DEVELOPMENT OF THE CONCEPT OF PUBLIC INTEREST AS IT APPLIES TO RADIO AND TELEVISION PROGRAMMING

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CHAPTER I

INTRODUCTION

The day that I take over, I'll clean up radio
I've got a little list, I've got a little list
Of things that upset listeners, I'll see that they all go
And they never will be missed. They never will be missed.
There's those fat off-key sopranos who keep singing Rinso White!
And that fellow Gabriel Whoosis, with his "Ah, there's news tonight...
There's those mournful serial programs, all unhappiness and grief,
Where the baby's a delinquent and the grandma is a thief...
And those honeymoon atrocities, where the bride is always kissed.
They never will be missed. They never will be missed.

There have been many critics of broadcasting. Their observations have ranged from the serious to the ridiculous. Thoughtful broadcasters and listeners have both been concerned, however, with the impact of radio and television programs on society. Does this impact go beyond the mere promotion of goods and services? May broadcasting also "sell" information and opinions on subjects of social significance? Is it a possible vehicle for the propagandist, implying good and bad value judgments by the broadcaster? A means of communication capable of changing attitudes without face-to-face contact? Does broadcasting have any special relationship to children? These are questions which cannot be easily nor fully answered. An indication of the extent to

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which broadcasting influences society may be gained, however, by ex-
amining the comments and research of persons who have made a study of
this field.

The Impact of Broadcasting on Society

Researchers in many disciplines have focused their attention
on broadcasting. The psychologist has been concerned with the effects
produced by the nature of the medium, and its influence on personality
development. The sociologist has viewed the relationship of broad-
casting to family life, to larger social groups, to juvenile delinquency,
and to attitudes and attitude change. The educator has studied the
impact of broadcasting on reading habits, school work, and leisure
activities.

The results of this research have been conflicting. One in-
vestigator concluded that communication through the mass media can
modify attitudes. Another suggested the mass media may not have as
direct an influence on attitudes as many would believe. A psycholo-
gist charged that broadcasting tends to promote a passive acceptance
of life. Another argued "passivity" is merely a human trait and should
not be blamed on broadcasting. A study conducted in Roselle, New Jersey,
found that children who watched television a great deal had lower grades
in school than students whose television viewing was limited, but another
study concluded that television does not lower scholastic achievement.
There is one point, however, on which there is general agreement—that
radio and television are important media of mass communication capable
of influencing society in many ways. A brief review of a number of these studies will indicate possible effects of broadcasting and areas of influence.

**Effects of Broadcasting**

Before examining studies of broadcasting it might be well to look at the nature of the listening and viewing situation. Broadcasting is readily available in the home. Events are often seen and heard as they occur. No special skills, such as reading ability, are necessary. The audience is listening or viewing at home, alone, or in groups of two or three. Many persons in the audience are engaged in some other activity while watching or listening, giving only partial attention to the broadcast. There are probably frequent interruptions. Reception may be bad; the set may be in poor condition or not properly tuned. Radio is limited by the lack of visual presentation. The visual image in television is limited by the size of the television screens, necessitating a small effective set area. As will be shown, the nature of the listening and viewing situation is important because it frequently contributes to the effects broadcasting may have on the individual and on society.

**Crowd Reaction Without Face-to-Face Contact.**—As early as 1935, psychologists Hadley Cantril and Gordon Allport suggested that radio broadcasts might produce a crowd reaction without bringing the members of the crowd together in face-to-face contact: "Heretofore 'crowds' meant chiefly congregate clusters of people sharing and giving expression to a common emotion. But now, as never before, crowd mentality may be created and sustained without the contagion of
personal contact. Cantril observed this phenomenon in his study of the famous 1938 Orson Wells Halloween show which described the invasion of the world by "Martians." Cantril found that of the estimated six million people who heard the radio broadcast, at least a million were "frightened or disturbed."

Reinforcement of Influences from Other Sources.—During 1946 Robert Merton published the results of a study of a War Bond drive conducted by Kate Smith. The study indicated that broadcasting may reinforce influences from other sources and make them more effective.

On September 21, 1943, between 8:00 A.M. and 2:00 A.M., radio star Kate Smith had broadcast sixty-five appeals to buy War Bonds. Before the marathon was over she had secured $39 million in bond pledges. Merton reported:

The general finding that it was not only what Smith had to say that furthered persuasion led to the observation that other effective components of her campaign had been fashioned before the day of the marathon. The process of persuasion was well underway before she began her day long exhortations.

An image of Kate Smith as a good American, sincere and honest, had been established long before this particular drive. Merton maintained the marathon reinforced the already existing image.

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5 Ibid., p. 176.
The same effect has been observed by others. A study of the use of radio to create new music listeners found that: "the importance of radio as a source of music...lies in its ability to make other influences effective." A survey of news habits among students indicated that in any age group, students who both read and listen to the news are better informed.

Attention Getting and Holding.—As was pointed out earlier, many persons in a typical radio or television audience are engaged in some other activity at the same time they are watching television or listening to the radio. However, there is evidence to indicate that on occasion broadcasting, especially television, has a phenomenal ability to command and hold attention. This is most likely to be true when a "favorite" program is involved: "Pollsters report that three times as many people will leave a meal to answer questions at the door as will get up to abandon Dragnet." 

May Limit Use of Critical Faculties—There is research to suggest that the nature of the listening situation tends to limit critical faculties and create a favorable climate for suggestibility. Cantril and Allport presented this idea in an analysis of the psychology of radio. They said: "If other conditions are kept constant, the mental functions of recognition, verbatim recall, and suggestibility seem

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7Ibid., pp. 189-223.
more effectively aroused in listening; whereas critical attitudes and discriminative comprehension are favored by reading. In his study of the Orson Wells broadcast Cantril described this reaction:

Critical ability alone was not always sufficient insulation. At least two other factors were often so prominent in the picture that critical ability was blotted out. The first of these influences concerned some characteristic of the listener's personality, the second related to the nature of the actual listening situation in which the listener found himself when he tuned-in to the broadcast.10

This effect is even more significant in combination with findings that broadcasting is the favorite communications medium of people who are most suggestible. Joseph Klapper, reporting on research sponsored by the Bureau of Applied Social Research at Columbia University, concluded: The potential radio listener ... is ... more suggestible than the potential reader ... Of all the facts that make radio a powerful social institution, probably the most imposing one is that radio is the preferred medium of the more suggestible man.11 The same observation has been made about television: "Comparing the reaction of various social groups, the lower income and lower educational groups seem most responsive to TV ... The less privileged groups spend more time in viewing, hold more favorable opinions, and show greater effects of TV in their lives."12

9 Cantril and Allport, op. cit., p. 159.
10 Cantril, op. cit., p. 128.
May Influence Attitudes.—The Orson Wells broadcast, the Kate Smith bond drive, and other incidents would seem to indicate that broadcasting may have a strong influence on mass attitudes—at least on immediate, uncritical acceptance of attitudes. Actually, the relationship of broadcasting to attitudes has not been clearly defined, and much of the research in this area deals with the mass media in general. After surveying existing studies Klapper concluded that communications from the mass media can modify attitudes:

Thousands of experiments have established beyond reasonable doubt that persuasion can be achieved by the planned, or even unplanned presentation of appropriate content through mass media.

The experiments of Wilke and Knowler . . . indicate that attitudes on controversial subjects can be modified by appropriate content transmitted by face-to-face discourse, by wired speakers, or by print.13

It has been suggested, however, that the mass media are more likely to reinforce than to change existing attitudes. Studies already cited have shown that as a source of information broadcasting tends to reinforce other influences. Lazarsfeld and Katz have maintained there is a similar relationship between broadcasting and attitudes:

Research in mass communication has shown that people tend not to "expose" themselves to communications which conflict with their own predispositions, but instead to seek support for their opinions and attitudes in favorable communications . . . . There is substantial evidence for the role of the mass media as "reinforcers" rather than as "converters" of opinions and attitudes.14

Certainly, there is reasonable doubt that the mass media exert as direct an influence on attitudes as many would believe.

Lazarsfeld and Merton have suggested that

The mass media prove most effective when they operate in a situation of virtual "psychological monopoly," free from counterpropaganda or when the objective is one of channelizing rather than modifying basic attitudes, or when they operate in conjunction with fact-to-face contacts . . . .

As a result of this threefold situation, the present role of mass media is largely confined to peripheral social concerns and the media do not exhibit the degree of social power commonly attributed to them.15

Elmo Roper made a similar observation when he said:

As the result of my own research into public attitudes I have come to the tentative conclusion that ideas often penetrate the public slowly as a whole and——even more important——very often by interaction of neighbor on neighbor without any apparent influence of the mass media.16

Information on the circumstances under which attitude change may occur, the degree of change, and the persistence of change is conflicting. After surveying the literature on the relationship between the mass media and attitudes Klapper concluded:

The pertinent literature indicates that material presented over any medium may be persuasively effective, but on the other hand, that it may not be effective. It is generally agreed that attitude changes consist more often of modifications than of conversions, and that although some of these modifications wane after propaganda exposure is terminated, they are to some degree highly persistent.17


16 From introduction by Roper to: Katz and Lazarsfeld, op. cit., p. XIV.

17 Klapper, op. cit., p. IV - 7.
Areas of Influence

The research cited indicates that broadcasting may influence society in many ways. The possible effects of broadcasting are significant, however, only if they are related to actual situations where this influence may be exerted. These include such areas as personality development, family life, and reading habits.

Personality.—Little research has been specifically designed to study ways in which broadcasting may influence personality, or the degree of such influence. Both psychologists and sociologists have theorized that broadcasting may affect many aspects of personality. Dwight MacDonald suggested that all the newer art forms, including radio and television, tend to blur age lines by combining the child and the adult audience:

This merging of the child and grown-up audience means: (1) infantile regression of the latter, who, unable to cope with the strains and complexities of modern life, escape via kitsch [a German word meaning mass culture] which in turn, confirms and enhances their infantilism; (2) "over-stimulation" of the former, who grow up too fast. Or, as Max Horkheimer well puts it: "Development has ceased to exist. The child is grown up as soon as he can walk, and the grown-up in principle always remains the same."

The charge has frequently been made that broadcasting is turning the public into passive, rather than active, "consumers of the world." In other words, the average individual does not participate in events; he merely observes them. Gunther Anders said:

For the fact that the events of the day—the events themselves, not reports of events . . . visit us at home; that the mountain comes to the prophet, the world to man, that

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18 Rosenberg and White, op. cit., p. 66.
fact, next to the mass production of hermits and the transformation of the family into a miniature audience, is the revolutionary change brought about by radio and television. Lazarsfeld explored this idea further. He suggested that man is so much exposed to the issues of the day that he may come to mistake this secondary contact with reality:

He takes his secondary contact with the world of political reality, his reading and listening and thinking, as a vicarious performance. He comes to mistake knowing about problems of the day for doing something about them.

Quite apart from intent, increasing dosages of mass communications may be inadvertently transforming the energies of men from active participation into passive knowledge.

Psychiatrist Eugene Glynn outlined specific personality traits which might be fostered by television: "Traits of passivity, receptiveness, being fed, taking in and absorbing what is offered. Activity, self-reliance, and aggression are notably absent." However, Rolf Meyersohn argued we should not blame "passivity" on television. Meyersohn said that criticism of television centers around two charges; the more serious one that television viewing leads to passivity, and/or that the act of television watching is itself passive. Here social research has contributed little, in part because it is more difficult to study people than it is to study television—and easy to overlook that passivity is a human trait, not a characteristic of television.

Broadcasting has also been accused of fostering an unrealistic approach to life. Sociologist T. W. Adoron theorized that people "may

19 Ibid., p. 336.
20 Ibid., p. 464.
22 Rosenberg and White, op. cit., p. 464.
not only lose true insight into reality, but ultimately their very capacity for life experience may be dulled by the constant wearing of blue and pink spectacles. S. I. Hayakawa said:

If our symbolic representations give a false or misleading impression of what life is likely to be, we are worse prepared for life than we would have been had we not been exposed to them at all . . . . This is not to say, . . . that idealizations are in themselves unhealthy; they are a necessary and inescapable product of the human processes of abstraction and symbolization, and without idealizations we should be swine indeed. But there is a world of difference in the semantogenic effects of possible and impossible ideals.

Family Life.—Television has probably caused greater changes in family living patterns than radio. In a study of the effects of television on leisure activities Thomas Coffin found that television families stay home more. Participation in activities outside the home was about "three-fourths of that shown by the controls." A study sponsored by the University of Southern California showed that two-thirds of the television owning families were doing less visiting than non-television families. A survey of a group of studies concluded that television families were seeing from 20 to 30 percent fewer movies in motion picture theatres than families without television.

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24 Rosenberg and White, op. cit., p. 416.
This does not necessarily imply that television is bringing the family closer together. There is evidence that television actually separates family members. A study of mass culture pointed out:

In actual fact, this type of mass consumption ... threatens to dissolve the family under the guise of fostering the intimacy of the family life. For what now dominates in the homes, thanks to television, is the outside world—real or fictional; and this outside world is so unrestrictedly dominant that the reality of the home—not only the four walls and furniture, but precisely the shared family life—becomes inoperative and phantom-like ... It [television] does not provide a common center, but rather a common avenue of escape.26

Coffin also observed that television may disturb family routines, particularly meals and bedtime, and cause hobbies to be neglected. On the other hand, he found that television viewing may lead to new interests.29

Children.—The possible effects of broadcasting, especially television, on children have received considerable attention. A study conducted in Palo Alto, California, found that after a family got television 59 percent of the children stayed home more, 53 percent read less, 21 percent made fewer things with their hands, and 13 percent played less in groups.30 Television viewing was found to be the most important leisure time activity of junior high age children in Stanford, Connecticut. A survey showed the average junior high student was spending 3.86


28 Rosenberg and White, op. cit., pp. 360-361.

29 Coffin, American Psychologist, X, p. 634.

30 "What TV is Doing to America," loc. cit., p. 40.
hours watching television each Monday through Friday, and 4.3 hours on Saturday and Sunday.\textsuperscript{31}

In Roselle, New Jersey, the impact of television viewing on school achievement was investigated. The results showed that high school students who watched television 25 hours or more a week lowered their grades by 78 percent. The grades of students who spent only 10 hours each week in front of a television screen dropped 14 percent.\textsuperscript{32} However, Coffin concluded that there was "little evidence that tv has affected their [childrens'] scholastic attainment." \textsuperscript{33}

The relationship, if any, of television to juvenile delinquency has been a subject of special concern. A Senate Subcommittee, appointed to investigate juvenile delinquency, attempted to discover whether there was any connection between the increase in juvenile delinquency and the frequency of crime and violence shows on television. The Subcommittee's report was summarized in \textit{U.S. News and World Report}:

\begin{quote}
The report said that the Subcommittee, "has been unable to gather proof of a direct causal relationship between the viewing of acts of crime and violence and the actual performance of criminal deeds." . . .

In the report, the Subcommittee \textit{reaches} the conclusion that "there is reason to believe that \textit{television crime programs are potentially much more injurious to children and young people than motion pictures, radio, or comic books.}"

In general, the Subcommittee found that while viewing or reading about a specific act will not cause an average child to go out and commit a similar act, "reading and looking at a great amount of these acts could create on
\end{quote}

\textsuperscript{31}"Guinea Pigs for TV," \textit{Senior Scholastic}, LVI:8 (March 22, 1950), p. 3.
\textsuperscript{33}Coffin, \textit{loc. cit.}, p. 639.
impressionable minds a permissive atmosphere for this type of behavior—an atmosphere of acceptance—which can result in increasing behavior of this nature.  

After studying the effects of television on children, Robert Shayon concluded: "It would seem, then, that what television can do to your child will depend on what your child is, what you are educating and guiding him to be, before he looks at television."  

Reading.—In the first half of the fifteenth century Gutenberg developed printing by movable type. On November 2, 1920, station KDKA in Pittsburgh broadcast the Harding-Cox election returns. In less than forty years broadcasting has reached greater popularity than printing has been able to achieve in five hundred years. There is evidence that broadcasting, especially television, has not only become more popular than reading, but that it has actually changed the reading habits of the average person.

The study of the impact of television on society sponsored by the University of Southern California, cited earlier, found that two-thirds of the television families surveyed were reading less. Only one-fourth of the non-television families said they were reading less. A study in Washington, D.C., revealed that in television homes magazine reading had dropped 18.9 percent, book reading 33.7 percent,

34 "What TV is Doing to America," loc. cit., p. 75.
and newspaper reading 4.7 percent. However, Dr. Robert Goldenson, a psychology professor at Hunter College, suggested that instead of decreasing the amount of reading television viewing tended to increase reading:

Instead of the adverse effect they feared, librarians and teachers report that the cultural values communicated by children's television programs are responsible for much wider exploration of the world of books by children than in pre-television days. 38

In Radio and the Printed Page, Lazarsfeld pointed out that one reason for the tremendous popularity of radio is that, unlike the printed media, listening does not demand special skills. It is accessible to all. 39 Popularity, however, is not a measure of effectiveness. A study conducted at the University of Toronto compared results of teaching by radio, television, reading, and by the lecture method. It was found that: "The TV audience learned significantly more than the radio audience, which in turn learned more than the reading audience. The reading audience in turn learned about as much as the ones who had heard the lecture in person, from the professor or in the studio." 40 The army also reported good results from television instruction: "Television instruction is remembered at least as well as regular face-to-face teaching." 41

38 Rosenberg and White, op. cit., p. 17.
40 "What TV is Doing to America," loc. cit., p. 43.
41 Ibid.
Though research on the use of broadcasting as a teaching tool has yielded contradictory evidence, it is possible to conclude that under some conditions both radio and television may be effective "teachers." A summary of research in this field stated:

The investigations of comparative retention afforded printed and spoken (actual, transmitted, or recorded voice) material present contradictory findings. All the experiments involving simple and short material, however, agree that presentation by both methods is most effective, but the aural presentation alone is superior to visual presentation alone for most persons. In regard to more highly complex material the weight of available evidence slightly favors print, but the conflicting findings are not yet reconcilable.\textsuperscript{42}

\textbf{The American Political Scene.}—In 1955 \textit{U.S. News and World Report} predicted that seven out of ten American families would watch the national conventions on television.\textsuperscript{43} A survey of the 1956 election, conducted by a research team from the University of Michigan, found television to be the number one source of information about political candidates—"running far ahead of newspapers."\textsuperscript{44} Newspapers ranked second and radio third as a source of campaign information.

The crucial question concerns the ability of radio and television campaign propaganda to influence voting. In \textit{The People's Choice}, the authors reported an all or none relationship. They found that


\textsuperscript{43}"What TV is Doing to America," \textit{loc. cit.}, p. \textsuperscript{43}.

\textsuperscript{44}"TV Top Political Data Source," \textit{Broadcasting-Telecasting} LI\textsuperscript{11} (September 9, 1957), p. 57.
propaganda may lead to increased interest which in turn makes people more willing to expose themselves to further propaganda. Thus, those who were exposed to a lot of campaign propaganda through one medium of communication were also exposed to a lot in the other media; and those who were exposed to a little in one were exposed to a little in the others.\textsuperscript{145} The determining factor was interest in the election. The study concluded: "To the extent that the formal media exerted any influence at all on vote intention or actual vote, radio proved more effective than the newspapers."\textsuperscript{146}

Public Information. — World War II made a tremendous difference in the news habits of America. Up to that time the chief source of news had been newspapers, but during the war radio news "came of age." Its immediacy, its ability to bring direct reports from the front, its wide coverage of events, not only established radio as the chief source of news in America, but made Americans more news conscious than ever before.

In a survey directed by Lazarsfeld and Field in 1945, 58 percent of the people contacted said they depended on radio as their chief news source.\textsuperscript{147} Only 38 percent listed newspapers. The other 4 percent gave no preference. Though this relationship had changed by 1947 to 48 percent preferring newspapers and 44 percent favoring radio—presumably because with the end of the war immediacy in news had become

\textsuperscript{145} Paul F. Lazarsfeld, Bernard Berelson, and Hazel Gaudet, The People's Choice (New York: Duell, Sloan & Pearce, 1944), pp. 121-122

\textsuperscript{146} Ibid., p. 128.

less vital, radio has retained much of its importance as a medium for
the distribution of information. In the 1947 study 74 percent of the
respondents said that news was a favorite program type. Another
significant finding was that it is "women, the less educated people, the
poorer people and the heavy listeners who are most dependent on radio
for their news." No similar study has been made of television news,
but certainly television has tremendously increased the potential of
broadcasting as a news and information source.

Public Opinion.—There is a vast difference between the
"mere" transfer of information and the creation of public opinion.
Social psychologist Kimball Young has defined public opinion in the
following manner:

Public refers to events or human activities of wide com-
munity concern or interest; whatever is generally or com-
monly seen, heard, or known, whatever is open to general
use or enjoyment.

An opinion is a belief somewhat stronger or more in-
tense than a mere notion or impression but less strong than
positive knowledge based on complete or adequate proof.

Public opinion consists of the opinions held by a
public at a certain time.

As broadcasting developed into a medium of mass communi-
tation, "experts" in the molding of public opinion predicted that with
radio it would be possible to completely control society. In 1926
Morris Ernst, representing the American Civil Liberties Union, testified
before the Senate Commerce Committee: "If I get control of the air I do

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18 Paul F. Lazarsfeld and Patricia Kendall, Radio Listening
in America (New York: Prentice-Hall, Inc., 1948), p. 34.
19 Ibid., p. 21.
20 Ibid., p. 35.
21 Kimball Young, Social Psychology (New York: Appleton-
not care who has the votes, I could get them; I could get them by the use of broadcasting propaganda. Before World War II the director of the German broadcasting system wrote:

> It was an event of fundamental importance that National Socialism made the radio the all embracing instrument for proclaiming its theses which were to be binding for everybody. In the new Germany, National Socialism and broadcasting have become one insoluble unit.53

After the annexation of Austria to Germany one of the first things Goebbels did was send 20,000 inexpensive radio sets to Austria for distribution among the poor. During a hearing conducted by the Senate Interstate Commerce Committee in 1943, Senator Burton K. Wheeler, Montana, chairman of the committee, concluded:

> But the reason that Mr. Hitler could maintain the kind of dictatorship and Mr. Stalin could maintain the kind of dictatorship that they have, is due almost entirely to the fact they are able to control the press and the radio, and the only opinions that go out over the air are what the government dictates.54

Studies reviewed earlier in this chapter, however, seem to indicate that broadcasting may not influence public opinion to the extent many persons would believe. The relationship between broadcasting and public opinion would be most similar to that existing between broadcasting and attitudes. This is not to suggest that the terms may be used interchangeably. Young observed: "An attitude is a tendency to
act. It is closely bound up with habit and overt behavior. Opinion is verbal and symbolic." On the basis of research cited, it seems possible to conclude that broadcasting may function as a source of information in the creation of public opinion; that communications received from broadcasting will tend to reinforce influences from other sources; and that under some circumstances, broadcasting may be a major factor in the formation of public opinion.

**Extent of Influence**

These, then are possible effects of broadcasting and the areas in which they may operate. There is no influence unless people are listening and viewing. As of March, 1958, 84 percent of all homes in the United States were television homes. In each of these homes there was a set in use an average of five hours and fifty-six minutes a day. Ninety-six and four-tenths percent of all homes owned at least one radio. In addition there were thirty-six million car radios. In-home radio listening averaged one hour and fifty-six minutes per day. Out-of-home listening added to this total by roughly 25.2 percent. This means that the average person is exposed to some form of broadcasting more than a third of the time he is awake.

