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THE FEDERAL COMMUNICATIONS COMMISSION AND PROGRAM REGULATION—VIOLATION OF THE FIRST AMENDMENT?

I. INTRODUCTION TO THE TELEVISION INDUSTRY AND ITS CONTROL

Probably no other industry has so captured the interest of the American public or shown such phenomenal yearly growth as the industry of television. Since the first commercial television broadcast over WBNT, New York, in 1941,¹ the number of operating stations has grown over the past two decades to 542, with construction permits authorized for nearly one hundred more.² The number of television sets in use in the United States has increased from only 8,000 in 1946 to 54,000,000 sets in use in 1960.³ In 1957 the average family in a television home viewed the medium's programs on the average of five hours in each day.⁴ The impact of television has made itself felt in the economic world also. The expenditures for television advertising have, from 1950 to 1960, climbed from \$185,000,000 or 3.3 per cent of the market total to \$1,495,000,000 or 13.8 per cent of the market total.⁵

Such a dynamic industry is almost certainly going to be the object of controversy. A necessary companion to such controversy is the problem of control—what can be done to change or stabilize the industry, and with whom does this power lie? Congress first answered this question with the passage of the Radio Act of 1927,⁶ which was subsequently replaced by the Communications Act of 1934.⁷ The power of the United States government to regulate the radio and television industry rests upon its constitutional power

¹ GOLENPAUL ASSOCIATES, INFORMATION PLEASE ALMANAC 290 (1962). The first successful demonstration of television, however, occurred nearly twenty years before in the early 1920's. *Ibid.*

² *Id.* at 310. These figures include the territories and possessions of the United States.

³ *Id.* at 407.

⁴ House Committee on Interstate and Foreign Commerce, *Network Broadcasting*, H.R. REP. NO. 1297, 85th Cong., 2d Sess. 36 (1958).

⁵ GOLENPAUL ASSOCIATES, INFORMATION PLEASE ALMANAC 582 (1962).

⁶ 44 Stat. 1162 (1927). This act included television in its definition of radio transmission although not specifically named as such.

⁷ 48 Stat. 1064 (1934), 47 U.S.C. §§ 151-609 (1958).

over interstate commerce.⁸ The delegation of this power to an administrative agency⁹ has been upheld.¹⁰

The question of who possesses the legal power to regulate the industry having long been settled, the task remains to determine the nature and extent of that power. The scope of this comment will, for the purposes set out below, be limited to the power of the FCC to regulate and supervise programs and program schedules presented by the individual station licensees. The purpose here is to comment upon the nature of the power Congress vested in the FCC pertaining to the programming area, to discuss the limitations upon that power, to discuss the criteria used by the FCC in the regulation of the radio and television industry, and to analyze the various possible approaches to delineating the extent of regulation the FCC should have in this area.

II. STATUTORY HISTORY OF RADIO AND TELEVISION REGULATION

Prior to the passage of the Radio Act of 1927, an expanding American radio industry found itself hampered by certain technical limitations inherent in the medium. The spectrum of available frequencies was, and still is, physically limited as to the number of stations that could broadcast in any one geographical area.¹¹ Too many stations in an area created an overlapping of station frequencies, and the interference caused by this overlapping served to further reduce the number of stations the listening audience could effectively receive.

The Radio Act of 1927 sought to alleviate this problem by authorizing the Federal Radio Commission to grant licenses to persons who wished to broadcast, and by prohibiting broadcasting over the air-waves without procuring such a license.¹² Congress further

⁸ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

⁹ 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1958). The FCC is composed of seven members, appointed by the President of the United States with the consent of the Senate for seven year terms. In addition, the Commission has authority to appoint any employees that are necessary to carry out the provisions of the Communications Act. 48 Stat. 1066 (1934), 47 U.S.C. § 154 (1958).

¹⁰ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹¹ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

¹² *Id.* at 474: "Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies . . . the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under licensing."

provided for assuring proper use of licensed facilities by giving the FRC the power to grant or refuse renewals of licenses after expiration of the original license grants.¹³ In 1934, Congress passed the Communications Act to consolidate the various statutes previously enacted to control the various methods of communication.¹⁴ The essentials of the Radio Act of 1927, however, remained unchanged in the Communications Act, indicating that Congress had no intention of increasing or decreasing the existing regulation of the radio industry.¹⁵

It is clear from the language of the Communications Act that Congress considered the air-waves inappropriate for private ownership. Control of such air-waves should at all times, according to the Congressional mandate, remain in the United States.¹⁶ In defining the control of the United States, through the FCC, Congress provided that all decisions made by that commission should be governed by the "public interest, convenience, or necessity,"¹⁷ and the courts have held this criterion to be sufficient.¹⁸

The FCC has sought to define the broad standard of public interest through its many administrative functions, such as rule-making, general policy statements, license grants and renewals and comparative hearings. At this time it is pertinent to describe the procedure employed by the FCC in granting or renewing licenses.

