SHOULD ECONOMIC CRITERIA BE USED BY THE FCC IN DETERMINING THE NEED FOR NEW AM RADIO STATIONS?

Thesis for the Degree of M. A.

MICHIGAN STATE UNIVERSITY

Stuart L. Luedtke

1963

ABSTRACT

SHOULD ECONOMIC CRITERIA BE USED BY THE FCC IN DETERMINING THE NEED FOR NEW AM RADIO STATIONS?

by Stuart Luedtke

Broadcasting and Federal Policy. -- The basic purpose and philosophy of the Federal Communications Commission is to stimulate broadcasters to greater efforts to meet the program needs of the areas they serve. In so doing, they may better carry out their primary obligation of serving the "public interest, convenience and necessity." For this reason, and because American radio is primarily a profit-making venture, the Commission has sought to stimulate service in the public interest by allocating additional stations to many markets. The rationale for this action is that each station will try to do a better job of serving the public than its competitor in order to attract both listeners and revenue from advertisers.

The Problem Under Study. - The general problem with which this research is concerned is the competitive situation faced by AM radio broadcasters in 1962. One-third of the AM stations are losing money and many others are existing on a marginal economic basis. It is the purpose of this research to make a historical-analytical study of the FCC's allocation policy and practice with regard to the use of economic criteria in determining the need for new AM stations. The study takes into consideration the inability of many stations to render good service because of an over-competitive situation in many markets. The study also considers the policy of the Commission and the courts in cases of economic injury to an existing station as a result of the Commission's allocation policy.

Sources Used. -- The important sources utilized for this study were journal articles, government documents and releases, a number of articles from industry publications, and several books. A large part of the source material in this study consists of FCC cases and court opinions.

Findings. -- Analyses and documentation of court and commission cases demonstrate that, since the days of the Federal Radio Commission in 1930 to the present, the Commission and the courts have vacillated between admission and denial of the use of economic criteria in determining whether new licenses should be issued. The implications of the anti-trust laws, the First Amendment, and the Communications Act concerning competition in broadcasting are analyzed, and considered to be no barrier to the use of economic criteria by the Commission.

Finally, recommendations are made calling for a clarification of the Commission's policy on the use of economic criteria. The suggestion is made that there are sufficient grounds for a policy which would consider the need for a new station in a given market, as well as the economic potential of that market. A more vigorous and emphatic use of FCC powers is called for. Congressional action is recommended if the Commission can find no legal basis for implementing an allocations policy that regards broadcasting as a quality instrument for public service, as well as a competitive enterprise.

SHOULD ECONOMIC CRITERIA BE USED BY THE FCC IN DETERMINING THE NEED FOR NEW AM RADIO STATIONS?

By

Stuart L. Luedtke

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF ARTS

Department of Television and Radio

1963

ACKNOWLEDGEMENTS

I am grateful to Dr. Walter B. Emery for his generous aid and direction in the planning and execution of this project.

TABLE OF CONTENTS

CHAPTER I

"SHOULD ECONOMIC CRITERIA BE USED IN DETERMINING THE NEED FOR NEW AM RADIO STATIONS?" BACKGROUND AND DIMENSIONS OF THE PROBLEM

The basic purpose and philosophy of the Federal Communications Commissions statement of program policy in July 1960 was to stimulate broadcasters to greater efforts to meet the program needs of the areas they serve and in so doing, to better carry out their primary obligations of serving the public interest. Unfortunately, the competitive situation today in AM radio is such that many stations are unable or unwilling to offer to their listeners the kind of program service the FCC would like. This is because, as Commissioner Fred W. Ford said in an address to the Kentucky Broadcasters' Association in October of 1961, "We are operating in an economy of saturation of radio stations in many populous areas. If we continue present policies for licensing radio stations and the number of radio stations continues to multiply we will find that in spite of our efforts to create a better climate for improved programming, existing engineering, allocation or processing policies may neutralize our actions. This may come about by reason of preoccupation by station management with economic survival and a financial inability to concentrate on the needs of their service areas instead of their emptying pocketbooks."[1]

---

[1]Fred W. Ford, Commissioner, FCC, in an Address to the Kentucky Broadcasters Association, Oct. 19, 1961, Lexington, Kentucky.

AM radio stations seem to have developed a financial paradox. Revenues and profits for the average station keep going down, and the value of the station properties keeps mounting. There have been several reasons cited for this paradox: uneven competition makes some segments of the industry more attractive to investors because they are less competitive; radio in general still appears to be a good business investment to many, even if revenue and profits are down; and the aggressive operator still sees a chance to beat the average.[2]

Broadcasting Magazine editor Sol Taishoff had this to say about increased AM radio competition in an editorial in the Oct. 5, 1959 issue of Broadcasting:

> In the past decade, (1949-59) the number of radio stations in operation has risen by 67%, the number reporting an annual loss by 74%.
>
> In the year 1948, 1,824 stations were operating. Of that number 581 lost money. In 1958...3,066 stations operated throughout the year. Of that number, 1,013 suffered losses.
>
> These are the cold measurements of a competitive situation that is getting hotter by the minute. Heat is generated by friction, and there is much friction in radio today. Talk to any radio broadcaster from any community bigger than a crossroads and you will hear stories of bitter competition for audience and business.
>
> In its most extreme forms the competition for audience degenerates into wild promotions and wilder programming.
>
> The objective is to be first in the ratings---never mind by how small a fraction or by how few listeners it represents. Be first in the ratings, the battle cry goes, and then you will get the business.

---

[2] C. H. Tower, Competition is tougher: traces postwar radio trends, Broadcasting, 57:80-1, Oct. 19, 1959.

> The urge to be first was responsible for two situations which have come to national attention recently, (1959). In Los Angeles one station offered listeners $10,000 for finding a certain disc jockey. Another Los Angeles station found him in Buffalo.
>
> In Denver one station has accused another of allowing smutty broadcasts to go on the air. True or false--the accusation--and the circumstances giving rise to it--will do nothing to enhance the image of radio.
>
> We have a feeling that unless the urge to be first is repressed, or at least combined with other urges of more lasting value, it will be the whole of radio that will get the business in the long run--and not the kind of business that stations can bill.
>
> The more complaints one broadcaster makes against another, the more reason one broadcaster gives another to complain, the stronger will become the argument for artificial limitation of competition.
>
> It is an argument that has often been heard, and sometimes from unexpected sources. At the Storz station disc jockey convention in the spring of 1959, Gordon McLendon, one of the most successful competitors in radio, publicly spoke out for legislation to permit no more stations in a market than the government decided the economy could support. Other operators have expressed the same thoughts privately.[3]

Taisheff goes on to give his views on the desirability of such legislation:

> However undesirable the by-products of free competition in radio (limited only by the availability of frequencies under proper engineering standards), they are less undesirable than government economic control would be. Let the government restrict the number of stations by its evaluation of the economic potential of a market, and the government will also restrict the amount of money any of those stations can make and will impose other conditions for doing business.
>
> If there are more radio stations licensed than the U.S. economy can support, the rigors of free competition will eliminate some of them.

Unfortunately, this has not been the case, and the competitive situation in radio has worsened since 1959.

---

[3]Sol Taisheff, The Short View, an editorial, Broadcasting, Oct. 5, 1959. p. 126.

Taisheff continues:

> These stations which adapt themselves to a condition of intense competition, which invent new services that meet public needs, will not only survive but flourish. Strong management and sound planning can build a radio system which will expand as the nation expands.
>
> But there is a dismal future for that type of radio management which thinks that the terminal point for advance planning is the date of the next rating report.[4]

It is possible that many stations would be happy to provide new and imaginative services but cannot afford better programming because of the increase in AM radio stations since the end of World War II. In order to survive, these stations must provide the cheapest programming possible in an effort to show a profit. American commercial radio is a profit-making venture in spite of the fact that it is licensed in "the public interest, convenience and necessity."

Supreme Court Justice Felix Frankfurter states in the decision of NBC vs US, 319 US 190 (1943) that:

"The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication--its facilities are limited; they are not available to all who may wish to use them; the radio spectrum is simply not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.[5]

---

[4] Ibid., p. 126.

[5] NBC vs U.S., 319 US 190, 213, 215-17 (1943).

In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

"But the act does not merely restrict the Commission to supervision of 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 own them. Methods must be devised for choosing among the many who apply, and since Congress itself could not do this, it committed the task to the Commission."

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience or necessity.'

"...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 of radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience or necessity.'" [6]

---

[6] Ibid., p. 215-217.

Justice Frankfurter's statement, I think, brings into clearer perspective the issues that are involved regarding the duties of the Commission where they relate to the issuing of licenses. Clearly there are other than technological factors which must be considered if the "public interest, convenience and necessity" is to be served. The Storer Broadcasting case illustrates a Supreme Court consideration of the "composition of the traffic" in radio broadcasting. In this case, Storer stated that it was being caused injury by the FCC rules:

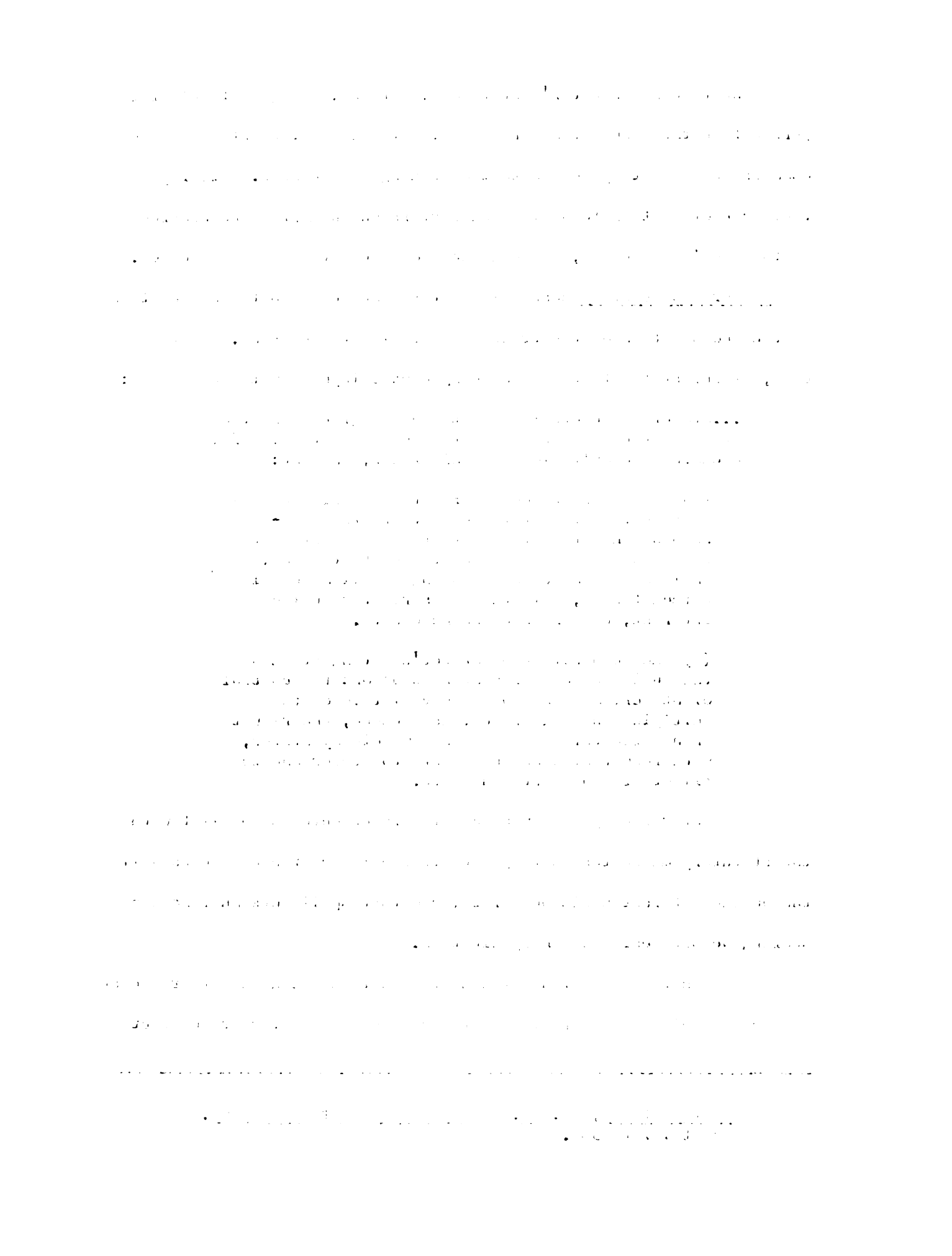
> ...Storer is adversely affected and aggrieved by the order of the Commission adopted on November 25, 1953, amending the Multiple Ownership rules, in that:
>
> (a) Storer is denied the right of a full and fair hearing to determine whether its ownership of an interest in more than seven standard radio and five television broadcast stations, in light of and upon a showing of all material circumstances, will thereby serve the public interest, convenience and necessity.
>
> (b) The acquisition of Storer's voting stock by the public under circumstances beyond the control of Storer, may and could be violative of the Multiple Ownership rules, as amended, and result in a forfeiture of licenses now held by Storer, with resultant loss and injury to Storer and to all other Storer stockholders.[7]

The Storer complaint was that the rules were in conflict with the statutory maindates that applicants should be granted licenses if the public interest would be served, and that applicants must have a hearing before denial of an application.

The Multiple Ownership rules provide that licenses for broadcasting stations should not be granted if the applicant directly or indirectly

---

[7] United States, et. al. v Storer Broadcasting Company. 351 US 192 at 197 (1953).



has an interest in other stations beyond the number limited by the rules. The purpose of the limitations is to avoid over-concentrated control of broadcasting facilities. Since Storer already had five VHF television stations, its application for a sixth was denied without a rehearing.

The court ruled that Section 309 (b) of the Communications Act does not withdraw from the Commission the rulemaking authority necessary for the orderly conduct of its business.[8]

As conceded by Storer, "Section 309 (b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest."[9]

The Court continued:

> ...This Commission, unlike other agencies, deals with the public interest. Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcast facilities. Accordingly, we cannot interpret Section 309 (b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible concentration of control. It is but a rule that announces the Commission's attitude on public protection against such concentration.[10]

The court therefore made it clear that the FCC does have rulemaking power to protect the public in the economic sphere of broadcasting, as well as the technical and programming areas. Section 3.35 of the Rules covering standard (AM) broadcast stations provides that no license may be granted to any party who already owns, operates or controls another such station

---

[8] Ibid., p. 202.

[9] Ibid., p. 202.

[10] Ibid., p. 203.

which serves substantially the same primary service area, except on a showing that the public interest will be served. This is known as the duopoly rule.[11] There have been exceptions to this rule however. In Lubbock County Broadcasting Co., 4 RR 493 (1948), the Commission said that each case involving multiple ownership must be decided on its merits and that Section 3.35 of the Rules is not an absolute bar to a grant in every instance involving overlapping service areas of two stations under common control.[12]

FCC Commissioner Fred Ford recalls that, until 1940, the FCC frequently rejected applications unless there was proof that the station was needed. More recently the Commission and the courts have taken the position that broadcasters are expected to operate in a free economy, without economic protection from the government.[13] Now, Ford wonders if the time has come for the FCC to re-examine its thinking: "Has the tremendous increase in competition between stations really brought the benefits which our agency contemplated, or has competition become a destructive force decreasing the quality of programming and placing station after station on a marginal economic basis? Is bad programming driving out the good because it costs less to produce?"[14]

If we analyze the fiscal side of station operation since the end of World War II, we find these trends in the radio competitive picture:

---

[11]Walter B. Emery, Broadcasting and Government, Michigan State University Press, 1961, p. 176.

[12]Lubbock County Broadcasting Co., 4 RR 493 (1948).

[13]License Cutback Might Help Radio Improve, says Ford, Advertising Age, 32: 1+, October 23, 1961, p. 12.

[14]Ibid., p. 12.

1. Radio competition is growing every year. Three station radio markets where FCC figures are available show that a majority of such markets are in the 0% to 10% profit margin category for the markets as a whole. All these markets showed a lower profit margin for stations that were operating in 1945, with the smallest decline occurring in the million and over population markets.[15]

2. In 1946, there were 996 stations; in 1960, 3,451 stations; in 1962 there are a total of 3,686, with 3,886 authorized to go on the air.[16] Excluding networks and the stations which they own and operate, total broadcast revenues increased little more than 200% from $220,584,000 in 1946 to $528,834,000 in 1960. It is important to note that even with this increase of 2,445 stations in 14 years, income before state and federal taxes decreased from $57,122,000 in 1946, to $51,281,000 in 1960. The change in the source of this revenue to predominatly local time sales is also significamt. In 1946, 21% of local time sales of broadcast stations was network, 31% national spot, and 48% local. By 1959, network time sales decreased to 2%, national spot sales remained the same (31%), and local time sales increased to 67%. Thus, while the average revenue for stations maintained a good earning record, more than one-third of the standard U. S. broadcast stations reported an operating loss in 1960.[17] (See additional financial

---

[15] Bower, op. cit., p. 80.

[16] Current statistics, Broadcasting, 62:97 August 20, 1962.

[17] Ford Speech, op. cit., Oct. 19, 1961.

data in the Appendix).

The following table shows the fluctuations in the revenues and profits of the broadcasting industry as a whole and AM radio in particular since 1944.

Calendar Year	Total industry revenue (TV+radio)	Total radio revenue (AM+FM)	%+ or -	AM+FM Radio profits (before taxes)	%+ or -
1944	$246.4 mil.	$246.4 mil.	+25.8	$90.3 mil.	+35.8
1945	$300.0 mil.	$300.0 mil.	+8.7	$83.5 mil.	-7.4
1946	$322.6 mil.	$322.6 mil.	+7.8	$76.5 mil.	-8.5
1947	$363.7 mil.	$363.7 mil.	+12.8	$71.8 mil.	-6.1
1948	$406.9 mil.	$406.9 mil.	+11.9	$64.1 mil.	-10.7
1949	$449.5 mil.	$415.2 mil.	+3.3	$52.6 mil.	-13.8
1950	$550.4 mil.	$444.5 mil.	+6.2	$68.2 mil.	+30.0
1951	$686.1 mil.	$450.4 mil.	+2.8	$57.5 mil.	-16.0
1952	$793.9 mil.	$469.7 mil.	+6.0	$60.1 mil.	+4.5
1953	$908.0 mil.	$475.3 mil.	+2.6	$55.0 mil.	-8.4
1954	$1,042.5 mil.	$449.5 mil.	-5.4	$41.8 mil.	-24.0
1955	$1,198.1 mil.	$453.4 mil.	+0.9	$46.0 mil.	+10.0
1956	$1,377.5 mil.	$480.6 mil.	+6.0	$49.2 mil.	+7.0
1957	$1,461.5 mil.	$518.3 mil.	+8.0	$54.0 mil.	+10.0
1958	$1,553.1 mil.	$523.1 mil.	+1.0	$37.3 mil.	-32.0
1959	$1,723.9 mil.	$560.0 mil.	+7.1	$42.4 mil.	+13.7
1960	$1,866.3 mil.	$597.7 mil.	+6.7	$45.9 mil.	+8.3

[18]

[18] United States FCC Annual Reports, Numbers 11 through 27, Fiscal Years 1945-1961. (See "Broadcast Industry Financial Data")

Contrasting preceding revenue and profit figures with the total commercial AM radio stations in operation or authorized for a comparable year in the following table, it becomes apparent that revenues have not kept up with the increasing number of AM radio stations in operation.

