ECONOMIC INJURY IN FCC LICENSING: THE PUBLIC INTEREST IGNORED*

THE Federal Communications Commission has responsibility for securing the most efficient use of broadcasting facilities.[1] Permission to construct and operate a radio or television station may be obtained only through a showing that the proposed station will serve the "public interest, convenience, or necessity."[2] Persons who would be adversely affected by the operation of a new station may protest approval of the application.[3] While economic injury to the protestant is not in itself ground for denying the license,[4] the question has arisen

*Southeastern Enterprises (WCLE), 13 PIKE & FISCHER RADIO REG. 139 (March 20, 1957), *temporary stay order granted pending appeal on merits sub nom.* Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 5, 1957, *program test authorization revoked,* 15 PIKE & FISCHER RADIO REG. 248 (June 6, 1957), *stay order vacated on rehearing,* Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 26, 1957. (PIKE & FISCHER RADIO REG. hereinafter cited as RADIO REG.)

1. The FCC was created "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." 48 STAT. 1064 (1934), as amended, 47 U.S.C. § 151 (1952). See also National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943): "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall 'generally encourage the larger and more effective use of radio in the public interest . . . .' "

2. 48 STAT. 1084, 1085 (1934), as amended, 47 U.S.C. §§ 308, 309 (1952), as amended, 47 U.S.C. § 309(c) (Supp. IV, 1957); 48 STAT. 1083 (1934), 47 U.S.C. § 307(a) (1952) (station licenses); 48 STAT. 1089 (1934), as amended, 47 U.S.C. § 319 (1952) (construction permits). The same standard must be met in applying for license renewals, 48 STAT. 1084 (1934), as amended, 47 U.S.C. § 307(d) (1952), transfers, 48 STAT. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1952), and modifications of construction permits and licenses, 48 STAT. 1084 (1934), as amended, 47 U.S.C. § 308 (1952).

The Communications Act does not contain the word "television," but its use of the term "radio" has been construed to include television. Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950), *cert. denied,* 340 U.S. 929 (1951).

3. The Commission may grant a license on the basis of an application alone or call a hearing in which the applicant must prove his fitness. At such a hearing, other parties in interest may offer evidence "protesting" the application. When the application is granted without hearing, the grant is subject to protest for a period of thirty days. When a protest contains facts which, if proved, would be grounds for setting the grant aside, a hearing will be held on the issues raised by protestant, and the license grant suspended pending outcome of the protest. Where the public interest requires, however, the grant may remain in effect. 48 STAT. 1084, 1085 (1934), as amended, 47 U.S.C. §§ 308, 309 (1952), as amended, 47 U.S.C. § 309(c) (Supp. IV, 1957). See note 32 *infra.*

4. "[E]conomic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commission] . . . must weigh, and as to which it must make findings, in passing on an application for a broadcasting license." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 473 (1940). However, such economic injury does give the station standing to protest Commission action. *Id.* at 477.

whether applications should be rejected when the likelihood of such injury threatens the public interest.[5]

5. The public interest standard was originally assumed to enable the Commission to protect stations against undesirable competition. WOKO, Inc. v. FCC, 109 F.2d 665, 666-68 (D.C. Cir. 1939) (dictum); Tri-State Broadcasting Co. v. FCC, 107 F.2d 956, 957-58 (D.C. Cir. 1939) (dictum); Tri-State Broadcasting Co. v. FCC, 96 F.2d 564, 566 (D.C. Cir. 1938) (dictum); Pulitzer Publishing Co. v. FCC, 94 F.2d 249, 251-52 (D.C. Cir. 1937) (dictum); Great Western Broadcasting Ass'n v. FCC, 94 F.2d 244, 248 (D.C. Cir. 1937) (dictum). But dicta in FCC v. Sanders Bros. Radio Station, *supra* note 4, the only Supreme Court pronouncement on the subject, cast doubt on the validity of these assertions:

"[T]he broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

". . . .

". . . . 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." *Id.* at 475.

However, the Court went on to say that results of competition could sometimes be relevant under the public interest standard:

"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. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter." *Id.* at 475-76.

Since *Sanders*, lower courts have differed on the significance of economic injury affecting the public. *Compare* Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 & n.4 (D.C. Cir. 1941) (dictum; *Sanders* asserts economic injury may be relevant to the public interest), *with* Stahlman v. FCC, 126 F.2d 124, 127 (D.C. Cir. 1942) (dictum; applicant who possesses minimum qualifications must be given an available frequency; *Sanders* stands for free competition in broadcasting). More recently, however, the cases before *Sanders*, and *Sanders* itself, were deemed authority for considering economic injury adversely affecting the public as ground for denying licenses. In Democrat Printing Co. v. FCC, 202 F.2d 298, 302 & n.14 (D.C. Cir. 1952), a commission finding that electrical interference resulting from licensing applicant did not cause serious economic injury to existing station was held invalid because based on insufficient evidence. On remand to the Commission, the economic injury issue was excluded as conjectural and not timely raised; hearing was held on the electrical interference issue. Texas Star Broadcast Co., 9 RADIO REG. 373, 979 (1953).

The Commission has used *Sanders* to support its contention that economic injury is irrelevant. See, *e.g.*, Presque Isle Broadcasting Co., 8 F.C.C. 3, 8 (1940); The Evening News Ass'n, 8 F.C.C. 552, 555 (1941). Yet the opposite view has not been without support among its members. See, *e.g.*, The Voice of Cullman, 14 F.C.C. 770, 777 (1950) (concurring opinion). Furthermore, in most cases, such reliance on *Sanders* was buttressed by insufficiency of evidence that the applicant would cause economic injury resulting in harm to the public. Independent Broadcasting Co., 9 F.C.C. 40 (1941); United Theatres,

In *Southeastern Enterprises (WCLE)*, the Commission disclaimed power to protect a station from competition irrespective of the potential effect on the public.[6] The case arose out of an application for a radio station construction permit in Cleveland, Tennessee. Protestant, WBAC, furnished the only local service, although Cleveland was also served by stations in other communities. WBAC alleged that the entry of a local competitor would decrease its share of advertising revenue in the Cleveland market.[7] It asked the Commission to determine whether Cleveland could support two stations or whether an inadequacy of advertising revenue might result, which, by causing either or both stations to fail or to render inferior service, would ultimately harm the public.[8]