The Commission first determines the number of television stations that may broadcast efficiently in any one area and the particular portion of the frequency spectrum in which each may broadcast.¹⁹ If there is only one applicant seeking an available fre-

¹³ 44 Stat. 1162, 1166 (1927): "Upon the expiration of any license, upon application therefore, a renewal of such license may be granted from time to time"

¹⁴ The history of the Radio Act of 1927 and the Communications Act of 1934 is discussed by Mr. Justice Frankfurter in *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-14 (1943).

¹⁵ *Ibid.*

¹⁶ 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1958): "It is the purpose of this chapter . . . to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal Authority, and no such license shall be construed to create any right beyond the terms, conditions, and periods of the license."

¹⁷ 48 Stat. 1082-85 (1934), 47 U.S.C. §§ 303, 307(a), 309(a) (1958).

¹⁸ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹⁹ See, e.g., 47 C.F.R. § 3.606 (1960) (table of assignments); Sixth Report and Order, S. Doc. No. 8736, April 14, 1952, 17 Fed. Reg. 3905 (1952). The number of assignments in the Report roughly correlates with the size of the city.

quency, the Commission will issue a construction permit if the applicant can demonstrate that he is legally, financially, and otherwise qualified, and that he will operate his station in the public interest. If construction requirements are met by the applicant, he receives a license to broadcast from the FCC which expires after three years operation.²⁰ If, however, there are two or more applicants seeking the same frequency, the FCC is required to hold comparative hearings to select the best qualified applicant.²¹ In selecting the applicant the Commission is currently using the following criteria: (1) proposed programming and policies, (2) local ownership, (3) integration of ownership and management, (4) participation in civic activities, (5) record of past broadcast performance, (6) broadcast experience, (7) relative likelihood of effectuation of proposals as shown by contacts made with local groups and similar efforts, (8) carefulness of operational planning for television, (9) staffing, (10) diversification of the background of the controlling person, and (11) diversification of control of mediums of mass communications.²² In making its determination, the Commission does not give equal emphasis to all of the above elements.²³

At the expiration of the original license grant, the licensee must file for renewal to continue broadcasting. In a renewal application, the licensee sets out his programming for a composite week of the last year of his license term. The FCC compares this with the proposed program schedule the licensee set out in his previous application.²⁴ If there are large differences between the proposed schedule and the actual record, the FCC brings this to the attention

²⁰ 48 Stat. 1083 (1934), 47 U.S.C. § 307 (1958); 47 C.F.R. § 3.630 (1960) (license period): "Licenses for television broadcast stations ordinarily will be issued for a period of three years and, when regularly renewed at three year intervals thereafter; *Provided, however*, that, if the Commission finds that the public interest, convenience, and necessity will be served thereby, it may issue either an initial license or a renewal therefor for a lesser term."

²¹ 48 Stat. 1085 (1934), 47 U.S.C. § 309 (1958); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1946).

²² Letter of August 30, 1956, to chairman Warren G. Magnuson of the Interstate and Foreign Commerce Committee, *U.S. Senate Hearings on S. Res. 13 and 163, Before the Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 979 (1956).

²³ *Id.* at 980: "[D]iversification of background or persons controlling, participation in civic activities, or carefulness of planning for television do not carry the same weight as the others."

²⁴ House Committee on Interstate and Foreign Commerce, *Network Broadcasting*, H.R. REP. NO. 1297, 85th Cong., 2d Sess. 44 (1958).

of the licensee and an attempt is made to reconcile the situation. With rare exceptions, the FCC has usually granted renewals of the licensees.²⁵

III. LIMITATIONS ON THE REGULATORY POWER OF THE FCC

As noted in the preceding section, the FCC considers the programming policies of an applicant when granting or renewing a license. At first glance, it would appear that the "public interest" standard provided by Congress would give the FCC this power. That the term "public interest" was to be given a broad interpretation was indicated by the Supreme Court of the United States six years after the passage of the Communications Act in *FCC v. Sanders Bros. Radio Station*,²⁶ when it stated that "an important element of public interest" to be considered in issuing a license is "the ability of the licensee to render the best practicable service to the community reached by his broadcasts."²⁷ Three years later the Supreme Court again gave a broad interpretation to the meaning of "public interest" in *National Broadcasting Co. v. United States*,²⁸ by stating that such interest is "the interest of the listening public in larger more effective use of radio."²⁹

In defining the power of the Commission to act in the public interest, however, it is necessary to consider this power in the light of limitations provided in section 326 of the Communications Act itself,³⁰ and in the first amendment to the Constitution.³¹ The programs broadcast by the radio and television industry are within the protection afforded by the first amendment,³² and the FCC has

²⁵ *Id.* at 45.

²⁶ 309 U.S. 470 (1940).

²⁷ *Id.* at 475.

²⁸ 319 U.S. 190 (1943) (hereinafter referred to as the *NBC* case).

²⁹ *Id.* at 216.