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55 Young, op. cit., p. 431.
58 Ibid., p. 109.
59 Ibid., p. 110.
60 Ibid., p. 116.
61 Ibid., p. 122.
Purpose and Plan of the Study

The aim of the preceding review was not to survey broadcasting research in detail, but to indicate the extent to which radio and television programs may influence society. It seems possible to conclude that broadcasting may successfully convey information and opinions on subjects of social significance, that it is a means of exchanging ideas and criticisms between different groups in society, of molding public opinion, of moving the public to action, and that it may be a factor in creating and changing attitudes. This influence extends into many areas of society: education, family life, child development, politics, public information, and the formation of public opinion.

The democratic process might be said to require two tools--literacy and communication. One can hardly escape the conclusion that here is a method of communication with almost frightening possibilities. Its immediacy, its ability to cross state and national boundaries, to travel at the speed of light directly into the home at any time of the day or night, establish broadcasting as a powerful vehicle for the communication of ideas.

There is, however, a limitation inherent in broadcasting which does not apply to other mass media. In theory any person may publish a newspaper, or a book, or produce a motion picture. The number of persons who may operate a radio or television station is limited by the frequencies available. Since these frequencies belong to the people, Congress has created an independent regulatory commission to regulate broadcasting in the "public convenience, interest, or necessity."
The manner in which this commission has applied the concept of public interest to such an important medium of mass communications as broadcasting is of vital concern to society. Since broadcasting is essentially programming, application by the Federal Communications Commission of the concept of public interest to the regulation of radio and television programming is a matter of special importance.

Subject of This Study.—The first Amendment to the Constitution guarantees to the press freedom from government censorship. The theory of this guarantee is that in a democracy competing ideas should have a chance to be heard, so that from this competition a public opinion will emerge which represents the will of the majority.62 The Supreme Court has held that broadcasting is included in the term "press."63 Because the available frequencies are limited, the would-be broadcaster must obtain a license.

As will be shown in subsequent chapters, government regulation of broadcasting developed slowly and at the request of broadcasters themselves. The first acts to regulate "wireless" were passed in 1910 and 1912, and were designed primarily to promote safety on the high seas. Radio broadcasting as we know it did not come of age until after World War I, but during the early twenties the growth of this new medium of communication was tremendous and chaotic. It was 1927, however, before Congress enacted a new law to regulate radio broadcasting, and created

the Federal Radio Commission to carry out the provisions of the act. By the Communications Act of 1934, the Federal Radio Commission was replaced by the Federal Communications Commission.

When Congress delegates authority it must provide a regulatory guide. The standard included in both the 1927 Radio Act and the Communications Act is that broadcasting serve the "public convenience, interest, or necessity." As Lewis G. Caldwell, a member of the first Radio Commission, said:

"Public interest, convenience or necessity" means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority. The underlying theory is, however, perfectly sound; only an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace."

Both the 1927 Radio Act and the Communications Act forbade censorship of broadcasting. However, in interpreting the concept of public interest, the Radio Commission and the Communications Commission alike have insisted, and generally have been upheld by the courts, on the necessity of considering various aspects of programming. This study will examine, by the historical method, the manner in which the Federal Communications Commission has applied the concept of public interest to the regulation of radio and television programming. Since the Federal Radio Commission was the forerunner of the Communications Commission it will also be necessary to consider the activities of the Radio Commission as they relate to programming.

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The Specific Purpose.--More specifically, the purpose of this study is to discover how, to what extent, and why the Commission has applied the concept of public interest to the regulation of programming in the way that it has. Some persons, especially broadcasters, have argued the Commission should not consider programming at all—on grounds it lacks authority and that such consideration is a form of censorship. The industry advocates self-regulation of programming. Others have suggested Congress should spell out the meaning of public interest. This investigation will examine in detail ways in which the Commission has related public interest to programming and the extent to which the Commission has actually enforced its views on programming, and suggest reasons why the Commission has pursued particular enforcement practices.

Significance of the Study.--The impact of radio and television programs on society has already been discussed. It has also been shown that since the available frequencies are limited, regulation is inevitable. Meiklejohn contends regulation is not synonymous with censorship, because the First Amendment "does not forbid the abridging of speech . . . . But, . . . the abridging of the freedom of speech." Stated another way: "The First Amendment, . . . is not the guardian of unregulated talkativeness . . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."

65 Meiklejohn, op. cit., p. 19.
66 Ibid., p. 25.
With only a limited number of radio and television stations possible, who is to insure that "everything worth saying shall be said"? The Commission? The broadcaster? The public? Congress? The responsibility for maintaining a vital broadcasting industry in the United States probably rests with all parties. Within the existing structure, however, the most powerful influence on broadcasting is that exerted by the Federal Communications Commission.

The manner in which the Commission has applied the concept of public interest to programming has frequently been criticized. Broadcasters have complained, with justification, that the Commission has not followed a consistent policy with respect to program regulation, putting broadcasters in the untenable position of attempting to operate in the public interest without "knowing" what the public interest is. Others have suggested the Commission has been far too lenient in its interpretation of public interest, implying that if the Commission will not "force" stations to "improve" programming, no one will. The Commission has sometimes been accused of being influenced more by the industry it is regulating than by a real desire to provide the broadcasting service which will best serve the public interest. Congress has "investigated" the Commission for too much regulation, and for too little regulation. The conduct of Commissioners, the manner in which the Commission has interpreted the Communications Act, the organization of the Commission, and many other phases of the Commission's operation have been studied by Congressional Committees. In theory the general public should be the group most vitally concerned with the regulation of programming.
Except in a few isolated cases, such as listener groups, a large portion of the public probably has little idea of the functions of the Federal Communications Commission.

Despite considerable criticism of the manner in which the Commission has regulated programming, and many suggestions for improvement, this author could find no detailed analysis of the Commission's application of the concept of public interest to programming. An examination of the ways in which the Commission has influenced programming should help provide a clearer picture of the regulation of broadcasting in the United States. The real significance of this study, then, is the insight it may give into the problems of regulating radio and television programming in the public interest.

Plan of the Study.—Since the purpose of this study is to examine the application of the concept of public interest to programming, Chapter II will trace the origin of the term public interest, show how it became associated with the regulation of broadcasting, and outline generally the historical development of the concept. This chapter will also discuss the organization and functions of the Federal Communications Commission and its forerunner, the Federal Radio Commission, the agencies created by Congress to interpret the public interest.

The Commission, however, does not regulate broadcasting in a vacuum. A clearer understanding of the work of the Commission is possible by first considering the forces which influence the Commission's activities; the broadcasting industry, Congress, advertisers and advertising agencies, other types of pressure groups, and public opinion. Chapter III will discuss the "climate of regulation."
The fourth chapter will review licensing criteria estab-
lished by the Commission, and examine the Commission's authority in
each type of licensing situation. The Commission has applied the con-
cept of public interest to programming largely through its licensing
activities.

Chapters V through VII will examine in detail the applica-
tion of the concept of public interest to the regulation of radio and
television programming. These chapters will consider application of the
concept of public interest to general program content, news, political
broadcasts, discussion programs, and advertising.

Chapter VIII will indicate the extent to which the Commission
has actually enforced its views on programming. In Chapter IX the author
will attempt to suggest reasons why the Commission has acted, in respect
to programming, in the manner that it has.

Limitations of the Study.—The scope of this study will be
limited to an analysis of the manner in which the Commission has applied
the concept of public interest to programming. No attempt will be made
to cite in detail views of industry personnel, political scientists,
educators, and the like toward the "proper" limits of the Commission's
authority. Neither will the author try to evaluate the Commission's
actions or suggest changes in the operation of the Commission.

Opinions of the Commission relating to specific cases are a
major source of information for this study. Representative cases will
be cited, but the actions of the Commission are too numerous to permit
review in this report of every opinion in which programming was a factor.
This study will deal only with commercial broadcasting. Educational broadcasting, short-wave broadcasting, and the like will not be considered.

Terminology.—Broadcasting, like most industries, has developed its own terminology. The word broadcasting itself is used within the trade to indicate both radio and television broadcasting, and will be so used in this study. The definition of broadcasting included in the Communications Act will be adopted for this study. The Act defines broadcasting as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." Radio communication" is defined by the Act to include both radio and television. The Communications Act says: "Radio communication" means the transmission by radio or writing, signs, signals, pictures, and sounds of all kinds including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."

The term mass media designates methods of communication capable of reaching vast numbers of persons with the same message. The phrase generally includes radio, television, motion pictures, newspapers, magazines, and books.

67 Stat. 1064 (1934), sec. 3 (o).
68 Ibid., sec. 3 (b).
Self-regulatory code refers to standards of good broadcasting formulated by radio and television personnel in attempts to "police" their own activities. Though some individual stations and networks have their own codes of practice, the only codes mentioned in this review are those sponsored by the National Association of Broadcasters.

The concept of public interest indicates the regulatory guide provided by Congress in the 1927 Radio Act and the 1934 Communications Act. Since an entire chapter will be devoted to tracing the development and meaning of this term, it will not be defined at this time.

Sources of Information.—The primary sources of information for this study are reports of decisions in specific cases; statements, letters, and memorandums of the Commission; annual reports of the Commission to Congress; the results of special investigations sponsored by the Commission; and the Commission's attitude as revealed through court decisions. Radio Reports, published since 1948 by Pike and Fischer, provides one of the most detailed accounts of the regulation of radio and television. These loose-leaf volumes, which are constantly kept up to date, are invaluable in a study of the activities of the Commission. They contain all relevant statutes, reports of Congressional Committees, and court rules pertaining to the regulation of broadcasting. In addition, decisions—relative to broadcasting--of the Communications Commission since July 1, 1945, and of the courts since January 1, 1948, are reviewed in detail. The organization of these volumes is excellent.
In July, 1934, the Communications Commission commenced publication of a series of reports entitled Federal Communications Commission Reports. These include summaries of the decisions, reports, and orders of the Commission and are frequently used as a reference.

An excellent overall view of the operation of the Federal Radio Commission and the Federal Communications Commission may be obtained from the Commission's annual reports to Congress. These reports generally review the highlights of the year, and have sometimes been used by Commissions as a means of expressing opinions to Congress.

Many of the problems which faced the Federal Radio Commission are dealt with in Air Law Review. This was a monthly legal journal, no longer published, dedicated to examining the legal aspects of broadcasting.

Cases involving regulation of broadcasting which have led to court action are reviewed in Radio Reports and in official court publications. The Federal Reporter series summarizes cases argued in the United States Court of Appeals. Cases heard in United States district courts are found in issues of the Federal Supplement. Decisions of the United States Supreme Court are available in United States Supreme Court Reports. State court decisions are included in area or state publications.

Material for this study was also obtained from special reports released by the Commission. During 1941 the Commission issued a Report on Chain Broadcasting which summarized the results of an investigation of network practices. The Public Service Responsibility of Broadcast Licensees was published in 1946. This was one of the
most ambitious attempts ever made by the Communications Commission to specifically define public interest. On September 14, 1954, a statement by the Commission on the meaning of section 315 of the Communications Act was inserted in the Federal Register. In addition the Commission has on occasion released memorandums pertaining to some aspect of public interest. These have included a 1931 memorandum of the Federal Radio Commission relative to fortune telling and lotteries, a 1934 memorandum of the Radio Commission on "hard liquor" advertising, and a 1939 memorandum of the Communications Commission listing "undesirable" program materials.

The results of a second investigation of network broadcasting were included in a 1957 report on Network Broadcasting. This investigation was under the supervision of a special Network Study Committee of the Communications Commission. The Committee, in turn, employed Dean Roscoe L. Barrow of the University of Cincinnati Law School to direct the study. Network Broadcasting is the report of a Network Study Staff headed by Barrow.

Problems of Congressional regulation of broadcasting are dealt with most extensively in the official proceedings of hearings conducted by committees of Congress, and in reports of Congressional committees. Most frequently cited are hearings and reports of the House and Senate Interstate Commerce Committees, since these are the committees charged with the responsibility of regulating broadcasting.
Statements and publications of the National Association of Broadcasters provide information on the broadcasting industry. Industry codes, the reply of the industry to the Commission's 1946 statement on public interest, the attitude of broadcasters toward investigation by the Commission of newspaper ownership of radio and television stations have all been outlined in special publications of the National Association of Broadcasters. Data on the day-to-day workings of the broadcasting industry are detailed in *Broadcasting*. This magazine, which has been variously published under the name of *Broadcast Advertising*, *Broadcasting-Telecasting*, and *Broadcasting*, is considered the "unofficial" spokesman of the National Association of Broadcasters, and usually gives the opinion of broadcasters on any matter concerning radio and television.

This study also makes frequent reference to articles by Louis G. Caldwell on the history and interpretation of the concept of public interest. Mr. Caldwell was a member of the first Radio Commission and his articles in *The Annals* and in *Air Law Review* are a useful source of information. *Regulating Business by Independent Commissions* by Marvin Bernstein provides one of the most complete references available on the organization and functions of independent commissions. *Independent Commissions in the Federal Government* by William Doyle also deals with the duties of independent commissions.
CHAPTER II

DEVELOPMENT OF THE CONCEPT OF PUBLIC INTEREST IN BROADCASTING

The term public interest, convenience, or necessity, originated in state utility regulation. In 1892 a New York statute required a certificate of convenience and necessity for railroads. It first appeared in federal regulatory law in the Transportation Act of 1920. The Act provided that the Interstate Commerce Commission must find "the present or future public convenience or necessity require or will require the construction or abandonment of a railroad line before granting a certificate to a railroad."^2

The meaning of public interest, convenience, or necessity in utility regulation was summarized by Louis G. Caldwell, a member of the first Federal Radio Commission, in an article in Air Law Review.

1. The standard has no fixed meaning; it must be construed in the light of the context and of the purpose of the statute in which it is found.

2. No particular significance attaches to the separate words "interest," "convenience," or "necessity," as distinguished from the phrase considered as a whole.

3. The purpose of the statutes in which such a standard is employed is the general public welfare, not the protection of the business regulated except insofar as such protection is in the public interest.

^1 New York Laws (1892), c. 676, no. 59.

^2 41 Stat. 456 (1920).
4. The public interest served by such statutes arises from the fact that there are economic and/or physical limitations on the number of persons who may safely or conveniently be permitted to engage in the business regulated.

5. The general rule undoubtedly is that a commission will not allow a new utility to enter a field already occupied by another similar utility and that when the choice of applications for operation in a new field lies between a new utility and a utility occupying an adjacent field, the existing utility is entitled to preference.

6. To the general rule, however, there are well-established exceptions, such as (a) where the service rendered by the existing utility is unsatisfactory and inadequate, and (b) where the new utility offers a new kind of service.

The transfer of the concept of public interest to the regulation of radio was suggested by broadcasters themselves. In 1922, when it became evident that the use of frequencies must be controlled, President Harding directed Secretary of Commerce Hoover to invite leaders from all phases of the broadcasting industry to a conference. The conference was called to establish a method by which the industry could regulate the use of broadcasting facilities.

Between 1922 and 1925 four conferences were held. Prior to the fourth, the National Association of Broadcasters adopted a resolution which they submitted to the meeting. They recommended "that in any Congressional legislation . . . the test of the broadcasting privilege be based upon the needs of the public served by the proposed station. The basis should be convenience and necessity, combined with fitness and ability to serve."

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The 1927 Radio Act directed the Federal Radio Commission to exercise its powers in the "public interest, convenience, or necessity." The same regulatory guide was included in the Communications Act. This chapter will examine the use of this concept in the regulation of radio and television.

Congressional Regulation of Broadcasting

The constitutional basis of Congressional control of broadcasting is the interstate commerce clause which reads: "The Congress shall have power ... to regulate commerce with foreign nations, and among the several states." Back in 1878 the United States Supreme Court concluded the transmission of intelligence is interstate commerce. In 1902 the Attorney General ruled, and was upheld by the Supreme Court, that radio communication is interstate commerce and subject to Federal Control. The radio of that day was wireless telegraphy. November 2, 1920, when station KDKA, Pittsburg, broadcast the Harding-Cox election returns is usually considered the beginning of broadcasting as we know it.

54 Stat. 1162 (1927).
7U.S., Constitution, Art. 1, sec. 8, cl.3.
Regulation Prior to 1927

On June 24, 1910, Congress passed the first act to regulate radio. The only significant use of wireless at that time was to increase safety at sea. The Act required certain passenger ships to carry wireless equipment and operators as a safety measure. Enforcement was assigned to the Secretary of Commerce and Labor, who handled other marine matters.

Interest in wireless developed rapidly. As more and more transmitters went on the air they began to interfere with government stations. On August 13, 1912, following the sinking of the "Titanic," Congress passed the second Radio Act. This Act required every wireless transmitter and operator to be licensed and reserved the frequencies between 187.5 and 500 kilocycles for government use. Private transmitters could operate on any other frequencies. Administration was again by the Department of Commerce and Labor.

Immediately after its passage a basic flaw was discovered in the 1912 Act. No method was provided by which the Secretary could exercise discretion in granting licenses. The Attorney General ruled: "The Secretary of Commerce and Labor is only authorized to deal with the matter as provided in the act and is given no general regulative power." Then came World War I. The day after we entered the war President Wilson directed the Navy to take over all privately owned wireless stations. During the war radio was under absolute govern-

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10 36 Stat. 629 (1910).
11 37 Stat. 302 (1912).
ment control. This is not to imply that interest in radio was suspended. As Gleason Archer pointed out: "The outbreak of the World War in 1914 had focused the attention of all belligerent nations upon the importance of wireless communication." Archer added: "The grim business of war now gave great impetus to the development of the art of radio transmission. The Government could do what private firms could not—combine the scientific resources of all electrical manufacturers in one common endeavor."

Following the war, radio began one of the most phenomenal growths in the history of American industry. The Radio Service bulletins issued by the Department of Commerce show:

- August 1, 1921................Two new stations
- October 1, 1921................Twelve new stations
- December 1, 1921...............Three new stations
- January 1, 1922...............Twenty-six new stations
- March 1, 1922..................Twenty-seven new stations
- May 1, 1922....................Ninety-nine new stations

By November, 1922, there were nearly 500 licensed stations on the air. Under the 1912 Radio Act the Secretary of Commerce could not refuse a license to any "American citizen in good standing."

It was obvious to all that regulation must take the form of allocating channels of communication...

The mischief of the situation...was that the art had not progressed to the point where stations could be tuned to different wave lengths and definite frequencies, nor were receiving sets capable of tuning out undesired stations...

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Nearly all stations were then on the 360-meter wave length, with the natural result that stations in the same area were driven to agree among themselves—if possible—for a division of broadcast hours.16

The 1912 Radio Act did not give the Secretary of Commerce authority to cope with the situation. In September, 1922, Senator Wallace H. White, Jr., Maine, introduced a radio bill which would empower the Commerce Secretary to designate wave lengths. When this did not pass Secretary Hoover decided something had to be done, regardless. During the summer of 1923 he put into effect a plan for assigning definite frequencies.

Apparently feeling that he already had sufficient authority, and that the situation was bad enough to warrant immediate action the Secretary of Commerce . . . reassigned frequencies to practically all the broadcasting stations in the country.17

There were many objections, chiefly because "the ordinary single circuit radio set was not capable of the selective tuning necessary."18 Soon another obstacle arose. Hoover was issuing licenses to all comers, provided they were American citizens in good standing. Frequencies were becoming scarce. By January, 1926, all available broadcast channels had been assigned. Would-be broadcasters were already vainly clamoring for licenses to operate new stations. Ugly threats were already being made of forcing the issue into the courts.19

The Court of Appeals had decided in 1923 that the Secretary of Commerce could assign wave-lengths and force stations to operate on their assigned frequency.20 However, three years later a Federal District

16Ibid., pp. 249 and 280-281.
17Ibid., p. 318. 18Ibid., p. 319. 19Ibid., p. 370.
Court ruled the 1912 Radio Act did not give the Secretary of Commerce such powers, and maintained a station might use any wave length outside the 187.5–500 kilocycle government band.\textsuperscript{21} Hoover asked the Attorney General’s office to decide the issue. July 8, 1926, the Attorney General said that Hoover had exceeded his statutory powers; that he had no authority to assign wave lengths, to issue licenses of limited duration, or to designate hours of broadcasting—except to prevent interference with government stations as stated in the 1912 Act.\textsuperscript{22} In an address before the Harvard University Graduate School of Business Administration, George Henry Payne described conditions following the ruling:

Waves and power were used at will no matter how prejudicial to the operation of other stations. Interference was so common that little practical use could be made of this great invention. The public interest required that immediate action be taken to regulate operations over the air.\textsuperscript{23}

The Radio Act of 1927

Finally, Congress undertook to straighten out the situation. On February 23, 1927, President Coolidge signed an act to regulate radio broadcasting.\textsuperscript{24} The Act was based on principles formulated during the National Radio Conferences conducted by Secretary Hoover.

1. Broadcasting belongs to the people\textsuperscript{25} The Government and therefore the people, have today the control of the channels through the ether.

\textsuperscript{21}\textit{U.S. v. Zenith Radio Corp.}, 12 F (2d) 614 (D.C.N.D. Ill., 1926).
\textsuperscript{24}\textit{44 Stat.} 1162 (1927).
2. [Broadcasting must be free to operate in the public interest. Radio activities are largely free. We will maintain them free--free of monopoly, free in program, and free in speech—but we must also maintain them free of malice and unwholesomeness. . . . Radio must now be considered as a great agency of public service.]

3. [Broadcasting shall be neither government controlled nor tax supported.] The decision that we shall not imitate some of our foreign colleagues with governmentally controlled broadcasting supported by a tax upon the listener has secured for us a far greater variety of programs and excellence in service free of cost to the listener. This decision has avoided the pitfalls of political, religious, and social conflicts in the use of free speech to the medium.

The 1927 Radio Act embodied these ideas and created the Federal Radio Commission to regulate broadcasting in the "public interest, convenience or necessity." Because broadcasting belongs to the people, the Commission was directed to establish technical regulations and allocate licenses in a manner that would provide "fair and equitable distribution of service." Stations were forbidden to operate without a license, or to claim any property right in a frequency. The Commission was given authority to require information about citizenship, financial status, and other qualifications of an applicant to be a licensee. Because broadcasting must be free to operate in the public interest, the 1927 Radio Act recognized that broadcasting is a changing and unique medium of communi—

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27 44 Stat. 1162 (1927), sec. 4.

28 Ibid., sec. 9.

29 Ibid., sec. 5-H.

30 Ibid., sec. 10.
cation. To cope with varying conditions the Commission was given discre­tionary powers to establish technical regulations, allocate facilities, and formulate rules and regulations. The Act specifically forbade censorship by the Commission, and through special regulations attempted to provide equal access to the air for political candidates. Because broadcasting is neither government controlled nor tax supported, the Radio Commission was not given absolute authority. Its decisions were made subject to judicial review.

The Communications Act

In 1934, following a study of Communications' regulation conducted by the Secretary of Commerce, President Roosevelt recommended to the seventy-third Congress that wire and wireless communication systems of a common carrier type be brought under one authority. That year Congress passed the Communications Act which Roosevelt signed on June 19, 1934. This Act, with amendments, is in effect today.