COMMERCIAL AM RADIO STATIONS SINCE 1945

FISCAL YEAR	TOTAL LICENSED	TOTAL ON AIR	TOTAL AUTHORIZED
1945	931	--	955
1946	961	--	1215
1947	1298	--	1795
1948	1693	--	2034
1949	1963	2006	2179
1950	2118	2144	2303
1951	2248	2281	2385
1952	2333	2355	2420
1953	2439	2458	2584
1954	2565	2583	2697
1955	2719	2732	2840
1956	2871	2896	3020
1957	3044	3079	3238
1958	3218	3253	3353
1959	3328	3377	3500
1960	3442	3483	3581
1961	3545	3602	3757

19

[19] United States FCC Annual Report, Number 27, Fiscal 1961, p. 59.

In granting applications, particularly for nighttime operation, the Commission has been inclined to authorize stations offering little or no interference to existing stations, even though the proposed station is subject to interference well over the recommended values of the allocation standards. The view is taken that when an applicant knows the restrictions that will be placed on his operation, and can install a station without materially increasing interference to other stations, that service should be permitted if the applicant feels that it is economically feasible.[20]

This statement of Commission policy appeared in the FCC's annual report for 1947 and helps to account for the greatly increased number of AM license grants since the end of World War II.

In the 27 months between the close of World War II and January 1, 1948, the Commission authorized 1,054 new AM stations. At the close of fiscal 1948, a total of 881 applications for new or changed AM stations was pending; 401 (or 45.5%) were awaiting hearing. At the same time, the Commission noted that from an engineering viewpoint, desirable AM facilities were becoming scarcer, with unlimited time facilities practically nonexistent; and daytime only facilities were extremely hard to find in the more heavily populated areas of the country.[21]

In spite of the increasing scarcity of AM frequencies, and the greatly increasing competition, the FCC continued to grant licenses at an increasing rate while issuing contradictory statements. On the one hand it bemoaned the fact that the air was rapidly becoming crowded to the limit

---

[20] Annual Report of the FCC, Number 13, Fiscal 1947, p. 17.

[21] Annual Report of the FCC, Number 14, Fiscal 1948, p. 30.

of capacity, and at the same time cited the increasing number of applications acted upon and granted.

The Commission noted in its report for the Fiscal year 1955 that "the year 1954 marked the first time in 16 years that the radio industry failed to establish a new alltime high for total revenues which declined to $449.5 million, or 5.4% below 1953."[22] At the same time the maturing television industry set a new record for total revenue, surpassing radio's record high of $475.3 million which was reached in 1953.[23]

By 1954 it was apparent that television was taking large portions of advertising revenue that had previously belonged to radio, while the number of AM stations continued to increase. If these events seemed to indicate that a new policy for AM radio allocations was needed, none was taken, or even mentioned in the 1955 Annual Report of the FCC. However in 1956 the Commission report noted that "...the AM band is, generally speaking, so crowded that only local daytime stations, for the most part, are now able to 'shoehorn in.'" [24] Succeeding years did not lead to a decline in AM allocations or even a relative slowing in processing. No agency questioned the value of additional stations in the light of the crowded spectrum, the ominous financial data and the continuing decline in the overall quality of radio programming on a national basis.

---

[22] Annual Report of the FCC, Number 21, Fiscal 1955, p. 120.

[23] Ibid., p. 120.

[24] Annual Report of the FCC, Number 22, Fiscal 1956, p. 32.

On a geographical basis, competition is unevenly distributed. The largest increase in the number of stations has been in the South Central and southeast sections of the U.S., particularly in the small towns.[25]

Figures from FCC's official record on station income compare the growing numbers of outlets in a number of markets.

	Year	Stations	Revenue	Income	Loss
Baltimore:	1950	10	$3,554,865	$816,590 (before taxes)	
	1960	15	$5,699,599	$872,989	
Birmingham:	1950	9	$1,833,973	$389,245	
	1960	12	$2,261,206		$101,712
Atlanta:	1950	11	$2,861,627	$863,870	
	1960	18	$4,470,376	$547,195	
Dallas:	1950	7	$2,985,837	$775,003	
	1960	12	$4,355,397	$188,707	
Fort Worth:	1950	6	$1,559,827	$209,237	
	1960	9	$1,711,873	$ 14,163	
Peoria Ill.:	1950	6	$1,122,412	$ 93,809	
	1960	5	$1,182,523		$148,659
Charlotte, N. C.:	1950	4	$1,814,711	$493,341	
	1960	7	$1,558,900		$103,281
Little Rock, Ark:	1950	5	$ 904,492	$209,051	
	1960	8	$1,047,648		$114,362
St. Louis:	1950	11	$5,917,879	$1,291,171	
	1960	14	$7,039,432	$ 473,957	

[26]

[25] Tower, op. cit., p. 80.

[26] Birth control for AM radio?, Broadcasting, 62:27+, April 9, 1962, p. 27.

In 1950, 1,976 radio stations reported total revenue of $340,891,476 from which they earned $55,113,872 in income before taxes. In 1960, 3,300 AM stations took in $560,315,348 but the income stood still, totaling $55,200,977. Other examples of the thinning community revenue dollars are these:

In 1948, six Denver AM stations shared $565,000 income; in 1960 17 stations shared $171,000, less than one-third of this sum.[27]

In Phoenix, where the population doubled in the last decade, the five stations operating in 1948 shared $204,000 in income; nine stations lost $50,000 in 1955; and 15 stations showed a loss of $62,000 in 1960.[28]

To what extent the FCC should take into account the ability of a community to support any additional broadcast stations has been one of the most persistent and difficult questions in the entire field of broadcast regulation. At the NAB convention at Chicago during the first week of April, 1962, the issue came to a head when FCC Chairman Newton Minow proposed putting a freeze on AM allocations. He suggested a "shirtsleeves working conference" to discuss the present art of radio broadcasting. "We are so busy grinding out grants of new licenses that we need to step back and take a look at why we're doing it," Minow said. "An intensive search for answers is long overdue and a search for policies that conform to the answers is imperative."[29]

Chairman Minow immediately received wholehearted endorsement from the majority of the NAB member delegates in the audience. The NAB accepted

---

[27] Ibid., p. 27.

[28] Ibid., p. 27.

[29] Ibid., p. 27.

the proposal and indicated it would be pleased to participate in a conference with the FCC to find solutions to broadcasting's problems.[30]

Chairman Minow also said that he felt that engineering standards must be tightened and the Commission's processing priorities sharply revised. He felt the FCC should encourage existing stations to merge and should also delete stations to permit operation based on sounder engineering standards, if these proposals are "guided by the principles of no significant loss of service and an avoidance of monopoly or undue concentration of control."[31]

These are just a few of the many questions which the industry-FCC conference would try to answer.

At the same conference, NAB head Governor Leroy Collins said that "The economics of good broadcasting are such that a station or a network simply cannot adequately determine community needs, plan for the meeting of these needs, finance the programming required, experiment with new formats and develop new talent without an adequate revenue base."[32]

It takes money, the governor continued, for broadcasters to do well the things that are expected of them:

> It is futile to think that this kind of financial base can be encouraged by the continued proliferation of an unduly large number of individual, competing broadcasting units.
>
> The theory of multiplicity as an incentive to better programming and a safeguard against mediocrity is a fine theory, but in actual practice there is a point of diminishing returns. No one wants monopoly, but the

---

[30] Ibid., p. 27.

[31] Ibid., p. 28.

[32] Ibid., p. 28.

> alternative is not the extreme in the other direction--anarchy through overpopulation of broadcast facilities.
>
> For when this happens, each economic unit is forced to cut back on costs, including important services in the very areas where public need requires strengthening, not lessening; creativity is stifled and the dreary drabness of conformity sets in.[33]

Chairman Minow warned, however, that the FCC should not get too deep into the number of stations a community can afford or it will be entering the utility type of regulation. Both FCC and NAB officials stressed that no one is advocating that the government return to economic stability considerations in making new grants. In the late 1930's the Commission had a question in its application form relating to the need of a community for the requested radio service. In a hearing, an applicant often was required to prove this need. This question was deleted from the application form and as a hearing issue in the early 1940's.[34]

Because no advance skill or knowledge is mandatory, and because programming sources are cheaper, there may be a large number of smaller stations which do not adequately serve the public interest. The Commission will often encourage mergers because stations have individual attributes which complement each other (i.e., desirable frequency, well known calls, no interference, unlimited hours, managing ability, sales ability and engineering ability, complementary accounts).[35]

The FCC will make it increasingly difficult for a station with an unprofitable record to be sold if future success depends on audience promotions and gimmicks. It is likely that the Commission will require

---

[33] Ibid., p. 28.

[34] Ibid., p. 28.

[35] Ibid., p. 29.

the station in financial straits to continue operating or turn in its license. In the case of the latter, the frequency involved would not be granted to a new station.[36]

Chairman Minow said that, "Though so many stations are in the red, radio seems to have no mortality rate. Radio stations do not fade away, they just multiply. The result has been a string of IOU's to several past owners, more and more raucous commercials, and a licensee so busy trying to pay his debts that he cannot serve the public."[37] Minow asked, "Is this the business of the Commission? If there are any jungle markets overpopulated by quick-buck operators where you have to scream at the listener to survive, is the Commission responsible?" In proposing a study of radio, Mr. Minow said he favors the present free enterprise system, with all its short term drawbacks.[38]

Sol Taishoff, editor of Broadcasting, voiced his objections to the establishment of economic criteria in an April 9, 1962 editorial:

> The machinery was started last week for government action to reduce competition in radio. It is a kind of action that a good many broadcasters eagerly seek, and we only hope their eagerness will not lead to an endorsement of procedures that could cause more troubles than they cure.
>
> It is no secret that some influential radio broadcasters believe that the FCC ought to establish economic criteria to be applied with engineering standards in the consideration of radio station grants. Some even think a combination of economic and engineering judgments ought to be invoked to eliminate some stations that are on the air. We suggest, as we have been suggesting for years, that a request for economic protection is also a request for

---

[36] Ibid., p. 29.

[37] At Chicago: a Minow of many moods, Broadcasting, April 9, 1962, p. 54.

[38] Ibid., p. 54.

> FCC regulation of the business practices of the licensees to which it has accorded economic protection.
>
> Historically the government has demanded the right to supervise the rates and practices of businesses that it shelters from free markets. We do not think that broadcasters can reverse that history.[39]

Taisheff, in his editorial, advocated the adoption and observance of realistic engineering standards for radio, rather than economic criteria. He does admit that there are too many radio stations, but says that many stations have been squeezed in at the cost of signal interference. Reception in many of the densely populated areas of the country is degraded.[40]

> If broadcasters confine their case to technology when they begin the FCC conferences on radio population that will now be held, they will be on sound ground. The minute they begin talking about economic methods of reducing competition they might as well also talk about the profit ceilings they are willing to accept.[41]

According to Broadcasting Magazine, agency executives in a position to help shape the economic future of radio overwhelmingly believe that reducing competition in radio would be beneficial. Just how beneficial is another question. They think radio would emerge with a better image, better programming and probably better billings, but they are divided about the extent of these improvements. Many emphatically would prefer that they not occur at all, rather than have them result from direct government intervention.[42]

---

[39]Profits and protection, Broadcasting, April 9, 1962, p. 122.

[40]Ibid., p. 122.

[41]Ibid., p. 122.

[42]Would radio birth control help?, Broadcasting, April 16, 1962.

One media director felt that a cutback in radio stations, especially in large markets, would bring to surviving stations larger national ad budgets, even though the total radio budget might not increase. Through a lessening of competition for the audience, he predicted, radio budgets might increase as a station's total audience became a more attractive purchase.[43]

Another agency man felt that it would be helpful if stations were eliminated in some markets, but was doubtful that such a move would lead to increased spending in radio. He advanced the theory that more and more radio stations are destined to become local advertising carriers ("just like the local newspaper"), largely because of television's continued growth and TV's increasing inroads on the advertiser's dollar.[44]

The vice president in charge of media for a top agency endorsed the suggestion of reducing stations because "too many of them operate as if they were a hardware store." A smaller number would eliminate "fierce competition" and persuade some stations to improve the quality of their programs. It was his experience, he said, that stations which were established as "going businesses" before the advent of television have maintained acceptable standards and are obtaining the large portion of national business. He thought the radio market of the future, ideally speaking, should be one with radio stations appealing to both a mass audience and to specialized audiences.[45]

---

[43] Ibid., p. 34.

[44] Ibid., p. 34.

[45] Ibid., p. 35.

An official at another agency took the position that "cutting down competition does not necessarily make a better entertainment medium. Competition between stations increases incentive to create better programs. It also gives timebuyers a wider range of choice. Less competition may also cause advertising rates to go up. I think the best way the FCC can handle the situation is to be careful as to who it licenses, rather than to trim down stations indiscriminately."[46]

These comments indicate a varying degree of familiarity with the overpopulation problem, but generally the agency men were in favor of some sort of readjustment of the allocation policies of the FCC.

With the AM freeze order in effect as of May 11, 1962, Charles H. Tower, administrative vice president of Corinthian Broadcasting Corp., raised a number of questions regarding the issue of economic criteria and the FCC's "birth control proposal." In a speech to the Kentucky Broadcasters Association, in Louisville on May 16, 1962, Mr. Tower asked, "What is meant by 'economic protection' in broadcasting? Why is economic protection being advocated now? What are the implications of the proposal? What sort of formula for economic protection is likely to be developed? Will the proposal, if adopted, mean more control over programming? Will it mean more supervision over station finances, and will broadcasters support the proposal?"[47]

Mr. Tower asserted that many of those who advocate the policy "are not primarily concerned with saving your dollar but are concerned with what they regard as lack of the content and quality of the service."

---

[46] Ibid., p. 36.

[47] Ten questions regarding the FCC's proposal, Broadcasting, May 21, 1962, p. 49.

He said that if "economic protection is given," broadcasters are "admitting that a competitive profit system does not provide a satisfactory service.... Economic protection will, in all likelihood, mean substantially more control over programming and a much closer supervision over the financial matters of broadcasting. Its chief impact will be in the smaller markets," Mr. Tower said.[48]

A look at the Commission's policies and practices partially answers some of the questions Mr. Tower has stated concerning the "birth control" proposals being made.

The FCC has built up over the years a fairly well-articulated policy regarding competition in the broadcasting field and the use of economic criteria to determine admission of an applicant to a given market. Historically, the Commission has conceived of the broadcasting industry as a competitive industry and has played an important role in maintaining and fostering competition. The Commission permits more than one station to operate in a given community or area and to maximize the total number of stations; insures that there is no overlapping of ownership interests among licensees of stations in the same broadcast service, i.e., AM or TV, serving substantially the same area; to limit total number of stations licensed to a single individual or group; provides roughly equal service areas so that competitive superiority will rest on programming rather than technical coverage; encourage diversification of ownership in mass media; assures freedom of the licensee from undue restraints by networks

---

[48] Ibid., p. 49.

and advertisers; and strengthens competition among the networks.[49]

The Commission does not concern itself with rate patterns, rate level or rate practices of stations. The benefits which the Commission expects to flow from competition relate both to the business practices and to the programming of stations.

On the business side, competition is presumed to provide a greater assurance that advertisers, large and small, will receive fair and equitable treatment in obtaining access to radio facilities and that undue concentration of economic power will be avoided.[50]

On the programming side, the competition of stations vying for audience is expected to encourage programming attractive to the public and reflecting community tastes and needs. Further, by limiting multiple station ownership, and by discouraging cross channel ownership of communications media, the FCC seeks to maximize diversity of program sources and ideas, to foster the free flow of news, and to encourage the airing of diverse views, attitudes and opinions in the public interest.

In short, the Commission hopes that licensees exercising their responsibility within a competitive framework will obviate the need for regulatory activity by the Commission in the day-to-day operations of stations.[51]

The Commission's concern seems designed to serve one or both of the following purposes:

---

[49] H. H. Goldin, Economic and regulatory problems in the broadcast field, Land Economics, 30:227+, 1954, p. 227.

[50] Ibid., p. 228.

[51] Ibid., p. 228.

1. Increasing the degree of diversification of economic power,

2. Promoting a richer, more varied program fare.

The first, is hardly sufficient to stand alone. While undue concentration may be undesirable, considerations of efficiency, and consumer satisfactions are critical in deciding whether a given degree of concentration is excessive.[52]

The critical dimension of competition in broadcasting is its effect upon the program fare. The public interest in broadcasting is largely program-oriented. This poses a difficult set of problems in regulation because the program is the by-product of stations' commercial operation.[53]

The Commission has consistently refused to exercise direct supervision of programs. It has, however, recognized that programs are influenced in at least three ways. They are:

1. The variety of program choice is limited in any area by the number of outlets. The Commission, through its licensing policy, has attempted to maximize the number of outlets possible (subject to certain limitations). These policies have been successful up to a point, then the law of diminishing returns sets in. The problem is, where is that point and how do we serve the public best in terms of stations authorized.

2. The variety of programs presented will be affected by the freedom of individual stations to select programs under their mandate of public service responsibility.

3. The free choice of stations among programs, is limited by the supply of programs.[54]

---

[52]Peter O. Steiner, Discussion: Goldin's Paper on Economic and Regulatory Problems in the Broadcast Field, Land Economics, 30: pp. 233-236, 1954, p. 234.

[53]Ibid., p. 234.

[54]Ibid., p. 235.

In determining if a station's entry into an area should be permitted, the Commission has excluded economic factors relating to financial loss, even when admission of a new station into the area could result in bankruptcy of prior licensees and possible cessation of service. Such a policy is the antithesis of those which rule industries such as utilities. It powerfully rebuts any claim that broadcasting is similarly regulated, with primary jurisdiction for enforcing the antitrust laws vested in the FCC.[55]

A review of the Commission's practice in considering the impact of new competition on existing stations shows that it has varied widely over the years. It can best be understood by analyzing various cases and decisions that the courts and the Commission have made as to whether or not economic criteria should be considered in the allocation of AM radio stations. Such an analysis follows in Chapter II.