The FCC denied authority to consider these issues and declined to make findings on them. Financial data necessary for such consideration, it suggested, could be obtained only through a regulation of accounts similar to that imposed on common carriers under the authority of the Communications Act.[9] Since

Inc., 8 F.C.C. 489 (1941); Burlington Broadcasting Co., 8 F.C.C. 366 (1941); Sentinel Broadcasting Corp., 8 F.C.C. 140 (1940). And the cases often do not clearly reveal whether *Sanders* merely prevents restrictions on competition when no public injury will result, or if it prohibits protecting stations from any competition even when serious public harm is likely. See, *e.g.*, The Voice of Cullman, *supra* at 775: "We are forced to conclude from a careful consideration of the pleadings in this proceeding that despite protestations to the contrary, petitioner is seeking a hearing for the purpose of showing that it is entitled to be protected against competition; this claim runs squarely against the Supreme Court's holding in the *Sanders Bros.* case."

6. 13 RADIO REG. 139 (March 20, 1957), *temporary stay order granted pending appeal on merits sub nom.* Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 5, 1957, *program test authorization revoked*, 15 RADIO REG. 248 (June 6, 1957), *stay order vacated on rehearing*, Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 26, 1957.

7. *Id.* at 140-42.

8. Protestant's evidence on these issues included an extensive study entitled "Economic Analysis of Potential Demand for Radio Advertising in Cleveland, Tennessee" prepared by Howard S. Dye, Professor of Economics at the University of Tennessee. Brief for Appellant, Attachment No. 1, Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 5, 1957 (hereinafter cited as *Dye Report*). The study purported to establish that "the sale of radio advertising in the Cleveland area has about reached the saturation point, and that the advent of an additional radio station in the area can prove successful only through a serious and probably injurious encroachment upon the customers and total sales of station WBAC." *Dye Report* 33. The study was based on statistics showing population and income trends, evaluation of the competition faced by local merchants from the neighboring market area of Chattanooga, analysis of the types of businesses in the area and their ability to support radio advertising, and questionnaires probing attitudes of potential advertisers on the amount of advertising contemplated and the proportion to be spent on radio. Protestant also offered evidence which indicated customers reducing advertising on WBAC to advertise on the new station, encroachment on WBAC revenues from this reduction and programming cuts which would have to be made to conserve operating costs at levels commensurate with reduced revenues. Brief for Appellant, Attachments 2-4, Fitch & Kile, Inc. v. FCC, *supra*.

9. 13 RADIO REG. at 150-51.

"[T]o interpret the Act as protestant urges inevitably results in the application of common carrier or public utility concepts to the broadcasting industry—a contradiction

section 153(h) of the act excludes broadcasting from common carrier status,[10] the Commission concluded that Congress intended broadcasting to be a field of free competition and gave the regulatory agency no power to mitigate its effects.[11] Moreover, protection of stations against competition, even when in the public interest, was said to be repugnant to antitrust policy as recognized by the Communications Act.[12]

Neither antitrust policy nor section 153(h), however, supports the FCC's conclusions. The antitrust provisions of the Communications Act, designed to prevent great concentration of power in the industry,[13] have long been held

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which cannot be read into the Act by interpretive construction or superimposed by administrative action." *Id.* at 149. "What must be considered in achieving the one objective [common carrier regulation] is not permissible in reaching the objectives of the other [radio regulation]." *Ibid.*

The Commission also argued that if both stations could not survive and it were called upon to consider this fact in licensing, it in effect would have to choose between stations. This choice, it maintained, would imply later public utility regulation of the selected station to ensure that the promised service would be forthcoming. *Id.* at 151. Yet, the same type of choice is made whenever two or more applicants seek a single frequency, and the Commission has not felt public utility regulation necessary in these cases.

10. " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 48 STAT. 1066 (1934), 47 U.S.C. § 153(h) (1952).

Licensing of carriers in communications is governed by FCC v. Radio Corp., 346 U.S. 86 (1953), where the Commission was held to have erred in licensing a radiotelegraph company on the basis of a supposed national or congressional policy in favor of competition. The case was remanded with instructions for the Commission to decide, as an expert body, whether the grant would serve the public interest. *Id.* at 97. "The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard." *Id.* at 93.

11. "[W]e cannot assume that Congress intended for us to prevent free competition in certain instances and yet not impose regulatory substitutes in such instances." 13 RADIO REG. at 150.

12. " 'The erection of a fence around an industry to keep out newcomers is wholly repugnant to the policy which underlies our anti-trust legislation. . . .' yet that is precisely what the protestant requests us to do. The protestant cannot justify an exception in his case because it claims that injury to the protestant will result in an injury to the public. This has been the habitual and historic allegation made by persons who are interested in avoiding or preventing competition." *Id.* at 146. See also note 13 *infra.*

13. 48 STAT. 1086 (1934), as amended, 47 U.S.C. § 311 (1952); 48 STAT. 1087 (1934), 47 U.S.C. §§ 313-14 (1952).

One of the act's main objectives was to prevent anyone from gaining excessive control over a means of communication which was capable of exerting tremendous influence over the public. See 67 CONG. REC. 5479-81, 5484, 5487, 12352, 12356-58 (1926); 68 CONG. REC. 2573, 2575 (1927) (discussing Radio Act of 1927, from which the antitrust provisions of the Communications Act were derived). Congress sought to avoid both private monopoly and too much regulation, either of which could lead to interference with the free expression of ideas. See 48 STAT. 1091 (1934), as amended, 47 U.S.C. § 326 (1952): "Nothing

not to limit the Commission's authority to grant or deny licenses in the public interest.[14] In addition, the Commission has stated that section 153(h) does not preclude application of common carrier accounting concepts when necessary to the proper discharge of its duty to administer radio licensing.[15] Section 153(h) merely prevents use of title two of the 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.[16] Nor does section

in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." See also 48 STAT. 1088 (1934), as amended, 47 U.S.C. § 315 (1952) (prohibiting private censorship of speeches by candidates for public office).

14. "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." Yankee Network, Inc. v. FCC, 107 F.2d 212, 223 (D.C. Cir. 1939).

