

6-1-1972

# Public Interest, Convenience, and Necessity: The Myth of the FCC

Patrick J. McDonough

Follow this and additional works at: [http://scholarship.law.nd.edu/new\\_dimensions\\_legislation](http://scholarship.law.nd.edu/new_dimensions_legislation)



Part of the [Law Commons](#)

---

## Recommended Citation

McDonough, Patrick J., "Public Interest, Convenience, and Necessity: The Myth of the FCC" (1972). *New Dimensions in Legislation*. Paper 5.

[http://scholarship.law.nd.edu/new\\_dimensions\\_legislation/5](http://scholarship.law.nd.edu/new_dimensions_legislation/5)

This Article is brought to you for free and open access by the Law School Journals at NDLScholarship. It has been accepted for inclusion in New Dimensions in Legislation by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

"PUBLIC INTEREST, CONVENIENCE, AND NECESSITY":  
the Myth of the FCC

Patrick J. McDonough\*

Introduction

Broadcasting is an industry which has grown rapidly in proportion to the technological progress of the twentieth century. It is considered both a medium for education, and a perverter of minds; a means to attain culture, and a 'vast wasteland'; a meaningful part of our lives, and a 'sea of uninteresting trivia'. But perhaps more than any of the above, it is a business----a business which does not sell its product door-to-door, or in the supermarkets, but, rather, by its mere existence in the air and its subsequent availability at the turn of a dial.

The early days of broadcasting brought great havoc. Sometimes the later days seem no better. But almost from the beginning, the government has seen the need for regulation---whether it be for 'public interest, convenience, and necessity', or for the regulation of competition, the vehicle has been at hand. The Federal Communications Commission has loomed as a

---

\*Second Year Student, Notre Dame Law School;  
Co-Director, 1972-1973  
Notre Dame Legislative Bureau

mysterious body of censors in the minds of many: little old ladies sitting next to TV screens, cutting out obscene words from talk shows. Of course, this is ridiculous, but in light of how the FCC conducts its affairs and spends our money (who knows how much?), maybe the 'little old ladies' theory is not that far-fetched.

Confusion over its role has been the characteristic of the FCC from its inception. Vast power now lies at its finger-tips provided by legislation containing a wide range of discretionary power. As an independent agency, it oversees 7,400 radio and television stations which are subject to license renewal every three years.<sup>1</sup> In practice, however, the "independence" and the "subjection" are acutely paradoxical. There is great sensitivity to Congressional pressure, especially when discussion concerns budgets and automatic renewals are the overriding characteristics.

This article will consist of treatment of the statutory basis of the FCC, and a general discussion of the policy arena in which the bureaucracy operates. Specific areas of the FCC's operation, illuminated by cases will serve as indication of the bureaucracy as a whole. The concentration here will be upon broadcasting and related FCC functions. The final product will be an evaluation of the public policy and predictions for the future.

# 1. Regulation: The History and Development

## A. Early Development

There was uproar in the scientific world in 1901 when Marconi first used electromagnetic waves to transmit voices. Great uproar among the public followed Fritz Kreisler's opera solo in Carnegie as it was transmitted over KDKA in Pittsburgh. However, there was even greater uproar, and not out of astonishment and marvel as before, by 1927, among scientists, public citizens, and government officials over the plight of broadcasting.

Fierce competition for audiences, furor over the many quacks and buffoons broadcasting unchecked, and enormous static and interference stigmatized the industry. The result was the invocation of the Third National Radio Conference in 1927, at which Herbert Hoover proclaimed:

"The whole broadcasting structure is built upon service to listeners..Broadcasting must be conducted to meet their demand, and this necessarily means higher character in what is transmitted and better quality in its reproduction to the ears of the listener"<sup>1</sup>

The Conference's main product was the Radio Act of 1927, which, in turn, established a 5-man commission to grant, renew, and revoke licenses.<sup>2</sup> After one year, all authority was to be vested in the Secretary of Commerce, except that he would have no power to revoke a license and was to refer applications, renewals, and

modifications to the commission whenever there was controversy.<sup>3</sup>

The Federal Radio Commission, as it was called, received several extensions of this power from Congress, and consequently remained the holder of all authority until 1934. These extensions appear to serve as nullifications of a very strong potential for territoriality conflict, as discussed by Downs, between the commission and the Department of Commerce.

#### B. Middle Development

Initially, we may view the impetus toward regulation as a response by government to the needs and desires of the public---the listeners. However, just as the major impetus for the Constitutional Convention of 1789 was regulation and control of commerce, the competition and rapid expansion of interstate commerce---telephone, telegraph, and radio---prompted the Roosevelt administration to expand the concept of the FRC.

The division of authority, as it appeared on paper at least, became extinct with the passage of the Communications Act of 1934. Thus, the Federal Communications Commission was created before the Secretary of Commerce exercised any authority whatsoever. Congress appeared to be mindful of potential conflict as it was careful not to encroach upon the authority of states. Moreover, regulation was intended only for

operations which crossed state borders.<sup>4</sup> This was in spite of a 1933 Supreme Court decision, which held that: "...state lines do not divide radio waves; regulation of them, therefore, is appropriate and essential for efficient use of the radio."<sup>5</sup> A similar opinion was handed down the following year in U.S. v. Gregg.<sup>6</sup>

Thus, it seems that the Court was making policy and creating power for the FCC; but, looking to the statutes it will be seen that the statutes were more than amply broad enough to allow the FCC to act on its own---judicial gloss was merely absorbed as further support. The FCC seemed reluctant, at first, to assert its authority, but slowly it began to exert power over all transmissions. The territoriality conflict potential in respect to the states was officially ruled dead in 1944, when the Supreme Court held that attempted exercise of authority by state agencies in this field was invalid.<sup>7</sup>

## 2. The Structure of the FCC

The Commission consists of seven commissioners, appointed by the President with the advice and consent of the Senate, one of whom is designated as Chairman.<sup>8</sup> No more than four may be of the same political party. The seven are to function as a unit, exercising general supervision over the work of the agency.<sup>9</sup> This

structure would seem to maximize conflict, something which is prevalent in regulatory commissions, and in regulation in general according to Lowi. The Chairman represents the agency in all legislative matters, conferences, and communications with other governmental offices, departments, or agencies, and generally coordinates and organizes the work of the Commission.<sup>10</sup>

The Commission was a compartmentalized organization until 1937, when this characteristic was deemed unsatisfactory.<sup>11</sup> The areas of broadcast, telephone, and telegraph had two commissioners each, with the Chairman being the third member of each division.<sup>12</sup> This resulted in varied workloads, and thus varied responsibility. The competency of the commissioners in the area assigned was often limited, and especially so with the Chairman who sat on three divisions' decision-making sessions.