---

[55]Victor R. Hansen, Broadcasting and the Anti-trust laws, Law and Contemporary Problems, 22:572+, Autumn, 1957, p. 573.

CHAPTER II

A CHRONOLOGICAL REVIEW AND ANALYSIS OF FEDERAL RADIO COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND COURT POLICY AND PRACTICE IN CASES INVOLVING THE IMPACT OF NEW COMPETITION UPON EXISTING STANDARD BROADCAST STATIONS

During the past thirty years official positions on refusal of broadcasting licenses because of new competition have been diverse. They vary from the decision that the Federal Communications Commission has no authority to consider any such factor, through an intermediate position that the Commission may weigh such an issue but should decline to do so as a policy matter, to the other extreme, enunciated in Carroll Broadcasting Co. v. FCC, 258 F2d 440, D.C. Circuit (1958), that the Commission must in certain instances consider the issue because of its impact upon the public, rather than its effect upon the existing station. Important because it affects the future of a vital industry, the question also exemplifies the problem of the degree of competition which should be permitted in regulated industries. The issue of refusal of entry on economic grounds is significant for all regulated industries when examined in the light of anti-trust policies, and in the case of broadcasting raises a further consideration of possible governmental infringement of freedom of the press.[56]

---

[56] Richard A. Givens, Refusal of Radio and Television Licenses on Economic Grounds, Virginia Law Review, Vol. 46, 1960. p. 1391.

One of the earliest cases which dealt with the question of economic injury was WGN, Inc. v. Federal Radio Commission 68 F2d 432, DC Circuit (1933), in December of 1933. WGN had claimed that an increase of facilities granted to WBBM in Chicago broadcasting with station KFAB in Lincoln, Nebraska, would subject WGN to economic injury. In the ensuing court case which was the result of an appeal by WGN, the court ruled that WGN's protest was "too vague, problematical and conjectural to furnish present substantial objection" and the appeal was dismissed.[57]

One of the first cases to come before the newly created Federal Communications Commission in 1934 was that of Red Oak Radio Corporation et. al. This case arose over an application filed by the Red Oak Radio Corporation, Carter Lake Iowa, and the Palmer School of Chiropractic, Davenport, Iowa, for consent to assignment of the station license of station KICK, Carter Lake, Iowa, to the Palmer School of Chiropractic which then filed an application for a construction permit for the removal of station KICK to Davenport, Iowa.

However the Rock Island Broadcasting Co., which was the licensee of station WHBF in Rock Island, Ill. protested (1) that additional facilities were unnecessary in the Rock Island and Davenport area; (2) that additional facilities, if authorized, would subject station WHBF to economic injury by curtailing the advertising business of that station, and (3) that as a result of such alleged pecuniary loss the protestant would be unable to "continue the high standard of service heretofore rendered."

---

[57] WGN, Inc. v. FRC, 68 F2d 432 at 433 Circuit Court, (1933).

[58] Red Oak Radio Corp. et. al., 1 FCC 163 at 164, (1934).

As a result a hearing was ordered and the Commission granted the construction permit for removal of the station to Davenport upon the demonstration, inter alia, that there was need for the additional service, and that potential advertising business could maintain an additional station. Possibilities of financial injury resulting to an existing station were considered by the Commission. The burden of proof, ruled the Commission, is on the protestant to sustain allegations contained in a protest filed against the granting of an application by the Commission.[59]

In making its decision the Commission considered population, coverage area, profit and loss statements of the existing stations and the need for local service as well as prevailing business conditions and the advertising potential of the area involved. However, the Commission found that the protestant had not sustained its protest and that the application for a CP would serve the public interest, convenience and necessity. It should be clear from the deliberations in this case that the newly-formed Commission did consider need for a station in a given area and probable economic injury to an existing station.

In 1936 the case of Atkinson v. FCC reaffirmed the policy established in the Red Oak decision. In this case, a construction permit was granted for a new local broadcasting station to operate daytime only in Watsonville, California, which, according to the testimony of the applicant Atkinson, was one of the best advertising fields for a city of its size (8,344). Station KDON - Monterey, also served the area and offered depositions to show that the Monterey Bay area of which Watsonville is a part would not be able to support commercially two radio stations.[60]

---

[59] Ibid., p. 165.

[60] Atkinson v. FCC, 3 FCC 137 at 140, (1936).

As in the Red Oak case, the Commission allowed such evidence to be admissible but ruled it was not sufficient to justify a decision that the Monterey Bay area would not be able commercially to support two stations. It would appear, then, that the Commission's policy was to consider the need for a new station in a given area as well as the effect it would have upon an existing station, with the burden of proof placed upon the protestant.

In December, 1937, the case of Great Western Broadcasting Association, Inc. v. FCC and Intermountain Broadcasting Corp. v. FCC came before the Court of Appeals, District of Columbia. Great Western had filed with the FCC an application to erect two stations in Utah, one at Logan and one at Provo. Jack Powers and Associates had requested authority to erect a station at Salt Lake City. Intermountain Broadcasting, the appellant, was the licensee of an existing station in Salt Lake City and it sought to intervene and prevent a grant of the Powers application for a station in that city.[61]

Great Western's applications were denied on the grounds of financial inability to construct and operate two stations. Great Western contended that these findings were wholly contrary to the evidence.[62]

Hearings before the Court disclosed that Great Western was in fact a subsidiary of Intermountain which owned controlling interest which had not been paid for by Intermountain, in effect an "empty corporation possessed of no character save its charter." The Court denied

---

[61] Great Western Broadcasting Assn., Inc. v. FCC and Intermountain Broadcasting Corp., v. FCC, 94 F2d 244 at 246, (1937).

[62] Ibid., p. 246.

the appeals of Great Western.[63]

On appeal, the Appellate Court held that Intermountain had failed to allege any sort of injury that might result from the allocation of radio facilities to Powers and Associates. Intermountain's appeal was based upon the theory that Salt Lake City had all the radio service it needed. The court stated: "In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of an older license to carry on in the public interest, the application should be denied unless there are compelling reasons of a public nature for granting it. And it is obviously a stronger case where neither license will be able to render adequate service. This, we think, is the clear intent of Section 402 (b) (2) of the statute, which provides for an appeal by an aggrieved person whose interests are adversely affected by a decision of the Commission granting or refusing an application."[64]

The Court stated that where a corporation operating a broadcasting station intervenes and opposes the grant of a license for a new station and appeals from the grant of the license, but, in its reasons for appeal, asserts, in substance, merely that the city has all the broadcasting it needs and does not allege any financial or economic injury to the station through the grant of a new license, it does not show any right to appeal.[65]

Shortly after the Great Western decision the Court heard the case of Pulitzer Publishing Co., v. FCC. The Star-Times Publishing Co. had applied to the FCC for a construction permit for a new station in

---

[63] Ibid., p. 247.

[64] Ibid., p. 248.

St. Louis. The Pulitzer Publishing Company appealed as a party aggrieved, on the ground that granting a license to Star-Times would throw that station into competition with KSD, the appellant's station. It also stated that the FCC should have found that broadcasting facilities in the St. Louis area were sufficient.[66]

Pulitzer felt that its application for increased facilities should have taken preference over the application for a new station. The Court stated that: "The ground of this contention is that a broadcasting licensee is a public utility, and from this ground Pulitzer argues that a new utility ought not to be allowed to enter the field until an old established utility is given the opportunity to extend its service."[67]

The Court made it clear, however, that radio is not a public utility. Congress does not fix and regulate rates or establish rules requiring it to serve alike the entire public in the use of its facilities, nor has Congress assumed the right to limit the profits, choose advertisers, programs, etc. Generally, the only requirement for the renewal of a license is that the station has not failed to function and will not fail to function in the public interest.[68]

Therefore the Court stated that: "We hold that the FCC, as a matter of positive duty, is not required to give the owner of an existing station priority to enlarge or extend its facilities alone of the primacy of its grant. Instead the test should be the character and quality of its service. To this we may add the requirement which we stated in Great

---

[66] Pulitzer Publishing Company, v. FCC, 94 F2d 249 at 250, (D.C. Circuit, 1937).

[67] Ibid., p. 251.

[68] Ibid., p. 251.

Western Broadcasting Assn. v. FCC., namely, that where the effect of granting an application for a new license will be to destroy the ability of the holder of the old license to carry on in the public interest the application should be denied." The Court, however, did not find this situation to be prevailing in this case and dismissed it.[69]

Later, in 1937, the case of Packard, Stebbins and Packard came before the Commission. This company, doing business as Valley Broadcasting Co., Pomona California, sought a construction permit to erect a new 250-watt daytime only station in Pomona.

"There is no broadcast station in Pomona," stated the Commission, "but primary service is available to that city and vicinity from stations KHK, KFI, and KNJ of Los Angeles and a number of other stations located there, and in addition to these stations, secondary service would be available from distant clear channel stations at night."[70]

The FCC went on to say that: "From a study of all the evidence adduced... we are of the opinion and so find that the Valley Broadcasting Co. is legally, financially and technically qualified to construct and operate the proposed new station at Pomona...." "We are not satisfied, however, that the applicants have shown there is an existing need for the additional service contemplated in this application. Moreover the record affirmatively shows that objectionable interference will be caused should this application be granted."[71]

---

[69] Ibid., p. 253.

[70] Packard, Stebbins and Packard, 4 FCC 288 at 291, (1937).

[71] Ibid., p. 292.

"It is not in the true interest of the public that the service of existing stations should be curtailed to make way for a new station without compelling reasons. No such compelling reasons are shown on this record."[72]

The Commission, therefore, took into consideration the adequacy of available service, regardless of the availability of a frequency. The Commission's policy was not to curtail the operations of existing stations, even though, as in this case, the city did not have a local radio station and the applicant was otherwise qualified to receive a license.

The Beaumont Broadcasting Association, in a hearing before the FCC in 1938, wanted to construct a new station at Beaumont, Texas. Primary service was already being rendered that city by KFDM, an unlimited time station. In the hearing it was contended that KFDM was being operated at a loss with 45% of the station time commercial, and 55% sustaining, and that therefore no new station should be allowed in the city.[73]

The Commission, in its decision, stated that it felt a public need existed for the proposed new station. Although the existing station (KFDM) was operating at a loss, it was shown that no serious effort had been made to sell advertising and that the station was not efficiently managed.[74]

---

[72] Ibid., p. 292.

[73] Beaumont Broadcasting Association, 5 FCC 139 at 139, (1938).

[74] Ibid., p. 142.

The Commission stated that:..."an existing station cannot be heard to complain that it is losing money unless it appears that said existing station is efficiently managed."[75] Beaumont's application was therefore approved and the Commission had established that it would consider the efficiency of the management of a station protesting on economic grounds.

On May 11, 1938, the case of the Fall River Herald News Publishing Company came before the FCC. Fall River had applied for a construction permit to install a new unlimited time AM station in Fall River, Massachusetts. Station WSAR located in Fall River had protested a grant of the application. Stations WEAN, WJAR and WPRO located in Providence, Rhode Island rendered service to Fall River and territory adjacent thereto.[76] The hearing examiner had recommended denial of the application. Station WSAR was shown to be rendering an "acceptable" and "sufficient" service in Fall River. (The meaning of these terms was never defined by the Commission). WSAR was established in 1921 but it had made an operating profit for only a short while immediately before the hearing of this case. The Commission felt, therefore, that there was nothing in the testimony before it to encourage the belief that two local broadcast stations in Fall River would find "sufficient" financial support to sustain themselves, nor that the existing station could survive the expected rivalry of the Fall River Herald News Publishing Co. Since the performance of the existing station was "acceptable and sufficient," the application for a permit to construct another station was denied.[77]

---

[75] Ibid., p. 142

[76] Fall River Herald News Publishing Co., 5 FCC 377 at 379, (1938).

[77] Ibid., p. 381.

In its grounds for decision, the Commission, on the record of the case, found that:

> "1. The Fall River, Massachusetts area has adequate broadcast service.
>
> 2. The applicant has not shown a public need for the radio broadcast service he proposes.
>
> 3. The record does not show that sufficient commercial support could be reasonably expected to enable the existing station to continue its operations and at the same time to sustain the applicant in its proposed operations.
>
> 4. The granting of the application would not serve the public interest, convenience and necessity."[78]

The Commission in this decision considered elements of showing by the applicant as to the need for a new broadcast service. This case is an example of the consideration the Commission gave to the existing broadcast service, its facilities, programs, and economic survival of existing stations. A compelling need would have to be shown in order to obtain a construction permit in cases such as the one above. Since the record indicated that the community could not support two local stations, and that the existing station could not survive the rivalry of a new station, the application was denied.

It appears that the broad concept of "need" has been variously interpreted by the Commission. It has been viewed in a number of contexts; e.g., the question of assigning a broadcast service to one of two or more communities; determining whether or not to grant an application despite interference; determining whether to revoke a license or deny renewal

---

[78] Ibid., p. 382.

because of some improper conduct of the licensee; determining whether or not to condone departures from the Standards of Good Engineering Practice. Need for a local broadcast service may also override other considerations which might militate against a grant, e.g., newspaper ownership.

In 1939 the Commission heard the Curtis Broadcasting Co. case. Curtis had applied for a construction permit to establish a new station in Richmond, Indiana. Primary service was already being rendered Richmond by local station WKBV. The station was a 100-watt full time operation. The Commission found that the city was already being provided with an adequate service to serve public interest, convenience and necessity.[79]

The applicant, stated the Commission, would offer approximately the same type of service now being broadcast by stations in the area. In contending that the existing station did not provide adequate service, the Curtis Co. did not apply for the facilities of that station, stated the Commission. The application would have to be considered as an application for additional facilities.[80]

The Commission stated that: "Furthermore, there is not sufficient evidence to indicate that there are adequate sources of commercial support available in Richmond, Indiana to insure the successful operation of two broadcast stations... Therefore the granting of the application will not serve the public interest, convenience and necessity."[81]

The Commission, in the Curtis case, continued its policy of considering the economic success of a proposed operation, the effect it

---

[79] Curtis Broadcasting Co., 6 FCC 7, (1939).

[80] Ibid., p. 7.

[81] Ibid., p. 10.

would have upon service in a given community, and competitive effects upon an existing station.

A landmark case which tested the policy of the FCC on the question of economic criteria for entrance into a given area or market was the Sanders Brothers v FCC, decided in 1940. In this case, the Telegraph-Herald newspaper, located in Dubuque, Iowa, wanted to set up a radio station in that city, and applied to the FCC for a construction permit. Sanders Brothers, owners of radio station WKBB in East Dubuque, Illinois, applied to the Commission to have their station relocated in Dubuque and stipulated that there was not enough talent and revenue, to support an additional station in the area. They contended it would not serve the public interest, convenience and necessity, as the present station was rendering adequate service to the community. WKBB showed that it had operated at a loss in the same area that the Herald-Telegraph proposed to serve.[82]

Both applications were granted by the FCC, but the Sanders Brothers appealed, on grounds of economic injury as a person aggrieved. The D.C. Circuit Court of Appeals held that one of the issues that the FCC should have considered was the possible economic injury to Sander's station that might occur with the establishment of an additional station, and that the FCC had erred in failing to make findings in that issue. The Appellate Court decided that, in the absence of such findings, the Commission's action in granting the Telegraph-Herald permit must be set aside as "arbitrary and capricious."[83]

---

[82] Federal Communications Commission v Sanders Brothers, 309 US 470, (1940).

[83] Ibid., p. 472.

The FCC contended that under the Communications Act, economic injury to a competitor is not ground for refusing a broadcast license and that Sanders was not a person aggrieved nor were its interests adversely affected by the Commission's action within the meaning of Section 402 (b) of the Act, which authorizes appeals from the Commissions orders.[84]

The U.S. Supreme Court granted a petition for Writ of Certiorari on December 11, 1939, and held that the "resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public interest, convenience and necessity, an element the FCC must weigh, and as to which it must make findings, in passing on an application for a broadcasting license."[85]

The Court continued:

> ...Section 307 (a) of the Communications Act directs that "the Commission, if public interest, convenience or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant, therefore, a station license provided for by this Act." This mandate is given meaning and contour by the provisions of the statute and the subject matter with which it deals. (FRC v Nelson Bothers, Co., 289 US 266, 285). The Act contains no express command that in passing upon an application the FCC must consider the effect of competition with an existing station.[86]

The Supreme Court stated that:

> ...In contradistinction to communication by telephone and telegraph... the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. (47 USC Sect. 153 (h)). Thus the Act recognizes that the field of broadcasting is one of free competition.[87]

---

[84] Ibid., p. 472.

[85] Ibid., p. 473.

[86] Ibid., p. 473.

[87] Ibid., p. 474.

The Court continued:

> ...The Act does not assay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcast field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others.... Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business 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.[88]

The Court concluded that:

> ...Economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.[89]

The Supreme Court therefore reversed the judgment of the Court of Appeals and sustained the Commission.

Nevertheless, the Supreme Court seemingly left the door open for consideration of economic factors in one situation:

> ...This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant to adequately serve his public; it may indicate that both stations -- the existing and the proposed -- will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that by a division of the field, both stations will be compelled to render inadequate service.[90]

---

[88] Ibid., p. 475.

[89] Ibid., p. 476.

[90] Ibid., p. 476.

The Court continued:

> ...These matters, however, are distinct from the consideration that, if a license is granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license, this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives (Section 311), which Congress would not have contemplated without granting the Commission powers of control over the rates, programs and other activities of the business of broadcasting.[91]

In a subsequent case, decided in 1939, the question arose as to whether a court could hear an appeal involving economic injury in the light of the previous Sanders decision.

In Yankee Network v FCC, the D.C. Court of Appeals, in discussing the case, stated that:

> ...The Commission attempts to support its position (to grant a new license to a station which would be in competition with Yankee) by arguing that "one of the chief concerns of Congress, as evidenced by the reports and debates, was to guard against monopolies and to preserve competition." It is difficult to understand how this result could be achieved by deliberately or carelessly licensing so many new competing stations as to destroy already existing ones, and possibly the newly created ones as well. While it is true that it was the intention of Congress to preserve competition in broadcasting, and while it is true that such intention was written into Section 314 of the Act, it certainly does not follow therefrom that Congress intended the FCC to grant or deny an application in any case, other than in the public interest. Just as a monopoly -- which may result from the action of the FCC in licensing too few stations -- may be detrimental to the public interest, so may destructive competition, effected by the granting of too many licenses. The test is not whether there is a monopoly, on the one hand, or an overabundance of competition, on the other, but whether the granting or denying

---

[91] Ibid., p. 476.

