC imposes sanctions in every case of nonconformance.
19. DAVIS, ADMINISTRATIVE LAW 72 (1959): "On this foundation, the Commission has gradually built a whole structure of supervising power. Because of the value of the license and the necessity for periodical renewal, a station is likely
constitute a means of supervision that is virtually immune to judicial review and at the same time highly effective because of the potentially disastrous effects of incurring the Commission's displeasure. Application for license may be denied for nonconformance with a policy if it is made an *ad hoc* rule by its application to a particular case. Consequently, licensees generally adhere to these pronouncements, since they do not choose to risk the possibility that the Commission will apply the disregarded policy as an *ad hoc* rule. An unsuccessful challenge of an *ad hoc* rule results in loss of license. In addition, even should the licensee succeed in his appeal, litigation is time-consuming and expensive, thus desirable to avoid from a business standpoint. The proposition has been aptly put:

"The crucial business fact which accounts for the effectiveness of the Commission's supervising power is that hardly any question of program content can be important enough to cause a station to endanger renewal of its license."  

In one instance, the prospective transferee of a station agreed to discontinue all contests and giveaway programs broadcast by its other stations in response to the Commission's suggestion that it appeared to be "purchasing" its listening audience. Thus, the Commission achieved a striking result by merely writing a letter. Even if the transferee considered recourse to judicial review it was apparently unwilling to risk it, for in cases of policy pronouncements the "opportunity for judicial review is unavailable except at the prohibitive cost of risking a valuable license." The transferee would have had to risk his license because it has been held that pronouncements of policy are not "agency action" by noncompliance, forcing the Commission to deny his

---

20. Rule by *ad hoc* decisions may prove less effective than officially promulgated rules, as a licensee affected by the former may successfully argue that the rule's application be limited to the particular facts of the proceeding in which the rule was announced, distinguishing his case.


22. Miami Broadcasting Co. (WQAM), in 14 *Pike & Fischer, Radio Regulation* 125 (1956). The transferee was "of the opinion that all contests, promotions and 'giveaways' carried by its stations were legal and well within the Commission's Rules and Regulations, and that its programming was in the public interest." *Davis, Administrative Law* 72 (1959).

23. *Id.* at 73.

24. *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948): "[T]he Administrative Procedure Act does not provide judicial review for everything done by an administrative agency. . . . Broad as is the judicial review provided by the. . . Act, it covers only those activities included within the statutory definition of
“agency action” before judicial review is available to him.\textsuperscript{25} Therefore, the transferee would have had to precipitate “agency action” by non-compliance, forcing the Commission to deny his license by rule \textit{ad hoc}.

By the “lifted eyebrow” the Commission may assert broad new policies with which broadcasters must comply or risk application of the policy by \textit{ad hoc} rule. In the event of noncompliance, the Commission is not committed to invoke disregarded policy as an \textit{ad hoc} rule and subject sweeping policy to the test of judicial review. Thus rule-making, which affords opportunity for judicial review, may be restricted to proposals not involving major constitutional questions.

\textbf{THE NEED FOR QUALITY CONTROL OF BROADCASTING}

Broadcasting is unique in that effective use of the frequency spectrum is limited by its very nature to a few broadcasters. Unregulated use of frequencies would result in broadcasting chaos and ultimate destruction of broadcasting’s great value as a public service.\textsuperscript{26} Because applicants exceed available frequencies, licensing has become highly selective.\textsuperscript{27} Broadcasters vie for use

\textsuperscript{25} Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a) (1958): “Right of Review. — Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

\textsuperscript{26} Prior to enactment of the Radio Act of 1927, the Attorney General rendered an opinion that the Secretary of Commerce “had no authority to assign wave lengths, specify hours of operation, limit the power to be used, or limit the duration of a license. [35 Ops. Atty. Gen. 126 (1926).]” Rosenbloom, Authority of the Federal Communications Commission, in Freedom and Responsibility in Broadcasting 112 (Coons ed. 1961) [hereinafter cited as Memorandum]. All attempt was then abandoned to regulate broadcasting and “the ensuing chaos on the airways is the phenomenon which has been called ‘the breakdown of the [Radio Act of 1912].’” Ibid. When Congress reconvened in December, 1926, President Coolidge spoke: “‘Due to the decisions of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wavelengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value.’ [H. Doc. No. 483, 69th Cong., 2nd Sess., p. 10.]” Id. at 113.

\textsuperscript{21} Memorandum 156: “‘Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the Commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those
of frequencies, the Communications Act having provided them with the weapon—"programming in the public interest"—so that those who better meet the statutory criterion stand the greater chance of receiving licenses.\(^{28}\) In addition, the audience is captive, in that their choice of programs is limited.