A reorganization attempt was begun in 1937 with an aim toward unit operation where each commissioner was to have a voice in policy determination.<sup>13</sup> The staff level at this time consisted of only four departments. This system was found to be inefficient also, as it was observed that no one below the seven commissioners was in a position to coordinate and direct the daily work of the Commission effectively.<sup>14</sup> Thus, the next reorganization attempt was to gear

toward achieving more economical and efficient operation through reorganization of the staff.

Selection of commissioners and staff members in general provides a choice between two sets of values: 1) according to specialized knowledge or skill; and 2) according to industry to be regulated.<sup>15</sup> There are, indeed, dangers with both of these alternatives---some of which blatantly are reflected in the FCC from time to time. Under the first basis, excessive costs will surely ensue, but there is the assurance that the decision-making will be done properly, with full disclosure of important considerations.<sup>16</sup> The second possesses the danger that staff members will prejudice decisions by failure to make known all the information and points of view which ought to be considered.<sup>17</sup> The Hoover Commission of 1949 recommended the second. This eventually gained acceptance, largely through the attacks by Congress on the "permissive decisional organization"<sup>18</sup> and the great backlog of cases. Congress saw three bureaus within the FCC, acting independently with jealousy and dictatorial control over the expedition of cases.<sup>19</sup>

If the Senate's observation was valid, it would seem that bias was being brought into the decision-making process causing a limitation in organizational efficiency. On the basis of Downs' characterizations,



it would appear that self-interest was riding high---climbers and/or conservers were ruling. Since the Commission was 17 years old at that time, the logical conclusion with respect to Downs' theories is that conservers were running the show in the FCC.

Both houses urging change, the FCC began to adapt to a system whereby integrated bureaus were to function on the basis of the Commission's principal workload operation and other divisional organizations were to be formed that the FCC deemed necessary.<sup>20</sup> A "review staff" was formed to assist in preparation of summaries of evidence. The sum effect of the reorganization was greater flexibility in the delegation of authority---functions could now be delegated whenever necessary to employees, as well as to commissioners.

### 3. The Broadcast Bureau

The Broadcast Bureau of the FCC, the bureau within the agency most concerned with in this paper, consists of the Office of the Chief and eight divisions: Broadcast Facilities; Renewal and Transfer; Complaints and Compliance; Rules and Standards; Economics; License; Hearing; and Network Study.<sup>21</sup> The Bureau is served constantly by the Office of Hearing Examiners of the FCC which provides for appointment of hearing examiners, who, in turn, preside over adjudicatory proceedings.<sup>22</sup> The Chief Hearing Examiner is the

liaison for the FCC and the Examiners in securing advice and information from outside sources concerning the improvement of administrative procedures, and he recommends changes in rules to simplify and expedite the conduct of hearings.<sup>23</sup>

The Offices of the General Counsel and the Chief Engineer are among the most important in the decision-making process information-gathering. The former cooperates with other officers in sending advice with respect to rule-making matters and proceedings affecting more than one bureau in the Commission; he is also in charge of litigation and advises on proposed legislation.<sup>24</sup> The latter, who works with the Counsel when the jurisdictions of two or more bureaus are involved, advises and represents the FCC in the allocation of radio frequencies.<sup>25</sup> In addition, the Broadcast Bureau works in conjunction with the more functional departments: Office of Administration; Secretary; and the Office of Reports and Information which generally deal with the housekeeping chores of the FCC.

It is obvious, then, that the funneling of information is designed for maximum cooperation among the various offices involved in the decision-making process. Of the above-mentioned FCC staff, the following are deemed "decision-making personnel": Commissioners; Chief of the Office of Opinions and Review;

Review Board; Chief Hearing Examiner; General Counsel; Chief Engineer; and their respective staffs.<sup>26</sup> Moreover, the FCC appears somewhat unique in that its internal rules denote specifically who is to make decisions.

#### 4. The Authority of the FCC

The totality of the powers of the FCC are best summarized in the following memo by Joel Rosenbloom:

1. The Communications Act of 1934....authorizes the FCC to classify broadcasting stations on the basis of the general types of programs such stations transmit, to make reasonable judgments as to the public interest served by the programs offered by each class of stations, and to assign radio frequencies...
2. (The) Act authorizes the Commission to consider the nature and content of the programs proposed to be broadcast by individual applicants in deciding whether to grant, construction permits or station licenses...authorizes Commission to consider the general nature and content of the programs which have been broadcast in deciding whether to renew, modify or revoke broadcasting station permits or licenses, whether to consent to the assignment of the same or to consent to the transfer of the control of broadcasting permittees or licensees.
3. (The) Act forbids the Commission to censor, i.e. to prevent the broadcasting of any individual program on the ground that its content is objectionable. It also forbids the Commission to select broadcasting licensees on the basis of the social, political, or economic views embodied in their programs.... However, the Act both permits and requires the Commission to make reasonable judgments as to the nature of the broadcasting program service which serves the public interest and to carry out its licensing functions on the basis of such judgments.<sup>27</sup>

Most of the powers of the FCC are in licensing. The Act provides for the granting of construction permits, as well as station licenses, and the FCC will determine who gets these on the basis of applications setting forth such things as: citizenship character; financial and technical qualifications; proposed frequency; power; hours of operation; and purposes for which station is to be used (i.e., type of programming). Thus, the broad range of discretionary power is evident in the policy-making process.