> of the application will best serve the interest of the public.[92]

The Court continued:

> ...The rapidly increasing number of stations and the resulting competition for advertising as well as program "talent" has just as dangerous possibilities as electrical interference. The public interest requires not merely that a maximum quantity of minimum quality service shall be given. If competition is permitted to develop to that extent, then "the larger and more effective use of radio in the public interest" cannot be achieved.[93]

The Court further stated that:

> The method of uncontrolled competition argued for by the Commission in the present case is in fact one way of creating monopolies. If it were allowed to go on unrestrained, according to its theory of non-reviewable arbitrary power, none but a financial monopoly could safely exist and operate in the radio broadcasting field. The Commission justifies its action in the present case, and justifies its contention in theory, by assuming that if a chain, operating several broadcasting stations, or a company which owns both newspapers and broadcasting stations, is able to carry one of them financially, even though the latter station is not able to support itself, then the latter cannot protest against destructive competition. The result of this policy might well be to destroy or frighten from the radio broadcasting industry any independent station attempting to operate on its own resources; and to leave in the field only monopolies which were sufficiently supported financially to withstand the destructive competition which might result from arbitrary careless action upon the part of the Commission in the granting of new station licenses. It was undoubtedly with just such considerations of possible arbitrary administrative action in mind that Congress provided for judicial review under the Communications Act on behalf of any person aggrieved or whose interests are adversely affected.[94]

---

[92] Yankee Network v FCC, 107 F2d 212 at 223, D.C. Circuit Court, (1939).

[93] Ibid., p. 223.

[94] Ibid., p. 224.

> Our jurisdiction on appeal under the Communications Act depends upon whether reasons of appeal are assigned, which, if well founded, would show that the appellant is a person aggrieved or whose interests are adversely affected by the decision of the Commission from which the appeal is taken. If, however, upon an examination of the record we find that the appellant is not a person aggrieved or adversely affected by the order of the Commission, it then becomes our duty to dismiss the appeal.[95]

> We have held that the reasons assigned in the Sanders Brothers case were sufficient to furnish proper grounds of contest on appeal upon the issue of "economic injury to the existing station through the establishment of an additional station." In that case the reasons given showed (1) that the appellant was a licensee under the Act; (2) that it was engaged in the operation of a broadcasting station; (3) that the Commission had granted an application for a competing station license; (4) that the operation of the proposed station would necessarily result in such severe loss of operating revenue as to impair the service rendered by appellant; and (5) destroy its ability to render proper service in the public interest. Such a showing is sufficient to present the issue on appeal.[96]

On the basis of these criteria, the Court found that Yankee had sufficient gounds for appeal under Section 402 (b) (1) and (2). Although the Court admitted the appeal, it upheld the FCC's decision to grant a construction permit to the Northern Corporation, stating:

> ...The protestants have failed to establish facts to show that operation by the applicant (Northern Corporation) as proposed, would adversely affect their economic interests. There is nothing in the record indicating that the entry of the applicant into the regional field would so affect the economic welfare of the protestants, or any of them, as to have any ultimate effect whatsoever on the public interest, convenience and necessity.[97]

---

[95] Ibid., p. 224.

[96] Ibid., p. 224.

[97] Ibid., p. 225.

The Court continued:

> ...The reason given does suggest the issue of economic injury, and is sufficient for contest on appeal, but does not show any injury in fact. Therefore the Commission's decision to grant a construction permit to the Northern Corporation is not arbitrary and capricious and should be upheld.[98]

In 1939, subsequent to the Sanders case, the D.C. Circuit Court also held, in Tri-State Broadcasting v FCC, that:

> ...The owner of an existing station may well contend in any case that a new station may reduce the present income of his station, but it requires more to justify the Commission's refusing to grant the new license. A mere showing that the income of an existing station may be reduced if another station enters its field is not sufficient. The appellant (Tri-State) recognizes that such cannot be the criterion of economic injury herein, as it charges that the competition complained of will be destructive and ruinous. This character of competition may affect the public interest, convenience and necessity, which is the statutory criterion under which the Commission must act.[99]

However the Court held that it was not the case here and the appeal was dismissed.

Another important subsequent case involving economic injury was the Spartanburg Advertising Co. case decided in 1939. This company sought a construction permit for a new station at Spartanburg, South Carolina, to operate both day and night. Station WSPA, a daytime only station already in operation there, alleged that it would be adversely affected by the proposed station. The licensee of WSPA testified that in 1938 the station's gross income was $700 less than the operating cost

---

[98] Ibid., p. 226.

[99] Tri-State Broadcasting v FCC, 107 F2d 956 at 957, D.C. Circuit Court, (1939).

of $34,000. However, the Commission felt that "there is no evidence of the extent if any, to which the station's income will be reduced by the operation of the proposed station or that station WSPA will be unable to continue its service."[100]

Therefore, the Commission concluded that the licensee of WSPA "failed to show that he has any interest which will be adversely affected by a grant of the instant application or that such a grant will result in an impairment of his ability as a licensee to serve the public interest, convenience and necessity." Accordingly, the application of Spartanburg Advertising Company was granted.[101]

In the case of Summit Radio Corporation, the Commission employed a somewhat different approach. In this case, Summit had applied for a construction permit to establish a new special station in Akron, Ohio, unlimited time at 1 kw.[102]

Allen T. Simmons, licensee of station WADC, in a petition to intervene, stated that the addition of a new radio broadcasting service would necessarily deplete his station's existing audience, talent and revenue. Another intervener, station WJW in Akron, charged that "the granting of a license to another radio station in Akron would limit the scope of the activities of WJW, distribute the audience of listeners and limit the program material, talent and support available to WJW."[103]

---

[100] Spartanburg Advertising Co., 7 FCC 498 at 499 (1939).

[101] Ibid., p. 499.

[102] Summit Radio Corporation, 7 FCC 619, (1940).

[103] Ibid., p. 621.

The Commission stated that: "The evidence, however, does not substantiate the claims of economic injury, even if such matters were cognizable by the Commission."

> "The only other issue raised upon the argument relates to the question of need for service. In view of the statements in the opinion of F. W. Meyer (7 FCC 544), Docket No. 5074, decided on November 15, 1939, some weeks after the argument in this case was held, no further extended discussion of this question seems necessary."

The Commission further said:

> ...It should be noted that nothing in the Communications Act, our rules and regulations, or our policy requires a finding of a definite need to support the grant of an application. Cases where such a finding of need is not made are, however, to be distinguished from situations in which a real lack of broadcast service is made clear. (See Courier Post Publishing Co. v FCC., 104 F2d 213, (1939). In the latter class of cases the Commission will give due consideration to this fact. The public interest, convenience and necessity which the statute provides as the basis for a grant, cannot be construed as a mandate that actual necessity for the particular facilities must be shown. Neither the disjunctive form nor the public convenience as an independent factor is to be entirely ignored. Indeed, the words "public necessity" in the Act are not to be construed narrowly, but rather as calling for the most widespread and effective broadcast service possible.[104]

The Commission found that the grant of an application would be in the public interest, convenience and necessity.

An interpretation of the language used in the Supreme Court's Sanders Brothers decision was the issue in the case of the Presque Isle Broadcasting Company. Presque Isle had requested authority from the FCC to construct a station at Erie, Pennsylvania, to operate on an unlimited time basis. The application was granted but WLEU Broadcasting Company, licensee of station WLEU in Erie, requested a rehearing. WLEU, the only station

---

[104] Ibid., p. 621.

in Erie, claimed that economic injury would result from the new operation.[105]

The petitioner urged that the language of the Supreme Court in the Sanders Brothers decision required the FCC to reconsider its decision and reopen the proceedings to consider the effect of the proposed competition on the public.

The petitioner quoted the language of the Supreme Court:

> ...This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations -- the existing and the proposed -- will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service...[106]

The Commission, however, stated that the Supreme Court had made it perfectly clear that "Congress intended to leave competition in the field of broadcasting where it found it" and to permit "a licensee to survive or succumb according to his ability to make his programs attractive to the public." The Commission further said,

> "...a licensee is not entitled to be protected from competition and the FCC is under no duty to make findings on the effect of such competition on the licensee. If, however, the financial qualification of the applicant depends on his ability to compete for business with the existing licensee, the question of the effect of competition on the applicant is an important fact to be considered by the Commission in determining whether the applicant is financially qualified, for the statute requires an applicant to be financially qualified to operate a station...."[107]

---

[105] Presque Isle Broadcasting Company, 8 FCC 3 at 5, (1940).

[106] Ibid., p. 8.

[107] Ibid., p. 8.

The Commission further stated that there is a vital distinction between the situation where an applicant is not financially qualified, and the case where the applicant is financially and otherwise qualified but where the effect of granting his application will be to drive an existing station out of business.[108]

> ...The statutory requirement that an applicant be financially qualified to operate a station makes relevant in some cases the effect which the competition of the existing licensee will have on the applicant, for where the applicant's financial qualification depends on his ability to compete successfully for business with the other licensees, the Commission cannot grant him a license unless he can show that he can derive sufficient revenue from the operation of a station to make him financially qualified.[109]

The Commission continued:

> ...In the case at bar, the petitioner does not allege that the applicant is not financially qualified in all respects but, in effect, is complaining of the competitive effect which the applicant's successful operation of its new station will have on the petitioner. The statute, however, does not require the Commission to consider the effect which the competition of the new station will have on the existing station, for by hypothesis, the existing station was financially qualified when the license was granted to it and the statute makes his success or failure in the broadcasting business depend solely on "his ability to make his programs attractive to the public." The Supreme Court guarded against the possibility of its opinion being construed as requiring the Commission ever to consider the effect which the competition of a new station would have on the existing licensee, by adding the following language immediately after the portion of the opinion quoted by the petitioner, WLEU.[110]

The FCC quoted the language of the Supreme Court in the Sanders decision as follows:

---

[108] Ibid., p. 8.

[109] Ibid., p. 9.

[110] Ibid., p. 9.

> ...It is inescapable that the intent of Congress would be completely nullified and the Supreme Court's declaration concerning the desirable effects of competition would be rendered entirely meaningless if the FCC were required to deny to a new station permission to enter the field merely because it would adversely affect the ability of an existing station to continue to serve the public. It is implicit in the idea of free competition that public interest cannot possibly be adversely affected by the failure of an existing station to survive due to increased competition because this result cannot follow unless the new station's competitive efforts enable it to render a superior public service. In other words, under the statute, competition which an applicant had to face may be important because his financial qualifications may depend on it; but the effect of competition with which an existing licensee is confronted as the result of the operation of a new station need not be considered by the Commission under the statute because whatever that effect may be, it is only the end-product which a system of free competition is designed to produce.[111]

Regardless of whether or not the Supreme Court's reasoning could be considered illogical and/or faulty, the Commission ruled that the grant of a license to Presque Isle would serve the public interest, convenience and necessity because the public would have the benefit of improved service and a wider choice of programs.

In 1941, the case of Colorado Radio Corporation v FCC came before the D.C. Circuit Court of Appeals. In this case, Colorado Radio Corporation sought to have the FCC deny F. W. Meyers' application for a third station in Denver, Colorado, on the grounds of economic injury. The appeal was dismissed by the Court because the public interest was not shown to be affected.[112]

In a concurring opinion, Associate Justice Edgerton stated in part:

---

[111] Ibid., p. 10.

[112] Colorado Radio Corporation v FCC, 118 F2d 24 at 24, D.C. Circuit Court, (1941).

> ...The Sanders case permits an appellant to come here, but not to succeed here, on the basis of financial injury to himself. In order to succeed, one who appeals against the granting of a license must present reasons why the license should not be granted. The Supreme Court held in the Sanders case that injury to the appellant, another licensee, is not such a reason. The fact of injury to him entitles him to present relevant matters, but is not itself a relevant matter; it entitles him to be heard, but it is not among the things concerning which he is entitled to be heard.[113]

The majority of the judges further stated that the Sanders case decides that competition between an existing and proposed station is to be considered by the Commission only when it bears "upon the ability of the applicant adequately to serve his public," i.e., when it shows that the applicant, and not merely the existing station, will either "go under" or "be compelled to render inadequate service." However this was not the case here.[114]

In the case of Ewing Broadcasting Company in September of 1944, the Commission appeared to be following the same policy that it had set down in Colorado Radio Corporation (with the support of the courts) and Presque Isle Broadcasting. In this case, both Ewing and the Mississippi Broadcasting Company had petitioned for permits to erect new stations in Jackson, Mississippi on widely separated frequencies. However, Mississippi Broadcasting protested the grant of the construction permit to Ewing, claiming that the "petitioner is apprehensive that the grant of a construction permit in the instant case may preclude favorable action by the Commission on petitioner's application for a station at Jackson, Mississippi," in that the Commission may decide that the facts do not

---

[113] Ibid., p. 28.

[114] Ibid., p. 28.

warrant the establishment of two new standard broadcast stations in Jackson.[115] In other words, Mississippi Broadcasting feared that a grant to Ewing would preclude favorable consideration of its own application.

The FCC stated in its decision that if Mississippi Broadcasting's apprehension stemmed from this hypothesis, such fears were groundless, citing the Sanders Brothers case. Competition from a second station in Jackson was ruled not to be a factor in the decision and the application was therefore granted.[116]

In the years between 1944 and 1949 there were few, if any, cases heard or decisions made by either the FCC or the courts that significantly altered Commission or court policy regarding the economic injury issue. Then, in 1949, the D.C. Circuit court reaffirmed its position previously taken regarding economic injury and the need for new stations in the case of Easton Publishing Company v FCC. In determining whether a new station should be admitted to an area already served by three or four stations the D. C. Circuit Court said:

> The Supreme Court made clear in FCC v Sanders Brothers Radio Station that Congress intended to make broadcasting a competitive business and that the usual rules relating to the certification of public utilities do not apply.
>
> It said in 309 US at 475: "In short, the broadcasting field is open to anyone, provided there is an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

---

[115] Ewing Broadcasting Company, 10 FCC 393 at 394, (1944).

[116] Ibid., p. 394.

> Under that view of the statute, the public interest, convenience and necessity to which the Act refers are served by effective competition between strong competitors.
>
> Competition of course is between broadcasters on different frequencies covering the same area. If there is only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial. But if the choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service and the relative abilities of the applicants to meet the greater need.[117]

In March of 1950, the Commission issued its opinion in the matter of the application of the Voice of Cullman Broadcasting Co., Cullman, Alabama, for a construction permit to erect a new standard broadcast station in that town. The FCC had before it a petition for rehearing, filed by the Cullman Broadcasting Co., licensee of station WKUL, Cullman, protesting the grant of the new station. Among the grounds for protest, Cullman Broadcasting alleged economic injury to itself and injury to the public as the result of destructive competition between its station and that of the Voice of Cullman.[118]

Cullman alleged that "there is not sufficient available or potential advertising budgets or amount available as revenues to radio stations located in Cullman, Alabama, to pay the actual cost of operating two such stations in that city or vicinity."[119]

---

[117] Easton Publishing Company v FCC, 175 F2d 344 at 346, (1949).

[118] Voice of Cullman, 14 FCC 770, (1950).

[119] Ibid., p. 775.

It was also alleged that the establishment of a new station would result in either "(1) destruction of WKUL or depreciation of the quality of its service, or (2) in the discontinuance of the proposed new station because of insufficient revenue."[120]

The Commission, however, felt that these conclusions were not supported by the facts. The Commission took the position, as it had in the past, that the public interest strongly favors competition and cited the Sanders Brothers decision. The Commission also stated that:

> Petitioner attempts to circumvent the recognized purpose of the act by equating private with public interest. It argues that the establishment of another broadcast station in Cullman will cause WKUL's program service to deteriorate and thus the public interest will suffer. But this obviously does not follow since the public will be enjoying not only petitioner's service but a new service. What the public may lose at one point it will gain at another.[121]
>
> Similarly the public interest is not concerned with the possibility that the new station or WKUL may be forced to cease operation because of inadequate revenues. The likelihood and even the certainty of some business failures is the price of competition. Congress in determining that the broadcast industry should be competitive has decided that the price is not too high considering the benefits which flow therefrom.[122]
>
> We do not believe that the results of establishing two stations in an area which at the time can allegedly support only one can be foreseen. One station may rapidly drive the other out of business; both stations may survive either by attracting sufficient additional revenue or by reducing expenses without necessarily degrading their program service since quality of program service cannot be measured by cost alone; one or both stations may be content to operate at a loss either permanently or until the business situation permits the development of additional

---

[120] Ibid., p. 775.

[121] Ibid., p. 775.

[122] Ibid., p. 775.

> revenues. The possibilities are numerous, and since they lie in the future and stem from the interaction of individual purposes...the ultimate results...upon the service rendered the public cannot be predicted. Detailed information of the present business situation obtained at a hearing would not make prediction substantially more possible.[123]
>
> Moreover, assuming the worst possible results arose from the establishment of the new station, the situation would be self-correcting and injury to the public, if any, would be of short duration. If either station by reason of lack of revenue becomes unable to discharge its responsibility of providing a program service in the public interest, that station will likewise be unable to secure a renewal of license and must leave the field clear for the other station. If both stations should cease operations, the way would then be open for the establishment of a new station for which, in the instant case by petitioner's own figures, there would be adequate support.[124]
>
> Thus against speculative and at the most temporary injury to the public interest as a result of competition we must weigh the very real and permanent injury to the public which would result from restriction of competition within a regulatory scheme designed for a competitive industry and without the safeguards which are necessary where government seeks to guarantee to any business enterprise greater security than it can obtain by its own competitive ability. With these considerations in mind, the Commission has determined that, as a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations. We here reaffirm that determination.[125]

The Commission did state however, that

> "There can be no doubt at all, since the decision of the Supreme Court in FCC v WJR, the Goodwill Station, Inc., 337 U.S. 265, (1949), that the decision of whether the facts alleged in the petition warrant the holding of a hearing may be made by the Commission on the pleadings presented."[126]

Although, in Voice of Cullman, the hearing asked for by Cullman was denied, the Commission had not disclaimed power to limit licenses on

---

[123] Ibid., p. 776.

[124] Ibid., p. 776.

[125] Ibid., p. 776.

[126] Ibid., p. 773.

competitive grounds in broadcasting cases.

