

AN ANALYTICAL REVIEW OF CONGRESSIONAL
AND JUDICIAL COMMENTS CONCERNING THE
FEDERAL REGULATION OF
BROADCAST PROGRAMMING

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A THESIS

Submitted to the College of Communication Arts of Michigan
State University of Agriculture and Applied Science
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Walter B. Emery

ABSTRACT

The purpose of this study is to report the debates and comments of Congress regarding the control of broadcast programming made while legislation was being considered before either House, and the opinions of the Federal Courts reviewing decisions of the Federal Radio Commission and its successor, the Federal Communications Commission.

This material reveals some of the intent of Congress in passing legislation to control broadcast programming, as well as the interpretation placed upon the law by the Federal Courts.

The information in this thesis covers the thirty years between 1926 and 1956 and was gathered from the Congressional Record and the appropriate Court decisions.

The first chapter begins with Congressional debates prior to the passage of the Radio Act of 1927 and ends with a discussion of Congressional consideration given to amendments to the Communications Act of 1934. The second chapter deals with judicial review of the constitutionality and propriety of the Commissions' evaluation of program proposals or performance as an element of the "public convenience, interest, or necessity."

Among the conclusions drawn in the third chapter was that broadcasting has been recognized as a unique medium of mass communications by Congress and the Courts. Because of this, Congress provided both the FRC and the FCC with the standard of "public convenience, interest,

or necessity" by which to measure the qualifications and performance of station licensees. While the meaning and merits of the standard have been argued, the decisions of either Commission that considered programming as an element of the "public convenience, interest, or necessity" have been upheld by the Courts.

Congressmen have been reluctant to propose specific legislation dealing with programming. The law, however, is quite clear regarding the broadcasts of political candidates. In addition to this, Congressional intent reveals that the Commission has the authority to reserve frequency assignments for educational and non-profit organizations.

The Courts have held that the Commission was arbitrary and guilty of exceeding its authority when it interpreted the Criminal Code as prohibiting the broadcast of "give-away" programs. However, several of the decisions reported in this study have been remanded because the Commission was not thorough in its consideration of programming as a measure of an applicant's ability to serve the public interest.

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INTRODUCTION

The Problem.--Today, over thirty years after the first broadcasting law was passed by Congress, there is some question as to the authority of Congress to regulate the program service of the nation's broadcasting stations. This is a study of the intent and interpretation of the provisions of broadcasting law that deal with the control of programming.

Limitations.--This thesis is limited to the comments made on the floor of Congress regarding the passage of legislation concerned with the regulation of programming and to the opinions written by the courts reviewing the Commission's actions regarding programming.¹

Significance.--This study brings together information that is scattered through thirty years of Congressional and Judicial records. Although much of it is often quoted in the literature, this thesis is, as far as is known, the first comprehensive compilation of the material. Melvin White, in 1948, made a study of regulations affecting programming policy.² This thesis, however, contains all of the pertinent Congressional and Judicial comments that could be found from February, 1926 through April, 1956.

Sources.--The sources of information for this study were the

¹Unless otherwise noted "Commission" will refer to both the Federal Radio Commission and its successor, the Federal Communications Commission.

²Melvin Robert White, "History of Radio Regulation Affecting Programming Policy" (Unpublished Ph. D. dissertation, University of Wisconsin, 1948).

Congressional Record; the Annual Reports of the Federal Radio Commission and the Federal Communications Commission; Pike and Fischer's Radio Regulation; and the records of the appropriate Federal Courts.

Several books, as well as articles from law journals, concerned with the question of government control of programming have also been referred to.

Organization.--The purpose of this introduction is to state the problem of the thesis and to give a brief account of the development of the radio industry and its regulations prior to the passage of the Radio Act of 1927.

The first chapter will focus on Congressional comments, as they bear on the control of programming, regarding two legislative actions: The Radio Act of 1927 and the Communications Act of 1934. There will also be an account of Congressional comment concerned with the passage of amendments designed to affect the control of programming. Judicial review of the actions of the FRC and the FCC, as they bear on the control of programming, will be reported in the second chapter. The final chapter will summarize this material and suggest possible areas for further research.

Broadcasting Law Prior to 1926. The first Federal statute concerned with radio was passed by Congress on June 24, 1910.³ The law required all ships carrying 50 or more persons be equipped with radio apparatus, but it did not contain any provisions for the regulation of

³Carberry F. O'Shea, "Radio - Federal Jurisdiction and Regulatory Power over Radio Communication," Georgetown Law Journal, 17(June, 1922), 341.

radio.⁴ On August 13, 1912 the Act to Regulate Radio Communication was enacted, it was a law primarily concerned with marine transportation as radio telephony and broadcasting were still in the formative and untried states.⁵ Senator Dill observed in 1926:

Congress . . . passed the Radio Law of 1912, which has remained the law from that time until now. The law of 1912 was designed to give the Secretary of Commerce power to control the use of wave lengths for radio telegraph purposes in connection with navigation, and at that time there was no provision for wave lengths for broadcasting or any regulations to govern broadcasting as it now exists.⁶

The Act did require the Secretary of Commerce to issue a license before a person could engage in radio communication involving interstate or foreign commerce. The law was broad enough to control radio telephony as it developed, and when radio broadcasting began the Secretary of Commerce was of the opinion it was included under a clause in the Act termed, "commercial intercourse."⁷

Station KDKA began experimental broadcasting in the Fall of 1920. The first regular broadcasting license was issued on September 15, 1921 to the Westinghouse Electric and Manufacturing Company's station at Springfield, Massachusetts, WBZ.⁸ By February 1927 there were 733 radio broadcasting stations on the air.⁹

⁴67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12350.

⁵0'Shea, op. cit., 341

⁶67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12350.

⁷0'Shea, op. cit., 341.

⁸67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12335.

⁹Duke M. Patrick, "The Regulation of Radio and Some of Its Legal Problems," Michigan State Bar Journal, 10(April, 1931), 234.

With the advent of broadcasting, as differentiated from point to point communication, Secretary of Commerce Herbert Hoover soon found that his powers to control the industry were limited. In 1923 the Court of Appeals of District of Columbia ruled that the Secretary had no right, under the Act of 1912, to establish and regulate the hours that a station could operate.¹⁰ In addition, the Court found that "the issuance of a license was merely a ministerial and not a discretionary function, and that a license must be issued to all applicants."¹¹ In 1926, the Appellate Court for the Northern District of Illinois held the entire Act of 1912 unconstitutional as applied to broadcasting since it was "too general, indefinite and ambiguous."¹² The Court observed that the Secretary of Commerce had "no power to assign a station to any particular wave length or limit power or time of operation. The Act of 1912 having proved in practice to be nothing more than a means of registering the various radio stations."¹³ Confronted by these two decisions, the Secretary requested an opinion from the Attorney General clarifying his position regarding the control of broadcasting. The Attorney General held¹⁴ that the Secretary of Commerce, under whose jurisdiction the Act had placed the control of radio, had no power to determine the frequency, power, or hours of operation of a radio station; all he could do was to

¹⁰Shea, op. cit., 341 - 3. See: Hoover v Intercity, 286 Fed. 1003, 52 App. D. C. 339 (1923).

¹¹"Radio Broadcasting Under the Radio Act of 1927," Michigan Law Review, 28 (June, 1930), 1032.

¹²Shea, op. cit., 341-43. See: United States v Zenith Radio Corporation, 12 F. (2d.) 614, (D.C. Ill. 1926).

¹³"Radio Broadcasting Under the Radio Act of 1927," Michigan Law Review, 28 (June, 1930), 1032.

¹⁴35 Opinions of the Attorney General, (1926), 129.

issue a license to all applicants that might apply.¹⁵ Upon receiving this opinion the Secretary of Commerce gave up all pretense at regulation and turned to Congress for legislation.¹⁶

At this time the radio industry went into a complete state of chaos as hundreds of stations went on the air regardless of frequency or power.¹⁷ Between July, 1926 and February, 1927 the number of broadcasting stations grew from 528 to 733, an average of a little over 29 stations a month.¹⁸ All of these 733 stations were operating on one of 89 frequencies, meaning that, at best, there would have been 8 stations utilizing each frequency.¹⁹

As he realized that his powers, under the Radio Act of 1912, were limited, the Secretary of Commerce attempted to encourage and facilitate the self-regulation of the industry. In 1922 he called the first of four annual conferences in Washington of those interested in broadcasting. Attending the conferences were broadcasters, manufacturers and distributors of radio apparatus, and other interested parties. The conferences were for the purpose of making recommendations as to how the difficulties facing radio broadcasting could be solved.²⁰ The first three of these annual conferences were almost entirely devoted to technical questions, aimed at clearing the radio band of the interference created by the

¹⁵Patrick, op. cit., 234.

¹⁶O'Shea, op. cit., 341 - 3.

¹⁷Ibid.

¹⁸"Federal Control of Broadcasting," Yale Law Journal, 39 (December, 1929), 247.

¹⁹67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12336.

²⁰67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12350.

great number of stations on the air. However the fourth conference, held in 1925, "passed a number of resolutions urging [the passage] of legislation."²¹

And so the Congress, called upon by the industry and the static-weary public, was faced with passing legislation in an area that was only a few years old and, as would be pointed out several times in ensuing debates, was without precedent or parallel in legislative history. Regarding the particular area of broadcast programming the legislators had one solid cornerstone upon which to build any regulation, the First Amendment: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"

²¹Ibid.

CHAPTER I

THE LEGISLATIVE HISTORY OF THE CONTROL OF BROADCAST PROGRAMMING

The Radio Act of 1927

The material, concerned with the legislative history of the Radio Act of 1927, is arranged so that topics of a general nature bearing on the control of programming are discussed, followed by an account of Congressional discussions bearing on the controls of specific programming topics.

Chronology of the Radio Act of 1927.--House Bill 9971, for the regulation of radio communications and other purposes, was submitted in the House of Representatives by Wallace H. White, Jr. of Maine, on March 3, 1926. After being referred to the Committee on Merchant Marine and Fisheries, it was reported back to the House for debate on March 5, 1926. The bill was passed by the House and sent to the Senate, where it was referred to the Committee on Foreign and Interstate Commerce on March 15, 1926. Following debate, H. R. 9971 was amended and passed by the Senate on July 2, 1926. The two versions of the bill were referred to a Conference Committee on this same date.

The Conference Report was submitted to the House, at the next session of Congress, on January 27, 1927; and to the Senate on January 31, 1927. Following debate, the bill was passed in the lower chamber on January 29, 1927 and in the Senate on February 18, 1927. H.R. 9971 entitled the Radio Act of 1927, was approved and signed by President

Coolidge on February 23, 1927.¹

Need for Legislation. The Radio Act was necessary because of the physical limitations on the number of radio transmitters that could be operated with efficient reception.² The technical limitations of the radio spectrum moved one Senator to comment, "unless we now exercise foresight we will wake up some day to find we have created a Frankenstein monster, because . . . there are only 500 broadcasting stations."³ The technology of radio necessitated legislation for two reasons: The limited number of transmitters and the unique physical characteristics of radio waves. Senator C. C. Dill of Washington, in introducing Regulatory legislation, noted that radio waves moved as quickly as light waves, crossed borders and oceans in circling the globe, and that:

This annihilation of time and space differentiates radio from every other kind of communication ever known, from the marathon runner and sailboat to the airplane and the telephone.⁴

Congress was unanimous in its belief that there should be legislation regarding the technical aspects of radio. A reading of the Congressional debates reveals concern with questions of technical

¹See the Index of both 67 Congressional Record, 69th Congress, 1st Session, December 7, 1925 - July 3, 1926 and 68 Congressional Record, 69th Congress, 2nd Session, December 6, 1926 - March 4, 1927

²Louis G. Caldwell, "The Standard of Public Interest, Convenience on Necessity as Used in the Radio Act of 1927," Air Law Review, I (July, 1930), 316.

³67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12505.

⁴67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12335.

interference, excessive geographical clustering of stations, monopoly and unfair trade practices, and the "public interest."⁵

Comparatively speaking, little was said about the problem of program controls. However, a concern with the effects of programs was evident in Congressional comment. For example, Senator R. B. Howell of Nebraska stated:

We are all familiar with the results of propaganda, its dangers and its advantages; and the question which we are called upon to settle now is how the public may enjoy the advantages of broadcasting and avoid the dangers that may result therefrom."⁶

Senator K. Pittman of Nevada took note of radio's ability to overcome the limitations of time and space as obstacles to communications:

The power of publicity by means of radio is greater than anything that has ever been known in the world. There is no newspaper that can reach what radio can reach. There are 15,000,000 listeners in this country, we know, and maybe twice as many. Those in control of radio transmitting can couple up a great system over in New York and can reach every part of the United States by the voice of one man."⁷

Still another Senator, R. S. Copeland of New York, spoke of the profits of the broadcasting industry, and suggested its potential impact on the newspaper:

The radio business is more profitable and brings in more money than is represented by the receipts

⁵⁶⁷ Congressional Record, 69th Congress, 1st Session, March 5, 1926, 5430.

⁶⁶⁷ Congressional Record, 69th Congress, 1st Session, March 1, 1926, 12503.

⁷⁶⁸ Congressional Record, 69th Congress, 2nd Session, February 5, 1927, 3035.

for sales of all the organs and pianos, all the sheet music, all the harps, horns, violins, banjos, talking machines, saxaphones, and drums, so it must be a very profitable business. It is going to be more and more dependent upon the radio. The newspapers of the country have a great problem to face in the development of radio. There are other rights to be considered than those of the broadcaster.⁸

Senator Howell of Nebraska differentiated newspapers and other print media from broadcasting as follows:

Radio affords such a unique facility of publicity that one has to think very carefully lest he go astray, thinking of newspapers and reasoning by analogy. This vehicle for publicity is entirely different from any other with which we are familiar. We have tens of thousands of newspapers, magazines, and other publications, but there is now from necessity, and will be hereafter, only a limited number of radio stations.⁹

Senator Copeland no doubt expressed the feelings of many Congressmen when he observed that radio was "the most wonderful invention . . . of this wonderful generation," and "that as time goes on, the American people will be dependent upon it for the dissemination of information and for entertainment."¹⁰

Pressure to Legislate.--The chaotic condition of the radio industry added a note of urgency to the Congressional debates. In introducing H.R. 9971, Senator Dill remarked:

Up to this time radio broadcasting is like Topsy, it has 'just grewed!' By that I mean that broadcasting has come upon us in such a rush that

⁸68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4150.

⁹67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12503.

¹⁰68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4148.

Congress has not provided adequate laws and regulations to meet the situation that has developed.¹¹

In the House, Representative F. D. Scott of Michigan, in presenting the Conference Report on H.R. 9971, felt that the differences voiced by the conferees often seemed insurmountable, "but in view of the present chaotic condition which endangers the entire industry, your conferees determined that a compromise was distinctly preferable."¹²

This same line of reasoning was voiced by many Congressmen during the debates on the Radio Act. On several occasions, particularly during the last few days prior to passage, legislators declined to offer criticism or amendments lest the session end without any radio legislation.

Not only were the Congressmen reminding one another of the pressing need for radio legislation but their constituents were flooding them with mail. Radio stations all over the country broadcast appeals to their listeners, asking them to contact their Congressmen with demands for action on the Radio Act.¹³ In response to editorials of the Boston Post, many readers wrote their Congressmen demanding action to alleviate the "mess in frequencies." On January 4, 1927, Senator Thomas J. Walsh of Massachusetts, feeling the pressure of his constituents, informed the

¹¹67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12336.

¹²68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2564.

¹³68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4151.

Chair: "Mr. President, my daily mail is being inflated by complaints . . . in regard to the present chaos in the radio situation."¹⁴ A few days later the same Senator, in an attempt to expedite the passage of legislation, told Senator Dill: "I want to suggest to the Senator that unless something is done very quickly some members of the Senate will have to ask for an additional appropriation for clerical hire to take care of the mail."¹⁵ Senator Dill, in turn, warned the Senate that there would be 1,200 broadcasting stations on the air by July 1, 1927 if no steps were taken to regulate the industry. He strongly felt that such a situation would make the ordinary receiver worthless, excepting for local station reception under optimum conditions.¹⁶

In the Public Interest.--When Representative White introduced H.R. 9971 he quoted from the principles adopted by the Fourth National Radio Conference as guides for desirable legislation:

d)That a license or a permit to engage in radio communication shall be issued only to those who in the opinion of the Secretary of Commerce will render a benefit to the public; or are necessary in the public interest; or are contributing to the development of the art.¹⁷

Throughout the debates over the passage of the Radio Act the question of broadcasting in the public interest arose. Although Congress, as has been shown, was aware of broadcasting's importance to the public,

¹⁴68 Congressional Record, 69th Congress, 2nd Session, January 4, 1927, 1034.

¹⁵68 Congressional Record, 69th Congress, 2nd Session, January 15, 1927, 1704.

¹⁶68 Congressional Record, 69th Congress, 2nd Session, February 12, 1927, 3589.

¹⁷67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5479.

differences were voiced as to what kind of legislation would guarantee that broadcasters would serve the public interest.

Representative E. L. Davis quoted part of Secretary of Commerce Hoover's testimony before a Congressional Hearing in this regard.

Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as are other public utilities.¹⁸

As the industry grew, but before the Act was passed, Secretary Hoover wrote to Representative White:

The public interest of radio broadcasting is rapidly widening. Entertainment and amusement have ceased to be its principal purposes. The public, especially our people on farms and isolated communities, are coming to rely on it for the information necessary to the conduct of their daily affairs. It is rapidly becoming a necessity, and they rightly feel that since the public medium is used to reach them they have a direct and justifiable interest in the manner in which it is conducted.¹⁹

Representative Davis was particularly impressed with the ability of a local station, being close to the listener's needs, to broadcast in the public interest. He was concerned over the geographically disproportionate distribution of broadcasting stations; out of about 700 broadcasting licenses 600 were held in 21 states, with 70 of them in

¹⁸67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12452.

¹⁹68 Congressional Record, 69th Congress, 1st Session, January 29, 1927, 2573.

one state.²⁰ He brought to the attention of the House the fact that several state universities were unable to obtain licenses because of this geographical inequity:

I know in particular of one governor who came to Washington in an effort to procure a license for a great State university doing agricultural extension work in order that they might have a license to broadcast to the farmers of that State the result of their experiments and investigations, yet he went home without a license.²¹

The Representative of Oklahoma, Mr. T. D. McKeown, spoke on this point in more general terms:

Every State that has a state university carrying on educational work in that State is entitled by right to have an opportunity to have a station, and there should be sufficient wave lengths allotted to that State.²²

The importance of another broad area of programming, the discussion of public questions, was touched upon in a comment by Senator Howell of Nebraska.

The discussion of public questions by radio is reaching the youth of the country, and will have a tremendous effect in the formation of their views. The youth of the country are listening in constantly. In fact, the larger proportion of the radio audience is the youth of the country. Give me control of the character of the matter that goes out over our broadcasting stations and I will mold the views of the next generation.²³

²⁰68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2575.

²¹Ibid.

²²68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2568.

²³67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12504.

Senator Dill's reply to the comments on the need for an impartial presentation of both sides of a "public question" was to caution the Senate that such a term could be so broadly interpreted that the airwaves might be glutted with controversy over insignificant matters, and regarding H.R. 9971, it seemed to him unwise "to put it in the bill at this time, but to await developments, and to get this organization to functioning, and the bill can be amended in the future".²⁴

Mr. A. M. Free of California was moved to comment that good programming was assured because, as he put it, the public could refuse to listen if not satisfied.

I think there is one monopoly in this thing and I think it is the individual listener. The minute he turns off his set and refuses to listen, just that minute the radio is gone so far as the sellers of sets are concerned. Because of that fact they must put on good programs; they must maintain the public interest because the public is their asset. When they sell time to an advertiser they have got to show that you and other people are listening, and if they cannot show that they cannot get the money for broadcasting.²⁵

Representative White quite early in the debates made it clear to the House that, as far as the Radio Act was concerned the broadcasting privilege would rest upon the insurance of the broadcaster that the public interest would be served.²⁶

Radio as a Public Utility.--The question of regulating broadcasting as a public utility was raised quite often during debates over the Act. The Senate's version of the bill, while still in committee,

²⁴Ibid.

²⁵67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5491.

²⁶Ibid, 5479.

considered radio stations to be common carriers subject to public utility regulation. However, this phrasing was struck out before the bill reached the floor of the Senate because of "what would result to the broadcasting stations in the present state of development."²⁷ The sentiment of the Senate was that radio, being a young industry, should not be hampered in its development by too much regulation. The finished bill, however, did contain the phrase: "And there shall be no discrimination as to charges, terms, or services to advertisers."²⁸

Representative Davis argued that this provision was sufficient protection for the public.

Although Secretary Hoover himself said, properly, that radio stations operating for profit are public utilities and ought to be considered as such, and although the members of these big concerns admitted at hearings . . . that they are public utilities, and that they should be regulated both as to rates and service and that they did not object to it, yet we are proposing to pass a bill that has no such provisions in it for the protection of the public, except with a single exception. (Emphasis supplied.)²⁹

At another time Davis pointed out to the House that even David Sarnoff, then vice-president and general manager of the Radio Corporation of America, had voiced support for considering broadcasting as a public utility. Said Sarnoff:

Well, my recommendation on that is very definite:
That where a broadcasting station performs a
function of public service, or as a common carrier,

²⁷67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12502.

²⁸67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12358.

²⁹68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2577.

and charges for the service it renders at that station, it should open its doors to all who have a legitimate right to use it, and that type of station should be subject to Government regulation both as to rates, character of service, and license. I offer no objection to it.³⁰

In addition to this Sarnoff declared, "So powerful an instrument for good should be kept free from partisan manipulation."³¹

Representative Davis summarized his opposition to the phrasing of the Radio Act of 1927 by commenting:

I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities . . . As it stands now they are absolutely the arbiters of the air.³²

As Senator Dill had presented H.R. 9971 to the Senate for its approval he had carefully pointed out the comparative freedom from Federal regulation which had surrounded the growth of the radio industry in the United States. After contrasting this freedom, both for the listener and for the broadcaster, with Government controls instituted in other countries, he added "not only are radio reception and radio broadcasting free from government restraint in the United States, but it is our desire and purpose to keep them free so far as it is possible to do so in conformity with the general public interest and the social welfare of the great masses of our people."³³ However, when the bill

³⁰67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12452.

³¹Ibid.

³²67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5479.

³³67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12335.

had passed the Senate and was being sent into conference, Senator Dill made this final observation:

I desire to state further that there is nothing in the bill that will prevent the means of radio communication from being kept free from private control in the future, and thus make further legislation possible in the interest of the public and in the interests of radio development.³⁴

Censorship.--The first exchange of comment in the House, following Representative White's speech introducing H.R. 9971, concerned the question of censorship:

Mr. LaGuardia. The gentleman stated the recommendations among which was a guaranty of free speech over radio. What provisions does the bill make to carry this out?

Mr. White. It does not touch that matter specifically. Personally, I felt that we could go no further than the Federal Constitution goes in that respect. The pending bill gives the Secretary of Commerce no power on interfering with freedom of speech in any degree.

Mr. LaGuardia. It is the belief of the gentleman and the intent of Congress in passing this bill, not to give the Secretary any power whatever in that respect in considering a license or a revocation of a license.

Mr. White. No power at all.³⁵

Congressional debate soon revealed that censorship had two faces: Censorship by the Government and censorship, through "editing," by licensees. Representative Davis stated the problem:

We naturally object to even governmental censorship, and yet under the existing law and practice we have something far worse - a censorship exercised by the broadcasting stations. There is nothing in the pending bill to prevent or regulate

³⁴67 Congressional Record, 69th Congress, 1st Session, July 2, 1926, 12619.

³⁵67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5480.

that. As Secretary Hoover stated, 'We can not allow any single person or group to place themselves in a position where they can censor the material which shall be broadcasted to the public!³⁶

The Congressmen were keenly aware of the political implications of this power to control radio. Senator R. B. Howell warned:

We are building up in this country a tremendous, irresponsible power, unregulated, of which Members of Congress and many other public officials may find themselves not only early victims, but practically without redress.³⁷

Earlier, Howell, in discussing the question of censorship by station management, had asked his colleagues, "Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men [Management], and empower those few men to determine what the public shall hear?"³⁸ Minutes before the Conference Report was agreed to by the Senate, Senator C. L. Blease of South Carolina predicted that within a year:

Men who are voting for it in this Chamber will be deprived of putting their views before the country over the radio . . . it will be controlled for partisan political and religious purposes, and . . . that the select few only will be given the privilege of having use of that machinery.³⁹

On several occasions the debates revealed a distaste for government censorship. At one point Representative White expressed the belief

³⁶ Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12452.

³⁷ Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4152.

³⁸ Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12503.

³⁹ Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4155.

that protection from slanderous broadcasts should be left to common law and State statutes as specific legislation by Congress would border on censorship.⁴⁰ Concern that regulations might infringe the right of free speech is evidenced by the following exchange of remarks on the House floor:

Mr. Woodruff. Could the Congress take action in regulating what a person might say over the radio without abridging the right of free speech?

Mr. White. You get very near censorship when you do that.⁴¹

The wish to avoid any implications of censorship was clearly expressed by Representative Scott of Michigan as he cautioned against changing Section 14 of the Act in a manner which would further restrict the free speech of the licensee.

You are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle.⁴²

The Radio Act of 1927, as finally passed by Congress, contained only two direct references to censorship. The Government was prohibited from exercising powers of censorship. The licensee was forbidden to censor political speeches. Regarding the Government, Section 29 provided:

Nothing in this act shall be understood or construed to give the licensing authority the power

⁴⁰ 67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5480.

⁴¹ Ibid.