³⁰ 48 Stat. 1091 (1934), 47 U.S.C. § 326 (1958): "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

³¹ U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

³² *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

declared that "it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or what is not a good program."³³

At least one early writer sought to distinguish the various types of programs by asserting that the protection of the first amendment did not extend to programs which were solely musical or entertaining in nature, as the protection merely extended to the communication of ideas.³⁴ This theory was rejected, however, in *Winters v. New York*,³⁵ when the Supreme Court stated:

We do not accede to the appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

Section 326 of the Communications Act was incorporated without change from the Radio Act of 1927.³⁶ The principal sponsor of the radio legislation in the House of Representatives was Representative White of Maine. A portion of the debate on the floor of the House between Mr. White and F. H. LaGuardia of New York indicates the attitude toward the meaning of section 326:³⁷

Mr. LaGuardia. The gentleman states the recommendations, among which was a guaranty of free speech over the radio. What provision does the bill make to carry that out?

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

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

Mr. White of Maine. No power at all.

Having noted that judicial and congressional opinion has declared that the programs of a licensee are to be afforded the protection of the first amendment and section 326 of the Communica-

³³ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed. Reg. 7291, 7293 (1960).

³⁴ Caldwell, *Censorship of Radio Programs*, 1 J. RADIO L. 441, 475 (1931): "Whenever it is a question of musical or entertainment programs, solely, then the Commission has broad discretion to grant or deny application for license or renewals thereof"

³⁵ 333 U.S. 507, 510 (1948).

³⁶ See 78 CONG. REC. 10988 (1934).

³⁷ 67 CONG. REC. 5480 (1927).

tions Act, it becomes necessary to determine the nature and limits of that protection. In *Near v. Minnesota*,³⁸ the Supreme Court held unconstitutional a statute under which the publication of a newspaper had been enjoined following malicious and defamatory editions. Chief Justice Hughes, for the majority, stated that "liberty of the press . . . has meant principally, although not exclusively, immunity from previous restraints or censorship"³⁹ This is not the same, however, as saying that programs may not be viewed without censoring by an administrative agency prior to their exhibition. In *Times Film Corp. v. City of Chicago*,⁴⁰ the Supreme Court held that an administrative agency has the right to view motion pictures before they are exhibited to the public. The Court, however, did not deal with the censoring activities of the agency after they have viewed the pictures.⁴¹

Thus, it would seem that the FCC may require licensees to submit their programs to the Commission for viewing before these programs are broadcast. Such viewing would not violate the first amendment as long as the Commission did not enter a value judgment upon the programs which would affect the broadcaster's right to exhibit them. However, if the Commission did exercise its judgment over the programs viewed, it would seem that the *Near* case should be controlling and any restraint of a program by the FCC would have to be within the exceptions to the first amendment as stated in *Near*.

In the *Sanders* case⁴² the Supreme Court seemed to remove consideration of programs from the Commission by stating:

[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

However, three years later in the *NBC* case⁴³ the Court indicated that, while the Commission had no supervisory control of pro-

³⁸ 283 U.S. 697 (1931).

³⁹ *Id.* at 716. The Court stated, however, that exceptional cases such as obscene publications, publications which endanger national security in time of war, and publications which incite the populace to acts of violence to overthrow the government would not be afforded the benefits of the previous restraints doctrine.

⁴⁰ 365 U.S. 43 (1961).

⁴¹ See 40 NEB. L. REV. 491, 499 (1961); 61 COLUM. L. REV. 921 (1961).

⁴² 309 U.S. 470, 475 (1940).

⁴³ 319 U.S. 190 (1943).

grams, it could look to the schedule of such programs in determining whether or not an applicant was qualified for a license. The Court reasoned that the FCC could not discharge its obligation to act in the public interest merely by finding no "technological objections" to granting a license, as this would not insure the "best practicable service to the community reached by his broadcasts."⁴⁴ Instead, the Communications Act which regulates the radio traffic "puts upon the Commission the burden of determining the composition of that traffic."⁴⁵ Much of the reasoning behind allowing the Commission to consider the merits of programming lies in the fact that the facilities for radio are limited,⁴⁶ and, since not everyone can have access to these facilities, the Commission must judge as to which applicants are best qualified to serve the public.

The extent of the Commission's power as interpreted in the *NBC* case is not entirely clear. In the same year that the case was decided one writer asserted that determining "composition" is distinct from determining "content" of traffic: the former dealing with the over-all level of programs, and the latter dealing with the quality of individual programs.⁴⁷ This seems to be the position adopted by the FCC which has thus far abstained from rendering judgments as to particular programs,⁴⁸ but which still

⁴⁴ *Id.* at 216.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 226.