The FCC in 1954 indicated in a decision (Radio Cleveland, 11 RR 348) that issues regarding economic injury to an existing station are separate from issues regarding the establishment of a second station in a community. The Commission made clear that such issues would not be stricken in a protest proceeding, but the burden of proof would be placed on the protestant.[127]

In the Radio Cleveland case, a protest was filed by station WBAC in Cleveland, Tennessee, against the establishment of a new 1000 watt station by Radio Cleveland. The Commission found that WBAC had standing as a "party in interest" within the meaning of Section 309 (c) of the Communications Act. However, the Commission stated that the station owner must "do something more than set forth in his protest vague, non-specific, conclusionary arguments and allegations; he must allege those facts upon which his conclusions as to the impropriety of the Commission's grant without hearing are predicted. These facts must be alleged with specificity; they must be concrete, basic facts."[128]

The Commission stated that the burden of proof is on the protestant to:

1. Determine whether the Cleveland market will provide sufficient revenues to the proposed station so as to permit the applicant to adequately serve his public.

2. Determine whether the advertising potential of the Cleveland market is such that both stations, the existing and proposed, may go under with the result that a portion of the listening public will be left without adequate service.

---

[127] Radio Cleveland, 11 RR 348 (1954).

[128] Ibid., p. 349.

3. Determine whether the advertising potential of the Cleveland market is so slight that by a division of the field both stations, the existing and the proposed, will be compelled to render inadequate service.[129]

The Commission designated the application of Cleveland Broadcasting for hearing, but if the rationale of the Cullman case had been followed here, it would have precluded consideration of these criteria. However, the Commission decided to afford consideration pending further investigation of the problem.[130]

In a case which clarified the scope of inquiry in a protest hearing, the Commission heard the Cumberland Valley Broadcasting Company in 1954. In this case, WAGG, Franklin, Tennessee and WMMT, McMinnville, Tennessee protested the grant of a new station to operate in McMinnville daytime only. The FCC ruled that "a protestant objecting to authorization of a second station in its community will be given an opportunity to present evidence bearing on the competitive aspects of a second station in a small market but the burden of proof and of demonstrating the materiality and relevancy of the facts alleged is on the protestant." The issues in this case were the same as those in Radio Cleveland, and this case was designated for hearing also, pending further consideration of the problem.[131]

In contrast to the Cumberland Valley case is the 1955 American Southern Broadcasters case. A protest was filed by Southland Broadcasting Co., licensee of WLAU, and New Laurel Radio Station, Inc., licensee of

---

[129] Ibid., p. 350.

[130] Ibid., p. 350.

[131] Cumberland Valley Broadcasting Co., Inc. 11 RR 840 (1954).

WAML, both located in Laurel, Mississippi, against the establishment of a new station, requested by American Southern, (WPWR). The criteria for making a protest in this case are the same as those in Cumberland and Radio Cleveland. The Commission, following its reasoning in the Voice of Cullman, stated that hearing on these issues (economic injury) would be an abuse of process.[132]

The Commission stated:

> ...It is our opinion that the possibility that competition between radio stations may result in detriment to the public by reason of lowered quality of program service or the complete elimination of one of the competitors is, as a practical matter, a fact which is incapable of proof.[133]

The Commission continued:

> ...Moreover, even if the possible effects of the new competition, which petitioners have alleged might result, were capable of proof, we have grave doubts as to whether they should properly prevent this Commission from issuing a license to an applicant who is otherwise qualified. Nor do we believe that the language of the Sanders case would require us to do so. As we see it, the Court at this point in the Sanders opinion [where it cited the danger of a station being forced to render inadequate service] was not so much directing the Commission as to what factors it must consider, but rather reserving the question of whether such factors should be considered -- which was not then before the Court -- for further deliberation by the Commission.[134]

Up to a period of time shortly before the Sanders case, the Commission, as a matter of policy, had considered these economic factors. In American Southern, however, the FCC stated:

---

[132] American Southern Broadcasters, 11 RR 1054, (1955).

[133] Ibid., p. 1056.

[134] Ibid., p. 1057.

> ...Our deliberations lead us to the conclusion that considerations of such factors would, in fact, be contrary to the entire regulatory scheme, as laid down by Congress in the Communications Act, which is designed for a competitive broadcasting industry and not for an industry where government seeks to guarantee a business enterprise greater security than it can obtain by its own protective ability.[135]

The Commission continued:

> ...Recognizing, however, that we are here faced with an open question, (see Radio Cleveland, 11 RR 349, and application of Cumberland Valley Broadcasting Co., 11 RR 840, where the Commission expressed a desire for further consideration of the general problem "raised by protestants seeking hearing issues in the competitive aspects of new stations") an oral argument will be held at which the policy and legal questions raised will be resolved.[136]

The Commission therefore withheld the grant of a new channel to American Southern until hearings could be held.

Oral argument was held on February 21, 1955. Thereafter, the Commission designated the economic injury issues for evidentiary hearing, placing the burden of proof upon the protestants.[137]

The economic issues involved were these:

> (1) To determine whether the Laurel market will provide sufficient revenues to the proposed station so as to permit the applicant to adequately serve its public.
>
> (2) To determine whether the advertising potential of the Laurel market is such as may indicate that one or both of the existing stations and the proposed station will go under, with the result that a portion of the listening public will be left without service.
>
> (3) To determine whether the advertising potential of the Laurel market is so slight that by a division of the field, one or both of the existing stations and the proposed station, will be compelled to render inadequate service.[138]

---

[135] Ibid., p. 1057.

[136] Ibid., p. 1057.

[137] American Southern Broadcasters, license denied, 13 RR 927 at 929, (1957).

[138] Ibid., p. 930.

There were two additional issues and the burden of proving them was placed upon the applicant. These issues regarded the financial qualifications of the applicant, and alleged misrepresentations of fact contained in the applicant's application.[139]

When the evidentiary hearing was held, however, both Southland and New Laurel had abandoned their allegations with respect to issues 1, 2 and 3, and stated that they would not introduce evidence on them. Accordingly, they were not considered further by the Commission.[140]

As a result, the Commission never was able to "hold an oral argument at which the policy and legal questions raised will be resolved." However, the Commission continued:

> ...In view of our determination that the applicant, American Southern Broadcasters, is not financially qualified to construct, own and operate its proposed station, we conclude that the public interest and necessity would not be served by a grant of the application of American Southern Broadcasters.[141]

The protests of Southland and New Laurel were dismissed. The Commission's action of November 24, 1954, granting the application of American Southern for a construction permit was reversed and the application denied on November 13, 1957.[142]

Further clarification of this issue came in 1955, subsequent to the first American Southern proceedings, when the Commission heard the case of Iredell Broadcasting Co. In this case the Commission stated

---

[139] Ibid., p. 930.

[140] Ibid., p. 947.

[141] Ibid., p. 947.

[142] Ibid., p. 947.

that issues regarding economic injury to an existing station are probably not relevant to the question of whether establishment of a second station in a community would be in the public interest. The FCC did say that such issues would not be stricken in a protest proceedings, but the burden of proof of demonstrating the materiality and relevancy of the issues would be placed on the protestant.[143]

The Commission held oral argument in the case because of the unsolved questions relating to economic issues raised by the American Southern case, despite policy statements already made in the Voice of Cullman decision which preceded it.

As a result of the hearing, a construction permit was granted to Iredell. In its decision, the FCC made a policy statement to the effect that, "The Commission may not withhold a permit or license on the basis of so-called economic injury considerations or consider the effect of legal competition, except perhaps in cases involving Section 307 (b) of the Act. Even if the Commission had power to consider economic effects, as a matter of policy it will not do so in passing on applications for new broadcast stations."[144]

Subsequently, however, in 1957, in the case of George A. Hormell II, the Commission found that the operator of the only existing station in a community had standing to protest the grant of an application for a new station in the community. The withdrawal by the protestant of economic injury issues previously specified in a hearing of the Hormell case did not nullify its showing that it would be injured by competition,

---

[143] Iredell Broadcasting Company, 12 RR 573, (1955).

[144] Iredell Broadcasting Co., 13 RR 996, (1957).

or affect its standing, according to the Commission.[145]

The crucial question in this case was whether a grant would cause economic injury adversely affecting the public interest.[146]

In the Voice of Cullman case, the Commission had not disclaimed power to limit licenses on competitive grounds in broadcasting cases, but decided in that particular case it would not be in the public interest to do so. Subsequent cases have shown the Commission's vacillation between admission and refusal of consideration of economic injury and competitive factors.

In 1957, however, the Commission went further in the Southeastern Enterprises case, declaring that not only should economic injury not be considered as a matter of policy, but that the FCC was without jurisdiction to consider it.[147]

This conclusion was based upon the assumption of an overall Congressional policy of promoting competition, and the fact, that broadcasting was not subject to the same detailed regulation as telephone and telegraph service, so that competition was the chief regulator of performance. The FCC also noted that Congress had failed to adopt proposals to require a finding of need before a license could be issued.[148]

In the Southeastern case, the Commission disclaimed any authority even to consider the adverse effects of legal competition upon service

---

[145] George A. Marzall, II, 16 RR 274a, (1957).

[146] Ibid., p. 274a.

[147] Givens, op. cit., p. 1393.

[148] Hearings on S. 1333 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 80th Congress, 1st Session, p. 33, (1947).

to the public. The Commission refused to consider the effect of economic factors on competition even when there was a possibility of failure of both stations and interruption of service with consequent injury to the public. The FCC regarded the door left open by the Supreme Court as obiter, and seized upon "this opportunity now to disclaim any power to consider the effects of legal competition upon the public service in the field of broadcasting."[149]

If it were to consider economic effects, the Commission said, it must engage in a detailed common-carrier-type examination of the existing station's efficiency, its proper rate of return, and the prices charged advertisers, factors which it believed Congress had excluded from consideration in the broadcasting field. The Commission said that, "Thus after careful consideration of Congressional intent (a) in the original enactment of the Communications Act relating to broadcasting, (b) specific provisions prescribing the regulation of broadcasters as common carriers (Section 3 (h); (c) subsequent rejection by Congress of proposed amendments of the Act which would delete the requirement as to demand as provided by Section 307 (b) and instead require the Commission to give effect to the needs of a community and the U.S. Supreme Court's interpretation of Congressional intent (Sanders case), we conclude that we do not have the power to consider the adverse effects of legal competition upon service to the public."[150]

The Commission further stated that , "Until Congress gives us the power to permit something less than free competition in the industry,

---

[149]Broadcast Regulation and Intermedium Competition, Virginia Law Review, 45:1126, 1959, p. 1126.

[150]Southeastern Enterprises v FCC, 22 FCC 605 at 614, (1957).

we have no power to save either the public or the protestant from certain of competition's uncomfortable effects."[151]

In one of a number of cases subsequent to the Southeastern Enterprises decision and policy statement, the Commission supported its position in Kaiser Hawaiian Village Radio, Inc., decided April 26, 1957.[152] Kaiser had applied for a construction permit and KIKI Ltd. sought to stop the grant by protesting economic injury. The FCC ruled for Kaiser, using the same rationale it gave in the Southeastern decision. It stated that, "The FCC will disregard possible effects of competition in passing upon applications for new broadcast stations, both as a matter of policy and because it lacks statutory power to do so."[153]

A complete reversal of the Commission's Southeastern Enterprise policy came in the 1958 District of Colombia Circuit Court decision in Carroll Broadcasting Company v FCC.[154] An existing licensee claimed that the grant of a new license to West Georgia Broadcasting Company would not merely injure its operation, but would also injure the public interest because valuable service would be destroyed. The FCC had declined to consider this argument, relying upon the decision and the reasoning it had used in the Southeastern Enterprises case.[155]

The Appellate Court, based its decision upon the language that

---

[151] Ibid., p. 614.

[152] Kaiser Hawaiian Village Radio, Inc., 22 FCC 941, (1957).

[153] Ibid., p. 941.

[154] Carroll Broadcasting Co. v FCC, 258 F2d 440, (1958).

[155] Givens, op. cit., p. 1394.

the Supreme Court used in the Sanders case, which apparently left the door open for consideration of economic issues when it became apparent that one or both stations might go under. The Court stated:

> ...thus it seems to us, the question whether a station makes $5000, or $10,000, or $50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.[156]

The Court further said that:

> ...The basic charter of the Commission is, of course, to act in the public interest. It grants or denies licenses as the public interest, convenience and necessity dictate. Whatever factual elements make up that criterion in any given problem--and the problem may differ factually from case to case--must be considered. Such is not only the power but the duty of the Commission.
>
> So in the present case the Commission had the power to determine whether the economic effect of a second license in this area would be to damage or destroy service to an extent inconsistent with the public interest. Whether the problem actually exists depends upon the facts, and we have no findings upon the point.[157]
>
> ...This opinion is not to be construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing station licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (i.e., if the protestant

---

[156] Carroll, op. cit., p. 443.

[157] Ibid., p. 443.

does not fail entirely to meet his burden), should make a finding or findings.[158]

The Court continued:

...The Commission says that, if it has authority to consider economic injury as a factor in the public interest, the whole basic concept of a competitive broadcast industry disappears. We think it does not. Certainly the Supreme Court did not think so in the Sanders Brothers case, supra. Private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public. The broadcast industry is a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When that happens the public interest controls.[159]

...The Commission says it lacks the "tools" -- meaning specifications of authority from the Congress -- with which to make the computations, valuations, schedules, etc., required in public utility regulation. We think no such elaborate equipment is necessary for the task here. As we have just said, we think it is not incumbent upon the Commission to evaluate the probable economic results of every license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected. We think the problem arises when a protestant offers to prove that the grant of a new license would be detrimental to the public interest. The Commission os equipped to receive and appraise such evidence. If the protestant fails to bear the burden of proving his point (and it certainly is a heavy burden) there may be an end to the matter. If his showing is substantial, or if there is a genuine issue posed, findings should be made.[160]

The Court further said that:

...Perhaps Carroll did not cast its proffer of proof exactly in terms of the public interest, or at least not in terms of the whole public interest. It may be argued that it offered to prove only detriment to its own ability for service. We are inclined to give it the benefit

---

[158] Ibid., p. 443.

[159] Ibid., p. 443.

[160] Ibid., p. 444.

> of the most favorable interpretation. In any event, whatever proof Carroll had is already in the record. If it does not support a finding of detriment to the public interest, but merely of detriment to Carroll, the Commission can readily so find.[161]

The Court remanded the case to the Commission for further findings, which were made in the West Georgia Broadcasting case in 1959.

In its preliminary statement, the Commission said:

> 1. On August 1, 1957, the Commission adopted its decision reinstating and reaffirming after a protest filed by Carroll Broadcasting Co., the grant of the application of West Georgia Broadcasting Co., for a permit to construct a station at Bremen, Georgia. Before the Commission for consideration at this time is the decision of the U.S. Court of Appeals for the D.C. Circuit, dated July 10, 1958, in Carroll Broadcasting Co. v FCC, 258 F2d 440, (1958) wherein this proceeding was remanded for findings pertinent to the economic injury issue to which the Commission had previously directed no findings of fact because of its determination In re Application of Southeastern Enterprises, 22 FCC 605, and Voice of Cullman, 6 RR 164 (1950), that it had no power to consider the effect of legal competition and that as a matter of policy it would disregard the possible effects of competition.[162]

The Commission continued:

> 2. The economic injury issue reads as follows:
>
> ...To determine whether a grant of the application would result in such an economic injury to the protestant (Carroll) as would impair the protestant's ability to continue serving the public, and if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.[163]
>
> ...The protestant did not claim that a new station in nearby Bremen would destroy WLBB in Carrollton but rather that one

---

[161] Ibid., p. 444.

[162] West Georgia Broadcasting Co., 27 FCC 161 at 162, (1959).

[163] Ibid., p. 162.

> station in the area could bring the public programming of a higher type and quality than two.
>
> ...Carroll did not anticipate that its station would go under if a new station were licensed to operate in Bremen. Bremen is 11 miles from Carrollton with a population of 2,300 (1950 census) while Carrollton has a population of 7,753.[164]

The case which Carroll had presented to the Commission had emphasized community satisfaction with its station and the fact that profits were rather low. All aspects of the economy of the Carrollton-Bremen area were considered and offered into evidence.[165]

The president of Carroll Broadcasting expressed the opinion that if the applicant's license were granted the following would occur:

> 1. Audience would be diverted and ability to sell advertising would be reduced.
>
> 2. Advertising rates would be forced downward, and a reduction of income would result, sustaining programs would be discontinued and staff would be cut.[166]

After hearing all of the evidence the Commission concluded that: "If it should be assumed that certain changes will result in station WLBB's operation because of a new station in the area, still consideration must be given to whether the changes proposed to be incurred by WLBB are the only ones reasonable to institute or whether other changes could be incurred which might have less effect on the listening public."[167]

---

[164] Ibid., p. 163.

[165] Ibid., p. 163.

[166] Ibid., p. 168.

[167] Ibid., p. 173.

The Commission reacted to the protestant's claim that changes would be necessary if a new station were allowed by stating that reliance upon assertions of the protestant were insufficient and that the protestant had not sustained the burden of proof in this area. However, even if the Commission accepted the predictions of Carroll as to changes that would occur, "the extent to which the public would be injured is not so substantial as to warrant the conclusion that a grant would not serve the public interest, convenience and necessity."[168]

The Commission held that even if alleged conditions were to materialize, the public would also be acquiring a new service and a choice of services in compensation for the loss of some WLBB programs. This was the persuasive factor in the Commission's mind. The real and permanent injury to the public resulting from the restriction of competition is to be weighed against the speculative injury to the public interest from competition.[169]

Accordingly, the Commission granted West Georgia's application on the ground that the protestant had not shown that competition would result in such injury that the public should be deprived of a choice of services from competing stations, and that the town of Bremen should not be denied its first local radio outlet.[170]

The Carroll-West Georgia decision, therefore, had the effect of requiring that the Commission must make findings on economic injury due to

---

[168] Ibid., p. 173.

[169] Ibid., p. 174.

[170] Ibid., p. 174.

new competition upon the public in each case where an existing licensee offers substantial evidence thereof.

Subsequent FCC decisions have followed the reasoning of Carroll, but have limited its impact by requiring the protestant to file an application for renewal of his license. Examples of this procedure are the cases of Video Independent Theatres, 17 RR 150a (FCC 1959) and Herbert P. Michels, 17 RR 557 (FCC 1958). FCC Commissioner Hyde pointed out in the Michels case that, "I would not require an application for renewal of license of an applicant who already has a license. I would not use this kind of procedure as a sanction against the exercise of rights [freedom of competition] given by Congress."[171]

Jacob W. Mayer, writing in the Kentucky Law Journal, stated that:

> ...Since the Carroll Broadcasting decision there has been little further development of the threshold doctrine of economic injury affecting the public and thus precluding the grant of an application. In one respect, however, the Commission seems to have gone beyond the technical requirements of the Carroll decision. In Martin Karig, 19 RR 1084, (1960), an interventor claimed that economic injury would impair its ability to serve the public and was granted intervention even though it did not claim that the totality of service available to the public would be diminished or impaired.[172]

In the Karig case, Martin Karig had applied for a construction permit to erect a new 1 kw station in Johnstown, New York. WENT Broadcasting Corp., licensee of station WENT, Gloversville, New York, requested that the issues in the application proceeding be enlarged to include the economic issue.[173]

---

[171] Herbert P. Michels, 17 RR 557 at 560, (1958).