⁴² 68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2567.

of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent or profane language by means of radio communication.⁴³

Aside from the language previously quoted forbidding discrimination in rates or service, the only specific prohibition in the Act against the exercise of censorship by the licensee appeared in Section 18 and pertained to political speeches. This section provided that equal facilities must be provided for candidates and, "That such licensee shall have no power of censorship over the material broadcast under the provision of this paragraph."⁴⁴

The Federal Radio Commission.--Congress created the Federal Radio Commission to administer the Radio Act of 1927. In presenting the bill, H.R. 9971, to the Senate, Senator Dill explained why this was done:

It is sometimes said that radio has not yet affected our people in a vital way. That is true to a certain extent, but it is a developing art, and the progress that has been made during the past five years opens the possibilities of what it may do in the future. It was believed that there ought to be in this government somewhere a body of men who would keep in touch with the development of radio, with its relation to the social and economic life of our people, and that the best way to have such a body was to establish a Commission of this kind.⁴⁵

⁴³68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2562.

⁴⁴Ibid, 2561

⁴⁵67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12356.

The idea of an administrative commission was a controversial one. While the radio bill was in conference it was explained that, "the principal difference between the two Houses was represented by the House provision giving control of radio to the Department of Commerce and the Senate provision giving the entire control to a commission."⁴⁶ Representative F. Crowther of New York summarized the House's point of view.

The Dill bill [passed by the Senate] carries five commissioners at \$10,000 a year. There is no more need of five commissioners at \$10,000 a year to regulate the art of radio than there is for a cat to have nine tails in addition to its proverbial nine lives. It can be done in the Department of Commerce.⁴⁷

The Conference Report compromised on the issue of a commission by creating one that would operate on a full-time basis for a year; then it would function on a per diem basis, turning over all of its duties, excepting license renewals, to the Secretary of Commerce.⁴⁸

The Conference Report had little to say specifically concerning the Commission's role in controlling program content. Section 4 provided that, as "public convenience, interest or necessity requires," the Commission shall:

- a) Classify radio stations;
- b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within each class;
-
- h) Have authority to make special regulations applicable to radio stations engaged in

⁴⁶ 68 Congressional Record, 69th Congress, 2nd Session, January 8, 1927, 1273.

⁴⁷ 68 Congressional Record, 69th Congress, 2nd Session, January 8, 1927, 1298.

⁴⁸ 68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2558.

in chain broadcasting.⁴⁹

Section 14 of the Conference Report evoked a good deal of adverse comment on the floor of Congress. This section proposed that any complaints concerning discrimination in "service" had to be investigated by the Interstate Commerce Commission, which, in turn, would certify them to the Federal Radio Commission.⁵⁰ In criticizing this division of authority, as well as the vague meaning of "service," Senator Pittman commented concerning Section 14:

It would allow them [radio monopolies] to select who may use their broadcasting station as far as the regulatory body is concerned [The FRC], as far as the Secretary of Commerce is concerned, or as far as the commission [the I.C.C.] is concerned.

They do not retain in this so-called regulatory body [the FRC] any power of limitation of the character of the stuff that they will use the broadcasting facilities for.⁵¹

In defending this section, with its divided control, Senator Dill pointed out:

We have then provided. . .that all disputed matters shall be referred to them [the FRC], and all decisions that are unsatisfactory to any person whose interests are affected - and that would include the owner of a radio receiving set - may be appealed to them.⁵²

⁴⁹Ibid.

⁵⁰68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 2111.

⁵¹Ibid.

⁵²68 Congressional Record, 69th Congress, 2nd Session, February 5, 1927, 3031.

However, many Congressmen contended the provision for the investigation of complaints by the Interstate Commerce Commission was unrealistic, as well as inefficient, because of that body's unfamiliarity with the problems of radio and the fact that its time was being monopolized by regulatory matters pertaining to the railroads.

Section 10 of the Conference Report on H.R. 9971 provided that the Commission could require an applicant for a broadcasting license to submit his proposed programming.

All such applications for station licenses shall set forth such facts as the licensing authority by regulation may prescribe as to . . . the purposes for which the station is to be used; and such other information as it may require.⁵³

Senator Dill, the guiding force of the Radio Act in the Senate, was of the opinion that in matters concerning the control of programming the Congress should formulate general principles as the law of the land and that it "seemed better . . . to allow the commission to make rules and regulations governing such questions [as political speeches] rather than to attempt to go into the matter in the bill."⁵⁴

When the question arose on the floor of the Senate regarding the qualifications of Radio Commissioners, some Senators favored the appointment of experts. Senator Dill differed with this point of view:

I want to disagree with the Senator who said . . . this commission should be composed of experts. I do not think so. I think it should be composed of men who have an understanding of the public needs,

⁵³68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2559.

⁵⁴67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12503.

men of vision and of great ability, who will depend upon experts for the necessary technical information, but who will administer the law from the standpoint of the public's interest, and particularly with a view to the future development of the radio art for the social and economic good of our people.⁵⁵

Political Programming.--The question of the use of radio in political campaigning was raised throughout the debates preceding the passage of the Radio Act of 1927. Representative Davis expressed the fear shared by many other elected officials concerning the influence over elections that could be exerted by those who controlled broadcasting.

They can permit one candidate to be heard through their broadcasting stations and refuse to grant the same privilege to his opponent. They can permit the proponents of a measure to be heard and refuse the opposition a hearing. They can charge one man an exorbitant price and permit another man to broadcast free or at a nominal price. There is absolutely no restriction whatever upon the arbitrary methods that can be employed, and witnesses have appeared before our committee and have already given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy.⁵⁶

Later, Davis looked to the future and warned Congressmen, "The broadcasting field holds untold potentialities in a political and propaganda way; its future use in this respect will undoubtedly be extensive and effective."⁵⁷

⁵⁵67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12358.

⁵⁶67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5483.

⁵⁷67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5483.

The Senate's version of radio legislation contained provisions for the availability of equal facilities for all candidates, forbidding the censorship of political speeches by licensees, and providing that the licensee "shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast."⁵⁸

Senator Howell was of the opinion that this legislation should be expanded to provide equal facilities for the discussion of public questions. "If such a course is correct with reference to candidates, how much more important is it respecting public questions?" Because of the unlimited demand for time that might result from such a provision, the Senate turned this proposal down.⁵⁹

The final wording of Section 18 of the Radio Act, as it was decided upon during conferences between the two Houses, was similar to the Senate's version excepting that there was no exemption from criminal or civil action for the licensee because of any uncensored statements.

Section 18. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: Provided that such licensee shall have no power of censorship over the material broadcast under the provision of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of

⁵⁸67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12458.

⁵⁹67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12503.

its station by any such candidate.⁶⁰

The problem of defining the term, "equal opportunities," was brought up by members of both Houses. A brief discussion on the floor of the House of Representatives gives some indication of the legislative intent.

Mr. Blanton. Suppose there are two candidates, one a rich man and one a poor man, and the corporation charges for service one candidate \$5,000, a sum that the poor man cannot pay. Is that giving them an equal chance?

Mr. Scott. No; I think the bill preserves to the commission the authority to prevent any discrimination.

Mr. Blanton. That would be discrimination?

Mr. Scott. Absolutely.⁶¹

Advertising.--Very little was mentioned concerning advertising during the debates. The principal concern of the Congressmen in this area was the possibility of disguised advertising; advertising not identified as such on the air. Representative Emanuel Celler of New York appealed for prohibitory legislation. He wanted all programming that was paid for to be identified as such, just as newspapers are required to identify advertising "to avoid the foisting of disguised advertising matter 'as reading notices' or news."⁶² This plea for legislation was effective.

⁶⁰ 63 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2561.

⁶¹ 68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2567.

⁶² 67 Congressional Record, 69th Congress, 1st Session, January 18, 1926, 2309.

Section 12. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.⁶³

Senator K. Pittman of Nevada had the most to say on the subject of advertising when he criticized the Conference Report on H.R. 9971.

The Senator observed:

No authority is given the commission or the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes. The owners of the 15,000,000 purchased radio receiving sets in the United States are interested in the character of the matter that is broadcast.⁶⁴

He further commented:

There is one thing which you will find out, that if it becomes necessary to make money out of broadcasting, the broadcasting concerns, when they have sold all of the receiving sets they can, will shoot out through this country every night magnificent statements with regard to sausage and pig's feet. Why not? If they can be paid to broadcast advertising matter through the country, why should they not do it? It is fair to the broadcasters, but is it fair to the 15,000,000 people who have bought receiver sets? There should be some power. . . to place some reasonable limitation on the use of the broadcasting stations so that they might be enjoyed by and be beneficial to the people of the country. But the conferees' bill does not propose to do any such thing.⁶⁵

⁶³68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2561.

⁶⁴68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4109.

⁶⁵68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4112.

Regardless of the Senator's predictions and warnings, only Section 19 of the Radio Act made reference to advertising.

Rebroadcasting.--The only other section of the Radio Act which directly concerned itself with controlling the content of broadcasts forbade the unauthorized rebroadcast of another station's programming.

Section 28 . . .nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.⁶⁶

Additional Comments.--Several areas of programming, and their control, were discussed during the debates although there was no resultant legislation. These comments are included here to afford a complete picture of the views expressed on the floor of each House while legislation to control broadcasting was under consideration.

Programming Standards. During all of the debate that preceded passage of the Act, the concept of program balance was raised on only one occasion. Senator Reed of Pennsylvania asked what the proposed law would mean in a particular case involving WCAE, Pittsburgh. This station had been broadcasting on a wave length of 461 meters for six years. The Senator reported that it offered a well balanced program schedule. Within a few months time three stations, using the same wave length, had gone on the air; two of them in Iowa and the third in Ohio. It was noted, regarding the late-comers, that "their programs are terrible."⁶⁷ Senator Dill, in rising to answer this question, did not address his comments to

⁶⁶68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2562.

⁶⁷68 Congressional Record, 69th Congress, 2nd Session, February 7, 1927, 3119.

the problem of comparative program standards. Rather, he pointed out that the law empowered the commission to say "who should broadcast, what wave length should be used, where the station should be located, when it should broadcast, and every other power that would be necessary for the prevention of the very interference which is complained of."⁶⁸ During the ensuing discussion it was observed that public interest might demand the deletion of WCAE.

Representative Crowther of New York thought enough of contemporary programming to reflect, on the floor of the Senate, that hospital patients, through radio, were able "to enjoy the best in prose and poetry, and music that we have in this country."⁶⁹

Local Service. Representative Davis summed up the comments of several Congressmen when he complained of the fact that local stations, limited in range by low power and poor frequencies, could not supply a needed local service. He illustrated this complaint by telling of how, during the election of 1926, it was impossible, at his home in the State of Tennessee, to receive any signal but those emanating from Chicago, Pittsburgh, Cincinnati, and St. Louis. "We were entertained with static and 'jazz.' The result was that we did not know - I did not know - who was elected governor of my own State until I received the newspapers the next day. That shows the situation."⁷⁰

⁶⁸Ibid.

⁶⁹68 Congressional Record, 69th Congress, 2nd Session, January 8, 1927, 1297.

⁷⁰68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2576.

On the other hand, arguments in favor of the high-powered metropolitan stations were entered in the Record. A letter from a citizen in Connecticut stated:

In my opinion and in the opinion of others around here . . . as long as these high-powered stations continue to give the class of broadcasting entertainment that they are giving now, the public is lots better off and better satisfied than it was when we were getting a jumble of poor stuff from poorly equipped, low powered stations, and from actual experience I find that the public in this section much prefer high-class music with an occasional interesting lecture than they do much of the educational and religious features that have been talked about so much in the hearings.⁷¹

Libel and Slander. The question of libel and slander on the part of radio speakers was perplexing. Several of the States, at least Texas and Oklahoma according to Representative T. L. Blanton of Texas,⁷² limited recourse to the courts only to those injured by the printed word. In addition to this, there was the problem of determining any State's jurisdiction over signals originating in another State. Representative Blanton asked his colleagues, "How are the people of New Jersey going to hold responsible the people of New York, who may damage them in their personal standing and character and in their business in the transmission of radio messages, unless you have some kind of controlling statute in this matter?"⁷³ Later, Blanton, in emphasizing his point, gave this

⁷¹⁶⁷ Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12498.

⁷²⁶⁷ Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5480, 5501.

⁷³⁶⁷ Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5500.

example:

The night before a primary in your State some of your enemies induce somebody in some other State . . . to make derogatory statements about you in such a way that it might absolutely ruin you in the next day's primary or election. Do you want to take a chance on that? . . . You could thus ruin a presidential candidate, or you could ruin a candidate for any elective office.⁷⁴

Representative Blanton ended an unsuccessful plea for an amendment to the Radio Act, concerning libel and slander, by insisting it was a problem that could be solved only through Federal legislation.

Is it not our intention to protect the citizens of every State against slander and libel which may come from others in other States into their own States about them? This is a national question and can be settled only by a Federal law.⁷⁵

Pay Radio. The Senate, in its bill to regulate radio, had provided for the regulation of devices for pay-radio - either broadcast or wired - but this section was eliminated by the conferees.⁷⁶ During a discussion about the status of any station which might charge the listener a fee, Senator Walsh observed, "Of course the board [sic] presumably, would not license any of those [pay-radio stations] if they interfered substantially with the service of the general broadcasting stations."⁷⁷ Senator Dill was much more definite in his opinion.

⁷⁴⁶⁷ Congressional Record, 69th Congress, 1st Session, March 13, 1926, 5573.

⁷⁵Ibid.

⁷⁶⁶⁸ Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4113.

⁷⁷⁶⁸ Congressional Record, 69th Congress, 2nd Session, February 5, 1927, 3025.

The commission is under no compulsion to license all the stations that want to put on such apparatus. Under the clause of public interest, convenience, and necessity they could refuse to license.⁷⁸

Other Controls. The only other legislative attempt at control of the licensee's programming, mentioned on the floor of Congress during these debates, was a section of the Senate's version of the bill requiring broadcasting stations to keep an accurate log of their programs. The section was deleted by the conferees.⁷⁹

Adequacy of the Law.--Several of the Congressmen who wrote the bill that was to become the Radio Act of 1927, and who steered it through conference meetings, realized that the law was not perfect. On the day of its introduction to the House, Representative White admitted:

Your committee has no illusions concerning this bill. We have given too long and too thoughtful consideration to this subject to permit the belief in our own minds that this is the last word in radio legislation.⁸⁰

On the day of the Conference Report's passage in the House of Representatives Mr. L. Lazaro of Louisiana commented:

While we do not claim this bill to be perfect, we feel that it is the very best that could be agreed upon at this time. With the absolute chaos in the air and the demand of the public for relief. I think it is our duty to pass this measure at this time. Later on we will have an opportunity of observing how the law

⁷⁸68 Congressional Record, 69th Congress, 2nd Session, February 5, 1927, 3034.

⁷⁹68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4152.

⁸⁰67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5480.

functions and, if necessary, we can perfect it.⁸¹

Criticism.--During the debates that preceded the passage of the Act, Senator C. L. Blease of South Carolina was the only member of Congress who expressed opposition to the basic principle of Federal regulation of the air waves.

The air belongs to the people, and I do not see how Congress has any right to say who shall talk and who shall not talk and who shall have a radio and who shall not have one. This is a free country, and if a man wants to make a speech he should be allowed to make it. If a private company has a radio apparatus over which a man wants to speak and the people want to hear him and he can make arrangements with the company to make his speech, he ought to have the right to make it.⁸²

Immediately prior to the passage of the Conference Report in the Senate several members of this body were critical of its shortcomings in regard to the control of programming.

Senator Pittman noted that, among other weaknesses of the bill, "you do not give them [the Commission] any power to regulate the service."⁸³ He went on to observe:

What powers of regulation has this bill in it?
 . . . It does not give. . . the power to investigate discriminations. It does not give
 . . . the power to investigate lack of service.⁸⁴

⁸¹⁶⁸ Congressional Record, 69th Congress, 2nd Session, January 29, 1927, 2578.

⁸²⁶⁷ Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12508.

⁸³⁶⁸ Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4110.

⁸⁴Ibid.

Senator Howell spoke critically when he pointed out that Section 18 of the Act was silent on the questions of a candidate's representative being given equal opportunity to answer the broadcasts of another candidate's representative, the affording of equal opportunity for the discussion of public questions, and the general area of censorship by the licensee.⁸⁵

Finally Senator Walsh of Massachusetts summarized what he felt were the bill's major weaknesses.

The bill deals with an unknown and undefined problem and should have fully defined the rights of the public for the guidance of the commission in the discharge of its duties. It fails to clearly and definitely safeguard the rights of free speech, to prevent the control of broadcasting in the interest of the dominant party or powerful special interests, and to secure to the exponents of all shades of opinion a reasonable access, upon equal terms, to its facilities for influencing public opinion, aiding or opposing the election of candidates, and controlling legislation.⁸⁶

⁸⁵68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4152.

⁸⁶68 Congressional Record, 69th Congress, 2nd Session, February 8, 1927, 3257.

After the Radio Act of 1927

In the years between the passage of the Radio Act of 1927 and the introduction of the legislation that resulted in the Communications Act of 1934, discussions in Congress concerning proposed amendments to the Radio Act touched on these areas related to the control of program content; the control of advertising, the prohibition of broadcasting information or advertising about lotteries, and censorship by the licensee. There were also discussions that touched on matters of program regulation regarding the assignment of frequencies, the life of the Federal Radio Commission, and procedural changes in the Act. What follows is a detailed accounting of what members on Congress had to say concerning each of these, although only one of these discussions, concerning the life of the FRC, actually resulted in legislation.

Assignment of Frequencies.--In February, 1931 an amendment to the Radio Act reached the floor of the House which proposed reserving a "cleared" channel for the use of organized labor. This provided that "there should be preserved to the labor interests of the United States, out of the ninety-some broadcasting frequencies, at least one for the use of labor interests so they could put their cause before the country."⁸⁷

The Bill provided that:

The Federal Radio Commission shall assign one cleared-channel frequency. . .with unlimited time and power equal to the maximum power assigned any broadcasting station. . .to the owner or owners of the broadcasting station or stations approved by the recognized labor organizations which in the opinion of the commission are most representative of the labor interests in the

⁸⁷74 Congressional Record, 71st Congress, 3rd Session, February 17, 1931, 5206.

United States, and shall issue no license or licenses for the use of said frequency except with the written consent of such so recognized labor organizations to any other person, association, corporation, organization, or copartnership.⁸⁸

Although this amendment was not passed, it is of interest to note the opinion of the House Committee on Interstate Commerce on the question of why no similar reservation was being sought for educational institutions. The committee, after taking testimony concerning the needs of education and agriculture, did not feel these areas required special legislation.⁸⁹

The question of legislating to protect local radio stations from the powerful metropolitan ones alleged to have the best frequencies was discussed in the House on February 10, 1932. Representative Benton of Texas, in answering a question about the benefits of listening to metropolitan stations, had this to say about reception in his home state:

We listen in on WEAf and other stations in New York when we want to, but. . .we ought to have the inherent privilege as American citizens to listen in for local matters on our own station . . .we may want something besides advertising programs, and we are entitled to listen in on our own stations whenever we want to.⁹⁰

Representative Celler of New York noted that New York stations had probably been guilty of exploiting their assigned frequencies. However, while holding no brief for these stations, he wanted to "give the devil his due."

⁸⁸Ibid, 5205

⁸⁹Ibid, 5206

⁹⁰75 Congressional Record, 72 Congress, 1st Session, February 10, 1933, 3690

Do you know, gentlemen, that we would be deprived of the finest programs, programs that even reach the district of my distinguished friend from Texas. . . . We must remember that it costs money to operate these stations, and it is essential to get advertising to pay for these broadcasts.⁹¹

The Federal Radio Commission.--Several debates occurred on the floor of Congress regarding the life of the Federal Radio Commission. The Radio Act of 1927 had created a Commission with temporary powers and it wasn't until December of 1929 that the Act was amended to make these powers permanent.⁹² In the debate that preceded the passage of this amendment, Senator Copeland testified as to the importance radio had assumed in American life.

I know that in the farm homes and in other homes in remote parts of the country. . . persons so situated have had the benefit of listening to music, to addresses, to speeches, and to instructive messages. I myself have no question that the radio to the average citizen is a very necessary part of the household equipment.⁹³

Procedural Change.--The House bill, H.R. 7716, which was passed by Congress and then pocket-vetoed by President Hoover in February, 1933,⁹⁴ was primarily concerned with amending the administrative procedures of the Act. One of its sections dealt with the suspension of licenses. This section, Representative Davis of Tennessee explained,

⁹¹Ibid., 3691

⁹²72 Congressional Record, 71st Congress, 2nd Session, December 16, 1929, 714.

⁹³Ibid., 712

⁹⁴76 Congressional Record, 72nd Congress, 2nd Session, February 28, 1933, 5204.

would allow the Federal Radio Commission to order a lesser penalty than license revocation as well as giving the FRC an opportunity to suspend a station's operations while investigating charges.⁹⁵

Advertising.--During the debates over H.R. 7715, amending the Radio Act of 1927, Representative W. Williamson of South Dakota asked if there had been any attention given in the bill to the character of radio advertising, as he had received many complaints from citizens of his State. Mr. F. R. Lehlbach of New Jersey answered:

Not in this bill. This bill contains only matter that is absolutely uncontroversial and is necessary for the proper administration of the radio laws. This question. . . will be taken up in the course of time in a form that will enable free and full discussion and not impede or interfere with these changes in procedure which are so necessary.⁹⁶

Mr. Lehlbach was further questioned by Mr. Williamson.

Mr. Williamson. If a radio station persists in sending out what the commission considers as objectionable advertising, the Commission could refuse to renew its license?

Mr. Lehlbach. Absolutely.⁹⁷

A few minutes later, Representative C. L. Gifford of Massachusetts made the point that radio should have more important uses than to sell lipsticks, and that there seemed to be a "dangerous trend in the use of radio, although I do not find the great interest in the general subject that there ought to be on the floor of the House. Every year our Radio Commission will come in with recommendations to clarify existing law,

⁹⁵75 Congressional Record, 72nd Congress, 1st Session, February 10, 1932, 3683.

⁹⁶Ibid., 3684.

⁹⁷Ibid.

rather than to recommend changes in the system, which the American people will soon demand."⁹⁸

Mr. LaGuardia followed these comments with his own observation that:

If these broadcasting stations continue in abusing their licenses in such ways as to make their broadcasting nauseating, by repeated advertisements and advertisement talks which could not be used in the same manner in the papers, then if there is legislation, it will be their fault and not the fault of Congress.⁹⁹

Prohibiting Lotteries.--In discussing the bill H.R. 7716, to amend the Radio Act of 1927, Representative Lehlbach justified the section which, if the bill had not been pocket-vetoed, would have prohibited the broadcasting of any information or advertising concerned with lotteries.

It is not in the sense of censorship that this provision is sought but because it is unfair, grossly unfair, to permit, in the event they should avail themselves of the absence of a prohibition, radio to advertise a lottery when, if a newspaper attempts to do the same thing, it is unmailable.¹⁰⁰

Censorship by the Licensee.--This same H.R. 7716 contained a provision to require, in the public interest, "licensees, so far as it is possible, to permit equal opportunity for the presentation of both sides of public questions."¹⁰¹

⁹⁸Ibid., 3684.

⁹⁹Ibid., 3688.

¹⁰⁰Ibid., 3884.

¹⁰¹76 Congressional Record, 72nd Congress, 2nd Session, February 28, 1933, 5204.

In 1934 Representative L. T. McFadden of Pennsylvania introduced H.R. 7936 to amend the Radio Act so as to prevent censorship by station management. Representative McFadden felt his amendment would alleviate a situation whereby the networks "which control 80 percent, directly or indirectly, of the broadcasting in the United States, . . . assume to censor. . . not only religious programs but. . . political and educational programs as well." This amendment never reached the floor of the House of Representatives.¹⁰²

The Communications Act of 1934

Chronology.--The Senate bill, S. 3285, was introduced by Senator Dill on April 4, 1934 and sent to the Committee on Interstate Commerce. It was reported out of committee, with amendments, on April 19. The bill was further amended and passed by the Senate on May 15, 1934. The bill was referred to the House Committee on Interstate and Foreign Commerce on May 21 and reported out, with an amendment, on June 1. On June 2, S. 3285 was further amended and passed by the lower chamber. The Conference Report on S. 3285 was submitted and agreed to in the Senate on June 9, 1934 and, on the same day, the House also agreed to its passage. The bill was presented to the President by Congress on June 14, and signed into law on June 18, 1934. The Communications Act took effect on July 1, 1934.¹⁰³

¹⁰²₇₈ Congressional Record, 73rd Congress, 2nd Session, March 1, 1934, 3543.

¹⁰³₇₈ Congressional Record, 73rd Congress, 2nd Session, 497

Nonprofit Programming and Stations.--Even before any debate over S. 3285 had begun, the Legislature of the State of New York had petitioned Congress "to enact. . .such measures as may be necessary to increase the broadcasting time of educational and religious associations to one quarter of all the radio-broadcasting facilities."¹⁰⁴

Senator Dill, in introducing S. 3285, noted that the Interstate Commerce Committee had considered writing a provision into the bill to allocate 25 percent of the country's radio facilities to those engaged in broadcasting on a nonprofit basis. Although this provision was rejected by the Committee, Senator Dill pointed out that the subject of the allocation of these facilities was considered important enough to have resulted in Section 307 (c) of the proposed bill. The section provided for a study by the Commission of the need for any allocation of facilities for educational and religious broadcasting. It also stipulated that the Commission was to report its findings to the Congress.¹⁰⁵

Senators R. F. Wagner of New York and H. D. Hatfield of West Virginia submitted an amendment to S. 3285 calling for the allocation of 25 percent of radio's facilities for broadcasting in time, power, and frequency to "cultural, educational, religious, agricultural, labor, cooperative, and similar non-profit making organizations."¹⁰⁶ Senator Hatfield spoke in support of the amendment.

¹⁰⁴78 Congressional Record, 73rd Congress, 2nd Session, April 26, 1934, 7507.

¹⁰⁵78 Congressional Record, 73rd Congress, 2nd Session, May 15, 1934, 8824.