⁴⁷ Barber, *Competition, Free Speech and FCC Network Regulations*, 12 GEO. WASH. L. REV. 34, 49 (1943): "It seems reasonable to conclude that the Court meant 'composition' in its legal sense. The word has been used frequently in connection with freight traffic over a railroad line where the public is interested in the freight being composed of commodities generally. This interest would not be served by a rail line that carries only farm produce and refuses manufactured products and the regulatory agency in the field would see that no such discrimination is practiced. It does not mean, however, that such an agency would have any directorial power as to whether a particular car, or even a particular train hauls oranges, household goods, or furniture. Likewise, the public interest in the composition of radio traffic does not mean that the regulatory agency can insist that any particular public discussion, entertainment or musical program shall or shall not be carried on a specific local radio program or chain broadcast. It does mean, however, that the regulatory body can concern itself with the general level of programs and see that no particular type of program or particular points of view are carried to the exclusion or at the expense of all other types of programs and points of view."

⁴⁸ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed. Reg. 7291, 7293 (1960).

maintains the authority to consider the balance of the programming schedule.⁴⁹ The Commission's position received the approval of the Supreme Court in 1950, when it declared that "the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license."⁵⁰

In the area of renewal, the courts have also allowed the FCC to investigate program proposals and to review past broadcast performance.⁵¹ The reasoning responsible for these holdings is perhaps best expressed in *Sangamon Valley Television Corp.*:⁵²

Such past records take on importance in evaluating the applicant's proposals, since a licensee's past operating record is a demonstration of its ability to meet and fulfill its obligation to the public.

In *KFKB Broadcasting Ass'n v. FRC*,⁵³ the Court of Appeals of the District of Columbia declared that reviewing the past conduct of a licensee did not infringe upon the protection of the first amendment by stating:

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

It may thus be seen that, although section 326 of the Communications Act and the first amendment of the Constitution protect the right of free speech, under judicial holdings the FCC may nevertheless enter the general area of programming without impinging upon those protections.

IV. THE PRESENT STATUS OF PROGRAM REGULATION BY THE FCC

The previous section noted that the FCC has the authority to consider future program proposals and past conduct of an applicant without violating the limitations imposed upon it.

⁴⁹ *Id.* at 7294.

⁵⁰ *Regents of University System of Ga. v. Carroll*, 338 U.S. 586, 598 (1950).

⁵¹ *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *Greater Kampeska Radio Corp. v. FCC*, 108 F.2d 5 (D.C. Cir. 1939); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

⁵² 22 FCC 1167, 1168 (1957).

⁵³ 47 F.2d 670, 672 (D.C. Cir. 1931).

The Commission currently maintains that the primary right and responsibility of choosing programs remains with the individual station licensee, and that the Commission merely reviews his past actions and future proposals to see that an over-all balance in the public interest is maintained.⁵⁴ In considering the over-all balance of a program schedule, the FCC has stated that the following elements are important:

- (1) Opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programming.⁵⁵

By emphasizing the above elements, the FCC has come very close to requiring that each category be assigned some broadcast time by an applicant,⁵⁶ although the Commission has stated that these elements are not intended "as a rigid mold or fixed formula for station operation."⁵⁷

Further, although the Commission has recognized that network programs "are the principal broadcast fare of the vast majority of television stations,"⁵⁸ the greatest emphasis is placed upon the amount of local live programming that the applicant has proposed or broadcast in the past.⁵⁹ The reasoning behind the unequal emphasis is based upon section 370(b) of the Communications Act which requires the FCC to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution to each of the same."⁶⁰ The Commission has stated that it is implicit in this section that appropriate attention be directed to local live programming.⁶¹

The present position of the FCC in the programming area seems to be a supervisory one. The individual licensee is primar-

⁵⁴ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed Reg. 7291, 7294 (1960).

⁵⁵ *Id.* at 7295.

⁵⁶ See, Irion, *FCC Criteria for Evaluating Competitive Applicants*, 43 MINN. L. REV. 479 (1959).

⁵⁷ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed Reg. 7291, 7295 (1960).

⁵⁸ *Ibid.*

⁵⁹ *Id.* at 7294.

⁶⁰ 48 Stat. 1083 (1934), 47 U.S.C. § 307(b) (1958).

⁶¹ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed. Reg. 7291, 7294 (1960).

ily responsible for choosing the programs that he will broadcast and determining the emphasis that he will place on the various elements of his program format. The FCC has the right to review the licensee's past broadcast conduct to insure that the over-all balance of his schedule is in the public interest, and it also has the right to view the applicant's proposed programming schedule to insure that the public interest will be served in the future.

As a practical matter, most of the regulating accomplished by the Commission is indirect: by a letter or speech of a Commissioner, by a public notice in the Federal Register, or by disapproving a practice in dictum but granting a license or renewal thereof. The policies announced by the Commission in these ways are virtually unassailable by the licensee. Judicial review is unavailable because letters, speeches, public notices, and dicta are not considered legally binding upon the licensee, as rules and orders promulgated by the FCC would be. If the licensee has no legal obligation he has no standing to challenge the policy until such time as the policy is actually made obligatory on him.⁶²

Another consideration is important at this point. The effectiveness of authority presented in this way rests upon the economic fact that the value of a Commission license far outweighs the value that could be obtained by challenging the FCC's programming policies at the risk of losing such license. Stations will usually endeavor to conform to the wishes of the Commission rather than chance being removed from the air at renewal time.⁶³

Because of this it is unlikely that the right of the FCC to exercise authority in the programming area will be challenged in the near future. However, in view of the previous discussion, if such a challenge is made it is probable that the Supreme Court will approve the authority of the FCC in the programming area as a necessary function of the Commission to act in the public interest.