The Commission has implemented its statutory authority\(^{29}\) by continually making various rules designed to improve the quality of programming. Of these, the rule requiring "balanced programming" is the most important.\(^{30}\) This criterion has been gradually modified and refined to secure greater program service from broadcasters.\(^{31}\) Programs which are obscene, profane, or defamatory, and thus inimical to the public interest, have long been grounds for denial of licenses.\(^{32}\) The Commission has re-

---

\(^{28}\) broadcasters not only compete among themselves, but they constantly compete on an individual basis with users of that portion of the frequency spectrum designated for nonbroadcasting station use. (Memorandum 166, n. 46 points out the importance of nonbroadcasting use of the spectrum.) Thus, it would seem broadcasters must justify the appropriation of their total broadcasting spectrum to them through a high standard of public service.

\(^{29}\) The Commission is, among other things, authorized to "make such rules and regulations as may be necessary to carry out the provisions of" the Communications Act. 47 U.S.C. § 303(r) (Supp. 1962). From Section 303(g) it would seem the Commission was given the role of a promoter of the use of radio as a medium of communication, as the section states the Commission shall "study new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest."

\(^{30}\) EDELMAN, THE LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 to 1947, 77 (1950): The "balanced programming" standard is designed to insure that "... the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion . . . ." The rule encompasses "'a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.' In the Matter of Application of Great Lakes Broadcasting Company et al., in Federal Radio Commission, Third Annual Report (1929), p. 34." Ibid.

\(^{31}\) BLUE BOOK 12. Since 1928 "balanced programming" has been included in license application forms.

\(^{32}\) Broadcasts not in the public interest. Dr. Brinkley established Station
The latest rule made by the Commission ruled that actual presentations must conform to original programming proposals. The commission held that the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest; that the testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee. The court was in accord. KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670, 671 (D.C. Cir. 1931).

Reverend Doctor Shuler owned and operated Station KGEF, which he used to attack a religious organization, judges of courts having cases pending before them, the bar association for its activities in recommending judges, the board of health, a labor temple; in general indiscriminately made defamatory statements. The court upheld denial of his application for license renewal on the ground that the public interest, convenience, or necessity would not be served by the grant. Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932).

Other broadcasts held not in the public interest: In re WNAX Broadcasting Co., 6 F.C.C. 397 (1938) (appeals in behalf of a scheme to solicit funds to be used to influence legislation pending before Congress); In re Radio Broadcasting Corp., 4 F.C.C. 125 (1937) (analyzing dreams and offering advice on love, marriage, business, etc.); In re Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935) (encouraging listeners to use contraceptives); In re Application of Magnolia Park, Ltd., F.R.C. Dockets 1570, 1675 (January 20, 1933) (fortune-telling and advertising astrological charts).

47 U.S.C. § 303(m) (1) (D) (1958) gives the Commission authority to suspend the license of any operator for transmitting communications containing profane or obscene words, language, or meaning. Palmetto Broadcasting Co., 31 U.S.L. WEEK 2082 (1962) (FCC refused renewal license on ground that the station had devoted a substantial portion of its broadcast time to coarse, vulgar, and suggestive material).

Defamatory political broadcasts. 47 U.S.C. § 315 (1958), as amended, 47 U.S.C. § 315(a) (Supp. III, 1965). Subsection (a) provides that a licensee shall have "no power of censorship over the material broadcast under the provisions of" Section 315. 47 C.F.R. 3.290(a) (1958) defines a "legally qualified candidate." Id. paragraphs (b)-(d) set forth other rules peculiar to such broadcasts. Paragraphs (e) and (f) (Supp. 1962), set forth other operating requirements. The United States Supreme Court held that under Section 315(a) a licensee may not delete material from a candidate's radio speech, even if deemed defamatory, but that such licensee is immune from liability for defamatory statements broadcast over his station by a candidate for public office. Farmers Education & Cooperative Union of America, North Dakota Division v. WDAY, Inc., 360 U.S. 525 (1959).

33. Station KORD's license was renewed for only one year because of disparity between its programming and that originally proposed. In re KORD, Inc., 30 U.S.L. WEEK 2038 (1961).

With reference to this requirement Chairman Minow has said: "On July 13, 1961, we informed every broadcaster of a change in the Commission's renewal policy. In the past, we granted renewals even though there had been a substantial failure to live up to the programming representations, where the applicant upgraded his proposals and gave reliable assurances that these new proposals would be carried out. This will no longer be the case. We have put our licenses on notice that 'proposals vs. actual operation' is of vital concern to the Com-
sion requires applicants to ascertain their communities' broadcasting needs and to program accordingly.\textsuperscript{34}