¹⁰⁶Ibid., 8828

The use of radio broadcasting as a constructive educational procedure is in its infancy, . . . education by radio will remain in its infancy unless the Congress of the United States takes a hand and apportions a part of the vast radio opportunity, supposedly controlled by the Government, which can be sent broadcast throughout the country.¹⁰⁷

Senator Wagner made the point that, "Commercial stations enjoying the free use of the air captured 98 percent of the broadcasting today, while non-profit-making stations. . . have secured only 2 percent."¹⁰⁸ Senator Hatfield went on to argue that if an amendment to allocate facilities for nonprofit stations was rejected, the "Congress of the United States will find it essential and necessary to possess and to operate all radio facilities for the benefit of the people as a whole."¹⁰⁹

Senator W. H. White Jr., of Maine, who authored the House's version of the Radio Act of 1927, opposed the Wagner-Hatfield amendment.

We should either go ahead as a Congress and divide up the entire spectrum among persons and organizations for uses here in the United States or we should leave it alone in its entirety and place the responsibility of allocation where it already is - upon the Federal Radio Commission.¹¹⁰

Senator Dill was opposed to the amendment because it seemed impractical to reallocate all of the country's broadcasting frequencies within 6 months and because:

¹⁰⁷Ibid., 8832

¹⁰⁸Ibid., 8829

¹⁰⁹Ibid., 8834

¹¹⁰Ibid., 8845

These stations are not to be what we understand as educational and religious stations merely, but they are to be stations that are to sell time on the air to advertisers who will make use of the stations for advertising purposes. Thus we are simply changing the ownership of these stations from the present commercial owners to owners who call themselves nonprofit organizations.¹¹¹

The amendment to allocate 25 percent of the country's broadcasting facilities to nonprofit organizations was defeated by the Senate.

When S. 3285 came out of committee in the House of Representatives it did not contain the Senate's provision, Section 307 (c), requiring the Commission to study the need for allocating licenses to nonprofit organizations. Representative F. T. Maloney of Connecticut was disturbed by this omission.

I have not yet heard any serious reason why the Radio Commission, or the new organization which will administer this bill, should not make such a study or should not have the authority to re-allocate time to those all important groups and institutions. Of course, every member of the Congress knows that these particular groups represent the very cornerstone of our Government and that education, religion, labor, and agriculture should be afforded a proper time to tell their story, and to spread their advantages over the radio broadcasting systems of the country.¹¹²

Representative E. W. Goss of Connecticut indicated bi-partisan support for an investigation by the Commission of the broadcasting needs of nonprofit organizations.

There are many people, not only on both sides of the aisle of this House but in the country, who are anxious to have some consideration given to that. [The Senate's section dealing with the

¹¹¹Ibid., 8843.

¹¹²78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10319.

allocation of facilities for nonprofit licensees.] While I realize the specific 25 percent is stricken out, all that would do would be to have the Commission study the matter and report back at a later date with some kind of findings. I just wanted to. . . call attention to the fact that there are many Members on our side of the aisle as well as on the Democratic side of the aisle who are interested in this.¹¹³

In answer to questioning as to why there was no provision for the reservation of a fixed percentage of facilities for nonprofit stations in the House's version of the bill, Representative Sam Rayburn of Texas explained the position of the Committee on Interstate and Foreign Commerce.

We had up what is known as the 'Father Harvey amendment,'. . . That provided for the allocation of 25 percent of all the time to religious, educational, and. . . [other uplifting licenses. Our thought - at least, my thought - was this:] If 25 percent should be allocated, or the allocation of it taken away from the Radio Commission, why not take away 30 percent or 40 percent or 100 percent? Also, if you allocate 25 percent to education and religion, then what difficulty is the Radio Commission going to have in dividing the 25 percent between Catholic, Jew, Protestant, and other sects, and also between what colleges, where located, and what else might be supposed to be taken into consideration for morals, education, and uplift? Our committee took that position, and we believe it is a wise one.¹¹⁴

Representative R. Ramspeck of Georgia agreed that he, too, was opposed to the allocation of frequencies by law because of the difficulties inherent in attempting to distribute judiciously wave lengths among the multitude of religious faiths, schools, and other nonprofit

¹¹³Ibid., 10323.

¹¹⁴Ibid., 10315

organizations.¹¹⁵ He also registered opposition to the idea of reserving channels for nonprofit groups because, "As far as I have been able to see at this time, no radio station can operate under the American system without having sustaining programs. When they accept sustaining programs they enter the commercial [sic] field."¹¹⁶

Senator Dill, in continuing his opposition to the Wagner-Hatfield amendment, took exception to the statement that only 2 percent of radio's facilities were being used for educational purposes.

I dare say that many of the speeches of the Senator from New York [Mr. Copeland], as well as those of other Senators, would be considered partly educational, at least. They are put out by the larger radio chains which furnish the American people the great radio programs.¹¹⁷

In contrast to this, Senator Wagner observed, "This amendment does not in any way interfere with the larger stations. They may continue to use all their time for purely profit-making purposes."¹¹⁸

Continuing his argument against the amendment, Senator Dill made the point that since its inception the Federal Radio Commission had only received 71 applications for stations from educational institutions. He then engaged in an exchange of comments with Senator Copeland of New York in which he suggested that some consideration be given the idea of

¹¹⁵Ibid., 10324.

¹¹⁶Ibid.

¹¹⁷78 Congressional Record, 73rd Congress, 2nd Session, May 15, 1934, 8844.

¹¹⁸Ibid., 8829

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stipulating that a licensee devote a certain number of hours to educational broadcasts.

Mr. Copeland. I realize that. . .to operate a radio station costs a lot of money. But if we find a religious or educational body willing to take the chance of disposing of certain commercial time in order that the main objective may be reached, which is the dissemination of religion or education, I think certainly we should give consideration to their willingness to do so.

Mr. Dill. Does not the Senator think a much more practical result might be obtained by working out some system of requiring stations to permit a certain part of their time to be used for these purposes and requiring that in the licenses of existing stations?

Mr. Copeland. No; I do not think so.

Mr. Dill. That is the only way the religious and educational broadcasts can be gotten out to the people generally, because they are the only stations which can get those broadcasts out in that way.

Mr. Copeland. There is no question that the existing stations have done a great work. . . . For example, in disseminating the sermons which are broadcast every Sunday. But there are institutions which have definite programs in educational development or programs where it is not possible for the casual use of a station now and again to accomplish what the originators of the various programs have in mind. Therefore I believe that where there are educational and religious bodies willing to assume the responsibility of carrying on the work we might well give consideration to permitting them to have the radio channels in order that they may do the work in education.¹¹⁹

Political Partisanship.--Several legislators made the accusation that political partisanship was affecting both broadcast programming and its regulation. Representative Wilford of Iowa spoke in general terms

¹¹⁹Ibid., 8837

on the subject.

The United States, especially, can proudly say that nearly every home in this country has either radio, newspapers, or magazines for their enjoyment and education. By these means of communication, problems of a nation can be quickly presented to the people for their opinion and consideration. The press fortunately has enjoyed a broad freedom in which they can advocate or bring to the people their views in editorials and in columns, by various writers. I believe this same privilege should be extended to the radio stations of these United States without any political hatchet ready to sacrifice them if their principles are not pleasing.¹²⁰

Representative H. McGugin of Kansas alleged that political favoritism was practiced in both networks and stations.

I have no personal complaint. No Republican Member of Congress can have any personal complaint, so far as I know. It is my understanding that a Republican Member of Congress can get on the air whenever he wants to with either of the chains on any reasonable time or occasion, but there it stops. The ordinary private citizen who is a Republican cannot get on the air to discuss the other side of some of this so-called 'new deal' legislation.

.....
It is not enough that Members of Congress of the minority party or with minority views may have the benefit of the air. This right must be extended to other citizens.¹²¹

Representative Hamilton Fish, Jr. of New York also spoke on the problems of obtaining equal broadcasting opportunities.

I think that fair-minded Democrats must sympathize with the Republicans. . . . We have not a chance at all. . . . Until recently it has been very difficult to get on the radio.¹²²

¹²⁰78 Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10992.

¹²¹78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10327.

¹²²Ibid., 10317.

Censorship.--Almost immediately after S. 3285 was presented on the floor of the House, Representative F. D. Culkin of New York inquired, "Will the gentleman [Representative Rayburn] tell the House specifically whether Section 29 is reenacted? Section 29 relates to the right of free speech by means of radio and communication and provides that no obscene language may be used."¹²³ After he was reassured of Section 29's retention in the House's version of the bill, Representative Culkin, referred to it as the "Magna Carta of the whole procedure." At another time he reminded the House's conferees to press for Section 29's reenactment as, "It is of the highest importance that this section should be retained in the law."¹²⁴

Representative A. C. Willford of Iowa looked upon the renewal of licenses as a possible form of censorship.

I do not believe that the system of the Radio Commission of a 6 month license is adequate protection or encouraging to the present-day broadcaster. I believe these licenses should be issued for 3 to 5 years and should be inviolable except where charges of malicious intent or violations of such rules that are equitable in fairness of radio broadcasters is violated. I believe radio broadcasters should have the privilege of expressing their views editorially, as newspapers do, and they should not be suppressed by quiet threats or the impossibility of renewal of licenses or any other way that is used against an unfriendly or disliked broadcaster.¹²⁵

Representative McFadden charged that the networks exercised censorship powers over all of the country's stations through their

¹²³Ibid., 10313.

¹²⁴Ibid., 10329.

¹²⁵78 Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10992.

domination of the Federal Radio Commission.

They [the National Broadcasting Company and the Columbia Broadcasting System] had arbitrarily set up a board of censorship and. . .these two systems control over 80 percent of the facilities of broadcasting in the United States, and if any independent stations permit anything to be broadcast that either of these two systems object to, the independent station is immediately in hot water and placed in fear of losing its station license to broadcast. The National Broadcasting Company and Columbia seem to dominate the Commission. The independents are scared to death at the present time.¹²⁶

A few minutes after this speech, Representative C. V. Truax of Ohio charged, on the floor of the House, that the National Broadcasting Company and the Columbia Broadcasting System were "throttling such magnificent voices raised in behalf of the people in distress as, for instance, Father Coughlin. . . . I maintain the throttling and strangling of this information. . .is something that this Congress should not overlook."¹²⁷

Program Balance.--Several of the legislators were disturbed at the programming of the country's radio stations. Senator S. D. Fess of Ohio expressed distaste for much of what was being broadcast, but did not wish to have Congress prescribing what "could go over the radio and what could not go over the radio. . . . I would not want to censor the air; but I do think there ought to be some assurance that there should

¹²⁶⁷⁸ Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10306.

¹²⁷Ibid., 10327.

be some reform of the present situation, with which everybody is now acquainted."¹²⁸ Senator Fess also noted that there had been complaints about the neglect shown "matters of an educational character, cultural as well as religious," since the inception of broadcasting.¹²⁹

One Representative, F. T. Maloney of Connecticut, in comparing radio with motion pictures, expressed the hope that:

Those who administer this law will be particularly careful of radio, and not permit it to fall into the careless ways of the motion-picture industry. Most of us are hopeful that there will not be built up the tyranny that exists in the motion-picture field, which allows certain producers to run roughshod over the interests of independent theater owners and a great majority of the careful and clean-thinking people.¹³⁰

Representative C. L. Gifford of Massachusetts proposed a study of other broadcasting systems with the possible goal of incorporating some of their features into ours.

We all know that in general we have to listen to what may be furnished by those who buy time to advertise their products.

.
I want to make the point as clear as I can that we should know why the radio cannot be used for the more important matters of transmitting messages, news, and education features. People in other countries seem to be willing to pay for the service they receive, rather than surrender the air to advertisers who may be able to pay for such a privilege. The board should study the way it is carried on elsewhere and

¹²⁸78 Congressional Record, 73rd Congress, 2nd Session, May 15, 1934, 8831.

¹²⁹Ibid., 8830.

¹³⁰78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10319.

make recommendations. Congress itself should suggest to this new board a broad field of investigation in the radio field.¹³¹

Over-Commercialism.--In the course of the debates several comments were made concerning advertising excesses on the radio. Some of these are reported elsewhere in this thesis but perhaps the severest criticism against over-commercialism came from Senators Wagner of New York and Fess of Ohio. Senator Wagner declared, "I am only one of those public officials who is tired of a few radio stations having a complete monopoly of the air and using it purely for commercial purposes."¹³² Mr. Fess spoke the harshest words against radio's advertising excesses: "Everyone must be impressed with the pollution of the air for commercial purposes until it is actually nauseating."¹³³

Legislation.--The only reference made to the control of radio broadcasting in the House's version of the bill passed by the Senate, S. 3285, was made in Title III. This proposed to transfer the powers of the Federal Radio Commission to the newly-formed and more inclusive Federal Communications Commission, and to incorporate the Radio Act of 1927, without any changes, into the Communications Act of 1934.¹³⁴ Representative Rayburn, when he introduced S. 3285 in the House, noted, "I do not deem it necessary to take up much time on this matter. . . for the reason that in the House draft of the bill we do not in anywise

¹³¹Ibid., 10323.

¹³²78 Congressional Record, 73rd Congress, 2nd Session, May 15, 1934, 8831.

¹³³Ibid., 8830

¹³⁴78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10314.

amend or change the Radio Act.¹³⁵ Representative Rayburn, who chaired the Committee on Interstate Commerce, was supported by Virginia's Representative S. O. Bland, in his wish to avoid any changes in radio legislation at this time.

I may say. . .that as Chairman of the Committee on Merchant Marine, Radio, and Fisheries I believe this is the best that could be effected at this time, dealing with such a delicate article as the radio.¹³⁶

When S. 3285 came out of conference between the representatives of the two chambers, a statement by the House's conferees emphasized the similarity between the Radio Act of 1927 and Title III of the Communications Act of 1934.

Sections 301, 302(a), 304, 306, 309, 313, 314, 315, 317 318, 319, 320, 321, 322, 323, 324, 325(a), 326, 327, 328, and 329 are, respectively, substantially identical with the following sections of the Radio Act of 1927: 1, 2, 5, 8, 11, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 35, and 36.¹³⁷

The following provisions of the Communications Act of 1934 have some direct or indirect relationship to the FCC's control of broadcast programming. With the exceptions of Section 316 and 305(g), they all appeared in the Radio Act of 1927 in identical or similar language. Section 316, prohibiting the broadcasting of any information concerning lotteries, as heretofore mentioned was originally proposed in 1933 in an amendment to the Radio Act of 1927 but failed to pass at that time because of a pocket-veto by President Hoover.

¹³⁵Ibid., 10312.

¹³⁶Ibid., 10313.

¹³⁷78 Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10987.

Section 301. It is the purpose of this act, among other things, to maintain the 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.

Section 305. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, and necessity requires, shall -

- (a) Classify radio stations
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within each class;
-
- (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.
- (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting.
- (j) Have authority to make general rules and regulations requiring stations to keep such records of programs transmissions of energy, communications, or signals as it may seem desirable.

Section 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than 3 years. . . . Upon the expiration of any license, upon application thereof, a renewal of such license may be granted from time to time for a term not to exceed 3 years in the case of broadcasting licensees. . .but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

Section 309. (a) If upon examination of any application for a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said findings.

Section 315. If any licensee shall permit any person who is a legally qualified candidate for

any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect.

Provided, That such licensees shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Section 316. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisements of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

Section 317. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

Section 325. (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

Section 326. Nothing in this act shall be understood or construed to give the Commission the power of censorship over 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. No person within the jurisdiction of the United States shall utter any obscene,

indecent, or profane language by means of radio communication.¹³⁸

Criticism.--Representative H. McGugin of Kansas was concerned that, since radio was subject to necessary governmental licensing and controls, freedom of speech in the medium, as guaranteed in the Constitution, might be denied. Just one week before the House passed the Communications Act he expressed his views as follows:

The broadcasting systems which are looking to the Radio Commission for courtesies are going to be found upon the side of the administration in power. So, after all, the real protection of the people yet rests in the freedom of the press rather than in the freedom of speech since the coming of radio.¹³⁹

Representative McGugin continued:

With the coming of radio it is not enough to have freedom of speech which includes the right to stand on a street corner and speak one's views. With radio there must be reasonable freedom of speech over the air, otherwise the benefits of freedom of speech have been taken away from the people.¹⁴⁰

Representative McFadden of Pennsylvania was perturbed at the haste with which S. 3285 was drafted and offered. He expressed these critical views.

I say to the House that which I believe: That this bill was written or at least the controlling and important part of it, in conformity with the wishes of the people who control this industry, and propose to control it as a monopoly, to control public sentiment in the United States, to control it now immediately for political purposes as part of the

¹³⁸Ibid., 10977, (See: Infra, 78)

¹³⁹78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10327.

¹⁴⁰Ibid.

administration in control and eventually use it as an instrument of international control for the dissemination of information leading toward the destruction of the constitutional government in the United States. The passage of this bill is quite in harmony with regulation that is taking place in Canada, with the regulations of communications that is taking place in Great Britain.¹⁴¹

Mr. Gifford of Massachusetts asked the House why Congress had never formulated some definite policy for the administrative commission charged with carrying out the law.

There ought to be some expression of policy from Congress for these boards set up to handle radio problems. If we do not set up a policy, are they expected to take the initiative?¹⁴²

After the Communications Act of 1934

During the years that have followed the passage of the Communications Act of 1934, comparatively little consideration has been given by Congress to proposed changes in the Act relating to program controls. This section will report on amendments which have been introduced, debated, and discussed in Congress.

Legislation.--Between June, 1934 and July, 1936 two amendments to the Act were passed having some relationship to control of programming. The first was S. 63, "To amend Title V of the Communications Act of 1934 so as to prohibit certain coercive practices affecting radio broadcasting." This amendment, was designed to restrict the American Federation of Musicians' union and its president, James Caesar Petrillo, and, was

¹⁴¹⁷⁸ Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10989.

¹⁴²⁷⁸ Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10323.

signed into law, as Section 506 of the Act, on April 16, 1946.¹⁴³

The only other amendment enacted, pertinent to this study, was S. 658, an act to further amend the Communications Act of 1934. This bill known as the McFarland Amendments, was signed by the President on July 16, 1952.¹⁴⁴

James Caesar Petrillo.--The actions of James C. Petrillo, President of the American Federation of Musicians, in forcing the networks to abandon plans to broadcast the music of the National High School Orchestra from Interlochen, Michigan, as well as other coercive acts on the part of the A. F. of M., precipitated three proposals to amend the Communications Act: H.R. 5117, S. 1957, and S. 63. All of these were drafted so as to prohibit any further such interference.¹⁴⁵

Senator A. H. Vandenberg of Michigan submitted an amendment, S. 1957, to the Communications Act "to prohibit interference with the broadcasting of noncommercial cultural, educational programs." The Senator pointed out that, "The chief and important objective [of the bill] is to release music of American school children from the domination of James Caesar Petrillo."¹⁴⁶ The Senate bill, S. 1957, which proposed adding a new section, Section 330, to the Communications Act of 1934, was

¹⁴³⁹² Congressional Record, 79th Congress, 2nd Session, April 16, 1946, 3829.

¹⁴⁴⁹⁸ Congressional Record, 82nd Congress, 2nd Session, July 7, 1952, 9733.

¹⁴⁵⁹² Congressional Record, 79th Congress, 2nd Session, February 21, 1946, 1542.

¹⁴⁶⁹⁰ Congressional Record, 78th Congress, 2nd Session, May 29, 1944, 5074.

passed by the Senate.¹⁴⁷

In the House of Representatives a similar proposal took the form of H.R. 5117. Representative C. J. Brown of Ohio, made several comments in defense of the bill drafted by Representative C. F. Lea of California, about Congressional jurisdiction in matters of program control.

The Congress of the United States licenses every broadcasting station. We control the air, we grant monopolies to those who operate these broadcasting stations; and we set forth in this bill the definition of practices in the broadcasting industry which shall be, and are, declared illegal.¹⁴⁸

Speaking in the same vein Representative Brown stated:

I say that the time has come for us to stand up and decide for ourselves whether the air of America that we control, if you please - the use of which we dispense as a Congress, because we do control the use of it - is to be free for all Americans.¹⁴⁹

Neither of these bills, S. 1973 and H.R. 5117, was passed by the Lower House. Another proposed amendment, S. 63, which was essentially identical to S. 1973, was passed by the Senate two years later and then, in a radically amended form, by the House of Representatives.¹⁵⁰ The amended S. 63, agreed to in conference and passed by the Senate, was a much broader piece of legislation. As outlined by Senator E. C. Johnson of Colorado, S. 63 made it unlawful to coerce, compel, or constrain a licensee to employ any person or persons in excess of those needed, to

¹⁴⁷⁹⁰ Congressional Record, 2nd Session, 78th Congress, December 14, 1944, 9431.

¹⁴⁸⁹² Congressional Record, 79th Congress, 2nd Session, February 21, 1946, 1547.

¹⁴⁹Ibid., 1548.

¹⁵⁰Ibid., 1566.

pay for anyone's services in lieu of giving employment, to pay more than once for any services rendered, to pay for services not performed, to refrain from broadcasting noncommercial or cultural educational programs, or to refrain from broadcasting any program originating outside of the United States. The bill also contained provisions prohibiting any restriction on broadcasting recordings.¹⁵¹

The McFarland Amendments.--Senator Ernest W. McFarland of Arizona first submitted his proposed bill of amendments to the Communications Act in May, 1949 in the form of the Senate bill, S. 1973. At that time he said:

It should be noted that the bill I have introduced today is limited strictly to organizational, administrative, and appellate provisions. I have included no policy sections simply because the most urgent and pressing problem of the Commission today deals with its internal organization. If legislation on substantive matters of policy are found necessary, it is my belief that they must be given careful committee consideration, either in this bill or possibly in other legislation.¹⁵²

The McFarland Amendments, S. 658, did touch on two areas of program control: the renewal of licenses, and the use of broadcasting stations by political candidates.

The Renewal of Broadcast Licenses.--Senator McFarland's original bill of proposed amendments, S. 1973, made the following changes in Section 307 of the Communications Act:

¹⁵¹₉₂ Congressional Record, 79th Congress, 2nd Session, April 6, 1946, 3241.

¹⁵²₉₅ Congressional Record, 81st Congress, 1st Session, May 31, 1949, 7006.

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Section 307. (d) Upon the expiration of any license, . . . a renewal of such license may be granted from time to time. . . if the Commission finds that public interest, convenience, and necessity would be served thereby.¹⁵³

The report of the Committee on Interstate and Foreign Commerce on S. 1793 explained that the proposed change would delete the phrase in the Act that instructed the Federal Communications Commission to grant license renewal "by the same considerations and practice which affects the granting of original applications." The report went on to say that the Committee did not believe there was need for the same searching investigation in the case of a renewal application as there was in the case of an original application for a broadcast license. However, the amendment was not to be considered as having impaired "the Commission's right and duty to consider, in the case of a station. . . applying for a renewal, the over-all performance of that station against the broad standard of public interest, convenience and necessity."¹⁵⁴

Cease and Desist Orders.--The Senate bill, S. 1973, also contained an amendment to the Act, Section 312 (b), which would authorize the FCC to issue cease and desist orders. The change would have provided the Commission with the power to "institute proceedings by serving upon the licensee an order to show why it should not cease and desist from such action." "Such Action" was defined as the failure to operate as put forth in the license application, failure to observe the Commission's rules and regulations, or failure to observe all of the restrictions of

¹⁵³₉₅ Congressional Record, 81st Congress, 1st Session, August 9, 1949, 11049.

¹⁵⁴Ibid., 11092

the Act.¹⁵⁵

The Committee's report on S. 1973 discussed the reason for this suggested change in the Communications Act.

The Commission is reluctant to revoke a license for a minor offense, and therefore minor offenses may be committed almost with impunity; and there exists no clear distinction between types of offenses. It is felt that some method short of revocations should be provided for minor or less serious violations.¹⁵⁶

When S. 658 was introduced it still provided that the Commission be authorized to issue cease and desist orders. This provision was kept intact by the conferees and became law when the bill was signed by the President on July 16, 1952.¹⁵⁷

The House of Representatives amended S. 658 so as to give the Commission, in addition to the authority to issue cease and desist orders, the power to "suspend licenses for periods not to exceed 90 days, and to levy fines up to \$500 per day for violations of the Communications Act, Commission regulations, or treaties."¹⁵⁸ This power to suspend licenses was deleted by the conferees.¹⁵⁹ In a statement, accompanying the Conference Report, the House's conferees noted that

¹⁵⁵₉₅ Congressional Record, 81st Congress, 1st Session, May 31, 1949, 7008.

¹⁵⁶₉₅ Congressional Record, 81st Congress, 1st Session, August 9, 1949, 11094.

¹⁵⁷₉₈ Congressional Record, 82nd Congress, 2nd Session, July 2, 1952, 9024.

¹⁵⁸₉₈ Congressional Record, 82nd Congress, 2nd Session, June 17, 1952, 7397.

¹⁵⁹₉₈ Congressional Record, 82nd Congress, 2nd Congress, July 2n 1952, 9024.

this authority had been eliminated because the Commission could call on the Courts to employ their power to punish for contempt if a cease and desist order were not complied with by a licensee. Therefore, read the report, the Commission still had a measure less severe than revocation to resort to in enforcing its cease and desist orders.¹⁶⁰

Section 315.--As reported out of Conference Committee, the Senate bill, S. 658, did not contain any changes in Section 315. However, two amendments were offered on the House floor regarding the liability of radio stations for libelous statements occurring in political broadcasts. Under the provisions of Section 315, these statements were protected from censorship by the licensee, yet many felt he was still liable for a candidate's remarks.

Representative Joseph P. O'Hara of Minnesota offered an amendment to S. 658 which would have given the licensee the right to delete from political candidate's speech any libelous material and would have made such licensee responsible for any that occurred during a broadcast.

Representative Walt Horan of Washington submitted an amendment which proposed maintaining the prohibition against the licensee's censoring of political speeches and to absolve the station, by statute, from any liability for what a candidate said.¹⁶¹

The debate over these two amendments revealed some Congressional thinking regarding the freedom of speech in broadcasting and the similarity between broadcasting and the press.

¹⁶⁰Ibid., 9028.

¹⁶¹98 Congressional Record, 82nd Congress, 2nd Session, June 17, 1952, 7412.