V. ANALYSIS AND COMMENTS

In discussing the various approaches utilized in approving or criticizing the power of the FCC in the programming area, it is important to keep in mind the purpose of the Communications Act and the limitations imposed by Congress and the Constitution. As pointed out earlier, the Radio Act was enacted originally to alleviate the problem of frequency overlap between stations.

⁶² For a more detailed discussion of the supervisory power of the FCC, see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 4.03 (1958).

⁶³ *Ibid.*

The purpose of the subsequent Communications Act is "to make available, so far as possible, to all people of the United States, a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charge."⁶⁴ In providing for this purpose, Congress worded the Communications Act in terms of public interest. In view of the foregoing, it is reasonable to assume that a large part, if not all, of the public interest mentioned by Congress was the assurance that radio stations did not interfere with each other by overlapping frequencies. Creation of this assurance would establish the "rapid, efficient" radio service desired by Congress. This seemed to be the opinion of the Supreme Court in the *Sanders* case⁶⁵ when it stated that the broadcasting field was open to anyone showing "competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel,"⁶⁶ provided an available channel existed. Further, section 326 of the Communications Act provides essentially the same protection offered by the first amendment to the Constitution. It is arguable, therefore, that by including section 326 in the Act, Congress wished to emphasize that the radio industry, though subject to regulation by the FCC, was to be afforded the same protection by the first amendment as other communications media not governmentally controlled.

Under the broad interpretation given by the Supreme Court to the term "public interest," the Commission has the right to view the proposed program schedules and the past broadcasting conduct of an applicant. One of the approaches used by the Commission and the courts in justifying this interpretation is that the radio and television media are unique because they are limited by the frequency spectrum available for use. In the *NBC* case⁶⁷ the Supreme Court followed this approach in allowing the Commission to review programming and refused to accept the premise that the first amendment was being violated. The Court stated:⁶⁸

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.

It is certainly true that radio facilities are limited and all who wish to use them may not do so. If Congress had not exercised its

⁶⁴ 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1958).

⁶⁵ 309 U.S. 470 (1940). See note 12 *supra*.

⁶⁶ *Id.* at 475.

⁶⁷ 319 U.S. 190 (1943).

⁶⁸ *Id.* at 226.

power to regulate the use of radio frequencies, this limitation would have proved injurious to the public as the resulting interference would have nullified the effectiveness of the medium. It was therefore necessary, in the public interest, to regulate the number of stations that can broadcast in any one area and to designate the frequency on which each may operate. Other media of communication do not have this technical limitation and the public is not injured if an unlimited number of each exist in any area. Thus, there is no need to require a licensing of the other media. The Commission's position seems to be, however, that the public interest requires not only that the FCC designate the number of stations that may broadcast in any one area and the frequency on which each may operate, but also that the FCC insure that the programming of each licensee is balanced to the needs of the community.⁶⁹ In other words, because the public can receive only a limited number of stations, the FCC has the duty to see that those stations which are received by the public are broadcasting an acceptable program format.

The first amendment draws no distinction as to the various means of communication.⁷⁰ It flatly prohibits the abridgment of freedom of speech or the press. Before it is to be conceded that the public interest requires that the FCC insure balanced programming in the radio and television industry, while other media have no such obligation, it should first be established that not only has radio a unique limitation which requires licensing, but that the other media are not limited as to public reception.

A survey of the fifty largest cities in the the United States indicates that each city has an average of three to four television stations,⁷¹ while the average number of newspaper publishers in each city is only two.⁷² The obvious reason that a greater number of newspapers does not exist is an economic one. The public demand

⁶⁹ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed. Reg. 7291, 7294 (1960): "It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires."

⁷⁰ *Superior Films v. Department of Education*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring): "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or magazine. But the First Amendment draws no distinction between the various methods communicating ideas."

⁷¹ *GOLENPAUL ASSOCIATES, INFORMATION PLEASE ALMANAC* 390 (1962). The average per city according to the statistics given is 3.6.