The Communications Act has been amended extensively only once. In 1952, the McFarland Bill, known as the 1952 Communications Act Amendments, was approved by Congress. Prior to 1952, the Act had been amended sixteen times, but in each case, changes made were

31Ibid., sec. 4.  32Ibid., secs. 11, 12, 14.
33Ibid., sec. 4.  34Ibid., sec. 18.  35Ibid.
36Ibid., sec. 15.  3748 Stat. 1064 (1934).
minor. Even the 1952 Amendments did not substantially change the basic principles of regulation.

The Communications Act was based on the 1927 Radio Act. The chief difference was inclusion of provisions to regulate interstate and foreign wire communication, and the addition of two members to the Commission to help handle the increased responsibilities. The Act provided for the regulation of broadcasting and created the Federal Communications Commission to "make such regulations not inconsistent with law as it may deem necessary ... to carry out the provisions of this Act," subject to the test of "public convenience, interest, or necessity."

The Communications Act forbade operation of a broadcasting station without a license issued by the Federal Communication Commission,\textsuperscript{39} transfer of a license without written consent from the Commission,\textsuperscript{40} false statements in an application for a license or construction permit,\textsuperscript{41} broadcasting false distress signals,\textsuperscript{42} broadcasting another station's programs without permission from the station,\textsuperscript{43} broadcasting lotteries or information about lotteries,\textsuperscript{44} or the use over the air of "obscene, indecent or profane language."\textsuperscript{45} In 1952, section 1303 was added to

\begin{itemize}
  \item [\textsuperscript{39}] Ibid., sec. 301 (f).
  \item [\textsuperscript{40}] Ibid., sec. 310 (b).
  \item [\textsuperscript{41}] Ibid., sec. 312 (a) (1).
  \item [\textsuperscript{42}] Ibid., sec. 325 (a).
  \item [\textsuperscript{43}] Ibid.
  \item [\textsuperscript{44}] The section relating to lotteries was recodified in 1952 as section 1304, Criminal Code 18 of the United States Code.
  \item [\textsuperscript{45}] The section relating to "obscene, indecent or profane language" was recodified in 1948 as section 1464, Criminal Code 18 of the United States Code.
\end{itemize}
Criminal Code 18 of the United States Code. This forbade the broadcasting of false or fraudulent schemes to obtain money.\textsuperscript{46}

The Act specifically charged that sponsored material must be identified by the name of the sponsor or of the product being advertised,\textsuperscript{47} and that a station making time available to one political candidate must make time available, on the same basis, to all other qualified candidates for the same office. A station might, however, refuse time to all candidates.\textsuperscript{48} A 1952 Amendment prohibited charging a political candidate more for time than other types of sponsors.\textsuperscript{49} The provisions of this Act will be discussed in detail in later chapters.

The Federal Communications Commission

The Supreme Court has upheld the right of Congress to delegate authority, provided there is a "standard reasonably clear whereby the discretion must be governed."\textsuperscript{50} The standard provided by the Communications Act is that broadcasting be regulated to serve the "public interest convenience, or necessity." The agency created to administer the Act is the Federal Communications Commission. The Court of Appeals for the District of Columbia has said:

The Congress of the United States, which has plenary power to regulate the radio industry, has designated the Commission as its administrative agent because it is desired to

\begin{itemize}
\item \textsuperscript{46}66 Stat. 711 (1952), 18 U.S.C., 1343 (1952).
\item \textsuperscript{47}68 Stat. 1064 (1934), sec. 317.
\item \textsuperscript{48}Ibid., sec. 315.
\item \textsuperscript{49}66 Stat. 711 (1952), sec. 315 (b).
\item \textsuperscript{50}Panama Refining Co. v. Ryan, 293 U.S. 389 (U.S. Sup. Ct., 1935).\end{itemize}
have the regulatory work done by technically trained experts, skilled and experienced in the technical duties of radio regulation.51

Organization and Functions

The Federal Communications Commission consists of seven members appointed by the President, subject to the approval of the Senate, for terms of seven years. The President designates one member to serve as chairman. Commissioners must be United States' citizens and have no financial interest in broadcasting. No more than four may belong to the same political party.52

The Communications Commission is an independent, regulatory commission. The term independent commission has been generally used to identify certain agencies which are considered parts of the administrative framework because of their administrative powers and which are organized under a board of control and generally regarded as independent of the president.53

The need for a commission arises when the legislative body finds that particular conditions call for continued and very frequent acts of legislation, based on a uniform and consistent policy, which in themselves require intimate and expert knowledge of numerous and complex facts, a knowledge which can only be obtained by processes of patient, impartial, and continual investigation.54

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52 48 Stat. 1064 (1934), sec. 4.


The function of an independent commission is to exercise some "form of restrictive or disciplinary control over private conduct or private property." They have administrative, policy making, and judicial powers.

The job of the Communications Commission is to use its powers to regulate broadcasting in the public interest. It has the "policy making" responsibility of determining what constitutes operation in the public interest and formulating regulations for the operation of licensed stations. It has the "administrative" responsibility of granting construction permits, licenses, license renewals, and station transfers. It has the "judicial" responsibility of refusing to grant new licenses or license renewals, and of revoking a license prior to its expiration date in a manner prescribed by law. The 1952 Amendments also gave the Commission authority to issue cease and desist orders for certain prescribed actions. In practice these functions usually overlap.

Section 312 of the Communications Act outlines administrative sanctions which the Commission may employ. Section 303 provides that the Commission may "make such rules and regulations ... as may be necessary to carry out the provisions of the Act." The Federal Communications Commission has used various techniques to discharge its duties. In extreme cases it has issued cease and desist orders.

56 48 Stat. 1064 (1934), sec. 312.
57 Ibid., sec. 303 (f).
58 Ibid., sec. 312 (b).
refused to grant license renewal, or revoked a license. Less drastic measures are more often called for. The Commission has sometimes required a formal hearing on license renewal, put a station on temporary license, "punished" a station by refusing to grant increased power, ordered an investigation of a station in the community, sent a letter of inquiry, or issued a public reprimand when renewing a station's license.

These are all punitive measures. The Commission has most frequently interpreted the Communications Act in this way. On occasion, however, the Commission has issued formal interpretations of the Act in the form of regulations, released informal memorandums, stated its ideas in orders refusing to grant license renewals or construction permits, made statements against some practice when granting license renewals, and sent "public" letters of censure to stations.

Scope of the Commission's Authority

The Commission's authority is not absolute. Section 402 of the Communications Act provides for appeals from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia by an applicant for a license or construction permit whose application is not approved, an applicant for renewal or modification of a license or construction permit whose application is denied.

59 Ibid., sec. 312 (a). 60 Ibid., sec. 312 (c).
61 Ibid., sec. 402 (b) (1). 62 Ibid., sec. 402 (b) (2).
an applicant for authority to transfer whose application is denied, any other person whose interests are adversely affected by any decisions of the Commission granting or refusing any such application, and any operator whose license has been suspended. The 1952 Amendments extended this to include the holder of a construction permit or license which has been modified or revoked by the Commission, and any person upon whom a cease and desist order has been served. The actions of the Commission have been reviewed by the courts on many occasions.

Broadcasters have questioned the Commission's interpretation of public interest, convenience, or necessity. The District of Columbia Court of Appeals has held that this standard is not rigid, but must be defined in relation to particular combinations of fact.

It would be difficult, it not impossible, to formulate a precise and comprehensive definition of the term public interest, convenience, or necessity, and it has been said often and properly by the courts that the facts of each case must be examined and must govern its determination.

The United States Supreme Court has said:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are

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63Ibid., sec. 402 (b) (3). 64Ibid., sec. 402 (b) (6).
65Ibid., sec. 402 (b) (8). 66Ibid., sec. 402 (b) (5).
67Ibid., sec. 402 (b) (7).
not large enough to accommodate all who wish to use them. Methods must be devised for choosing among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.69

Methods used by the Commission in determining "the composition of that traffic" have frequently been challenged.

The courts have been asked to examine the manner in which the Commission conducts hearings and arrives at decisions. In 1938 the District of Columbia Court of Appeals held that, as an administrative body, the Commission is not limited to strict rules of evidence.70 In another opinion the same court outlined the essentials of a legally valid Commission decision:

Within that framework the public interest standard the administrative agent is free to exercise its expert judgment; it cannot act unconstitutionally, for neither could its principal, the Congress, ... and it cannot act arbitrarily or capriciously. ... The doctrine is that the act of the administrative agent is the act of Congress itself; as long as the agent stays within the boundaries of the standard.71

The Court of Appeals has also recognized that the opinions of the Commission are not rigid. They may change as the broadcasting situation changes and as new Commissioners are appointed.72 If these essentials of a legally valid decision are followed the courts have generally refused


to interfere with the findings of the Commission. The Court of Appeals has said:

The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence.73

On another occasion the Court of Appeals explained:

The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, ... entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary.74

Broadcasters have asked the courts to review the rules and regulations adopted by the Commission. In 1956 the Supreme Court upheld the multiple ownership rules, maintaining the Commission may formulate rules "necessary for the orderly conduct of its business."75 The Supreme Court has also upheld the authority of the Commission to require compliance with its rules.76

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The courts have examined the criteria established by the Commission in the exercise of its licensing activities. The authority of the Commission to consider such factors as the provision of facilities for local service, diversification of ownership of the mass media, past performance, character of an applicant, and monopolistic practices of an applicant has been affirmed.

Application of the standard of public interest to programming has been of special concern to broadcasters. The courts have ruled that the Communications Commission may not force a station to broadcast a specific program or attempt to control programming. At the same time the courts have held that the Commission may examine an applicant's proposed program plans and evaluate the quality of proposed service.

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The cases cited are specific instances where broadcasters have used the right of judicial review to challenge the authority of the Commission. Even from this brief analysis it is evident that, so long as the Commission's decisions are not arbitrary or capricious, the courts will seldom interfere.

**Historical Development of the Concept of Public Interest**

Though the term public interest, convenience, or necessity is a utility term, broadcasting is not a public utility or a common carrier. The Communications Act explicitly states that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."\(^{86}\) A Federal District Court has held: "A Radio broadcasting station is not a 'public utility' in the sense that it must permit broadcasting by whoever comes to its microphones."\(^ {87}\) Nevertheless, the Supreme Court concluded that public interest, convenience, or necessity provides a criterion on which to base the regulation of broadcasting as "concrete as the complicated factors for judgment in such a field of delegated authority permit."\(^ {88}\)

An important difference in the application of this concept to utilities and to broadcasting centers around the interpretation of

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\(^{86}\) 48 Stat. 1064 (1934), sec. 3 (h).


\(^ {88}\) National Broadcasting Company v. FCC, 319 U.S. 190 at 216 (U.S. Sup. Ct., 1943).
"public interest." In his analysis of utility regulation Caldwell pointed out that the words "interest," "convenience," or "necessity" have no separate significance "as distinguished from the phrase considered as a whole." An examination of the regulatory history of broadcasting shows a growing emphasis on "public interest."

**Interpretation of Public Interest by the Federal Radio Commission**

Initial concern with public interest in broadcasting was largely a concern with solving technical problems. When Congress passed the 1927 Radio Act, its objective was to straighten out the frequency situation. In its first report to Congress the newly created Radio Commission said:

Public opinion assumed that the prime purpose of the law in creating the Federal Radio Commission was the immediate establishment of a sound basis, in the interest of the radio broadcast listener, for the orderly development of American broadcasting.

For this reason the work of the Federal Radio Commission from its first meeting, ... was devoted almost exclusively to clearing up the broadcasting situation. With the physical capacity of the available channels, or wave lengths, already far exceeded by the number of stations ... the Commission found it necessary to evolve some plan whereby, ... the listening public could receive more dependable broadcasting service, and whereby a gradual and orderly development could be counted on to bring about a progressive reduction in radio interference.90

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89 Caldwell, loc. cit.

Preoccupation of Congress with the technical aspects of regulation was further evidenced by the passage of the Davis Amendment in 1928.\textsuperscript{91} The 1927 Radio Act directed the Commission to provide "the different States and Communities . . . fair, efficient, and equitable radio service."\textsuperscript{92} This Amendment divided the country into five zones for purposes of frequency allocations and directed the Commission to provide each zone with equal facilities in proportion to the population of the zone.\textsuperscript{93}

Solving Technical Problems in the Public Interest.—During its first year of operation the Federal Radio Commission instigated no major changes in broadcasting. It temporarily set the licensing period at 60 days, defined the standard broadcast band as 550-1,500 kc., eliminated portable broadcasting stations, and standardized the designation of channels by frequency rather than wave length.\textsuperscript{94}

The Davis Amendment resulted in more drastic actions. An immediate result was General Order No. 32.\textsuperscript{95} When the Amendment was approved the Commission had on file approximately 700 applications for license renewal. Before fixing the quota for each zone, the Radio

\begin{itemize}
  \item \textsuperscript{91}Public Law No. 195, 70th Congress (March 28, 1928).
  \item \textsuperscript{92}\textit{Stat.} 1162 (1927), sec. 9.
  \item \textsuperscript{93}The Davis Amendment was appealed in 1936 as impractical because of the nature of radio transmission.
  \item \textsuperscript{94}The present upper limit of 1,600 kc. was established in 1937, and the lower limit of 540 kc. in 1947.
\end{itemize}
Commission wanted to determine how many stations were to remain in operation. General Order No. 32 directed 164 stations on which the Commission had reports indicating service of "doubtful" public interest, to show why their licenses should be renewed. Following hearings, 62 stations were deleted: 64 as the result of surrender of license, 26 as the result of action by the commission, and 32 as the result of default.96

On August 23, 1928, the Radio Commission issued a statement outlining the principles followed in applying the public interest standard at these hearings. The goals of the Commission were (1) to set aside a good part of the broadcasting band for broadcasting to the public; (2) to provide for the best possible technical service; (3) to provide for a fair distribution of different types of service—referring to local, regional, and clear channel; and (4) to avoid "too much duplication of programs and types of programs."97 Only the fourth goal dealt with other than the technical aspects of regulation. The Davis Amendment also precipitated General Order No. 40.98 Under this order the Commission classified types of service as local, regional, and clear channel; designated the allocation of facilities to each zone; and fixed a 10 kc. separation between frequencies.

96 Ibid., p. 16.
97 Ibid., pp. 166-168.
98 Ibid., pp. 48-50.
Between 1927 and the passage of the 1934 Communications Act the total number of stations was reduced from 681 to 598. The number of stations broadcasting at night was reduced from 565 to 376.\(^9\)

In 1930 the Commission developed a "code of practice and procedure governing the conduct of hearings."\(^{100}\) An "almost complete revolution in the type of equipment used in broadcasting stations" enabled the Commission to establish much stricter engineering standards in 1931.\(^{101}\)

Because of the growing complexity of general orders, that same year the Radio Commission undertook to codify regulations.\(^{102}\) The Commission also instigated the keeping by stations of engineering and program logs.

**Nontechnical Factors in Licensing.**—The Radio Commission soon realized, however, that it would be difficult to limit its activities to purely technical matters. Through decisions in specific cases, memorandums, and reports to Congress the Commission maintained it must develop criteria on which to base its licensing activities. If the public interest was to be protected, the Commission felt these licensing criteria could not be confined to technical considerations.

The Radio Commission suggested it must consider the fitness of an applicant to be a licensee: character, financial ability, place

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\(^{102}\) Ibid., p. 2.
of residence, other business interests, and the like. On August 23, 1928, the Commission issued a statement relative to public interest, convenience, or necessity. The Commission said it was convinced that in applying the test of public interest, convenience, or necessity, it may consider the character of a licensee or applicant, his financial responsibility, and his past record, in order to determine whether he is more or less likely to fulfill the trust imposed by the license than others who are seeking the same privilege from the same community, State, or zone. 103

The following year, in a decision involving the Great Lakes Broadcasting Company, the Radio Commission stressed the importance of length of service.

The first important general principle in the validity of which the commission believes is that, as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right. . . . Where two contesting broadcasters do not have otherwise equal claims the principle of priority loses its significance in proportion to the disparity between the claims. In a word, the principle does not mean that the situation in the broadcast band is "frozen" and that existing stations enjoying favorable assignments may not have to give way to others more recently established. 104

In the Great Lakes opinion the Commission also suggested it would not be in the public interest to license propaganda stations.

The Commission said broadcasting might be examined from two points of view:

(1) as an instrument for the communication of intelligence of various kinds to the general public by persons wishing


to transmit such intelligence, or (2) as an instrument for
the purveying of intangible commodities consisting of en-
tertainment, instruction, education, and information to a
listening public. 105

The Radio Commission concluded the emphasis in regulation should be on
the receiver rather than on the sender, and that the "entire listening
public within the service area of a station, or of a group of stations
in one community, is entitled to service from that station or stations." 106

The Federal Radio Commission maintained it should consider a
station's past performance before granting license renewal. The Commiss-
ion refused to renew the license of KFKB, Milford, Kansas, because the
owner had advertised a "goat gland" operation and prescribed for ailments
over the air. 107

Programming in the Public Interest.--Examination of such
factors as overall program service and past performance implies standards
of evaluation. The Federal Radio Commission maintained the no censor-
ship clause of the Radio Act prevented formulation of specific program
regulations. However, the Commission did suggest principles of "good
programming."

The program characteristic most frequently mentioned was
balance. One aspect of balance defined by the Radio Commission was
variety of types of programs. In its Second Annual Report the Commission
reviewed four aspects of public interest. The fourth was "avoiding too

105 Ibid., p. 32.

106 Ibid., p. 34: The attitude of the Radio Commission, and the Communications Commission, toward propaganda stations will be ex-

much duplication of programs and types of programs. Elaborating on this idea of variety in program types the Commission said:

Where one community is underserved and another community is receiving duplication of the same order of programs, the second community should be restricted in order to benefit the first. Where one type of service is being rendered by several stations in the same region, consideration should be given to a station which renders a type of service which is not such a duplication.  

In the Great Lakes opinion the Radio Commission suggested a balanced program schedule must include many kinds of programs.

The Great Lakes opinion also discussed the importance of serving community needs. The Commission said:

In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast. If... the station performs its duty in furnishing a well rounded program, the rights of the community have been achieved.

Advertising in the Public Interest.—In 1922 station WEAF broadcast the first radio commercial. Advertising soon became the major support of broadcasting, and in the Great Lakes opinion the Radio Commission examined the role of advertising. The Commission concluded that even though advertising might be considered propaganda, it occupies a privileged position:

Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private...

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109 Ibid.
110 FRC, Third Annual Report - 1929, p. 34.
The only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible. As will be pointed out below, the amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of the station.  

The Radio Commission denied, however, that it had authority to restrict or control advertising. Senate Resolution No. 120 directed the Commission to study broadcasting—particularly the use of broadcasting for advertising. Among questions asked by the Senate was what plan might be adopted to control or limit advertising. In its reply the Commission said:

Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the commission to do so.  

Freedom of Speech and Broadcasting. In its first report to Congress the Radio Commission quoted extensively from a talk by Commissioner Henry H. Bellows in which he had advocated "listener control" of programs.

Every broadcasting station exists for one sole purpose—the creation of public good will for its owners or for the sponsors of its programs. It will broadcast whatever it believes will best create and maintain that good will. . . .

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111 Ibid., pp. 32 and 35.
It is for you, the listener, not for us, to censor his programs. It is for you to tell him when he is rendering, or failing to render, real service to the public, and you may be sure that he will listen to your voices.

Above all, it is for you, not for us of the commission, to safeguard the so-called freedom of the air.¹¹³

After a year of getting its regulatory feet wet, the Commission developed a far more specific interpretation of duties. It began to structure its role as not merely one of traffic regulation, but of actively promoting the public interest in content of programs provided.

In a 1928 order placing four stations "virtually . . . under probation," the Commission concluded that evaluation of a station's overall programming is not censorship. In fact, the Commission believed, as protector of the public interest, it had the duty to examine programming. In this particular instance the stations were charged with airing "personal disputes." The Commission reasoned:

It is self-evident that the constitutional guaranty of freedom of speech applies to the expression of political and religious opinions, to discussions, fair comments, and criticisms on matters of general public interest, of candidates, of men holding public office, and of political, social, and economic issues. . . .

Does this same constitutional guaranty apply to the airing of personal disputes and private matters? It seems to the commission that it does not. The history of the guaranty shows that it was the outgrowth of a long struggle for the right of free expression on matters of public interest. Two neighbors may indulge in any verbal dispute they please in their own back yards. . . . Let them try to conduct the same dispute in a public place, such as on a busy street or in a theater, and they soon find that they are not protected by the Constitution. . . .

With these limitations already imposed by law on unrestricted utterances, is the commission powerless to protect the great public of radio listeners from disturbances and nuisances of this kind? . . . Listeners have no protection unless it is given to them by this commission. . . . Their only alternative, which is not to tune in on the

¹¹³ FRC, First Annual Report - 1927, pp. 6-7
stations, is not satisfactory... When a station is misused for such private purpose the entire listening public is deprived of the use of a station for a service in the public interest.

The Commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such. Since there is only a limited number of channels and since an excessive number of stations desire to broadcast over these channels, the commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service.114

In the Brinkley case, cited earlier, the Commission maintained, and was upheld by the courts, that evaluation of past performance is not censorship. The Court of Appeals for the District of Columbia said:

Appellant contends that the attitude of the commission amounts to a censorship of the station contrary to the provisions of section 29 of the radio act. This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.115

The Radio Commission suggested that reviewing "character" of program service is not censorship. In its 1928 statement placing four stations on "probation" for airing personal disputes, the Commission concluded that it had the duty to prevent nuisances of this type. In 1930 the Commission refused to renew the license of station KVEP because its owner, William D. Schaeffer, had allowed vicious and profane attacks to be broadcast over his facilities.116 License renewal

was denied Dr. Norman Baker, on grounds he was using his station to broadcast vicious attacks against doctors. In 1932 the Commission refused to renew the license of KGEF in Los Angeles, because the station had been used for attacks against religious groups.

In the Great Lakes opinion the Radio Commission attempted to justify the political provisions of the Radio Act as not constituting censorship. The Commission said it would not be in the public interest to "allow a one-sided presentation of the political issues of a campaign." The Commission felt that not only should political discussion be many-sided, but the same stipulation should apply to discussion of important public issues.

The Doctrine of Previous Restraint v. Subsequent Punishment.—The doctrine followed by the Radio Commission in the 1928 order placing four stations "on probation," and in the KVEP, KTNT, and KGEF cases was that of "previous restraint v. subsequent punishment." The Court of Appeals endorsed the application of this doctrine to broadcasting when it sustained the Commission's decision in the Trinity Methodist Church case. The Court said:

It is enough . . . to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare.

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117 FRC, Fifth Annual Report - 1931, p. 78.
120 Trinity Methodist Church South v. FRC, 62 F. (2d) 850 at 851 (App. D.C., 1932).
The key test of this doctrine came in 1931 as a result of a Minnesota law making a person convicted of printing scandal sheets and similar material guilty of maintaining a nuisance. The United States Supreme Court declared the law unconstitutional, and in its decision outlined the meaning of this doctrine:

In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. . . . Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.121

Development of Public Interest - 1934 to 1939

When Congress replaced the Federal Radio Commission with the Federal Communications Commission in 1934, the new Commission continued many of the policies established by its predecessor. The early life of the Communications Commission, however, was marked by a heightened concern with the meaning of public interest. Previously the Commission had been chiefly responsible for defining the role of government in the regulation of broadcasting. During the thirties others began to examine the "proper extent" of the Commission's authority. The following discussion will review the changing concept of public interest. Specific

121 Near v. Minnesota, 283 U.S. 697 at 713 (U.S. Sup. Ct., 1931).
subject areas, such as how the Commission has applied the concept of public interest to discussion programs, will be considered in subsequent chapters.