The antitrust provisions of the Communications Act bar certain concentrated holders from competing. See 48 STAT. 1087, 47 U.S.C. § 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 antitrust policy, Commission power to restrict competition may sometimes be used for antitrust purposes. "The method of uncontrolled competition argued for by the Commission in the present case is 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." Yankee Network, Inc. v. FCC, *supra* at 223-24.

15. See The Travelers Broadcasting Serv. Corp., 6 F.C.C. 456, 463-64 (1938), *on rehearing*, 7 F.C.C. 504 (1939) (new findings of fact and opinion issued, but transfer still denied):

"[I]n considering applications for authority to transfer control of licensee corporations such as the one discussed herein, the Commission must in each instance determine primarily whether or not a grant thereof would serve public interest, but it is not bound by strict principles of accounting such as would be applicable in rate proceedings governing common carriers. It is well settled, however, in numerous decisions in such proceedings, that past losses in operation may not be capitalized in the valuation of property for rate-making purposes. . . . Under Section 3(h) of the Act, *supra*, a person engaged in radio broadcasting is not deemed to be a common carrier, and the [carrier] . . . cases are not, therefore, strictly applicable. However, the principle expressed therein is one which the Commission recognizes to be in accordance with sound public policy. To permit, therefore, prior losses in the operation of Station WTIC, and its affiliated short-wave stations, to be capitalized in the manner proposed herein . . . would not be in the public interest."

16. Congress believed that the highly complex field of radio required an expert body with broad power to consider whatever it believed was relevant to the public well-being.

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.[17] Such a conclusion assumes that Congress considered free competition and close supervision sole and mutually exclusive methods of insuring that the public interest would be adequately subserved.[18] But Congress could have thought the license renewal and revocation provisions sufficient to maintain good service.[19] And, it might have recognized that exclusion of one competitor does not destroy the safeguards of competition. A station must still provide good service to compete successfully for advertising with other media and with other stations serving the area.[20]

See S. REP. No. 772, 69th Cong., 1st Sess. (1926); National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940).

17. Yankee Network, Inc. v. FCC, 107 F.2d 212, 222 (D.C. Cir. 1939) (rejecting the argument that the fact that radio is not regulated as a common carrier implies that the Commission may not protect radio against competition).

18. *Cf.* "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 where government seeks to guarantee to any business enterprise greater security than it can obtain by its own competitive ability." The Voice of Cullman, 14 F.C.C. 770, 776 (1950).

19. 48 STAT. 1084, 1086 (1934), as amended, 47 U.S.C. §§ 307(d), 312 (1952). Commission practice has minimized the effectiveness of these provisions in controlling station behavior. The power of revocation is seldom used, and the fact that the licensee has made a large investment in the station has induced the Commission to grant renewals except in cases of exceptional disregard of the public interest. Thus, between 1934 and 1942, only two licenses were revoked, and thirteen applications for renewal were denied. See Comments, 57 YALE L.J. 275, 280 n.26 (1947), 66 YALE L.J. 365, 370, 379-80 & nn.87-91 (1957).

Nevertheless, stations may be spurred to better service by the knowledge that their records of past performance will be carefully considered in future licensing proceedings, should they desire to establish new stations. See, *e.g.*, WORZ, Inc., 12 RADIO REG. 1157, 1213-15 (June 6, 1957); WPTF Radio Co., 12 RADIO REG. 609, 636-46, 658d-660 (1956). In any event, congressional intent must be gleaned from the powers to regulate given the Commission, not the disuse into which they have fallen.

20. See Southeastern Enterprises (WCLE), 13 RADIO REG. 139, 142 (March 20, 1957) (Cleveland area served by stations in other communities). Even where local merchants do not advertise on stations in nearby communities, a local station must maintain good service or risk loss of its audience and subsequent decline in advertising revenue. See *Dye Report* 19.

Broadcasting is not the most favored form of advertising. In 1955, less than 20% of total national advertising expenditures were attributable to radio-television. Direct mail advertising accounted for 24.0% of expenditures, newspapers 14.2%, magazines 13.7%, network television 9.8%, trade publications 7.8%, spot television 5.8%, spot radio 2.6%, outdoor 2.5%, network radio 1.7%, miscellaneous 18.7%. Memorandum prepared by the Columbia Broadcasting System, *Hearings Before the Senate Committee on Interstate and Foreign Commerce on S. Res. 13 and S. Res. 163*, 84th Cong., 2d Sess. 1759-60 (1956). See also *Dye Report* 25-31, indicating that radio is less favored than other types of local advertising.

Similarly, policy considerations advanced in other cases but not expressed in *Southeastern Enterprises* fail to support the decision. Justification cannot be found in the rationale that failure of an existing station through entry of a competitor ultimately leaves the area in its original position.[21] Public harm is ordinarily apparent when a new station destroys two or more existing broadcasters,[22] or when both old and new stations are forced off the air.[23] For subsequent entry, though sometimes possible, does not justify depriving listeners of service in the interim.[24] Even where only one station is driven out, however, the public suffers if the defunct station was preferable. Thus, to the extent diversification of ownership is desirable,[25] public harm results when an independent station is forced off the air by a concentrated holder with a superior competitive position.[26] In addition, if the original licensee furnishes the only service for a substantial group of people not reached by the new station, free competition thwarts the FCC's primary objective of providing each person with at least one service.[27] Free competition may also impede the Commission's

21. This theory was most clearly expounded in The Voice of Cullman, 14 F.C.C. 770, 776 (1950): "[A]ssuming 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 . . . by petitioner's own figures, there would be adequate support."

See also Presque Isle Broadcasting Co., 8 F.C.C. 3, 9 (1940): "It is implicit in the idea of free competition that the public interest cannot possibly be 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."

22. See WJR, The Goodwill Station, Inc., 13 RADIO REG. 763, 808-13 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957) (new television station will probably drive two existing stations off the air).

23. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1940), quoted at note 5 *supra*.