Mr. O'Hara of Minnesota explained his position on allowing licensees to censor candidates' speeches when he stated the opinion that a station should have the right "of censorship as to defamatory, or obscene matter in the script; it shall have under the provision of the O'Hara amendment the right to delete it." He went on to differentiate the street corner orator's right to freedom of speech from the political broadcaster's right.

After all, in the old days, when a man stood down on the street corner and made a political speech, and he said something that was defamatory, that was slanderous, it was only to a small group that the statement was made. Do not get the idea that there is just the radio station involved and a political candidate or political candidates. The vicious individual who turns loose in a radio broadcast, under the guise of political expediency, can ruin the family of a candidate or can ruin the lives and the families and the reputation of perfectly innocent people.¹⁶²

Representative O'Hara continued the argument for his proposed amendment by reminding the House that on three different occasions the Congress had refused to exempt radio stations from liability in the case of political broadcasts. He felt that this was only right as "this great, tremendous instrumentality that enters 50,000,000 to 75,000,000 American homes. . .is in the business of selling radio time and political time [and]. . .should also take some responsibility. . .so far as civic liability is concerned."¹⁶³

Representative Oren Harris of Arkansas, the Chairman of the House

¹⁶²Ibid., 7401

¹⁶³Ibid.

Committee on Interstate and Foreign Commerce, differed with this point of view "because the questions of censorship of political broadcasts is something that the station operator should not have any control over any-more so than it should with any other type of censorship."¹⁶⁴

Mr. O'Hara also expressed the belief that broadcast licensees should be responsible for libel the same as newspapers.

Mr. Hand. [of New Jersey] Is it not true that under the language of the gentleman's amendment. . .[it] absolutely prohibits censorship as such, but merely gives the broadcaster the right to delete not the whole speech but that part of it that may be defamatory or obscene?

Mr. O'Hara. The gentleman is completely right.

Mr. Hand. Is not that exactly analogous with the situation in the public press where the editor of a newspaper in perfect good faith might point a letter to the editor, and if that letter happens to be libelous, without the editor's knowledge, the editor of that paper and his newspaper are liable in civil damages?

Mr. O'Hara. Exactly.

Mr. Hand. Can the gentleman think of any reason why the great radio means of transmission of thought should be in a different category from the press and have greater advantages than the press?

Mr. O'Hara. I cannot see where there should be any difference in it at all.¹⁶⁵

In opposition to this point of view, Representative G. Meader of Michigan commented:

A newspaper must always make a record before it is of any use to anybody. It cannot be read until it is printed, and there is an opportunity to edit it. But, where you have these extemporaneous

¹⁶⁴Ibid., 7414.

¹⁶⁵Ibid., 7412.

programs, some of them being the most interesting programs on the radio and television as compared to the canned programs, it seems to me you are placing a terrific liability on the publisher of a news broadcast, and not giving him exactly the same position as the editor of a newspaper who will see it in writing first before he publishes it.¹⁶⁶

Representative Jim Vorys of Ohio also differed with Mr. O'Hara.

A newspaper does not have two rival candidates walking into the composing room and composing whatever they please that is going to be printed in the paper. That is what a radio station does when it permits a panel discussion or debate on its station, with questions and answers.¹⁶⁷

Representative Horan of Washington, speaking in opposition to Representative O'Hara's proposed amendment, also touched upon the problems in editing that are unique to the medium of broadcasting.

In the case of radio broadcasting and particularly panels - and we have plenty of them - once a word goes out on the ether you can not pull it back, and you can talk about monitoring and hanging on to the lever as much as you want, but there it is. The words will go out despite this.¹⁶⁸

Mr. J. W. McCormack, the Representative from Massachusetts, was also of the opinion that broadcasting stations, in the case of political speeches, were "innocent by-standers" and not liable for the comments of a speaker who is really, once on the air, impossible to control.¹⁶⁹

The O'Hara proposal to amend S. 658 was rejected by the House.¹⁷⁰

¹⁶⁶Ibid., 7413.

¹⁶⁷Ibid., 7416.

¹⁶⁸Ibid., 7414.

¹⁶⁹Ibid., 7403.

¹⁷⁰Ibid., 7416.

After Representative Horan submitted his amendment to S. 658, relieving the station of liability for political speeches, Representative O'Hara spoke in opposition as follows:

I think it is completely wrong to permit a tremendous instrumentality to act in the manner that a radio station acts in broadcasting to thousands and millions of homes and then to say that the station does not have to exercise judgment as to the type of broadcasts that are made. Just because it is a political broadcast, that it should be exempted from any liability is so completely and inherently wrong that I cannot see how the Congress of the United States would vote to whitewash such an operation.¹⁷¹

Despite the Minnesota Representative's opposition, the House passed the Horan amendment to S. 658.¹⁷²

Several years later, in 1955, Representative Harris of Arkansas, while introducing H.R. 6810, to be discussed below, commented that he had been informed the question of a licensee's liability for a candidate's speech, the focal point of the debate over amending S. 658, was being solved successfully through State legislation.¹⁷³

This amendment, as passed by the House, contained two other provisions that would have altered the original Communications Act. Section 315 (a) of the Horan amendment would have extended the right of equal broadcasting facilities, to representatives of political candidates as well as the candidates themselves.¹⁷⁴ In addition, the proposed Section 315 (d) of the amendment Act would have read:

¹⁷¹Ibid.

¹⁷²Ibid.

¹⁷³¹⁰¹ Congressional Record, 84th Congress, 1st Session, June 14, 1955, 8214.

¹⁷⁴Ibid., 7415.

The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the minimum charges made for comparable use of such station for other purposes.¹⁷⁵

When S. 658 came from the Conference Committee, two-thirds of the Horan amendment had been stricken from the bill. The House's conferees reported that the proposed changes in Section 315, relieving licensees of liability for political speeches and extending the right to equal facilities to the spokesmen of candidates, were deleted because it was felt that these provisions had not had sufficient study by the Committee on Interstate and Foreign Commerce in both legislative bodies.¹⁷⁶

That part of the Horan amendment which prohibited inflated rates for political speeches was passed into law with one minor alteration, the word "minimum" was dropped. The final draft read:

Section 315. (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.¹⁷⁷

Control of License Renewal and Political Use Other Than S. 658.--

The only other proposed amendment which would have affected the renewal of licenses during these years, and commented upon in the Congress, was submitted by Representative K. T. Clardy of Michigan. He introduced his bill, H.R. 3977, which was referred to committee, as one which would amend the Communications Act so as "to provide that station licenses

¹⁷⁵Ibid.

¹⁷⁶98 Congressional Record, 82nd Congress, 2nd Session, July 2, 1952, 9028.

¹⁷⁷98 Congressional Record, 82nd Congress, 2nd Session, July 2, 1952, 9025.

shall be issued for an indefinite term, and shall be revoked only by the United States District Court for the District of Columbia."¹⁷⁸ This bill was never reported out of Committee.

In 1950 Representative C. C. Sadowski of Michigan introduced a bill, H.R. 6949, which, in addition to altering some of the FCC's administrative duties, would have amended Section 315 of the Communications Act in several ways. The bill proposed to "render radio stations immune from criminal or civil actions for statements made in the course of political broadcasts." It also proposed to extend equal facilities to a candidate, or his supporters, if a licensee made his station available to a supporter of another qualified candidate for the same office. Finally, in the case where "a licensee permits use of a broadcasting station in support of or in opposition to a public question to be voted upon in any referendum, initiative, recall, or any other form of public election," the bill provided that equal opportunities must be provided for the opposite view.¹⁷⁹ This bill also was never voted out of Committee.

Representative Harris of Arkansas introduced a bill, H.R. 6810, in 1955 which would have amended Section 315 of the Communications Act so as to give stations or networks an opportunity to schedule the candidates of the major political parties without being obligated to insure equal facilities to every candidate for the same office. The proposed legislation, suggested by Dr. Frank Stanton, President of the Columbia

¹⁷⁸⁹⁹ Congressional Record, 83rd Congress, 1st Session, March 16, 1953, 1997.

¹⁷⁹⁹⁶ Congressional Record, 81st Congress, 2nd Session, January 24, 1950, 840.

Broadcasting System, read:

Section 315. (a) Appearances by a legally qualified candidate on any news, news interview, news documentary, panel discussion, debate or similar type program where the format and production of the program and the participants therein are determined by the broadcasting station, or the network in the case of a network program, shall not be deemed to be use of a broadcasting station within the meaning of this subsection.¹⁸⁰

Representative Harris introduced into the Record an editorial from the Washington Post and Times Herald commenting on the proposed amendment. The editorial stated that the Communications Act of 1934 should be examined for the purpose of "bringing television and radio regulations up to date with political realities." It warned that H.R. 6810, as it stood, "would raise the possibility of favoritism for one candidate through repeated appearances. . . . The aim ought to be to preserve the equal-time principle for serious contenders while affording greater flexibility in format."¹⁸¹ The editorial further suggested that the Communications Act of 1934 might be amended to deal realistically with the country's two party system while still providing an opportunity for minority parties to be heard.

The public interest in equal free time for parties with a national following. . . [might] be met without placing the vegetarians or prohibitionists on a par with the Democrats and the Republicans.¹⁸²

Local and Multiple Ownership.--Senator Johnson of Colorado introduced a bill, S. 2231, in 1948 to limit the power of radio broadcasting

¹⁸⁰¹⁰¹ Congressional Record, 84th Congress, 1st Session, June 14, 1955, 8214.

¹⁸¹Ibid.

¹⁸²Ibid.

stations. In a supporting memorandum he warned:

Whether or not a half-dozen 500- or 750- kilowatt stations serve the radio listeners of America is more than an engineering problem. To give this great power of mass communications to a few persons is to give those same persons the power to influence greatly if not to formulate public sentiment.¹⁸³

He further declared:

So far as is possible, radio should be returned to local control and sponsorship; the radio-station owner who makes his living in a community will tend to do a better job in that community than the absentee owner operating thousands of miles away; first-hand knowledge of local or State problems will result in vastly improved radio service to that locality and State.¹⁸⁴

The Senator continued:

It must be clear that the greater the number of communities any individual station seeks to serve, the poorer the service must become to all of the communities. Not only do the outlying communities receive less adequate service, but inevitably the community in which the station is actually located receives impaired service because of the station's desire to give service to a community far out on the periphery of its useful-coverage area.¹⁸⁵

In referring to a Senate resolution, passed in 1938, asking that the FCC limit the power of broadcasting stations to 50,000 watts, Senator Johnson further buttressed his arguments in favor of the proposed amendment.

Technologically this is so simply because that much power gives a station coverage over its maximum useful service area. This is premised on the idea that radio-station service to a community or area should be built around a

¹⁸³⁹⁴ Congressional Record, 80th Congress, 2nd Session, February 26, 1948, 1727.

¹⁸⁴Ibid., 1728

¹⁸⁵Ibid.

policy of giving the greatest public service to the people who can hear the signal. . . . Obviously a station located in metropolitan New York. . . cannot at one and the same time serve its own local area and [other parts of the country]. Even if it had the time, it is unlikely that its operators. . . are enough interested in the views that may be espoused by the Governors or Representatives in Congress of [those other] States.¹⁸⁶

This proposal, which never emerged from committee, drew both opposition and support from two Tennessee legislators. Representative Albert Gore of Tennessee, speaking on the floor of the House, opposed it as follows:

I hope America's rural population will awaken to the danger of being denied adequate radio service.

.
I know from first-hand experience that much of rural America receives good and dependable radio service only through the high-powered, clear-channel stations.

.
The inevitable result of such action [the passage of S. 2231] would be to rob the millions of rural listeners of satisfactory and dependable radio reception.¹⁸⁷

In his opposition to S. 2231, Representative Gore suggested that the matter should be left to the administrative discretion of the FCC.

By S. 2231 it is proposed that Congress act upon a highly technical and complicated question - a question which has been under consideration by the Federal Communications Commission for more than 3 years. What is the purpose of the Federal Communications Commission unless it is to deal with such problems?¹⁸⁸

¹⁸⁶Ibid., 1727.

¹⁸⁷94 Congressional Record, 80th Congress, 2nd Session, April 14, 1948, A 2277.

¹⁸⁸Ibid.

Taking the point of view that legislation such as S. 2231 would prevent a monopoly in the broadcasting industry Senator Estes Kefauver of Tennessee spoke in favor of it.

The dispersal of thousands of small stations all over the country is strong protection against the possibility of radio and its tremendous power of influence ever falling into the hands of a few individuals who might conceivably use it for selfish ends against the best interests of the American people.¹⁸⁹

Network programming, and its influence on local stations, was commented upon by Senator Bricker of Ohio in 1934 as he introduced the Senate bill, S. 3456, to authorize the Federal Communications Commission to establish rules and regulations regarding networks.

Since the original Communications Act of 1934 was enacted by the Congress, networks have grown to dominate the broadcast field. The ability of an individual station to obtain network programming too often determines whether that station lives or dies.¹⁹⁰

Advertising.--There have been two proposed amendments to the Communications Act regarding the regulation of broadcasting's advertising that have been discussed on the floor of Congress during the 22 years covered in this section. One of these would have prohibited the broadcasting of liquor advertising and the other would have had the FCC regulate the proportion of program time to be devoted to advertising.

Senator Johnson of Colorado, in 1939, introduced a bill, S. 517, to prohibit the broadcasting of liquor advertising. In supporting the

¹⁸⁹94 Congressional Record, 80th Congress, 2nd Session, May 5, 1948, A 2788.

¹⁹⁰100 Congressional Record, 83rd Congress, 2nd Session, May 5, 1934, 6505.

proposal he made several comments regarding the jurisdiction of Congress and the Commission over programming. In denying the Commission any authority over programming he referred to such matters as the control of international broadcasting as being "clearly the business of Congress and Congress alone."¹⁹¹ Concerning Congress he declared:

The courts have spoken on the subject prohibition of the broadcasting of information concerning lotteries, so that now no informed person in all the land contends that Congress has not the right as well as the duty in the public interest to enact necessary prohibitions.¹⁹²

He went on to state the view that the Commission should not use its licensing authority to control a station's program content.

I am convinced that Congress expected the Communications Commission to use its licensing authority to control the physical facilities of broadcasting rather than the programs themselves. There are many physical, scientific, and technical problems which should be decided in the public interest by this Commission.¹⁹³

Senator Chan Gurney of South Dakota believed that the issue of liquor advertising should be handled by means other than new legislation because Congress had "reposed sufficient powers in the Federal Alcohol Administration, Federal Trade Commission, and the Federal Communications Commission to regulate advertising of liquor."¹⁹⁴

Senator Johnson, in commenting on this point of view, took the opportunity to voice his belief in the need for a law formulated by legislators rather than by administrators.

¹⁹¹⁸⁴ Congressional Record, 76th Congress, 1st Session, August 3, 1939, 10921.

¹⁹² Ibid., 10919.

¹⁹³ Ibid., 10921.

¹⁹⁴ Ibid.

In other words, the able Senator [Senator Gurney] wants government to be by edict and not by law enacted by the representatives of the people. I violently oppose his position as not being democratic and not being in the good interest of good government. Congress should determine and set forth policies by law wherever and whenever possible and not attempt to act indirectly through bureaucratic decree.¹⁹⁵

The bill, S. 517 died in the Interstate and Foreign Commerce Committee.

In 1956 Representative J. W. Heselton of Massachusetts submitted a bill, H.R. 5741, which proposed that the FCC regulate the proportion of broadcasting time to be devoted to advertising. His bill would have added Section 330 to Title III of the Communications Act of 1934 and would have read:

Section 330. The Commission shall prescribe appropriate regulations, applicable to licensees, program sponsors, and others, to insure that, of the total time available for any radio or television program, the proportion of such time which is devoted to advertising shall not be excessive.¹⁹⁶

The FCC, in a written statement, denied any need for H.R. 5741 because it felt that "fixed rules by a Government agency" would not solve the problem of advertising excesses and that its authority to renew a license was a sufficient control over any possible excesses. After entering this statement in the Record, Representative Heselton went on to point out that much of the adverse criticism directed towards broadcasting "constitute[s] conclusive evidence that the Federal Communications Commission has been confronted all too long with a responsibility

¹⁹⁵Ibid.

¹⁹⁶¹⁰² Congressional Record, 84th Congress, 2nd Session, January 19, 1956, 927.

of its own, which it failed utterly to meet."¹⁹⁷

Mr. Heselton, in evaluating the Commission's effectiveness, said:

I have been convinced that the problem [advertising excesses] has not been solved through the 'cooperation of the industry through self-regulation and self-restraint' on which the Commission relied so heavily. Rather, the abuses have increased to the point of stupidity.¹⁹⁸

After entering in the Record a newspaper review critical of television network advertising, the Representative from Massachusetts said:

Those responsible for this [violation of good taste in advertising excesses and in programming] seem to be completely unconcerned about the fact that they use the airwaves only by sufferance and that the public interest should be the major responsibility of the Federal Communications Commission.¹⁹⁹

Additional Comment.--The discussion of various proposed amendments to the Communications Act of 1934 have resulted in other significant statements by Congressmen relating to program matter.

Representative Harris of Arkansas, Chairman of the House Committee on Interstate and Foreign Commerce, in presenting S. 658, the McFarland Amendments,²⁰⁰ to the House, compared the changes in the Act with the changes in broadcasting that 18 years had wrought.

There have been very few minor changes in the Communications Act since its passage in the Congress in 1934. In the meantime, it is well recognized that tremendous changes have taken place in the broadcast media. The number of licenses has skyrocketed. New applications of the electronic arts have made possible the

¹⁹⁷Ibid., 928

¹⁹⁸Ibid., 927.

¹⁹⁹Ibid., 926.

²⁰⁰Supra, 60.

introduction of completely new techniques of presenting information and entertainment to the public at large.²⁰¹

In commenting on the same bill, Senator F. Case of South Dakota gave his overview of the 18 years in describing the growth of the Commission's regulation of "specific programs, rather than. . .over-all program content."

Over a period of years, the Commission has moved from looking over a radio station's over-all program content to specific programs to which it objects. It has been unwilling to cancel the license or fail to renew the license of a station, for example, that is engaging in give-away programs and broadcasting horse-racing information, but it has proceeded to make rulings as to whether such programs are in the public interest, and, at the same time, it renews the station's license. Hence a body of law seems to have been growing up with reference to specific programs, rather than the over-all program content of a given station. If this practice should continue over a period of years, the Commission will have specifically approved or disapproved various specific types of programs, notwithstanding the provision of the act, that '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.'²⁰²

In terms of specific programs, Representative A. P. Morano of Connecticut, during the debate regarding S. 658, inquired if the proposed bill contained any provisions to protect citizens from "certain disk-jockeys who operate after midnight and allegedly libel persons." Representative Harris answered that there were no such provisions.²⁰³

²⁰¹⁹⁸ Congressional Record, 82nd Congress, 2nd Session, June 17, 1952, 7392.

²⁰²⁹⁷ Congressional Record, 82nd Congress, 1st Session, February 5, 1951, 960.

²⁰³⁹⁸ Congressional Record, 82nd Congress, 2nd Session, June 17, 1952, 7396.

On August 23, 1935 Representative F. D. Scott of Michigan introduced three bills, H.R. 9229, 9230, and 9231, to amend the Communications Act of 1934. In a statement, made later, Representative Scott explained that these bills were designed to:

Deprive the Communications Commission of censorship powers and relieve radio stations from liability for remarks made in any broadcasts on public, social, political, or economic issues; would compel radio stations to set aside regular periods for uncensored discussion of social problems, with an equal opportunity for both sides of a controversial issue to expound their points of view; and would compel all radio stations to keep accurate records of rejected applications for time and the reasons therefore.²⁰⁴

In 1948 Sections 316 and 326 of the Communications Act were recodified in order to provide criminal punishments for violators.

Effective September 1, 1948, section 316 of the Communications Act, prohibiting the broadcast of any advertisement of, or information concerning any lottery, gift enterprise or similar scheme, was recodified without substantial change, as part of a general recodification of the original law as section 1304 of the Criminal Code (18 U. S. C. sec. 1.304) and section 316 of the Communications Act was repealed.²⁰⁵

Only the last sentence of Section 326 was repealed and relocated.

Section 326 [of the Communications Act] was recodified in the United States Criminal Code as section 1464, effective September 1, 1948. It states: 'Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than \$1,000 or imprisoned not more than 2 years, or both.'²⁰⁶

Finally, it should be noted that S. 658 also amended the Criminal

²⁰⁴80 Congressional Record, 74th Congress, 2nd Session, January 24, 1936, 973.

²⁰⁵15 Annual Report of the Federal Communications Commission for the Year Ending June 30, 1949 (Washington: U.S. Government Printing Office, 1950), 33.

²⁰⁶Ibid., 34.

Code so as to provide punishments for anyone utilizing a broadcasting station to transmit fraudulent information.²⁰⁷

²⁰⁷97 Congressional Record, 82nd Congress, 1st Session, February 5, 1951, 965.

CHAPTER II

JUDICIAL REVIEW OF THE CONTROL OF BROADCAST PROGRAMMING

This chapter is concerned with what the Federal Courts have had to say regarding governmental regulation of broadcasting programs in connection with judicial review of decisions of the Federal Radio Commission and the Federal Communications Commission.

The cases discussed in this chapter were selected through a reading of Pike and Fischer's Radio Regulation, Volume 2, which contains a comprehensive digest of all the cases involving Court appeals from decisions of the FRC and the FCC. A survey of the Annual Reports of the two Commissions also contributed to the list of cases reported here.

The material in this chapter is so organized that it moves from cases testing the constitutionality of the standard of "public convenience, interest, or necessity," as applied to broadcast program service, to cases testing the application of this standard to specific kinds of programs and program policies.

Under the provisions of the Communications Act of 1934 the Courts must respect the Federal Communications Commission as an expert body. Their reviewing authority is limited to matters of law and they cannot disturb findings of fact unless they are arbitrary and capricious.¹

¹Federal Radio Commission v. General Electric Company, 281, U. S. 464 (1930).

Federal Radio Commission v. Nelson Brothers Bond and Mortgage

The Validity of the Standard of "Public Convenience, Interest, or Necessity."--The Courts have commented several times upon the standard of public convenience, interest or necessity that was established in the Radio Act of 1927 and continued in the Communications Act of 1934. In Federal Radio Commission v. Nelson Brothers Bond and Mortgage Company, the Supreme Court held that the standard is a valid one not being so indefinite as to confer unlimited power.

In this case, Station WJKS at Gary, Indiana applied for a modification of its license to operate unlimited time on the frequency 560 kc. This same frequency was being shared by two Chicago stations, WIBO, owned by the Nelson Brothers Bond and Mortgage Company, and WPCC, owned by the North Shore Church. The FRC examiner recommended that the application be denied. The Commission, however, overruled him, approved WJKS's application, and ordered WIBO and WPCC deleted.

The programming of all three stations was carefully reviewed in the Commission's decision. The Commission found that WJKS's programs were designed to meet the needs of the foreign population that made up 60 percent of the Calumet region it served. It further stated that WIBO broadcast "a large number of chain programs originating in the National Broadcasting network and are almost entirely commercial in their nature," and were being carried by other stations in the Chicago district. The Commission noted that WPCC, which operated largely on Sunday, had programs made up entirely of religious programs including sermons relating

Company, 289 U. S. 266 (1933).

"Radio Censorship and the Federal Communications Commission," Columbia Law Review, XXXIV (March, 1939), 447 - 59.

to the work and interests of a particular church, and was not used by other denominations or societies. Moreover, the Commission pointed out that other stations in Chicago devoted more time to programs of a religious nature than did WPCC.²

The Court of Appeals for the District of Columbia reversed the decision of the FRC and, in part, said:

It would not be consistent with legislative policy to equalize broadcasting facilities of States or zones by unnecessarily injuring established stations rendering valuable service to their natural service areas.³

A request by the FRC for a writ of certiorari was granted by the U. S. Supreme Court. Upon review, the decision of the lower Court was reversed and the Commission upheld. Chief Justice Charles Evans Hughes announced the Court's opinion.⁴

In the instant case the Commission was entitled to consider the advantages enjoyed by the people of Illinois under the assignments to that State, the services rendered by the respective stations, the reasonable demands of the people of Indiana, and the special requirements of radio service at Gary. The Commission's findings show that all of these matters were considered.⁵

The Supreme Court further noted that the owners of broadcasting Stations necessarily make their investments and contracts subject to the permanent regulatory powers of Congress.⁶

²FRC v. Nelson Bros. Bond & Mortg. Co., 289 U. S. (1933), 266, 269.

³7 Annual Report of the FRC, 9. (62 F. (2d) 854).

⁴FRC v. Nelson Bros. Bond & Mortg. Co., 289 U. S. (1933), 266.

⁵Ibid., 285.

⁶Ibid., 266.

In answer to the appellant's plea that the standards provided by the Communications Act were so indefinite that they afforded no protection to the individual, the Court stated:

In granting licenses 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 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.⁷

In one of the first cases to arise from a protest lodged against the actions of the Federal Radio Commission, United States v. American Bond and Mortgage Company, the District Court for the Northern District of Illinois ruled that the standard of public convenience, interest or necessity was not, within the context of the Radio Act, so vague as to constitute an unlawful delegation of legislative power.

The American Bond and Mortgage Company operated station WMBB-WOK at Homewood, Illinois on a frequency of 1190 kc and with a power of 5,000 watts. The Commission refused to renew the station's license as of September 1, 1928. This action was taken in order to effect a more equitable distribution of broadcasting facilities among the five zones of the United States⁸ and to alleviate the crowded radio spectrum around

⁷Ibid., 285.

