

## RADIO PROGRAM CONTROLS: A NETWORK OF INADEQUACY

“. . . [T]he troubles of representative government . . . go back to a common source: to the failure of self-governing people to transcend their casual experience and their prejudice, by inventing, creating, and organizing a machinery of knowledge.” †

RADIO broadcasting is unique among the media of mass communication in that, while the reach of its facilities is unsurpassed,<sup>1</sup> their number is limited ultimately by the finite nature of the broadcast spectrum<sup>2</sup> and not by the availability of finance capital.<sup>3</sup> Conditioned in its every aspect by this physical circumscription, national policy toward radio<sup>4</sup> has abandoned the theoretically free competition guaranteed other vehicles of expression<sup>5</sup> and has established a licensing system restricting the number of stations,

---

† WALTER LIPPMAN, PUBLIC OPINION 364-5 (1922).

1. Ninety-eight per cent of the people of the United States are within range of at least one of the more than 1400 operating or authorized stations, WHITE, THE AMERICAN RADIO 204 (1947), while approximately four-fifths of the country's homes, it may be estimated, are equipped with radios. SIXTEENTH CENSUS, HOUSING, Vol. II, pt. I, p. 28 (1943). The picture is darkened by the fact that 5,575 of the cities of 1,000 or more population have no local stations and, accordingly, can receive only programs broadcast to extensive areas and not aimed at the needs of particular localities. While frequency modulation (FM) makes technically possible indigenous coverage of these communities, construction expense forces the prediction that most small towns will continue to receive only outside treatment of local news. See WHITE, *op. cit. supra*, at 205-6.

2. FCC, RADIO, A PUBLIC PRIMER (1940). This is true, of course, only of the current state of scientific knowledge. Development of FM has made possible, through exploitation of a hitherto unused band, at least four times the existing number of stations. SIEPMANN, RADIO'S SECOND CHANCE 240 (1947). Either through further expansion of the utilizable portions of the broadcast spectrum or by the discovery of means of transmitting a number of signals on one frequency, it is quite possible that so many channels will become available that only technical controls will be necessary to prevent accidental over-lapping, thus resolving the problem of this comment. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 33 (1947).

3. This is scarcely to suggest that the problem of securing capital does not inhibit the development of new stations. A recent FCC estimate indicated \$34,107 as the average initial outlay involved in establishing a local station in a community under 50,000 population and \$133,000 for a regional station in a larger city. N.Y. Times, Nov. 4, 1947, p. 37, col. 6.

4. For discussion of radio regulation in other countries, see HUTH, RADIO TODAY (1942); TURNER, FREE SPEECH AND BROADCASTING (1943).

5. While the individual is guaranteed freedom of expression against either federal or state interference, U.S. CONST. AMEND. I, *Near v. Minnesota*, 283 U.S. 697 (1931), the protection seemingly covers only his voiced sentiments unless he possesses \$25,000-\$100,000 to establish a small-town newspaper, five to ten million dollars for a metropolitan daily, two or three million for a mass market magazine or \$100,000 for a feature motion picture or a book publishing house. See COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra* note 2, at 50.

their power and position in the spectrum, to the end that those on the air may operate with maximum efficiency.<sup>6</sup>

Underlying these regulations is the thesis that radio's enormous potentialities are to be used in the public interest. Accordingly, there has developed simultaneously with the technical restrictions a correlative system of controls intended to insure that holders of the privilege of broadcasting exercise their franchise in the manner most beneficial to the public welfare, that the programs aired are those which best exploit radio's capabilities. Unlike the technological regulatory power, which is centralized in the government's supervisory agency,<sup>7</sup> the Federal Communications Commission,<sup>8</sup> program content controls are distributed. Basically, the split is between the FCC

---

6. Currently embodied in the Communications Act of 1934, 48 STAT. 1064 (1934), 47 U.S.C. § 151 *et seq.* (1940), federal regulation of commercial radio began shortly after the first successful scheduled transmission of speech by radio in 1919, the Secretary of Commerce claiming authority under the Radio Act of 1912, 37 STAT. 302 (1912), to assign frequencies, hours and power maxima to broadcasters. In 1926, however, the asserted mandate was judicially denied. *United States v. Zenith*, 12 F.2d 614 (N.D. Ill. 1926); *cf. Hoover v. Intercity Radio Co.*, 286 Fed. 1003 (App. D.C. 1923); 35 OPS. ATT'Y GEN. 126 (1926). Almost immediately, the flimsy control structure collapsed. At the time of the enactment of the Radio Act of 1927, 44 STAT. 1162, source of the present control structure, of the 733 stations operating on 90 channels, 129 were off their channels, 41 were operating on Canadian frequencies and virtually all were ignoring power and time restrictions. ROBINSON, *RADIO NETWORKS AND THE FEDERAL GOVERNMENT* 51 (1943); WHITE, *op. cit. supra* note 1, at 134.

7. Broadcasting is interstate commerce within the control of Congress when the radius of transmission extends beyond state lines, *United States v. American Bond & Mortgage Co.*, 31 F.2d 448 (N.D. Ill. 1929), *aff'd*, 52 F.2d 318 (C.C.A. 7th 1931), *cert. denied*, 285 U.S. 538 (1932); *cf. Fisher's Blend Station, Inc. v. Tax Comm'n*, 297 U.S. 650 (1936). State statutes are unconstitutional insofar as they attempt to regulate broadcasting whose effect crosses state boundaries. *National Broadcasting Co. v. Board of Public Utility Comm'rs of New Jersey*, 25 F. Supp. 761 (D.N.J. 1938). Under these decisions, state regulation of amplitude modulation (AM or standard) broadcasting stations is barred, for it is impossible to transmit via AM without the waves crossing state lines; an interesting problem may arise should the states, under existing statutes, attempt to regulate television or FM broadcasting whose maximum range falls well within the borders of many states. See N.J. REV. STAT., tit. 48, c. 11 (1937), MICH. COMP. L. §11726 *et seq.* (1929). Michigan apparently contemplates no action under its statute. Communication to the Yale Law Journal from the Michigan Public Service Commission, Sept. 10, 1947. But a bill has been presented to the Ohio Legislature subjecting all television broadcasts to approval by the state Educational Department, an agency currently charged with censorship of films. WHITE, *op. cit. supra* note 1, at 126 n. 1. A rationale for defeating this control is suggested in *United States v. Gregg*, 5 F. Supp. 848 (S.D. Tex. 1934) (AM station must be federally licensed despite fact its signals not audible beyond state boundaries on ground of interference with incoming signals).

8. The Commission is composed of seven members—no more than four of whom may be members of the same political party—appointed for terms of seven years by the President with the advice and consent of the Senate. Communications Act of 1934, §4, 48 STAT. 1066 (1934), 47 U.S.C. § 154 (1940) (hereinafter cited by section only).

and the broadcaster, the former having an over-all mandate under the Communications Act of 1934 to administer the ether as "public convenience, interest, or necessity requires,"<sup>9</sup> and the latter being charged with the responsibility of exercising in the public interest the privilege of which he is trustee. In the listening public itself is the ultimate, if largely untapped, power of program determination through expression of its demands. These program content controls, all of which raise problems peculiar to radio, are the subject of this discussion. Other restraints exist, imposed by the trademark,<sup>10</sup> copyright,<sup>11</sup> defamation<sup>12</sup> and fair trade<sup>13</sup> laws, but inasmuch as the questions they pose are common to all media of mass communication they will not here be treated.

### FEDERAL CONTROL

#### *The Statutory Dilemma*

In the Communications Act of 1934,<sup>14</sup> substantially a re-enactment of the Radio Act of 1927,<sup>15</sup> all radio channels are declared to be public property, available to private users for limited periods only.<sup>16</sup> The FCC is authorized to license stations applying for use of broadcast frequencies whenever the "public convenience, interest, or necessity will be served thereby,"<sup>17</sup> a for-

9. Section 303. For a study of the objectives and effectiveness of governmental regulation of content, see Note, *Government Control of the Content of Radio Programs*, 47 COL. L. REV. 1041 (1947).

10. See 2 SOCOLOW, *THE LAW OF RADIO BROADCASTING* 916-50 (1939).

11. Copyright Act of 1909, 35 STAT. 1075 (1909), as amended, 17 U.S.C. § 1 *et seq.* (1940). See discussion 2 SOCOLOW, *op. cit. supra* note 10, at 1036-1221.