24. For discussion of areas in which stations driven out may never be replaced, see note 39 *infra*.

25. See Comment, 66 YALE L.J. 365, 366-68 & n.18 (1957); note 13 *supra*.

26. "The 'concentrated' owner can utilize joint facilities and staffs, and combined advertising services, to realize the cost savings that may be the first step in monopolization." Comment, 66 YALE L.J. 365, 367 (1957). He also can have the advantage of tying contracts and a superior bargaining position in competing for network affiliations. *Id.* at 367-68 & nn.14, 17. See also Fall River Herald News Publishing Co., 5 F.C.C. 377 (1938) (license denied applicant who owned only English language newspaper in town and who was adverse to announcing programs of sole existing station).

27. See, *e.g.*, Radio Cincinnati, Inc. v. FCC, 177 F.2d 92, 95 (D.C. Cir. 1949) (first electrically satisfactory service for 5,000 people preferred over an additional such service for 600,000 people).

The Sixth Report and Order of the Federal Communications Commission, which assigned television channels to different communities throughout the country, was based on the following priorities: [1] "To provide at least one television service to all parts

policy of encouraging stations which meet local needs.[28] The licensing of an additional large-city station may cause the failure of local services in nearby communities.[29] And, while listeners in these communities can usually receive the city station, the programming and advertising it carries may not be adapted to their interests.[30] Nor is a policy of free competition supported by arguing that

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of the United States." [2] "To provide each community with at least one television broadcasting station." [3] "To provide a choice of at least two television services to all parts of the United States." [4] "To provide each community with at least two television broadcast stations." Sixth Report and Order, 1 RADIO REG. 91:601, 91:620 (1952).

In WJR, The Goodwill Station, Inc., 13 RADIO REG. 763, 810-14 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957), the hearing examiner found that licensing the applicant would proably destroy a station providing the only network grade television for about 27,000 people, and the sole grade A television service for 119,000 people. The examiner approved the application, although he acknowledged that licensing would defeat the objectives of the Sixth Report and Order and the statutory requirement of a "fair, efficient, and equitable distribution" of facilities among communities, 48 STAT. 1084 (1934), as amended, 47 U.S.C. § 307(b) (1952), note 41 *infra*. He stated that the Commission expected economic facts would preclude full realization of these objectives. WJR, The Goodwill Station, Inc., *supra* at 826-27. Final commission action on the problem has been deferred pending rehearing on the comparative qualifications of WJR and the two other applicants for the Flint channel. See Butterfield Theatres, Inc. v. FCC, 237 F.2d 552 (D.C. Cir. 1956) (ordering rehearing).

28. See second priority in Sixth Report and Order, note 27 *supra*; Enid Broadcasting Co., 14 F.C.C. 1054, 1071 (1950); Utica Observer-Dispatch, Inc., 11 F.C.C. 383, 391-92 (1946) (§ 307(b) requires not merely availability of service, but also, wherever possible, media for local expression).

The television allocation table, 47 C.F.R. § 3.606 (Supp. 1957), was designed to protect the interest of the "public residing in smaller cities and rural areas." Sixth Report and Order, 1 RADIO REG. 91:601, 91:604 (1952). For doubts as to its effectiveness, see Commissioner Jones' dissent, *id.* at 91:1048.

In *Southeastern Enterprises*, while local service would remain even if the original station failed, the public might be deprived of the only local nighttime service. Brief for Appellant, pp. 2, 16, Attachment No. 2, pp. 1, 3, Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 5, 1957 (claiming night service to be unprofitable and undertaken as a public service, and that applicant had sought daytime permit only). Even if the existing station did not fail, the feared competition was alleged to require elimination of the unprofitable nighttime service. *Ibid.* Nighttime programming may still have been worthwhile, however, if it tended to keep the public aware of the station and thus to increase the daytime audience.

29. See WJR, The Goodwill Station, Inc., 13 RADIO REG. 763, 808-13 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957), where the hearing examiner found that applicant, seeking to institute a service in Flint, Michigan, would probably destroy the local services in Cadillac and Saginaw. The examiner, approving the application, stated that "though it would unquestionably be better to have it otherwise, Flint will have a station at the expense of Saginaw and Cadillac—at least as far as the present grantees are concerned." *Id.* at 827. His holding should be construed as a failure to make the findings on relative need of communities for television service required by § 307(b), see notes 41, 57 *infra*, and a failure properly to apply the public interest standard.

30. See WJR, The Goodwill Station, Inc., *supra* note 29, at 798 (noting that the Flint station had made no survey of the interests of the other communities in planning its programming). WWTV, in Cadillac (pop. 10,425), serves a largely rural area containing many communities of 2,000 to 8,000. Accordingly, it adapted its advertising policy to the limited financial resources of rural merchants. The Flint (pop. 163,000) station

the results of competition cannot be predicted, and that allowing a hearing merely encourages protests lodged for purposes of delay.[31] Dilatory tactics can be defeated under a recent Communications Act amendment authorizing the FCC to permit, when required by the public interest, the new licensee's continued operation pending the outcome of the protest proceeding.[32]

The difficulty of predicting the effects of radio competition furnishes no justification for a decision which declares the FCC powerless to weigh such considerations in all broadcasting cases. *Southeastern Enterprises*, based on the exclusion of broadcasting from close supervision, extends to television as well as radio. While the outcome of competition among radio stations may

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would be most unlikely to adopt a similar policy. See *id.* at 766, 810-14. Therefore, if the Flint station replaces the Cadillac station, viewers in the Cadillac market would probably no longer get advertising from local merchants, and local merchants would be deprived of a television outlet. See note 52 *infra.*

31. "[T]he 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. 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." American Southern Broadcasters (WPWR), 11 RADIO REG. 1054, 1056, *license granted*, 13 RADIO REG. 927 (1955).

"We do not believe that the result 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 revenues. The possibilities are numerous, and since they lie in the future and stem from the interaction of individual purposes, energies, perseverance, and resourcefulness in a dynamic situation over a period of time, the ultimate results, and even more the effect of any particular result upon the service rendered cannot be predicted. Detailed information of the present business situation obtained at a hearing would not make prediction substantially more possible." The Voice of Cullman, 14 F.C.C. 770, 776 (1950).