⁸The Davis Amendment to the Radio Act of 1927, adopted on August 30, 1928, attempted to give each section of the country a fair share of the available broadcasting facilities. Its provisions divided the United States into five zones, required the FRC to allocate frequencies equally among the zones, and to then allocate equitably among the States within each zone according to population. This amendment was written into the Communications Act of 1934 as Section 307 (b). In 1936 this section was amended so that this rigid allocation of frequencies was replaced by a

Chicago. The defendant threatened to operate the radio station without a license, claiming that the Radio Act was invalid. The Attorney General requested a temporary injunction restraining the licensee from such action. The District Court for the Northern District of Illinois granted the injunction on March 1, 1929.⁹

In answer to the defendant's plea that the Radio Act of 1927 furnished "no standard for determining what will be served by public convenience, interest or necessity, and hence leaves decision to arbitrary judgement, whim, and caprice." the Court stated:

The words of the standard of public convenience or necessity must be read in connection with other portions of the act and interpreted in light of its purpose. The act requires the commission to make equality of broadcasting service between zones and to establish good service.¹⁰

In support of its decision, granting the injunction, the District Court quoted from the Supreme Court's decision in Mutual Film Company v. Industrial Commission, 236 U. S. 230, 245.

General terms get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.¹¹

more generally worded requirement, one that did not contain a formula, calling for the equitable distribution of radio service among the States and their communities by the FCC. See: Harry P. Warner, Radio and Television Law, (New York: Matthew Bender and Company, 1948), Sections 23b, 26, 93, and 95.

⁹U. S. v. American Bond & Mortg. Co., 31 F. (2d) 448, 450.

¹⁰Ibid., 457

¹¹Ibid.

The decision of the District Court for the Northern District of Illinois was affirmed by the reviewing court, the Circuit Court of Appeals, Seventh Circuit, on July 9, 1931.¹²

The Federal Radio Commission issued an order refusing to renew the license of station WCRW in Chicago. Clinton R. White, the owner, requested the District Court for the Northern District of Illinois to grant a temporary injunction staying the Commission's order. He based his request on the ground that the standard of "public interest or necessity" was insufficient protection of the citizen from being deprived of property without due process of law, as provided in the Fifth Amendment.¹³ The Court rejected this argument on October 28, 1928 and, in denying his request, said in part:

The Act of February 23, 1927, is not invalid, in whole or in part by reasons of indefiniteness of the standard prescribed by the Congress for the guidance of the commission in issuing licenses. .
 . .¹⁴

The Standard as a Yardstick for Programming.--In the following three cases the Courts expressed their views with respect to the standard of "public interest, convenience and necessity" as applied in the evaluation of an applicant's proposed or past program service.

In Chicago Federation of Labor v. Federal Radio Commission the Court of Appeals for the District of Columbia upheld the Commission's decision which had stated that there was no place for a station catering to a particular group, but rather all stations should cater to the general public.

¹²U. S. v. American Bond & Mortg. Co., 52 F. (2d) 318.

¹³4 Annual Report of the F. R. C., 49.

¹⁴White v. F. R. C., 29 F. (2d) 113.

In October, 1928 station WCFL, operated by the Chicago Federation of Labor, filed an application to modify its license so that instead of operating on the frequency 970 kc, with a power of 1,500 watts during the daylight hours, it would broadcast unlimited time on a frequency of 770 kc with a power of 25,000 watts. This frequency was a cleared channel allocated by the Commission to the fourth zone, of which Illinois was a part. Stations WBEM, Chicago, and KFAB, Lincoln, Nebraska were already sharing time on this frequency.¹⁵

After the Commission had denied its application, station WCFL filed an appeal with the Court of Appeals for the District of Columbia. It had based its application on the proposition that, being owned and operated by a labor group, its programs were of importance generally to organized labor. In fact, WCFL pleaded, this audience was large enough to warrant its having an exclusive channel. To this the Commission had answered:

It was the opinion of this commission, and it so found, that there are numerous groups of the general public that might similarly demand the exclusive use of a frequency for their benefit This classification could be carried on until more classes than frequencies would be found.¹⁶

The Commission's statement ended:

Since there is only a limited number of available frequencies for broadcasting, this commission was of the opinion, and so found, that there is no place for a station catering to any group, but that all stations should cater to the general public and serve public interest as against group or class interest.¹⁷

¹⁵Chicago Federation of Labor v. F. R. C., 41 Fed. (2d) 422.

¹⁶3 Annual Report of the F. R. C., 36.

¹⁷Ibid.

As the Court saw it, the question before it in this case was whether the public convenience, interest or necessity would best be served by granting WCFL's application, thereby deleting WBBM and KFAB, or by maintaining the status quo.¹⁸ The Court affirmed the Commission's refusal to alter WCFL's license on May 5, 1930 but it made no comment on the FRC's conclusion that there was no place for a station catering to an exclusive audience. The Court did say, however:

It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and Kfab should be deprived of broadcasting privileges when once granted to them, . . . unless clear and sound reasons of public policy demand such action.¹⁹

In Technical Radio Laboratory v. Federal Radio Commission, the Court of Appeals addressed itself to the problem of irregular schedules and their meaning in terms of the standard of public convenience, interest or necessity.²⁰

The Technical Radio Laboratory was authorized to operate station WTRL at Midland Park, New Jersey on a wave length of 206 meters and with a power of 15 watts. On January 18, 1928 the Commission designated the applicant's renewal application for a hearing. The Commission failed to reach a determination that public interest, convenience, or necessity would be served by such a renewal and the application was denied.²¹ This

¹⁸Chicago Federation of Labor v. F. R. C., 41 F. (2d) 422.

¹⁹Ibid., 423.

²⁰"Indirect Censorship of Radio Programs," Yale Law Journal, XL, (April, 1931), 967.

²¹Technical Radio Laboratory v. F. R. C., 36 F. (2d) 111, 112.

action was announced on August 24, 1928 and was to become effective on September 1, 1928. The Technical Radio Laboratory took an appeal to the Court of Appeals of the District of Columbia.²²

The following statements filed by the Commission in the Court of Appeals in connection with this case were offered to show "the policy and practice of the Commission in the exercise of its licensing power."

This Commission considers that the Technical Radio Laboratory, and all other stations operating under Government license, are trustees of public property, this property to be used for the benefit of the public; and that trust so imposed upon this applicant and assumed by it has not been fully kept in that there have been no regular hours of operation; the programs have not been of the standard to which the public is accustomed, particularly in view of the extensive use of commercial phonograph records; [and] that operations have been suspended entirely at times.²³

The Commission concluded:

Manifestly this station is one which has not justified its existence and the applicant is holding a license without regard to the rendering to the public of any real service in the field of radio broadcasting.²⁴

The president of Technical Radio Laboratory admitted at the hearing that WTRL was not operated on a regular commercial basis and that he wasn't certain of the number of hours a week it was on the air. However he did maintain, "We have operated the station regularly. We have given programs."²⁵

²²Annual Report of the F. R. C., 156.

²³Annual Report of the F. R. C., 31.

²⁴Annual Report of the F. R. C., 157.

²⁵Technical Radio Laboratory v. F. R. C., 36 F. (2d) 111, 114.

One of the owners of the station, Mr. D. W. May, a successful radio receiver manufacturer, in outlining proposed programming stated that he had "been waiting on the Commission to grant increased power and a better wave length" so that the station might have some usefulness.²⁶

Regarding the appellant's contention that station WTRL "served the public interest, convenience and necessity of Bergen County, New Jersey," the Court pointed out:

It is manifest from the record that due to the station's power and inadequate wave length, and the lack of care and attention given to it, the station has been of no actual benefit to its owners or to the community of Bergen county.²⁷

The Court, in affirming the Commission's decision on November 4, 1929, summarized the important evidence which indicated that the program service of station WTRL did not serve the public convenience, interest or necessity.

The material equipment of the station at present is meager. The parlor of the manager's home is used as a 'studio'; the broadcasting apparatus is located in adjacent shed used formerly as a barn; the antenna is a wire fastened to a pole nailed upon the shed. The station has rarely been on the air, and its programs have been almost entirely limited to phonograph reproductions. So irregular have been these efforts that the Radio Supervisor of the Department of Commerce, . . .one of whose duties it was to make a check of broadcasting stations in his district. . .was unable to discover this station on the air during the full year preceding the hearing.²⁸

²⁶Ibid.

²⁷Ibid.

²⁸Ibid., 115.

In Colonial Broadcasters v. Federal Communications Commission, the Court recognized the need for service and the ability of a community to supply talent for programs as elements of the public interest.²⁹

The Court said:

The duty imposed on the Commission is to grant the permit if public convenience, interest or necessity will be served. The Commission's established yardstick for determining public convenience includes a showing of. . .a need for service at the place in question, the ability of the community to support the station and to furnish what is called 'talent.'³⁰

The Quality of Programs and Program Policies.--On several occasions the two Commissions have measured the quality of programs and program policies by the standard of "public interest." The courts have commented on this application of the standard of "public interest," both as to general programming policy, past and proposed, and as to specific programs. This section will deal first with the judicial review of the Commission's orders and decisions that were concerned with its control over programming, past and proposed, and then with those orders and decisions that dealt with specific programs and programming offenses.

General Standards of Programming Practices.--In National Broadcasting Company v. United States, the Supreme Court affirmed the Commission's authority to regulate in the public interest the relationship of networks and individual stations regarding certain program practices. The Court held in this case that the regulatory powers of the Federal Communications Commission are not limited to engineering and technical

²⁹"Comments on Television and the Law," St. Johns Law Review, XXV (May, 1951), 245.

³⁰Colonial Broadcasters, Inc. v. Federal Communications Commission, 105 (2d) 781, 783.

aspects of broadcasting.³¹

The Federal Communications Commission began an investigation of chain broadcasting in the United States on March 18, 1938. On May 2, 1941, after exhaustive hearings, the Commission issued its "Report on Chain Broadcasting," in which it proposed to adopt network regulations.³²

Upon appeal, the Supreme Court, in a decision dated May 10, 1943, held that these regulations were "in the public interest" and were within the powers conferred upon the Commission by the Communications Act of 1934. These regulations recited by the Court were:

(1) A regulation providing that no license shall be granted to a standard broadcasting station having any contract, arrangement, or understanding with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

(2) A regulation providing that no license shall be granted to a standard broadcasting station having any contract, etc., with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization; but not prohibiting any contract between a station and a network organization pursuant to which the station is granted the first call in its primary coverage area upon the programs of the network organization.

(3) A regulation declaring that no license shall be granted to a standard broadcasting station having any contract, etc., with a network organization which provides for the affiliation of the station with the network organization for a period longer than two years.

(4) A regulation providing that no license shall be granted to a standard broadcasting station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments

³¹National Broadcasting Company, Inc. v. U.S., 319 U. S. 190.

³²Ibid., 193-195.

of the broadcast day, as described in the regulations, and that such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

(5) A regulation providing that no license shall be granted to a standard broadcasting station having any contract, etc., with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

(6) A regulation providing that no license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability in terms of coverage, power, frequency, or other related matters that competition would be substantially restrained by such licensing.

(7) A regulation providing that no license shall be granted to a standard broadcasting station having any contract, etc., with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.³³

In the "Report on Chain Broadcasting", the Commission stated that, although the networks were indeed beneficial to both the public and to affiliated licensees, it did not follow that the practices and policies of the networks and their affiliates were sound in all respects.

³³Ibid., 196.

The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.³⁴

The legality of the regulations were challenged by the networks on the grounds that the Commission misconceived the scope of the Act, particularly in regard to the application of the anti-trust laws to the radio industry, that the Commission was arbitrary and capricious, and that if the Act did authorize the Commission to promulgate these regulations it was an unconstitutional delegation of legislative powers. In addition to these attacks on the regulations the appellants charged that "the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934. . .and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment."³⁵

Justice Felix Frankfurter delivered the opinion of the Court. It quoted with approval from the Commission's "Report on Chain Broadcasting" as follows:

We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.³⁶

The Court reaffirmed the constitutionality of the standard of "public convenience, interest or necessity," noting again that it was

³⁴Ibid., 198.

³⁵Ibid., 209.

³⁶Ibid., 224.

not so vague as to be an unlawful delegation of legislative authority.³⁷

The Court also quoted from its decision in Federal Communications Commission v. Pottsville Broadcasting Company, 309 U. S. 134, 138.

The Commission was. . .not left at large in performing this duty [selecting licensees from among competing applicants.] The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgement in such a field of delegated authority permit.'³⁸

The Supreme Court's opinion, regarding the latitude of the Commission's powers, referred to the Communications Act of 1934.

Congress was acting in a field of regulation which was both new and dynamic. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'³⁹

In another reference to the Act, the Court repudiated the contention that the Commission must limit itself to regulating matters of a mere technical nature.

These provisions [Sections 303 (g), (i), and (r) of the Communications Act of 1934], individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority.⁴⁰

The opinion also stated:

The criterion governing the exercise of the Commission's licensing power is the 'public interest,

³⁷Ibid., 192.

³⁸Ibid., 216.

³⁹Ibid., 219.

⁴⁰Ibid., 217.

convenience, or necessity.'

.....
The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of the regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to the supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.⁴¹

Mr. Frankfurter elaborated further on this point:

The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.' The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. . . . The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by [sic] radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.'⁴²

The Court also commented that it felt the motives of Congress in not being more explicit in defining the boundaries of the Commission's authority were to avoid frustrating the purposes of the Communications

⁴¹Ibid., 215.

⁴²Ibid., 216.

Act by strictly prescribing the limits of the Commission's authority to regulate an industry whose principal characteristic was its rapid growth and change.

And so Congress did what experience had taught it in similar attempts to regulation, . . . the essence of that experience was to define broad areas for regulation and to establish standards for judgement adequately related in their application to the problems to be solved.⁴³

Regarding charges that the First Amendment was abridged, the Court held that the network regulations did not constitute a denial of freedom of speech.⁴⁴ The Court said:

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. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.⁴⁵

In Great Lakes Broadcasting Company et al. v. Federal Radio Commission the U. S. Court of Appeals for the Northern District of Illinois held that, in setting up a standard of program quality, the Commission did not transgress against the statutory prohibition against censorship

⁴³Ibid., 219.

⁴⁴Ibid., 192.

⁴⁵Ibid., 226.

or infringing the right of free speech.⁴⁶

This case grew out of a rather complicated situation concerning the frequency assignments granted three existing stations in the Chicago area as part of the FRC's attempt to eliminate interference. The stations involved were WENR, Chicago, owned by the Great Lakes Broadcasting Company; WCBD; Zion, about 40 miles north of Chicago, owned by Wilbur Glenn Voliva and operated in the interest of the Zion Temple, a religious denomination; and WLS, Chicago, which was owned by the Agricultural Broadcasting Company. These stations had appealed the order of the Commission which reassigned their operating frequencies and changed their hours of operation. The Court's opinion partially affirmed the Commission's order and, in part, reversed it. Therefore the case was remanded to the Commission on January 6, 1930 for further proceedings.⁴⁷

In its statement to the Court, the FRC discussed in detail its reasoning and findings. It was particularly concerned with the broadcasting of programs that appeal exclusively to a small segment of the public.

Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this.⁴⁸

After excepting advertising from this general rule, because it furnishes the economic support of the industry, the Commission's statement

⁴⁶ Pike and Fischer, RR, M-106.

⁴⁷ Great Lakes Broadcasting Company et al. v. F. R. C., 37 F. (2d) 993.

⁴⁸ Annual Report of the F. R. C., 32.

continued:

There is no room for the operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some. . . . It favors the interests and desires of a portion of the listening public at the expense of the rest. The entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. If, therefore, all of the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the commission, that the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by 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. . . . The commission does not propose to erect a rigid schedule of specifying the hours or minutes that may be devoted to one kind of a program or another. What it wishes to emphasize is the general character which it believes must be conformed to by a station in order to best serve the public.⁴⁹

The Commission concluded that programs must be broadcast on a reliable schedule during those hours when the public usually listens,⁵⁰ and that:

The emphasis in [radio broadcasting] should be on the receiving of service and the standard of public

⁴⁹3 Annual Report of the F. R. C., 34.

⁵⁰Ibid. ,

interest, convenience or necessity should be construed accordingly.⁵¹

The Court's decision in this case did not comment on these specific statements by the Commission. The Court's opinion, however, referred to "the comparatively limited public service" rendered by station WCBD and "the excellent service heretofore rendered to the public by WENR, . . . also its large expenditures for meritorious programs for public instruction and entertainment."⁵²

In another case, Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission, the U. S. Court of Appeals for the District of Columbia held that while the Commission may not control the programming of a foreign station, it may consider the character of that station's programming before permitting someone in the United States to supply it with programming.⁵³

Under Section 325 (b) of the Communications Act any person wishing to operate a studio in the United States for the purpose of supplying programs to foreign stations operating with sufficient power to be heard within the United States, must make application to the Commission for an appropriate permit.

The American Broadcasting Company was given permission to transmit its programming to station XETV, Tijuana, Mexico on October 25, 1956. This resulted in ABC's programs being received in San Diego, California. Wrather-Alvarez, who operated one of two stations in San Diego, asked

⁵¹Ibid., 33.

⁵²Great Lakes Broadcasting Company et al. v. F.R.C., 37 F. (2d) 993, 995.

⁵³2 Pike and Fischer, RR, S - 6.

the Court to reverse the Commission's decision in this matter because, among other things, it had refused to consider the character of XETV's programming. The Court concurred with the appellant's view and remanded the case to the Commission for reconsideration.⁵⁴

In its decision, dated September 26, 1957, the U. S. Court of Appeals for the District of Columbia held:

It is not suggested that the Federal Communications Commission has any authority to control the content of the programs which XETV chooses to broadcast. The question is whether the Commission may consider the character of that programming in deciding whether the public interest would be served by authorizing an American network to supply its programs to XETV. While the Commission has no power to prevent XETV from broadcasting to San Diego locally originated programs which are objectionable by American standards, it has power to refrain from issuing a permit which would give those programs a large American audience. . . . We hold. . . the Commission may not altogether exclude from consideration such serious defects of the foreign station's programming as would affect the public interest.⁵⁵

In one case covered by this study the courts were most explicit in placing restrictions on the Commission's authority to regulate programming. In Federal Communications Commission v. Sanders Brothers Radio Station the Supreme Court stated that, "The Commission is given no supervisory control of the programs, business management, or of policy."⁵⁶

On January 20, 1936 the Telegraph Herald Company, the publisher of a newspaper in Dubuque, Iowa, applied for a broadcasting permit in that city. On May 14, 1936 the Sanders Brothers Radio Station, WKBB,

⁵⁴Wrather-Alvarez Broadcasting, Inc. v. F. C. C., 15 RR, 2108.

⁵⁵Ibid., 2114.

⁵⁶F. C. C. v. Sanders Brothers Radio Station, 309 U. S. 470, 475.

operating in East Dubuque, Illinois applied for authority to move its location across the Mississippi River to Dubuque. The Sanders Brothers Radio Station asked that the Telegraph Herald application be denied for the reason, among others, that a grant thereof would cause economic injury to WKBB.

After the Commission had granted both applications, WKBB filed an appeal with the Court of Appeals for the District of Columbia. The Court reversed the Commission, ruling that it acted in an arbitrary and capricious manner by neglecting to make findings concerning the alleged economic injury.⁵⁷

On appeal from this decision, the Supreme Court, on March 25, 1940, upheld the Commission, stating:

We hold that resulting economic injury to a rival station is not, in and of itself, and apart from consideration of public convenience, interest, or necessity, an element the petitioner [The Federal Communications Commission] must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.⁵⁸

In the same opinion the Court used language specifying limits with respect to the Commission's authority over programing.

The Act does not essay 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 the financial ability to make good use of the assigned channel.

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Congress intended to leave competition in the business

⁵⁷F. C. C. v. Sanders Brothers Radio Station, Inc., 309 U. S. 470, 471.

⁵⁸Ibid., 473.

of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.⁵⁹

Proposed Programs and Program Policies.--The Courts have supported the Commission's claim that it can weigh program proposals in deciding comparative hearings. In Johnston Broadcasting Company v. Federal Communications Commission the Court of Appeals of the District of Columbia found that while the Commission cannot prohibit any type of program, it can make comparative evaluations on the basis of public interest and in so doing is not guilty of censorship.⁶⁰

The Johnston Broadcasting Company and Thomas N. Beach filed mutually exclusive applications for the same broadcasting facilities. Johnston applied for a construction permit to erect a new station and Beach filed a conflicting application for a change in frequency and an increase in power for an existing station. After a comparative hearing, the Commission decided in favor of Beach. Johnston appealed this decision. Among other things, he contended in the appellate court that the Commission had been arbitrary and capricious in comparing the program plans and staffs proposed in the two applications, and was guilty of censorship.⁶¹

The Court, in its opinion dated May 4, 1949, upheld the Commission's decision and in part, quoted therefrom with approval as follows:

Our opinion to favor the Beach application on its merits over that of the Johnston application

⁵⁹Ibid., 475.

⁶⁰2 Pike and Fischer, RR, M - 226.

⁶¹Johnston Broadcasting Company v. F. C. C., 175 F. (2d), 351.

was based on our finding that while there were no sharp distinctions between the applicants in terms of residence, broadcasting experience, or proposed participation in the operation of the facilities applied for, there was a sharp distinction in favor of the applicant Beach in matters of program proposals and planned staff operations.⁶²

The Court held that the Commission's conclusions were based upon the evidence of record and were "within the permissible bounds of the Commission's discretion." In further support of its views the Court said:

It [The Commission] found nothing in the record to indicate that Johnston had made or would make an affirmative effort to encourage broadcasts on controversial issues or topics of current interest to the community, such as education, labor, and civic enterprises. On the other hand, it found that Beach has had and proposes to have a program of positive action to encourage such broadcasts, and of complete cooperation with civic interests. The Commission concluded that Beach would provide greater opportunity for local expression than would Johnston.⁶³

The Court also affirmed the Commission in its finding that, "the proposed positions and duties of the Beach staff promise a much more effective provision for program preparation and presentation than do those of the Johnston staff."⁶⁴

The opinion of the Court rejected the appellant's plea that the Commission had exercised censorship.

It is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital

⁶²Ibid., 358.

⁶³Ibid.

⁶⁴Ibid.

element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was.⁶⁵

In Allen T. Simmons v. Federal Communications Commission the Court of Appeals held, first, that a program policy which makes no effort to tailor the programs offered by a national network to the particular needs of the community does not meet the public service responsibilities of a broadcast licensee; and, secondly, that the Commission has the authority to consider program content in passing upon applications. No censorship is involved since the Commission is requiring only that licensees exercise their own judgement in the selection of their programs.⁶⁶

Allen T. Simmons requested permission from the Commission to increase station WADC's power from 5 kw to 50 kw and to change the Akron, Ohio station's frequency from 1350 kc to 1220 kc. The Commission denied this application and granted the power increase to WGAR Broadcasting Company, which operated on a frequency of 1220 kc, at Cleveland, Ohio. Simmons appealed the case. In an opinion dated May 24, 1948 the U. S. Court of Appeals for the District of Columbia affirmed the Commission's decision.⁶⁷

⁶⁵Ibid., 359.

⁶⁶2 Pike and Fischer, RR, M - 226.

⁶⁷Allen T. Simmons v. F. C. C., 169 F. (2d) 670.

In the course of its decision the F. C. C. found that, "In the event the instant application is granted, WADC proposes to broadcast all programs, commercial and sustaining, offered by the CBS network." The Court's opinion quoted from the Commission's findings concerning WADC's plans to act, for the major part of the day, as a mere relay for the network.

[The] applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with particular needs and desires of any one service area in mind.⁶⁸

The appellate court, in affirming the Commission's position that no censorship was involved, quoted from the Supreme Court's opinion in the National Broadcasting Company case⁶⁹ which made it clear that the Commission's powers were not limited to mere supervision of technical matters.⁷⁰

Even if the National Broadcasting Company case had not foreclosed any such contention, censorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgement to the conditions that arise from time to time.⁷¹

On October 16, 1948 the Supreme Court denied a request for a writ of certiorari and refused to review the findings of the U. S. Court of

⁶⁸Ibid., 671.

⁶⁹Supra, 96.

⁷⁰Ibid., 672.

⁷¹Ibid.

Appeals for the District of Columbia in this case.⁷²

The Commission's authority to investigate the amount of sustaining time an applicant proposed, and then base its findings, in part, on the results of this investigation was sustained in Bay State Beacon, Inc. v. Federal Communications Commission.

The Commission, on January 14, 1948, denied the application of the Bay State Beacon, Inc. for a construction permit to build a radio station at Brockton, Massachusetts, which would operate on 1450 kc with a power of 250 watts. The Commission granted a permit for these facilities to a competing applicant, the Cur-Nan Company. Bay State appealed this decision.⁷³

The appellant contended that the "decision of the Commission was based upon a so-called 'quantitative analysis' of the amount of time to be devoted by itself and Cur-Nan to commercial programs, that the application of such a test was beyond the authority of the Commission, violative of the Communications Act. . .and unconstitutional."⁷⁴

With respect to these arguments, the U. S. Court of Appeals for the District of Columbia, in an opinion issued December 20, 1948, replied:

The test applied was that of 'public convenience, interest, or necessity. . .the touchstone for the exercise of the Commission's authority.' (Federal Communications Commission v. Pottsville Broadcasting Company, 1940, 309 U. S. 134, 137, 138.) In applying

⁷²Allen T. Simmons v. F. C. C., 69 S Ct 67.

⁷³Bay State Beacon, Inc. v. F. C. C., 171 F. (2d) 826.

⁷⁴Ibid., 827.

this yardstick it not only was concerned with the matter of the time devoted to commercial programs, but it found also in addition that. . .Cur-Nan. . . could more effectively realize its over-all proposed operation plans.⁷⁵

The Court also agreed with the Commission's conclusion that Cur-Nan had made the more careful and intelligent plans for determining and meeting the needs of the community.⁷⁶

The Court of Appeals denied that the Commission had acted in a manner beyond its authority by inquiring into the amount of sustaining time planned by the appellant. Regarding allegations that the Communications Act and the First Amendment had been violated, the Court said:

To argue that the Commission may not in the performance of its plain duty inquire into the amount of sustaining time a prospective licensee purports to reserve if granted a license, and to further argue that if it does, such inquiry is in excess of its authority, contravenes the First Amendment, and constitutes censorship prohibited by Section 326 of the 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.