All licensing power and authority generally related to broadcasting is based upon the notion that the public owns the airwaves (the broadcast channels), and stations are allowed to use them with a waiver of control in deference to the FCC.<sup>28</sup>

#### A. Purpose of the Policy

The general purpose of the policies of the FCC is to prevent chaos and insure satisfactory service as is understood under the "public interest, convenience, and necessity" standard of §301 of the Communications Act. A general aim is stated in §303: "fair, efficient, and equitable distribution of radio service." However, as early as 1931, during the days of the old FRC, the notion that independent regulatory agencies actually regulate competition and not simply for the consumer's benefit can be seen developing in a Supreme

Court case holding: "...it is in the interest of the public and common justice to the owner that the status of broadcasting station be constructed and maintained in good faith, and should not be injuriously affected except for compelling reasons."<sup>29</sup>

Thus, it appears that the drift from concern only with public interest to the "compelling reason" standard may have been an omen for the future. This notion is further supported by §326, which deals with censorship (supra at 7).<sup>30</sup> This section indicates Congress' desire to restrict the FCC's power---but actually, this is the only place in the Act where there is a definite restriction on its authority. Theoretically, this section could be circumvented, and is at times, in that the FCC views past performance in handing out renewals; it determines whether the station's operation has been in the "public interest."

In simplest terms, the FCC has regulatory power with respect to any type of radio transmission and can require every station, regardless of its power or range, to have a license and to operate under the rules of the Commission.<sup>31</sup> The FCC more than regulates traffic. The Court has held that it holds the burden of determining composition of traffic.<sup>32</sup> This, in effect, amounts to the authority to evaluate past program

performance in respect to consideration of renewal applications as set out in the Act itself.

What has been developed here is the responsibility factor which Downs holds as fundamental to bureaucratic policy-making. The factor is large, indeed, in the FCC. In addition to what the Court has held and the "public interest, etc." standard of §301, the impact of radio-TV is immense. They are vital communications media for the social, cultural, and political development of our people---the responsibility of the FCC in this regard is greater than any other government agency or department.<sup>33</sup>

At this point, it would be well to set a pattern. In order to gain an insight into some of the nuances of policy-making in the FCC, licensing will be focussed on as an illustration. This will be followed by a discussion as to the legitimacy of the regulatory process. And, finally, an evaluation will be made as to whether the "public interest, etc." are really served.

#### B. Licensing

Discretion provided the FCC by the Act is great in the area of licensing, especially in regard to determining minimum qualifications. For example, under the heading of "technical qualifications," there are included staffing, studio, and equipment plans.<sup>34</sup> The general requirement is that they, "...must be adequate

to effectuate to a reasonable degree the programs (the station) has promised".<sup>35</sup> "Reasonable" is defined nowhere within the Act---its determination is entirely within the discretion of the FCC. Another example is the character qualifications: honesty, reliability, moral, financial and social responsibility.<sup>36</sup> Again, the FCC alone determines the breadth of meaning.

An example of application of this discretion bears on the above policy. A newspaper applicant was denied a license for a past attempt to coerce advertising contracts.<sup>37</sup> No law was actually violated. But in the FCC's discretion, that was immaterial---it was enough that behavior standards of an applicant in business affairs and dealings with the public raise serious questions as to his ability to meet the requirements of a broadcast license.<sup>38</sup> "Serious" is, of course, within the discretion of the FCC.

Moreover, as typical examples of use of discretion by the FCC, show there are no hard and fast rules as to qualifications nor for application of the standards. In this respect, the FCC resembles the neutral competency category discussed by Kaufman: generally there is the overriding aim of "public interest"; the approach is a case by case method, as epitomized in licensing---totally ad hoc; and in the absence of

hypothetical rule-making there appears an abundance of administrative rule-making, common to that category.

Generally speaking, the burden of proof is upon the applicant.<sup>39</sup> The FCC, in choosing contenders, tends to prefer stations which are to be owned and controlled by persons living in the community where the station is operating.<sup>40</sup> Experience in the broadcast field is also viewed as an important aspect of qualifications in deciding between applicants.<sup>41</sup> Programming itself is an important element; he who serves particular needs and interests in the particular area in which station will operate, ideally, also is to be favored. "Need", as seen by the FCC, encompasses the following: news; issue programs; community religious and educational shows; etc.<sup>42</sup> Therefore, necessarily, environment is a factor in the decision-making process. Live programming is seen as very important. Of even more significance is the content and promise of implementation of the proposal which the applicant makes.<sup>43</sup>

Despite all the factors and considerations mentioned above, there is no general rule as to who gets licenses and who does not. The policy which results is simply the product of the FCC acting over a course of years. Usually, preferential treatment is given to cultural, educational, issue, talk shows, followed by



stations which offer diversified programming. This may not be definitive either, as even Newton Minow, ex-Chairman of the FCC, questioned the relevance of the policy as the ratings show that a substantial number of people prefer old movies to public affairs.<sup>44</sup> Further, it might easily be predicted that in sub-standard socioeconomic-educational areas, entertainment and sports events would be most desired, and consequently, an attempt to stress the programming mentioned above there, would result in a great deal of channel-changing.

Through past decisions, a process has developed in one area of licensing which serves as an excellent example of discretionary power, ad hoc policy-making, and lack of specific limitations of power, to sum up the area of licensing. This area is "ownership." At the present time, one cannot own more than 7 AM stations, 7 FM's, 5 VHF's, and 2 UHF's.<sup>45</sup> There does not appear to be that much of a restriction in respect to pure numbers.

The policy aims of the FCC in the area of ownership are to preclude concentration of control of mass media, and to obtain the greatest possible diversity of programming, sources, and viewpoints among the many stations.<sup>46</sup> Here, again, there are no specific rules--- FCC policy impedes concentration and induces diversity

as provisions are designed to maximize competition among broadcasters.<sup>47</sup> Of course, the actions are guided to an extent by the Act<sup>48</sup>, and also supported by the courts, which have held that broadcasting should best exist as a business of free competition.<sup>49</sup> However, neither has hindered the FCC in its discretion.