32. The protest procedure had been used by competitors effectively to prevent a new radio or television station from going on the air for as long as two or three years. See 101 CONG. REC. 11156 (1955); 102 CONG. REC. 416-18 (1956). To eliminate such unnecessary and wasteful delays, the act was amended, 70 STAT. 3 (1956), 47 U.S.C. § 309(c) (Supp. IV, 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 . . . ." See Letcher Broadcasting Corp., 14 RADIO REG. 183 (1956) (grant of license kept in effect pending protest hearing, as likelihood of need to set grant aside was slight); Wrather-Alvarez Broadcasting, Inc., 13 RADIO REG. 754, *license granted*, 14 RADIO REG. 213, *aff'd*, 14 RADIO REG. 218 (1956) (grant remains in effect pending outcome of protest).

When the license is withheld until the applicant can prove his fitness in a hearing, consideration of the economic injury issue would not appear to cause objectionable delay. The applicant could not be operating even if no protest had been lodged, and the extent to which the otherwise necessary hearing would be extended does not seem sufficiently great to justify classification of the protest as dilatory. See note 3 *supra.*

defy prediction,[33] the results of television competition are often foreseeable. The great expense of local television programming generally makes some network service a prerequisite for successful operation.[34] Consequently, where the entry of a new station with network affiliation is likely to prevent other broadcasters from obtaining network programming, sufficient ground for predicting failure of existing stations may be found.[35] Moreover, television presents a distinctive situation in that its broadcast band is divided into two portions: very-high-frequency, VHF, with twelve channels and ultra-high-frequency, UHF, with seventy.[36] Since comparatively few sets receive the UHF signal,[37] programming and advertising sources prefer the VHF medium.[38]

33. See note 31 *supra*.

34. See *Hearings*, *supra* note 20, at 37; Plotkin, *Memorandum Prepared for the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 14-16 (1955) (hereinafter cited as *Memorandum*).

35. See WJR, The Goodwill Station, Inc., 13 RADIO REG. 763, 808-13 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957). The hearing examiner found that entry of a station with CBS affiliation would probably deprive two existing stations of their CBS programming, without which they could not survive. One existing licensee testified that he would lose his national "spot" business if he were unable to provide spots adjacent to network programs, and that loss of CBS programming would force him to go off the air. The other also expected to lose CBS programming, which accounted for 80% of his national programming and 84% of advertising sales. The examiner conceded that such loss would make survival very difficult, because "stations with network programs make money (and make it in direct proportion to the level of such programs carried); those without such programs do not." *Id.* at 812.

36. VHF has channels 2-13, UHF 14-83. Both bands produce the same type of picture, but UHF is better suited for color and freer from electrical interference. *Hearings*, *supra* note 20, at 21-22. However, UHF signals are more difficult to send over long distances because they are more sensitive to rough terrain and bend less easily with the curvature of the earth. *Id.* at 189. Higher power and perhaps a higher tower may compensate for this shortcoming, *id.* at 86, and so the Commission has recently authorized an increase in maximum UHF power from 1,000 to 5,000 kilowatts. Second Report on Deintermixture, 13 RADIO REG. 1571, 1585 (1956). The higher bands also have certain technical difficulties, but the Commission expects these to be eliminated by an expedited research program to improve UHF transmitters, receivers and techniques. *Id.* at 1578; see *Hearings*, *supra* note 20, at 153.

37. All sets receive the VHF signal, while only about 15% of sets presently being made can also receive UHF. *Hearings*, *supra* note 20, at 69, 298. From 1948-52, when the licensing of new stations was suspended pending adoption of a nation-wide television plan, almost 17 million VHF-only receivers were sold. See *Memorandum* 3-8. Today, of 37 million television receivers in the country, only about 4 million receive the UHF signal. *Hearings*, *supra* note 20, at 69.

38. Second Report on Deintermixture, 13 RADIO REG. 1571, 1573 (1956); *Hearings*, *supra* note 20, at 125, 126. See also Greylock Broadcasting Co. v. United States, 231 F.2d 748 (D.C. Cir.) (staying Commission order pending appeal on merits), *appeal on merits sub nom.* Van Curler Broadcasting Corp. v. United States, 236 F.2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956).

To give the UHF stations a chance at better programming, it has been suggested that all stations be limited to one network service, so that one VHF broadcaster cannot obtain the best programs of three networks. *Hearings*, *supra* note 20, at 90. But no action has been taken on this proposal.

Thus, as the Commission itself has admitted, licensing an additional VHF competitor often will have the foreseeable effect of driving existing UHF operators off the air.[39] Under these circumstances, difficulty in foreseeing the results of competition in radio does not warrant a limitation of commission power derived from a statute applying equally to radio and television.

Furthermore, *Southeastern Enterprises* is inconsistent with both prior and subsequent commission determinations in rule-making proceedings. In hearings on a proposed amendment to the rule limiting the wattage of the most powerful stations, the FCC considered whether increased power "would unfavorably affect the economic ability of other stations to operate in the public interest."[40] Again, under its authority to determine the location of stations,[41] the Commission has adopted "deintermixture" rules eliminating VHF channels which impede development of UHF television.[42] But if the act bars con-

39. See Elmira Deintermixture Case, 15 RADIO REG. 1515, 1523 (Feb. 26, 1957); *Hearings, supra* note 20, at 55, 80, 127. See also Greylock Broadcasting Co. v. United States, *supra* note 38, at 749; WJR, The Goodwill Station, Inc., 13 RADIO REG. 763, 808-09 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957).

The survival records of UHF and VHF stations differ significantly. Of 368 VHF authorizations from 1946-54, only 23 cancelled or suspended operations. In contrast, of 318 UHF authorizations from 1952-54, 118 cancelled or suspended operations because of economic difficulties. *Memorandum* 5. 1957 figures show that of 177 commercial TV grants cancelled since 1952, 144 were UHF and 33 VHF. Broadcasting, Oct. 14, 1957, p. 107. Apparently, then, in areas where a UHF station has been destroyed by a VHF, the possibilities of anyone else attempting to operate another UHF service are slight.

40. 10 FED. REG. 2194 (1945).

41. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall— . . . (d) Determine the location of classes of stations or individual stations; . . . (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ." 48 STAT. 1082 (1934), as amended, 47 U.S.C. § 303 (1952).

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such 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." 48 STAT. 1084 (1934), as amended, 47 U.S.C. § 307(b) (1952).