⁷² *Id.* at 308.

simply will not support a larger number. Thus, it may be said, from a practical standpoint, that the number of newspapers that can be published in any one geographical area is also necessarily limited. While it is true that the limitation in radio and television is a physical one and the limitation in the newspaper industry is an economic one, both limitations have the same effect—they effectively determine how many of each medium are to exist in any one geographical area, and, as shown by the survey above, it appears that the newspaper industry is even more limited to those who wish to engage in the communications industry than is the radio and television industry. To argue, therefore, that because the radio and television industry is limited, the FCC has the duty to view past broadcasting performance and proposed program schedules to insure that those who are given a license to broadcast will use the license in the public interest is to give the industry a uniqueness which it does not in fact possess. The radio and television industry is unique in that its particular limitation necessarily requires licensing, but it is not unique because it is limited to those who wish to enter it. Every communications medium is confronted by limitations, whether they be market, cost, or physical! To distinguish the radio and television industry because of its particular limitation, and to allow government review on that basis is to read a distinction into the first amendment which does not exist.

Another approach used by the Commission in attempting to distinguish the particular medium it regulates was stated in a Network Programming Inquiry, Report and Statement of Policy⁷³:

We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. As we stated in our petition in *Grove Press, Inc. and Readers Subscription, Inc. v. Robert K. Christenberry* (Case No. 25,861) filed in the U.S. Court of Appeals for the Second Circuit, "radio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature * * * Thus, for example, while a nudist magazine may be within the protection of the First Amendment * * * the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464. * * * Similarly, regardless of whether the 'four-letter' words and sexual description set forth in 'Lady Chatterly's Lover', (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions." Nevertheless, it is essential to keep in mind that the basic principles of freedom of speech and the press like the First Amendment's command do not vary.

⁷³ 25 Fed. Reg. 7291, 7292 (1960).

While the Commission's assertion that radio and television programs come into the home and reach children is clearly beyond argument, to justify the distinction the Commission is attempting to make requires a similar assertion that the other media do not likewise come into the homes of the public. It is reasonable to assume that a large proportion of the publications purchased by the public are taken into their homes for reading, and that these publications are kept out of the reach of children, if at all, by parental supervision. One might well ask why parental supervision should not be responsible for the programs the child views on television or hears over the radio. With various publications containing an advance description of programs to be broadcast by each station, the emotionally mature persons of the household should be able to ascertain which programs the less mature members should not view.

Perhaps the strongest approach used by the FCC to justify its entrance into the programming area is that its particular method of reviewing past broadcast conduct and proposed programming schedules does not violate section 326 or the first amendment. The position of the Commission is that the individual applicant chooses his entire program format without supervision by the Commission, and is free to broadcast as he wishes during the three-year license period. At renewal time, however, the Commission will take the past record into account and look at the proposals an applicant makes for the future, but this is done only to see that the balance and structure of the applicant's format meets the needs of the community he reaches.⁷⁴

As was previously noted, the court stated in the *KFKB* case⁷⁵ that reviewing past broadcast conduct was not censorship because the programs were not subjected to prior scrutiny. This argument would be much stronger were it not for the fact that the Commission not only looks to see that an applicant broadcasted properly in the past, but it carries the past performance forward as a demonstration of what the applicant is likely to do in the future.⁷⁶ This was the opinion of one writer⁷⁷ who strongly criticized the *KFKB* case by stating:

The inference is irresistible that the application was denied because of what the appellant intended to release in the future; the commission was in the position of saying that in view of the appellant's past conduct they knew what the future conduct would be

⁷⁴ See note 69 *supra*.

⁷⁵ See text at note 53 *supra*.

⁷⁶ This is indicated by the opinion in *Sangamon Valley Television Corp.*, 22 FCC 1167 (1957), quoted in the text at note 52 *supra*.

⁷⁷ Caldwell, *Censorship of Radio Programs*, 1 J. RADIO L. 441, 470 (1931).

as well as if the actual programs had been submitted to them, that they considered those (future) programs, had disapproved them and would not license appellant to release them. This is not something resembling censorship, it is censorship in fact, the very essence of it. To say, under these circumstances, that because past releases had not in fact been subjected to prior scrutiny, therefore there was no censorship, is a misconception of the practical effect of the decision as well as of what constitutes censorship.

One further point that should be noted here is the apparent difficulty in reconciling the *KFKB* case with *Near v. Minnesota*,⁷⁸ decided in the same year by the Supreme Court. The *Near* case held previous restraint of publication of a newspaper unconstitutional. It was argued by one writer⁷⁹ at the time both cases were decided that:

Subsequent punishment is that form of government control which prevents publication through fear of consequent penalties or the deprivation of some right. Obviously, the fear of punishment has the indirect effect of a previous restraint.

The indirect previous restraint involved in the radio and television industry is the refusal to renew a license which is of obviously great value to the licensee. If the two opinions are compared, the logical conclusion to be drawn is that a radio or television station can be denied the right to exist for broadcasting material that is deemed not in the public interest by the FCC, while the press is protected by the first amendment and can publish the same material without fear of governmental repercussions.⁸⁰

The criticisms applied to reviewing past conduct can be applied even more strongly to the viewing of future programming schedules by the FCC. The Commission, however, points out that the "ascertainment of the needed elements of the broadcast matter . . . remains primarily the function of the licensee."⁸¹ Thus, the FCC seems to say that the licensee is free to choose his programs, but the Commission still has the power to judge whether or not the

⁷⁸ 283 U.S. 697 (1931).