The Philosophy of Regulation.—A 1933 editorial by Leland Chapman in George Washington Law Review discussed problems of censorship in broadcasting. The editorial cited the Brinkley and Shuler cases in which license renewal was refused because, in the opinion of the Commission, the stations were not operating in the public interest. Chapman contended this was not a denial of free speech, but merely denial "of the use of a radio frequency over which to carry the speaker's voice." He pointed out that because available frequencies are limited the right to their use belongs to the people. Thus, a license is not a property right, but merely permission from the people to use a frequency "for the best interest of the public to which it belongs." Chapman concluded that when a broadcaster shirks his responsibility "no individual can be heard to complain when the people ask for its return for the use of someone who will better serve their interest."

Former Commissioner Bellows considered whether radio is censored and answered yes. Bellows examined policies established by both the Radio Commission and the Communications Commission, and concluded that the decision to examine program service was a "flagrant violation of the very law we were appointed to administer." He felt


that when a licensee could only be fined for violating the law, but put completely out of business without being convicted of violating any law or regulation—it might be necessary, but it was censorship.

Seymour N. Siegel, at the time Assistant Director of Radio Broadcasting for New York City, narrowed his discussion to censorship of "public men." Siegel maintained the term "public interest, convenience, or necessity" gave the Commission "virtually unfettered discretion."

He suggested the decisions in the Brinkley, Baker, and Schaeffer cases were a form of censorship. Siegel reasoned that even though the Radio Commission might be using its powers in the public good: "These station owners were punished by the equivalent of complete extermination, not because they were convicted law violators, but because the Commission did not like their programs." He felt that even if the Radio Commission did not intend to censor broadcasting it had created rigid censorship. To solve this dilemma Siegel advocated extending the license period, and forcing the Communications Commission to use revocation proceedings when a specific misconduct occurred—making it necessary for the Commission to prove misconduct. He also suggested the establishment of definite Federal statutes listing violations and their penalties.

An editorial note in Air Law Review concluded that broadcasters must prevent censorship by fulfilling their obligation to the public. The editorial said: "It remains for the broadcasters to

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recognize their public duty to allow freedom of expression by radio, and the Federal Communications Commission consistently to guard against any infringement of the basic constitutional right.125

In a 1938 article in Air Law Review, Louis Caldwell summarized the attitude of the Communications Commission toward the regulation of programming:

Under the construction which it has placed upon its powers, and in which it has so far been upheld by the courts, it may take the program service of an applicant either in the past or as proposed for the future, either solely or in conjunction with other factors, as the basis for its decisions, by applying to such program service the test of "public interest, convenience, or necessity." In doing this, according to its own views and the views of the United States Court of Appeals for the District of Columbia, it does not exercise censorship, and does not run counter to either the First Amendment or Section 326 of the Communications Act.126

Caldwell concluded that whether this view is correct or not, if the Commission plans to evaluate programming, it should establish program standards. He felt it was not fair to broadcasters to use such a vague description of service as "meritorious," or "mediocre," or "not high-minded."

These discussions were philosophical in nature; with little agreement on whether evaluation of programming within the concept of public interest constitutes censorship. There was agreement, however, on one point—if the Commission was going to consider programming, it should provide definite standards of practice. It is noteworthy that


only one article published during the period included recommendations for improving regulatory practices, and only one suggested that perhaps broadcasters must "earn" their right to freedom through responsible action.

Memorandum on "Undesirable" Program Materials.—During this period, as now, the Communications Commission maintained the "no censorship" clause of the Communications Act prevented formulation of standards of practice by the Commission, and continued to adhere to the doctrine of previous restraint v. subsequent punishment. In March, 1939, however, the Commission did release to the press a memorandum calling fourteen types of program materials "undesirable." The memorandum said that when renewing licenses the Commission would consider whether a station had carried these materials. The undesirable materials were (1) defamation, (2) fortune telling or similar programs, (3) approval of the use of "hard" liquor, (4) programs depicting torture, (5) advocating one side of a controversial discussion, (6) refusing to give equal rights to both sides in a controversial discussion, (7) too much use of recordings, (8) racial or religious intolerance, (9) obscene programs or those bordering on obscenity, (10) promiscuous solicitation of funds, (11) excessive suspense in children's programs, (12) lengthy and frequent advertisements, (13) false, fraudulent, or misleading advertising, and (14) interruption of artistic programs by advertising. Though the memorandum did not carry the weight of an official regulation, its influence should not be minimized. Few stations would dare to completely ignore the "suggestions" of the Commission on programming.

The Chain Regulations

During the thirties the Commission was also concerned with the growing power of the networks. In 1938 the Communications Commission undertook an investigation of network practices. On May 2, 1941, the Commission adopted regulations for network broadcasting. The regulations forbade exclusive affiliation contracts, territorial exclusivity, affiliation contracts of longer than two years' duration, and limited option time; directed affiliates to retain the right to reject network shows; prohibited common ownership of two stations in the same coverage area; and forbade network control of local station rates. The chain regulations became effective June 15, 1943, after being upheld by the United States Supreme Court.

Reaction to the regulations was mixed. Generally, the industry was against the regulations. Broadcasters claimed the regulations would destroy radio as it then existed. David Sarnoff, president of RCA, summarized the views of the industry in a talk before the Communications Commission. Sarnoff pointed out that of the two types of control exercised by the Commission, technical and program, control of programs is by far the more difficult and dangerous. He felt the chain regulations would exert an undemocratic influence on broadcasting, and suggested the democratic answer to the problems of broadcasting would be self-regulation through industry codes. Sarnoff advocated that "the

\footnote{128}{Statutes-Regulations-Standards, I RR, part I, 53:241-243 (1956).}

broadcasting industry . . . establish a voluntary system of self-regulation . . . and that it take the necessary steps to make that self-regulation effective.\textsuperscript{130}

Oren Barber, a member of the District of Columbia Bar, disagreed with Sarnoff.\textsuperscript{131} Barber contended that even though the chain regulations might indirectly censor broadcasting, the interests they would protect were the same interests protected by the First Amendment—the interests of the listener. He felt the networks censored broadcasting through selection of programs—especially news and discussion shows. Barber believed the network regulations would increase the freedom of broadcasting by giving the individual licensee more freedom to "choose his programs without prejudice or discrimination."

Possibly the most extensive study of the chain regulations was a dissertation by Thomas Robinson.\textsuperscript{132} Robinson outlined the basic conflict as one between a business using a public franchise for private profit, and the government aiming to insure that broadcasting "will not be commercially exploited in a manner inconsistent with the public welfare." After examining the growth and function of the networks and possible effects of the regulations, he concluded the regulations would not solve the problems of broadcasting. He suggested that the networks

\textsuperscript{130} Ibid.


should be licensed so they would no longer be merely "program producing organizations." Robinson advocated giving the networks final authority over programs, with local outlets serving as distribution points. All outlets for a single network could operate on a common frequency. This would make it possible to have more networks, and still provide additional frequencies for local stations. Robinson did not attempt to determine whether such concentration of control would be against the public interest, or what effect his plan might have on independent stations.

From the "Blue Book" to the "Mayflower" Decisions

During the forties there was intense concern with program policies. This was the decade of the Blue Book, studies by The Commission on Freedom of the Press, and the "Mayflower" decisions. A major attempt was made by the Commission to define programming in a report released in 1946 entitled Public Service Responsibility of Broadcast Licensees. In the Blue Book, as it popularly called because of the color of its cover, the Communications Commission outlined a philosophy of programming based largely on the concept of balance.

The Blue Book discussed four aspects of balance: (1) sustaining programs, (2) local live programs, (3) discussion of public issues, and (4) elimination of advertising excesses. The Commission maintained that with sustaining programs the licensee may broadcast shows

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not appropriate for sponsorship, present programs for significant minority tastes and interests, serve the needs of nonprofit organizations, and experiment with new program types. Local live programs provide an outlet for local talent and the expression of local interests. The Commission suggested discussion of important public issues is essential to an informed and enlightened community. The fourth aspect of balance discussed in the Blue Book was the necessity of eliminating advertising excesses. The Blue Book concluded that while "much of the responsibility for improved program service lies with the broadcasting industry and with the public, the Commission has a statutory responsibility for the public interest of which it cannot divest itself." The Blue Book will be considered in more detail in subsequent chapters of this study.

The industry was quick to reply to the Blue Book. Response came in the form of a letter from Justin Miller, president of the National Association of Broadcasters, to Representative Harris Ellsworth, Oregon, a member of the House Committee on Interstate and Foreign Commerce. The letter was in reply to a request for information made by Representative Ellsworth. According to Miller, the industry disapproved of the Blue Book because it suggested an assumption of powers "never conferred by Congress, and statement of philosophy destructively inconsistent with a free medium of speech." He maintained the Blue Book overlooked freedom of speech in broadcasting, showed lack

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134 Ibid., p. 55.

of faith in the American system of broadcasting, and indicted the entire industry because a few stations were guilty of inadequate programming. Miller concluded that freedom of speech demands that radio be subject to a minimum of government control. He suggested that if additional control is needed, it should come from broadcasters and the people themselves; because most people approve of American broadcasting and do not want it to be government owned, operated, or controlled.

Discussion of the Blue Book and the need to guard the freedom of broadcasting reflected a growing awareness of the importance of broadcasting in society. Typical of this concern were the investigations conducted by the Commission on Freedom of the Press. The Commission, organized in 1943 by Time, Inc. and Encyclopaedia Britannica, was headed by Robert M. Hutchins, then Chancellor of the University of Chicago. During 1947 the Commission issued two reports.

The first report, A Free and Responsible Press, dealt with the press in general—using the term press to include broadcasting, newspapers, movies, and magazines. It suggested the freedom of the press was in danger because the importance of the press had greatly increased, while the number who have access to the mass media had greatly decreased. The report said that those who control the mass media have not provided a "service adequate to the needs of the society." They have engaged in practices "which the society condemns and which, 136

if continued, it will inevitably undertake to regulate or control." \(^{137}\)

The chief criticism of broadcasting was that the advertiser and the advertising agency more often determine what people shall hear than the station owner. The study concluded that the problems of the press must be solved by the industries involved, not by more laws or government action. It recommended, concerning radio, that the guarantee of the freedom of the press be recognized as applying to broadcasting; and that the "radio industry take control of its programs and treat advertising as it is treated by newspapers." \(^{138}\)

A second report published by the Commission on Freedom of the Press, *The American Radio*, was authored by Llewellyn White. \(^{139}\) This dealt specifically with the problems of broadcasting. White also found that control of programs by advertisers was the chief impediment to operation in the public interest. He concluded the advertiser had played a more significant role in the development of broadcasting than the government. To better serve the public interest White recommended that the Communications Commission maintain its policy of promoting diversification of ownership, provide for local service whenever possible, and for more educational stations. He recommended to the industry that advertising and content be separated in programs, that broadcasters work to improve programs and program balance, and guard their freedom by appealing to the courts any attempts to censor broadcasting.

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\(^{137}\)Ibid., p. 1.  
\(^{138}\)Ibid., pp. 22-102.  
These two studies are among the most definitive ever conducted by a group other than the Communications Commission. Both of these studies were based on testimony and recorded interviews with interested persons, and on the personal knowledge of the Committee members. The Commission on Freedom of the Press specifically said that no attempt was made to conduct "elaborate research" for these studies.

In line with the concern for freedom in broadcasting, was the furor caused by the 1941 "Mayflower" decision. In a case involving the Mayflower Broadcasting Corporation, the details of which will be discussed in a later chapter, the Communications Commission decided editorializing by a licensee is not in the public interest. The opinion was criticized so severely that seven years later the Commission called a hearing on "editorializing." Two basic questions were considered:

1. Is editorializing by the licensee consistent with the concept of public interest? 2. Does editorializing carry an affirmative obligation to present all sides of a controversial discussion?

Again, Judge Miller spoke for the industry. His statement to the Communications Commission on April 19, 1948, was based on two premises:

1. That speech, broadcast, is speech within the meaning of the First Amendment; 2. that prohibition of broadcast editorializing, by the Commission, is abridgment of freedom of speech, whether the editorializing be done by a station licensee or otherwise.

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140 Mayflower Broadcasting Corp., 8 FCC 333 (1941).
Judge Miller examined principles on which editorializing might be prohibited: the public interest concept, the utility concept, the problem of limited frequencies, and others. He concluded that the Commission lacks authority to consider whether, or how, a licensee might be editorializing. Miller said that even though he believed the right to editorialize carried with it an affirmative obligation to present other views, this was not an obligation which could be enforced by the Commission. He concluded the relationship was one which "should be controlled on a basis of professional standards, self-imposed and self-operating." 142

Following the hearing the Commission reversed its initial decision on editorializing. It suggested, however, that editorial opinion should be identified, and that licensees have an affirmative obligation to provide "many-sided" presentations of public issues. 143

Charles Siepmann, an astute critic of broadcasting reputedly the author of the Blue Book, analyzed the implications of the "Mayflower" reversal. He concluded that the original opinion on editorializing should not have been reversed because "access to public domain should not and ... does not empower him [the broadcaster] to advance his private interests and convictions in ways that put him at an advantage over other citizens." 144

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142 Ibid., pp. 29-32.
143 Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).
The "Barrow" Report

A more recent study of broadcasting was the investigation of network practices directed by the Network Study Committee of the Federal Communications Commission. The Committee employed Dean Roscoe L. Barrow of the University of Cincinnati Law School to organize and head a Network Study Staff to conduct the inquiry. Late in 1957 a two-volume report of the study was released. The introduction to the report outlined the basic problem of the study:

The network study was initiated by the Federal Communications Commission to determine whether the present operation of television and radio networks and their relationship with stations and other components of the industry tend to foster or impede the development of a nationwide, competitive broadcasting system.\textsuperscript{145}

The investigation attempted to answer nine questions: (1) Is there concentration of control in broadcasting contrary to the public interest? (2) Is there opportunity for effective competition between networks and for the entry of new networks? (3) Is there opportunity for effective competition between networks and non-network organizations? (4) What is the effect on public interest of the affiliation relationship between networks and stations? (5) Of multiple ownership of stations? (6) What is the "effect on competition of network operations which are not a part of network broadcasting and are in direct competition with network broadcasting"? (7) What is the "effect on new network entry and station service of the level and structure of the rates for A.T. & T. line services"? (8) What is the effect of networks on programming? (9) Should the Commission's rules apply directly to networks?\textsuperscript{146}


\textsuperscript{146} Ibid., pp. I, 7-17.
Chapter III of the report of the Network Study Staff considered station performance, as judged by the concept of public interest, and examined methods used by the Commission to implement its views. The investigators observed that the theme stressed most often by the Commission has been "service to the public," largely evaluated in terms of program service. The report said that one way the Commission has fostered better service has been through promoting competition.\textsuperscript{147}

The report suggested the most important competitive factors promoted by the Commission have been encouraging new entry into broadcasting, and attempting to equalize competitive opportunity. The Commission has encouraged new entry by refusing to consider economic injury, and through its multiple ownership rules. The Staff concluded the chain regulations were the most important attempt ever made by the Commission to equalize competitive opportunity.

The Staff found that in addition to promoting competition within broadcasting, the Commission has encouraged competition in the mass media in general through its diversification policy. However, after examining hearings in which diversification was a factor, the Study Staff discovered the "seemingly vigorous support given the diversification policy by the Commission in many of its official statements has been seriously eroded by a long series of qualifying decisions.\textsuperscript{148}

Another criterion of performance in the public interest cited by the Study Staff is service to the local community: providing

\textsuperscript{147}Ibid., p. III-76.  \textsuperscript{148}Ibid., p. III-11h.
a local outlet for programs, presenting discussion and news of im-
portant community issues, and developing local talent. The Staff found,
however, that other policies have often been in competition with the
local institution concept. Competing policies have included the practice
of favoring an applicant with an outstanding record of past performance,
or with extensive past experience, or one with broadcasting experience
combined with a good record of past performance.

The Study Staff discovered the most frequently mentioned
criterion of programming was "well-rounded" program service suitable
to the community served. The investigators also considered whether the
Commission should evaluate programming at all, and reached the conclusion
that it must:

This review . . . has shown that administering the
Communications Act in accord with the public interest
standard necessarily involves the Commission with the
programming function. It is only through a consideration
of service or programming structure that the public in-
terest concept can be given meaningful content. It would
appear, therefore, that, while the limits of legal authority
are not well defined in all respects and Commission inter-
vention in certain aspects of the programming function may
be unwise as a policy matter, even within such legal limits
the Commission has properly concerned itself with the pro-
gramming function and must continue to do so.119

Summarizing its analysis, the Study Staff concluded that
hearings in competitive situations are the only really effective method
the Commission has of promoting public interest. With most of the VHF
channels already assigned, the report added, it will soon be almost
impossible to get a channel except through transfer. Since in transfer
cases the Commission does not consider other possible owners, the Com-
mission is rapidly losing control over broadcasting. The Staff

119 Ibid., p. III-177.
recommended the Commission strongly consider the possibility of opening up channels by the "renewal deficiency" route.

The remainder of the report was devoted to an analysis of the networks. The final chapter concluded with the following statement:

The fundamental objective of Commission policy is the best possible service to the public. The implementation of this primary objective has been sought through the policies of: (1) promoting competition and preventing undue concentrations of economic control; (2) diversifying ownership and control of broadcast facilities; and (3) fortifying the independence of station licensees in order that they may exercise a high degree of discretion in providing a service consistent with the needs and desires of the community reached by their broadcasting. . . . The dominant theme of this Report is the importance of achieving or maintaining the conditions necessary for effective competition in the television industry.150

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Since broadcasting facilities are limited it is necessary to control their use. As a form of interstate commerce, radio and television are subject to Congressional regulation. The broadcasting situation changes so rapidly, however, it needs constant attention. Obviously Congress can't devote this much time to a single industry. It has delegated authority to an independent commission and directed the commission to regulate broadcasting in the public interest, convenience, or necessity.

The 1927 Radio Act was largely an effort to solve technical problems of broadcasting. Much of the early work of the Federal Radio Commission was formulating technical regulations. These regulations

150 Ibid., XV, 44-45.
had two goals: promoting the orderly development of broadcasting and providing fair and equitable distribution of service. From the first, however, the Radio Commission maintained it could not limit its activities to purely technical matters. The Commission felt the Radio Act directed it to protect the interests of the listening public. The Federal Radio Commission established the practice of examining such factors as an applicant's qualifications to be a licensee, overall program service, and "character" of program service.

When Congress approved the Communications Act in 1934, the newly created Federal Communications Commission continued policies established by the Radio Commission. Through memorandums, reports of special investigations, and decisions in specific cases the Federal Communications Commission has further defined the concept of broadcasting in the public interest.
CHAPTER III

THE CLIMATE OF REGULATION

The Federal Communications Commission does not apply the concept of public interest in a vacuum. Its activities must be geared to the patterns of American broadcasting. The Commission must take into account the fact that stations are privately owned and operated under a license from the Commission as a profit-making venture; that broadcasting is supported by advertising; and that the broadcaster, especially in television, may depend on the national networks for programs and revenue. In addition, the Commission is subjected to pressures from a wide variety of special interest groups.

Within this context the Commission must attempt to discover the public interest. Sydney Head defined this problem in his book *Broadcasting in America*:

> On some occasions we need to think and act in terms of society as a whole, arriving at some kind of balance among all the conflicting group interests. ... Out of the many special interests emerges a broader more inclusive interest—the "public" interest. This is not to say, of course, that the compromise is ever perfect. In actual practice the public interest has to be defined by someone, ... and that someone cannot completely escape the influence of his own interests; ... In our country, ... as far as broadcasting is concerned, that machinery is the F.C.C., whose task is to mediate between the private interests of the broadcaster and the other private interests of society and to effect an equilibrium among all these interests which can be interpreted as "the public interest." ¹

Any effort to analyze the manner in which the Commission has applied the concept of public interest to the regulation of programming should first consider the structure of American broadcasting.

Patterns of American Broadcasting

The American system of broadcasting is unique. In many countries radio and television stations are owned and operated by the government, often primarily as a means of contact between the government and the people. In the United States a broadcasting system has evolved which reflects the philosophy of our country toward the operation of the mass media. Stations are privately owned. They are operated to make money. As a vehicle of mass communication, broadcasting is protected from government censorship.

Broadcasting and Advertising Support

In the early days of broadcasting radio was not visualized as an advertising medium. Secretary of Commerce Herbert Hoover told the First Radio Conference in 1922: "It is inconceivable that we should allow so great a possibility for service to be drowned in advertising chatter." Nevertheless, broadcasters soon found that operating a station cost money. As the novelty wore off listeners began to demand better programs. Better programs cost money. On August 28, 1922, WEAF, a New York station owned by A.T. & T., broadcast radio's first commercial announcement. Here was the answer to the broadcaster's prayer.

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FCC, Public Service Responsibility . . ., p. 41.
At first advertising was merely tolerated as a necessary evil.

In its Second Annual Report the Federal Radio Commission said:

> While it is true that broadcast stations in the country are for the most part supported or partially supported by advertising, broadcasting stations are not given these great privileges . . . for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public . . . Advertising should be only incidental to some real service rendered to the public, and not the main object of a program.3

Just one year later, however, in its Third Annual Report, the Commission said of arguments to ban advertising:

> If a rule against advertising were enforced, the public would be deprived of millions of dollars worth of programs which are being given out entirely by concerns simply for the resultant good will which is believed to accrue to the broadcaster or the advertiser by the announcement of his name and business in connection with programs. Advertising must be accepted for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege.4

Between the time of the first commercial announcement in 1922 and the Commission's Third Annual Report in 1929, advertising had become the established means of support for broadcasting.

The type of sponsorship which developed was probably more the result of chance than design, but its implications for the regulation of broadcasting are important. When an advertiser buys a commercial on radio or television, he frequently buys the "editorial" content as well. Though the Commission holds the licensee responsible for all material broadcast, it is often the sponsor who makes the actual choice of program material.