Sections 303 and 307(b), taken together, give the Commission authority to establish a nation-wide plan allocating channels to specific areas. Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); see Peoples Broadcasting Co. v. United States, 209 F.2d 286 (D.C. Cir. 1953). Under this plan, "an application for a television broadcast station must request a specific channel provided for in the table of assignments (§ 3.606 of this chapter) for the city in which the applicant proposes to construct a station." 47 C.F.R. § 1.304 (Supp. 1957). Upon petition by an interested party or on the initiative of the Commission, proceedings may be instituted to change any rule (including the table of assignments) if the public interest requires. 47 C.F.R. §§ 1.701, 1.702 (Supp. 1957).

42. See, *e.g.*, Elmira Deintermixture Case, 15 RADIO REG. 1515, 1523 (Feb. 26, 1957): "The advent of a VHF station will, in all likelihood, result in less effective competition among fewer stations. We believe that . . . [deletion of the VHF channel] carries out the mandate of Section 307(b) of the Communications Act, because it will result in the assignment of frequencies so as to provide a more fair, efficient and equitable distribution of tele-

sideration of competitive effects in licensing proceedings, it must also preclude such consideration in rule-making, since rules can be made only "to carry out the provisions of the Act."[43] Even the Commission, before *Southeastern Enterprises*, seemed to recognize no distinction in this regard between licensing and rule-making.[44]

By threatening undue constriction of the rule-making power in addition to removing relevant inquiry from licensing, *Southeastern Enterprises* undermines the aims of the Communications Act. Formerly, the Commission declined to issue rules on problems of competition when it thought preferable the more flexible regulation afforded by the licensing procedure. On this ground, it rejected a rule designed to protect local stations against injurious competition by requiring large-city stations to build within five miles of the principal community served.[45] Similarly, the case by case approach was deemed

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vision service in the Elmira area, and will increase the likelihood of more TV service and more local TV outlets in that city and surrounding areas. It should be emphasized that in deleting Channel 9 from Elmira our primary purpose is not to ensure the profitable operation of particular UHF licensees. Rather, we wish to ensure more effective competition among a greater number of stations in order that the public in Elmira and the surrounding area will be afforded more and better television service."

See also Springfield Deintermixture Case, 15 RADIO REG. 1539, 1540h (June 20, 1957): "[D]eintermixture is not contrary to statutory policy of free competition in the broadcast industry."

Consideration of whether a VHF channel should be deleted "would depend to a large extent on such factors as: 1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel. 2. Whether one or more UHF stations are operating in the area. 3. Whether a reasonably high proportion of the sets in use can receive UHF signals. 4. Whether the terrain is reasonably favorable for UHF coverage. 5. Whether, taking into account all the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations." Second Report on Deintermixture, 13 RADIO REG. 1571, 1582 (1956).

VHF channels have been deleted in five areas. Elmira Deintermixture Case, *supra*; Springfield Deintermixture Case, 15 RADIO REG. 1525 (Feb. 26, 1957); Peoria Deintermixture Case, 15 RADIO REG. 1550c (Feb. 26, 1957); Evansville Deintermixture Case, 15 RADIO REG. 1573 (Feb. 26, 1957); Fresno Deintermixture Case, 15 RADIO REG. 1586i (Feb. 26, 1957). However, deintermixture has also been denied. See, *e.g.*, Hartford Deintermixture Case, 15 RADIO REG. 1540i (Feb. 26, 1957); Madison Deintermixture Case, 15 RADIO REG. 1563 (Feb. 26, 1957). In the latter instance, deletion of the VHF channel would have left some listeners beyond the reach of any television service, *id.* at 1572, thereby contravening the requirement of a "fair, efficient, and equitable distribution" of facilities, *id.* at 1569. The Commission reversed its decision to delete the VHF channels in Albany-Schenectady-Troy, and decided instead to make the area all VHF. Unlike the other areas in which deintermixture occurred, a station was in operation on one of the VHF channels to be deleted, and its removal would have required lengthy proceedings. Accordingly, the Commission decided that making the area all VHF would best enhance the opportunities for effective competition. Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (Sept. 5, 1957), *reversing* 15 RADIO REG. 1501 (Feb. 26, 1957).

43. See note 41 *supra*.

44. See notes 45, 46 *infra* and accompanying text.

45. Transmitter Location of Television Stations, 13 RADIO REG. 1530a, 1531-36 (1955). The rule was sought by the Saginaw UHF station, one of the protestants in WJR, The

the better means of dealing with the competitive effect on local services of "translators" relaying programs originating in distant cities.[46] Presumably, the Commission is now powerless to adopt what it admits is the best solution.[47] Moreover, protection of UHF television by deintermixture often requires supplementary action through licensing.[48] Deintermixture will proceed more

Goodwill Station, Inc., 13 RADIO REG. 763 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957). WJR originally applied for Channel 12 in Flint, Michigan, and proposed to build its transmitter at a point 20 miles southeast of Flint and 50 miles from Saginaw. After its application was approved, it applied for permission to move its transmitter to a location 23 miles northwest of Flint and 12 miles from Saginaw. *Id.* at 765, 803. The Saginaw station, which would probably be driven off the air if WJR was granted the modification, *id.* at 808-09, 825-27, protested that the competitive results were against the public interest and violated commission policy under § 307(b) and the Sixth Report and Order. *Ibid.* See notes 27, 41 *supra*.

46. Television Translator Stations, 13 RADIO REG. 1561, 1566 (1956). Translators, employing relatively inexpensive, low-powered equipment, receive the signals of existing television stations and convert them for retransmission on one of the upper 14 UHF channels. *Id.* at 1561.

47. In WJR, the Goodwill Station, Inc., 13 RADIO REG. 763 (1956), *final disposition deferred*, 14 RADIO REG. 976 (Jan. 23, 1957), despite the decision in the rule-making proceeding that the problem was better handled in licensing, see note 45 *supra* and accompanying text, the hearing examiner at the licensing hearing foreshadowed *Southeastern Enterprises* by stating that he was without authority to protect the protestants against the applicant "exercising its right of free and fair competition." WJR, The Goodwill Station, Inc., *supra* at 826-27.