[172] Jacob W. Mayer, Sanders Brothers Revisited, Kentucky Law Journal 49:370 at 380, Spring, 1961.

[173] Martin Karig, 19 RR 1084, (1960).

In support of its request, WENT alleged that Gloversville and Johnstown lie adjacent to each other and are known as Twin Cities; economically the two cities were very much entwined.[174]

WENT further contended in the Commission's words, that:

> ...Annual average revenue of WENT for the three years 1956, 57, 58 was $119,000 and that it must do an annual volume of about $104,000 to break even. It had estimated that the gross potential revenue of standard broadcast stations in the communities involved is approximately $160,000, and based upon this estimate, it alleges that if a new station collects an annual revenue of $72,000 from this area, as forecast by the applicant, the WENT Broadcasting Corp. would sustain an operating loss of approximately $16,000 a year.[175]

This, argued WENT:

> "...would result only in a drastic impairment of the valuable public service which has now for several years been established by WENT. Should there be a division of the field, such public service could not possibly be adequately maintained."[176]

The Commission continued:

> ...In the absence of a protest from the applicant...it appears that the allegations made by the petitioner as to the adverse effects that a new station would have upon it, together with its allegation that such effects would result in a drastic impairment of the service now rendered by it, required enlargement of the issues to include the economic issue in accordance with the petitioner's request. (See Carroll Broadcasting Co. v FCC, 17 RR 2066, and 258 F2d 440, (1958).[177]

Accordingly the Commission adopted issue #7, which was to:

> ...determine whether a grant of the application would result in such an economic injury to WENT Broadcasting Corp. as would impair its ability to continue servicing the public,

---

[174] Ibid., p. 1084.

[175] Ibid., p. 1084.

[176] Ibid., p. 1085.

[177] Ibid., p. 1085.

> and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.[178]

On April 13, 1960, the Commission's Broadcast Bureau requested reconsideration by the Commission of its previously granted petition to WENT which enlarged the issues to include economic considerations. The Bureau asserted in substance that WENT failed to allege facts which show a detriment to the public interest as opposed to mere economic injury to WENT, and that in the absence of such a showing there was no basis for enlarging the issues. The Bureau cited the Carroll case as authority for its view.[179]

The Commission, however, denied the Bureau's petition for reconsideration saying that, "The burden of proof is on WENT and it should be given an opportunity to show that the licensing of another station would be detrimental to the public interest."[180]

The decided cases have involved the problem of whether economic impact may bar an application; but they have largely disregarded the question of the action which should be taken when a grant of an application would adversely affect the public interest.

"It seems implicit in the Carroll Broadcasting doctrine, states Jacob Mayer, that the Commission can not grant the new application after finding that its grant would have an adverse effect on the public interest."[181]

---

[178] Ibid., p. 1085.

[179] Ibid., p. 1086.

[180] Ibid., p. 1086.

[181] Mayer, op. cit., p. 381.

One very recent treatment of the subject by the courts, in Delta Airlines, Inc. v Civil Aeronautics Board, 275 F2d 632, (1959), supports this view as follows:

> ...In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity. The public interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee.[182]

Mayer, however, states that:

> ...The above quotation is misleading as it applies to the communications field. Inherent in the Communications Act is the requirement that licensees submit periodic renewal applications, which must then be governed by the same considerations which affect the grant of an original application. (Radio Station WOW v FCC, 184 F2d 257, 260, (D.C. Circuit, 1950).
>
> ...Consequently, even though an application may be denied on Carroll Broadcasting grounds, the existing station is not granted an indefinite period of de facto monopoly since the applicant may file a mutually exclusive application, against the existing station's renewal application.[183]

Mayer continues:

> ...The situation at renewal time could present a host of problems. In any market with more than one existing station seeking renewal of license, a question would immediately arise whether all renewal applications should be treated as mutually exclusive with the new application.
>
> ...To the extent that the rationale of the Sanders Brothers dictum and of the Carroll Broadcasting decision is interpreted as requiring that the sum of the broadcast services provided to the public be the best available, it would seem that all other stations in the market would need to be included in further proceedings, since they might propose and/or provide less satisfactory public service than either

---

[182] Mayer, op. cit., p. 381.

[183] Ibid., p. 381.

> the new applicant or the objecting station. In practical terms, such multiparty hearings would be involved and expensive for all concerned, and would increase the problems of administering the Act. Thus, although subsequent decisions may reveal that this possibility is mere idle speculation, it is noteworthy that Carroll Broadcasting has opened a new problem area while closing an old one.[184]

At the present time, the Commission policy in the Carroll-West Georgia cases and the ruling of the Court in the Carroll case serve as guidelines for Commission action when protests involving economic injury are made. Litigation concerning the issue of economic injury, allowable if the protestant can present sufficient facts to support his claim, would appear at the present time to constitute a substantial barrier to entry to the broadcasting field. On the other hand, the burden of proof, as the court in Carroll stated, lies heavily upon the protestant to justify his claim that the public interest will suffer if competition is permitted.

Chapter III will consider problems posed by the present and past policy of the courts and the FCC; suggest a perspective for viewing the overall problem of whether or not economic criteria should be used by the Commission in granting applications; and discuss whether such criteria are needed in view of the present condition of AM radio.

---

184 Ibid., p. 382.

CHAPTER III

ANALYSIS OF THE PROBLEM: SHOULD ECONOMIC CRITERIA BE USED; CONCLUSIONS AND PROPOSALS FOR FURTHER RESEARCH

First, it will be helpful to summarize the practice of the courts and the Commission in considering the impact of new competition on existing stations, which has varied widely over the years.

During the Thirties, the Commission regularly took into account the nature and extent of economic injury which would be caused to existing stations by the grant of a new application. It can be said in a narrow sense that the Commission never denied an application solely because it would inflict financial harm on an existing station. However, applications were frequently denied on the related ground that insufficient public need had been shown for the proposed service. A law review study published in 1941 showed that 86 applications were denied for this reason during the years 1937-38. (9 George Washington Law Review 873, 886 (1941)).[185]

The following grounds for decision in the Fall River Herald case illustrate the considerations which were taken into account by the Commission at that time:

---

[185] Fred W. Ford, "Economic considerations in licensing of radio broadcast stations," 17 Federal Communications Bar Journal 191 at 192, (1961).

> 1. The Fall River, Massachusetts area has adequate broadcast service.
>
> 2. The applicant has not shown a public need for the radio broadcast service he proposes.
>
> 3. The record does not show that sufficient commercial support could be reasonably expected to enable the existing station to continue its operations and at the same time to sustain the applicant in its proposed operations.
>
> ... ...
>
> 5. The granting of the application under consideration would not serve the public interest, convenience or necessity.[186]

Late in the 1930's, the Commission's policy on economic injury was altered substantially, a change which led to the landmark Sanders Brothers case in the Supreme Court. In the Meyer case, decided in 1939, the Commission reversed its earlier ruling that the applicant had failed to show need for the service proposed. Moreover, it rejected the idea that in all cases a positive need must be shown by the applicant. In this case the Commission said:

> It should be noted that nothing in the Communications Act, our Rules and Regulations, or our policy requires a finding of a definite need to support the grant of an application.... The public interest, convenience or necessity which the statute provides as the basis for a grant cannot be construed as a mandate that actual necessity for the particular facilities must be shown.
>
> Neither the disjunctive form nor the public convenience as an independent factor is to be entirely ignored. Indeed, the words 'public necessity' in the act are not to be construed narrowly, but rather as calling for the most widespread and effective broadcast service possible.[187]

---

[186] Fall River Herald News Publishing Co., 5 FCC 377 at 382, (1939).

[187] F. W. Meyer, 7 FCC 551 at 558, (1939).

The Commission's new view on economic impact was forcefully expressed in an opinion denying rehearing after the grant of a second station in Spartanburg, South Carolina:

> In the radio broadcast field, public interest, convenience and necessity is served not only by the establishment and protection of monopolies, but by the widest possible utilization of broadcast facilities. Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting.[188]

This is substantially the view taken by the Supreme Court in the Sanders case. In effect it meant that an existing station was not entitled to protection from competition so long as the competition was not harmful to the public interest.

Following World War II, the broadcast industry's accelerated growth brought the total number of AM stations from under 1000 in 1945 to more than 3700 today. Changes in engineering rules, made in 1947, permitted many additional assignments not theretofore possible under the Standards of Good Engineering practice. These additional assignments, for the most part, provided more services in the same areas. Even though the number of stations tripled, coverage of the land area of the United States has improved very little since 1946.[189]

Faced with increased competition, existing stations continued the issue of economic impact. No longer able to content that they were

---

[188] Spartanburg Advertising Co., 7 FCC 498 at 499, (1940).

[189] Ford, op. cit., p. 195.

entitled to protection from the economic effects of competition, some broadcasters presented the argument that grants of additional stations in a community would be harmful to the public at large by causing an overall deterioration in program service.[190]

In 1950, the Commission clarified the issue somewhat by refusing to reconsider the authorization of a second service in the town of Cullman, Alabama. (The Voice of Cullman).[191]

The Commission held that the consequences of competition were impossible to predict, but that even if the worst were assumed and both stations went under, injury to the public would be short-lived since it could be expected that a new applicant would soon appear. The Commission stated:

> Thus against speculative and at the most temporary injury to the public interest as a result of competition we must weigh the very real and permanent injury to the public which would result from restriction of competition within a regulatory scheme designed for a competitive industry and without the safeguards which are necessary where government seeks to guarantee to any business enterprise greater security than it can obtain by its own competitive ability. With these considerations in mind, the Commission has determined that, as a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations.[192]

Seven years later in 1957, the Commission went a step further. In disposing of an economic injury issue raised in the Southeastern Enterprises case, the FCC stated for the first time that it had no statutory authority "to consider the effects of legal competition upon the public service in the field of broadcasting."[193]

---

[190] Ibid., p. 195.

[191] Voice of Cullman, 14 FCC 770, (1950).

[192] Cullman, op. cit., p. 776.

[193] Southeastern Enterprises v FCC, 22 FCC 605, (1957).

The effect of this decision however, was extremely short-lived. In 1958 the Commission's position was reversed by the District of Columbia Court of Appeals in the Carroll case:

> ...We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (i.e., if the protestant does not fail entirely to meet his burden) should make a finding or findings.[194]

The Court continued:

> ...Private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public. The broadcast industry as a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When this happens the public interest controls.[195]

This is approximately where the matter rests today. As a matter of law, the Commission cannot refuse to consider the economic effects of a new grant where an existing station offers to prove resultant injury to the public at large. Stations may appeal to the Commission under Section 402 (b) (6) of the act as a person aggrieved and attempt to show that detriment would result to the public interest if an additional station were allocated to a specific market.

> "Section 309 (c) of the Act formerly specified that grants of applications were subject to protest for a period of thirty days. During that time, any party in interest might formally register opposition and request a public hearing. Congress, however, in the recent 1960 Amendments to the Communications Act, abolished the protest procedure and in lieu thereof has provided that any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) at any time prior to the day the Commission grants it. The petitioner must serve a copy

---

[194] Carroll Broadcasting Co. v FCC, 258 F2d 440 at 443, (1958).

[195] Carroll, op. cit., p. 443.

> of such a petition on the applicant. The applicant is afforded an opportunity to make a formal reply. If the application and the pleadings raise serious questions as to whether a grant of the application will serve the public interest, the Commission must designate the application for public hearing on specified issues, giving due notice to the applicant and other parties in interest. On the other hand, if the application and the petition raise no material questions, the Commission must make the grant, deny the petition, and issue a concise statement of reasons for denying the petition."[196]

It would appear from the Commission's actions over the past twenty years however, that the nature of the evidence produced by the existing station would have to be extremely compelling to persuade the FCC to reach such a finding. The cost of such a proceeding might well be prohibitive from the standpoint of an already hardpressed station. In contending that a market will not support another station, the existing licensee is in effect arguing a kind of economic "mutual exclusivity," raising the possibility that his own authorization will be considered comparatively with that of the applicant. This was in fact done in the Herbert P. Michels case, 17 RR 557, (1958), and the existing station promptly dropped its objections.

What then, should be done with regard to this allocation problem? Should engineering standards be altered? Harry P. Warner, in his book Radio and Television Law states:

> Although the tri-partite structure of clear channel, regional and local stations with the four classes of stations exists on the books, there has been a complete breakdown of the engineering standards.
>
> The flexibility of the 1939 rules and standards has demolished the so-called normally protected contours

---

[196] Walter B. Emery, Broadcasting and Government; Responsibilities and Regulations, Michigan State University Press, 1961, p. 186.

> of all classes of stations. Interference is now measured in terms of population and service area. As long as an applicant will render service or increase his service to an additional number of persons and to an increased service area, and provided that there will not be increased electrical interference to existing stations, the Commission will grant the application. Directional antennas have been employed extensively to locate an increased number of stations, on classes 2, 3 and 4 channels. It is further believed that the assignment of limited time and daytime stations on clear-channel frequencies presage a breakdown of the clear-channel station.[197]

Warner continues:

> The published decisions do not reflect the breakdown of the engineering standards. It is believed that a greater percentage of stations have been licensed without hearing, hence no published information is available on the extent of the interference, populations served, etc. An examination of administrative action taken without hearing would probably disclose that the interference values to new and existing stations exceed by far the interference actually discussed in hearings.[198]

While it appears that engineering standards are in need of some clarification and revision, it is not within the scope of this paper to consider possible modifications of the Commission's engineering standards.

Section 303 of the Communications Act gives the FCC the power to allocate radio channels. This task has been complicated by technical, social and economic factors. One of the major difficulties before the Commission is the technical limitation inherent within the broadcasting art. With only 96 channels available, the Commission is confronted with the task of providing broadcast service to the widest

---

[197] Harry P. Warner, Radio and Television Law, Albany, New York, Matthew Bender and Co., Inc., 1948, p. 278.

[198] Ibid., p. 278.

extent possible.[199]

To be sure, the primary function of the FCC is the equitable distribution of broadcast facilities throughout the wire and radio communications services. But closely connected with the engineering problems of allocation are the social and economic aspects which give contour and meaning to the allocation plan ultimately adopted. There can be no clear-cut definition of "social" and "economic" factors. They are broad concepts which are given meaning by intuitive judgments and colored by usage.[200] For the purposes of this paper, "social" refers to the service to the people of the United States, including the extent to which broadcasting assists in the development of national, community and individual well-being. "Economic" refers to the revenues available to the broadcast stations in order to provide a service to the public.

Efforts have been made in the past to amend the Communications Act, with particular attention given to Section 307, which deals with allocation of broadcast facilities. In the 80th Congress, First Session in 1947, hearings were held before a subcommittee of the Senate Committee on Interstate and Foreign Commerce concerning Bill number S. 1333, the White-Wolverton Bill. One of the provisions of the bill would have amended Section 307, subsection (b) to read as follows:[201]

> ...(b) In considering applications for licenses, and modifications thereof, the Commission shall make such

---

[199] Warner, op. cit., p. 229.

[200] Ibid., p. 229.

[201] Warner, op. cit., p. 814.

> distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same, giving effect in each instance, to the needs and requirements thereof. (Changed portion underlined)

At the present time the act reads:

> ...equitable distribution among states and communities "insofar as there is a demand for the same."
> (48 Stat. 1083, 47USCA Sect. 307 (b))

The effect of the amendment would have been to delete the requirement of demand and instead require the Commission to give effect to the needs and requirements of the various communities. The purpose of this amendment was to "bring about a fairer distribution of radio broadcast facilities in the country and at the same time discourage a policy which grants licenses wholesale simply on demand."[202]

Warner, in his book Radio and Television Law states that:

> ...It is believed that this amendment [was] designed to rectify the philosophy of the Mayer decision. In that and similar opinions the Commission abandoned the requirement that an applicant make an affirmative showing as to the need for new or improved broadcast facilities.
>
> ...The mere filing of an application now furnishes conclusive evidence as to the need for broadcast facilities.[203]

Warner continues:

> ...The effect of the Mayer decision has been to greatly increase the number of broadcast stations. At the S. 1333 hearings, the fear was expressed that the saturation point for broadcast stations had been reached, particularly in the large metropolitan districts.
>
> ...The Commission opposed section 9 of S. 1333 if the intent of that amendment is to require the Commission to consider

---

[202] Ibid., p. 815.

[203] Ibid., p. 815.

> economic factors in the allocation of broadcast facilities, viz.--the ability of a community to support an additional radio station.
>
> ...The broadcast industry opposed the amendment on the ground that "this leads directly into the rate-regulation type of activity."[204]

Bill S. 1333 never came before either the House or the Senate for a vote and the "offensive" amendment to Section 307 (b) was never enacted into law.

Notwithstanding the fact that amendments to the Communications Act such as the one proposed in S. 1333 were never enacted, several court decisions indicate that the Commission has some power to protect existing licensees. The Supreme Court, in announcing the rule that no protection was to be afforded to existing licensees, (Sanders Brothers), nevertheless indicated that the FCC should consider whether too much competition would put all licensees out of business and therefore make it impossible for any to serve the public. Similar views have been expressed by lower courts:

> ...The mere loss of profits to an existing station would not, of course, be an adequate basis for denying a license to a proposed station. If, however, the result of the grant to the proposed station is to make it financially impossible for an existing station to continue its operation or maintain a higher level of service, the resultant loss of service might be adverse to the public interest and therefore warrant denying the new license. (District of Columbia Circuit Court) (1952)[205]

The D. C. Circuit court also stated in the 1958 Carroll case:

---

[204] Ibid., p. 815.

[205] Democratic Printing Co., 202 F2d 298 at 302, D.C. Circuit, (1952).

> ...To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be of purely private concern.[206]

According to this statement, economic injury to a station becomes a matter of public concern when service to the public is adversely affected. The problem becomes how and when to determine that service is being injured or destroyed by competition. Then, upon the judgment of the FCC that programming is being injured as a result of competition, a station or stations could be barred or deleted from the market in question.