Generally, in regard to multiple ownership, the FCC's philosophy appears to be that it believes that the better method of creating diversity of viewpoints in an area, is to grant the broadcast authorizations to as many separate owners as possible.<sup>50</sup> The FCC has not yet established a definite rule prohibiting, for example, newspaper ownership of broadcast facilities--- nevertheless, application of its philosophy in the policy-making process would necessarily preclude such. In the ad hoc case by case analysis of applications, comparisons are made between the paper applying and other papers, as well as other applicants.<sup>51</sup>

There appears to be unbridled discretion in this specific case of newspaper applications. Cases go both ways. An applicant having no newspaper interests is ordinarily preferred over one who controls, say, the only newspaper in the community, but these circumstances of ownership alone, do not necessarily exclude one in light of past decisions.<sup>52</sup> All considerations as to determine as to which applicant will serve the

public interest are supposed to be weighed. Where equally qualified, the FCC will usually go with the non-owner.<sup>53</sup> It might be inferred logically that the FCC prefers moderate concentration of control of broadcast facilities to a combination of broadcast and newspaper ownership in light of previous cases, and the FCC's own standard of "experience" as a factor in selection of applicants. Indeed, a fine line is created here.

Within the multiple ownership area, then, it appears that the FCC does not favor a grant to an applicant where it may tend to constrict or control the dissemination of information in the area.<sup>54</sup> In a comparative hearing, evidence that one applicant owns other broadcast facilities or a newspaper may be the 'kiss of death', but not necessarily, since it depends upon an enormous number of factors entirely within the FCC's discretion.

These decisions reflect both quantitative and qualitative comparisons. They are, indeed, the type that Lindblom would categorize as "rational-comprehensive" (root), despite the element of successive comparisons, which is often indicative of the 'branch' method. The reason for this analysis is contained in the fact that the ends are set forth prior to the decision---there results an end-means analysis

throughout the mechanism of comparison. The test of "good" policy is generally that shown to be most appropriate or convenient means of the desired end, as evidenced by the fact that cases go both ways here.

##### 5. Justification for the Authority of the FCC

A brief mention of the FCC's statutory authority was made earlier. Some of the policy-making of the agency has also been demonstrated. The connection between these two areas comes in many forms of justification and legitimization. Vague statements such as the following often serve to explain the authority:

"The Commission has the legislative authority to take actions, make rules and regulations, and issue orders, not contrary to law, as may be necessary to carry out its functions and may conduct proceedings in a manner as will best conduce proper dispatch of business and to the ends of justice." (Emphasis added)<sup>55</sup>

In addition to being void of substantive meaning, a statement such as the above appears humorous. What is really being said is that the FCC has enormous breadth in discretionary power.

Licensing has been the subject of the expression of pre-determined goals in the form of vagaries. A July, 1960 policy statement on programming, indicating root decision-making, is a prime example:

"The principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort...to discover and fulfill the

tastes, needs, and desires of his---service area."<sup>56</sup>

Viewing the enormous discretion and vagaries of language, questions are raised. How far can the FCC really go? Is the FCC utilizing legislative authority as it appears? Has Congress delegated unconstitutionally, power to the FCC? Are there any effective checks by the three 'official' branches of government? These questions have been answered to a certain extent previously. However, it would be well to approach them in more depth from the perspective of the Executive, the Legislative, and the Judicial and their relation to the FCC.

The only statutory provision relating directly to the President in the area of checking the operation of broadcasting is §606, which deals with emergency powers in time of war and national disaster. Of course, the President appoints the Commissioners within the guidelines noted previously, and he will obviously search for those who possess his philosophy. But direct contact from the day of appointment is minimal. The best case in point is the appointment of Nicholas Johnson in 1966 by President Johnson. The appointment was, indeed, for faithful service to LBJ, but Johnson soon proved that he was his own man in the FCC. The advent of the Nixon administration, and especially the appointment of Dean Burch to the Commission, brought

Johnson no closer to the Executive. In fact, he publicly scored Nixon for clearing Burch's appointment with the "great men" of broadcasting before announcing it.<sup>57</sup>

Congress, on the other hand, has retained an element of control in the FCC despite having given enormous discretionary power. Indeed, this is not "official control"...it is more one-on-one. Congressmen seek to please their constituents; thus, they may speak to the FCC in the latter's behalf. Inevitably, the constituency contains broadcasters...sometimes influential, powerful and wealthy broadcasters. Members of Congress more easily come in contact with the broadcasters than they do with private citizens, and they very easily come in contact with the FCC. The result on FCC policy is a certain degree of negation of independence. It becomes 'independent' to transmit what Congressmen and itself come to terms on. Examples of what transpires when they do not come to terms are the delay of the FCC Revised Program Policy in 1960 by pro-broadcaster Congressmen<sup>58</sup>, and the defeat of a 1961 reorganization proposal by a broadcast lobby<sup>59</sup>.

There are also official connections between Congress and the FCC in the form of investigatory hearings and action on legislation. However, the FCC essentially responds on the level of finance.

"The House Commerce Committee and its communications subcommittee habitually meddle into FCC policy matters at the behest of the broadcasting industry. The Committee has initial legislative jurisdiction in the House over the FCC..."<sup>60</sup>

That which occurs at the committee level of Congress deals largely with "who pays?" and "how much?" Here, Kohlmeir's notion of individual involvement and influence takes form. He comments that "...over 24 Congressmen are known to have personal interests in broadcasting stations..."<sup>61</sup> It is a well-known principle that those Congressmen who control the purse strings stand first in line for the bestowal of gifts. For example, Kohlmeir points out that Senator Magnuson never had to ask for favors from the FCC...his company simply received licenses automatically.<sup>62</sup> This intertwining and entanglement of the FCC with Congress, makes obvious the potential for a check on the FCC's discretion by Congress. The effect of such is not always good.

The courts, not really being technically equipped to concern themselves with the FCC, have generally adhered to a "hands-off" attitude. The FCC, on the other hand, has suggested that clarification by the courts of the doubt as to Constitutional limitation on the Commission's power to consider programming would aid the FCC in the administration of the Communications Act.<sup>63</sup> The result is somewhat of a stalemate. In some cases,

the FCC does not formulate rules, largely due to the lack of court opinion in certain areas.<sup>64</sup> For example a law which provides potential punishment of 2 years imprisonment or a \$10,000 fine for obscene or indecent language by means of radio communication<sup>65</sup>, has never been drawn into an FCC rule because of the above reason.