48. See notes 45, 46 *supra* and accompanying text.

Should the Commission adopt a proposed rule abandoning the television allocation table with respect to stations more than 250 miles from the Canadian and Mexican Borders, the need to use the licensing procedure to protect UHF stations will be even greater. See 22 FED. REG. 3076-78 (1957). While this proposal contemplates some degree of protection for UHF stations (no VHF can be licensed within 75 miles of a UHF), it withholds protection in the very instances in which it is most needed. For although UHF stations can often survive one VHF station, but not two, *Hearings*, *supra* note 20, at 55, the 75 mile requirement is waived if a VHF station is already within the 75 mile limit, or if the UHF station competes with two or more existing VHF stations. Thus UHF stations, formerly protected against additional VHF competition by lack of available VHF assignments in their areas would be threatened by new VHF applicants. Licensing would thus become the only means of excluding VHFs excepted from the 75 mile requirement. See 1 RADIO REG. 53:588 (April 24, 1957) (dissent opposing proposed rule as harmful to solution of UHF problem).

By considering the economic injury in licensing proceedings, the Commission can induce applicants to modify their proposals to minimize harmful UHF-VHF competition. For instance, an applicant for a station in an area where both UHF and VHF channel assignments are available would normally choose the VHF. See *Hearings*, *supra* note 20, at 15. However, he might be persuaded to apply for the UHF channel if the Commission were likely to deny a VHF application on the ground that the public interest required protection of existing UHF channels against VHF competition. Filling all UHF channels before admitting VHF applicants enhances the likelihood of eventual successful operation by both UHF and VHF stations in the area, because UHFs commencing operation before VHFs have a better chance of survival. See *id.* at 9.

Furthermore, consideration of possible injury to UHF stations in licensing procedures may induce VHF applicants to locate transmitters so as to minimize the competitive effect on neighboring UHFs. See notes 45, 47 *supra* and accompanying text.

smoothly if the Commission is empowered to bar VHF applicants from areas in which reallocation of channels is likely.[49] And where complete deletion of VHF channels is either undesirable or in the long run unnecessary, consideration of competition would enable the FCC to refuse VHF applications until enough UHF-VHF receivers were in use to assure substantial UHF survival.[50] Finally, deintermixture itself may be threatened if *Southeastern Enterprises* is carried to its logical conclusion. For if the assertion that Congress intended broadcasting to be freely competitive were applied to rulemaking as well as licensing, protection of UHF stations by any means would become impossible.[51] Yet, since only twelve VHF channels exist, a truly competitive system of nationwide television can only be achieved through development of UHF service.[52]

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49. See Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a, 1514g-14j (Sept. 5, 1957) (deintermixture denied since existing station operated on one of the VHF channels, and removal of that station would require lengthy proceedings; area made all VHF instead); *Hearings, supra* note 20, at 24; *cf.* Greylock Broadcasting Co. v. United States, 231 F.2d 748, 750 (D.C. Cir.) (staying commission order assigning new VHF channel to area where deintermixture proceedings were pending), *disposition on merits sub nom.* Van Curler Broadcasting Co. v. United States, 236 F.2d 727, 730-32 (D.C. Cir.) (dissenting opinion; objecting to court's affirming commission assignment of VHF channels to area where deintermixture proceedings were pending), *cert. denied*, 352 U.S. 935 (1956). *But see* Coastal Bend Television Co. v. FCC, 234 F.2d 686 (D.C. Cir. 1956) (licensing of VHF applicants pending outcome of deintermixture proceedings upheld as within commission discretion).

50. Deletion may be undesirable since the VHF station, with longer range than UHF, may be required to give service to outlying areas. *Hearings, supra* note 20, at 14; Madison Deintermixture Case, 15 RADIO REG. 1563, 1569 (Feb. 26, 1957) (deletion of VHF would deprive some people of service).

If an area is kept predominantly UHF, people will likely replace old sets with all-channel receivers, Greylock Broadcasting Co. v. United States, *supra* note 49, despite the slightly higher cost of such receivers ($25-$30). *Hearings, supra* note 20, at 70. Alternatively, they may be induced to undertake the expense of converting VHF sets to UHF ($30-$35 plus cost of adjusting antenna). *Hearings, supra* note 20, at 79.

Exclusion of the VHF stations probably will not need to exceed six years, the average life of television receivers. *Id.* at 292. Deprivation for this period would be balanced against the benefits of an ultimately greater number of stations in the area than would otherwise have been possible.

An alternative solution would be available were Congress to repeal the 10% federal excise tax on all-channel receivers, thus making such receivers about equal in price with nonexempt VHF-only sets. See *id.* at 70.

51. The FCC attaches so great importance to the development of UHF television that such interpretation of *Southeastern Enterprises* is doubtful. In fact, the Commission has stated that the most promising solution to the UHF-VHF problem is shifting all television to UHF. FCC ANN. REP. 95 (1956). Since accomplishment of this aim would require a number of years, the Commission has used deintermixture as an interim solution. Second Report on Deintermixture, 13 RADIO REG. 1571, 1576, 1581 (1956). Even if a court were favorable to UHF stations, it would, if confronted with the *Southeastern Enterprises* issue, have difficulty in reconciling protection through rules with lack of power to protect in licensing.

52. *Id.* at 1572; *Hearings, supra* note 20, at 24. As of July 1956, almost 25% of the population could receive no more than one station. FCC ANN. REP. 93 (1956). With more

Considering whether economic injury adversely affects the public interest does not detract from preservation of competitive broadcasting. The protestant, raising the issue of economic injury, has the burden of proving that the new station will cause public harm.[53] To meet this burden, he must show that supervening policies of the Communications Act require restriction of competition. When the effects of competition are unforeseeable, protestant will be unable to sustain his burden.[54] Even if foreseeability presents no problem,

stations, the public would have wider choice of programs. The limited number of stations injures small businesses, which often cannot buy time because wealthier competitors are able to secure the limited time available. See *Hearings, supra* note 20, at 134, 175, 176, 303. And where only one or two stations serve an area, only one or two network shows may be heard. Thus, some networks with shows to sell do not have sufficient outlets, and the development of competitive national networks is hampered. *Id.* at 175. See *Memorandum* 5-6; Jones, *Progress Report Prepared for the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 27-78 (1955).