The appellate court in Carroll stated that the FCC possessed the necessary authority and administrative tools to make such decisions and implement them:

> ...We think no such elaborate equipment [found in common carrier regulation] is necessary for the task here. As we have just said, we think it is not incumbent upon the Commission to evaluate the probable results of every license grant.[207]

The court further stated:

> ...The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected. We think the problem arises when a protestant offers to prove that the grant of a new license would be detrimental to the public interest.
>
> ...The Commission is equipped to receive and appraise such evidence. If the protestant fails to bear the burden of proving his point...there may be an end to the matter. If

---

[206] Carroll, op. cit., p. 445.

[207] Ibid., p. 445.

> his showing is substantial, or if there is a genuine issue posed, findings should be made.[208]

The court indicated that perhaps Carroll did not offer its proof in terms of the public interest. It may be argued that it offered to prove only detriment to its own ability for service.

The Commission has stated:

> ...Restriction of competition is a corollary of exclusivity, and exclusivity is tolerable only by the application of public utility concepts or techniques. When common carrier techniques are employed in the broadcast business to the extent necessary to accomplish the objectives urged upon us, a subtle, indirect, but nonetheless a real transformation from competitive regulatory practices to public utility regulation will inevitably result. This we deem contrary to the specific provisions of the Communications Act, the intent of Congress, and the interpretation of that act in the Sanders case, supra.[209]

The Commission felt that if it were to consider economic effects it would be put in the position of engaging in a detailed common carrier type examination of the existing stations' efficiency, its proper rate of return and prices charged advertisers, factors which it believed Congress had excluded from consideration in the broadcasting field.

The FCC does, however, regulate broadcast activities which touch on the business relations of its licensees to a certain extent. For example, the Chain Broadcasting Rules, although addressed in terms of station licensees, actually governs specified relations between stations or applicants and networks.

---

[208] Ibid., p. 446.

[209] Southeastern Enterprises v FCC, 22 FCC 605 at 614, (1957).

In a common carrier case in 1953, FCC v RCA Communications Inc., (346 US 86, (1953), the FCC allowed a new radiotelegraph service upon the ground that overall national policy favored competition whenever feasible. The Supreme Court, however, remanded the case to the Commission, holding that the FCC should first determine that competition was beneficial under the circumstances. Although indicating that the Commission might properly formulate a rule favoring competition whenever reasonably feasible, the Court said that it must exercise its own judgment in doing so and not merely rely upon a supposed congressional policy, stating:

> ...We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted whenever competition is reasonably feasible.[210]

The opinion in RCA Communications makes it clear that there is no inevitable logical requirement that the economic consequences of competition be considered anew in each case. Instead, the FCC should consider these consequences in reaching its general rule, rather than merely relying upon a supposed overall congressional policy automatically favoring competition in each case.

However, the court in Carroll indicated that since the public interest is the controlling factor and standard, it must be considered separately in each case.

Richard A. Givens, a lawyer and member of the New York Bar, writing in the Virginia Law Review states:

---

[210] FCC v RCA Communications, Inc., 346 U.S. 86 at 96, (1953).

> ...The fact that competition may sometimes be wasteful must be considered in the light of the fact that the applicant for entry /to broadcasting/ is willing to stake his investment on his belief that he can perform a service for which people will be willing to repay him.
>
> ...Furthermore, aside from actual new entry, the possibility of new entry into an industry exerts a powerful influence upon the conduct of established enterprises. Thus it is clear that if price is high, service inadequate, or demand unfulfilled, the field will appear particularly attractive to potential newcomers. The established firms will therefore strive to avoid a situation not only out of their concern for public interest, and to avoid political intervention, but also to make the entry of new competition less likely.[211]

It appears to me that if the Commission would revoke licenses or withhold renewal of licenses of those stations with poor programming records, it would not have to rely on the threat of entry of another station in a particular market. The FCC has seldom if ever revoked a broadcasting license on grounds of inadequate or poor overall programming. One example should suffice to illustrate this point:

> In 1958-59, eight radio stations in Georgia operated on temporary licenses for more than a year. Renewals were held up by the FCC because the stations had carried little or no agricultural, educational and religious programming. The Commission had under advisement the question of whether to hold public hearings. On July 15, 1959, as a leading trade journal reported it, these stations, "which had been sitting on an FCC hot seat for more than a year were removed from their uncomfortable positions." By a 4 to 2 vote (one Commissioner was absent and didn't vote) all these licenses were renewed. It is assumed that the licensees made satisfactory explanations of their past performance and gave adequate assurances to the Commission that their future programming would serve the public interest.[212]

---

[211] Givens, op. cit., p. 1395.

[212] Walter B. Emery, Broadcasting and Government, Responsibilities and Regulations, Michigan State University Press, 1961, p. 240.

Unfortunately, the Commission in general has not adequately considered the job that present licensees are doing as a matter of policy. At the present time, prices may be low, service adequate and demand filled, but under the law the Commission has felt compelled to issue new licenses if applicants were financially and technically qualified and a frequency was available. Existing stations, under Section 309 (d) as a party in interest may, however, file a petition to deny any application at any time prior to the day the Commission grants it. Because of the nature of radio broadcasting and its technical character, there is no way that the existing station licensee can meet the new competition by expanding his facilities, strengthening his signal or diversifying into other fields, without Commission approval. The broadcaster has only one commodity that advertisers and the public are interested in -- air time for programming and sale to the advertiser. The broadcaster can, if he so desires, cut his rates to attract more business, with the usual result that he has less revenue with which to meet his expenses and provide more and better service which would, hopefully, attract more listeners and clients. It is my assertion that because of this revenue decline, sustaining programming of a public service nature suffers and the qualitative level of programming in general declines. Therefore, it is my contention that licensing policies that do not recognize the special and unique nature of broadcasting in the area of competition are not in the public interest.

A decision by the FCC to weigh the issue of economic injury and its effect upon the public interest would mean that substantial limitation of entry to broadcasting is in the public interest. The Commission's policy appears to be moving in this direction as indicated by the Carroll

decision and subsequent cases that acknowledge the right of an existing station to some consideration of its economic status.

Mr. Givens continues his case against FCC use of economic considerations in licensing new AM stations, citing anti-trust laws as a deterrent to consideration of limited entry to the broadcast field:

> ...The antitrust laws are emphatic in their condemnation of any attempt to exclude competitors.
>
> ...Economic factors do not favor limitation of entry except where it is clearly compelled by specific circumstances in the industry. It would therefore appear proper to hold that in the absence of highly persuasive facts concerning the specific industry, regulatory bodies should not restrict entry into their industries on the basis of economic considerations.[213]

Givens continues:

> ...Do the specific facts of the broadcasting industry justify limitation of entry on economic grounds notwithstanding the conclusions emerging from a synthesis of antitrust and regulatory policies? The answer must clearly be no. On the contrary... the degree of regulation authorized by the act is less than that authorized in most regulatory statutes. The anti-trust laws are fully applicable to broadcasting and no exemption power is granted by the act.[214]

It is my assertion that neither anti-trust policy nor Section 153 (h) of the act support these conclusions. The anti-trust provisions of the Communications Act, designed to prevent great concentration of power in the industry, have long been held not to limit the Commission's authority to grant or deny licenses in the public interest. In Yankee Network, Inc., v FCC, 107 F2d 212, 223, (D.C. Circuit, 1939), the court said:

---

[213]Givens, op. cit., p. 1400.

[214]Ibid., p. 1400.

> ...While it is true that it was the intention of Congress to preserve competition in broadcasting, and while it is true that such intention was written into Section 314 of the Communications Act, it certainly does not follow therefrom that Congress intended the Commission to grant or deny an application in any case, other than in the interest of the public. Just as a monopoly -- which may result from the action of the Commission in licensing too few stations -- may be detrimental to the public interest, so may destructive competition, effected by the granting of too many licenses. The test is not whether there is a monopoly, on the one hand, or an overabundance of competition, on the other, but whether the granting or denying of the application will best serve the interest of the public.[215]

The anti-trust provisions of the Communications Act bar certain concentrated holders from competing. See 48 Stat. 1087, 47 U.S.C. paragraph 314 (1952) (prohibiting the granting of a license when "the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce...or unlawfully to create monopoly in any line of commerce.") Consequently, far from being inconsistent with anti-trust policy, Commission power to restrict competition may sometimes be used for anti-trust purposes:

> ...The method of uncontrolled competition argued for in the present case /Yankee Network/ as in fact one way of creating monopolies.../by leaving/ in the field only monopolies which were sufficiently supported financially to withstand the destructive competition which might result from arbitrary, careless action on the part of the Commission in the granting of new station licenses.[216]

In addition, the Commission has stated that Section 153 (h) does not preclude application of common carrier concepts when necessary to the proper discharge of its duty to administer radio licensing. (See The Travelers Broadcasting Service Corp., 6 FCC 456, 463-64 (1938),

---

[215] Yankee Network, Inc., v FCC, 107 F2d 212, 223, (D.C. Circuit,) (1939).

[216] Yankee Network, supra, at 223-24.

on rehearing, 7 FCC 504 (1939).[217]

Section 153 (h) merely prevents use of title two of the Communications Act, dealing with common carriers, as a source of authority over radio. It need not be taken as limiting the power to license radio or other broadcasting granted in title three of the act. Nor does Section 153 (h), excluding broadcasting from the title two provisions for close supervision of common carriers, warrant the inference that Congress intended competition to be preserved notwithstanding the public interest. (See Yankee Network Inc. v FCC at 222, which rejected the argument that the fact that radio is not regulated as a common carrier implies that the Commission may not protect radio against competition.)[218]

A policy of completely free competition such as Givens advocates is not adequately supported by arguing that the results of competition cannot be predicted, and that allowing a hearing merely encourages protests lodged for purposes of delay. (See American Southern Broadcasters (WPWR), 11 RR 1054, 1056, license denied, 13 RR 927 (1957)):

> ...The possibility that competition between radio stations may result in detriment to the public by reason of lowered quality of program service or the complete elimination of one of the competitors is a fact incapable of proof. To permit the existing stations to utilize the protest procedure to force a useless hearing on these issues would under such circumstances appear to be an abuse of process.[219]

The protest procedure had been used effectively by competitors to prevent a new radio or TV station from going on the air for as long as two or three years. (See 102 Congressional Record, 416-18 [1956]).

---

[218] Yale Law Journal, notes, "Economic Injury in FCC Licensing; The Public Interest Ignored, 67:140 (1957).

[219] American Southern Broadcasters, 11 RR 1054, 1056, (1954).

To eliminate such unnecessary delays the act was amended in 1956 (47 U.S.C. (Section 309 (c)), Supplement 4, 1957), to allow a grant of license to remain in effect despite pending protest proceedings if "the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect...."[220] In 1960 the Act was further amended, abolishing the protest procedure and instead permitted parties in interest to file a petition with the Commission to deny the grant of an application.[221]

Beyond these economic factors however, there is a fundamental policy question to be raised. The First Amendment may compel the disregarding of economic injury in granting broadcast licenses.

This has been asserted for three reasons: 1) rejection of a qualified applicant where available frequencies exist and where aspects of broadcasting which are "unlike other modes of expression" are not involved, would appear to be itself an abridgment of freedom of the press; 2) the First Amendment militates against the kind of detailed regulation of broadcasting which frequently accompanies limitation of entry; and 3) the underlying policies of freedom of expression flowing from the First Amendment counsel against limitation of entry on economic grounds.[222]

These policies have, it is alleged, been frequently recognized in such criteria as diversification of ownership, and would be violated by denying a qualified applicant an equal opportunity to compete for

---

[220] 47 U.S.C. (Section 309 (c), Supplement 4, 1957.

[221] Walter B. Emery, op. cit., p. 186.

[222] Givens, op. cit., p. 1403.

viewers' and listeners' attention if frequencies are available.[223]

The Supreme Court has observed, however, that, "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." (NBC v US, 319 US 190 at 216, (1943)).

This principle, together with the fact that the wording of Section 326 of the Communications Act does not specifically include mention of admission to broadcasting being guaranteed by the First Amendment, would appear to make this issue irrelevant. The wording of Section 326 provides that:

> ...Nothing in this Act shall be understood or construed to give the Commission the power to censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[224]

By this provision the Commission is not permitted control over programs offered by established broadcasters. No power of censorship is given the licensee and the Commission is to regulate in the public interest, convenience and necessity. The licensee is to broadcast under the same standard. The Commission cannot interfere with programming; this is the meaning and intent of Section 326. Since radio broadcasting is by nature a field of limited competition for engineering as well as regulatory reasons, the allegation that the First Amendment supports every applicant cannot be accepted. Using such reasoning, any applicant

---

[223] Columbia Law Review, FCC Disclaims Power to Limit Competition in Broadcasting, 57: 1036 at 1038, (1957).

[224] 47 U.S.C. Section 326.

turned down in a comparative hearing for admission to broadcasting could plead injury on the grounds of restriction of freedom of speech under the First Amendment, and this has not been accepted by the Commission.

Economist Harvey J. Levin, writing in the American Journal of Economics and Sociology, presents the view that:

> ...the FCC has only hinted at some ultimate norm of "adequacy" in applying its various licensing standards. A fuller, more systematic statement and development of such a norm will ultimately be necessary if spectrum space is to be allocated and licensed in the "public interest".[225]

In order to achieve this norm of adequacy, Levin recommends the following:

> 1) The inconsistencies which riddle the FCC's decisions at competitive hearings should somehow be ironed out. This might reduce the risk element implicit in joint hearings, and strengthen the relative position of applicants with less extensive financial resources.
>
> 2) The FCC needs help in the form of Congressional appropriations and the cooperation of universities and research foundations in studying at length the social basis and social impact of its different licensing standards.[226]

Levin continues:

> ...For instance, it is high time that policy makers should ascertain the impact of different licensing standards on the form and content of radio programming, the impact of programming on listeners' attitudes and values, and finally the effect of changes in these attitudes and values on the listeners' political behavior, prejudices, creativity, and spontaneity. Effective

---

[225] Harvey J. Levin, "Social Welfare Aspects of FCC Broadcast Licensing Standards", American Journal of Economics and Sociology, 13:39-55, (1953), p. 39.

[226] Ibid., p. 53.

> allocation of the airwaves "in the public interest" would seem eventually to require answers to such questions.
>
> ...The standards that have evolved to date are at best makeshift, instituted because practical problems of tremendous magnitude had to be faced and answered. It is more than time to ferret out the inconsistencies and to test the significance of the standards in terms of some concrete norm of adequacy of radio service.[227]

While the present freeze on AM allocations may indicate that the Commission is conducting the re-examination of policy that Levin advocates, there has been no public discussion of whether or not radio should be considered a public utility, since it serves the public interest.

It has been submitted that perhaps a public utility status for radio is to be preferred to the present confusing, semi-competitive system. Congress has the power to denominate radio a public utility if it so desires. Judge Ira Robinson, formerly head of the Federal Radio Commission has stated: "Whether you look at it from the listening end or the transmitting end, it is concededly a public utility."[228] And as regards the position of radio networks on the question, Judge Robinson said: "It seems that every time the broadcasters have a meeting, they resolve that their stations are not public utilities. The wish is merely father to the thought."[229]

A similar view was given by former FCC Chairman, McNinch in Brather, Radio Power and Air-Channel Regulatory Headaches, 23 Public Utilities Fortnightly 643 at 644-45, (1939). He stated: "Like a public

---

[227] Levin, op. cit., p. 54.

[228] Heinl, Is a Broadcasting Station a Public Utility?, 6 Public Utilities Fortnightly 344 at 345, (1930).

[229] Ibid., p. 345.

utility, a broadcasting enterprise is a licensed monopoly on a given frequency and in a given area, in return for which license the enterprise submits to government regulation."[230]

It is true that Section 153 (h) of the Communications Act provides that a broadcaster is not a common carrier (with stated exceptions); but many public utilities are not common carriers, e.g., electric light and power plants. Therefore it would not follow from the fact that if a service is a common carrier, it is also a public utility.[231]

In Pulitzer Publishing Co. v FCC, the Court held that since no rates are fixed, or profits limited "...public convenience, interest, or necessity should not be given meaning as broad as in public utility legislation." The arguments generally presented on both sides of the issue as to whether broadcasting is a public utility may be summarized as follows:

For:

1) The phrase "public interest, convenience and necessity" is borrowed from public utility laws and manifests an intent on the part of Congress to impose the strict obligations thereof in the broadcasting field.

2) The prime duty is to serve the public.

3) Point-to-point broadcasting is prohibited.

4) Rate regulation is not the determining factor in the question.[232]

---

[230] Brather, Radio Power and Air-Channel Regulatory Headaches, 23 Public Utilities Fortnightly, 643 at 645 (1939).

[231] Stanley Brown and John Wesley Reid, Regulation of Radio Broadcasting: Competitive Enterprise or Public Utility?, 27 Cornell Law Quarterly 249 at 264 (1942).

[232] Air Law Review, Is Radio a Public Utility?, 11:177-91 (1940).

Against:

1) Radio is not a necessity and is not paid for by the public.

2) No obligation to serve all equally.

3) No regulation of rates or limit on profits.

4) The FCC is not a public utility commission. It has no jurisdiction to investigate and supervise actual business operations. (It will be noted that arguments 3 and 4 are characteristic of common carrier regulation, but common carriers constitute only one class of public utilities).[233]

In Yankee Network v FCC, the court in comparing the Transportation Act and the Communications Act stated:

> ...But in spite of these differences (viz. broadcasting excepted from the common carrier provisions and absence of rate regulation) the two acts contain vital similarities which make the analogy proper.... Radio broadcasting, the subject of one, is affected with the public interest in fully equal measure as railway transportation, the subject of the other. Congress recognized this fact by making the Communications Act speak in terms of public interest from beginning to end.... Rate fixing is only one of many regulatory procedures. The fact that it is specified for carriers and not for broadcasters is by no means conclusive. In each case (railroads and radio stations), Congress has delegated the power to regulate public utilities in interstate commerce for the purpose of safeguarding a dual interest involving a reciprocal and correlative relationship between the public and the owner of the utility.[234]

Growing concern with the economic aspects of radio regulation makes it worthwhile to examine this problem of whether or not radio is in fact a utility. However such an examination is beyond the scope of this paper. Further research on this question would be of great value in helping to clarify the status of radio as a competitive enterprise

---

[233] Ibid., p. 181.

[234] Ibid., p. 182.

charged with serving the public interest.

The possible use of economic criteria by the FCC in determining allocations of new AM radio stations must be considered as an exercise of regulatory authority in such a manner that the business system of broadcasting will render program service of maximum satisfaction to the public.