However, the courts, upon application of the Attorney General, may issue writs of mandamus commanding compliance with provisions of FCC rules as stated in the statutes.<sup>66</sup> With respect to the FCC's own policy-making, there is some conflict. The Supreme Court has generally adhered to the notion of an innate lack of spectrum space to be passed out in licensing<sup>67</sup> as justification for any FCC regulation. The Court also has clarified its own position with the FCC:

"Congress has charged courts with responsibility of saying whether the Commission has fairly exercised its discretion within the vague bounds expressed by the standard of 'public interest'".<sup>68</sup>

It is interesting that even the Court has taken note of the vagueness of FCC policy-making standards.

Consideration of the Fairness Doctrine, §315 of the Act, may give some insight into one area regulated by the FCC, that permits a judgment as to whether the Commission is exercising legislative power. On its face, of course, any such delegation would be



unconstitutional, but the breadth and sweeping quality of discretionary authority under the Act does not, per se, include Congressional powers. The Fairness Doctrine requires that, when a partisan position is expressed over a station, a reasonable opportunity must be afforded opponents of the view to present their side.<sup>69</sup> It also requires that when an editorial attacks one by name, there must be communication to him of a copy of the editorial, prior to, or at the time of broadcast.<sup>70</sup> No station is obligated to carry political broadcasting, but it must afford equal opportunity to all 'legally qualified candidates' in campaigns.

Does this infringe upon First Amendment rights of freedom of speech by press? The Court has held:

"Commentators and newsmen who criticize public officials, whether by 'editorial opinion' or by paid commercial, cannot be sued for libel, provided malice is not proven."<sup>71</sup>

Moreover, it would appear that radio and TV are protected. But the Court, again playing in the scarcity of spectrum space held in the famous Red Lion case, that:

"In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable to gain access to them for the expression of their views...the regulations promulgated by the Fairness Doctrine are both authorized by statute and constitutional."<sup>72</sup>

Meanwhile, the FCC's developed policy is that licensees have responsibility to present and encourage opposing views; more affirmative effort is required when the station, itself, is editorializing.<sup>73</sup> Thus, somewhere in the grey area between the First Amendment and the justifiable aim of the FCC to afford as wide a dissemination of viewpoints, lies the Fairness Doctrine.

#### 6. Impact of FCC Policy

The FCC holds as its chief concern the overall operation of stations, measured in terms of local "needs", and not individual programs or particular formats, or the way they are presented.<sup>74</sup> Thus, on the last count, broadcasters are given a wide range of discretion. Pursuing this end is one of the newest divisions of the FCC, Complaints and Compliance, established in 1960 in the Broadcast Bureau. It deals with complaints regarding radio and TV programming, and assists in the overall evaluation of station operations at renewal of license time.<sup>75</sup> Despite this innovation and the wealth of policy-making, it has been reported that within the FCC, 95% of the staff feel that broadcasters are no nearer the established goals than they were 20 years ago.<sup>76</sup>

Beginning with 1960, the FCC stressed heavily that it was the duty of the broadcaster to determine

needs, desires, and tastes of listeners and viewers in order to meet the public interest responsibility.<sup>77</sup>

However, certain types of programming have come under official disfavor, e.g., liquor ads, medical treatment prescriptions, racial and religious attacks, and the like.<sup>78</sup>

This area of FCC policy is paradoxical: public interest is determined with no direct public input into the policy-making process. All the information pertinent to maintaining standards is gathered by those who are regulated. The information is then directed to the FCC, where it is used in comparative hearings on original grants or in license renewal proceedings to determine whether the public interest standard and the balanced program doctrine are met.<sup>79</sup> We thus depend on the good faith of the broadcaster, ultimately, for the factual basis for decision-making.

Moreover, the results reflect a high potential of failure on "needs-desires" criterion, as mentioned before (supra p.202), and as Nicholas Johnson states: "Citizen participation in the FCC's decision-making processes is virtually non-existent...the FCC is a captive of the very industry it is purportedly trying to regulate<sup>80</sup>".

One of the greatest weaknesses of the FCC has been its undaunted adherence to the case-by-case

approach in decision-making. The FCC maintains that public interest is always considered fully, and that any change should be accomplished only through proposed rule-making.<sup>81</sup> Public interest considerations, as noted above, vis-a-vis the citizenry and the stumbling block of 'pro-broadcastism' in Congress causes one result: a lack of effectiveness in many areas.

Looking to the complex and confusing area of multiple ownership of broadcast facilities, once again as an example, supports the prior conclusion. Despite FCC "policy" against such, the top 10 markets, which include 40% of all TV households ( 20 million), have 40 VHF stations, of which 37 are multiply owned and the remaining three are owned by newspapers!<sup>82</sup> Of the top 50 markets, 75% of TV households, 111 of the 156 VHF stations are multiply owned, with the remaining 45 being owned by papers!<sup>83</sup>

Proposed rule-making to limit the number of stations in the top 50 markets was advanced in 1965, and little resulted until early 1969 when the FCC refused renewal of WHDH, Channel 5, in Boston.<sup>84</sup> This celebrated case, involving the TV station and the Boston Herald-Traveler, resulted in the allocating of a license to an independent group in a fit of unexpected activism in the FCC.<sup>85</sup> This occurred within one year of an open advocacy of the FCC's abolition by a

Commissioner--a period of great despondency in the FCC and the height of rubber-stamping!<sup>86</sup> WHDH was not judged to have failed in its duties as a broadcaster, although there was some quibbling over the lack of agricultural programming<sup>87</sup> (a strange topic, indeed, for Bostonians!). Rather, the FCC took away the license primarily to encourage diversification of ownership.<sup>88</sup> Such cases virtually never occur because of the Commission's traditional policy of treating licensee's past performance as automatic evidence of superior future performance,<sup>89</sup> (hence, the result of information-gathering performed by the regulated).