53. See, *e.g.*, Letcher Broadcasting Corp., 14 RADIO REG. 183, 187-88 (1956) (burden of proof and of demonstrating relevancy on protestant); Coos County Broadcasters, 13 RADIO REG. 626, 632 (1956) (burden of proving economic injury on protestant), *license granted*, 14 RADIO REG. 921, 924-25 (Dec. 21, 1956) (allegations of economic injury too speculative to warrant hearing); Southeastern Enterprises (WCLE), 12 RADIO REG. 578, 580 (1955) (hearing on economic injury issues; protestant must prove injury and also demonstrate its relevancy), *license granted*, 13 RADIO REG. 139 (March 20, 1957); Cumberland Valley Broadcasting Co., 11 RADIO REG. 840 (1954) (protestant has burden of proving both facts and materiality of economic injury issue).

54. See, *e.g.*, Spartan Radiocasting Co., 13 RADIO REG. 589, 609 (1956) (permit granted upon failure of protestant to sustain burden of proof on allegations of economic injury); Neptune Broadcasting Corp., 8 F.C.C. 96, 98 (1940) (license granted; insufficient evidence to allow Commission to make findings on economic injury issue).

In *Southeastern Enterprises*, and in every succeeding case involving allegations of economic injury adversely affecting the public, one or two Commissioners were able to concur in the granting of the license without depending on the position that they lacked authority to consider the matter. See West Georgia Broadcasting Co., 14 RADIO REG. 275 (Aug. 1, 1957); Iredell Broadcasting Co., 13 RADIO REG. 996 (July 18, 1957); Lebanon Broadcasting Co., 14 RADIO REG. 297, 320 (May 1, 1957); Midland Empire Broadcasting Co., 14 RADIO REG. 201, 206 (April 17, 1957); Kaiser Hawaiian Village Television, Inc., 15 RADIO REG. 85, 87 (April 5, 1957). The concurring Commissioners reached the same result as the majority in *Southeastern Enterprises* by citing protestant's failure to sustain his burden of proof and by holding that the Commission, though authorized to consider economic injury, should disregard it for the policy reasons stated in The Voice of Cullman, 14 F.C.C. 770, 775-76 (1950). 13 RADIO REG. at 153-54. See notes 21, 31 *supra*.

Although the economic injury question should properly be treated by evaluating the evidence of the protestant and determining whether he meets his burden of proof, disregarding the issue on the grounds of the policy in *Cullman* is still a more reasonable solution than *Southeastern Enterprises*. That policy, based in part on the general unpredictability of radio competition, would presumably leave the Commission free to deal with the problems of television, where prediction is often possible. But it is questionable whether the administrative convenience of ignoring the issue in most radio cases would justify denying relief in those rare instances where the outcome of competition is predictable. And, unfortunately, the policy enunciated in *Cullman* has been extended to television as well, with apparent disregard of the peculiar problems that medium presents. See Wrather-Alvarez Broadcasting, Inc., 13 RADIO REG. 754, 755 (protestant must show relevancy of

the presumption that competition is beneficial will generally rule.[55] But in the rare cases where true public injury can be shown, and in areas like UHF-VHF where preservation of competition requires protection of individual competitors, the Commission will be able to insure effectuation of the act's purpose to promote the public interest. *Southeastern Enterprises* presents no insurmountable obstacle to future consideration of competitive injury. The courts have not directly ruled on the issue,[56] and the Commission, not strictly bound by stare decisis, can reject the decision's reasoning and avoid ultimate inability to refuse licenses which foster competition subverting the public interest.[57]

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economic injury; Commission stated that failure of both existing and proposed television stations would not be relevant, citing *Cullman*), *license granted*, 14 RADIO REG. 213, 218 (1956) (insufficient evidence for Commission to make finding on economic injury issue); WWSW, Inc., 14 RADIO REG. 492, 494-95 (1956) (economic injury in television not considered; allegations of harm to public too conjectural, and effects of competition must be disregarded, citing *Cullman*).

55. See Wrather-Alvarez Broadcasting, Inc., *supra* note 54, at 755.

56. A fair amount of dicta supports the contention that economic injury adversely affecting the public is ground for denial of a license. See note 5 *supra*. And a circuit court, granting on several grounds, including the economic injury holding, a petition to stay the Commission order in *Southeastern Enterprises* pending appeal, stated that "the probabilities of success appear to lie heavily with appellant." Fitch & Kile, Inc. v. FCC, No. 13868, D.C. Cir., June 5, 1957. However, the same court vacated the stay order, Fitch & Kile, Inc. v. FCC, D.C. Cir. June 26, 1957, and the appeal was withdrawn.

57. See WOKO, Inc. v. FCC, 153 F.2d 623, 631 (D.C. Cir.), *rev'd*, 329 U.S. 223 (1946); Powel Crosley, Jr. (Avco Case), 11 F.C.C. 3 (1945).

A loophole in *Southeastern Enterprises* may enable the Commission to grant protection against competition without explicitly rejecting the case. The Commission stated in passing that except for cases involving a § 307(b) issue, see note 41 *supra*, an applicant does not have to show a "need" for his station. 13 RADIO REG. at 148. The remark presumably indicated that a choice between mutually exclusive applications for different communities is made on the basis of which community has greater need for a new station, even if that station is less highly qualified than the other applicant. See FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 360-62 (1955), *remanding* 222 F.2d 781 (D.C. Cir. 1954), *on remand*, 232 F.2d 57 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956). Subsequent decisions have construed this to mean that § 307(b) cases were "perhaps" excluded from the holding in *Southeastern Enterprises*. See, *e.g.*, West Georgia Broadcasting Co., 14 RADIO REG. 275 (Aug. 1, 1957). A broad interpretation of § 307(b) could remove competition problems in radio or television involving more than one community from the holding in *Southeastern Enterprises*.

However, the case does not actually justify this result, for the main grounds of the decision—antitrust policy, § 153(h) and congressional intent—do not provide support for distinguishing § 307(b) issues. Furthermore, since § 307(b) will not apply when only one community is involved, use of that section would improperly make consideration of economic injury depend on chance rather than basic policy issues.