Notwithstanding existing regulations, areas remain in which the FCC will doubtless attempt to revamp present broadcasting service. These have been pointed out by recent statements to the effect that "violence, murder, mayhem, and sadism on TV shows" is undesirable,\textsuperscript{35} broadcasters are guilty of censorship,\textsuperscript{36}

mission, that licensees are not entitled to any license period in which they do not in good faith make an effort to deliver on their public-service proposals, and that if they have not been endeavoring in good faith to discharge their representations, they should take \textit{immediate steps} to do so." Public Interest \textbf{31}. 34. \textit{1960 Report} 7295: "The principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service." The Commission listed the following elements usually necessary to meet the public interest, needs, and desires of the community: "(1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) New Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming." \textit{Ibid.} It was careful to point out that "the elements set out above are neither all-embracing nor constant." \textit{Ibid.} The report continued: "To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise PART IV of our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to: (1) The measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires." \textit{Ibid.}

Although PART IV has not been officially revised, a sole broadcaster seeking a construction permit for a new class A FM station was denied his permit on the ground that his proposal was not designed to meet his area's needs. The Commission stated that the application made no showing of the area's programming needs, so that determining whether his proposal could be expected to meet those needs was impossible. Suburban Broadcasters, \textit{30 U.S.L. Week} 2023 (1961), affirmed on appeal, \textit{302 F.2d} 191 (D.C. Cir. 1961), on the basis that the FCC can require a showing that the applicant has ascertained the community's needs and has programmed to meet them, even though he has established that he is legally, financially, and technically qualified. Petition for certiorari to the United States Supreme Court was filed June 26, 1962, No. 212, Henry v. F.C.C. Questions presented: "(1) Did the FCC's denial of a construction permit, based upon a finding that the applicant's program proposal was not designed to serve the community's needs, and that no investigation of such needs had been made, constitute censorship of such proposal, violate Section 326 of the Communications Act of 1934, as amended, and abridge the First Amendment guarantee of free speech; (2) does the FCC have statutory authority to inquire into the needs of an area proposed to 'be served by the applicant, to pass judgment upon the adequacy of the applicant's proposed programming to meet these needs, and to deny application for failure to investigate these needs?'' 31 U.S.L. \textit{Week} 3043.

35. \textit{Public Interest} \textbf{31}: "At the same time, the amount of violence, murder, mayhem, and sadism on TV shows increases, because in somebody's opinion—sponsor, agency, network—the ratings need a boost. If this is the \textit{public interest}, I can only echo the words of Mark Twain: 'The more you explain it, the less I understand it.'" Also, with reference to TV, the Chairman has said: "You will see a procession of . . . blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, [and] more violence . . . ." \textit{Address} \textbf{7792}.
respectable minority interests must be served, substituting "old movies" for network public service programs during free hours of programming is no longer to be condoned, television is a "vast wasteland." The Commission's means of preventing such practices is, of course, to refuse to license any station that employs them. A cursory examination of the effect of present rules reveals their inability to remedy the aforementioned problem areas of broadcasting; more dynamic rules must be made to remedy these problems.

Any effort by the Commission to improve programming by pre-empting the field of broadcaster responsibility for quality is bound to be met with charges of censorship and violation of free speech. Therefore, it is appropriate to examine rules likely to be adopted by the Commission in order to determine how far it may constitutionally go in its attempt to revamp broadcasting service in the problem areas. The general issue is whether the Commission would be within its statutory and constitutional authority to deny licenses on the basis of rules reflecting its own standards of quality in programming. To elucidate this issue

36. Public Interest 17: "[T]here is . . . censorship connected with 'ratings' and the almost desperate compulsion of some of our licensees to work and to plan and to live by the numbers—always striving to reach the largest possible audience, in order to attract and hold the mass advertising dollar."

Another form of censorship referred to by the Chairman "is what Clare Booth Luce has called 'dollar censorship.' Here, the broadcast licensee simply abdicates his own judgment and turns programming decisions over to an advertiser or his agency." Ibid.

37. Ibid.: "The First Amendment embodies the fundamental idea that minority views will and must find their place in a free market of ideas and communication. When the broadcaster ignores minority tastes and serves only the majority which the advertiser seeks (and this sometimes means rejecting a program which many millions of people want to see), he is unconsciously rejecting one of the fundamental concepts upon which our society is based and upon which, to quote Judge Learned Hand, 'we have staked our all.' And in so doing, he is using public property as a trustee for the public."

38. Address 7793: "[S]tations taking network service should also be required to report the extent of the local clearance of network public service programming, and when they fail to clear them, they should explain why. If it is to put on some outstanding local program, this is one reason. But, if it is simply to carry some old movie, that is an entirely different matter. The Commission should consider such clearance reports carefully when making up its mind about the licensee's overall programming."

39. See note 11 supra.

40. Proscription of obscenity does not encompass violence, balanced programming fails to insure service to the respectable minority, programming proposed in light of the community's needs as ascertained by the broadcaster imposes no obligation whatsoever to broadcast network public service programs, broadcasting according to a proposal offers no remedy for alleged censorship by broadcasting and advertising industries, and in general the "vast wasteland" appears to be a matter of taste, the responsibility for which has heretofore been the broadcasters'.