12. As might have been anticipated from the confused nature of the defamation laws, Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902), the courts have experienced serious difficulty in determining whether broadcast defamation is libel, *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *cf. Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947), or slander, *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939); and whether the station owner is liable, *Sorenson v. Wood*, *supra*, or not, *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942). See Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 729-31 (1937); Vold, *The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611 (1935). In any event, most large stations retain lawyer-censors to avoid defamation suits. FROST, *IS AMERICAN RADIO DEMOCRATIC?* 72-9 (1937).

13. Federal Trade Commission Act, 38 STAT. 717 (1914), as amended, 15 U.S.C. § 41 *et seq.* (1940). In the fiscal year 1946, the FTC scrutinized 1,186,724 pages of commercial broadcast continuity for violations of the Act. REP. FTC 62 (1946). See 2 SOCOLOW, *op. cit. supra* note 10, at 968-1004.

14. 48 STAT. 1064 (1934), 47 U.S.C. § 151 *et seq.* (1940).

15. 44 STAT. 1162 (1927). The 1927 statute embraced radio alone; the Communications Act of 1934 entrusted the Commission with regulation of telephone and telegraph service as well.

16. Section 301.

17. Section 307. Licenses are granted for three-year periods, 47 CODE FED. REGS. § 3.34 (1943 Supp.), upon written application stating the frequency, power and time re-

mula neither defined by the statute nor given meaningful judicial construction.<sup>18</sup>

Accordingly, in cases where applicants of equal technical and financial standing apply for the same frequency, the Commission has felt compelled to employ program content as a determinant of desirability;<sup>19</sup> by extension, the Commission has held that program content presented or proposed must be "in the public interest" for the application to be granted.<sup>20</sup> Whether imposed prior or subsequent to transmission of programs, such consideration is a form of censorship. But the Commission is forced to deny that it exercises censorial authority, for Section 326 of the Act categorically withholds any such power and forbids the FCC to "interfere with the right of free speech by means of radio communication."<sup>21</sup> Attempting to reconcile these

requested and the purposes for which the station is to be used, § 308(b). Upon examination of the application, the FCC may issue a license; should the application fail to justify licensing, the Commission is required to hold hearings before making final determination, § 309. From any final action of the FCC, aggrieved parties may appeal to the Court of Appeals for the District of Columbia and therefrom to the Supreme Court on certiorari, the courts' jurisdiction being confined to matters of law unless it appears that the regulatory agency's action has been arbitrary or capricious, § 402.

The Supreme Court has been reluctant to interfere with the regulatory process. *See* *FCC v. WOKO, Inc.*, 67 Sup. Ct. 213 (1946); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Fly v. Heitmeyer*, 309 U.S. 146 (1940); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); and *FRC v. Nelson Bros. Co.*, 289 U.S. 266 (1933). *But see* *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *FCC v. National Broadcasting Co.*, 319 U.S. 239 (1943); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

18. "The 'public interest' to be served . . . is . . . the interest of the listening public." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943). Certain definite restraints on program content, however, do appear in the statute. Transmission of obscene, indecent or profane language, and information concerning lotteries or similar games of chance is banned, §§ 326, 316. *WRBL Radio Station, Inc.*, 2 F.C.C. 687, 691 (1936). Maximum criminal punishment for violation of any of the Act's prohibitions is a fine of not more than \$10,000 or imprisonment for not more than two years, or both, § 501.

Affirmatively, the Act requires that program sponsors be identified, § 317, and that should the use of a licensee's facilities be extended to a candidate for political office, equal opportunity be afforded to rival office-seekers, § 315. The licensee is denied censorial powers over material broadcast under this latter section but is not affirmatively obliged to offer his facilities to any candidate.

19. *WBNX Broadcasting Co.*, Proposed Decision, FCC Docket No. 6013, April 15, 1947; *Metropolitan Broadcasting Corp.*, 5 F.C.C. 501 (1938); *Southwest Broadcasting Co.*, 3 F.C.C. 630, 635 (1937). "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?" *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-7 (1943).

20. *Pacific Radio Corp.*, 6 F.C.C. 475 (1938); *Carl S. Taylor*, 3 F.C.C. 281 (1936).

21. Section 326. A questionable solution to the dilemma has been offered by Senator White (R., Me.) in S. 1333, 80th Cong., 1st Sess. § 16 (1947), which would amend § 326 to read that "the Commission shall have no power to censor . . . the substance of any

contradictory mandates, the Commission has denied licenses to applicants and revoked existing franchises on the ground of failure to satisfy the requirements of the public interest but has always considered over-all service as a basis for such action rather than any particular program.

Assertion by the FCC of power to regulate program content has drawn repeated attack, based on the contention that it is the intent of the Communications Act to permit as much freedom of expression on the air as the available frequencies will allow and that circumscription of this freedom is violative of the guarantees of the First Amendment.<sup>22</sup>

This rationale seemingly fails to appreciate the premise underlying the First Amendment, that truth can be discovered only through "free trade in ideas"<sup>23</sup> *in a free market place*.<sup>24</sup> Knowledge of the truth can scarcely be measured by the possession of funds sufficient to construct radio stations. When there is added the further consideration that a broadcasting license is an exclusionary privilege, the argument for permitting that franchise to

material to be broadcast by any radio broadcast station . . . : *Provided*, That nothing herein contained shall be construed to limit the authority of the Commission in its consideration of applications for renewal of licenses to determine whether or not the licensee has operated in the public interest." At Senator White's request, the bill has not been reported out of committee. N.Y. Times, June 28, 1947, p. 16, col. 8.

22. See, e.g., MILLER, *THE BLUE BOOK* 11 (1947); Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 ANNALS 179 (1935); Dawson, *Censorship on the Air*, 31 AM. MERCURY 257, 261 (1934); N.Y. Times, Nov. 16, 1931, p. 36, col. 3.

In the legislative history of the Radio Act of 1927, there is some slight evidence to support the thesis that Congress would, at that time, have been reluctant to adopt the FCC's interpretation of the anti-censorship provisions; see, e.g., 67 CONG. REC. 5480, 12615 (1926); Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 ANNALS 179, 184-8 (1935). But see Note, 46 HARV. L. REV. 987 (1933). Certainly an equally possible explanation is that Congress failed, in its rush to enact legislation, to consider the ramifications of the problem. Moreover, on reconsideration in 1934, the essential provisions of the statute were not changed although the FRC had long since enunciated its interpretation of § 326. 2 FRC ANN. REP. 160 (1928).

The Supreme Court has not ruled on the point. Dicta in *FCC v. Sanders Bros.*, 309 U.S. 470, 475 (1940), support the claim that the Commission may not consider program content, but are seemingly outweighed by more persuasive statements. See, e.g., Justice Frankfurter in *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-7 (1943): the Commission has "the burden of determining the composition of the traffic" and its "licensing function cannot be discharged . . . merely by finding that there are no technical objections to the granting of a license." Cf. *FRC v. Nelson Bros. Co.*, 289 U.S. 266, 285 (1933).

23. Mr. Justice Holmes, dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919). And for one of the classical sources of the thesis, see MILTON, *Arctopagitica* (1644) in JOHN MILTON, *COMPLETE POETRY AND SELECTED PROSE* 677, 719 (Med. Lib. Ed. 1942).

24. For a skillful expansion of this theme, see Letter of Dr. Alexander Pekelis, N.Y. Times, Nov. 27, 1946, p. 24, cols. 1-2, replying to an allegation by Arthur Krock that the FCC, in the *News* case, see pp. 283-6 *infra*, was exceeding its authority. N.Y. Times, Nov. 15, 1946, p. 22, col. 5.

be utilized at the will of individuals appears untenable. It is hardly debatable that government regulation of the media of communication should be kept at a minimum. But intervention in radio is mandatory. Accordingly, it seems far more advisable to attempt, through regulation, to secure the widest circulation of contending ideas, fine entertainment,<sup>25</sup> and maximum service in public, rather than private, interest, than to urge minimized intervention in the name of the very freedom reduced regulation would subvert.