⁷⁹ Siegel, *Censorship in Radio*, 7 AIR L. REV. 1, 18 (1936).

⁸⁰ *Ibid*: "For the oral dissemination of language, a broadcasting station can be deprived of its very existence, whereas the daily press would be protected by the First Amendment if this same material were published. The net result then is that every broadcaster in the country awaits with fear and trembling, the action of the Federal Communications Commission. Even though the broadcaster study published regulations with ever so much diligence, he must need have a crystal ball or a clairvoyant to know whether the Commission is going to like his programs or not."

⁸¹ NETWORK PROGRAMMING INQUIRY, REPORT AND STATEMENT OF POLICY, 25 Fed. Reg. 7291, 7295 (1960).

over-all balance of the programming schedule is in the public interest. It is difficult to surmise why the distinction is made between one program and a multitude of programs. Surely, if judging an individual program would involve the taste of the Commission, judging a group of programs necessarily involves the same taste. In other words, it would be an impossibility for the Commission to determine whether or not the schedule of programs for a typical week is good or bad if they could not determine whether the individual programs within that schedule are good or bad. Yet, the Commission has repeatedly denied itself the right to examine individual programs on the ground that such judgment would surely be censorship.⁸² The reasoning to be extracted seems to be that taste judgments and censorship decrease as the amount of matter under scrutiny increases. Overlooked is the basic fact that in determining whether either an individual program or a schedule of programs is in the public interest, a conclusion must be drawn as to the needs of the public. If that conclusion is said to rest on taste in one instance, it cannot be said to rest less on personal taste in the other.

The difficulty in allowing the FCC to exercise control over the over-all policies of a licensee, while refusing it authority to prohibit the broadcasting of an individual program, is that the first amendment, and presumably section 326, are applicable in both areas. The danger in allowing the FCC to control the policies of a licensee can readily be pointed out by an analysis of *Mayflower Broadcasting Corp.*,⁸³ where the Commission determined that editorializing by stations was not in the public interest. In that case Mayflower and the Yankee Network were both applying for the same license. Yankee finally received the approval of the Commission only after filing affidavits that its editorial policy had been changed. The Commission effectively changed this policy of the station by stating: "A truly free radio cannot be used to advocate the causes of the licensee."⁸⁴

The position of the Commission, commonly referred to as the Mayflower doctrine, seemingly is in accord with the Commission's

⁸² *Id.* at 7294; *Hearing on the Nomination of Newton N. Minnow To Be A Member of the Federal Communications Commission For The Unexpired Term From July 1, 1954, and for a 7-year Term Commencing July 1, 1961, Before the Senate Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 11 (1961)*. This reasoning is discussed in 2 CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 641 (1947).

⁸³ 8 FCC 333 (1940).

⁸⁴ *Id.* at 340.

present position. No individual program was censored. The Commission merely declared that editorializing by a station was not in the public interest, which implies that the Commission found that the communities reached by Yankee did not require or need editorialization. The FCC did not, however, explain why newspapers are free to editorialize and radio is not. During the nine years that the Mayflower doctrine remained in effect, no station felt that it was worth risking a license to challenge it. Then in 1949, a Commissioner asserted that the doctrine "violated the First Amendment."⁸⁵ It is interesting to note that the amount of editorializing that a station proposes is now one of the factors to be considered in the over-all balance of its programming schedule.⁸⁶

One further limitation upon agency control, heretofore unmentioned in this article, was stated by the Supreme Court in the *Sanders* case:⁸⁷

The sections [of the Act] dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

Because broadcasting is essentially a free enterprise, it is reasonable to assume that a licensee will choose the programs he broadcasts in a manner that will allow him to effectively compete with his own and other media of communication. The industry is supported by advertisers wanting to exhibit their products or services to the largest possible audience. Therefore, for the licensee to compete with other stations, it is necessary for him to determine which programs will receive the greatest approval from the audience he reaches. The FCC realizes how effective public approval is in influencing the opinion of the licensee, for it recently stated:⁸⁸

But the most important factor is public demand. The public knows what it wants and is both quick and eager to make its desires known. That the public has this power to influence the programming directed toward it we deem appropriate, the public being, after all, the beneficiaries of the trusts we create.

It is apparent that the program format of a station licensee determines his effectiveness in competition. If then, he chooses his

⁸⁵ *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1259 (1949) (separate opinion of Commissioner Jones).

⁸⁶ See criterion considered by the FCC discussed in the text at note 55 *supra*.

⁸⁷ 309 U.S. 470, 475 (1940).