36. Public Interest 17: "[T]here is . . . censorship connected with 'ratings' and the almost desperate compulsion of some of our licensees to work and to plan and to live by the numbers—always striving to reach the largest possible audience, in order to attract and hold the mass advertising dollar."

Another form of censorship referred to by the Chairman "is what Clare Booth Luce has called 'dollar censorship.' Here, the broadcast licensee simply abdicates his own judgment and turns programming decisions over to an advertiser or his agency." Ibid.

37. Ibid.: "The First Amendment embodies the fundamental idea that minority views will and must find their place in a free market of ideas and communication. When the broadcaster ignores minority tastes and serves only the majority which the advertiser seeks (and this sometimes means rejecting a program which many millions of people want to see), he is unconsciously rejecting one of the fundamental concepts upon which our society is based and upon which, to quote Judge Learned Hand, 'we have staked our all.' And in so doing, he is using public property as a trustee for the public."

38. Address 7793: "[S]tations taking network service should also be required to report the extent of the local clearance of network public service programming, and when they fail to clear them, they should explain why. If it is to put on some outstanding local program, this is one reason. But, if it is simply to carry some old movie, that is an entirely different matter. The Commission should consider such clearance reports carefully when making up its mind about the licensee's overall programming."

39. See note 11 supra.

40. Proscription of obscenity does not encompass violence, balanced programming fails to insure service to the respectable minority, programming proposed in light of the community's needs as ascertained by the broadcaster imposes no obligation whatsoever to broadcast network public service programs, broadcasting according to a proposal offers no remedy for alleged censorship by broadcasting and advertising industries, and in general the "vast wasteland" appears to be a matter of taste, the responsibility for which has heretofore been the broadcasters'.
while attempting to resolve it, each problem area will be individually examined.

FCC AUTHORITY TO PROSCRIBE PROGRAMS:
CONSTITUTIONAL AMBIT OF FREE SPEECH

The Commission might make a rule proscribing excessive violence in programming by enumerating quantitative and qualitative standards; greater than a maximum number of violent programs or programs containing greater than a permissible degree of violence would be prohibited. An applicant denied a license on the basis of the rule might appeal on the ground that the Commission pre-empted his area of discretion in programming and that this area is within the protection of the first amendment.\(^4\) The narrow constitutional issue would be whether broadcasting violent programs in a manner prohibited by the FCC is a right protected by the first amendment guarantee of free speech.

It would seem that if viewing excessive violence were as objectionable and as useless to society as obscenity,\(^4\) the Commission would be well within its statutory authority to limit or repress it.\(^4\) However, since society has not proscribed violent programming as it has obscenity, it appears that objectionable qualities of violence, if any, must lie in the harmful effects upon society of viewing violence.\(^4\) Thus, the Commission has the burden of proving these effects in order to place violence among the

\(^{41}\) U.S. Const. amend. I. Censorship would not likely be raised as no prior restraint is involved; that the Commission can deny licenses on the basis of past programs is well settled. In Trinity Methodist Church, South v. FRC, 62 F.2d 850, 852 (D.C. Cir. 1932) the court said it was the Commission's "duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit . . . ." KFKB Broadcasting Ass'n, Inc. v. FRC, 47 F.2d 670, 672 (D.C. Cir. 1931): "In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for 'by their fruits ye shall know them.' Matt. VII:20." Past programs have since been considered by the Commission without objection.

\(^{42}\) In disposing of the question whether obscene utterances are within the area of protected speech, the United States Supreme Court in Roth v. United States, 354 U.S. 467, 484 (1957) stated: "All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. . . ." The Court further indicated that it was unnecessary to show the probability of obscenity's inducing persons to antisocial conduct because it is not protected speech.


\(^{44}\) See notes 47-49 infra.
societal evils not protected by the first amendment, such as obscenity, profanity, and defamation. The Commission's argument to strip excessive violence of constitutional protection might be two-fold: (1) that the harm generated is not intended to be protected by the first amendment; and (2) that the unique characteristics of broadcasting require extensive regulation.

That a publication merely lacks societal value is not sufficient to remove it from the protection afforded by the first amendment. Thus, though viewing violence may be valueless to society, the Commission may not eliminate it for that reason alone. It could be argued that violent programs incite violence for viewing is analogous to reading, and many reputable persons have contended that reading is "readily translated into behavior." However, the argument that reading and thus, by analogy, viewing is of a "small moment in shaping antisocial tendencies" is equally supportable. In fact, it has never been conclusively demonstrated that reading or viewing violence pro-