4FRC, Third Annual Report - 1929, p. 35.
As the advertiser entered the broadcasting picture, so did the advertising agency. First, as time broker; later as representative of the client in every phase of his business. The advertising agency is not subject to regulation by the Commission. The first duty of an agency is not to the public interest, but to the advertiser. An advertising agency is legally obligated to promote its client's interests.\footnote{Wilhite, op. cit., p. 94.}

Ilewellyn White charged in The American Radio that the agency calls the tune in broadcasting. He claimed the agency-sponsor relationship enables men about whom the public knows nothing and whom the F.C.C. is not required by law to investigate to enjoy franchises which the public grants to another, or "dummy," group for the use of the public's frequencies. . . . This is not to say that advertising men are not useful citizens and often very pleasant people to know, or to disparage the vital role they play in our national economy. It concerns their point of view, their aim in life, their raison d'etre.\footnote{John Crosby, Life, November 6, 1950, p. 147.}

Areas of Influence.--The influence of the advertiser and the advertising agency in broadcasting may extend into many areas. The observation has frequently been made that concern for the advertiser distorts the broadcaster's viewpoint; that he becomes more concerned with "advertiser interest" than "public interest." John Crosby said in an article in Life: "Broadcasting sold . . . itself to the advertiser before it was old enough to know what it was doing. Radio, . . . is not the only medium supported by advertising, but it is the only one owned outright by it."\footnote{Hofflin v. Moss, 67 F. 140 (C.A.A., 8, 1895). 67 F. 140 (C.A.A., 8, 1895).}

\footnote{John Crosby, Life, November 6, 1950, p. 147.}
broadcasting. However, Justice Douglas suggested, while chairman of the Securities and Exchange Commission, that the influence of the advertiser in broadcasting is not so much a "shocking" situation as an economic "fact of life." Douglas said:

It is idle to say that the requirements of business are constantly going to be determined in the light of the requirements of the public interest. Concessions to the public interest are frequently made. But the immediate requirements of management will tend to bow to the larger public interest only when necessary and to the extent that is necessary. It would be against all experience with psychological facts to expect sudden and permanent conversion.9

Another charge leveled at the economic structure of broadcasting is that it has resulted in the transfer of control from the station to the sponsor. Testifying before a Senate committee Niles Trammel admitted:

The argument is now advanced that business control of broadcasting operations has nothing to do with program control. This is to forget that "he who controls the pocketbook controls the man." Business control means complete control, and there is no use arguing to the contrary.10

Broadcasting magazine reported an instance of a sponsor attempting to influence station policy. It claimed the General Manager of Procter and Gamble "warned" an NBC affiliates meeting "unqualifiedly that P & G, the nation's biggest radio spender, would seriously object to new restrictions in advertising that would limit commercial flexibility."11

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8 Frost, op. cit., p. 94.
9 Bernstein, op. cit., p. 261.
10 U.S. Senate, Committee on Interstate Commerce, Hearings on S. 814, To Amend the Communications Act of 1934, 78th Cong., 1st Sess., 1943.
The advertiser's strongest influence is on programming—for the obvious reason it is the advertiser, or his agency, who selects a program to sponsor. The advertiser shapes programming by the shows he is willing to sponsor, and his decision is most often dictated by a desire for a mass audience. This preoccupation with a large audience has tended to result in much sameness in program types, and poor balance in the overall program schedule. The advertiser wants the "tried and true." Thus, the viewer's choice of network programs at a given time may be between three quiz shows or two quiz shows and a western. Public interest type programs, local programs, programs for minority groups, and experimental shows are seldom attractive to an advertiser. Charles Siepmann has said: "Advertisers concentrate on programs with a potential mass market to the exclusion . . . of programs of wide interest and inherent merit from a public interest point-of-view."\(^{12}\)

It is in the field of news and information that the influence of the advertiser on programming can be most serious. Niles Trammell stated before a Congressional committee that NBC does not allow the advertiser to have anything to do with news or news comment: "I have never known an advertiser—and we certainly would not permit it—to attempt to influence the opinion of any commentator he might have on the air."\(^{13}\)

However, a candidate for a master's degree at the University of Minnesota School of Journalism studied the extent of sponsor control

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\(^{12}\)Siepmann, op. cit., p. 55.

\(^{13}\)Hearings on S-814, loc. cit., p. 770.
over news and found evidence of influence. The study showed that requests to include stories for a client exceed requests to omit stories. By slightly less than a two to one margin television news directors reported they did not honor requests from clients for deletions. There was considerably more leniency in allowing inclusion of news favorable to a sponsor. Of the 118 news directors surveyed, 77 said they never omitted a news item so as not to offend the sponsor.

In addition to direct influences on content of news, the advertiser indirectly slants radio and television news by the newscaster or commentator he sponsors. Frederick Irion concluded this leads to a predominance of conservative newscasting. As an example he cited an instance of extreme conservatism by Procter and Gamble:

Probably the largest single radio advertiser, Procter and Gamble, has been described as having a "policy never to offend a single listener." The most extreme example of fear of minority reaction came in 1935 when Alexander Woolcott's broadcasts were discontinued because the sponsor complained that Woolcott's criticism of Hitler and Mussolini might offend some listeners.

Another method by which the sponsor may attempt to shape public opinion is through the inclusion of editorial content in commercials. Four days after the Department of Justice filed suit against DuPont in connection with an alleged cartel agreement, the "Cavalcade of America" carried the following commercial:

I want to talk to you tonight about an agreement current in the news. . . . This is the agreement which

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the DuPont Company has had for years with a British chemical company...

Literally hundreds of transfers of technical and scientific information have occurred for the advancement of chemical science and the benefit of the American people...

Many important products have resulted... synthetic ammonia...

These agreements have been of the greatest benefit in giving to the American public products and processes... which are a part of the promise for the future of "Better Things for Better Living Through Chemistry."16

Implications of Advertising Support.—As both sponsor and program selector, the advertiser has tremendous influence in broadcasting. Since stations depend on the sponsor for income, a broadcaster may think more often of the interests of the advertiser than the interests of the public. This is not to imply that the interests of the advertiser are necessarily contrary to the public interest. It does suggest that station owners approach decisions from the point of view of the sponsor rather than of the public.

The control of advertisers over programming has resulted in repetition in program types, lack of balance, failure to program for minority groups, and failure to provide shows of special interest to the local community. The advertiser may both directly and indirectly shape the presentation of news and information.

A 1946 survey asked station managers to indicate whom they felt had done the most to retard the improvement of broadcasting: 47 percent replied advertising agencies, and 44 percent sponsors.17

16 Ibid., p. 129.
17 "Who Does Most to Improve Radio?" Broadcasting, XXXI:18 (November 4, 1946), p. 18. (Total is more than 100 because votes for 1st, 2nd, and 3rd place were combined.)
When regulating broadcasting the Commission must attempt to strike a balance between the demands and needs of the advertiser, and the requirements of public interest.

Broadcasting and the National Networks

On January 1, 1923, WEAF, New York, fed a five-minute program by wire to WNAC, Boston. This was one of the first tests of the network idea. Later in 1923, the first permanent hookup was made between WEAF and WMAF in South Dartmouth, Massachusetts. In the early days of broadcasting it became evident that radio's tremendous appetite for material demanded some type of program syndication. If broadcasting hoped to attract the large advertiser it had to offer national programming.

During December of 1926, the first national network, the National Broadcasting Company, commenced operation. This was followed in 1927 by the Columbia Broadcasting System. In 1934 Mutual was organized, and in 1942 the American Broadcasting Company. Today, national networks are a major source of income for television stations. In a special report Sponsor summarized where the television advertising dollar went during 1957: $667 million to the networks, $367 million for spot announcements, and $281 million for local advertising. Prior to television the networks were also a major source of income for radio broadcasters. Today, however, radio depends more and more on local and national spot advertising for revenue.

The relationship between networks and affiliates is governed by contract. Under the average affiliation contract the station agrees to option certain time to the network. In return the network promises to supply service for a specified number of hours each day, the service to include both commercial and sustaining programs. To compensate for network service, including line rental, and to help defray costs of sustaining programs, the affiliate gives a stipulated number of hours to the network free of charge. Income from other hours of network shows carried is distributed according to an agreed rate, usually a percentage of the rate card value of the station’s time.

**Areas of Influence.**—The national networks have contributed much to American broadcasting. Economically they have made it possible for broadcasting to attract the national advertiser on a major scale. On a technical level networks have carried on a constant program of experimentation. It was the networks, for instance, that could invest the vast sums necessary to turn television into a profitable commercial medium.

In the area of programming network contributions have been particularly significant. Networks have pioneered in the development of new production techniques. The high quality of network productions has undoubtedly helped raise the standards of American broadcasting in general. Networks have developed and experimented with new program forms and promoted variety in programming. With their financial and production resources they have been able to present shows which would be difficult or impossible to produce locally. In the news and informa-
tion field only a national network could afford to bring on-the-spot
reports of national and international events, to have their own
reporters at the scene of major happenings, and to present special docu-
mentaries requiring months of preparation. Charles Siepmann summarized
the contributions made by networks to broadcasting in the United States.
Siepmann said:

The advantages that have accrued to listeners since
network broadcasting began are almost too obvious to men-
tion. The great stars of the entertainment world are now
on the air for most ... listeners to hear. Network news
services ... have proved so useful that millions of people
rely primarily on radio for information about current events.
A number of distinguished programs of a "public service"
character have been regularly broadcast on sustaining time.
Networks have transformed radio from a parochial pursuit
to a vast and complicated operation on a national and, at
times, even a global scale.19

Networks have brought certain special advantages to affiliates.
Network affiliation gives a station prestige. Economically it provides
revenue, offers access to the national advertiser, and makes other
station time more saleable. In the realm of programming a network
affiliation relieves the pressure of continuous local programming—
almost essential in television. It provides the local audience with more
variety in program types and higher quality shows than would be available
on a strictly local level.

Methods of Influencing Broadcasting.—Network control over
broadcasting is based on the individual station's need for network
programs and revenue. This is particularly true in television. Former

19Siepmann, op. cit., p. 46.
Senator John W. Bricker of Ohio charged in a minority report issued by the Senate Interstate and Foreign Commerce Committee, following a probe of television networks and of the uhf-vhf problem, that the power of television networks "to determine whether or not to make programs available to an individual tv station amounts practically to the power to control the number of tv stations in the country which can subsist financially." Networks also influence broadcasting through the policies they follow in the operation of their own stations.

Implications of the Network System.—The national networks have a tremendous influence on radio and television in the United States. It is not too surprising that the Commission has suggested the networks may have too much control. The Report on Chain Broadcasting said of Radio Corporation of America, parent organization of the National Broadcasting Company:

RCA occupies a premier position in fields which are profoundly determinative of our way of life. Its diverse activities give it a peculiarly advantageous position in competition with enterprises less widely based. Its policies are determined by a management subject to little restraint other than self-imposed. . . . We have thought it proper, . . . to call the attention of Congress and the public to the broader problems raised by this concentration of power in the hands of a single group.21

As early as 1938 Louis Caldwell summarized the criticisms of network control over programming:

Network programs have been subjected to criticism chiefly on three grounds: (1) that stations owned by or


affiliated with networks devote or are obliged by contract to devote too large a proportion of their hours to network programs to the exclusion of "local" programs, (2) that too many stations are affiliated with the national networks, with the result that in many areas (particularly rural areas) there is duplication of program service on a number of different channels, and (3) that the situation tends toward monopoly, because of undue control over program service by a few large organizations.22

The first investigation by the Commission of network practices was conducted between November, 1938, and May, 1939. The eventual results were chain broadcasting regulations designed to lessen network control over broadcasting.23 During 1957 the report of a second investigation of networks, also sponsored by the Commission, was released.24 Following publication of this report the Commission held hearings on the findings and recommendations of the study. It is very possible this investigation will also result in new regulations.

Efforts of the Commission to control the influence of the networks over broadcasting are limited by the fact that the Commission cannot regulate networks directly. New legislation would be required to make this possible. The Commission must formulate regulations in terms of affiliates. The Commission also controls networks through their owned and operated stations.

As with the advertiser, the Commission must keep the influence of networks within proper bounds without destroying the advantages of


23These regulations were discussed in Chapter II.

24This report was reviewed in Chapter II.
the network system. The difficulty of the task lies in determining this fine line between helpful regulations and regulations which might be a hindrance to the industry. When the chain regulations were put into effect the networks argued the network system would be destroyed. Obviously this did not prove to be true. One proposal included in the 1957 network study is that option time be abolished. Again, the networks argue this would destroy the network system. The Federal Communications Commission must attempt to consider the needs of the networks, the needs of the individual broadcaster, and from this to determine how to best promote the interests of the public.

**Pressure Group Influences**

Because government is so vast and complicated, an individual seldom tries to influence government actions directly. He more likely joins with others who have similar interests to form what is commonly referred to as a pressure group. These groups may be defined as a "number of individuals bound together in a common cause or united by similar interests into an articulate unity." They are formed because:

> With the advent of political intervention and control, . . . it became evident that the formation of policy could not be confined to ballot or to legislature. To fill the gap the voluntary group was resorted to, not only by the individual who felt himself alone but by the government which felt itself ignorant.

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Pressure groups have a variety of objectives. In relation to the public they may be an active dispenser of propaganda. The purpose of the propaganda is to form a general opinion favorable to the group or idea. They may attempt to influence legislation through such techniques as bringing personal pressures to bear on Congressmen, promoting a "string of telegrams," and appearing before Congressional committees. They may also try to influence administrative agencies.

The Commission is constantly subjected to the demands of a wide variety of special interest groups. The most important include groups within the broadcasting industry and in related areas, political pressures other than direct legislation, and pressures from special interest groups concerned with broadcasting. These varying influences must be weighed as the Commission attempts to discover the public interest.

**Industry Pressures on the Commission**

The most powerful pressure group in broadcasting is the radio and television industry. The industry functions as a pressure group chiefly through its trade associations. A partial list would include the Association of Maximum Service Telecasters, Association of Radio News Analysts, Broadcasting Promotion Association, Clear Channel Broadcasting Service, Community Broadcasters Association, FM Broadcasters, National Association of Television and Radio Farm Directors, Radio and Television News Directors Association, Station Representatives Association, and the National Association of Broadcasters. Since the National

\[\text{Franklin L. Burdette, } \text{Lobbyists in Action} \text{ (Manassas, Virginia: Capitol Publishers, Inc., 1950), p. 6.}\]
Association of Broadcasters is by far the most influential trade association in broadcasting, and the most nearly representative of the entire industry, its activities will be considered here as an example of how a trade association may operate as a pressure group for broadcasters.

The National Association of Broadcasters.—The National Association of Broadcasters was organized in 1923 to deal with ASCAP. As broadcasting developed into a medium of mass communication the functions of the Association grew accordingly. When the Attorney General ruled in 1926 that the Secretary of Commerce did not have authority to force stations to operate on definite frequencies and power, the Association attempted to prevent complete chaos by asking stations to sign a "certificate of promise" that they would remain on their previously assigned frequencies. The Association helped promote the 1927 Radio Act. When Congress failed to appropriate money to the Federal Radio Commission for its first few months of operation, the Association reportedly performed many favors for the Commission.

In January, 1959, Broadcasting magazine reported that the National Association of Broadcasters had a staff of seventy-seven persons and an operating budget for 1958 of nearly one million dollars.\(^\text{28}\)

Though membership is voluntary, it has been estimated that Association members do over 90 percent of all broadcasting business in the country.\(^\text{29}\)


At the beginning of 1958, "1,415 am stations, 337 fm stations, 4 radio networks, 319 tv stations, 3 tv networks, and 118 associates in manufacturing and related fields" were members of the National Association of Broadcasters.30 The Association's activities extend into many phases of broadcasting. The Association maintains separate departments to work with employer-employee relations, engineering, government relations, legal aspects of broadcasting, publicity and information, research, station relations, and television code affairs.

Methods of Influence.—As a pressure group the National Association of Broadcasters operates primarily on three levels. It may attempt to influence the activities of the Commission directly. It may try to mold public opinion and thereby indirectly influence the Commission. By defining the goals and problems of broadcasting for its own members, it may promote better public relations for the industry.

To work with the Commission, and with other government agencies, the Association maintains a government relations department. It is difficult to obtain information on the operation of this department. One might surmise that the Association would use "typical" pressure group techniques to acquaint the Commission with the views of the industry on matters of importance to broadcasting. It might contact members of the Commission, attempt to exert political pressure on the Commission, represent the industry at hearings of the Commission, and appear before Congressional committees.

30 "NAB Budget Nears Million Mark," loc. cit.
The Association might try indirectly to influence the Commission by bringing the weight of public opinion to bear on the Commission's activities. The House Committee to study lobbying concluded: "The power of government ultimately rests on the power of public opinion."\(^{31}\) By means of press releases, pamphlets, films, and other techniques, the Association tells the general public about broadcasting in the United States—its accomplishments, goals, and problems. The Television Code Review Board, for instance, has sponsored a number of publications designed to explain code activities. These include First Report to the People of the United States,\(^{32}\) and You and Your Family Are in This Picture.\(^{33}\) During 1958 the Board released a 24-minute film, A Welcome Guest in the Home.\(^{34}\) The film may be shown by local stations which subscribe to the code, and describes how the television code helps broadcasters improve programming and advertising.

Another aspect of its information program is keeping its own members up-to-date. Through direct mail, through the magazine Broadcasting, the unofficial mouthpiece of the Association, and through


\(^{33}\)Television Code Review Board, You and Your Family are in This Picture (Washington: National Association of Radio and Television Broadcasters).

\(^{34}\)"Tv Code Film to Debut in 23 Cities This Week," Broadcasting, LIV:12 (March 24, 1958), p. 84.
national and regional meetings and conventions, the Association informs its own members of pending legislation, of the activities of the Commission, and the tenor of public opinion.

A continuing effort of the Association to minimize government control, create favorable public opinion, and influence its own members has been the promotion of self-regulatory codes. The first "Code of Ethics" was adopted March 25, 1929. It dealt primarily with questionable advertising practices, and provided for investigation of written charges of violations by the Association's board of directors. The 1929 code remained in effect until 1935, when it was revised at the national convention of the Association. The revised code provided no method of enforcement and, according to Llewellyn White, "Members of the NAB observed the Code to the extent that it pleased them. There were no penalties for flouting it." Many stations felt, however, that even the revised code was too strict. In 1937 this code was abolished, and the industry pledged to a 5-point program. The five points dealt entirely with the problems of broadcasters and made no reference to any obligation to serve the public interest.

By 1938 the industry was in trouble. The networks were under fire for monopolistic practices. The Association hired its first full-time, paid, president. The editor of Broadcasting observed: "Self-regulation of broadcasting through a voluntary code embodying program standards, looms as the first tangible outcropping of the FCC inquiry.

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36 White, op. cit., p. 72.
into network operations and alleged tendencies toward monopoly.\textsuperscript{37}

The 1939 convention adopted a new code known as the \textbf{NAB Standards of Practice}.\textsuperscript{38} The president of the Association appointed a Code Compliance Committee to interpret the standards.

In 1942, a problem arose which the standards did not cover. The Co-operative League of the United States, a consumers' group, announced it would sponsor a series of programs. At the last minute CBS refused to broadcast the series, saying they considered the programs controversial. This prompted the Association to add a new section to the standards aimed at preventing advertising by co-operatives and unions. In effect the new provisions forbade selling time for the discussion of controversial issues. This provision caused a storm of protest. Largely through the efforts of the Political Action Committee of the CIO, the broadcasting industry was forced to abolish this portion of the standards, and to abandon its code compliance activities—as far as radio was concerned.\textsuperscript{39}

On May 24, 1948, a streamlined set of radio standards was adopted.\textsuperscript{40} The abbreviated standards made recommendations for the handling of news, political broadcasts, public affairs, religious pro-

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\textsuperscript{39}The latter part of this chapter will discuss this incident more fully as an example of pressure group activities in broadcasting.
\textsuperscript{40}The National Association of Broadcasters, \textit{Standards of Practice} (Washington: The National Association of Broadcasters, July 1, 1948).
\end{flushright}
grams, children's programs, educational shows, crime and mystery programs, and advertising. The standards included no compliance provisions. It is this radio code, with minor revisions, which is in effect today.

The television code has had a somewhat different history. During May, 1951, an invitation was extended to all television stations to attend a meeting for the purpose of formulating a television code. The group met June 22, 1951, and passed a resolution asking the Association to supervise the development of a code. A proposed code was tentatively approved at the 1951 convention. It became effective March 1, 1952.\textsuperscript{1}

The television code is unique in that it attempts to provide a method of enforcement. To help gain compliance a "Seal of Good Practice" was established. The seal may be displayed by all code subscribers. The regulations of the code provide for withdrawal of the seal for code violations. A Television Code Review Board was also created to review code violations and to generally interpret and direct code activities.\textsuperscript{2} To further promote code compliance the Association now includes in its organization a department of Television Code Affairs.

Self-regulatory codes are based on the concept of licenses responsibility. The Commission has frequently said the individual licensee is responsible for all material broadcast over his station.


In answer to a query on the acceptability of certain material the Commission replied:

The sole responsibility of operating its station in the public interest . . . is upon the station licensee. If a station licensee is not prudent and intelligent enough to find its sources of information to properly guide it, then it is not properly qualified to operate a station in the public interest and according to law. 43

It is often difficult, however, for an individual licensee to determine what is proper and in the public interest. The task is further complicated by the Commission's use of the doctrine of previous restraint v. subsequent punishment. There is also the problem that with some 2,500 individuals or companies operating stations, a few unprincipled owners may give the entire industry a "black eye."

Self-regulatory codes are used to provide standards of good broadcasting for the entire industry. Through such codes the industry attempts to minimize government control of broadcasting and foster better public relations. Justin Miller said of efforts of the National Association of Broadcasters to formulate a new broadcasting code in 1946:

The influx of new station, . . . it was evident, motivated the Board's desire to spell out explicitly the functions and obligations of stations and the need for constant vigilance lest the FCC attempt further to invade the field of program regulation and business practices. 44

Head commented that the function of broadcasting codes is to "identify and codify public opinion on the subject of broadcast programs."\(^{45}\)

The major code problem is enforcement. The insistence of the Commission on licensee responsibility for all material broadcast makes it difficult to devise a method of forcing code compliance which does not run the risk of a monopoly charge. Code compliance must be on a voluntary basis. To gain compliance, the Association is forced to depend chiefly on publicity, and on convincing stations of the value of self-regulation. Thus, many stations ignore the codes. Stations not members of the Association may feel no compulsion whatsoever to comply. A broadcaster may openly oppose sections of a code which are at variance with his own current practices. Stations operating on a narrow margin of profit, or in the red, may fear that adherence to certain portions of a code will cause loss of revenue.

Implications of Industry Pressures.—Pressures by the broadcasting industry may be both a help and a hindrance to the Commission. Through its information program the industry may acquaint the Commission and the public with the goals and problems of broadcasting. It can outline for the Commission the possible effects of proposed rules and regulations. Once regulations are formulated the trade associations can explain the significance of regulations to their own members. The industry may suggest possible solutions to problems of broadcasting for the Commission's consideration.

\(^{45}\)Head, op. cit., p. 296.
Perhaps the chief danger in industry pressures is that the Commission may come to identify public interest with the interests of the broadcasting industry. Marver Bernstein has said:

Discussions of the "public interest" that Commissions are supposed to seek frequently seems unreal. Usually, the public interest is conceived as a balancing by a commission of the interests involved in regulation. Unreality begins to creep in, however, as soon as it appears that the Commission's enabling statute may in fact provide only the most general guide to the goals of regulatory policy. Left largely to its own resources, a commission will probably be guided by dominant interests in the regulated industry in its formulation of the public interest. Thus the public interest may become more private than public.\(^{16}\)

Lacking an answer of its own to industry problems, the Commission may accept the broadcasters' solution without making any real attempt to discover what would best serve the public interest.

**Political Pressures on the Commission**

The most obvious control Congress has over the Communications Commission is legislation. There are numerous other methods, however, by which Congress shapes Commission policy. Though an independent commission is theoretically not political, Bernstein has suggested it is impossible to divorce regulatory commissions from politics, because the very nature of regulation forces them to be political.