The reaction of Congress, let alone the broadcast industry, was something to behold. Congress urged the National Association of Broadcasters to prohibit the FCC from allowing competing applications for licenses, unless the original holder was found to be acting contrary to the public interest.<sup>90</sup> Meanwhile, Nicholas Johnson was defending the FCC's action by citing the market statistics, and stating: "The door has thus been opened for local citizens to challenge media giants in their local community at renewal time with some hope of success."<sup>91</sup> However, Congressional action closed that 'door' by passing legislation from among numerous bills which makes it virtually impossible for

one to challenge a present holder while applying for a license.<sup>92</sup>

Many held, and still hold that there are too many stations, and that decisions such as WHDH are necessary. Competition does not necessarily improve program quality; where there are a reasonable number of licenses in a market, the services are generally superior.<sup>93</sup> The market for broadcast programs is one from which the consumer is barred: what he would pay plays no part in determination of programs.<sup>94</sup> This is largely the basis for the arguments for the increase of development of pay-TV. However, the FCC's trace of activism has not carried over from WHDH, and has been cool to the idea, maintaining narrow restrictions under the auspices of a special bureau devoted to cable TV.

Extensive regulatory power generates a certain fear of bureaucracy that frequently makes administrative adjudication unbalanced.<sup>95</sup> Kohlmeir sees the FCC as fulfilling its role through the maximum use of discretionary power in a quasi-judicial, quasi-legislative manner. Though the FCC has no particular power to compel programming of a certain nature, it may generally approach the matter through license renewal, and thereby attain its goals. This is where the height of inconsistency is reached in the FCC.

The possibility of criminal action, under such things as the obscenity law, would surely be sufficient to cause broadcasters to obey. However, the FCC is one of the weakest agencies in applying sanctions which profoundly affect the exercise of its judicial functions. When commissioners fail to agree, station owners and networks can and do ignore the FCC.<sup>96</sup> Although the FCC frequently threatens action and dire consequences, more often than not the threat comes from a minority of commissioners.<sup>97</sup> When the Commission is united, however, its sanctions are impressive, for example, WHDH.

Until 1960, the FCC's only recourse for rule violations was the institution of proceedings for the revocation of licenses.<sup>98</sup> This 'death-sentence' was seen to be inequitable for minor violations, requiring much time and money to be expended in formal hearings, and was generally considered as one to be avoided by the Commission, no matter what the violation. There are now a rapidly growing number of penalties, forfeitures, and cease and desist powers available to the FCC.<sup>99</sup> However, many observers, including Kohlmeir, charge that the FCC, and independent regulatory agencies in general, are geared toward the regulation of competition. Tracing the FCC to the earliest days, it was seen that public interest was not the primary

impetus for its inception (supra, p.191), rather the intention was to serve expanding competition for the benefit of the industry. The vagaries of the "public interest, etc." standard, and specific events such as 'Nicholas Johnson's door closing', support this notion.

Indeed, the FCC is prime example of a supposed public agency engaged in private planning. Davis would call for a renewal of openness as a cure for the lack of public representation in policy-making.

#### 7. Lowi and the FCC

Conflict would seem to be the essence of a regulatory agency such as the FCC in developing regulatory public policy. Specific benefits and specific costs, with conflict at the heart of the process resulting in a great deal of open bargaining are the characteristics of the second category of Lowi's public policy-making analysis. Those qualities are not found, however, in the FCC. Dealings there are largely behind the scenes---there is no public input into the process. Benefits are general in theory, and in practice are geared along vague standards. And most significantly, conflict is muted by Congressional and industrial pressures exercised upon the FCC's operation. There is substantial backing-off, and only occasional holding of ground in conflict.



The lack of conflict is not by design, nor is it universal in the FCC as is characteristic in purely distributive policy-making. However, results of policy-making show narrowly distributed benefits in actual practice and widely distributed costs---the industry and the public, respectively. This is, indeed, characteristic of Lowi's first category. The FCC is not engaged in purely "porkbarrel" decision-making directly, but it often aids cronies of Congressmen, and there are losers in this game: the general public.

Class politics are the model of redistributive politics in Lowi's third category. A conflict of elites is theorized to occur in this type of public policy-making, and, indeed, the FCC officials, Congressmen, and industrial leaders seem to form a holy triumvirate worthy of the redistributive label. In addition, the FCC designedly, by statute at least, is aimed at a reshuffling of valuable commodities in society, namely: licenses and permits for the use of spectrum space.

Utilizing "coercion" as a guide in viewing Lowi's scheme of categories, varied conclusions regarding the FCC are possible. The likelihood of coercion is generally remote in view of the lack of consistent united decisions by the commissioners and the political games

with Congress and its committees. But the applicability of what little coercion there is, is both specific and general. Dictates from the FCC are primarily aimed at the entire industry; violations of them, however, are met with sanctions on a station by station basis. The former indicates a constituent policy, the latter, distributive policy. Indeed, since the FCC rarely responds to the public, one wonders if the constituency is not the industry itself.

It seems that when the likelihood of coercion is balanced with the likelihood of peaceful adjustment, the FCC seems to fall into the category termed "deadlock." This is keyed to the fact that the FCC's decisions are inconsistent with its statutory power, and, again, rarely unanimous. The public policy resulting thus appears to be distributive.

Viewing particular characteristics of the FCC with respect to the three categories and their general characteristics, it can be seen that variance abounds, in theory, but not so much in practice. Standards of jurisdiction (scope of authority) varies from specific to vague in the statutes. Sanctions are very specific, as is procedural implementation. This would seem to indicate regulatory public policy, or even redistributive, in light of the valuables being passed out. But it must be remembered that there are not many

valuables left---i.e., spectrum space has largely been consumed. In addition, there are not many WHDH cases resulting in redistribution of licenses. Further, since coercion in actual practice is, at best, fairly unlikely, the specificity of the regulatory and redistributive categories is out of step with reality.

Moreover, the scope of authority inherently affords enormous discretion---a loose standard has evolved. Implementation, directly affected by the discretionary power, is characterized by nebulous policy statements and justifications, resulting in selective application of authority---a vague standard. For example, to illustrate the two preceding statements, the Communications Act provides that stations must keep program logs<sup>100</sup>, but the FCC has never promulgated a standard as regard to the format of the logs.<sup>101</sup> Indeed, sanctions are specific when utilized, but are rarely implemented. The same is true regarding procedural implementation---the result being the effect of no sanctions and entirely administrative rule-making. And the last consideration, scope of statutory coverage, lends itself to the others and is dominated by discretionary power--vague as to its actual application.