45. See note 32 and last sentence of note 42 supra and note 49 infra and accompanying text.
46. Winters v. New York, 333 U.S. 507, 510 (1948): "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. ... They are equally subject to control if they are lewd, indecent, obscene or profane." The analogy of magazines to broadcasts seems sound as both are media of mass communication.
47. Gellhorn, Individual Freedom and Governmental Restraints 60-61 (1956): "The view that reading is readily translated into behavior is shared by many reputable persons. Mr. J. Edgar Hoover, as an example, has been quoted as contending that 'the increase in the number of sex crimes is due precisely to sex literature madly presented in certain magazines. Filthy literature is the great moral wrecker. It is creating criminals faster than jails can be built.' And Dr. Frederic Wertham, a psychiatrist of high standing, has waged a virtual crusade against comic books because his clinical observation has convinced him that the comics have sexually stimulated and emotionally brutalized many children.
48. Id. at 62-63: "So far as disclosed by the most exhaustive study of juvenile delinquency yet made in America, reading seems to be of small moment in shaping antisocial tendencies. Sheldon and Eleanor Glueck searchingly inquired into numerous cases to identify the influences that produced delinquency. Reading (if it was influential at all) was of such slight significance that it was altogether omitted from their statement of 'factors with probable causal significance.' Judge George W. Smyth, ... for many years acclaimed as one of the nation's outstanding children's court judges, has described to the New York State Temporary Commission on Youth and Delinquency the causes that had seemingly contributed to delinquency in cases recently adjudged by him. Reading difficulty was mentioned as among the 878 causative factors that had had effect upon the troubled children before him; reading, no matter of what, found not a single place in his list.
"Judge Smyth's observation is confirmed by other workers in the field of undesirable juvenile behavior. ... Far from discovering that delinquency grew out of reading, the clinicians have discovered that among New Yorkers it is more likely to grow out of inability to read."
motes antisocial behavior. It would seem then that the harm generated is so incapable of ascertainment that it could not be seriously asserted as a reason for placing violent programming outside the protection of the first amendment.

The uniqueness of broadcasting has already accounted for revolutionary regulation of free speech, e.g., licensing of communications media. Its uniqueness certainly affords the Commission powerful arguments to justify its attempt to achieve higher program quality through reduction of program violence. The possibility of antisocial tendencies resulting from program violence coupled with the need for regulation as a result of broadcasting's uniqueness may be sufficient for the Commission to restrain violence constitutionally. However, because the guarantee of free speech is without a comprehensive definition, it is uncertain at what point the Commission would be infringing upon it. The United States Supreme Court in National Broadcasting Co. v. United States only slightly clarified the guarantee by prohibiting the Commission's choice of licensees on "political, economic or social views, or upon any other capricious basis." From this it would seem the Commission was left a wide berth to license on the basis of program quality. The amorphous concept of free speech with which regulation through licensing is involved has been succinctly stated:

49. Id. at 61: "Such objective evidence as does exist, does not sustain the fear."
50. Desmon, Legal Problems Involved in Censoring the Media of Mass Communication, 40 Marq. L. Rev. 38 (1966): "It is remarkable and paradoxical that the United States Supreme Court while deciding during its long history perhaps two hundred cases directly or indirectly involving freedom of speech, press and religion has never announced a comprehensive definition of 'freedom of the press' or indeed, of the other First Amendment freedoms of speech and religion."
51. 319 U.S. 190 (1943).
52. In concerning itself with the first amendment argument that chain broadcasting regulation abridges the right of free speech, the United States Supreme Court said, id. at 226: "If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."
53. Since the issues of program content and quality were not met in the National Broadcasting Company case, it could be argued that the narrow limits placed upon the Commission's licensing power are not applicable to licensing on the bases of such criteria. It is submitted that such contention is without merit,
"This enumeration of bases of choice by the Commission which are proscribed by the First Amendment should not, of course, be taken to exhaust all conceivable limitations, nor can the question of the constitutional limits of the Commission's authority in the programming field be solved on the basis of this language by the simple statement that any non-capricious choice by the Commission would be constitutionally sanctioned, but the position that any consideration of program content by the Commission violates the First Amendment cannot be maintained in the face of the National Broadcasting Company case."54

Whether broadcasting's uniqueness per se will suffice as a ground upon which the Commission could remove excessive violence from broadcasting is, in view of the impact that such regulation will have on the first amendment freedom of speech, unclear and at best doubtful. It is submitted that if such regulation were permitted simply on the ground that broadcasting is unique, there would no longer be any constitutional restraint of regulation and the industry would be wholly subservient to the FCC. In a situation analogous to broadcasting, the United States Supreme Court stated that even if movies possess a greater capacity to produce evil than other communications media, it does not necessarily follow that they are to be denied the protection of the first amendment.55 It would seem to follow that if violent broadcasting is proved harmful, it is not, even then, to be subjected to unqualified control, but merely to enough control to repress its proven antisocial effects.

In short, it seems that until more conclusive proof can be made of antisocial effects of violent programs, regulatory attempts to eliminate them must fail as infringements upon the first amendment guarantee of free speech.