Acting to fulfill its duty thus conceived, the FCC has adopted three methods: first, by barring the air to certain classes of applicants, it has assured that programs likely to be broadcast by them will not be transmitted; second, it has stigmatized various classes of programs as not in the public interest; and, finally, it has affirmatively required presentation of other program types. Qualifying the effectiveness of the Commission's pursuit of these goals is the device employed, the licensing power; for in each case the Commission must weigh the advisability of having a station in being against the conjectural deterrent effect on other potential offenders of license denial or revocation.<sup>26</sup> Accordingly, for the comparative freedom from censorship attained through limitation of regulation to the licensing weapon, the price is less than complete control.<sup>27</sup> Justifying this incomplete control, however, is the point that in a field where freedom is contrived, rather than assumed, it is best sought slowly, on peril that it vanish in the contriving.<sup>28</sup>

#### *Limitations on Licensees*

Most indirect of the controls exerted over program content by the FCC is that resulting from license denial on the ground that the public interest will not be served by permitting the particular applicant to function as a broadcaster.

---

25. Apparently content with the certainty that sponsors will insist on a sufficiency of entertainment, the Commission has not concerned itself markedly with the problem except to insure that stations are not licensed where no talent is available, see note 29 *infra*, and to attempt to secure, through the Chain Broadcasting Regulations, competition for the listening audience. See pp. 282-3 *infra*.

26. Far more frequently than it revokes a license or denies renewal, the Commission merely warns. Thus, between 1934 and 1942, two licenses were revoked and 13 applications for renewal denied. *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5497, 77th Cong., 2d Sess. 834 (1942)*. On applicants for unassigned frequencies, of course, the Commission can be somewhat harsher.

27. Witness the plaintive remonstrance of the Federal Radio Commission made nineteen years ago but remarkably similar to FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) (the so-called "*Blue Book*"): ". . . broadcasting stations are not given . . . great privileges . . . for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public." 2 FRC ANN. REP. 168 (1928).

28. Probably quite desirable is the provision in S. 1333, 80th Cong., 1st Sess. § 14 (1947), empowering the Commission to issue cease and desist orders. Failing substantial increase in the FCC's staff, however, it may be doubted that the agency's task would be materially facilitated.

As its initial criterion in this field, the Commission requires that the applicant be familiar with the needs and resources of the community or region he intends to serve and that the area be adapted to the type of service proposed. In a large number of cases, failure to meet this standard has been cited by the FCC as a bar to licensing,<sup>29</sup> although the recent *Powel Crosley*<sup>30</sup> case casts doubt on the criterion's uniformity of application.<sup>31</sup>

Oligopoly being inevitable in the technology of radio, the Commission has sought to prevent control of a number of stations by any one licensee<sup>32</sup> in order to diversify as much as possible the points of view represented<sup>33</sup> and to assure service appropriate to the area covered. While general awareness of the policy's existence has doubtless caused some licensees to refrain from seeking further franchises, it can scarcely be alleged that the Commission's enforcement has been so vigorous as to preclude fraudulent attempts at multiple ownership. Discovering misrepresentation as to ownership<sup>34</sup> after issuing a license, the regulatory agency has invariably subordinated its anti-monopoly policy to its desire for continued program service and let off the miscreant with a warning.<sup>35</sup>

29. See, e.g., *Havens and Martin, Inc.*, 6 F.C.C. 237 (1938) (applicant unfamiliar with district); *Pacific Radio Corp.*, 6 F.C.C. 475 (1938) (insufficient talent available).

30. *Powel Crosley*, FCC Docket No. 6767 (July 7, 1945).

31. Transfer of WLW and 23 other licenses to the Aviation Corp. was permitted despite the fact that neither the president nor the board chairman of the transferee had more than a listener's acquaintance with the requirements of service in the public interest. Neither had so much as read the Communications Act. Apparently, transfer of the radio licenses as part of a much larger transaction between Crosley and the Aviation Corp. was decided upon only as an afterthought. See *SIEPMANN*, *op. cit. supra* note 2, at 167-83.

32. See, e.g., *Louisville Times Co.*, 5 F.C.C. 554, 559 (1938). But note that one licensee has been permitted to amass 23 licenses in varying fields. *Powel Crosley*, FCC Docket No. 6767 (July 7, 1945).

33. "The Commission recognizes the . . . importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable." FCC Public Notice No. 72933, Jan. 13, 1944. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-5 (1940); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

34. Spurred in many cases by the high degree of profitability of many licenses. Several metropolitan stations have recently been sold for over \$500,000. *Smith*, *The People's Stake in Radio*, 111 *NEW REPUBLIC* 11, 12 (July 3, 1944).

35. *Panama City Broadcasting Co.*, 9 F.C.C. 208 (1942); *Ocala Broadcasting Co.*, 9 F.C.C. 223 (1942); the "Texas Cases," 8 F.C.C. 445-84 (1941). The Commission has strangely been somewhat harsher in cases where misrepresentation of stock ownership or payment has been made for purposes other than concealing unified control of several licenses. *Western Gateway Broadcasting Corp.*, 9 F.C.C. 92 (1942); *WOKO, Inc.*, 10 F.C.C. 454 (1944), *aff'd*, 67 Sup. Ct. 213 (1946). The ruling in the former case may be explained on the ground that while one application was denied another for the same frequency was granted.

By denying licenses to applicants guilty of patently false statements, the Commission maintains a remote control on program content, for supervision of content is based to a great extent on the promises made and records kept by licensees; if these can be relied on

Acting somewhat more emphatically, the FCC has sought to prevent control of local stations by network organizations. On investigation in 1938, the Commission found that the networks had in many cases taken over virtually complete control of the program policies of individual licensees and had contractually bound the outlets in such fashion as to throttle any exercise of local initiative.<sup>36</sup> A series of regulations was accordingly issued, aimed at freeing local stations from external control while simultaneously permitting the continuation of chain organization for the purpose of sharing resources.<sup>37</sup>

Although sustained by the Supreme Court,<sup>38</sup> the Chain Broadcasting Regulations have been of questionable value in returning to the individual licensee complete responsibility for programming. So long as the networks are able to perpetuate the present system of unitary sponsorship of nationwide broadcasts, it appears that the consequent revenue<sup>39</sup> will persuade local out-

---

the Commission's task is simplified. See *Western Gateway Broadcasting Corp., supra* at 102; *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 338 (1941). But see FCC, *PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES* 5 (1946).

36. See FCC, *REPORT ON CHAIN BROADCASTING* (1941). For the purpose of this discussion, the evils discovered are best treated in terms of the remedies devised. See note 37 *infra*.

Symptomatic of the Commission's wonted caution to avoid charges of authoritarianism is the fact that three years were spent in surveying the effects of chain broadcasting on licensee competition for listeners and advertisers, when reference to NBC's standard affiliation contract would have sufficiently documented most of the ultimate findings of restraint. The contract is reprinted in *ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT* 253 (1943). At one juncture, investigation of the obvious permitted John Royal, program director of NBC, to defend the proposition that despite his complete control over NBC's Red and Blue networks the two nonetheless competed. Transcript, pp. 644-7, Hearings on Chain Broadcasting, FCC Docket No. 5060 (1941).

37. The regulations provide that no license will be issued to a standard broadcast station affiliated with a network by a contract which: (1) provides that the station shall not broadcast programs of another network; (2) denies to any other station in the area the privilege of broadcasting network programs not transmitted by the first station or which prevents a station not serving the same area from broadcasting any network program; (3) is of more than one year's duration; (4) grants the network an option on the station's time in such fashion as to hinder the station's independent programming; or (5) hinders the station in establishing rates for other than network programs. Moreover, networks are barred from owning two licenses in the same area or any license where ownership by a network will reduce competition; and stations are denied licenses if they have contracts with a network organization which operates two or more networks. 47 *CODE FED. REGS.* § 3.101-8 (Cum. Supp. 1943), as amended, 47 *CODE FED. REGS.* § 3.107 (Supp. 1943).

The last prohibition made necessary the sale by NBC of one of its networks. The Blue, the weaker, was sold in October, 1943, to Edward J. Noble, licensee of WMCA and, in 1945, became the American Broadcasting Co. *WHITE, op. cit. supra* note 1, at 40.