The objectives of radio regulation in the economic sphere have been outlined and should be clear. What, however, do they imply? I believe that a portion or all of two basic categories of objectives stated by Herman Hettinger in the Air Law Review should be attained by the use of economic criteria:

> 1) The allocation of broadcast facilities in such a manner as to make radio signals and the programs they carry available to as many listeners as possible, but also under conditions which will provide stations the potentiality of revenues adequate for technical and program service of a standard that is in the public interest.[235]
>
> 2) Once facilities have been allocated, the exercise of general supervision of a nature that will result in a quality of service both technical and program, in keeping with the public interest.[236]

The conception of program service as radio's ultimate utility must be given attention. Yet an overextension of regulatory activity will have far-reaching social, political and economic consequences.

Accordingly, I believe that the following proposals put forth by Hettinger, may be of some value in constructing a new and more workable allocation policy. They are as follows:

---

[235]Herman S. Hettinger, The Economic Factor in Radio Regulation, Air Law Review, 9:115-28, April, 1938, p. 120.

[236]Ibid., p. 120.

1) Stations should be located in communities or with respect to wider marketing areas of sufficient economic importance to insure the potentiality of financial support adequate to maintain operations in the public interest.[237]

2) To the extent to which it is technically feasible, a station should be granted facilities sufficient to cover its logical area of social and economic influence.[238]

3) Stations in a like class serving the same area should be granted as great a parity of coverage as is technically feasible.[239]

4) A sufficiently high standard of working capital and professional skill must be required of new applicants for licenses to insure a grade of service which will interest listeners and will attract revenues with which to maintain broadcasting in the public interest.[240]

5) When once it is established by careful economic analysis that a community or logical area of service possesses as many stations of proper class and kind as it can reasonably support, then these stations should be safeguarded from unreasonable further increases in facilities and consequent ruinous and unfair competition.[241]

6) This protection should be balanced, however, by fostering competition between stations, groups of stations, and -- to the extent that they are basically competitive -- classes of stations, so that vitality of service and incentive for further improvement may be maintained.[242]

Safeguarding stations from unreasonable competition requires scientific determination of communities' potential advertising revenues, together with factual data on performance of various classes of stations under different conditions; these two classes of information being

---

[237] Ibid., p. 122.

[238] Ibid.

[239] Ibid.

[240] Ibid.

[241] Ibid.

[242] Ibid.

necessary to determine the limits of reasonable competition.[243]

In order to foster competition, a reasonable balance between the various elements in the broadcasting structure and flexibility in allocation are two constructive steps. Of course the government cannot regulate mediocrity out of existence, but the FCC can safeguard the public by encouraging competition at a reasonably high level so that the best program service will result. The public has a vital interest in the service it receives and is penalized by a policy of unlimited grants which pulls down the good stations to the level of economic survival. The Darwinian doctrine of "survival of the fittest" after the Sanders decision has not resulted in programming of a measurably higher quality resulting from increased competition.[244] While radio is private in the property sense, it is public in the functional sense.

Naturally there can be no guarantee that even if the number of stations were reduced, better programming will automatically result. Perhaps stations with fewer competitors will not use added revenues to improve or increase program services to the public. On the other hand, could the industry have continued rapid expansion in the face of smaller profits, heavier losses, and increased competition for a relatively fixed number of advertising dollars? I do not believe that a situation of this kind could have been tolerated much longer than it has been. It is my view that the judicious use of economic criteria for determining admission to the field of broadcasting should be the result of Congressional action

---

[243] Ibid., p. 123.

[244] Edwin Conrad, Economic Aspects of Radio Regulation, Virginia Law Review, 34: 283-304 at 303, April, 1948.

in the event that the Commission cannot find justification for such a policy under the present Communications Act.

Suggestions for Further Research.-- With regard to the FCC's policies on programming standards and practices of licensees and allocation policies, there are a number of areas that can be approached. A study could be made of whether the present engineering standards of the Commission adequately meet the demands placed upon them, or if they are, in fact, a set of rules more frequently waived than observed by the FCC.

What effect upon programming, and public service programming in particular, does the addition of a second or third station in a small one or two station market have? Is programming improved through competition, does it remain about the same in quality and frequency, or does it decline in both quantity and quality?

Is there a need for an entirely new broadcasting section of the Communications Act? Could the present act be effectively amended or modified to handle contemporary and future problems not envisioned in 1934 and the years when amendments of the act were made? Have increased technical knowledge and the more insistent demands of the American people for more and better programming been adequately understood and dealt with by the Commission? Is there a need for a more comprehensive and specific program policy with regard to types and quality of programs?

It is quite evident that the area involving the competitive and business status of broadcasting needs investigation and clarification. Is broadcasting, for example, really a sort of quasi-public utility; should it be considered an area of completely free competition; or should the Commission assert more control over the assignment of spectrum space

and the need for new stations?

These are a few suggestions for further research in the general problem area with which this study has been concerned.

BIBLIOGRAPHY

Books

Emery, Walter B. Broadcasting and Government. East Lansing: Michigan State University Press, 1961.

Warner, Harry P. Radio and Television Law. Albany, New York: Matthew Bender Co., Inc., 1948.

_____. Radio and Television Rights. New York: Matthew Bender Co., Inc., 1953.

Journal Articles

Ball, F. J. "Economic Injury Theory of Appealable Interest Under the Communications Act," George Washington Law Review, 8 (March, 1940), 836.

Brather, J. "Radio Power and Air-Channel Regulatory Headaches," Public Utilities Fortnightly, 23 (1939), 643.

Brown, Stanley and Reid, John Wesley. "Regulation of Radio Broadcasting: Competitive Enterprise or Public Utility?" Cornell Law Quarterly, 27 (1942), 249.

Conrad, Edwin E. "Economic Aspects of Radio Regulation," Virginia Law Review, 34 (April, 1948), 283.

"Economic Injury to an Existing Station as Grounds for Appeal," Air Law Review, 11 (April, 1940), 177.

"Federal Communications Act--Right to Appeal under Section 402 (b) as an "aggrieved person," Air Law Review, 11 (January, 1940), 98.

"FCC Disclaims Power to Limit Competition in Broadcasting," Columbia Law Review, 57 (November, 1957), 1036.

"FCC Regulation of Competition Among Radio Networks," Yale Law Journal, 51 (1941-42), 448.

Ford, Frederick. "Economic Considerations in Licensing of Radio Broadcast Facilities," Federal Communications Bar Journal, 17 (1961), 191.

Ford, Frederick, "Some Current Problems in Broadcast Regulation," Federal Communications Bar Journal, 17 (1960), 76.

Givens, Richard A. "Refusal of Radio and Television Licenses on Economic Grounds," Virginia Law Review, 46 (1960), 1391.

Goldin, H.H. "Economic and Regulatory Problems in the Broadcast Field," Land Economics, 30 (1954), 227.

Hale, G.E. and Hale, R.E. "Competition or Control: Radio and Television Broadcasting," University of Pennsylvania Law Review, 107 (March, 1959), 585.

Hansen, Victor R. "Broadcasting and the Anti-trust Laws," Law and Contemporary Problems, 22 (Autumn, 1957), 572.

Heinl, Robert D. "Is a Broadcasting Station a Public Utility?" Public Utilities Fortnightly, 6 (1930), 344.

Hettinger, Herman S. "The Economic Factor in Radio Regulation," Air Law Review, 9 (April, 1938), 115.

Huntley, R.R. "Growing Pains in Broadcast Regulation," Washington and Lee Law Review, 14 (1957), 186.

Irion, H. Gifford. "FCC Criteria for Evaluating Competing Applicants," Minnesota Law Review, 43 (January, 1959), 497.

"Is Radio a Public Utility?" Air Law Review, 11 (1940), 177.

Keyes, Lucile S. "The Recommendations of the Network Study Staff: A Study of Non-Price Discrimination in Broadcast Television," George Washington Law Review, 27 (1959), 303.

Levin, Harvey J. "Broadcast Regulation and Intermedium Competition," Virginia Law Review, 45 (November, 1959), 1104.

_____. "Social Welfare Aspects of FCC Broadcast Licensing Standards," American Journal of Economics and Sociology, 13 (1953), 39.

Mayer, Jacob W. "Sanders Brothers Revisited," Kentucky Law Journal, 49 (Spring, 1961), 370.

Notes. "Economic Injury in FCC Licensing: The Public Interest Ignored," Yale Law Journal, 67 (November, 1957), 135.

Sainer, H. "Assessments for Broadcast Licenses," Federal Communications Bar Journal, 21 (Spring, 1961), 209.

Schwartz, Bernard. "Anti-trust and the FCC: The Problem of Network Dominance," University of Pennsylvania Law Review, 107 (April, 1959), 753.

Segal and Warner. "Ownership of Broadcasting Frequencies; a Review," Rocky Mountain Law Review, 19 (1947), 111.

Smythe, Dallas W. "Facing Facts About the Broadcast Business," University of Chicago Law Review, 20 (Autumn, 1952), 96.

Steiner, Peter O. "Discussion: Goldin's Paper on Economic and Regulatory Problems in the Broadcast Field," Land Economics, 30 (1954), 239.

"Symposium on Broadcasting," Law and Contemporary Problems, 22 (Autumn, 1957), 539 and 23 (Winter, 1958), 1.

Warner, Harry P. "Some Constitutional and Administrative Implications for the Sanders case," Federal Communications Bar Journal, 4 (April, 1940), 214.

_____. "The Economic Basis of Broadcasting," Federal Communications Bar Journal, 6 (December, 1941), 76.

Weaver, H.B. and Cooley, T.M. III. "Competition in the Broadcasting of Ideas and Entertainment--shall Radio take over Television?" University of Pennsylvania Law Review, 101 (April, 1953), 721.

Zias, Joseph F. "The Sanders Case," Federal Communications Bar Journal, 4 (January, 1940), 134.

Broadcasting Industry Periodicals

"Address to the Kentucky Broadcasters Association by Frederick W. Ford," Broadcasting, 62: 42, October 23, 1961.

"At Chicago: A Minow of Many Moods," Broadcasting, 62:54, April 9, 1962.

"Birth Control for AM Radio?" Broadcasting, 62:27, April 9, 1962.

"Competition is tougher: traces postwar trend," C.H. Tower, Broadcasting, 57:80, October 19, 1959.

"Current Statistics," Broadcasting, 62:97, August 20, 1962.

"Decade of Decision: Broadcasting in the 60's--Special Report," Printers Ink, 271:27, April 1, 1960.

"FCC Control Over Rates, Profits?" Broadcasting, 55:33, July 14, 1958.

"License Cutback Might Help Radio Improve, says Ford," Advertising Age, 32:1, October 23, 1961.

"Profits and protection, an editorial," Sol Taishoff, Broadcasting, 62:122, April 9, 1962

"Ten questions regarding the FCC's proposal," Broadcasting, 62:49, May 21, 1962.

"The Short View, an editorial," Sol Taishoff, Broadcasting, 57:126, October 5, 1959.

"Would Radio Birth Control Help?" Broadcasting, 62:33, April 16, 1962.

U.S. Government Documents

Federal Communications Commission. Public Notice. No. 12337 Final AM-FM Broadcast Financial Data--1960. November 8, 1961.

U.S. Federal Communications Commission Annual Reports. Fiscal Years 1945-1961. Numbers 11-27.

U.S. Senate. Hearings on S. 1333 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce. 80th Congress, 1st Session, 1947.

Case Material

American Southern Broadcasting. 11 RR 1054, (1955), license denied 13 RR 927, (1957).

Atkinson Radio Corporation. 3 FCC 137, (1936).

Beaumont Broadcasting Association. 5 FCC 139, (1938).

Carroll Broadcasting Co. v FCC. 258 F2d 440, (1958).

Colorado Radio Corp. v FCC. 118 F2d 24, (1941).

Courier Post Publishing Co. v FCC. 104 F2d 213, (1939).

Cumberland Valley Broadcasting Co., Inc. 11 RR 840, (1954).

Curtis Broadcasting Co. 6 FCC 7, (1939).

Democratic Printing Co. v FCC. 202 F2d 298, (1952).

Easton Publishing Co. v FCC. 175 F2d 344, (1949).

Ewing Broadcasting Co. 10 FCC 393, (1944).

Fall River Herald News Publishing Co. 5 FCC 377, (1938).

FCC v RCA Communications. 346 US 86 (1953).

FCC v Sanders Brothers. 309 US 470, (1940).

FCC v WJR, The Goodwill Station, Inc. 337 US 265, (1949).

FRC v Nelson Brothers. 289 US 206, (1933).

F.W. Meyer. 7 FCC 544, (1939).

George A. Hormell II. 16 RR 274a, (1957).

Great Western Broadcasting Association v FCC and Intermountain Broadcasting Co. v FCC. 94 F2d 244, (1937).

Herbert P. Michels. 17 RR 557, (1958).

Iredell Broadcasting Co. 12 RR 573, (1955); 13 RR 996, (1957).

Kaiser Hawaiian Village Radio. 22 FCC 941, (1957).

Lorain Journal Co. v US. 342 US 143, (1951).

Lubbock County Broadcasting Co. 4 RR 493, (1948).

Mackay Radio and Television Company v FCC. 97 F2d 641, (1938).

Martin Karig. 19 RR 1084, (1960).

NBC v US. 319 US 190, (1943).

Packard, Stebbins and Packard. 4 FCC 288, (1937).

Presque Isle Broadcasting Co. 8 FCC 3, (1940).

Pulitzer Publishing Co. v FCC. 94 F2d 249, (1937).

Radio Cleveland. 11 RR 348, (1954).

Red Oak Radio Corporation, et. al. 1 FCC 163, (1934).

Southeastern Enterprises. 22 FCC 605, (1957).

Spartanburg Advertising Co. 7 FCC 498, (1939).

Summit Radio Corporation. 7 FCC 619, (1940).

Travelers Broadcasting Service Corp. 6 FCC 456, (1938), on rehearing, 7 FCC 504, (1939).

Tri-State Broadcasting v FCC. 107 F2d 956, (1939).

US et. al. v Storer Broadcasting Co. 351 US 192, 13 RR 2161, (1953).

Video Independent Theaters, 17 RR 150a, (1959).

Voice of Cullman. 14 FCC 770, (1950).

West Georgia Broadcasting Co. 27 FCC 161, (1959).

WGN, Inc. v FRC. 68 F2d 432, (1933).

Yankee Network v FCC. 107 F2d 212, (1939).

APPENDIX

STANDARD AM BROADCAST FINANCIAL DATA -- 1960

Table 1

NUMBER OF AM RADIO STATIONS CLASSIFIED BY YEAR LICENSED SHOWING THE NUMBER REPORTING AND THE NUMBER REPORTING A LOSS

1959 - 1960

Item	All Stations	Year Licensed: 1941 and Prior Years[1]	1946-1951	1952-1956	1957	1958	1959	1960
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
A. Total Stations Reporting in 1960	3,470	882	1,349	703	180	136	131	89
Number Reporting a Loss in 1960	1,145	268	384	223	65	63	75	67
Percent Loss in 1960	33.0	30.4	28.5	31.7	96.1	46.3	57.3	75.3
Total Stations Reporting in 1959	3,380	879	1,349	704	179	136	133	
Number Reporting a Loss in 1959	1,174	286	399	245	74	69	101	
Percent Loss in 1959	34.7	32.5	29.6	34.8	41.3	50.7	75.9	

[1] 63 stations, licensed during the war years 1942-1945, are also included in this group.

Table 1 -- Continued

NUMBER OF FM STATIONS OPERATED BY NON-AM LICENSEES

REPORTING PROFIT AND LOSS

Year	Total Stations Reporting	Number Reporting Profit	Number Reporting Loss
1960	218[1]	50	168
1959	148	38	110
1958	93	25	68
1957	67	23	44
1956	51	15	36

[1]Of the 65 reporting stations that began operations in 1960, 59 reported losses and 6 reported a profit.

Table 2

AM RADIO STATIONS CLASSIFIED BY PROFIT AND LOSS GROUPINGS

(Stations Operating Full Year)

	Number of Stations	
Profit (Before Federal income tax) of:	1960	1959
$500,000 and over	25	26
250,000 - $500,000	26	28
150,000 - 250,000	31	24
100,000 - 150,000	43	36
75,000 - 100,000	39	37
50,000 - 75,000	87	90
25,000 - 50,000	281	244
20,000 - 25,000	133	134
15,000 - 20,000	226	216
10,000 - 15,000	322	284
5,000 - 10,000	447	434
Less than 5,000	643	621
Total Stations	2,303	2,174
Median Profit	$10,800	$10,300
Loss of:		
Less than $5,000	396	403
$5,000 - 10,000	202	210
10,000 - 15,000	119	118
15,000 - 20,000	71	70
20,000 - 25,000	52	49
25,000 - 50,000	125	121
50,000 - 75,000	51	54
75,000 - 100,000	24	23
100,000 - 150,000	18	13
150,000 - 250,000	8	8
250,000 and over	12	5
Total Stations	1,078	1,074
Median Loss	$8,500	$7,200

Table 3

AM RADIO STATIONS CLASSIFIED BY VOLUME OF TOTAL BROADCAST REVENUES SHOWING NUMBER REPORTING PROFIT OR LOSS[1]

(Stations Operating Full Year 1960 Only)

Total Broadcast Revenues	Total Stations Reporting	Profit	Loss
Less than $25,000	104	31	73
$25,000 - 50,000	555	322	233
50,000 - 75,000	637	427	210
75,000 - 100,000	535	373	162
100,000 - 150,000	644	445	199
150,000 - 200,000	314	223	91
200,000 - 250,000	161	123	38
250,000 - 500,000	252	203	49
500,000 - 1,000,000	120	100	20
$1,000,000 and over	59	56	3
Total	3,381	2,303	1,078

[1]Before Federal income tax.

Table 4

NUMBER OF AM STATIONS REPORTING PROFIT AND LOSS[1] CLASSIFIED BY SIZE OF STANDARD METROPOLITAN STATISTICAL AREA AND COMMUNITIES NOT IN METROPOLITAN STATISTICAL AREA[2]

(Stations Operating Full Year 1960 Only)

	Total	Profit	Loss
Population of:			
2,000,000 and over	205	139	66
1,000,000 - 2,000,000	140	92	48
500,000 - 1,000,000	243	145	98
250,000 - 500,000	337	202	135
200,000 - 250,000	109	65	44
150,000 - 200,000	96	69	27
100,000 - 150,000	149	100	49
50,000 - 100,000	68	42	26
25,000 - 50,000	366	241	125
10,000 - 25,000	646	458	188
5,000 - 10,000	554	424	130
2,500 - 5,000	351	245	106
Less than 2,500	117	81	36
Total	3,381	2,303	1,078

[1]Before Federal income tax.

[2]Census of Population, 1960.