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Certainly if a denial of a license would be violative of the First Amendment, then every unsuccessful applicant would have the right of free speech throttled and abridged. . .a palpably absurd conclusion.⁷⁷

In Plains Radio Company v. Federal Communications Commission, the Court upheld the Commission's view that program proposals could be compared and given value in a competitive hearing, but it also held that

⁷⁵Ibid.

⁷⁶Ibid.

⁷⁷Ibid., 827, 828.

this comparison must be based on evidence of record.

Plains Radio Company and the Lubbock County Broadcasting Company filed mutually exclusive applications for broadcasting facilities at Lubbock, Texas. Following a comparative hearing the Commission granted a construction permit to the Lubbock Company for a station to operate 5 kw during the day and 1 kw at night. In its appeal Plains Radio contended that the Commission was in error when it "evaluated [Lubbock's] program proposal as superior to that of appellant, although, in fact, 62½ percent of [the] proposal was impossible of accomplishment, as the Commission knew and recognized." The appellant also claimed that the Commission was in error when it "weighed against appellant the fact that it owned and operated a newspaper in Lubbock."⁷⁸

The U. S. Court of Appeals in its opinion dated May 4, 1949, held that the Commission was justified in comparing program proposals in the selection of successful applicants in competitive proceedings.

The Commission has contended in this court, and has been sustained in the contention, that in a comparative determination the relative merits of program proposals are an important, if not vital feature of measurement in the public interest.⁷⁹

The Court was critical, however, of the general language employed in the Commission's findings regarding Lubbock's proposed programs which as the Court said, "leaves us uninformed as to the facts upon which [a certain] portion of the conclusion rested."

We are not told by any findings what type of program Lubbock proposes, absent the Mutual network affiliation. Moreover, this is a comparative consideration, and the question is not whether the applicant will present a

361. ⁷⁸Plains Radio Broadcasting Company v. F. C. C., 175 F. (2d) 359,

⁷⁹Ibid., 362.

well-rounded program but whether its proposals will better serve the public interest than will those of another applicant. How can a conclusion be reached as to which proposal is better, if the nature of one of them is not known?⁸⁰

The Court agreed with the Commission's view that diversity of ownership of the mass media would result in a more balanced presentation of news and informational programs. Therefore it would be more in the public interest.⁸¹ However, the Court remanded this decision because of the FCC failing to make a complete analysis of the facts in its decision.

It seems to us that in considering the public interest in the maintenance of competition in the dissemination of news, the Commission cannot select the one fact that one applicant is the owner of the town's only newspaper and ignore the fact that the other applicant is directly related to several newspapers and radio stations in the same general section of the country (although not in this immediate community). A concentration of news dissemination by a chain of stations over an area would seem to us a factor in a comparative evaluation from the standpoint of competition in news dissemination.⁸²

The Commission decision in the assignment of a television channel, in W. S. Butterfield Theatres, Inc. v. Federal Communications Commission, was remanded by the appellate court for further proceedings because, among other things, of the Court's belief that films are an important part of television programming and, as such, demand the attention of the Commission.⁸³

The Commission, after comparative hearings for a television station at Flint, Michigan, issued a construction permit to WJR, the Goodwill Station, Inc., on May 12, 1954. After an appeal by the losing

⁸⁰Ibid.

⁸¹Ibid., 363.

⁸²Ibid.

⁸³2 Pike and Fischer, RR, S - 30.

applicants to reopen the hearings, the Commission affirmed its decision of December 6, 1954. Ten days later WJR requested permission to modify its construction permit and to change its programming from that proposed in its application. After these changes had been granted, the two losing applicants appealed to the U. S. Court of Appeals, District of Columbia Circuit, requesting that the Commission be required to reopen the record and hold additional hearings on the basis of WJR's modifications, including the changes in program plans.

The station proposed to change its network affiliation, with an increase in network programming. In addition to this, "WJR cut its film programming by one third and made various changes in its proposed local live programs, though the amount of local live programming was left substantially unaltered."⁸⁴

The Commission had not attached significance to the program alterations proposed by WJR. The Court, however, disagreed. In its decision of May 24, 1956, remanding the case for further hearings, the Court said:

The Commission erroneously disregarded the sharp curtailment of film programming upon the ground that the film programs proposed by an applicant are not 'the Commission's concern.' Film programs make up a very substantial part of the program fare of television audiences. . . . Moreover, unlike network programs, over which perhaps the licensee has relatively little control, films are the free and independent selection of the licensee and are, therefore, as much a part and a measure of his responsibility to the public and the Commission as are the live programs he produces. We pointed out in Johnston Broadcasting Company v. Federal Communications Commission (175 F. (2d) 351, 359) that 'in a comparative consideration, it is well recognized that comparative service to

⁸⁴Butterfield Theatres, Inc. v. F. C. C., 13 RR 2181.

the listening public is the vital element, and programs are the essence of that service.' Some television stations devote only an insignificant portion of their time to live programming. If the network and film programs which occupy the bulk of their broadcast time are not the 'Commission's concern,' then the Commission has little left to consider in determining the relative merit of such stations.⁸⁵

The Court noted that program proposals in comparative hearings are a very necessary part of the competing applicants' presentations. It referred to the Plains Radio case and reemphasized the point that general conclusions as to program proposals are not enough and that adequate evidence must be adduced to support the findings and conclusions of the Commission.⁸⁶

The Commission was also reversed in Democratic Printing Company v. Federal Communications Commission when it failed to compare the proposed program service of an applicant with the programming of an established station and make findings thereon.

The Court of Appeals for the District of Columbia, in a decision issued June 12, 1952, reversed the Commission's decision to issue a construction permit to Texas Star Broadcasting Company for a standard broadcasting station at Dallas, Texas. The appellant operated station KSEO at Durant, Oklahoma and would have suffered interference from the proposed station.

The court held that the Commission had erred in failing to make a comparison of the proposed program service of Texas Star with that of KSEO in the area

⁸⁵Ibid.

⁸⁶Ibid., 2182

of interference, which was of substantial size and population and where the Texas Star signal would be substituted for that of KSEO, since this comparison was a necessary factor in determining whether the grant to Texas Star was in the public interest despite the alleged interference to KSEO.⁸⁷

License Renewals.--In KFKB Broadcasting Association, Incorporated v. Federal Radio Commission, the Commission's denial of license renewal because the station had been broadcasting a "medical question-box" program was upheld by the Court as not constituting censorship. In addition, the Court sustained the Commission's view that a broadcasting station should serve a public purpose and not be used as a private or individual affair.⁸⁸

The KFKB Broadcasting Association, Inc. was licensed to operate station KFKB at Milford, Kansas on a frequency of 1050 kc with a power of 5,000 watts. The Court observed that the station's policies were dictated by Dr. John R. Brinkley, in whose name KFKB had been licensed from October, 1926 until November 26, 1929. When KFKB Broadcasting Association, Inc. applied for a renewal of license on March 30, 1930, the FRC ordered a public hearing to determine if the public interest, convenience or necessity would be served by such a renewal. On the basis of the evidence, the Commission denied the renewal application effective June 13, 1930. The station continued to operate under a stay order of the Court of Appeals of the District of Columbia until it could review the case.⁸⁹

⁸⁷18 Annual Report of the Federal Communications Commission, 21.

⁸⁸2 Pike and Fischer, RR, M - 225.

⁸⁹KFKB Broadcasting Association, Incorporated v. F. R. C., 47 F. (2d) 670.

The evidence of record, cited in the Court's opinion, showed that Dr. Brinkley had established station KFKB, the Brinkley Hospital, and the Brinkley Pharmaceutical Association and operated all three as a common enterprise. The major share of advertising revenue for KFKB came from the other two enterprises but Dr. Brinkley would broadcast three half-hour programs a day in which he prescribed medication and treatment to letter-writing patients. The majority of these prescriptions involved the purchase of a coded medication prepared by Brinkley and sold only by members of his Association. The following excerpt is from one of his broadcasts.

Sunflower State, from Dresden Kansas. Probably he has gall stones. No I don't mean that, I mean kidney stones. My advice to you is to put him on Prescription No. 80 and 50 for men, also 64. I think he will be a whole lot better. Also drink a lot of water.⁹⁰

Aside from the obvious danger to the public health that such programs created, as heretofore indicated, the Commission had a broader reason for refusing to renew this license. It objected to the operation of KFKB largely in the personal interest of Dr. 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.⁹¹

The Court clearly supported the Commission's point of view in a brief discussion of the intention of Congress regarding the public nature of broadcasting.

⁹⁰Ibid., 671

⁹¹Ibid., 670.

When Congress provided that the question of whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously there is no room in the broadcasting band for every business or school of thought.⁹²

In its 4th annual report to Congress, the FRC stated that it felt this case squarely raised the question of how far the Commission could go in controlling programs in the name of public interest.⁹³

The Court of Appeals of the District of Columbia, in its opinion affirming the Commission's decision stated:

We have held that the business of broadcasting, being a species of interstate commerce, is subject to reasonable regulation of Congress. . . . It is apparent, we think, that the business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for 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. Especially this is true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past.⁹⁴

The Court agreed with the Commission's view on the dangers of Dr. Brinkley's radio consultations as being "inimical to the public health and safety, and for that reason. . .not in the public interest."⁹⁵

⁹²Ibid., 672.

⁹³4 Annual Report of the Federal Radio Commission, 46.

⁹⁴KFKB Broadcasting Association, Inc. v. F. R. C., 47 F. (2d) 670, 672.

⁹⁵Ibid.

The appellant's plea that the Commission was exercising censorship, in violation of Section 29 of the Radio Act, was rejected by the Court.

There has been no attempt on the part of the Commission to subject any part of the appellant's broadcasting matter to scrutiny prior to its release. In considering the question of whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the Commission has merely exercised its undoubted right to take note of the appellant's past conduct, which is not censorship.⁹⁶

In another case involving an appeal from the Commission's decision denying a renewal of a station's license, Trinity Methodist Church, South v. Federal Radio Commission, the appellate court held that the FRC's action was not a denial of freedom of speech when the licensee had abused his permit by broadcasting defamatory and untrue matters.⁹⁷

Trinity Methodist Church, South was licensed to operate station KGEF at Los Angeles, California. Evidence showed that KGEF, which broadcast for 23½ hours each week, was in fact operated by the Reverend Doctor Shuler, minister of the Church. When the Church applied for a license renewal in September, 1930 "numerous citizens of Los Angeles protested," and the Commission set the application for hearing. The examiner who heard the case recommended that the license be renewed, however exceptions to this decision were filed and the Commission, after further review, denied the application. In its conclusions the Commission found that:

⁹⁶Ibid.

⁹⁷2 Pike and Fischer, RR, M-225.

The station has been used to attach a religious organization, meaning the Roman Catholic Church; that the broadcasts by Dr. Shuler were sensational rather than instructive; and that in two instances Shuler had been convicted of attempting in his radio talks to obstruct the orderly administration of public justice.⁹⁸

The Church appealed the Commission's decision, alleging that the action was unconstitutional in that it violated the guaranty of free speech; involved censorship and the taking of property without due process of law; was not based upon substantial evidence and therefore was arbitrary and capricious.⁹⁹ The Court rejected these contentions and, on November 29, 1932, sustained the Commission's decision. The Court in part said:

In the case under consideration, the evidence abundantly sustains the conclusion of the Commission that the continuance of the broadcasting of programs of appellant is not in the public interest.

.
If it is to be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civil discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the insistence of the one offended, then this great science will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise.¹⁰⁰

⁹⁸Trinity Methodist Church, South v. F. R. C., 62 F. (2d) 850.

⁹⁹Ibid., 851.

¹⁰⁰Ibid., 853.

The Court further said:

Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander - subject, of course, to be required to answer for the abuse thereof - but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.¹⁰¹

The Court noted that in determining the "public interest. . . it was its [the Commission's] duty to take notice of appellant's conduct in his previous use of the permit."¹⁰²

The Supreme Court denied a petition for a review of this decision.¹⁰³

The Commission was upheld by the Court in Sacramento Broadcasters, Inc. v. Federal Communications Commission. In this case the Commission selected one of two competing applicants for a television channel solely on the basis of comparative program performance.¹⁰⁴

Sacramento Broadcasters, Inc. and KCRA, Inc. applied for a construction permit to build a television station on channel 3 at Sacramento, California. The Commission granted the application of KCRA, Inc. and, after it had denied the petition of the Sacramento Broadcasters, Inc. for a rehearing, the Broadcasters filed an appeal.¹⁰⁵

¹⁰¹Ibid., 853.

¹⁰²Ibid., 852.

¹⁰³Trinity Methodist Church, South v. F. R. C., 288 U. S. 599.

¹⁰⁴2 Pike and Fischer, RR, C - 12.

¹⁰⁵Sacramento Broadcasters, Inc. v. F. C. C., 13 RR 2194.

The two applicants were extremely well matched in their qualifications to operate a television station. "Neither was found to be superior to the other in any of the areas of comparison except one." KCRA was found to have a slight, though definite and significant, margin of superiority over Broadcasters in terms of past broadcast performance. The Commission regarded this factor as "the most critical or determinative one in resolving the important question of likelihood of effectuation of promises or commitments."¹⁰⁶

The appellate court in its decision dated June 14, 1956, ruled that:

This case is a trying one, for Broadcasters stood so well before the Commission in comparison with KCRA. One 'spotty' place in its overall fine qualifications assumed unusual importance. But this occurred only because the case was so close. And a slight difference may be decisive when greater differences do not exist.¹⁰⁷

In sustaining the Commission's decision in Evangelical Lutheran Synod v. Federal Communications Commission, this same Court held that it could not pass on the judgement of the Commission regarding the relative public importance of the programs offered by two different stations.

KFUO, owned by the Synod and operated at St. Louis, Missouri, shared time with station KSD, St. Louis, owned by the Pulitzer Publishing Company, on a frequency of 550 kc. KFUE operating about 20 percent of the time, applied for authority to increase its hours of operation to 50 percent of the time, and to increase its power. At the same time, station KSD applied for a change in its license which would allow it to broadcast

¹⁰⁶Ibid., 2195.

¹⁰⁷Ibid., 2197.

full-time. After a comparative hearing, in which the Commission examined the program performance of each applicant, both applications were denied. While KSD was willing to abide by this decision, KFUD appealed. The Commission's findings were affirmed by the Court of Appeals in an opinion dated June 26, 1939.¹⁰⁸

After noting that both stations offered a varied fare of programming and that KFUD had not operated commercially, although it proposed to do so if its application had been granted, the Court observed:

The Commission's decision that the public interest will be served by maintaining the status quo, rather than by switching time from one station to the other, is supported by substantial evidence and is not arbitrary or capricious. The public interest does not necessarily demand that all stations become commercial, or that none be supported by religious bodies. We cannot substitute our judgement for the Commission's as to the relative public importance of the different types of programs offered by KSD and KFUD.¹⁰⁹

Consideration of an Applicant's Prior Activities.--The two following cases are not directly concerned with either proposed or actual programming. In these cases the Commission denied applications for construction permits because it believed the past record of the applicants indicated their program performance would not be in the public interest.

The Commission was upheld in Independent Broadcasting Company v. Federal Communications Commission when it refused to grant a license to a company, one of whose three stockholders had been discovered to be intemperate in his previous writings, sermons, and broadcasts and, as

¹⁰⁸5 Annual Report of the Federal Communications Commission, 99.

¹⁰⁹Evangelical Lutheran Synod v. F. C. C., 105 F. (2d) 793, 795.

the Court described him, was an "expert in vituperation and vilification."¹¹⁰

Independent Broadcasting, of Knoxville, Tennessee, filed an application for a construction permit to erect an FM station after it had been granted a permit to construct an AM facility. As a result of the hearing on the request for an FM construction permit, the Commission discovered that Independent had made several misrepresentations in its application for the AM permit. Among other things, it was shown that one of the stockholders of the company, Reverend J. Harold Smith, had been involved in certain objectionable radio programs. The hearing revealed that:

Smith had used intemperate language in his writings, sermons, and broadcasts; that he had a constant habit of attacking the honesty and sincerity of those individuals and groups who did not agree with him; that he had attempted to institute economic boycotts of persons and groups who did not cooperate with him as he demanded; and that he had constantly solicited funds on the basis of statements of urgent needs which were contrary to fact.¹¹¹

On appeal, the appellate court upheld the FCC's refusal to grant either the FM construction permit or the AM license to the Independent Broadcasting Company in a decision dated October 25, 1951. The Court held:

The evidence. . . contained information showing not only that Smith had been intemperate in his writings, sermons and broadcasts, but that he was an expert in vituperation and vilification.¹¹²

¹¹⁰Independent Broadcasting Company v. F. C. C., 193 F. (2d) 900.

¹¹¹Ibid., 901.

¹¹²Ibid., 902.

In a second case, Mansfield Journal Company v. Federal Communications Commission, the appellate court found that the Commission was justified in denying a construction permit to an applicant who attempted to suppress competition in advertising and news dissemination in connection with the operation of its newspaper business. The Court held that this refusal of a grant by the Commission did not represent any censorship or infringement of freedom of the press.¹¹³ This case, as was noted above, revolved about the past record of the applicant rather than its past performance as a broadcaster, but it did show the Commission's concern, and the Court's sanction of this concern, for the applicant's future programming policies.

The Mansfield Journal Company, the sole newspaper publisher in Mansfield, Ohio, was denied a license by the Commission because of its monopolistic practices aimed at WMAN, Mansfield, the only other medium of mass communications in the area. The Commission found that the Mansfield Journal used its position as sole newspaper in the community to coerce its advertisers into entering exclusive advertising contracts with the newspaper and to refrain from utilizing station WMAN for advertising purposes. It did this by refusing to permit certain advertisers, who also used the radio to sell their products, to secure any regular advertising contracts with the newspaper. The Commission also found that the Journal had refused to print the program logs of WMAN or anything that was favorable regarding the station.¹¹⁴

The Commission denied the Mansfield Journal Company's application

¹¹³2 Pike and Fischer, RR, M - 115

¹¹⁴Mansfield Journal Company v. F. C. C., 180 F. (2d) 28, 32.

for a broadcast license on the ground that it would be inconsistent with the public interest. Regarding the activities of the newspaper the Commission concluded:

Such actions were taken with the intent and for the purpose of suppressing competition and of securing a monopoly of mass advertising and news dissemination, and that such practices were likely to continue and be reenforced by the aquisition of a radio station.¹¹⁵

The United States Court of Appeals, District of Columbia Circuit, affirmed the Commission's denial of a license to the Mansfield Journal Company. In its opinion, issued January 23, 1950, the Court said:

Certainly in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people, it is appropriate that the Commission examine pertinent aspects of the past history of the applicant.¹¹⁶

The Court concluded:

It is certainly not in the public interest that a radio station be used to achieve monopoly.¹¹⁷

Local Programming.--The following three cases involve judicial consideration of the relationship of local ownership and program service. In the first, Pottsville Broadcasting Company v. Federal Communications Commission, the U. S. Court of Appeals for the District of Columbia felt that there was no real foundation for a ruling on the part of the Commission regarding this relationship. In the second case, Kentucky Broadcasting Company v. Federal Communications Commission, this same Court not

¹¹⁵Ibid.

¹¹⁶Ibid.

¹¹⁷Ibid., 34.

only concurred with the Commission's findings in regard to local ownership but it clearly affirmed the Commission's views about the importance of local programming, and finally, in Scripps-Howard Radio, Inc. v. Federal Communications Commission, it expressed no doubt as to the Commission's authority to weigh local ownership in a comparative hearing.

In Pottsville Broadcasting Company v. Federal Communications Commission, the Court of Appeals, without ruling on the validity of a policy of confining grants of local stations to local people, remanded the case to the Commission for further proceedings because of an improper interpretation of a State law.¹¹⁸

A Washington lawyer, Charles D. Drayton, organized a corporation, Pottsville Broadcasting Company, in the State of Maryland and applied in May, 1946 for a permit to construct a local daytime station in Pottsville, Pennsylvania. The Company sold 2625 shares of stock, with Drayton purchasing 2550 of these shares.

The examiner who heard the case recommended that the construction permit be granted, but the Commission, in April, 1937, overruled the examiner's decision. This refusal was based upon two things: a technical point involving Pennsylvania law and its effect on the financing of the station, and the fact that Drayton was a stranger to Pottsville.

The Commission found that there was need of a local station in Pottsville, sufficient financial patronage reasonable to assure its success, and sufficient local talent to support its service. But the Commission said. . . [in addition to noting a financial technicality] that the principal stockholder, Drayton, was not a resident of Pottsville, 'had no definite plans for residing in that town, or spending a percentage

¹¹⁸2 Pike and Fischer, RR, M - 120.

of his time therein,' and was not familiar with the needs of the listening audience in that region. The Commission also observed that the record established that 'Drayton's interest in the proposed station was primarily for investment purposes.'¹¹⁹

Mr. Drayton appealed to the U. S. Court of Appeals for the District of Columbia on the grounds that the Commission erred in its understanding of Pennsylvania's financial laws and "on the alleged error of the Commission in holding that an applicant for a local station must be a resident of the community intended to be served and must be personally familiar with local needs."¹²⁰

The Court quoted the Commission's position on local ownership:

It is the opinion of the Commission that those who will control the policies of proposed new 'local' broadcast stations should show themselves to be acquainted with the needs of the area proposed to be served and to be prepared to meet that need.¹²¹

In its opinion, dated May 9, 1938, the Court remanded this case to the Commission. However, it carefully pointed out that this action was being taken because of the Commission's error in interpreting Pennsylvania's law rather than any matters of local ownership. The Court said:

This particular ground of refusal local ownership has never been presented to us before, but we know from the published reports of the Commission's decision that on the question of the propriety of confining grants of a local nature to local people the Commission has not given any indication of the adoption of a fixed and definite policy. If the contrary of this were true, we should be slow to say that the establishment of such a policy would be either arbitrary or capricious. But the policy should be applied with substantial uniformity.¹²²

¹¹⁹Pottsville Broadcasting Company v. F. C. C., 98 F. (2d) 288.

¹²⁰Ibid., 289.

¹²¹Ibid.

¹²²Ibid., 290.

The Court went on to state its policy regarding the review of any of the Commission's decisions. Regarding this particular question, local ownership, it pointed out that it would affirm matters of judgement even though it differed with the opinion of the administrative body.

If the Commission should be of the opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation, and should announce a policy, with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas. We have never assumed, however, and do not intend now to assume, such supervisory control of questions of policy. We think it perfectly clear it is the intent of the statute that such matters should be left wholly in the hands of the Commission.¹²³

In Kentucky Broadcasting Corporation, Inc. v. Federal Communications Commission, the appellate court held that the Commission did not act arbitrarily or capriciously in preferring one of two mutually exclusive applicants on the basis of local residence and proposed local program service.¹²⁴

The Federal Communications Commission had issued a construction permit to the Mid-America Broadcasting Corporation on October 24, 1947 to erect a standard broadcasting station, operating on a frequency of 1080 kc with a power of 5 kw during the day and 1 kw at night, at Louisville, Kentucky. The licensee of station WINN at Louisville, the Kentucky Broadcasting Corporation, Inc., had filed a mutually exclusive application for the same facilities. WINN appealed on the grounds, among other

¹²³Ibid.

¹²⁴Pike and Fischer, RR, M - 2001.

things, that the Commission had preferred a newcomer to the radio field over an existing licensee.¹²⁵

The appellate court, supporting in detail the Commission's conclusion that Mid-America had proposed a much more thorough local program schedule, said:

The Commission expressly found that on the basis of superior local programming the application of Mid-America was to be preferred over that of Kentucky. This finding seems to have been the chief determinative factor in the case, if any one factor can safely be called the deciding one in a case such as this.¹²⁶

The Court continued:

We find ample and substantial evidence of record to support the findings that Mid-America's proposed service would better serve the community needs of Louisville and environs than would that of Kentucky. Kentucky is. . . a network affiliate. Mid-America proposed. . . new, local non-network program service. Mid-America proposed the carrying of musical programs by local organizations Kentucky's proposals contained no such local musical service. Mid-America planned to broadcast religious programs from local churches. The religious programs carried and proposed by Kentucky were solely network programs. Mid-America proposed various locally-originated programs of cultural, dramatic and forensic nature. There were no comparable proposals by Kentucky. Mid-America's proposed coverage far exceeded that of Kentucky with respect to farm programs. . . . As to local news service, Kentucky had no members of its staff assigned to gathering local news and obtained such news only from the Associated Press wire service. On the other hand, Mid-America proposed to establish a staff of three to gather and disseminate local news. . . . It is thus apparent that the Commission was completely correct in deciding in favor of Mid-America on the basis of far superior local program proposal.¹²⁷

¹²⁵Kentucky Broadcasting Corporation, Inc. v. F. C. C., 174 F. (2d) 38, 39.

¹²⁶Ibid., 40.

¹²⁷Ibid., 40, 41.

In this decision, dated April 6, 1949, the Court of Appeals also refused the appellant's contention that a subsequent network affiliation would significantly alter Mid-America's program performance as measured by its proposals. The Court commented on testimony which showed that Mid-America would consider an affiliation "only if such an arrangement would not be 'at the sacrifice of local programs'."¹²⁸

The Court also held that the Commission was not acting in an arbitrary or capricious manner by favoring Mid-America over Kentucky on the basis of local residence of the owners. Although this difference was not a controlling one in the decision, the Court pointed out:

It is, of course, generally true that persons living in a community have a better knowledge of local civic affairs, acquaintance with community activities and understanding of local needs and desires.¹²⁹

In Scripps-Howard Radio, Inc. v. Federal Communications Commission, the appellate court held that the Commission was acting within its permissible discretion by giving weight in a comparative hearing to local ownership and familiarity with local conditions.¹³⁰

Scripps-Howard Radio, Inc. and the Cleveland Broadcasting Company filed mutually exclusive applications to construct a standard broadcasting station at Cleveland, Ohio. The Commission issued the permit to the Cleveland Company from which decision Scripps-Howard appealed. The appeal was based, in part, on the claim that Scripps-Howard would "provide the better, more comprehensive and assured broadcasting service considering the interest of the listening public in receiving the best

¹²⁸Ibid., 40, 41.

¹²⁹Ibid., 42.