For criticism of the chain regulations, see *ROBINSON, op. cit. supra* note 36, at 202-7; Friedrich, *The FCC "Monopoly Report": A Critical Analysis*, 4 *PUB. OPIN. Q.* 526 (1940) (based on the preliminary report).

38. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

39. The profitability of radio today is indicated by the increase in taxable profits for

lets to follow voluntarily the practices the regulations prevent their agreeing to contractually.<sup>40</sup>

Further in aid of the anti-monopoly policy's objective of diversification of points of view, the Commission has declined to license parties possessed of known attitudes—*e.g.*, religious groups and labor unions<sup>41</sup>—where a less obviously prejudiced applicant was available. While laudable in theory, this over-all policy of giving paramount attention to the outward indicia of diversified objectivity depends for practical validity on the extent to which the individual broadcaster actually controls his programming and the fairness with which he considers requests for time from groups over whom he has been preferred by the Commission as probably less biased. Both of these points will be examined later in this discussion.<sup>42</sup>

The legitimacy of looking beneath an applicant's institutional label to pre-evaluate his capacity to serve the public interest was before the Commission in *WBNX Broadcasting Co.*<sup>43</sup> Along with fourteen other applicants, the News Syndicate Co., publisher of the *New York Daily News*, requested assignment of one of four FM channels open in the New York area. The American Jewish Congress appeared at the hearings on the conflicting applications to oppose the *News'* petition on the ground that "the consistent bias and hostility displayed by the Daily News in its editorial and news columns against Jews and Negroes"<sup>44</sup> rendered the newspaper unfit to act as the trustee of the public interest.

---

all networks and stations from \$23,837,944 in 1939 to \$90,272,851 in 1944. More significantly, in 1939, the ratio of taxable profit (per cent) to depreciated cost of broadcast property was 67.1; in 1944, it was 222.6. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 49 (1946).

40. *E.g.*, although, under the regulations, if a chain member refuses to accept a network broadcast any other station in the area may take it, the number of instances of exercise of this option is negligible. SIEPMANN, *op. cit. supra* note 2, at 225. "The Commission labored greatly and brought forth a mouse." *Ibid.*

41. 3 FRC ANN. REP. 34 (1929) (over-all rationale for discrimination against special interest groups); *see* Churchill Tabernacle v. FCC, 160 F.2d 244 (App. D.C. 1947); Evangelical Lutheran Synod v. FRC, 105 F.2d 793 (App. D.C. 1939); Chicago Federation of Labor v. FRC, 41 F.2d 422 (App. D.C. 1930) (regarded by the FRC as raising the "question whether it is in the public interest to give a cleared channel to an organization . . . to broadcast social doctrines of its owners." 3 FRC ANN. REP. 76 (1929).

Note, however, that in *WBNX Broadcasting Co.*, Decision, p. 27, FCC Docket No. 6013 (Nov. 4, 1947), discussed *infra*, note 49, the Commission granted FM licenses to a labor union and a religious group, abandoning its intention, announced earlier in the proceedings, to continue the discriminatory policy. *WBNX Broadcasting Co.*, Proposed Decision, FCC Docket No. 6013 (Apr. 15, 1947). The move may, perhaps, be regarded as belated recognition that "[t]he agencies of mass communication are big business and their owners are big businessmen." COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 59 (1947).

42. *See* pp. 292-3, *infra*.

43. Decision, FCC Docket No. 6013 (Nov. 4, 1947).

44. AJC Memorandum in the Nature of Proposed Findings, p. 2, *WBNX Broadcasting Co.*, *supra* note 43.

Introduced by the AJC in support of its contentions were a number of editorial and news items which allegedly demonstrated anti-Semitic bias on the part of the *News*,<sup>45</sup> and a content analysis comparing the number of items "favorable" and "unfavorable" to Jews and Negroes appearing in the *News* and four other New York newspapers.<sup>46</sup> Replying to the charges, the *News* contended that constitutional and statutory provisions precluded any consideration by the Commission of the material submitted and that, in any case, the evidence introduced by the AJC did not substantiate its accusations.<sup>47</sup>

In its decision, the FCC avoided the major issue presented by the contending parties, striking the AJC's evidence on the grounds that the samples offered were insufficient to demonstrate any consistent bias on the part of the *News* and that the content analysis was lacking in reliability.<sup>48</sup> The newspaper's license application was denied, however, the announced rationale being that granting it would undesirably centralize control of New York's communication media.<sup>49</sup> While the Commission has lengthily investigated

45. *Id.* at 22-51.

46. *Id.* at 57-61. Regarded as "favorable" mentions were achievements of individuals, political or community activities, mention of persecution and discrimination, inter-group good-will activities and "miscellaneous favorable." In the "unfavorable" category were crimes, inter-group antagonisms and clashes and "miscellaneous unfavorable."

The AJC's fundamental finding was that the *News* had printed, over a sample period, 65 "favorable" stories concerning Jews or Negroes for every 35 "unfavorable," while the average ratio of the other newspapers was 89-11. Limited to Negroes, the *News* ratio was 45-55, with the average of the others again 89-11. *Id.* at 58.

47. See News Syndicate Co. Proposed Findings of Fact and Conclusions, pp. 13-76, WBNX Broadcasting Co., FCC Docket No. 6013 (Nov. 12, 1946).

48. WBNX Broadcasting Co., Memorandum Opinion, FCC Docket No. 6013 (April 9, 1947) (released June 13, 1947); *aff'd*, Decision (Nov. 4, 1947). Commissioner Durr dissented, pointing out that the majority was treating the matter as though the AJC bore a burden of proof whereas actually its evidence was merely in aid of the Commission's decision. Durr argued, moreover, that such *News* editorial statements as "Plenty of people just now are exercising their rights to dislike the Jews" and "Not all German Jews were profiteers" tended not only "to show bias and prejudice but also a lack of that sense of public responsibility which should be expected of a broadcast licensee." *Id.* at 7-8.

In the *WHKC* case, 10 F.C.C. 515 (1945), the FCC admitted in evidence a content analysis offered by the United Automobile Workers to show that the station presented biased commentators. See Stewart, *Radio Commentators and Free Speech*, 14 COMMON SENSE 32 (Aug., 1945). And in *United States v. Pelley*, 132 F.2d 170 (1942), *cert. denied*, 318 U.S. 764 (1943), a content analysis was introduced at a criminal trial showing that of 1240 statements printed by a newspaper in 157 articles, 1195 were consistent with and suggested copying from the 14 major Nazi propaganda themes. The analysis was held admissible "if only to show the background from which the intent might be better judged." *Id.* at 181.

49. WBNX Broadcasting Co., Decision, p. 26, FCC Docket No. 6013 (Nov. 4, 1947). On the same basis, the Commission denied the application of WLIB, Inc., owned by the publisher of the *N.Y. Post*.

Of the four licenses granted, one was given to Unity Broadcasting Corp., organized

the monopolistic effects of joint newspaper-radio ownership,<sup>49</sup> the infrequency with which they are considered determinative<sup>51</sup> leads to the conjecture that the AJC's intervention had tangible, if hidden, results. In any event, remarks made at the hearings indicate that the members of the Commission believed the controversy to be within their jurisdiction,<sup>52</sup> a point of view thoroughly sustainable, it would appear, on the basis of the earlier discussion of the statute and its interpretation.

More difficult among the questions raised by the *News*' case are the standards by which previous expressions of prejudice are to be judged and the sufficiency of proof required. It would, to pursue the present example, seem necessary flatly to deny licenses to applicants demonstrably guilty of defamatory attacks on the racial and religious groups comprising our pluralistic democratic society, careful distinction being made between defamation and reasoned, if unpopular, criticism.<sup>53</sup> It is far more in the public interest to

by the International Ladies Garment Workers Union, and another to Radio Corp. of the Board of Missions and Church Extension of the Methodist Church. In doing so, the FCC made clear that in metropolitan areas, where other adequate service is available, it is willing to relax its general policy against licensing special interest groups, see p. 233 *supra*, and will even prefer them to other applicants. WBNX Broadcasting Co., Decision, *supra* at 27.

50. In furtherance of its anti-monopoly policy, the Commission investigated for three years the advisability of permitting newspaper-radio joint ownership, FCC Order No. 79 (Mar. 20, 1941), concluding ultimately that newspaper ownership should not be a bar to licensing, but that the possibility of creating a monopoly of information should be a factor considered in acting on applications. FCC Public Notice No. 72933 (Jan. 13, 1944).