CENSORSHIP BY BROADCASTING AND ADVERTISING INDUSTRIES: PERMISSIBLE FCC INTERVENTION

At a recent conference on freedom and responsibility in broadcasting the Chairman of the FCC stated that "there is as the Court's language appears to embrace licensing in general. See note 52 supra.


55. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The analogy of movies to television seems appropriate in that both are media of mass communication and are for the purpose of visual perception.
much censorship," and charged licensees with violating the spirit of the first amendment56 "just as surely as if we [the FCC] had done it."57 Broadcasters and advertisers present programs in response to the majority's tastes and endeavor to suppress material objectionable to various interests or groups, as they understandably do not want to offend anyone of the listening audience.58 It is also probably true that to reach a greater audience broadcasters select commercial programs with high ratings in preference to network public service programs. These practices are not astonishing, considering the free-enterprise atmosphere in which these industries compete for revenue. Should the Commission move into the area of program production to prohibit suppression of certain information by broadcasters and advertisers, and the making of programming decisions by the latter, these industries will surely attack the move as being unconstitutional. The question is whether the first amendment safeguards, or their embodiment in Section 326 of the Communications Act, would permit such FCC practices and the application of rules prohibiting suppression and advertiser-programming.

One might surmise that Congress intended for the broadcasting industry to be regulated as a monopoly in view of the act's criterion for licensing,59 but this is not so. Notwithstanding

56. Licensees were also charged with violating Section 326 of the Communications Act. See note 57 infra.

57. Public Interest 16, 17: "There is much censorship. Even as it is defined here, there is much censorship in broadcasting today. It is as much to be examined, spotlighted, and at times deplored as any form of censorship by a government agency. And since it is done by our own governmental licensees every broadcast day, it violates the spirit of the First Amendment and Section 326 of the Act just as surely as if we had done it ourselves."

58. Chairman Minow states as a fact that broadcasters substitute commercial programs for informative programs produced by the networks in order to receive better ratings. Id. at 17. Also, with reference to testimony elicited at recent Commission hearings, the Chairman relates: "An electric company wanted a different title for Kipling's 'The Light That Failed.' And the Civil War drama, 'The Andersonville Trial,' came up on camera as 'The Trial of Captain Wirtz' because the advertising agency 'wanted to disguise the fact in the South that this was going to be Andersonville.' What's more, the agency nudged out President Lincoln's name because Chrysler sponsored the program. As for Edith Wharton's bleak tragedy, 'Ethan Frome,' the agency inquiry was: 'Couldn't you brighten it up a little?'" Id. at 18.

59. 47 U.S.C. §§ 307(a), 309(a), (Supp. 1962). The statutory criterion for licensing is whether the public interest, convenience, and necessity will be served by issuing the license. The writer has found no significance given the difference in language between the two sections. Section 307(a) states: "public convenience, interest, or necessity," while Subsection (d) and Section 309(a) state: "public interest, convenience, and necessity." See note 60 infra, wherein the criterion is phrased "public interest, convenience or necessity." It seems doubtful that any significance should be given this difference in language since the act and the FCC in its reports seem to employ either phrase indiscriminately.
chain broadcasting regulations, broadcasting is a business enterprise operating in the realm of free market competition. That the first amendment applies to the industry is certain.

The Commission might argue that the broadcaster, in his use of the airwaves, "is using public property as a trustee for the public" and is therefore prima facie subject to such regulatory scrutiny; consequently, the Commission should conduct itself accordingly in discharging its responsibility to prohibit suppression of certain information and advertiser-programming. If this position were sustained it would seem from the holding in KFKB Broadcasting Ass'n, Inc. v. FRC that the Commission would not have authority to scrutinize and prohibit the suppression of broadcasting matter, for subjecting broadcasting matter to scrutiny prior to its release is censorship.

It appears that denial of a license on the basis of suppression found by scrutiny after the broadcast has occurred would also be an unconstitutional interference with the right of free speech,

60. 2 SOCOLOW, THE LAW OF RADIO BROADCASTING 1025-26 (1939) [hereinafter cited as LAW OF RADIO BROADCASTING]: "Although the operation of a broadcast station is licensed by the Federal Communications Commission in the public interest, convenience or necessity, broadcast stations are not public utilities. On the contrary, they are private enterprises operating within limits defined by the federal government. Where there are no statutory or administrative restrictions on the contents of programs, a broadcast station may establish its own standards which shall govern and apply to the contents of programs transmitted over its facilities."

61. Superior Films v. Department of Education, 346 U.S. 587, 589 (1954), Justice Douglas concurring: "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas." (Emphasis added.)

United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." (Emphasis added.)

It cannot be successfully argued that because broadcasting is a large-scale business conducted for private profit the first amendment does not apply to its form of expression. That production, distribution, and exhibition by motion pictures is a large-scale business conducted for private profit did not remove them from the aegis of the first amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). The court said: "We fail to see why operation for profit should have any different effect in the case of motion pictures."