The process of regulation is unavoidably political. So long as regulation is conditioned by the general political and social environment and remains founded on the efforts of organized groups to utilize public power to promote either private ends or the public welfare, it will remain a major aspect of political life. . . .

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\(^{16}\) Bernstein, *op. cit.*, p. 154.
The political nature of regulation reflects the inadequacy of the tools of economic and political analysis in providing a sure line of direction for the formulation of regulatory objectives. The determination of regulatory goals does not result inevitably from the logical analysis of certain economic facts, nor is it automatically deduced from a set of propositions concerning the nature of the political state and the proper boundaries of political action in a democratic society.\footnote{Bernstein's analysis emphasizes the need for Congress and the president to resolve conflicts of policy.}

Since action strong enough to eliminate alleged abuses and guide conduct in the future will be stoutly resisted by the regulated groups, the function of political leadership is to maintain the vitality and integrity of regulation in the public interest. A regulatory agency cannot be expected to make its contribution to the public interest unless the president and Congress are able to establish general policies to direct and sustain it in the face of strong opposition and hostility.\footnote{Methods of Influence: Congressional efforts to resolve policy conflicts, in addition to legislation, have assumed chiefly the form of investigations. More rarely Congress has made suggestions to the Commission through letters and resolutions from committees. Congress has examined network practices, the UHF-VHF problem, conduct of Commissioners, and at one time or another, nearly every aspect of broadcasting. Many of these investigations have served a useful and legitimate function. Others, it is to be feared, have been more in the nature of a political witch hunt.}

In addition to investigations, Congress has brought other pressures to bear on the Commission. Legislation, introduced but not

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\footnote{Tbid., p. 259.}

\footnote{Tbid., p. 260.}
approved, has affected broadcasting. Periodically, for instance, an attempt has been made to prohibit the advertising of alcoholic beverages on radio and television. Stations would probably have been less hesitant to carry "hard liquor" commercials if they were not afraid that Congress might prohibit, not only advertising for "hard liquor," but beer and wine advertisements as well.

Resolutions or letters from standing committees have affected policies of the Commission. A "sense of the committee" resolution from the House Commerce Committee caused the Commission to postpone the approval of pay-television trials. The resolution, sent to the Commission during February, 1958, said:

> It is the sense of this committee that the FCC should not grant authorizations for subscription television operations as contemplated . . . unless and until the Communications Act of 1934 is amended so as to specifically empower the Commission to grant such authorizations.49

Another type of Congressional pressure on the Commission has been that exerted by individual members of Congress on behalf of "special interests." Such pressures are difficult to document. The Task Force on Regulatory Commissions did attempt to study the problem, however, and reported:

> Many members of Congress appear to feel free to concern themselves, on behalf of their constituents, with the handling of specific cases . . . . Doubtless, many of these inquiries are casual or routine without any threat of pressure, but others imply or suggest more active interest. In any event, such activity creates an unhealthy atmosphere for the commissions to carry on

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their work in, and tends to impair their reputation for nonpartisan and impartial administration.\textsuperscript{50}

\textbf{Implications of Congressional Control.}—Congressional controls over broadcasting, other than legislation, fall into two main categories—Congressional investigations, and pressures from individual Congressmen on behalf of special interests. Since the Commission is actually an agent of Congress and dependent on Congress for operating expenses, and even its very existence, the Commission is peculiarly susceptible to Congressional influence.

The results of investigations may be many and varied. The most obvious can be legislation by Congress. Congressional investigations may also cause the Commission to take specific action, perhaps in the form of new rules and regulations. While there is the danger that such investigations may become a political tool, they may also serve the useful function of outlining for the Commission how it can more effectively promote the public interest.

Pressures by individual Congressmen represent a problem which only Congress itself can solve. During the sensational investigations conducted by the House Commerce Legislative Oversight subcommittee during 1957-1958, which resulted in Commissioner Richard A. Mack resigning under pressure, several "integrity" bills were introduced. Typical was the bill submitted by Representative Charles A. Wolverton which would forbid attempts to influence a regulatory commission by

"enlisting the influence or intercession of members of Congress or other public officers."\textsuperscript{51} No bill was passed, but the very fact that several were introduced suggests a problem does exist.

Pressures by "Special Interest" Groups

In addition to pressures from groups within the broadcasting industry and from Congress, the Communications Commission is constantly subjected to the demands of a wide variety of special interest groups. Senate hearings on S. 814, a bill to amend the Communications Act, brought forth the President of the Italian-American Labor Council, the Director of the National Negro Council, Publicity Director of the CIO, the Mayor of Salt Lake City, the Legislative Representative of the American Federation of Labor, the Publicity Director of the American Federation of Labor, and the President of the United Automobile Workers.\textsuperscript{52}

Methods of Influence.--It is probable that at one time or another every known pressure group technique has been used in attempts to influence activities of the Commission. The purpose of this summary is not to study pressure group techniques, but to suggest the influence which special interest groups may have on the Communications Commission. Two examples of pressure group action will be cited as representative of the way in which these groups function.


\textsuperscript{52}Senate Committee on Interstate Commerce, Hearings on S. 814, 1943.
During December, 1957, station WGN-TV, Chicago, canceled a scheduled, sponsored showing of a film on Martin Luther. According to the general manager of WGN-TV, the show was canceled because the station did not want "to be a party to the development of any misunderstanding or ill will among persons of the Christian faith in the Chicago area." Privately it was charged the film was canceled due to pressure from the Roman Catholic church in the area. An Action Committee for Freedom of Religious Expression was formed. The Committee petitioned the Commission to order WGN, Inc., to file a license renewal application, and to hold a hearing on WGN's application for a license to cover its construction permit. The Commission took no action on the petition.

Another example of pressure by a special interest group was the campaign waged by the Political Action Committee of the UAW-CIO against the provision, referred to earlier, in a broadcasting code which discouraged selling time for the discussion of controversial issues. During August, 1943, Richard T. Frankenstein, vice-president of the United Auto Workers, petitioned the Commission for a hearing on "censorship and operation contrary to public interest" by WHKC, Columbus, Ohio. The petition charged the station had a policy not to sell time for programs which solicit membership or discuss controversial subjects. Frankenstein also maintained that "in deleting from his speech on WHKC . . . statements in criticism of Senator Taft and Representative Vorys and praising Senator Burton for their voting records, WHKC did not carry out any uniform policy, but discriminated against him and the

53 "Cancellation of Luther Film to Lead to FCC Investigation," The Living Church, February 3, 1957, p. 6.
54 "WISN-TV Schedules Martin Luther Film," Broadcasting-Telecasting, LII:9 (March 4, 1957), p. 78.
the UAW-CIO. Carl Everson, station manager, replied that in refusing to sell time for broadcasts of controversial material he had acted in accordance with the "NAB Standards of Practice."

This petition was denied hearing, but on June 2, 1944, Local 927, UAW-CIO, filed a petition against license renewal. Hearings were held August 16 through August 24, 1944. On October 20, 1944, WHKC and the Union filed a joint motion for dismissal. The motion said that in the future WHKC would not refuse to sell time for the discussion of controversial public issues. On June 26, 1945, the Communications Commission dismissed proceedings. In this instance a special interest group succeeded in virtually voiding the "NAB Standards of Practice," and caused the Commission to take a positive stand on an issue involving programming.

Implications of Pressure Group Activities.—As with industry pressures, influences by special interest groups on the Commission may be both a help and a hindrance. These groups may describe for the Commission possible effects of proposed rules and regulations. They may serve as a "watch-dog" for the Commission, informing the Commission when a broadcaster fails to operate in the public interest. They may suggest constructive answers to problems of broadcasting. Special interest groups may help the Commission evaluate public opinion on matters concerning broadcasting.


56United Broadcasting Company, 10 FCC 515 at 518 (1945).
These groups may also hinder the work of the Commission. They may attempt to represent their own interest as the public interest, but by their very nature they represent a limited group. There is a danger that the interests of the most powerful groups will prevail without real concern for the public interest. V. O. Key pointed out:

The rise to power of functional groups has in one respect created a gap in our representative machinery. The development of these groups has stimulated an attitude among legislators and other public officials that the proper function of these officials should be to referee the disputes between contesting interest groups with conflicting interests rather than to originate policies and proposals. If all interests were organized into pressure groups, this attitude would probably have no ill effects, but in reality there are in society many important interests that do not have effective organization. Public officials tend to succumb to those groups with representatives on hand to speak for them; the acceptance of the views of one group may injure the unheard side of the conflict of interest.57

The largest group in society, the general public, may not be represented at all. Max Geller suggested there is seldom anyone to represent the general public:

Of the basic economic groups in our modern society, the ultimate consumer is the largest and his interest the most akin to the general interest; yet he is the least organized in the dynamics of policy formation. The consumer's position is inherently weak, since his interest is diffused too widely to lend itself to effective organization.58


There is also the danger, according to Donald Blaisdell, that special interest groups may adopt unethical methods to win support.

Few citizens object to pressure groups appearing openly to urge their programs. . . . Nor do they object to the spreading of opinion when its source is clear. Such an interchange plays an important role in the democratic process. But when groups operate through "fronts" as well as in the open, and when they employ all the devices of modern propaganda without telling its origin, citizens will rightly question the desirability of this conduct.59

In attempting to regulate broadcasting in the public interest, the Federal Communications Commission must consider the structure of American broadcasting. In addition, the work of the Commission is both helped and hindered by influences from a wide variety of pressure groups. Nevertheless, this is the climate of regulation within which the Commission must interpret the public interest. The Commission has defined the public interest largely through its licensing activities.

Though the Communications Commission may define the concept of public interest through statements to the press, memorandums, letters of inquiry to stations, and the like, the Commission has most frequently interpreted the public interest through its licensing activities. There are seven major licensing situations in commercial broadcasting: (1) an application for a construction permit for a radio or television station, not competitive; (2) a request for a construction permit with one or more other applicants; (3) an application for a new broadcast station license; (4) an application to expand facilities, not competitive; (5) an application to expand facilities when the same facilities are sought by other applicants so that a competitive situation exists; (6) a request for permission to transfer the ownership of a station; and (7) an application for license renewal. In only two of the above situations does the Commission generally make a detailed examination of an applicant's claims: (2) application for construction permit, competitive; and (5) application to expand facilities in a competitive situation. Even in these instances the Commission does not itself investigate the accuracy of an applicant's statements, but depends on competing applicants to discover and disprove questionable claims.
This chapter will summarize the basic provisions of the Communications Act relating to licensing, and review the application forms used by the Communications Commission. It will then discuss some of the requirements more fully, and show how they have been interpreted by the Commission in specific licensing situations. Since application of the concept of public interest to programming will be considered in detail in later chapters, programming criteria will be mentioned only briefly in this discussion.

Communications Act Requirements
in Licensing

The Communications Act sets forth the principles on which the Federal Communications Commission bases its licensing procedures. As was pointed out in Chapter II, the basic regulatory guide provided by Congress is that of public convenience, interest, or necessity. The Commission, "if public convenience, interest, or necessity will be served thereby," is directed to provide for the use, but not the ownership, of broadcasting facilities for a period of not longer than three years.¹ Frequencies are to be allocated in a manner which will result in "fair, efficient, and equitable distribution" of service,² prevent interference between stations,³ and preserve competition in commerce.⁴ The Commission is authorized to classify stations,⁵ and prescribe the nature of service to be rendered by stations of each class.⁶

¹48 Stat. 1064 (1934), sec. 307 (d).
²Ibid., sec. 307 (b).
³Ibid., sec. 303 (e).
⁴Ibid., sec. 314.
⁵Ibid., sec. 303 (a).
⁶Ibid., sec. 303 (b).
Applications must be submitted in writing, and include "such facts as the Commission by regulation may prescribe as to the citizenship, character, financial, technical, and other qualifications of the applicant to operate the station." The Communications Commission may grant the application if it finds the public interest, convenience, or necessity will be served by the grant.

If the Commission does not make such a finding it must notify the applicant in writing, and provide an opportunity for reply. If still unable to make a positive finding, the Commission must designate the application for hearing. The burden of proof is on the applicant.

Citizenship requirements are outlined in detail. Section 310 (a) says a station license shall not be granted or held by

1. Any alien or the representative of any alien;
2. Any foreign government, or the representative thereof;
3. Any corporation organized under the laws of any foreign government;
4. Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens . . .
5. Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, . . . by aliens.

The Communications Act further specifies that before a new station may be licensed, the applicant must have obtained a construction permit. Once a license has been granted the Commission may renew the license if it believes renewal will serve the public interest.

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7Tbid., sec. 308 (a). 8Tbid., sec. 308 (b).
9Tbid., sec. 309. 10Tbid., sec. 310 (a).
The Commission also has the responsibility of approving the transfer of a license or construction permit if the transfer will serve the public interest.\textsuperscript{13} According to the 1952 Amendments to the Communications Act, when considering a transfer the Commission "may not consider whether the public interest, . . . might be served by the transfer, . . . of the permit or license to a person other than the proposed transferee or assignee."\textsuperscript{11} In other words, the Commission may consider only the qualifications of the proposed transferee of the station—not those of other possible buyers of the facility.

After a license or construction permit has been granted the Commission may revoke the license or permit

\begin{enumerate}
  \item for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;
  \item because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
  \item for willful or repeated failure to operate substantially as set forth in the license;
  \item for willful or repeated violation of, . . . any provision of this Act or any rule or regulation of the Commission authorized by this Act . . .
  \item for violation of or failure to observe any cease and desist order issued by the Commission under this section.\textsuperscript{15}
\end{enumerate}

Cease and desist orders are not generally used by the Commission in the regulation of commercial broadcasting.

\begin{footnotes}
\item\textsuperscript{13}Ibid., sec. 310 (b).
\item\textsuperscript{11}66 Stat. 711 (1952), sec. 8 (b).
\item\textsuperscript{15}48 Stat. 1064 (1934), sec. 312 (a).
\end{footnotes}
Before revoking a license or permit the Commission must serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation should not be issued. If after hearing, or a waiver thereof, the Commission determines that an order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order.\textsuperscript{16}

In a proceeding to revoke a license the burden of proof is upon the Commission. Methods of appeal were discussed in Chapter II.

The Communications Act also gives the Commission authority to modify a license or permit for a "limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity."\textsuperscript{17} If the modification is contested, however, a hearing may be necessary. In such cases the burden of proof is upon the Commission.\textsuperscript{18}

To translate these provisions into regulatory practice, the Communications Commission needs a variety of information from applicants. The basic information needed is provided by the applicant in writing, on application forms furnished by the Commission. Form 301 is used in four of the major licensing situations in commercial broadcasting: competitive and noncompetitive applications for construction permits, and competitive and noncompetitive applications for modification of facilities.\textsuperscript{19} Form 301 is in five sections.

\textsuperscript{16}Ibid., sec. 312 (c).  \textsuperscript{17}Ibid., sec. 316 (a).
\textsuperscript{18}Ibid., sec. 316 (b).
\textsuperscript{19}Federal Communications Commission, Form 301—Application for Authority to Construct a New Broadcasting Station or Make Changes in an Existing Station (Washington: Government Printing Office).
Under section I of this form an applicant specifies the exact facilities he is requesting. The application must state whether an AM or FM radio station, or a television station is being applied for. It must indicate the frequency or channel requested, the power to be used, and the hours of operation of the proposed station. If there is more than one applicant for the same facilities a competitive situation exists, and the Commission may designate the applications for hearing.

Section II attempts to determine whether the applicant is legally qualified to hold a license. The application must indicate who is applying (whether an individual, a partnership, or other) and explain the details of any partnership or corporation arrangement. Information must be given on the citizenship status of the applicant, or applicants, and state whether any person involved in the application has ever been convicted of, or is at the present time under indictment for, a felony. The application must indicate the business and financial interests, and other broadcast interests of all persons involved. Citizenship requirements have been discussed earlier in this chapter.

Section III deals with financial qualifications. The application must include an estimate of the cost of the proposed facilities and, in the case of new stations, of the first year of operation, and show where the money is coming from. Under section II the applicant has already indicated his business and financial interests. He must also give a detailed accounting of his assets and liabilities, so that the Commission can determine whether an applicant has sufficient funds to finance his request.
Section IV of the form deals with program plans. An application to construct a new station includes future plans only, unless the applicant has previously operated a station. In that event the Commission also desires information concerning his past broadcasting record. A request to expand facilities requires an analysis of current programming for a composite week, and a statement of the programs to be offered, should the application be approved. An applicant is asked to outline past and proposed programming by giving a percentage breakdown according to program types: entertainment, religious, agricultural, educational, news, discussion, talks, and other. The application must give proposed and, if appropriate, past practice concerning the number and length of spot announcements; indicate the percentage of programming which will be—and has been—network sustaining, network commercial, local sustaining, local commercial, and the like; and give detailed staff plans.

Section V is concerned with engineering data. The application must specify in detail the facilities requested; the proposed location of the station, transmitter, and studio; the type of transmitter and antenna system which will be used; and the area and population which would be covered by the proposed facilities.

Once a construction permit has been approved and the facilities constructed, the granting of a license is largely a matter of

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20 At the time this study was made the Federal Communications Commission had released a proposed revision of the program classifications used in application forms.
routine; though on at least one occasion, which will be discussed later, the Commission has refused such a grant. An application for a new station license is made on form 302, which asks chiefly for engineering and financial data. 21

Form 315 is used when transfer of a station is involved. 22 An application to transfer a station has the status of a noncompetitive application for a construction permit. As was mentioned earlier, the Commission is forbidden to consider other possible transferees. However, the 1952 amendments did give the Commission authority to evaluate applications for transfer "as if the transferee or assignee were making application under section 308 for the permit or license in question." 23 Form 315 requests much the same information as form 301, with additional questions pertaining to the transfer. The application must indicate the facilities involved, the legal and financial qualifications of both the transferor and the transferee to hold a license, how the transfer is to be accomplished, why the transfer is being made, and past program policies of the transferor and proposed program plans of the transferee.

Form 303 is used by applicants for license renewal. 24 Section I covers ownership data—to determine whether there has been any change


22 Federal Communications Commission, Form 315—Application for Consent to Transfer of Control of Corporation Holding Radio Broadcast Station Construction Permit or License (Washington: Government Printing Office).

23 66 Stat. 711 (1952), sec. 8 (b).

in ownership since the original license, or the current license, was granted. Section II deals with the condition of existing technical equipment. Section III is devoted to past programming and plans for future programming, and is identical to the section on programming in form 301.

**Defining Licensing Criteria**

The forms described provide the basic information which is to be evaluated by the Communications Commission in the various licensing situations in commercial broadcasting. For an understanding of the Commission's interpretation of this information it is necessary to analyze decisions and opinions of the Commission in specific instances. For purposes of organization these will be considered according to the licensing situation involved. It should be remembered, however, that the same principles may be used by the Commission to justify a decision in more than one situation, that a decisive factor in one situation may not be decisive in another, and that a single case may involve a number of licensing criteria.

**Construction Permit--Not Competitive**

When an application for permission to build a new station is not competitive and the proposed facilities will not interfere with existing stations, the Commission ordinarily approves the request without hearing—provided the applicant meets minimum statutory requirements. If the applicant does not meet minimum requirements, if the new facilities might adversely affect the operation of an existing station, or if for some reason the Commission questions whether the grant would serve
the public interest, a hearing may be required to enable the Commission better to decide whether the construction permit should be granted. The following paragraphs will consider noncompetitive applications for construction permits where the Commission has found that applicants failed to meet minimum requirements.

Failure to Meet Statutory Requirements.--In 1952 the Federal Communications Commission denied a construction permit to the Kansas City Broadcasting Company, owned by a branch of the Mormon church, because one of the seventeen members of the governing board of the church was not an American citizen. The church maintained that since it was a voluntary association provisions of section 310 of the Communications Act should not apply. The Commission held the provisions pertaining to citizenship apply equally to voluntary associations and to strictly commercial enterprises.

Economic Injury to Existing Stations.--The Commission has generally refused to consider possible economic injury to an existing station as grounds for not authorizing a new station in the same general community. However, a 1958 decision by the District of Columbia Court of Appeals questioned the Commission's policy, and makes it necessary to consider this problem.

The first case involving economic injury to an existing station occurred in 1936, when the Commission granted a construction permit for a second radio station in Dubuque, Iowa. The Sanders Brothers,

owners of the existing station, protested on grounds Dubuque could not support two stations. The case eventually went to the United States Supreme Court which upheld the Commission, saying:

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license. If such loss were a valid reason for refusing a license, this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act expressly negates. . . . The policy of the Act is clear that no person is to have anything in the nature of a property right as the result of the granting of a license.26

The Communications Commission has maintained that economic injury cannot be a decisive factor because the American system of broadcasting is necessarily competitive. The Commission has felt that maintenance of competition and safeguarding against monopoly is more important than any possible "hardship" which might result. When WKUL, Cullman, Alabama, protested the grant of a second station to Cullman in 1950 because of possible economic injury to the existing station, the Commission denied the petition for hearing, saying:

The public interest strongly favors competition in the broadcast industry. The whole scheme of regulation embodied in the Communications Act of 1934 is based upon the proposition that the governmental policies appropriate to the areas of free competition rather than those applicable in the public utility and common carrier fields will achieve the most satisfactory utilization of our available broadcast spectrum. . . . Petitioner attempts to circumvent the recognized purpose of the Act by equating private with public interest. It argues that the establishment of another broadcast station in Cullman will cause WKUL's program service to deteriorate and thus the public interest will suffer. But this obviously does not follow since the public will be enjoying not only petitioner's service but a new service. What the public may lose at one point it will gain at another.

Similarly the public interest is not concerned with the possibility that the new station or WKUL may be forced to cease operation because of inadequate revenues. The likelihood and even the certainty of some business failures is the price of competition.

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

In a similar decision in 1957, the Commission again emphasized that it had no power to consider "the effects of legal competition" on stations when considering applications for new stations.

During July, 1958, however, the District of Columbia Court of Appeals suggested the Commission should consider economic injury to an existing station before allowing a new station to be built in the same area. In 1957 the Commission had approved the construction of a radio station in Bremen, Georgia, a town of 2,300 persons. The owners of WLBB in Carrollton, Georgia, a city of 8,600 persons located 12 miles from Bremen, protested the grant to the Court of Appeals for the District of Columbia. This court remanded the case to the Communications Commission, holding the Commission should consider

whether the economic effect of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. The question whether a station makes $5,000, $10,000, or $50,000 is a

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matter in which the public has no interest as long as service is not adversely affected. But if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. 29

Whereas the Supreme Court based its findings in the Sanders Brothers case entirely on the principle the Commission should not consider economic injury to existing stations, the Court of Appeals examined the problem from the standpoint of possible downgrading of program service to listeners. The Communications Commission has appealed the Georgia case to the Supreme Court, but at the time this study was made no decision had been given.