51. Approximately one-third of all standard stations are owned by press interests. SIEPMANN, *op. cit. supra* note 2, at 130. And in allocation of FM licenses, the Commission gave little indication, prior to the *News* case, that it intended to terminate the overlapping. KONECKY, MONOPOLY STEALS FM 11-2 (1946). Indeed, as pointed out by Commissioner Jett, WBNX Broadcasting Co., Decision, p. 29, FCC Docket No. 6013 (Nov. 4, 1947), the *N.Y. Times* had previously been given an FM license.

52. After consultation with the entire Commission, the presiding officer at the hearing announced, "It seems to me that it is perfectly appropriate to examine into what the applicant, who is a newspaper, does with his newspaper." Transcript of Record, p. 1411, WBNX Broadcasting Co., FCC Docket No. 6013 (1947). See also *id.* at 279-80, 284, 287-8, 1412.

Collaterally, the *News* argued that to judge printed statements as indicative of their publisher's capacity to serve the public interest is to circumscribe the freedom of the press. The alternative, however, is to permit exploitation of a limited medium for a purpose unencompassed by the public interest, a consideration before which the "freedom" defense would seem unavailing.

53. The line of distinction to be drawn is that which separates a Hitlerian attack on Jews as a race from a critical appraisal of Judaism by an atheist. See statement by Neville Miller, as National Association of Broadcasters president, that broadcasts "inciting racial and religious hatred are an evil not to be tolerated." *N.Y. Times*, Dec. 23, 1938, p. 4, col. 5; see LEE AND LEE, *THE FINE ART OF PROPAGANDA—A STUDY OF FATHER COUGHLIN'S SPEECHES* (1939); cf. Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *COL. L. REV.* 727 (1942).

leave channels unoccupied than to permit their use by individuals whose broadcasts would be subversive of the democratic ethic. As the *News*' case made clear, however, the problem is not so much categorization of undesirables as demonstration of their undesirability.<sup>54</sup> No attempt was made by the AJC to show that the *News* had consciously adopted a defamatory policy,<sup>55</sup> and it may be doubted that such an attempt, if made, would have been convincing. On this point, it may be suggested that the Commission weigh carefully any evidence submitted to it, endeavoring, once a prima facie case has been presented, to investigate conclusively on its own motion.<sup>56</sup>

### *Limitations on Program Content*

Doubtless influenced by the Congressional denial of censorship powers, the Commission has never indicated in broad terms its conception of programming not in the public interest.<sup>57</sup> Instead, relying on the statutory provisions that make it the final judge of attempts by licensees to fulfill the responsibilities of their trusteeship, subject to judicial review only on points of law, the FCC has sought negatively to define the standard of the public interest by a series of *ad hoc* decisions.

The authority of the Commission to denominate programs not in the public interest was first considered judicially in *KFKB Broadcasting Ass'n v.*

---

54. See discussion of the *WHKC* and *Pelley* cases, *supra* note 48, for indication of a possible technique. It seems unlikely, however, that Congressional establishment of a content analysis section in the FCC is imminent.

55. In none of its prepared statements did the AJC attempt the inference from alleged instances of defamation of deliberate adoption of a defamatory attitude on the part of the *News*. "It makes no difference whether the *News* has any such *intent*. It is the *effect* of the policies of the *News* on its readers and its possible effect on the radio audience which is in issue here." AJC Brief on Exceptions to Proposed Decision, p. 12, *WBNX Broadcasting Co.*, FCC Docket No. 6013 (June 19, 1947).

56. Under §403 of the Communications Act. While the Commission is not oversupplied with funds, this factor would seem to be outweighed by the undesirability of being forced to return in effect a verdict of "not proven guilty" against the nation's largest newspaper. *N.Y. Daily News*, Sept. 22, 1947, p. 2, col. 3.

57. A policy criticized in *SIEMANN*, *op. cit. supra* note 2, at 230, for keeping "radio on tenterhooks as to when and where the next blow might fall." It might be argued, however, that such anxiety is unjustified in an industry where so few blows have fallen. See note 26 *supra*.

On one occasion, former Chairman Prall informally announced as a definite policy that certain types of programs were not in the public interest: (1) astrology; (2) solicitation of funds; (3) false, fraudulent and misleading advertisements; (4) fortune-telling; (5) defamatory statements; (6) refusal to give equal opportunity for discussion of controversial issues (but not, apparently, refusal to air them at all, see pp. 289-90 *infra*); (7) obscenity and indecency; (8) programs offending religious sensibilities; (9) programs in which the station favors particular viewpoints on political, religious or social issues; (10) liquor advertisements; (11) "cliffhanger" programs for children; (12) interruption of concerts for sponsor plugs; (13) excessive advertisements; (14) excessive use of transcriptions. *LANDRY, WHO, WHAT, WHY IS RADIO?* 52 (1942).

FRC,<sup>58</sup> where Dr. J. R. Brinkley challenged denial by the Federal Radio Commission—the FCC's predecessor—of his application for license renewal. Pointing out that Dr. Brinkley had employed his station largely as a means of stimulating interest in his "goat-gland" operation for masculine rejuvenation, and that he had prescribed remedies for ailing listeners on the basis of written descriptions of their afflictions, the Court of Appeals for the District of Columbia found that such activities did not advance the public interest so markedly as to require reversal of the Commission's ruling, as a matter of law. More significantly, the court held that the agency had "merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship."<sup>59</sup>

Similarly, the Radio Commission was upheld in lifting the license of Station KGEF, Los Angeles, owned by the Trinity Methodist Church, South,<sup>60</sup> on the ground that its actual proprietor, a Rev. Dr. Shuler, had broadcast attacks on judges, the local bar association, Jews and Catholics and had threatened an unnamed man with radio disclosure of damaging information unless a sizable contribution to the church were made immediately.<sup>61</sup> On the basis of these decisions, a number of other program types have been held not in the public interest, including astrological predictions<sup>62</sup> and advice on finance, love, marriage<sup>63</sup> and health.<sup>64</sup>

It can scarcely be asserted, however, that all programs featuring charlatanry, group defamation, or panaceas, psychical and physical, are barred from the air.<sup>65</sup> Rather, by singling out extreme instances, the FCC has striven to impose minimal restraints on program content in terms of the ethical and social tastes of the society, but, reluctant to face charges of censorship, has waited for public expression of those tastes before proceeding further.

Of more general deterrent effect are the twin rulings of the *Mayflower*

58. 47 F.2d 670 (App. D.C. 1931). Cf. Hammond-Calumet Broadcasting Corp., 2 F.C.C. 321 (1936).

59. KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670, 672 (App. D.C. 1931).

60. Trinity Methodist Church, South v. FRC, 62 F.2d 850 (App. D.C. 1932), *cert. denied*, 288 U.S. 599 (1933).

61. Several contributions were shortly received. Trinity Methodist Church, South v. FRC, 62 F.2d 850, 852 (App. D.C. 1932).

62. Adelaide Lillian Carrell, 7 F.C.C. 219, 222 (1939); Scroggin & Co. Bank, 1 F.C.C. 194, 195 (1935); T. Yount, 2 F.C.C. 200, 206 (1935).

63. Scroggin & Co. Bank, 1 F.C.C. 194, 195-6 (1935).

64. Bremer Broadcasting Co., 2 F.C.C. 79, 83 (1935). Specific program excesses were also banned in United States Broadcasting Corp., 2 F.C.C. 208, 219 (1935) (programs religious in character but commercialized); Bremer Broadcasting Co., *supra* (broadcast in code of racing results, code being sold at newsstands); and Cannon System, Ltd., 8 F.C.C. 207 (1940) (excessive use of transcriptions, *semble*).