62. Public Interest 17.

63. 47 F.2d 670 (D.C. Cir. 1931). See note 64 infra.

64. In the KFKB case, supra note 63, the court found no censorship and stated that "there has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release." Id. at 672.

Another argument against the Commission would be that suppression in aid of free speech is as objectionable as proscribing certain information prior to presentation. See note 72 infra and accompanying text.
as this right “was fashioned to assure [the] unfettered interchange of ideas.”

Concerning advertiser-programming, dictum in Simmons v. FCC indicates that the Commission may constitutionally require broadcasters to make their own programming decisions. The Commission’s broad discretion to perform its specific functions, recognized in Bay State Beacon v. FCC, also might lead one to conclude that it is authorized to delve into production areas and programming agreements to determine whether broadcasters have delegated programming authority to advertisers. Thus, it is not at all clear that application of a rule prohibiting programming by advertisers would run afoul of the censorship provision of the Communications Act.

FCC AUTHORITY TO PRESCRIBE INFORMATIVE PROGRAMS

The “Balanced Programming” Device

Perhaps a substantial part of the audience does not find present programming satisfactory, and desires higher quality and greater diversification; but, as a practical matter, advertisers buy programs which, according to ratings, are received by more people, and broadcasters sell more time for these programs because they account for the greatest revenue. The audience re-

65. Roth v. United States, 354 U.S. 476, 484 (1957) (thus, the Court concluded after a brief historical review of the first amendment guarantee of free speech and press).

66. 169 F.2d 670 (D.C. Cir. 1948). The court said that “censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time.” Id. at 672.

67. 171 F.2d 826 (D.C. Cir. 1948). To say that the Commission may not inquire into the amount of sustaining time a prospective licensee purports to reserve if granted a license without contravening the first amendment or violating Section 326 of the Communications Act “is to suggest that Congress intended to create the Commission and then by the very act of its creation, stultify and immobilize it in the performance of the specific functions that called it into being. Congress obviously intended no such thing.” Id. at 827.

68. LAW OF RADIO BROADCASTING 1008-09. The censorship provision: “The prohibition against censorship by the Commission was criticized in the House of Representatives as not extensive enough in scope to forbid private censorship of the content of broadcast programs. It was regarded as axiomatic to allow freedom of the press and therefore considered dangerous for Congress to supervise by indirectness the expression of opinion in broadcast programs.

“Section 326 may therefore be considered a statutory reiteration of the constitutional guarantees of freedom of speech in the regulation of broadcasting by the Commission. The failure to enact prohibitions against the regulation of defamatory broadcasts or the control of censorship of programs by broadcast station would seem to support this analysis.”
ceives these programs or none at all. For those who choose none at all for asserted lack of quality, the Commission might adopt a subtle approach toward improving programming by refining "balanced programming," e.g., dividing existing categories into a greater number of more definitive ones: whereas a percentage of total broadcast time was formerly appropriated merely to entertainment, it might be divided into classical, dramatic, comic, and musical entertainment. "Balanced programming" has become firmly entrenched in the Commission's array of rules since it was held in the KFKB case that "the commission is necessarily called upon to consider the character and quality of the service to be rendered." Consequently, it is submitted that the Commission would encounter little if any difficulty should it refine "balanced programming."

It appears that the Commission could not successfully apply a rule requiring certain categories of "balanced programming" to contain specific programs, since prescription of programming appears as offensive to the guarantee of free speech as proscription.

**FCC Power to Prescribe Informative Programming in the Interest of the Public**

It has been held that a licensee who subscribes to network service may accept or reject network broadcasts at will. He might refuse a public service program offered by the network in order to broadcast a commercial program of local interest. The Commission might, however, take cognizance of the station's choice and deny him a license upon renewal application. If a

---

69. KFKB Broadcasting Ass'n Inc. v. FRC, 47 F.2d 670 (D.C. Cir. 1931).
70. Id. at 672.
71. See note 31 *supra* and accompanying text. To date, modifications or refinements of the standard of "balanced programming" appear to have provoked no constitutional controversy.
72. 1960 Report 7293: "[T]he First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it." The idea is that licensees will not be required to present specific programs on the erroneous theory that such action would constitutionally enhance freedom of expression rather than unconstitutionally abridge it.
73. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). After having stated it to be the licensee's duty to determine what programs to broadcast, the Court stated: "'We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirement of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.'" (Quoting from FCC REPORT ON CHAIN BROADCASTING, May 2, 1941.) Id. at 206.
license were denied on this basis the licensee would probably contest the decision on the ground that the Commission violated his right of free speech by, in effect, prescribing network programs in lieu of local interest presentations. The FCC could argue that the public's interest in informative network programs transcends any constitutional limitation on prescription of programming. The issue is the Commission's authority to prescribe informative network programs in the public interest.