**Concentration of Control Over Broadcasting Facilities.**—In order to promote competition in broadcasting, the Commission has attempted to prevent "undue" concentration of control over broadcasting facilities. It has done this through its multiple ownership rules which limit grants to any one individual or company to not more than seven AM, seven FM, and seven television licenses—of which not more than five may be VHF.30

When the Commission proposed in 1955 to limit ownership of television stations to five VHF stations, the Storer Broadcasting Company applied for a permit to construct a station in Miami, Florida. The Commission dismissed the application without hearing, since Storer already held five VHF licenses. Storer appealed to the United

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States Court of Appeals for the District of Columbia, challenging the Commission's right to impose arbitrary restrictions on the number of stations owned by one licensee. In February, 1955, the court handed down a decision holding, in essence, the Commission's regulations on multiple ownership were invalid because there might be occasions when it would be in the public interest to grant additional licenses to an owner.31 The Commission appealed to the United States Supreme Court which in May, 1956, reversed the lower court's decision. The Supreme Court held the Communications Commission has the right to make rules "necessary for the orderly conduct of its business."32

An exception to the multiple ownership rules is made in the case of noncommercial educational stations. When the Wisconsin State Radio Council applied for more than the maximum of seven FM stations, the Commission approved the grant, saying:

There is no provision in the rules governing non-commercial educational FM stations limiting the number of stations which may be licensed to a single entity. A limit on the number of stations which might be held under common control would be inconsistent with the objective of the rules to encourage establishment of statewide plans for educational service. However, the question of diversification of control would be pertinent in cases where there were competitive applications for such stations by qualified educational applicants.33

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Not in the Public Interest.--The Commission has used the concept of public interest to deny noncompetitive applications for a variety of reasons. In 1936 the Commission refused a construction permit to two Atlanta chiropractors because there was evidence the doctors would use the station for self-advertising.34 In 1938 the Commission refused to grant a construction permit to the Young Peoples' Association for the Propagation of the Gospel to build a station in Philadelphia because there was evidence that the station would be used primarily for propaganda purposes.35 The details of these cases will be considered in another chapter.

In 1948 the Commission denied a construction permit to the Horvitz Brothers for a station in Mansfield, Ohio, because the newspaper owned and operated by the brothers had engaged in monopolistic practices.36 A previous hearing had revealed that at times the newspaper had refused advertising space to persons who advertised on the local radio station. When the Horvitzs appealed the Commission's decision, claiming the Commission did not have authority to consider the newspaper practices of an applicant, the United States Court of Appeals for the District of Columbia upheld the Commission.

"Fitness" to be a Licensee.--On one occasion the Commission revoked a construction permit when it discovered the holder was not

34Liberty Broadcasting Co., 3 FCC 218 (1936).
35Young Peoples' Association for the Propagation of the Gospel, 6 FCC 178 (1938).
During July, 1957, the Commission had granted a construction permit to Walter T. Gaines for a radio station in Amsterdam, New York. After construction had been started and most of the equipment purchased, another station in the same area filed a protest with the Commission. The protest claimed that Gaines had previously operated a station in Amsterdam, and at that time had forced an employee to falsify at least one entry in the station's log. It was also charged that Gaines had censored a political speech. For these, and other reasons, the Commission revoked Gaines' construction permit.

**Construction Permit—Competitive**

When two or more mutually exclusive applications for construction permits are submitted to the Commission and all applicants meet the minimum statutory requirements, the Commission must decide which grant will best serve the public interest. In this situation, a comparative hearing is almost invariably ordered, to permit the Commission to make a detailed examination of the rival applicants' claims. In 1949 the District of Columbia Court of Appeals outlined the essentials of a legally valid opinion in a competitive situation.

1. The bases or reasons for the final conclusion must be clearly stated.
2. That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion.
3. The ultimate facts as found must appear as rational inferences from the findings of basic facts.

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38 The same situation exists when there is an application for a construction permit for a new station, which would require revocation of the license of, or interference with the activities of, a station already licensed and on the air.
4. The findings of the basic facts must be supported by substantial evidence.

5. Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective.

6. The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con, on each applicant.39

The difficulty, from the would-be broadcaster's point of view, is that a factor that is decisive in one decision may not be decisive in another. In one instance newspaper ownership by one applicant is considered sufficient cause to deny that applicant's petition and to approve a competing application. In another it is not. There is no set of consistent rules which indicate the degree to which a particular factor will have a plus or minus value. However, examination of decisions and opinions of the Commission reveals that certain factors have frequently been considered important.

Local Service.—The Communications Act directs the Commission to provide fair and equitable distribution of service. The Commission has often interpreted this to mean providing a local outlet where possible. In a 1957 opinion the Commission said:

Applicant who will provide a first locally originated service to a city of 4,750 persons which now receives primary service from only two stations is entitled to grant over an applicant who proposes to serve a city of almost 20,000 which already has a local station and receives primary service from four stations.40


When mutually exclusive applicants have sought permission to serve different communities, both of which already have local service, the Commission has attempted to determine which community has the greater need for additional service. In 1946 the Easton Publishing Company and the Allentown Broadcasting Corporation submitted mutually exclusive applications for construction permits to build radio stations in Allentown and Easton, Pennsylvania, respectively. The Commission granted a permit to Allentown. Easton appealed, and the Court of Appeals for the District of Columbia reversed the Commission and remanded the case for "findings upon the comparative needs of the two communities for new radio service." Following rehearing, the Commission, in 1951, reversed its original decision and awarded the permit to Easton. Allentown appealed, and again the District of Columbia Court of Appeals reversed the Commission, saying that the Court's "examination of the record in detail demonstrated . . . that findings of fact of the Commission that overruled findings of the Hearing Examiner were erroneous." The Commission appealed to the U. S. Supreme Court which in 1955 upheld the right of the Commission to overrule a hearing examiner, and to base its decision on need for local service. The Supreme Court said:

Where mutually exclusive applicants seek authority to serve different communities, the Commission first determines which community has the greater need for additional service. . . . In choosing between applicants

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for AM stations in different communities, neither of which would serve the other community, the Commission did not err in preferring applicant which would afford a second outlet for local self-expression to its community, rather than applicant whose community already had three AM stations.43

Another aspect of the concept of local service is local residence. The Commission has maintained that applicants who live in the community to be served should be preferred because "they are better acquainted with local problems and may more confidently ... be expected to operate the station in the interest of the community."44

In a 1957 opinion the Commission explained why local residence is an important factor:

We believe local ownership and local identity with the community to be served to be of importance, and accordingly this is one of the factors relied upon by the Commission in comparative proceedings. It is a factor giving assurance of continued insight into the everchanging needs of the area, and through such knowledge some assurance as to their being met on a continuing basis. It is a factor closely related to that of participation in the civic life of the community and diversity of local business interests in that it gives rise to the same assurance.45

The importance of local residence of applicants has been upheld by the courts. When Scripps-Howard Radio and Cleveland Broadcasting Company submitted mutually exclusive applications for permission to build a radio station in Cleveland, the Commission approved the application of Cleveland Broadcasting because of the "local residence of its owners and managers and their familiarity with local conditions,

44 Hi-Line Broadcasting Co., 13 RR 1017 (1957).
the integration of its ownership with management, and diversity of ownership of the media of mass communication.\textsuperscript{46} Scripps-Howard appealed, but the District of Columbia Court of Appeals upheld the Commission, saying:

Where mutually exclusive applications for permit to construct radio broadcasting stations were submitted, Federal Communications Commission acted within its permissible discretion in giving weight to consideration of local residence and familiarity with local conditions to be served.\textsuperscript{47}

The Commission has stressed local residence because it believes local live programs are a necessary part of program service. The Commission has felt that a local operator will be more familiar with, and interested in the community, and so more likely to provide local programs of local interest. The matter of local programming will be considered in a later section.

An exception to the Commission's insistence on local programming has been the approval of UHF satellite stations.\textsuperscript{48} On August 4, 1954, the Commission released an order indicating it would consider approving UHF television stations which planned no local programming if such a grant would provide television in a community which could not otherwise have television service. The Commission also implied that, under the same circumstances, it might authorize UHF stations planning merely to duplicate the programs of another station owned by the same licensee, in a different community.

\textsuperscript{47} Ibid., p. 679.
Qualifications of the Applicant. — Qualifications of applicants to hold a license are another area of comparison when deciding between mutually exclusive applications. As has been pointed out, the Communications Act authorizes the Commission to require such information as it deems necessary about an applicant's "citizenship, character, financial, technical, and other qualifications." To arrive at a decision in a competitive situation the Commission may compare such factors as financial ability, place of residence, integration of ownership and management, and character.

In determining whether an applicant meets citizenship requirements of the Communications Act the Commission usually requires direct proof of citizenship. In a 1939 opinion the Commission held that a statement from the local board of elections that an applicant has voted for nine years is not sufficient proof of citizenship. However, in a 1938 hearing the Commission accepted verbal assurance of the president of the Kentucky Broadcasting Corporation that a shareholder, not present at the hearing, was an American citizen.

The importance of local residence of an applicant was discussed in an earlier section. The Commission has also stressed the advantages of integration of ownership and management. This was a

49 48 Stat. 1061 (1934), sec. 308 (b).
50 Tri-City Broadcasting Co., 7 FCC 80 (1939).
51 Kentucky Broadcasting Corporation, 6 FCC 779 (1938).
consideration in the Scripps-Howard case. It was the decisive factor when in 1956 the Commission had to choose between mutually exclusive applications for a radio station in Texas. The Commission said:

As between two mutually exclusive applicants, individual applicant who would devote his entire time to operation of the proposed station was preferred to applicant of which one 40% partner would devote full time to station operation, another 40% partner would devote two days a week and the third partner one day a week.

The Commission has also examined the character of an applicant. The United States Court of Appeals, Eastern District, New York, ruled:

Under Communications Act subjecting an applicant's character to scrutiny by the Commission, the courts must give to the word "character" its ordinary meaning. This includes the right to examine every facet of an applicant's personality—his behavior, integrity, temperament, consideration, sportsmanship, altruism, etc.

When the Commission refused a construction permit to the Mansfield Journal Company because of monopolistic practices of its newspaper, the District of Columbia Court of Appeals held the Commission had jurisdiction to hear evidence on alleged monopolistic practices of newspapers, regardless of whether or not such practices were specifically forbidden by statute, and to deny license upon its finding that such practices had in fact taken place, and were likely to carry over into operation of radio station.

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53 Blackwater Valley Broadcasters, 13 RR 32 (d) (1956).
Past Broadcasting Experience and Record.—Two factors frequently considered important by the Commission are past broadcasting record and past broadcasting experience. The Commission maintains that past broadcasting experience is a concrete indication of the probable success of an applicant in putting his plans into operation. In a 1957 opinion involving competitive applications in Boston the Commission said:

Another factor long given weight by the Commission, and one which we believe to be of substantial importance, is broadcast experience. Accordingly, our standard comparative issue specifically calls for a showing on this factor. . . . Like the factor of past broadcast record, broadcast experience applies chiefly to the likelihood of effectuation of proposals through the demonstrated reliability, competency, and efficiency which may be brought to bear. . . . Under this issue the Commission can measure the likelihood of an applicant giving both early effectuation to the proposals it makes . . . as well as adjustment thereof to industry conditions and changing local interests as they arise upon a continuing basis.56

Past broadcasting experience has been mentioned favorably in a number of the Commission's opinions. In 1956 the Commission observed:

Applicant whose officers, directors, shareholders and key staff members have significant past broadcast experience is entitled to a preference over an applicant only one participant in which has broadcasting experience.57

In a 1957 opinion relating to competing applications for television facilities the Commission concluded: "Applicants who have had AM radio experience . . . are to be preferred over an applicant with no experience in the operation of a radio station."58

58 Television City, Inc., 14 RR (1957)
Another aspect of past performance is past broadcasting record. By examining the past record of an applicant it is possible for the Commission to get some idea of possible future operation.

In the Boston opinion cited previously the Commission said:

The statement has sometimes been made that a past record is the most demonstrable proof that a proposal will be effectuated. A past broadcast record...represents as persuasive evidence as can be marshalled by an applicant. A past broadcast record in the community is regarded as the best indication of the applicant's awareness of and responsiveness to local programming needs and interest and of the reliability which may be placed in him to effectuate his proposals.\(^5^9\)

In the Pinellas case, also cited earlier, the District of Columbia Court of Appeals said, on upholding the Commission's decision:

The Commission made extensive and detailed findings of fact and explained at great length its choice of awardee. ... The decisive factor, in its judgment, was the comprehensive local live program proposals of Tribune, supported by the record it had made over the years, both in its newspaper and in its radio broadcasting, in furtherance of local civic interests and enterprises. Each of the groups owning these applicants has for years owned and operated a newspaper and radio station in this locality under the same ownership and in the same manner as it proposes for the new television station. Extensive evidence concerning the respective performances in the use of these media was presented. The Commission rested upon that factual basis.\(^6^0\)

Diversification of Ownership of Mass Media.—When other factors are equal the Commission has frequently given preference to non-newspaper applicants—feeling the public interest is probably better served by promoting diversification of ownership of the mass media of communication. Preventing undue concentration of control

\(^5^9\)WHDH, Inc., 22 FCC Reports 861 at 866-867 (1957).

\(^6^0\)Pinellas Broadcasting Co. v. FCC, 230 F. (2d) 204 at 205 (App. D.C., 1956).
within the radio and television industry was discussed previously when considering the multiple ownership rules. The diversification criterion is illustrated by a 1947 decision of the Commission.

During that year seventeen applications were filed for five FM frequencies available in the New York City area. After a prolonged hearing the Commission released a proposed decision including the New York Daily News among the successful applicants. The American Jewish Congress protested, claiming the News slanted stories and editorials against Jews. The Commission examined the charges, but concluded there was not sufficient evidence to deny the News application because of bias. However, when the final grants were made the News did not receive a license. The Commission explained:

We have repeatedly recognized that in competitive applications, if all other factors are equal, the public interest is generally better served by preferring non-newspaper applicants over newspaper applicants, since this promotes diversity in the ownership of media of mass communication.61

Diversification policy is based on the principle that the source of news is bound to influence its presentation. Thus, the Commission has maintained that the public is entitled to receive its news from a variety of sources. In the Scripps-Howard opinion the Court of Appeals for the District of Columbia affirmed this idea:

An element of preference for the Cleveland Company also resided in the circumstance that the grant of the permit to it "would undoubtedly be conductive to a greater diversification of the media of mass communication in the Cleveland area than would a grant of the application of Scripps-Howard Radio, Inc." . . . Inherent . . . is the realization that news communicated to the public is sub-

61 News Syndicate, 12 FCC 805 (1948).
ject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation. . . . In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected.62

The same court also upheld the authority of the Commission to consider common ownership of newspaper and broadcasting facilities, even though the newspaper may have little voice in the management of the station. During 1955, Oregon Television, Inc., and Columbia Empire Telecasters, Inc., submitted mutually exclusive applications for permission to build a television station. The Commission approved the Oregon Television application. Columbia Empire appealed on grounds Oregon Television was not financially qualified, and the Commission should not have held against Columbia the fact that part of its stock was owned by a newspaper. The Court of Appeals ruled the Commission did not err in holding against an applicant, . . . the fact that a newspaper publishing company and its wholly-owned radio subsidiary owned 40% of the stock of the applicant . . . even though . . . the newspaper and radio companies had only a 'relatively small voice' in the applicant's affairs.63

The Court of Appeals for the District of Columbia has affirmed the propriety of basing a decision entirely on diversification policy. McClatchy Broadcasting Company and Sacramento Telecasters filed rival

applications for permission to use Channel 10 in Sacramento, California. Following a hearing the examiner recommended the grant go to McClatchy Broadcasting—finding that even though McClatchy had both radio and newspaper interests, it was superior to Sacramento Telecasters in all other respects. The Commission, however, granted the license to Sacramento. Since the Commission did not take issue with the examiner's findings that McClatchy was the better applicant in all respects except diversification, the Commission's decision seemed to be based solely on this point. McClatchy appealed, but in January, 1956, the Court of Appeals for the District of Columbia upheld the Commission:

The Commission is entitled to consider diversification of control of communications media in connection with all other relevant facts and to attach such significance to it as its judgment dictates. The Commission is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so.64

On the other hand, the Court of Appeals has cautioned the Commission not to promulgate rules which would preclude joint ownership of newspapers and broadcasting stations. On March 20, 1951, the Commission released order Number 79 which directed that it would undertake an investigation of the joint ownership of newspaper and broadcasting facilities. During July, 1951, a subpoena was issued to James G. Stahlman, publisher of the Nashville Banner and former president of the American Newspaper Publishers Association, requiring his presence in Washington to testify at the investigation. Stahlman refused to comply, claiming the Commission lacked authority to conduct the investi-

The Commission filed an application with the District of Columbia Court of Appeals to require Stahlman's appearance. The court held the investigation was proper, but warned the Commission that "the Communications Act does not prevent or prejudice the right of newspapers as such to apply for and receive a license to operate a radio broadcast station."65

The Commission has never followed a policy of automatically ruling against newspaper applicants. The 1958 Broadcasting Yearbook included a summary of newspaper and broadcasting facilities that were jointly owned. The magazine reported that 432 AM stations, 173 television stations, 77 regional radio networks, and 11 regional television networks were owned by persons, or organizations, with newspaper and/or magazine interests.66 It should be remembered that here, as with other criteria, the Commission applies this test to applicants for new stations, but not to license renewals. Many of these stations have been operating since the days of the Federal Radio Commission. The desirability of diversification of ownership of mass media was not suggested by the Communications Commission until the 1940s.

In a 1954 opinion the Communications Commission concluded that diversification of ownership of the mass media is decisive only when monopoly is threatened.

Diversification of the ownership of media of mass communication is only one factor which must be considered

and where a monopoly or the threat thereof does not exist, this factor loses its overpowering position and only becomes entitled to equal consideration with other factors.⁶⁷

Program Plans.—When the Commission has been forced to choose between mutually exclusive applications, superior program plans have frequently been decisive. Ultimately, it is the best possible program service that the Commission is attempting to provide. In a 1949 opinion the Court of Appeals for the District of Columbia said:

In a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute.⁶⁸

Application by the Federal Communications Commission of the concept of public interest to programming will be discussed in detail in later chapters. Program factors compared by the Commission when choosing between competitive applicants for construction permits will merely be enumerated at this time.

Two aspects of programming may be evaluated by the Commission—past performance and future program plans. Past performance is not a consideration unless the applicant has previously operated, or is operating, a station. Then, as was pointed out earlier, the Commission investigates the applicant's past broadcasting record. Program policies


examined by the Commission when studying past performance will be
discussed in relation to renewal applications, for it is in the re-
newal context that past performance becomes most important. Whether
an applicant has previously operated a station or not, the Commission
evaluates future program plans. The criterion of "good" programming
mentioned most frequently is "program balance." The various aspects of
balance will be discussed in Chapter V of this study.

In a 1936 decision the Commission approved an application
offering a "different and needed" program service.\textsuperscript{69} Missouri Broad-
casting Corporation, operator of station WIL, St. Louis, requested in-
creased power and a change in frequency. The Star-Times Publishing
Company applied for a new station using the same facilities. The
Commission granted the license to Star-Times which proposed a different,
largely local, program service.

The Commission has concluded program plans are superior which
place a limit on the amount of time which will be sponsored.\textsuperscript{70} The
Commission has held against an applicant a proposal to devote 27 percent
of broadcasting time to foreign language broadcasts.\textsuperscript{71} In a 1956
opinion the Court of Appeals for the District of Columbia upheld the
right of the Commission to consider proposed use of films and network
programs when evaluating program plans of television applicants.\textsuperscript{72}

\textsuperscript{69}Missouri Broadcasting Corp., et al., 3 FCC 349 (1936).
\textsuperscript{70}Bay State Beacon, Inc., 12 FCC 567 (1947).
\textsuperscript{71}Pilgrim Broadcasting Company, 5 RR 861 (1949).
\textsuperscript{72}W. S. Butterfield Theatre, Inc. v. FCC, 99 U.S. 71 at 77
Other aspects of program plans evaluated by the Commission when deciding between rival applicants have included local live programming,\textsuperscript{73} news and educational programs,\textsuperscript{74} and discussion of public issues.\textsuperscript{75} These licensing criteria will be discussed further in Chapters V through VII.

\textbf{Initial Operating License}

Once a construction permit has been granted, obtaining the initial operating license is largely a matter of routine. However, even after a construction permit has been granted, and in some cases, even after a station has gone on the air on temporary authorization, the Commission may refuse to grant a regular license if new evidence is presented raising a question as to the qualifications of the permit holder to operate in the public interest.

One such case involving the construction permit for a new station in Amsterdam, New York, has already been cited. In another case, in 1952, WIBK, Knoxville, Tennessee, was taken off the air even though a construction permit had been granted and the station had commenced operation.\textsuperscript{76} The station, owned by the Rev. J. Harold Smith,\textsuperscript{73} This has been a factor in many decisions. To cite several examples: WHDH, Inc., 22 FCC 861 (1957); Hi-Line Broadcasting Co., 13 RR 1017 (1957); FCC v. Allentown Broadcasting Corp., 12 RR 2109 (Sup. Ct., 1955).
\textsuperscript{74} Cowles Broadcasting Co., 10 RR 1289 (1954).
\textsuperscript{75} Wyoming Valley Broadcasting Co., 11 FCC 436 (1946); Key Broadcasting System, Inc., 13 RR 159 (1955).
\textsuperscript{76} Independent Broadcasting Co. v. FCC, 193 F. (2d) 900 (App. D.C., 1951); affirmed 89 U.S. 396 (Sup. Ct., 1952).
began broadcasting under temporary authorization during July, 1947. In August the Commission announced that because of new information, a hearing would be held on granting a regular license. During the hearing it was revealed Smith had concealed the fact he was part owner of a Mexican border station; and that in the past, he had bought time on a South Carolina station and broadcast such vicious attacks against various religious faiths the station had refused him further time. Because of concealing information in his original application and his past record of conduct, the Commission refused to grant a regular license. Smith appealed, but the Commission was upheld, and the United States Supreme Court refused review. In October, 1952, the station went off the air.

Expand Facilities—Not Competitive

A noncompetitive application to modify existing facilities is handled in similar fashion to a noncompetitive application to construct a new station. The same application forms are used for both types of requests. There is one important case which should be discussed in relation to this type of application, however.

In 1956 the District of Columbia Court of Appeals held that when a successful applicant does not live up to proposals made in the original application, an unsuccessful competing applicant has the right to intervene and be heard on requests for modification of the original grant. The case involved the use of Channel 10 in Sacramento, California, mentioned earlier in this chapter. In line with its policy

toward promoting diversification of ownership of mass media, the
Commission ruled against McClatchy Broadcasting Company and in favor
of California Telecasters. Less than sixty days after it received
the grant, California Telecasters asked for, and was given, permission
to change its transmitter site and lower the height of its antenna.
This of course would substantially change the area to be served by the
station. McClatchy protested to the Commission that this was a "fraud,"
but the Commission said McClatchy had no further standing in the case.
However, when McClatchy appealed to the District of Columbia Court of
Appeals, the court held the Commission was obligated to consider McClatchy's
charges.

Expand Facilities—Competitive

A competitive application to expand facilities is treated
in much the same way as a competitive application for permission to
build a new station. The same application forms are used for both,
and many of the same factors considered: local service, program plans,
and the like—with more emphasis perhaps on past performance. This is
also a licensing situation in which the Commission carefully examines
the applicant's statements.

During the 1930's, competitive applications for increased
facilities were common. Originally nearly all stations operated on a
part-time basis, sharing a frequency with another station or sometimes
several stations in the same community or area. By the early and
middle 1930s, when broadcasting was found to be an effective advertising
medium, many of these stations wanted to operate on a full-time basis.
Their applications for full time usually were opposed by the stations sharing the frequency, which would be forced off the air if the first station's application for full time were granted.