65. All of the blame for presentation of extravagant claims for proprietary medicines must not be placed on the licensee. Health organizations and medical societies have demonstrated reluctance to cooperate with broadcasters by informing them of the validity

case,<sup>66</sup> decided in 1941, that "a broadcaster cannot be an advocate"<sup>67</sup>—in the instant case, of political candidates—and must, when public issues are discussed, present all sides fairly and equally.<sup>68</sup> With the exception of those who protest the Commission's assertion of powers of review over program content, few may be found to attack the latter ruling, for it is in direct accord with the FCC's original intervention in the field to assure the widest circulation of contending viewpoints.<sup>69</sup> Widespread criticism of the ban on editorial comment by the licensee has, however, caused the FCC to schedule hearings for the early part of next year to reconsider the question.<sup>70</sup>

The case for allowing editorializing contends first that broadcasters are incapable of personal objectivity, that their bias is reflected to some degree in their programs,<sup>71</sup> and that the public can best evaluate programs when it is informed of the broadcaster's own stand. It is argued, moreover, that the objectives of the FCC's control over program content are satisfied once equality of treatment has been assured and that further control is unwarranted interference with free expression.

In rejoinder, however, may be urged the undesirability of letting the licensee pose as an authority on all issues against whatever opponents he may produce, while still claiming that all points of view are fairly and equally presented. Furthermore, to allow freedom of expression to licensees subordinate in great measure to advertising interests<sup>72</sup> would probably assure over-emphasis of the point of view of those interests. In view of the abundant evidence demonstrating that, despite the impartiality requirement of the *Mayflower* doctrine, that point of view is already over-emphasized by broadcasters in news and commentary programs,<sup>73</sup> lending its presentation

---

of the claims. See address by Nathan Straus, president of WMCA, New York, reported in *N. Y. Times*, June 3, 1945, sec. 2, p. 5, col. 5.

66. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941); cf. *Bellingham Broadcasting Co.*, 8 F.C.C. 159, 171-2 (1940); 2 *FRC ANN. REP.* 152 (1928).

67. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1941).

68. Although the decision stated, at 340, that "the licensee has . . . the obligation of presenting all sides of important public questions, fairly, objectively and without bias . . .," it fell far short of the definite affirmative requirement of the *Scott* case, see pp. 289-90 *infra*, that the licensee arrange for discussion of leading issues.

69. See pp. 279-80 *supra*.

70. *Editorializing by Broadcast Licensees*, Order, FCC Docket No. 8516 (Sept. 5, 1947).

71. See note 73 *infra*.

72. See p. 292 *infra*.

73. Sussman, *How Radio Treated Labor in the Elections*, 14 *COMMON SENSE* 34 (March, 1945); Stewart, *Radio Commentators and Free Speech*, 14 *COMMON SENSE* 32 (Aug., 1945). See CHASE, *SOUND AND FURY* 128-9 (1942). Superficial compliance, until recently, has been complete. *Broadcasting*, Jan. 20, 1947, p. 13, col. 1.

Two years ago, *Variety*, flippant but authoritative trade magazine, estimated the qualifications of 30 leading news commentators and analysts. Six were found sufficiently trained to be "general analysts," four qualified in limited capacities, eight were regarded as adequate reporters. Comments on the balance ranged from "excellent sports reporter"

additional strength through official sanction seems altogether unjustified.<sup>74</sup>

#### *Affirmative Requirements of Program Schedules*

Apparently dissatisfied with the results obtained from limitations on licensees and negative restraints on program content, the Commission has, during the last two years, reversed its emphasis and enunciated the rudiments of an affirmative concept of service in the public interest.

The first clear-cut indication of the new policy was the decision in the *WHKC* case in June, 1945.<sup>75</sup> The station, on the ground that discussion of labor affairs was "controversial" and, accordingly, not suited to broadcasting on a sponsored program,<sup>76</sup> stringently censored remarks scheduled to be made on a United Automobile Workers program. Averring that consideration of organized labor was in the public interest under the circumstances, the UAW petitioned the FCC for revocation of the station's license. Upon request of both parties, the Commission dismissed the action, *WHKC* having promised the labor group a reasonable opportunity to be heard. In its order, however, the regulatory agency denounced refusal to air labor discussions on the basis of their "controversial" nature, and indicated that scheduling of programs devoted to public issues, "controversial" or otherwise, is required of licensees by the public interest.<sup>77</sup>

Additional emphasis was given this position in *Petition of R. H. Scott*,<sup>78</sup>

to "unlimited contacts with reactionary legislators and big business lobbyists in Washington." *Variety*, July 25, 1945, pp. 26, 30.

Perhaps the only possible solution to the problem of obtaining equal treatment in news and analysis is for each network to collect a group of qualified commentators, representative of all points of view, and present them at times of equal listener value. Even this method, however, would depend for success on the willingness of local outlets to accept all the programs. For unaffiliated licensees, there seems no alternative to attempting fair treatment.

74. But see, apparently, statement by the Commission on Freedom of the Press, reprinted in *WHITE*, *op. cit. supra* note 1, at v-x.

75. United Broadcasting Co., 10 F.C.C. 515 (1945). Indicative of the turmoil stirring in the FCC was the announcement two months earlier of "a policy of more detailed review of broadcast station performance when passing upon applications for license renewals." FCC News Release No. 81575 (Apr. 10, 1945).

76. *WHKC* was acting in accord with its interpretation of the Standards of Practice announced by the National Association of Broadcasters in 1939, which barred sale of time for discussion of controversial issues with the exception of political broadcasts. The rationale for this policy lay allegedly in the NAB's fear that sale of time would permit monopolization of the air by those able to pay for it.

The station's case was punctured by a content analysis which demonstrated that Fulton Lewis, Jr., news commentator on a sponsored program, was consistently guilty of anti-labor bias. See Stewart, *Radio Commentators and Free Speech*, 14 *COMMON SENSE* 32 (Aug., 1945).

77. Two months later, the NAB code provision was dropped. *Variety*, Aug. 8, 1945, p. 31, col. 5.

78. Memorandum Opinion and Order, FCC Release No. 96050 (July 19, 1946).

where petitioner, an atheist, asked revocation of the licenses of three California stations for refusing him time to reply to attacks made on his beliefs on regularly scheduled religious programs. Although denying the petition, the Commission brushed aside the licensees' argument that airing of Scott's views would not be in the public interest inasmuch as they were distasteful to the great part of the listening audience. "The criterion of the public interest," the FCC warned, ". . . clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech."<sup>79</sup> It would accordingly appear that the Commission is determined that radio shall serve as an instrument for the diffusion of ideas legitimately in dispute, regardless of the attitude of the broadcasters toward their propriety, a position wholly consistent with the agency's over-all concept of radio's proper function in a democratic society.

To implement its new, affirmative thesis of its responsibility for regulation keyed to this function, the Commission was studying on a broad front, during 1945-6, the degree to which radio had achieved its potential. The study disclosed widespread failure on the part of the industry to meet minimal requirements of its public service responsibility. Many listeners had been driven from their receiving sets by the tawdry, protracted nature of much advertising continuity.<sup>80</sup> Local material, if not eliminated entirely, had been relegated to the hours when most listeners were asleep or working.<sup>81</sup> Sustaining programs, primary vehicles of education and of experimentation in new aspects of radio programming, had similarly been actually or effectively banished.<sup>82</sup> Local stations had yielded their programming function to

---

79. *Id.* at 5. Only one of the stations, KQW, has since given Scott time, and that on only one occasion. Communication to the Yale Law Journal from Dow, Lohnes and Albertson, Sept. 5, 1947. Complying with the FCC's ruling, the stations have denied Scott's requests by asserting that the existence of a deity is far down on their list of controversial questions demanding discussion. Letter to R. H. Scott from the Don Lee Broadcasting System, October 24, 1946. The Commission is now considering a second Scott petition demanding revocation of the licenses of four stations on the ground that this priority allocation is not in the public interest. Petition of R. H. Scott, filed Mar. 7, 1947.

80. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 40-7 (1946) (hereinafter the *Blue Book*). Cited were excessive number and length of commercials (one station broadcast an average of 16.7 spot announcements per hour over the course of a week, while another regularly aired five uninterrupted minutes of sponsors' messages); insufficient time between commercials; interruption of programs for middle commercials (particularly news programs, with the news dangled as bait to sustain the listener through the plug); subversion of patriotic themes to commercial purposes; physiological commercials; propaganda in commercials; and intermixture of programs and advertising.

81. *Blue Book* 38. And see SIEPMANN, *op. cit. supra* note 2, at 19-23, for an analysis of the radio resources of a sample community and their non-utilization.