⁸⁸ *Enterprise Co., Pike & Fischer Radio Reg.* 816, 818 (FCC 1954).

programming schedule on the basis of FCC policy instead of public acceptance, his competitive effectiveness is reduced. The fact that other station licensees are also regulated in the same manner by the Commission becomes less important when it is realized that the radio and television licensee not only faces competition from other stations in his own media, but also must compete with the other forms of communication, such as motion pictures, newspapers, and magazines,⁸⁹ which have no similar regulation. If the licensee bends to the judgment of the Commission, he loses the optimum public support he could potentially enjoy, and thereby loses a portion of financial support from advertisers who now prefer to use a more effective medium of communication. As long as competition determines the financial viability of the radio and television industry, it is arguable that competition, and not a governmental agency, should determine the programming policy of the industry.

The foregoing discussion casts doubt upon the FCC's power to enter into the programming area. If it is to be conceded, however, that the radio and television industry is so dynamic and its effect upon the public is so great that judicial decision should declare that its freedom to broadcast program matter should be supervised to some degree, it is questionable whether or not the "public interest" standard is sufficiently clear to allow such restriction.⁹⁰ While this criterion may be sufficient in delegating to the FCC the power to issue licenses and allocate frequencies, it is questionable whether or not such criterion is sufficient to allow the Commission to enter the first amendment area and view the programming policies of a licensee. In *Burstyn, Inc. v. Wilson*,⁹¹ the Supreme Court refused to allow a censorship board to prohibit the showing of a motion picture on grounds that it was "sacrilegious." In a concurring opinion, Mr. Justice Frankfurter stated:⁹²

We not only do not know but cannot know what is condemnable by "sacrilegious." And if we cannot tell, how are those to be governed by the statute to tell.

It is this impossibility of knowing how far the form of "sacrilegious" carries the proscription of religious subjects that makes the term unconstitutionally vague.

⁸⁹ GOLENPAUL ASSOCIATES, INFORMATION PLEASE ALMANAC 582 (1962) indicates that a large part of the advertising percentages previously held by other media have been reduced while the percentage held by television has increased. It is implicit in these statistics that the various media of communications are in competition with each other for maximum support from the advertising market.

⁹⁰ See 2 VAND. L. REV. 464 (1949).

⁹¹ 343 U.S. 495 (1952).

⁹² *Id.* at 531 (Frankfurter, J., concurring).

If the term "sacrilegious" is too vague to justify imposing restraints upon a communications medium, it is tenable to assert that "public interest, convenience, or necessity" is even more so. The danger of such a broad standard is clearly pointed out in the *Mayflower* case⁹³ and its subsequent ramifications. In *Kunz v. New York*,⁹⁴ the Supreme Court explained the necessity of stating adequate reasons to justify prior restraint of speech by stating:

It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows . . . an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

It would seem that this statement is directly applicable to the power of the FCC in the programming area. At the present time the Commission has wide discretionary power to determine what is and what is not in the public interest. While this standard is adequate for the purposes of requiring licensees to be technically and financially capable to broadcast, it is too vague to be of use in determining questions in the area of freedom of speech and of the press.

VI. CONCLUSIONS

In view of the reasons behind empowering the Commission to issue and renew licenses, and in view of the limitations provided in the first amendment and the Act itself, it is questionable whether the present situation can be justified. Most of the support for the Commission's argument for control comes from the "public interest" standard established by Congress. The laws enacted by Congress, however, must be read with the limitations imposed by the Constitution. In the present situation, it is arguable that Congress intended the public interest standard to be the interest of the public in seeing that radio stations would not overlap and cause a loss of the effective frequencies. The Commission has the power to do this without entering into the programming area of the industry, for, as previously noted, the programming policy is only one of many fac-

⁹³ 8 FCC 333 (1940).

⁹⁴ 340 U.S. 290, 293 (1951). In the *Kunz* case New York City had an ordinance making it unlawful to hold public worship on the streets without a permit. Appellant was a Baptist minister who previously had obtained a permit which was revoked. He again applied and was refused. Subsequently he was convicted for violating the ordinance.

tors which the Commission takes into consideration when granting or renewing a license.

If the doctrine of free competition is to prevail, as was indicated in the *Sanders* case,⁹⁵ the industry must be free to determine the public demand and to cater to that demand. When governmental control is substituted the dangers sought to be prevented by the Constitution begin to loom beneath the surface. This is perhaps best expressed by the dissenting opinion in *Public Utilities Comm'n v. Pollak*:⁹⁶

Once a man is forced to submit to one type of program he can be forced to submit to another.

It may be but a short step from a cultural program to a political program The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice.

If, however, future judicial determination indicates that the FCC may remain in the programming area, it is submitted that the present standard is too vague. A more definite and restricted standard would alleviate much of the confusion presently existing in the area. Until such time as Congress does prescribe a more definite standard, it is questionable whether the FCC should be allowed to use the programming policies of an applicant in determining whether or not a license or a renewal should issue.

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⁹⁵ 309 U.S. 470 (1940). See text at note 87 *supra*.

⁹⁶ 343 U.S. 454, 469 (1952) (Black J., dissenting).