The conclusion with respect to Lowi's categories: the FCC public policy-making is largely distributive.

### 8. Same Time, Same Station?

As Ronald H. Couse has said:

"We cannot expect a regulatory commission to act in the public interest, particularly if we have regard to its actions over the long period...their (the commissions') views are liable to be in tune with those who have political power."102

This implies what Kohlmeir believes: That the regulatory agencies, the FCC included, look at problems in industry terms. It is evident that it is not what the public wants that is transmitted through the airwaves, rather it is what the public authority wants. The latter can be traced back to the industry---it is they who gather the information.

Couse predicts:

"Broadcasting is likely to continue as a decentralized system, operated in the main by private enterprise. What programs will be broadcast will, therefore, be determined by the economics of the industry...programs... will be those most profitable to broadcast."103

And the New Republic has said:

"The commercial broadcasting system (under the pretense of giving the people what they want) drowns (the people) in a sea of trivia, and not very interesting trivia at that."104

Is the situation hopeless? Is TV destined to be merely a vehicle for old movies, and radio for 'moldy-oldies'? Some have despaired, but others have not, including Couse.

"We should accept and use the fact that businessmen maximize profits--we must devise

institutional arrangements to lead businessmen to do what is desirable by making it profitable for them to do so."<sup>105</sup>

Viewing the FCC in its conserver top-heaviness, one wonders if the self-interest will not win out. Commissioner Johnson often finds himself refused on suggestions by the agency staff; they, in turn, find themselves referred to as inadequate, as many complaints are totally ignored.<sup>106</sup>

On the other hand, there are times when the FCC acts against stations (obviously, those without key friends in Congress) for picayune things. For example, Robert Shayon raises the question:

"Is the FCC acting in the public interest when it proposes to fine an educational broadcaster for allowing certain Anglo-Saxon, four-letter words aired during a taped interview with the leader of a rock music group?"<sup>107</sup>

The FCC's argument that millions will be offended and, subsequently, will stop using their radios and TV's is patently weak.<sup>108</sup>

Many policies which appear good on the surface, but which often are near shams in reality, will continue. For example, it is highly unlikely that the FCC will change its outward approach to multiple ownership. However, the case-by-case approach will continue, also. Intervening Congressmen and insecure bureaucrats will engage in molding foundations with respect to decisions. The bureaucrat, uncomfortable

at having to exercise his authority, will seek to placate as many interests as possible.<sup>109</sup> Indeed, the multi-million dollar licenses, dealt with in this context, indicate where the strongest and most placated interest lies: politicians. The result will thus be an entrenching of the statistics concerning the top markets with respect to multiple ownership, and a signal of the FCC's decision-making in general: private planning.

Perhaps, the only reason why there is not a calamitous situation comparable to the 1950's, when most existing licenses were first handed out on a case-by-case basis, is the fact that there are few allocations possible. The VHF space is virtually used up. UHF, on the other hand, has been held under wraps by the FCC. The reservation of such unused space, to many, represents a waste of frequencies and a denial to business and industry of a useful production tool.<sup>110</sup> There is also evidence that the practice has tended to discourage research looking toward broader and more efficient use of the spectrum.<sup>111</sup> Couse assesses the ad hoc method of allocation:

"The major resource used in the radio industry, the radio frequency spectrum, is carried out by a method which is inefficient, inequitable, and inflexible."<sup>112</sup>

Kohlmeir generally agrees with this idea, and goes further by saying that the FCC would have avoided many

of the problems by utilizing a "demand" method<sup>113</sup> in deciding who should get stations and where they should be.

Some have placed the blame for the FCC's muddle, not upon the method of decision-making, as it should be, but rather, upon Congress. They hold that Congress has not given the FCC sufficient guidelines to act. It is more than this, however---there is a composite of factors in the decision-making process:

" The FCC is exercising a judicial function for it is deciding a relatively specific case involving a limited number of parties on the basis of its own regulations, plus such requirements as Congress may have written into law."<sup>114</sup>

This quasi-judicial procedure---a product of private planning---rarely shows signs of breaking. The reaction to WHDH by Congress, et al., was enough to send second-rate bureaucrats scurrying, and first-raters toward making amends. Louis Jaffe sums the situation up, thusly:

"Regulation assumes legislative determination only of policy conflicts, with a resulting firm declaration of the regulatory principles to be applied; a grant of sufficient discretion to find the best ways and means to adapt policies to a constantly developing situation, and a well-informed, imaginative, disinterested bureaucracy operating in a judicial spirit."<sup>115</sup> (emphasis added)

This is not the FCC.

There is a need for the FCC to respond to the needs of the people---not through information garnered

by the industry, but directly, from the people to the Commission. For example the New Republic finds that TV needs new voices, more creativity, greater diversity "in order to refresh a bored society."<sup>116</sup> Congress, however, is seen to accept the broadcasters' contention that all's well and no newcomers need apply.<sup>117</sup> Pay TV and CATV are considered intruders on the FCC's master plan and its industry of commercial TV stations and networks.<sup>118</sup> Moreover, the FCC has reacted, thus far, by carving out a small role for the 'newcomers': they will supplement, but not compete with the established companies.<sup>119</sup>

Will there be new life from leadership? Can WHDH's become commonplace? It is unlikely. Throughout, there has been discussion here concerning the FCC's failure to escape politics with respect to Congressional and industrial pressure through committees and lobbying. However, Presidential appointments may loom large in potential impact. The Republicans now have a majority of Nixon appointees as Commissioners. The lack of structured channels of influence may be a boon for Nixon fans regarding the FCC. The New Republic predicts:

"The new line-up is good news to the industry, for it assures them that the FCC will keep right on defending commercial broadcasters against consumer challenges to license renewals, and will protect the industry...against the technological threat of cable TV and



multi-channel substitutes for the constraining broadcast system in use today."<sup>120</sup>

Despite the leadership factor, whoever it may be, the only way that the FCC can survive future political battles, especially with growing, and perhaps spreading, consumer rebellion in other areas, is to lay down flat rules. It must make clear commitments to its principles and permit few, if any, exceptions.<sup>121</sup>

No one has yet fully comprehended or established precisely what the effect of the media is on the human mind. Perhaps, nobody ever will. So why should the public be concerned with broadcasting and its regulator, the FCC, anyway? Who really cares? Somebody should, and it would be well for broadcasting and society alike if the people were informed, as Nicholas Johnson desires, especially since in the average American home, a TV is operating 5-3/4 hours per day; the average male American, by the age of 65, will have watched an equivalent of 9 years of TV! Fifty-five percent of American families change their eating schedules because of TV, and 60% adjust their sleep patterns;<sup>22</sup>...this, of course, is not to mention the additional impact of radio. Thus, there can be no escape from the importance of effective regulation of broadcast communications.