82. *Blue Book* 12-36. The Commission regards sustaining programs as essential to assure balanced programming, to air features inappropriate to sponsorship, to cover specific minority tastes and interests, to serve non-profit organizations, and for program experimentation.

networks<sup>83</sup> and networks had in turn surrendered their prerogatives to advertising agencies,<sup>84</sup> all to the end that highly lucrative,<sup>85</sup> nationally sponsored programs might be presented.

Disclosing the details of the study in its *Blue Book* of last year, the Commission asserted that failure of the industry on these counts was abusive of its responsibility to the public interest. Accordingly, the Commission announced that:

"In issuing and in renewing the licenses of broadcast stations, the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses."<sup>86</sup>

---

83. "The most immediately profitable way to run a station, may be to procure a net-spot announcements, and to substitute spot announcements and phonograph records for grams throughout the day—interrupting the network output only to insert commercial spot announcements, and to substitute spot announcements and phonograph records for outstanding network sustaining programs. The record on renewal, since April, 1945, of standard broadcast stations shows that some stations are approaching perilously close to this extreme." *Blue Book* 39.

84. *Blue Book* 18. Instead of the network determining in advance the composition of its broadcast day, planning all programs itself and then offering the shows to sponsors, programs originate with the advertising agencies and time for their presentation is then bought from the networks. ". . . [T]he broadcasting company sells Time. It owns the air. It will sell you a piece. Period." Norman Rosten, *N.Y. Times*, July 15, 1945, sec. 2, p. 5, col. 1. See COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 63-4 (1947).

The Commission on Freedom of the Press recommends that networks and licensees separate programs from commercials, selling only unrelated advertising time surrounding uninterrupted programs. Failing voluntary action, the Commission suggests adoption of the practice as a standard of service in the public interest by the FCC. Printed in *WHITE op. cit. supra* note 1, at viii-ix. Seemingly, there could be no objection under § 326, for no direct censorship is involved; § 310, which bars transfer of control of a station without the FCC's approval, might well offer affirmative authority. United States Broadcasting Corp., 2 F.C.C. 208, 224 (1935) (sale of one hour weekly to an individual, to be programmed and resold under his direction, held a violation of § 310). In view of the interdependence of sponsors and licensees, however, the possibility of securing arms-length bargaining in this fashion seems slight.

Within the advertising agencies, it appears that monopolistic controls are developing. In 1944, 38% of CBS business was handled by four agencies, 37% of ABC's business came from a like number and for Mutual the figure was 31%. *BROADCASTING YEARBOOK* 30, 32 (1945). Fewer than 150 advertisers are responsible for all but 3-4% of network income. COMMISSION ON FREEDOM OF THE PRESS, *op. cit. supra*, at 63.

85. See note 39 *supra*.

86. *Blue Book* 55.

Of the necessity for the policy thus enunciated, the *Blue Book* leaves little doubt. But it can scarcely be alleged that through this announcement of future policy the defections of the licensees have been or will be entirely cured.<sup>87</sup> Indeed, the observation has been authoritatively made that since the *Blue Book's* appearance program quality has deteriorated still farther.<sup>88</sup> While so extreme a statement may be questioned, it serves to point up the fact that government regulation alone, whether negative or affirmative in character, cannot afford a complete solution to the problem of securing a radio industry that is a fit component of a democratic society.

#### CONTROL BY LICENSEES

Responsibility for initial determination of program content is in the licensee as trustee in the public interest. Aware of the supplemental nature of its power, the FCC has only acted when the licensee has failed in his responsibility. Accordingly, evaluation must be made of the attempt by the broadcasters at fulfillment of their trust, and an appraisal attempted of the causes of defection.

Each of the major networks has a code of program policies, as do the great majority of the local stations,<sup>89</sup> most based on the theory that "radio entering the home and the family circle thereby incurs certain specific obligations."<sup>90</sup> As a result of the establishment of these standards, the more socially objectionable practices which characterized early radio have disappeared.

Contemporary criticism of the exercise by the licensees of their trust is, accordingly, more in terms of what they fail to do than what is done improperly, a point confirmed by the affirmative policies recently introduced by the FCC. Primarily responsible for the faults of omission, the *Blue Book* makes clear, is the lucrative reward of the sponsored program; for to sell time to advertisers licensees have permitted them to dictate program hours and content.<sup>91</sup>

---

87. Note the substantial similarity of the *Blue Book* policy to that announced in Great Lakes Broadcasting Co., FRC Docket No. 4900, quoted in 3 FRC ANN. REP. 32-5 (1929).

88. WHITE, *op. cit. supra* note 1, at 194.

89. "Standards of Practice" are formulated for its approximately 900 member stations by the National Association of Broadcasters. The code, usually revised biennially, sets reasonably high standards for program content, see text of proposed code, N.Y. Times, Sept. 16, 1947, p. 18, col. 2, the members apparently feeling free to approve in view of the total lack of enforcement procedures.

90. NBC, PROGRAM POLICIES AND WORKING MANUAL 9 (1943). The sound economic basis for this courtesy is the unwillingness of broadcasters to offend listeners and of sponsors to offend potential purchasers of sponsored products. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 73 (1947). In great measure, this policy has also been responsible for the suppression of discussion of "controversial" issues. See p. 223 *infra*.

91. As pointed out in note 84 *supra*, the programs generally originate with the adver-

Surrender of the programming capacity in this fashion has led not only to the breaches of trust itemized in the *Blue Book* but, on the aesthetic side, by making the profit-bent advertiser the judge of whether a program is to be aired, has placed a premium upon the already-successful,<sup>92</sup> thereby frustrating the development of higher standards of listener taste.

More subtle, if equally regrettable, is the power of direct censorship of points of view exercised by sponsors, epitomized by the discontinuance, in 1935, of Alexander Woollcott's programs because he had criticized Hitler and Mussolini.<sup>93</sup> And, whether to appease sponsors or in an attempt to be so completely innocuous as to avoid offending any listener, licensees<sup>94</sup> have de-emphasized broadcasting of "controversial" issues,<sup>95</sup> a policy whose effects the FCC's mandates can only partially ameliorate.<sup>96</sup>

Admittedly, the networks and some local stations make an effort to present public service and sustaining programs with some regularity,<sup>97</sup> many

tising agency representing the sponsor. Many sponsors, however, exercise comparatively direct control over their programs—a control difficult to justify in terms of their expertise in serving the public. See LANDRY, WHO, WHAT, WHY IS RADIO? 43 (1942) (G.W. Hill, American Tobacco Co. president, directing orchestra's tempo); ERNST AND LINDEY, THE CENSOR MARCHES ON 116 (1940) (Maxine Sullivan dropped for swinging "Loch Lomond"); LANDRY, *op. cit. supra*, at 40 ("Smoke Gets in Your Eyes" barred by cigarette firm).

92. Witness the presentation by NBC in September, 1945, of 19 "soap operas" daily; CBS aired 17. *Blue Book* 13. Advertiser domination is also succeeding, apparently, in stifling any possibility of creative improvement in radio by driving the best talent to other fields. See *Variety*, June 20, 1945, p. 25, col. 3.

93. *Blue Book* 17. The purported reason for Woollcott's discharge was the sponsor's fear that he would antagonize some listeners. The issue is difficult to resolve, but it is possible that censorship of this type is more the result of the sponsor's personal prejudices than of fear of alienating the audience.

Perhaps the high point in this type of censorship was reached when Chicago's baseball teams contracted for broadcasting of their games with the proviso that all comments on the games would be favorable and no criticism of players or umpires would be voiced. KASSNER AND ZACHAROFF, RADIO IS CENSORED! 36 (1936).

94. Broadcasters are also careful of their own sensibilities. Thus, Fred Allen was recently cut off the air for humorous sallies at NBC's vice-presidents, *Variety*, Apr. 23, 1947, p. 1, col. 1; and WLW, Cincinnati, on the occasion of a strike by its employees, barred all mention of strikes on its programs. KASSNER AND ZACHAROFF, RADIO IS CENSORED! 19 (1936).

95. Regularly regarded as "controversial" have been labor and cooperative movements. See SIEPMANN, *op. cit. supra* note 2, at 100-15; WHITE, *op. cit. supra* note 1, at 77-80. Seemingly, this attitude could scarcely be motivated by great fear of public reaction; consideration of the feelings of sponsors and licensees themselves is a more likely cause. See ARCHER, BIG BUSINESS AND RADIO (1939) for a study of the corporate control of radio.