¹³⁰2 Pike and Fischer, RR, M - 2001.

service available on the designated frequency." The appellant also contended that the "Commission exceeded its lawful authority in granting the permit to the Cleveland Company because of its alleged. . .greater degree of local residence among its stockholders, and the diversity of ownership of media of mass communications in the Cleveland area that would result."¹³¹

In reviewing the Commission's conclusions the Court pointed out that notice was taken of Scripps-Howard's superior program proposals, however it also noted that the Commission had found that Cleveland's proposals met minimal standards.

As to program plans and proposals the Commission found appellant's to be to some extent further advanced and better prepared and also that its schedule indicated greater time allocated to certain types of public service programs. The conclusion, however, was that each applicant proposed to render a meritorious service, including public service features, and neither demonstrated that its overall program would better serve the public interest than that of the competing applicant.¹³²

The Commission's comments regarding broadcasting experience, in which it also recognized the appellant's superiority, made the point that if it were to use such "narrow considerations" in choosing between competing applicants many qualified newcomers might never enter broadcasting, thus depriving "that art in certain areas of the lifeblood of competition which is necessary to its health and improvement."¹³³

¹³¹Scripps-Howard Radio, Inc. v. F. C. C., et al, 189 F. (2d) 677, 680.

¹³²Ibid., 681.

¹³³Ibid., 682.

The Court held that the Commission acted within its permissible discretion when it preferred the Cleveland Company because of the local residence of its stockholders, officers, and directors. This local ownership resulting in a greater familiarity with Cleveland, its civic resources and program needs. The Commission had held:

In considering, on a comparative basis, competing applicants for broadcast facilities, we have constantly attached considerable weight to the factor of local residence and familiarity with local conditions to be served.¹³⁴

The Court noted the fact that the city of Cleveland had 5 AM broadcast stations, two daily newspapers, and a number of other publications as well as a third daily newspaper, The Cleveland Press, owned by the parent company of the appellant. In supporting the Commission's stand on the need for diversified ownership of mass media, the Court quoted from Associated Press v. United States, 1945, 326 U. S. 1, 20.

The Supreme Court in answering the contention that the application of the Sherman Act. . .to the Associated Press might interfere with the freedom of the press protected by the First Amendment rests on the assumption that 'the widest possible dissemination of information from diverse and antagonistic sources' is essential to the public welfare. While uttered in a different context, this thought is the key to the present question. Inherent in the thought is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation.¹³⁵

The Court concluded that the Commission was justified in attaching importance to the fact that one applicant was not associated with any

¹³⁴Ibid.

¹³⁵Ibid., 683.

existing mass media in the area.

In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dis-associated from existing media of mass communication in the area affected.¹³⁶

However, the Court was careful not to leave the impression that association with existing mass media, ipso facto, is a disqualifying factor.

This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news. . . . But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest may let its judgement be influenced favorably toward the applicant whose situation promises to promote diversity.¹³⁷

On October 8, 1951, the Supreme Court refused a writ of certiorari and the decision was affirmed.¹³⁸

Lotteries and Their Regulation.--In 1948 the Commission promulgated rules implementing the provisions of Section 1304 of the Criminal Code which prohibit the broadcasting of lotteries or information with respect thereto.

The validity of these rules were challenged in the appellate court. In the opinion of that Court the Commission could promulgate rules restricting the renewal of licenses of broadcast stations which aired lottery programs, however, insofar as the rules went beyond the

¹³⁶Ibid.

¹³⁷Ibid.

¹³⁸18 Annual Report of the Federal Communications Commission, 20.

scope of the anti-lottery statute, the rules would constitute a form of censorship and would be in violation of the First Amendment. ¹³⁹

On August 19, 1949 the Federal Communications Commission issued a report entitled, "In the Matter of Promulgation of Rules Governing Broadcast of Lottery Information." These rules, originally scheduled to go into effect on October 31, 1949, were challenged by the three major networks because of the threat they posed to certain audience participation programs. ¹⁴⁰

The rules which the Commission adopted on August 19, 1949, were:

Lotteries and Give-Away Programs -

(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.' (See 18 U. S. C., Section 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such a program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) Such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor

¹³⁹2 Pike and Fischer, RR, M - 226.

¹⁴⁰American Broadcasting Company, Inc. v. U. S., 110 F. Supp. 374, 376. Note: The appeals of the Columbia Broadcasting System and the National Broadcasting Company were answered by this same decision.

of a program broadcast on the station in question;
or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question is correctly given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.¹⁴¹

Paragraphs (2), (3), and (4) of the rules were designated to eliminate the "give-away" type of programs. The Court recognized that these programs contained the elements of prize and chance but did not agree with the Commission that the element of consideration was present. The Commission had contended that:

"Something of value is furnished by the prospective participants because they become part of an invisible audience, which in the aggregate is a thing of value to the station broadcasting the program and to the advertiser who sponsors the program. To the station, because it can sell the program and its audience to an advertiser; to the advertiser, because he can use the program as a vehicle for "commercials" pushing the sale of his merchandise."¹⁴²

To this the U. S. Court of Appeals for the Southern District of New York answered:

¹⁴¹Ibid., 382.

¹⁴²Ibid., 385.

It is not the value of the listening participants to the station or to the sponsor that is the valuable consideration contemplated by the lottery statute. . . . It is the value to the participant of what he gives that must be weighed.¹⁴³

In continuing, the Court reminded the Commission that it could not regulate beyond the scope of the law regardless of the value judgement it placed on a particular type of program.

The merits of the 'give-away' programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that 'we can see nothing of any possible value to society' in these programs, 'they are as much entitled to the protection of free speech as the best of literature' or music. Winters v. People of State of New York, 333 U. S. 507, 68 S. Ct. 665, 667]. When the radio or television audiences tire of them, they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the 'give-away' programs as lotteries, if as a matter of law they are not.¹⁴⁴

In the opinion of the Court this was an area in which it was called upon to pass judgement.

The basic question presented on these motions is the interpretation of the lottery statute. . . . and its application to the types of programs condemned by the Commission's Rules. That is a legal question, and peculiarly within the province of the courts.¹⁴⁵

The Court, in its decision dated February 5, 1953, held that the Commission was within its authority to rule that those applicants who violated the law would be denied construction permits, licenses, or license renewals. However, the Court pointed out that the rules of the Commission could not exceed statutory limitations.

¹⁴³Ibid.

¹⁴⁴Ibid., 389.

¹⁴⁵Ibid., 388.

The Rules of the Commission, in their subject matter (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amendment. . . . But in so far as some of their provisions [paragraph (b) (2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment.¹⁴⁶

The Court of Appeals issued an injunction restraining the Federal Communications Commission from enforcing subdivisions (2), (3), and (4) of paragraph (b).¹⁴⁷

The Commission unsuccessfully appealed this decision to the Supreme Court in Federal Communications Commission v. American Broadcasting Company, Inc. The lower Court was affirmed in an opinion given by Chief Justice Earl Warren on April 5, 1954.¹⁴⁸

The Supreme Court's opinion took note of the fact that in 1940 the Attorney General declined to institute criminal proceedings, under Section 316 of the Communications Act, after receiving a series of letters from the Chairman of the Commission which pointed out a number of stations broadcasting "give-away" programs. The Court also observed that Congress had refused to act upon a suggestion made in 1943 by the Chairman of the Commission that Section 316 be amended to prohibit "any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from studio audience) selected in whole or part by lot or chance."¹⁴⁹

¹⁴⁶Ibid., 389.

¹⁴⁷Ibid.

¹⁴⁸F. C. C. v. American Broadcasting Company, Inc., 347 U. S. 284, 74 S. Ct. 593 (1954).

¹⁴⁹Ibid., 600.

The Commission's contentions regarding give-away programs were quoted by Chief Justice Warren.

[These programs] are nothing but age old lotteries in a slightly new form. The new form results from the fact that the schemes here are illicit appendages to legitimate advertising. The classic lottery looked to advance cash payments by the participants as the source of profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising.¹⁵⁰

The Commission further contended that consideration could be of the nature of a commercial benefit to the promoter as well as money or something else of value to the participant.

Where a scheme of chance is successfully designed to reap profits for its promoter, there will ultimately be consideration flowing from the participants, and it is of no consequence whether such consideration is direct or indirect. In either event, the gambling spirit - the lure of obtaining something for nothing or almost nothing - is exploited for the benefit of the promoter of the scheme.¹⁵¹

The Supreme Court answered:

The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement. . . . To be eligible for a prize on the 'give-away' programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.¹⁵²

The Supreme Court held that the Commission must abide by a strict

¹⁵⁰Ibid., 598.

¹⁵¹Ibid.

¹⁵²Ibid., 599.

interpretation of any criminal statute even though it did not propose to initiate criminal action. In concluding its opinion the Supreme Court said:

The Commission has over-stepped the boundaries of interpretation and hence has exceeded its rule-making power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of Section 1304 does not provide the remedy.¹⁵³

In 1957, in Caples Company v. United States, the Court held that a television program offering prizes to persons who utilize cards to participate is not a lottery since it did not meet the requirements of consideration. The fact that these cards can only be obtained from the sponsor's stores is not sufficient to satisfy the element of consideration.¹⁵⁴

The Caples Company, an advertising agency and owner of the game, "Play Marko," requested a ruling from the Commission "declaring that Marko is not a lottery as played on station KTLA-TV, Los Angeles, California, during the period from January 15, 1955 through May 28, 1955." The Commission issued an advisory opinion that "Play Marko", as broadcast by KTLA-TV, was a lottery and in violation of the Commission's rules. The Caples Company petitioned the U. S. Court of Appeals, District of Columbia Circuit, to set aside the Commission's opinion and to declare that the game was not a lottery. In an opinion dated March 14, 1957, this Court reversed the Commission's ruling.¹⁵⁵

¹⁵³Ibid., 601.

¹⁵⁴2 Pike and Fischer, RR, M - 5126.

¹⁵⁵Caples Company v. United States et al, 243 F. (2d) 232, 234.

In the course of its opinion the Court of Appeals described the program in question as being similar to the well-known game of "Bingo." In this case the cards used by the participant, the viewer, were obtained without cost from any of the stores handling the sponsor's product. The cards could be obtained in any number without any registration or purchase being required of the participant.¹⁵⁶

The FCC had contended that the American Broadcasting Company decision¹⁵⁷ was not applicable in this case because the program, "Play Marko," required "something more than 'listening,' in that the cards necessary for participation can only be obtained from the sponsor's stores or outlets." This requirement, the Commission argued, was "a thing of value since it is of benefit to the sponsor."¹⁵⁸

After noting that Section 3.656 of the Commission's Rules and Regulations, concerned with lotteries, was based squarely on the criminal statute, 18 U. S. C., Section 1304, the Court ruled that, although "Play Marko" did go beyond requiring just listening on the part of the participant, it would still be "stretching the statute to the breaking point to give it an interpretation that would make such programs a crime."

The undesirability of this type of programming is not enough to brand those responsible for it as criminals. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute or in additional legislative authority.¹⁵⁹

¹⁵⁶Ibid., 232.

¹⁵⁷Supra, 131

¹⁵⁸Caples Company v. United States et al, 243 F. (2d) 232.

¹⁵⁹Ibid., 234.

CHAPTER III

CONCLUSIONS

The first chapter of this study has surveyed the comments and discussion in Congress growing out of consideration of legislation concerned with the programming of broadcasting stations and the control thereof. The second chapter has reported the discussions and holdings of Federal Courts relating to such matters in connection with judicial review of decisions of the Federal Radio Commission and the Federal Communications Commission. This chapter will present conclusions drawn from this material.

Broadcasting is Unique.--Senator Dill, in introducing the Radio Act of 1927, recognized that radio was different than other means of communication. He told the Senate how radio could span the continents and the oceans in a fraction of a second and how the number of radio stations would be limited because of a scarcity of broadcasting spectrum. Several Senators were quick to agree with his reference to radio's uniqueness, its enormousness, and potential influence.

The Supreme Court recognized the unique limitations of broadcasting as a mass medium when it held, in the National Broadcasting Company case, that, due to the limited number of broadcasting stations, some who wish to broadcast must be denied that privilege. It followed, the Court held, that a denial of a license, on the ground that the applicant did not meet the standard of "public convenience, interest, or

necessity" was not a denial of freedom of speech. Because of its unique characteristics, therefore, broadcasting is not a right but a privilege.

Accordingly, the fact that not all who apply may be granted broadcasting stations has been recognized as differentiating the electronic medium from print. As early as 1926 Senator Howell of Nebraska pointed out, "We have tens of thousands of newspapers. . . [but] only a limited number of radio stations."

For example, in debates over the liability of licensees for political speeches which under the law could not be censored, the legislators discussed the differences between broadcasting and print. It was pointed out that the newspaper may be reviewed before it is distributed. There is time to permit editing. On the other hand, once the radio or television program leaves the station its contents cannot be modified.

The Meaning of the Standard of "Public Convenience, Interest, or Necessity."--Because Congress has faced unique problems in writing laws to govern the broadcasting industry, it has had to "grope its way toward a satisfactory legislative policy."¹ There have been members of Congress who have expressed dissatisfaction with the law because it has seemed to lack specificity. Senator Walsh of Massachusetts criticized the final draft of the Radio Act of 1927 because, among other things, it failed to fully define the rights of the public "for the guidance of the commission in the discharge of its duties." Representative Gifford was also critical of the Radio Act for its seeming lack of Congressional policy. Congress has also been fearful that this standard might be interpreted as granting

¹C. J. Friedrich and E. Sternberg. "Congress and the Control of Radio-Broadcasting, II," The American Political Science Review, XXXVII (December, 1943), 1016.

powers of censorship. One Representative said, "We certainly never intended to delegate to this commission the power to impose its judgement as to what are good programs and what are bad programs."² In 1939 Senator Johnson was critical of the FCC's interpretation of the Communications Act when he challenged the Commission's authority to control program content. He believed that it was limited to "physical, scientific, and technical problems." In this same year President Roosevelt, in a letter to the chairmen of the Senate and House Committees on Interstate Commerce, expressed a desire for more precise legislation:

New legislation is. . .needed to lay down clearer Congressional policies on the substantive side - so clear that the. . .administrative body will have no difficulty in interpreting and administering them.³

On the other hand, the standard of "public convenience, interest, or necessity" has been defended as being meaningful. Senator Dill, the author of the Senate version of the Radio Act of 1927, felt that the intent of Congress was to create legislation that would keep the radio industry just as free from regulation as possible while still protecting the general public interest and the social welfare of the great masses of out people. When Senator Pittman objected to the Conference Report on the proposed Radio Act, Senator Dill stated succinctly:

I just want to call attention to the fact that the whole basis of the bill is public service to the listeners.⁴

²C. J. Friedrich and E. Sternberg. "Congress and the Control of Radio-Broadcasting," The American Political Science Review, XXXVII (November, 1943), 818.

³C. J. Friedrich and E. Sternberg. "Congress and the Control of Radio-Broadcasting, II," The American Political Science Review, XXXVII (December, 1943), 1016.

⁴68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927, 4111.

Senator Dill was so concerned with the administration of radio in the public interest that he opposed the idea of appointing "technical experts" as members of the regulatory commission. In fact, he commented that while these men should have the advice of experts regarding the technology of radio, they should be primarily concerned with the public interest and in particular with the development of broadcasting for the social and economic good.

In 1952 the McFarland Amendments altered the language of the Communications Act regarding the criteria to be applied by the Commission in renewal hearings. The law's revised phrasing, eliminating the need to meet the statutory requirements of an original application, was objected to by members of the Commission. They felt it might be inferred that a perpetual franchise had been granted to any licensee who met the minimum standards of public service even though a superior applicant might apply for the frequency.⁵ However, in answer to this criticism of the proposed change of Section 307 (d) of the Act, proponents of the amendment pointed out that its language still maintained the concept of an applicant for a license renewal having his "overall performance. . . measured against the broad standard of public interest, convenience and necessity."

The wisdom of having a flexible standard has been defended on several occasions. Louis G. Caldwell, a former General Counsel for the Federal Radio Commission pointed out that the term, "public convenience, interest or necessity," in its general use, has no fixed meaning. He held that it "must be construed in the light of the context and purpose

⁵T. H. Wall and J. B. Jacob. "Communications Act Amendments, 1952 - Clarity of Ambiguity," Georgetown Law Journal, XIX XLI (January, 1953), 167.

of the statute in which it was found."⁶ The Courts have supported Caldwell in this contention. He went on to say that, "Because the Commission must deal with a wide variety of stations, no single definition is possible."⁷

The Federal Radio Commission long ago stated, "To be able to arrive at a precise definition of such a phrase which will foresee all eventualities is manifestly impossible."⁸ Along with this statement, the attitude of the U. S. District Court for the Northern District of Illinois, regarding the lack of specificity in broadcasting law, is worth noting. The lower Court quoted from a decision of the Supreme Court:

General terms get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instance of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.⁹

Judicial Approval of the Standard as Applied to Programming.--

The Courts have held that the standard of "public convenience, interest or necessity" is not unconstitutional, an unlawful delegation of Congressional authority, or vague. Appeals, based upon the premise that the Commission may not consider programming as an element of the public interest, have been denied.

In the KFKB Broadcasting case the Commission was affirmed in its

⁶L. G. Caldwell. "The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927," Air Law Review, I (July, 1930), 303-08.

⁷Ibid., 315.

⁸"Comments on Television and the Law," St. Johns Law Review, XXV (May, 1951), 247.

⁹Supra, 84.

decision to deny KFKB a license renewal. The Court held that in determining "the public interest. . .it was its [the Commission's] duty to take notice of the applicant's conduct in his previous use of the permit. In Trinity Methodist Church, South v. FCC, the Commission's denial of a license renewal was held not to be prior restraint and, because of this, it did not violate the provisions of the First Amendment. The Court declared every free citizen has the right to publish his thoughts, but he must be prepared to take the responsibility for his words. If the licensee broadcasts in a manner which does not meet the standard of "public convenience, interest or necessity" then he must take the consequences of being denied the privilege of continuing to use the nation's limited broadcasting facilities. The Court concluded:

In considering an application for renewal of the license an important consideration is the past conduct of the applicant, for 'by their fruits ye shall know them' Matt: VII:20.¹⁰

When Justice Felix Frankfurter delivered the Supreme Court's opinion in the National Broadcasting Company case, he defined some of the Commission's authority to regulate programming. He said the Communications Act puts upon the Commission the burden of determining the "composition of the traffic. The Court's opinion clearly stated that the Commission may consider proposed programming in a comparative hearing for broadcasting facilities. It held that the Commission could not be confined to technical matters in such a consideration because:

If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially qualified to operate a station? Since the very inception of Federal

¹⁰Supra, 114.

regulation by [sic] radio, comparative considerations as to the service to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.'¹¹

In another case, Johnston Broadcasting Company v. FCC, the U. S. Court of Appeals for the District of Columbia held that in a comparative hearing the comparative service to the listeners, the essence of which is programming, is the vital element.

In Sacramento Broadcasters Inc. v. FCC, the Court went so far as to affirm the Commission's action in assigning facilities, when all other factors were equal, solely on the basis of the comparative program performance of two radio licensees competing for the same television channel.

The Commission has been upheld on several occasions when it applied the standard of "public convenience, interest or necessity" to particular aspects of programming. The FRC took a stand on balanced programming when, in a statement to the Court of Appeals in support of its action in the Great Lakes Broadcasting Company case, it held a broadcasting station should not restrict the appeal of its programs to a narrow segment of the audience. Rather the station should attempt to meet "the tastes, needs, and desires of all substantial groups among the listening public. . .in some fair proportion." Although the Court did not comment specifically on balanced programming, it did uphold the Commission's action, in part, because of one station's "comparatively limited public service."

The Commission has been supported when it favored the applicant, in competitive hearings, who proposed more well-planned local programming or who resided in the community assigned the frequency. Upon appeal by

¹¹Supra, 95

the Kentucky Broadcasting Association, the Court affirmed the Commission's award of a frequency to another applicant because, in part, of his plans for local program service. The Court approved as being in the public interest the Commission's concern for such specific proposals as musical performances by local organizations, local church services, locally produced cultural, dramatic, and forensic programs, local farm information, and a well-planned local news service. In its decision, the Court also affirmed the Commission's authority to favorably consider local ownership of a proposed facility because it indicated a knowledge of local needs and was more likely to result in programs that served these needs. In the Scripps-Howard case the Court approved the Commission's position that, while considering competing applicants, it consistently gave weight to the factor of local residence and familiarity with local conditions.

In this same decision the standard of public convenience, interest or necessity was held to support a policy of diversification of ownership of the mass media in a community because of its ultimate result in an informed public. The Court made it clear that the Commission's policy of encouraging diversification is appropriate when measured by the "realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner, and emphasis of presentation.

In answer to other appeals of the Commission's decisions, reliance on network programs, provisions for sustaining programs, and a consideration of proposed staff positions were all held to be elements of the public convenience, interest or necessity.

Judicial Disapproval of the Commission's Application of the Standard of "Public Convenience, Interest, or Necessity."--The Commission,

in the Fall of 1948, warned the industry it was planning to issue regulations concerned with lotteries, gift enterprises, or similar schemes.

This is the first instance in which the Commission has proposed regulations threatening to withhold licenses if a specified type of broadcast material is used.¹²

In the American Broadcasting Company case, the Court disapproved of the Commission's definition of the element of "consideration." The Court made it quite clear that the Commission cannot allow its value judgement of a particular type of program to color an interpretation of the Criminal Code. In the Caples case it was held that the undesirability of the "give-away" programs is not an excuse for trying to eliminate them by stretching the criminal statutes beyond their legal meaning. The Court went on to suggest that the Commission will have to protect the public interest "by means not pegged so tightly to the criminal statutes or in additional legislative authority."

Inadequate Consideration of Programming.--With the exception of the lottery cases, where a criminal statute as well as the Communications Act was involved, none of the decisions discussed in this study have been remanded because the Commission exceeded its authority to consider programming. On the other hand, the Courts have remanded some decisions because the Commission had not been thorough in determining whether certain elements of programming were in the public interest.

On one occasion, the Plains Radio case, the Court scolded the Commission for phrasing its findings regarding an applicant's program proposals in general terms. The Court wanted matters of programming

¹²"FCC Attacks Radio Give-Away Programs," Stanford Law Review, I (April, 1949), 475-6.

treated in a specific manner which was clearly adduced from the record. The Commission has also been instructed to review its decision, in the Democratic Printing case, so that it might probe more deeply into the applicant's programming plans. The Wrather-Alvarez case is another in which the Court wanted the Commission to take a clearer stand on program content. It held that the Commission should evaluate the character of a station's programming in arriving at a decision. In W. S. Butterfield Theatres, Inc. v. FCC, the Court of Appeals ruled the "Commission's concern" most certainly included the proportion of time an applicant proposed to devote to film programs. In supporting its position, the Court stated that a licensee's control over film programs was often much greater than that which he exercised over network programs, hence of greater importance in determining his plans to serve the public interest.

Congressional Action Regarding the Control of Programming.--

Broadcasting is regulated by a law that was written, for all practical purposes, over thirty years ago. The provisions of this law which relate to programming have been barely altered since they were hastily written under such duress that one of the authors, Representative Lazaro, was prompted to admit that, considering the chaotic state of broadcasting, it was necessary to pass imperfect legislation in order to attain relief. The Representative was of the opinion that the Radio Act could be improved after the emergency of 1927 had been met.

Reluctance to Legislate Regarding Programming.--The law was written in an atmosphere that demanded some immediate action, and necessarily involved compromises. This was evidenced by Senator Mayfield's comment that if Senator Dill did not expedite the passage of the radio bill there would be no such legislation at that session of Congress.

Senator Dill, in turn, expressed a fear that if legislation were not immediately forthcoming, the spectrum would become so overcrowded that the ordinary receiver would become worthless. The Senators were eager to avoid controversial topics such as legislation concerned with programs that dealt with public issues because of the possibility of delaying the much-needed radio law.

The House bill that was to become the Radio Act of 1927 was introduced on March 23, 1926 and signed into law a little less than a year later, on February 23, 1927. One measure of the haste with which this bill was enacted was the fact that, with adjournment near, Congress failed to make any appropriation for the newly-created Federal Radio Commission which, as a result, had to function without any funds for a period of time.¹³

The pressing desire to enact the Communications Act of 1934 resulted in the verbatim incorporation of much of the Radio Act of 1927. With respect to broadcast programs, therefore, the provisions of the new law were virtually the same as those in the old. The Senate bill that became the Communications Act of 1934 was introduced by Senator Dill on April 4, 1934 and became law a little over two months later, June 18, 1934. The House of Representatives wrote the Radio Act of 1927 into the Communications Act intact. Because of this, Representative Rayburn, Chairman of the Foreign and Interstate Commerce Committee, felt that there was no need to spend a great deal of time debating Title III of the proposed Communications Act.

¹³C. J. Friedrich and E. Sternberg. "Congress and the Control of Radio-Broadcasting," American Political Science Review, XXXVII (November, 1943), 800.

While the Communications bill was in conference between the two Houses only two substantive changes in Title III, having relationship to control of broadcast programs, were made. Two sections were added to these of the Radio Act of 1927: Section 316, an explicit prohibition against broadcasting any information concerned with lotteries, and Section 305 (g), providing that the Commission should "generally encourage the larger and more effective use of radio in the public interest."

Because of their eagerness to avoid controversy and get quick action, Congressmen have often prefaced their proposals for new broadcasting legislation with statements to the effect they were concerned only with the mechanics of administration which they considered to be non-controversial and not matters touching on the regulation of programs. They were of the opinion matters of program policy could be taken up later when they could be fully "aired." For example, in 1949, when Senator McFarland submitted amendments to the Act, he pointed out they were only intended to affect "organizational, administrative, and appellate matters," and suggested that any areas of legislation dealing with regulation of broadcast programming would require further and more extensive committee study. The report of the Senate's Committee on Foreign and Interstate Commerce followed this same line.¹⁴ The McFarland Amendments of 1951 were introduced by another report of this same committee which noted that there had been no attempt to deal with any changes in policy affecting radio or television broadcasting.¹⁵ It should also

¹⁴95 Congressional Record, 81st Congress, 1st Session, August 9, 1949, 11090.