FOOTNOTES

1. Emery, Walter B., Broadcasting and Government: Responsibilities and Regulations 18 (1961).
2. Id. at 20.
3. Id.
4. Id. at 30.
5. Id.
6. 5 F. Supp. 848 (S. D. Texas 1934).
7. 326 U.S. 120.
8. Emery, supra at 44.
9. Id. at 45.
10. Id.
11. Id. at 47.
12. Id.
13. Id. at 48.
14. Id.
15. Hyneman, Charles S., Bureaucracy in Democracy, 509 (1952).
16. Id.
17. Id.
18. Sen. Rep. No. 44, 82d Cong., 1st Sess. (1951).
19. Id.
20. Emery, supra at 50.
21. Id. at 51.
22. Id. at 52.
23. Id.
24. Id. at 53.

25. Id.
26. Ray, Verne M., ed., Interpreting FCC Broadcast Rules and Regulations, 91 (1966).
27. Id.
28. 47 U.S.C. §301
29. Journal Co. v. Fed. Radio Commission, 48 F. 2d 461 (1931).
30. n. 27, supra.
31. Smery, supra at 31.
32. NBC v. U.S., 319 U.S. 190, 216-17 (1943).
33. Minow, Newton, "The Public Interest", The Crisis of the Regulatory Commissions, ed. Paul W. MacAvoy 54 (1970).
34. 47 U.S.C. §309.
35. Emery, supra, at 161.
36. Id.
37. Mansfield Journal v. FCC, 180 F. 2d 28 (1950).
38. Id.
39. Emery, supra at 169.
40. Id. at 172.
41. Id.
42. Id.
43. Tribune Co., 9 R.R. 719 (1954).
44. Minow, supra at 32.
45. Ray, supra at 91.
46. Id. at 95.
47. Id.
48. 47 U.S.C. §§311, 313, 314.

49. Ray, supra at 95.
50. Id. at 103.
51. Id. at 104.
52. Stephen R. Rintoul, 11 FCC 108 (1945):  
An example: the principal stockholder was owner of the only daily newspaper in Stamford Conn.; nevertheless, paper was allowed to run station due to the proximity of many papers in N.Y.C.
53. Ray, supra at 106.
54. Id. at 107.
55. Emery, supra at 45.
56. Ray, supra at 7.
57. "Activist at the FCC?", 94 Time 22 (Nov. 21, 1969)
58. Ray, supra at 8.
59. Barrow, "Private Interests", The Crisis, ed. MacAvoy at 70.
60. Kohlmeir, Louis M., The Regulators; Watchdog Agencies and the Public Interest, 54 (1969).
61. Id. at 61.
62. Id. at 67.
63. Barrow, supra at 74.
64. Emery, supra at 65.
65. 18 U.S.C. §1464 (1965).
66. Emery, supra at 66.
67. Red Lion Broadcasting Co. v. FCC, 395 U.S., 367 (1969).
68. 346 U.S. 89-90 (1953).
69. 47 U.S.C. §315 (1964).
70. Id.

71. Ray, supra, at 85
72. 395 U.S. 367.
73. Ray, supra at 74
74. Emery, supra at 240.
75. Id.
76. Ray supra at 8.
77. Id.
78. Id. at 242.
79. Barrow, supra at 73.
80. "The Public Be Damned", 161 New Republic 14 (Sept. 27, 1969).
81. Ray, supra at 114.
82. Id.
83. Id.
84. "Signs of Life at the FCC", 160 New Republic 16 (Feb. 22, 1969).
85. Id.
86. "The FCC Creates Some Static", 73 Newsweek 80 (Marc. 17, 1969).
87. "FCC: Policy by Whimsy", 208 The Nation 197 (Feb. 17, 1969).
88. Id.
89. 160 New Republic at 17.
90. "Boredom in Perpetuity?", 161 New Republic 9 (July 5, 1969).
91. "FCC Bares Its Fangs", 73 Newsweek 65 (Feb. 3, 1969).
92. 161 New Republic at 9.
93. Collins, "Freedom Through Responsibility", The Crisis, ed. MacAvoy, supra at 11.

94. Couse, The Crisis, ed. MacAvoy, *supra* at 101.
95. Kohlmeir at 70.
96. *Id.*
97. *Id.*
98. Ray at 154.
99. *Id.*
100. 47 U.S.C. §404.
101. Ray, *supra* at 19.
102. Couse, The Crisis, *supra* at 95.
103. *Id.* at 98.
104. 161 New Republic at 14.
105. Couse, The Crisis, *supra* at 99.
106. "Shayon, "Interest in Four-Letter Words", 53 Saturday Review 50 (May 2, 1970).
107. *Id.*
108. *Id.*
109. Jaffe, "The Scandal in TV Licensing", The Politics of Regulation, eds. Krislov and Musolf, 232 (1964).
110. Kohlmeir, *supra* at 218.
111. *Id.*
112. Couse, The Crisis *supra* at 99.
113. Kohlmeir, *supra* at 207.
114. Woll, Peter, American Bureaucracy, 9 (1963).
115. Jaffe, *supra* at 238.
116. 161 New Republic at 9.
117. *Id.*
118. Kohlmeir, *supra* at 216.

- 119. Id.
- 120. 161 New Republic at 14.
- 121. 160 New Republic at 18.
- 122. "The FCC Creates Some Static", 73 Newsweek 80 (Mar. 17, 1969).