96. See note 79 *supra*.

97. See Bryson and Rowden, *Radio as an Agency of National Unity*, 244 *ANNALS* 137 (1946). In the case of the network, the effort is often wasted, for many outlets substitute local commercial programs for the network offerings. *Blue Book* 32-6.

being of outstanding quality. But the licensee has, on the whole, substantially abandoned the control over program content which the regulatory scheme postulates in him, transferring his responsibility to the advertiser.

On the principles set out in the *Blue Book* and the *WHKC* and *Scott* decisions, the FCC has moved to require reassumption of that trust by the broadcaster. Short of enforcement of the new regulations with an unprecedented and unanticipated vigor, or statutory amendment to limit the profitability of radio, however, it can hardly be expected that broadcasters will in the near future reassert control of their own franchises in any great measure.

#### CONTROL BY THE PUBLIC

From a consideration of the controls imposed on program content by the FCC, it is apparent that there is little endeavor on the part of the regulatory agency to secure maximum attainment by radio of its potential as the society's most efficient agency of information dissemination. Instead, the FCC limits itself to mild, indirect regulation, most effective in aberrational situations. Quite probably, no government agency could set higher standards, for the effectiveness of radio's use as an affirmative instrument of democracy depends ultimately on the willingness of the people to listen to what is broadcast.

The evidence is strong that the listening audience likes radio the way it is.<sup>98</sup> Such evidence must be weighed against the fact that the public is usually unaware of any standard against which program service can be matched<sup>99</sup>—acceptance of a seeming gift<sup>100</sup> can scarcely be the measure of satisfaction in the absence of any alternative. But the recent, speedy demise of a Washington, D.C., station which sought to feature information and discussion as opposed to stereotyped entertainment<sup>101</sup> gives warning that any attempt at a quick shift in emphasis in radio is doomed.

Yet the need for attainment by radio of its potential in terms of information service is obvious. Representative, democratic government hypothesizes an electorate jealous of its freedom and possessed of information sufficient to make its policy decisions. Apparently, however, theoretical recognition of these conditions far exceeds their operational significance. Liberty is not

---

98. See LAZARFELD AND FIELD, *THE PEOPLE LOOK AT RADIO* (1946), an analysis by Columbia University's Bureau of Applied Social Research of data secured by The National Opinion Research Center.

99. ". . . [A] survey like the present one cannot tell what people would like if they had the opportunity to listen to different radio fare." *Id.* at 12. Cf. Borneman, *The Public Opinion Myth*, 195 *HARPERS* 30 (July, 1947).

100. Radio service can scarcely be regarded as entirely gratuitous when advertisers spend an estimated \$.02 per day per receiver to transmit their messages and listeners spend approximately \$.031 daily per receiver to hear the programs. *Blue Book* 54.

101. See *Variety*, July 23, 1947, p. 29, col. 5, "Blue Book Station (WQQW) Folds in Failure of Longhair Policy."

widely understood where only 58% of the people would permit the Socialist Party to publish a newspaper and one-third would bar the press from criticizing the American form of government.<sup>102</sup> Equally, the ability of an electorate to make informed decisions may be challenged when only 7% of its members know the meaning of the veto power in the United Nations mechanism and fewer than two-thirds can identify the majority party in Congress.<sup>103</sup>

To make freedom familiar and to fill in areas of popular ignorance, radio can be invaluable. From civic groups<sup>104</sup> and educational institutions,<sup>105</sup> leadership must come to take advantage of the increased opportunities afforded by the *Blue Book* requirements and the expansion of broadcast service through FM.<sup>106</sup> To exploit the advantages thus gained, expansion of radio criticism from its present impotent state<sup>107</sup> and development of radio listener councils<sup>108</sup> are necessary.

If we assume the creation of a public thus made slightly aware of the opportunity which is radio, attention can be turned to the problems raised by

102. 10 PUB. OPIN. Q. 248 (1946). Equally may be cited the approval 53% of the franchised voters in the poll-tax states give to continuation of the restricted ballot. And the nationwide tally shows only a 2-1 vote against the tax. Gallup poll figures printed in LYDGATE, *WHAT AMERICA THINKS* 127 (1944). Compare the opinion of a majority of Americans that 12 of 17 national or religious groups are either "not quite as good as we are in major respects" or "definitely inferior." *Id.* at 61.

103. Unpublished data gathered by the American Institute of Public Opinion. The Institute's release of Jan. 10, 1947, shows that shortly prior to the enactment of the Taft-Hartley Act, only one-fifth of the public had any idea of the provisions of its predecessor, the Wagner Act. Note that the degree to which Congress legislates in accordance with public opinion apparently depends directly on the measure of familiarity of the public with pending legislation. Topkis, *How Bad Is Congress?* 62 POL. SCI. Q. 531 (1947). See Van Loon, *Radio and Better City Government*, 2 PUB. OPIN. Q. 110 (1938). Consider the problem raised when Congress deliberately denies to the public the information necessary to the formulation of reasonable opinions. See Newman, *Control of Information Relating to Atomic Energy*, 56 YALE L. J. 769 (1947).

104. An indication of the possible benefits to be gained from action by civic groups both in securing licenses and in producing programs may be gained from Nockels, *Labor's Experience in Radio*, 44 AMER. FEDERATIONIST 276 (1937).

105. In the period 1921-36, 202 AM licenses were granted to educational institutions, of which 29 remain, the casualties being attributable to faculty disinterest and insufficient funds. Of the greater universities, Yale, Harvard and Chicago have never sought licenses. WHITE, *op. cit. supra* note 1, at 101-2, 111. See FRIEDRICH, *RADIOBROADCASTING AND HIGHER EDUCATION* (Harvard Studies in Control of Radio No. 4, 1942).

106. For discussion of the opportunity opened to institutions of higher learning by FM, see U.S. OFFICE OF EDUCATION, *FM FOR EDUCATION* (1944).

107. For this improvement, cooperation from the press is essential. Hitherto denied from a natural disinclination to aid a competing medium and for fear of alienating sponsors of criticized programs, it may be secured through sufficient public demand. See Landry, *Wanted: Radio Critics*, 4 PUB. OPIN. Q. 620 (1940). *But cf.* Siepmann, *Further Thoughts on Radio Criticism*, 5 PUB. OPIN. Q. 308 (1941).

108. Councils in Cleveland, Ohio, and Madison, Wis., are valuable in conveying to broadcasters the wishes of the generally inarticulate public, in publicizing programs and in conducting research on public tastes and attitudes. *Blue Book*: 55.

the *Mayflower* and *Scott* cases. Councils and critics can call public attention to broadcasters' bias, documenting their charges with competent content analyses.<sup>109</sup> Interest can be stimulated in the use of radio as a source of information and "controversial" issues discussed despite sponsors' prejudices. For, desirous of appealing to the potential purchasers of products advertised on their frequencies, broadcasters will bar from the air any program deemed unworthy by the public, will offer any for which there is expressed demand, far more readily and efficiently than they will heed any requirement or prohibition of the FCC.

The answer, then, as so frequently in our society, is in the public and the institutions from which that public expects leadership. The process can be a cumulative one, radio coming to serve increasingly in the public interest as the public becomes interested. There can be no guarantee that radio will be able to dispel the serious doubt cast by the increasing complexity of societal organization on the ability of the individual member to accumulate sufficient information to make valid policy decisions.<sup>110</sup> Yet little pleasure can be derived from contemplation of radio's demonstrated alternative talent for furnishing an escape from that complexity.

---

109. See note 48 *supra*. Still another possibility for the use of content analysis is in laying bare the stereotypes in which radio deals, in demonstrating its adherence to certain fixed conceptions concerning component parts of our society. Note the recent charge that on soap operas lawyers are invariably presented as shysters. N.Y. Post, Sept. 25, 1947, p. 30, col. 4-5. There is evidence that insofar as the Negro, at least, is concerned, radio's record is better than that of other media of communication. See 13 J. NEGRO EDUC. 382-6 (1944).

110. See LIPPMANN, PUBLIC OPINION (1922).