¹⁵97 Congressional Record, 82nd Congress, 1st Session, February 5, 1951, 965.

be noted that these amendments constitute the only major revision of the Communications Act since its passage in 1934.

Political Broadcasts.--Aside from a general prohibition of censorship by the Government, the only other reference in the Radio Act of 1927 to censorship was a prohibition against any interference by the licensee with the speeches of political candidates. This was written intact into the Communications Act of 1934.

The original phrasing of Section 18 of the Radio Act and Section 315 of the Communications Act specifically noted that licensees would provide "equal opportunities" for candidates. When the question of time costs arose in 1927, Representative Scott of Michigan thought the Commission would be able to prevent any discrimination in this matter. However, in 1951, Congress felt it had become necessary to pass legislation prohibiting the charging of rates in excess of normal time costs for the broadcasts of political candidates. This amendment to Section 315 prevents a wealthy candidate from pricing his poorer opponent out of broadcasting.

The question of a licensee's liability for a political candidate's remarks, the editing of which is specifically forbidden by Section 315, has caused some of the sharpest discussion in this study. After several exchanges of viewpoint on this question, the House passed the Horan Amendment to the McFarland Amendments which explicitly exempted licensees from any such liability. The Conference Report on the McFarland Amendments eliminated any reference to this section of the Horan Amendment. Although this was done in 1951, because of the lack of study the question of liability had received in both Houses, there has been no subsequent legislation regarding this topic introduced on the floor of Congress.

Considering all of the comment this subject has aroused in Congress, it is interesting to note not one of the Commission's actions regarding political programming has been appealed. This may result from the fact this is one area in which the Act is explicit, thus giving the Commission both guidance and support in reaching its decisions.

Reservation of Frequencies for Non-Profit Use.--During lengthy debates over whether facilities should be allocated by statute to educational and other non-profit organizations the sentiment of Congress was that such action would be impractical because of the difficulty, if not the impossibility, of dividing 25 percent of the country's broadcasting facilities equitably among those schools and organizations that might apply. This debate, concerned with the Wagner-Hatfield Amendment, revealed the Congressional intent that the Commission make any necessary reservations. The Commission, in accordance with Section 307 (c) that it investigate this question, reported to Congress that there was no need for further legislation.¹⁶ No further legislative action has been taken regarding the proposal to reserve frequencies for non-profit purposes. The Federal Communications Commission, however, has reserved channels for non-commercial, educational FM and television stations. These actions are in line with Congressional concern that broadcasting channels be used for educational purposes.

Summary of Conclusions.--Broadcasting has been recognized as a unique medium of mass communications by Congress and the Courts. Because of this, Congress provided both the FRC and the FCC with the standard of

¹⁶G. D. Rose Jr. National Policy for Radio Broadcasting (New York: Harper & Brothers Publishers, 1940), 165.

"public convenience, interest, or necessity" by which to measure the qualifications and performance of station licensees. While the meaning and merits of the standard have been argued, the decisions of either Commission that considered programming as an element of the "public convenience, interest, or necessity" have been upheld by the Courts.

Congressmen have been reluctant to propose specific legislation dealing with programming, however the law is quite clear regarding the broadcasts of political candidates. Congress has also made it clear that the Commission may reserve frequency assignments for educational and non-profit organizations.

The Courts have held that the Commission was arbitrary and guilty of exceeding its authority when it interpreted the Criminal Code as prohibiting the broadcast of "give-away" programs. However, several of the decisions reported in this study have been remanded because the Commission was not thorough in its consideration of programming as a measure of an applicant's ability to serve the public interest.

Future Research.--This study has shown that the Commission has the authority to inspect and evaluate the program proposals and performance of applicants. A comparison of the promises and performance of a sampling of licensees would indicate how valid these promises are. As a follow-up to this study it would be interesting to know how well the licensees whose grants were appealed because the Commission favorably considered their programming plans have fulfilled their promises.

Several Congressional committees have held hearings concerned with proposed broadcasting legislation. The thinking of interested parties and lawmakers regarding program regulation would be revealed in a study of the reports of these committees.

BIBLIOGRAPHY

BIBLIOGRAPHY

Books and Manuscripts

Edelman, Murray. The Licensing of Radio Services in the United States. Urbana: University of Illinois Press, 1950.

Pike and Fischer. Radio Regulation. Broadcast Edition, I-XVII.
Executive Editor: Henry G. Fischer.

Volume One contains statutes, Congressional committee reports, Court rules, treaties, and the Rules and Regulations of the FCC relevant to broadcasting.

Volume Two contains a current digest of the decisions of the FCC, relevant decisions of the Federal and State Courts, and selected decisions of the FRC.

Volume Nine, and succeeding volumes, contains the decisions of the FCC and the Courts since early 1953.

Rose, G. B. Jr. National Policy for Radio Broadcasting. New York: Harper & Brothers, Publishers, 1940.

Rundell, Hugh A. "The American Radio and Freedom of Speech."
Unpublished M.A. thesis, University of Wisconsin, 1947.

Warner, Harry P. Radio Television Law. New York: Matthew Bender & Company, 1948.

White, Melvin Robert. "History of Radio Regulation Affecting Programming Policy." Unpublished Ph. D. dissertation, University of Wisconsin, 1948.

Public Documents

Annual Report of the Federal Communications Commission to the Congress of the United States. Washington: Government Printing Office, I - XXIII, 1936 - 1957.

Annual Report of the Federal Radio Commission to the Congress of the United States. Washington: Government Printing Office, I - VII, 1927 - 1933.

Radio Laws of the United States, 1957 Edition. Washington: Government Printing Office, 1957.

Compilation of all Radio Law legislated in the United States including the Radio Act of 1927 and the Communications Act of 1934 and their amendments.

67 Congressional Record, 69th Congress, 1st Session, January 11, 1926, 1807.

Senator Dill submitted a bill to amend the Copyright Act regarding the use of music on radio.

67 Congressional Record, 69th Congress, 1st Session, January 18, 1926, 2309.

Statement by Representative Celler regarding the need to legislate against disguised advertising.

67 Congressional Record, 69th Congress, 1st Session, March 12, 1926, 5478.

Representative White's introduction of H.R. 9971, which was to become the Radio Act of 1927, ensuing debate, and several proposed amendments.

67 Congressional Record, 69th Congress, 1st Session, March 13, 1926, 5555.

Debate on passage of H.R. 9971.

67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12335.

Senator Dill presents H. R. 9971, a bill for the regulation of radio communication, for the Senate's consideration.

67 Congressional Record, 69th Congress, 1st Session, June 30, 1926, 12451.

Radio speech by Representative Davis concerning the regulation of radio.

67 Congressional Record, 69th Congress, 1st Session, July 1, 1926, 12497.

Continued debate on H.R. 9971 in the Senate.

67 Congressional Record, 69th Congress, 1st Session, July 2, 1926, 12614.

Senate discussion of H.R. 9971 regarding the size of the Radio Commission and questions concerned with the public utility aspects of radio.

67 Congressional Record, 69th Congress, 1st Session, July 2, 1926, 12617.

Continued debate in the Senate regarding the passage of H.R. 9971.

68 Congressional Record, 69th Congress, 2nd Session, January 8, 1927, 1272.

Senator Dill comments about the problems facing the conferees.

- 68 Congressional Record, 69th Congress, 2nd Session, January 8, 1927,
1297.
Further comments on the pending Radio Bill.
- 68 Congressional Record, 69th Congress, 2nd Session, January 12, 1927,
1704.
Comment concerning the pressure being felt by Congress from the public.
- 68 Congressional Record, 69th Congress, 2nd Session, January 29, 1927,
2556.
Presentation of the Conference Report on H.R. 9971 to the House and subsequent debate.
- 68 Congressional Record, 69th Congress, 2nd Session, February 5, 1927,
3025.
Comment on "pay-radio."
- 68 Congressional Record, 69th Congress, 2nd Session, February 5, 1927,
3025.
Senate debate on the Conference Report regarding H.R. 9971.
- 68 Congressional Record, 69th Congress, 2nd Session, February 7, 1927,
3117.
Debate on the floor of the Senate regarding vested rights in radio frequencies and a move to disagree with the Conference report. This motion was defeated.
- 68 Congressional Record, 69th Congress, 2nd Session, February 5, 1927,
3257.
Shortcomings of the Conference Report on H.R. 9971.
- 68 Congressional Record, 69th Congress, 2nd Session, February 12, 1927,
3589.
Comment on the chaotic condition of the air.
- 68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927,
4109.
A discussion of the alleged shortcomings of the Conference Report on H.R. 9971.
- 68 Congressional Record, 69th Congress, 2nd Session, February 18, 1927,
4148.
Critical Comment in the Senate concerning the Conference Report on H.R. 9971.
- 68 Congressional Record, 69th Congress, 2nd Session, February 26, 1927,
4938.
Report of the President's signature to the Radio Act of 1927.
- 72 Congressional Record, 71st Congress, 2nd Session, December 16, 1929,
706.
Discussion prior to making the FRC a permanent administrative body.

- 74 Congressional Record, 71st Congress, 3rd Session, February 17, 1931, 5203.
Discussion relative to amending the Act to provide facilities for nonprofit organizations.
- 75 Congressional Record, 72nd Congress, 1st Session, December 8, 1931, 94, 99.
Amendments to prohibit the broadcast of information concerning lotteries.
- 75 Congressional Record, 72nd Congress, 1st Session, February 10, 1932, 3608.
A discussion of the relationship between license suspension and censorship.
- 76 Congressional Record, 72nd Congress, 2nd Session, February 28, 1933, 5203.
Conference Report on H.R. 7716 including, among other changes, provision for the broadcasting of both sides of a public question.
- 78 Congressional Record, 73rd Congress, 2nd Session, January 31, 1934, 1709.
Comment on the possible uses of innuendo in radio broadcasting.
- 78 Congressional Record, 73rd Congress, 2nd Session, February 16, 1934, 2646.
Representative Celler's remarks concerning the Commission's regulation by the expression of its attitude, as contrasted with actual regulations based upon the law, in the case of liquor advertisements.
- 78 Congressional Record, 73rd Congress, 2nd Session, March 1, 1934, 3543.
Introduction of an amendment to the Radio Act to prevent censorship on the part of the licensee.
- 78 Congressional Record, 73rd Congress, 2nd Session, April 26, 1934, 7507.
An appeal to increase the broadcasting time of non-commercial organizations.
- 78 Congressional Record, 73rd Congress, 2nd Session, May 15, 1934, 8822.
Formal introduction of S. 3285 which was to become the Communications Act of 1934.
- 78 Congressional Record, 73rd Congress, 2nd Session, June 2, 1934, 10034.
Introduction of, and subsequent comments concerning, S. 3285 in the House of Representatives.

- 78 Congressional Record, 73rd Congress, 2nd Session, June 5, 1934, 10502.
Statement of a member of the Radio Commission concerning the Commission's attitude toward stations giving other than whole-hearted support of the National Recovery Act.
- 78 Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10912.
Senate agreed to the Conference Report on S. 3285.
- 78 Congressional Record, 73rd Congress, 2nd Session, June 9, 1934, 10968.
A discussion of the Conference Report, by the House of Representatives, on S. 3285.
- 80 Congressional Record, 74th Congress, 2nd Session, January 24, 1936, 973.
Three bills to amend the Communications Act of 1934 regarding censorship, the scheduling of controversial problems, and the keeping of records of rejected applications for time.
- 84 Congressional Record, 76th Congress, 1st Session, August 3, 1939, 10918.
Senator Johnson of Colorado commenting on S. 517, a bill to prohibit the broadcasting of liquor advertisements.
- 90 Congressional Record, 78th Congress, 2nd Session, May 29, 1944, 5074.
Introduction of legislation aimed at ending the A.F. of Musician's Union's control over the broadcasting of non-commercial and cultural programs.
- 92 Congressional Record, 79th Congress, 2nd Session, February 21, 1946, 1542.
Discussion of legislation, H.R. 5117, to curb the powers of the A. F. of Musician's Union in controlling non-commercial, cultural, and educational broadcasts.
- 92 Congressional Record, 79th Congress, 2nd Session, April 6, 1946, 3241.
Discussion of S. 63, as it was amended by the House of Representatives to prohibit certain coercive practices in broadcasting, by the Senate.
- 94 Congressional Record, 80th Congress, 2nd Session, April 14, 1948, A2277.
Comments in opposition to the bill, S. 2231, to restrict the power of radio broadcasting stations.
- 94 Congressional Record, 80th Congress, 2nd Session, February 26, 1948, 1727.
A discussion regarding proposed legislation, S. 2231, to limit the power of radio broadcasting stations.

- 94 Congressional Record, 80th Congress, 2nd Session, A2788.
Comments in favor of S. 2231.
- 95 Congressional Record, 81st Congress, 1st Session, May 31, 1949,
7006.
Introduction, by Senator McFarland of Arizona, of a bill of
proposed amendments to the Communications Act of 1934.
- 95 Congressional Record, 81st Congress, 1st Session, August 9, 1949,
11048.
A bill, S. 1973, introduced by Senator McFarland of Arizona to
amend the Communications Act of 1934 as it came out of the
Senate Committee on Interstate and Foreign Commerce.
- 95 Congressional Record, 81st Congress, 1st Session, August 9, 1949
11090.
The Report of the Committee on Interstate and Foreign Commerce
on S. 1973, a bill to amend the Communications Act of 1934.
- 96 Congressional Record, 81st Congress, 2nd Session, January 24, 1950,
838.
The provisions of a House bill, H.R. 6949, to amend Section
315 and other parts of the Communications Act of 1934.
- 97 Congressional Record, 82nd Congress, 1st Session, February 5, 1951,
960.
Comments regarding S. 658, a bill to amend the Communications
Act of 1934. This bill was identical with S. 1973.
- 98 Congressional Record, 82nd Congress, 2nd Session, June 17, 1952,
7389.
Introduction and debate in the House of Representatives of
S. 658, a bill to amend the Communications Act of 1934.
- 98 Congressional Record, 82nd Congress, 2nd Session, July 2, 1952,
9022.
The Report of the House of Representatives Conferees on S. 658.
- 99 Congressional Record, 83rd Congress, 2nd Session, March 16, 1953,
1997.
The introduction of a bill, H.R. 3977, to have licenses issued
for an indefinite period.
- 100 Congressional Record, 83rd Congress, 2nd Session, May 13, 1954,
6505.
Senator Bricker of Ohio comments as he introduces S. 3456, a
bill to authorize the Commission to regulate networks.
- 101 Congressional Record, 84th Congress, 1st Session, June 14, 1955,
8214.
The introduction of a House bill, H.R. 6810, by Representative
Harris of Arkansas to liberalize the equal time stipulation of
Section 315. It would have allowed free time to be given to
candidates of major parties without obligating the station to
splinter parties.

102 Congressional Record, 84th Congress, 2nd Session, January 19, 1956, 926.

Comments regarding a proposed amendment, H.R. 5741, which would authorize the Federal Communications Commission to insure that the proportion of time devoted to advertising in any radio or television program would not be excessive.

Annotated Case Citations

Allen T. Simmons v. FCC., 169 F. (2d) 670, 4 RR 2023 (App. D. C. 1948) cert. den. 335 U. S. 846.

A program policy which makes no effort to tailor the programs offered by a national network to the particular needs of the community does not meet the public service responsibilities of a broadcast licensee.

The Commission has the authority to consider program content in passing upon applications. No censorship is involved since the Commission required only that licensees select their own programs by the exercise of their own judgement.

American Broadcasting Company, Inc. v. U. S., 110 F. Supp. 374, 8 RR 2055 (S. D. N. Y. 1953).

The Commission cannot exceed the statutes with its regulations. This case regarded lottery regulations.

The Commission may promulgate rules which prohibit the broadcast of lottery programs. . . . In so far as the rules go beyond the scope of the anti-lottery statute. . . they may be considered as a form of censorship and hence in violation of the First Amendment.

Bay State Beacon, Inc. v. FCC., 84 U. S. App. D. C. 216, 171 F (2d) 826, 4 RR 2109 (1948)

The Commission may inquire into the amount of sustaining time an applicant plans to reserve if granted a license, and such action by the Commission is not in excess of its authority, does not constitute censorship in violation of Section 326 of the Communications Act.

Caples Company v. U. S., 100 U. S. App. D. C. , 23 F. (2d) 232, 15 RR 2005 (1957).

A television program offering prizes to persons who hold cards. . . is not a lottery since no consideration is involved. The fact that cards. . . can only be obtained from the sponsor's stores. . . is not enough to satisfy the element of consideration.

Chicago Federation of Labor v. FCC., 41 F. (2d) 422, 59 App. D. C. 333 (1930).

There is no place for a station catering to any group but all stations should cater to the general public.

Colonial Broadcasters v. FCC, 105 F. (2d) 781, 783, (1939).

The Commission's established yardstick for determining public convenience includes a showing of . . . a need for service. . . and the ability of the community to . . . furnish what is called "talent."

Evangelical Lutheran Synod v. FCC, 105 F. (2d) 793, 795, (1939).

The public interest does not necessarily demand that all stations become commercial, or that none be supported by religious bodies.

FCC v. American Broadcasting Company, Inc., 347 U. S. 284, 74 S. Ct. 593, 10 RR 2030 (1954).

Concerned with lottery regulations and give-away programs. Affirmed the lower court's decision in American Broadcasting Company, Inc. v. U. S.

FCC v. Sanders Brothers Radio Station, 309 U. S. 470, 475 (1940).

The Commission is given no supervisory control of the programs, business management, or of policy.

FRC v. Nelson Brothers Bond and Mortgage Company, 289 U. S. 266 (1933).

Public convenience, interest, or necessity is not so indefinite so as to confer unlimited power. The scope, character, and quality of services are among the criteria to be employed.

Great Lakes Broadcasting Company v. FRC., 37 F. (2d) 393, 59 App. D. C. 197, (1930).

In setting up a standard of program quality the Commission is not transgressing against the statutory prohibition against censorship or infringing the right of free speech.

Independent Broadcasting Company v. FCC, 89 U. S. App. D. C. 396, 193 F. (2d) 900, RR 2066 (1951).

The Commission properly denied a corporate permittee's application for a license and an application for an FM construction permit on the basis of findings that . . . one of the three stockholders had been intemperate in his writings, sermons, and broadcasts and was an expert in vituperation and vilification.

Johnston Broadcasting Company v. FCC, 85 U. S. App. D. C. ___, 175 F. (2d) 351, 4 RR 2138 (1949).

While the Commission may not proscribe any type of program, it can make a comparison on the basis of public interest and this is not censorship.

Kentucky Broadcasting Corporation v. FCC, 84 U. S. App. D. C. 383, 174 F. (2d) 38, 4 RR 2126 (1949).

The Commission did not act arbitrarily or capriciously in preferring one of two mutually exclusive applicants on the basis of local residence.

KFKB Broadcasting Association v. FRC, 47 F. (2d) 670, App. D. C. (1931).

A broadcasting station is public in purpose and character and any use of it as a private or individual affair is not to be tolerated.

A Commission denial of license renewal to an applicant which had been broadcasting a "Medical Question-Box" program. . .does not amount to censorship of a station's programs.

Mansfield Journal Company v. FCC, 86 U. S. App. D. C. 102, 180 F. (2d) 28, 5 RR 2074e (1950).

The Commission was justified in denying a construction permit to an applicant which the Commission has found has attempted to suppress competition in advertising and news dissemination in connection with operation of its newspaper business. No censorship or infringement of the press is involved.

National Broadcasting Company, Inc. v. U. S., 319 U. S. 190 (1943).

The right of free speech. . .is not abridged by the Commission's regulations designed to refuse a license to persons who engage in certain network practices.

The Act. . .puts upon the Commission the burden of determining the composition of that traffic.

Plains Radio Broadcasting Company v. FCC, 175 F. (2d) 359, 361, (1949).

Program proposals in competitive hearings are to be compared and given value, but this comparison must be based upon the evidence in the record of the hearing.

Pottsville Broadcasting Company v. FCC, 69 App. D. C. 7, 98 F. (2d) 288 (1938).

Without ruling on the validity of a policy of confining grants of local stations to local people. . .the case was remanded to the Commission for reconsideration, after the applicant's financial standing was clarified.

Sacramento Broadcasters, Inc. v. FCC, 13 RR 2194, (1956).

Decision of allocation based on past radio performance affirmed.

Scripps-Howard Radio Incorporated v. FCC, 89 U. S. App. D. C. 13, 189 F. (2d) 672, 7 RR 2001 (1951).

The Commission acts within its permissible discretion in giving weight in a comparative case to local ownership and familiarity with local conditions.

Technical Radio Laboratory v. FRC, 36 F (2d) 11 (Ct. of Appeals D. C. 1929).

Operating on an irregular schedule was held not to be in the public interest.

Trinity Methodist Church, South v. FRC, 61 App. D. C. 311, 62 F. (2d) 850 (1932).

Cert. den. 288 U. S. 599.

There was no denial of the freedom of speech. . .where the Commission refused in the public interest to renew a license to one who had abused it by broadcasting defamatory and untrue matters.

U. S. v. American Bond and Mortgage Company, 31 F. (2d) 448 (N. D. Ill. 1929), aff'd, 52 F. (2d) 318.

"Public convenience, interest, or necessity," when read in context with the Radio Act is not so vague as to constitute unlawful delegation of legislative power.

White v. FCC, 29 F. (2d) 113 (N. D. Ill. 1928).

The Radio Act of 1927 is not invalid because of the indefiniteness of standards.

Wrather-Alvarez Broadcasting, Inc. v. FCC, 15 RR 2108 (1957).

While the Commission may not control the programming of a foreign station, it may consider the character of that programming.

W. S. Butterfield Theatres, Inc. v. FCC, 13 RR 2175 (1956).

Films are an important part of television programming and of concern to the Commission.

Articles

"Authority of FCC to Regulate Chain Broadcasting," Michigan Law Review, XLI (June, 1943), 1195-7.

Ashby, A. L. "Legal Aspects of Radio Broadcasting," Air Law Review, I (July, 1930), 331-48.

Caldwell, Louis G. "Radio Legislation Pending Before Congress," Air Law Review, I (January, 1930), 39-46.

Caldwell, Louis G. "The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927," Air Law Review, I (July, 1930), 295-330.

Chamberlain, Joseph P. "The Radio Act of 1927," American Bar Association Journal, XIII (June, 1927), 343-347.

Chapman, Leland R. "The Power of the Federal Radio Commission to Regulate or Censor Radio Broadcasts," George Washington Law Review, I (March, 1933), 380-385.

"Comments on Television and the Law," St. Johns Law Review, XXV (May, 1951), 245-83.

Cooney, Stuart. "Analysis of Broadcast Literature: Periodical Publications in the Law," Journal of Broadcasting, I, No. 3 (Summer, 1957), 290.

Davis, Kenneth Gulp. "Administrative Powers of Supervising, Prosecuting, Advising Declaring and Informally Adjudicating," Harvard Law Review, LXVI (December, 1949), 193-240.

- Ethridge, Mark. "The Government and Radio," The Annals of the American Academy of Political and Social Science, CCXIII (1941), 109.
- "FCC Attacks Radio Give-Away Programs," Stanford Law Review, I (April, 1949), 475-85.
- "Federal Control of Broadcasting," Yale Law Journal, XXXIX (December, 1929), 245-56.
- Fly, James L. "Regulation of Radio Broadcasting in the Public Interest," The Annals of the American Academy of Political and Social Science, CCXIII (1941), 102.
- "The Freedom of Radio Speech," Harvard Law Review, XLVI (April, 1933), 987-93.
- Friedrich, Carl J. and Sternberg, Evelyn. "Congress and the Control of Radio-Broadcasting," American Political Science Review, XXXVII (November, 1943), 797.
- Friedrich, Carl J. and Sternberg, Evelyn. "Congress and the Control of Radio-Broadcasting, II," The American Political Science Review, XXXVII (December, 1943), 999.
- "Government Control of the Content of Radio Programs," Columbia Law Review, XLVII (September, 1947), 1041-52.
- "Indirect Censorship of Radio Programs," Yale Law Review, XL (April, 1931), 967-73.
- Jansky, Maurice M. "An Analysis of the Standard of Public Interest, Convenience, and Necessity," George Washington Law Review, XVII (June, 1929), 339-47.
- O'Shea, Carberry, F. "Radio-Federal Jurisdiction and Regulatory Power over Radio Communication," Georgetown Law Journal, XVII (June, 1929), 339-47.
- Patrick, Duke M. "The Regulation of Radio and Some of Its Legal Problems," Michigan State Bar Journal, X (April, 1931), 233-46.
- Penstone, Giles H. "Meaning of the Term 'Public Interest, Convenience or Necessity' under the Communications Act of 1934," George Washington Law Review, IX (June, 1941), 873-917.
- "The Radio Act of 1927," Columbia Law Review, XXVII (June, 1927) 726-33.
- "Radio Broadcasting Under the Radio Act of 1927," Michigan Law Review, XXVIII (June, 1920), 1032-41.
- "Radio Censorship and the Federal Communications Commission," Columbia Law Review, XXXIV (March, 1939), 447-59.

"Radio Editorials and the Mayflower Doctrine," Columbia Law Review, XLVIII (July, 1948), 785-93.

"Radio Regulation and Freedom of the Air," Harvard Law Review, LIV, (May, 1941), 1220-28.

Rosenberg, Sol I., and Seidman, Baruch S. "Radio," Air Law Review, IV (October, 1933), 413-33.

Smythe, Dallas. "Facing Facts About the Broadcast Business," U. of Chicago Law Review, XX (Autumn, 1952), 96-108.

Wall, Thomas H., and Jacob, John B. "Communications Act Amendment, 1952-Clarity or Ambiguity," Georgetown Law Journal, XLI (January, 1953), 135-81.

Warner, Harry P. "Subjective Judicial Review of the Federal Communications Commission," Michigan Law Review, XXXVIII (March, 1940), 632-80.

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