It has been said that the statutory criterion of public interest is not so "indefinite as to confer an unlimited power." The criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit," yet "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." The only limitations placed by the United States Supreme Court on the Commission's authority to regulate in the public interest are found in FCC v. Sanders and the National Broadcasting Company case. The limitation placed on FCC supervision over programs, business management and policy in the former case

74. He may well be denied a license on this basis. Chairman Minow used just such a case in his example of censorship practices. "The networks produce some magnificent informative programming. The need for this kind of programming is both urgent and obvious in view of the many critical subjects in our troubled times—such as Berlin, Colonialism, Space, Cuba, Medical Care, Education. Yet often over half the networks' affiliates won't carry these programs. Instead, they substitute a commercial program designed to get a better rating. You can be sure that their schedules aren't overbalanced with public-service programming. It's simply that too often when presented with public service of a high caliber, these 'trustees' choose to reject their opportunity to serve that smaller audience numbering sometimes in the millions." Public Interest 17.

75. FRC v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 285 (1933). The case involved allocation to an Indiana station of a frequency previously assigned to two Illinois stations. As to licensing the Court said: "... the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. ... The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities." Ibid.

76. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). The Court did state, however, that the statutory criterion "serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." The whole idea of the Communications Act was said to be to give sufficient "flexibility" to the administrative process "to adjust itself" to the "rapidly fluctuating factors characteristic of the evolution of broadcasting." The act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." One may well conclude that the concrete criterion is not hardened.

78. 309 U.S. 470 (1940).
is merely by way of dictum, as the Court was specifically concerned with an economic question; and the latter case simply prohibited choice among applicants essentially "upon any . . . capricious basis." From these assertions standing alone one may reasonably conclude that the wide discretion given the Commission includes the power to make a rule requiring licensees to give preference to network public interest programs. Nevertheless, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary, . . . they . . . make freedom of expression the rule," and any rule made by the FCC must be viewed in light of these principles.

It is submitted that a rule requiring licensees to give preference to network public service programs rather than local interest programs would go beyond those criteria formerly sustained to achieve improved program service, e.g., "balanced programming," and thus infringe upon the guarantee of free speech. The Commission would in effect be prescribing particular programs, which would appear to be unconstitutional regardless of the public interest factor.3

CONCLUSION

It may be that present-day programming is poor, and that widespread dissatisfaction exists. The "vast wasteland" of pro-

---

80. This was the first time in the history of the Communications Act that a court recognized such a comprehensive limitation as the following: "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." 309 U.S. at 475. The Court itself limited this sweeping statement: "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. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." Ibid. In view of the Nelson Brothers and Pottsville cases, notes 75 and 76 supra, it does not seem that the Court desires to limit the Commission, although one may infer the contrary from its previous statement. Reference to "not niggardly but expansive powers" in the NBC case seems to eliminate any doubt as to the weight to be given the sole statement of limitation in the Sanders case.

With respect to this statement Joel Rosenbloom said: "It is highly improbable, to say the least, that by this general dictum in a case not raising the question of programming the Supreme Court intended to sweep away some thirteen years of administrative, judicial and legislative history under the Communications Act." Memorandum 157.

81. 310 U.S. at 226. See last sentence of note 52 supra.


83. See note 72 supra and accompanying text.
gramming seems unquestionably a matter of taste, unimprovable by the Commission's present rules. For years broadcasters have responded to the subtle approach to regulation — various forms of policy pronouncements — and the Commission's rules have remained virtually unchanged, thus provoking no litigation of constitutional issues. But broadcasters' failure to improve present program quality invites increased regulation by the FCC. Experience has shown that broadcasters do not ignore policy pronouncements so that the Commission is not forced into rule-making. However, when broadcasting freedom faces serious limitation, broadcasters will be less receptive to policy pronouncements. At some point an impasse will be reached. Broadcasters will balk, no longer responding to the subtle approach, and the Commission will be forced to make rules incorporating broad assumptions of authority in its quest to improve program quality. The result will be litigation involving delicate constitutional problems of free speech.

If the Commission were to make rules that would attain a higher degree of quality programming, it appears that it would have a very difficult time sustaining them before the Court in view of the existing interpretation of the free speech guarantee. Perhaps the key to improved programming quality lies in the following statement by Chairman Minow: "To those few broadcasters and their professional associates who would evade the nation's needs by crying, 'Censorship! Oh, where will it end?' I ask, 'Responsibility! When will it begin?'"84

David S. Bell

CLASSIFYING MINERAL INTERESTS—MINERAL SERVITUDE V. MINERAL ROYALTY

In Louisiana jurisprudence the distinction between the rights and obligations that accompany an ordinary mineral royalty and those that accompany an ordinary mineral servitude is well settled.1 Many conveyances or reservations of mineral interests,

84. Public Interest 33.