Since 1940, there have been few "time-sharing" arrangements of this sort between stations. Consequently, the applications for increased facilities which have gone into hearing have usually been applications for increased power; sometimes on the same frequency, sometimes on a different frequency. They have been opposed by other stations operating on the frequency involved, at a distance from the location of the applicant's station. These other stations oppose the grant, since its result would be to curtail their own service areas, and a comparative hearing is scheduled.

In a 1935 opinion the Commission held against WARD, Brooklyn, the fact that it had broadcast too frequent, and often objectionable, foreign language programs; and sold blocks of time to outside contractors giving the contractors complete control over program content.78 In a 1936 decision, the Commission ruled against WGBZ, York, Nebraska, in a competitive request for modification of facilities, because the station had broadcast fraudulent advertising.79 In a 1947 decision involving Mid-American and WINN in Louisville, Kentucky, the Commission favored a new applicant offering "superior" program service over an existing licensee whose station was providing unsatisfactory programming.80

When both WADC, Akron, and WGAR, Cleveland, requested an increase in power to fifty thousand watts on the 1220 kc. channel, the Commission approved WGAR's application, finding that WGAR's program plans were superior to those of WADC. These cases are discussed in more detail in subsequent chapters.

Transfer of Control

Station transfers raise special problems. The Communications Act states explicitly that a licensee has no property right in a frequency. However, a station's good will, audience, programming, and the like may be far more valuable than the mere cost of the equipment. With the limited facilities available, especially in television, the only method of obtaining a license is often that of the transfer route. Thus, the right to use a frequency may be worth thousands, even millions of dollars. This causes a variety of difficulties.

In a transfer proceeding the transferor, rather than the Commission, chooses the new station operator. The Commission pointed out in a 1945 hearing that more than half of all existing radio stations had been acquired by their current owners through transfer proceedings. The difficulty is that the transferor is usually more interested in securing the best possible financial arrangement, than in selecting the licensee most likely to operate the station in the public interest. With the limited number of frequencies available, trafficking in licenses

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81 Allen T. Simmons, 11 FCC 1160 (1947).
82 Powel Crosley, Jr., Transferor, and the Aviation Corporation, Transferee, 11 FCC 3 (1945).
may result. An applicant applies for a license, constructs a station, and then sells it for a quick profit. Though not illegal, it is hardly the Commission's concept of public interest. There is also the chance that a station may be sold as part of a group of holdings, and become a mere sideline operation of a business or corporation.

Many of the problems relating to station transfers came into focus in the 1945 sale of the Crosley Corporation—appliances, auto accessories, and WIX, Cincinnati—to the Aviation Corporation. A hearing on the proposed transfer revealed that officials of the Aviation Corporation—aircraft parts—knew nothing of the responsibilities of broadcasting, and that the value of WIX had not even been separated from the total purchase price. The Commission finally approved the transfer, but took the occasion to formulate rules for future transfer proceedings.83

Under the Avco rules, as they were known, the terms of a proposed transfer had to be advertised locally, and by the Commission, to give other interested parties an opportunity to submit competing bids. The Commission felt this would make it possible to select the applicant who would best serve the public interest. However, since there was no way to force a licensee to accept a competing bid, the rule was abolished in 1949 as not effective.84

Another attempt to solve the problems of transfers was incorporated in the 1952 Communications Act Amendments. As was pointed

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out, an amendment forbade the Commission to consider other trans­ferees, but made it possible to evaluate a transfer application under the same conditions as an application for a noncompetitive con­struction permit for a new station. However, only in a few instances has the Commission refused approval in a transfer proceeding.

In a 1946 decision the Commission would not approve trans­fer of a station because of the character of the proposed transferee. The owner of WOV, New York City, arranged to sell his station to Murray and Meyer Mester. When the Commission discovered the Mesters had been in difficulties with the Federal Trade Commission for false representations in advertising, the Communications Commission would not allow the transfer. The Mesters appealed, and in 1947 a Federal District Court in New York held:

Findings of Communications Commission that proposed transferees of stock which would give substantial owner­ship and control of radio station were not possessed of a sense of public responsibility which the commission deemed an essential qualification, and that contemplated transfer would not be in the public interest, were sus­tained by the evidence, and the court was without power to disturb them.

The United States Supreme Court upheld the lower court's decision.

On at least two occasions the Commission has refused to ap­prove a transfer until the application has been revised. During 1943 the Commission delayed approval of the sale of the Blue network until

85 Arde Bulova, Transferor, and Murray and Meyer Mester, Transferees, 11 FCC 137 (1946).
the transferee stated he would be willing to sell time for the dis-
cussion of controversial public issues.87

During 1957 a rather unusual situation arose involving KCOP-
TV in Los Angeles.88 In September of that year the National Association
for Better Radio and Television formally asked the Commission to order
a hearing on the desirability of revoking the license of KCOP-TV.
The petition charged that KCOP had broadcast programs featuring faith
healer Oral Roberts; that its commentators were biased; and that it
had carried announcements, sometimes running as long as seven minutes,
for a used car dealer with a criminal record. Before the petition
was filed, the owners of KCOP had requested permission to transfer
the station to a corporation headed by Bing Crosby. The Commission
decided that under the circumstances revocation proceedings were not in
order. In the original application Crosby had stated he would follow
KCOP's program policies. Before the Commission approved the transfer,
Crosby modified his application, promising substantially improved
programming.

License Renewal

The Communications Act directs the Commission to grant a
license for a period of not longer than three years. The license
may be renewed if to do so will serve the public interest. Renewal
may be refused if, in the opinion of the Commission, the station is

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87 For a complete discussion of this case see Chapter VI.
88 See Radio Corporation of America Transferor, and American Broadcasting
System, Transferee, 10 FCC 212 (1943).

88 "KCOP-TV Amends Program Plans," Broadcasting, LIII:23
(December 2, 1957), p. 60.
not operating in the public interest. Since denying license renewal is a drastic form of punishment, it is seldom used.

License Renewal Refused.--License renewal has been refused for technical reasons combined with program shortcomings. When Congress passed the 1927 Radio Act there was a tremendous amount of interference between stations. In order to straighten out the frequency situation it was necessary for the Federal Radio Commission to take some stations off the air. General Order No. 32 asked 164 operators to show why their licenses should be renewed. Eventually 62 of these stations were deleted, largely by default. All of the 164 stations, however, were stations against which the Commission had reports indicating service of doubtful public interest. This situation was discussed in detail in Chapter II.

With the above exception, license renewal has been refused only in extreme instances of failure to operate in the public interest. Renewal has been denied for misrepresentation of facts in an application, as provided in the Communications Act. In 1940 the Commission revoked the license of WSAL, Salisbury, Maryland, because the licensee had misrepresented his financial ability. The owner of WSAL had stated in his original application, made in 1938, that he had $18,000 available to construct the station. Later evidence showed he had less than $500. There was every indication he had acted on behalf of another party.

89 FRC, Second Annual Report - 1928, p. 42.
90 WSAL, 8 FCC 34 (1940).
License renewal has been refused for concealed ownership. During October, 1942, hearing was ordered on the license renewal application of WOKO, Albany, New York. Hearing revealed that for twelve years the owners had concealed the fact that a one-fourth interest in the station was held by a former CBS executive. In March, 1945, the Commission denied license renewal. The case was appealed, and in January, 1946, the District of Columbia Court of Appeals handed down an opinion reversing the Commission's decision. The Commission then appealed to the United States Supreme Court which unanimously upheld the Commission. In 1947 the station was taken off the air.

License renewal has been refused for various program shortcomings. Since application of the concept of public interest to programming will be examined in later chapters, program practices which have resulted in denial of license renewal will merely be summarized briefly at this point. In 1928 the Federal Radio Commission refused to renew the license of WCHW, location not given, because of over-commercialization. In 1930 the Federal Radio Commission refused license renewal to KVEP, Portland, Oregon, on grounds the owner had allowed vicious and profane attacks against individuals and groups to be broadcast on paid time. License renewal was denied KTNT, Muscatine, Iowa, in 1931, when the Federal Radio Commission discovered

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91 *WOKO, Inc.*, 11 FCC 1124 (1947).
92 *FCC v. WOKO, Inc.*, 328 U.S. 228 (1946).
93 *FCC, Public Service Responsibility ...*, p. 41.
94 *FRC, Fifth Annual Report - 1931*, p. 78.
the station's owner was broadcasting "fake" medical advertising, and attacks against the medical profession. Station KGEF, Los Angeles, was taken off the air by the Federal Radio Commission in 1932 for broadcasting attacks against religious groups. In 1938 WMBQ, Brooklyn, New York, lost its license for violating the lottery provisions of the Communications Act.

Renewal Granted After Deliberation.—While the Commission has rarely taken a station off the air, it has frequently "punished" stations for failure to operate in the public interest by refusing to grant regular license renewal, and placing the station on temporary license until certain objectionable practices have been corrected. In many cases, the renewal of the station's license is designated for hearing—and the station required to undergo a costly hearing before its license finally is renewed. A hearing may result in a very real monetary expense for the station. Most hearings on license renewal cost the station from $50 thousand to $100 thousand, and in one case (Richards) a protracted hearing cost the owner whose station license was at stake an estimated $2 million. Through the use of temporary licenses and hearings on license renewal the Commission is able to present its ideas or requirements of operation in the public interest in a way likely to impress strongly, not only owners of the stations directly involved, but also licensees of other stations whose practices may be open to question.


97 Metropolitan Broadcasting Corp., 5 FCC 501 (1938).
The Communications Commission has withheld renewal until a station took steps to bring its program performance more nearly in line with the program promises made in its original application.\textsuperscript{98} When Cannon System, Ltd., requested permission to build a station in Glendale, California, in 1933, it said the proposed station would devote at least one-third of all broadcasting time to educational and agricultural programs, news programs, and programs on matters of importance to the community. When the owners applied for renewal in 1940 the Commission found the station's programming was largely recorded music. The Commission refused renewal until programming was improved.

License renewal has been questioned because of illegal transfer of control over a station's operation.\textsuperscript{99} During 1943 the Regents of the Georgia School of Technology, licensee of WGST in Atlanta, signed a contract with Southern Broadcasting Stations, Inc., to operate WGST for a percentage of the profits. In 1945 the Commission refused license renewal until the contract was cancelled, maintaining this was an illegal transfer of control.

License renewal has been delayed because of questionable program practices and questionable advertising policies. Since these licensing criteria will be examined in later chapters of this study, they will be reviewed only briefly at this time.

\textsuperscript{98}Cannon System Ltd., 8 FGC 207 (1940).

During 1935 the Commission set for hearing the license renewal application of KFEQ, St. Joseph, Missouri. The Commission concluded that a program on which an "astrologer" gives advice on matters of love, investments, marriage, and the like, is private communication and not in the public interest. That same year the Commission questioned the license renewal application of WMCA, New York City, because of offensive medical advertising. Hearing was called on renewing the license of WAAT, Jersey City, New Jersey, because of broadcasts giving racing results in code.

In 1936 the Communications Commission cautioned WWAE, Hammond, Indiana, that a licensee is responsible for investigating the legal status of an advertiser. In a 1936 hearing involving KFRC in San Francisco, the Commission held a station must accept responsibility for accuracy of advertising claims and any possible harmful effects of a drug product. The 1936 license renewal application of WRLB in Columbus, Georgia, was scheduled for hearing because of broadcasts the Commission felt violated the lottery provisions of the Communications Act. The license renewal application of WMBQ, Brooklyn, New York, was questioned because of advertisements for a prize drawing the Commission termed a lottery.

100 Scroggin and Co. Bank, 1 FCC 194 (1935).
104 Don Lee Broadcasting System, 2 FCC 642 (1936).
106 Metropolitan Broadcasting Corp., 5 FCC 301 (1938).
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During 1936 license renewal of KTWI, Twin Falls, Idaho, was investigated because of "advice" programs carried by the station.\textsuperscript{107} Hearing was held on renewing the license of KVOS in Bellingham, Washington, due to a contract giving an individual complete jurisdiction over all news broadcasts.\textsuperscript{108} WEIL in Battle Creek, Michigan, was also involved in a case of alleged transfer of control over news.\textsuperscript{109}

In 1938 the Commission designated for hearing the renewal applications of fourteen stations which had carried a network show using the words "damnation," "hell," and "for God's sake." However, there was such a storm of protest from both newspapers and broadcasters the order was canceled.\textsuperscript{110}

The following year the Commission ordered a hearing on renewing the license of KMPC in Beverly Hills, because of advertisements on behalf of a doctor known to have violated state medical laws.\textsuperscript{111} In 1945 hearing was held on renewing the license of WDSU, New Orleans, because of alleged violations of the equal time provision for political candidates.\textsuperscript{112} That same year the Commission questioned the renewal application of WHKC, Columbus, on grounds the station's policy of refusing to sell time for discussion was not in the public interest.\textsuperscript{113}

\textsuperscript{107}Radio Broadcasting Corp., 4 FCC 125 (1937).
\textsuperscript{108}KVOS, Inc., 6 FCC 22 (1938).
\textsuperscript{109}Federated Publications, Inc., 9 FCC 150 (1942).
\textsuperscript{110}News story, Broadcasting, XV:8 (October 15, 1938), p. 22.
\textsuperscript{111}KMPC, The Station of the Stars, 6 FCC 729 (1939).
\textsuperscript{112}Stephens Broadcasting Co., 11 FCC 61 (1945).
\textsuperscript{113}United Broadcasting Co., 10 FCC 515 (1945).
In 1947 the Commission set for hearing the renewal application of WTOL in Toledo, Ohio, because of overcommercialization.\textsuperscript{11h} License renewal of KMPC, Hollywood, was delayed from 1948 to 1951 because of charges of news slanting filed against the station by two discharged employees.\textsuperscript{115} In 1952 the application of WTUX, Wilmington, Delaware, was designated for hearing because of broadcasts which could aid illegal gambling.\textsuperscript{116}

This chapter has reviewed licensing criteria established by the Federal Communications Commission in the seven major licensing situations which apply to commercial broadcasting. The survey has indicated that the Commission has applied these criteria extensively in only two of the licensing situations: a competitive application to build a new station and a competitive application to modify existing facilities. When a noncompetitive application to construct a new station or expand facilities, or an application to transfer a station, has been submitted to the Commission it has usually been approved if the applicant meets minimum statutory requirements. License renewal has not generally been refused except for drastic misconduct, but the Commission has withheld license renewal until programming was improved or an applicant corrected other practices the Commission did not believe were in the public interest.

\textsuperscript{11h}Community Broadcasting Co., 12 FCC 85 (1947).
\textsuperscript{116}Port Frere Broadcasting Co., 5 RR 1137 (1952).
This is not to imply that statements made by the Commission in connection with licensing activities have not exerted a tremendous influence on broadcasting. In the Richards case, for instance, license renewal was eventually granted following charges of news slanting, but this incident has undoubtedly influenced news on radio and television.

The survey of licensing criteria has also indicated the emphasis placed on programming by the Commission. This is to be expected, since programming is the "product" broadcasting has to offer. The remainder of this study will examine in detail how the Federal Communications Commission has applied the concept of public interest to the regulation of radio and television programming.
CHAPTER V

PUBLIC INTEREST IN RELATION TO
GENERAL PROGRAM CONTENT

The Communications Act directs the Federal Communications Commission to license stations in the public interest. Though forbidden to censor programs, the Commission has consistently maintained public interest demands some kind of program evaluation. Rather than concerning itself with specific programs, the Commission has made it a practice to consider a station's overall program service.

Certain areas of programming have merited special treatment from the Commission--news, discussion, political broadcasting, and advertising. Other aspects of public interest in relation to programming might be grouped together under the more inclusive heading of general program content. This chapter will examine application of the concept of public interest to the regulation of general program content.

Program Practices Advocated by the Commission

Through the years the Commission has designated requirements of programming in the public interest. These are not rigid standards. They have been interpreted by the Commission according to the particular situation. Thus, the Commission might term a news and music station "in the public interest" in New York City, but "not in the public interest" in Hattiesburg, Mississippi.
Both the 1927 Radio Act and the 1934 Communications Act specified that stations be licensed to provide "fair and equitable" distribution of service. This referred primarily to technical facilities, but the Commission has also related the concept to programming. The Radio Commission and the Communications Commission have concluded that propaganda stations would not be in the public interest, because they would represent and serve only a limited public; and that program interests of the entire population should be met as nearly as possible. The latter idea will be considered in detail in the discussion of balanced programming.

An early statement on the undesirability of propaganda stations was the 1928 opinion of the Radio Commission regarding the application of the Great Lake Broadcasting Company. The Commission refused the application, saying:

Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. . . .

In such a scheme there is not room for the operation of broadcasting stations exclusively by or in the private interest of individuals or groups. . . . Propaganda stations . . . are not consistent with the most beneficial sort of discussion of public questions. As a general rule, . . . beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available.  

1FRC, Third Annual Report - 1929, pp. 33-34.
The Communications Commission reiterated this view in 1938 when it refused the application of the Young People's Gospel Association to construct a station in Philadelphia. The Association was a fundamentalist religious group and openly stated the station would be used to promote their religious beliefs. The Commission said:

Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public. That being the case, if one group or organization is entitled to a station facility for the dissemination of its principles, then other associations of equal magnitude would be entitled to station licenses on the same grounds. Obviously, there are not a sufficient number of broadcasting channels to give each group a station license. The Commission has accordingly considered that the interests of the listening public are paramount to the interests of the individual applicant in determining whether public interest would best be served by granting an application.2

A second principle of service to the entire public is that stations should provide programs for all segments of the population. The Commission has promoted this idea by emphasizing a balanced program schedule. In the Great Lakes decision the Radio Commission said:

There is, however, a deeper significance to the principle of nondiscrimination which the commission believes may well furnish the basic formula for the evaluation of broadcasting stations. The entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. . . . The commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What it wishes to emphasize is the

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2Young People's Association for the Propagation of the Gospel, 6 FCC 178 at 181 (1938).
general character which it believes must be conformed to by a station in order to best serve the public.  

A Balanced Program Schedule

From the Great Lakes opinion to the present, both the Federal Radio Commission and the Federal Communications Commission have stressed the importance of balanced programming. In a 1957 opinion the Communications Commission said:

In comparing the program proposals of competing applicants, primary reliance will be placed upon a balanced format containing suitable amounts of the several categories and types of programs. A program by program comparison is of less importance because of the likelihood of change in the case of a new station and the belief that detailed comparison would necessarily have the ultimate effect of substituting the Commission's administrative for management's operating judgment.

Definite requirements of balanced programming have been singled out by the Commission.

Ratio of Commercial to Sustaining Time.--In the Blue Book the Communications Commission devoted considerable attention to the importance of sustaining programs. According to that report, sustaining programs are necessary to insure a well-rounded program schedule. The Commission argued that since the advertiser is primarily interested in attracting a large audience, he is not likely to sponsor programs for minority groups, experimental shows, and the like. The Commission suggested such broadcasts are essential to "good" programming, and

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3 FRC, Third Annual Report - 1929, p. 34.

4 Hi-Line Broadcasting Co., 13 RR 1017 at 1018 (1957).
should be presented on sustaining time. The Commission listed five functions of sustaining programs:

1. To secure for the station or network a means by which in the overall structure of its program service, it can achieve a balanced interpretation of public needs.
2. To provide programs which by their very nature may not be sponsored with propriety.
3. To provide programs for significant minority tastes and interests.
4. To provide programs devoted to the needs and purposes of non-profit organizations.
5. To provide a field for experiment in new types of programs, secure from the restrictions that obtain with reference to programs in which the advertiser's interest in selling goods predominates.

In a 1947 opinion the Commission again reminded broadcasters of the importance of sustaining programs. Receiving two requests for the same facilities in Brockton, Massachusetts, the Commission approved the application of the Cur-Nan Company which proposed to limit commercial shows to 60 percent of total broadcasting time. The unsuccessful applicant, Bay State Beacon, planned an 80 percent commercial schedule. In its decision the Communications Commission said that the program plans of Cur-Nan were superior because they would limit commercial time. On appeal, the District of Columbia Court of Appeals upheld the Commission saying the Commission had "properly considered proportionate amount of time devoted to commercial programs."

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6 Ibid., p. 12.
Ratio of Network to Local Programs.—The 1941 Report on Chain Broadcasting examined network influence on broadcasting, and concluded network pressures had caused affiliates to relinquish program control to the networks; which in turn had made it difficult for stations to adequately serve the local community. The report said:

It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. . . . The licensee is obligated to reserve to himself the final decision as to what programs will best serve the public interest.9

This network influence on programming hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community.10

The report led eventually to the chain broadcasting regulations, which were discussed in the second chapter of this study.

A 1957 investigation of networks directed by a Network Study Committee of the Federal Communications Commission also concluded that, despite their many contributions to broadcasting, networks still exert too much influence on affiliates. This study, which was also discussed in Chapter II, may result in new rules and regulations governing network activities; or even in modifications of the Communications Act.

10Ibid., p. 63.
Specifically, the Communications Commission has ruled a program schedule almost entirely of network programs is not in the public interest because it does not take into account local community needs. In 1948 WADC, Akron, requested an increase in power to fifty thousand watts on the 1220 kc. channel. WGAR, Cleveland, asked for the same facilities. The Commission approved the WGAR application, finding WGAR's program plans superior to those of WADC. The Akron radio station proposed to carry all available CBS shows, while WGAR planned more extensive local programming. The Commission concluded:

We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcasting licensee.11

WADC appealed the decision, but the Commission was upheld by the Court of Appeals.12 The Supreme Court refused review.

In a 1957 decision the Commission again stressed the importance of local programming. When five applicants requested the use of channel five in Boston, a Commission hearing examiner held against the Boston Herald-Traveler, licensee of WHDH radio and one of the applicants for channel five, the fact that it planned no network affiliation. The examiner felt an independent station could not offer adequate program service. The Commission reversed the examiner's decision and

11Allen T. Simmons, 11 FCC 1160 at 1173 (1947).
awarded the station to the Herald-Traveler. The Commission recognized that while

networks provide programming which is of very real interest to the public the Commission cannot and would not approve the proposition that an applicant is to be disfavored if in its discretion it proposes programming which on the record adequately serves the public interest and does not comparatively suffer when considered together with the program proposals of its competitors. Particularly is this true as to WHDH which has pursued a meritorious past record of aural broadcast operation independent of network affiliation. It exercises what must be considered an appropriate management discretion to affiliate only if such affiliation would permit the carrying out of its own plans of programming in the public interest which have been concluded herein to be adequate and comparatively equivalent to that of the other applicants.\textsuperscript{13}

Two of the losing applicants appealed the Commission's decision. In August, 1959, the District of Columbia Court of Appeals upheld the grant, but at the same time "remanded the case for an investigation to determine whether any commissioner should not have voted and whether any undue influences may have been attempted in behalf of any of the competing applicants."\textsuperscript{14}

\textbf{Ratio of Recordings to Other Programs.}—It is difficult to consider local programming without examining the use of recordings, because much local programming is chiefly record playing. In the eyes of the Commission recordings are no substitute for local live shows. For many years use of recordings was considered a sign of inferior programming. Back in 1922 the Department of Commerce prohibited the playing of phonograph records by stations having the better (Class B) channel assignments except in

\textsuperscript{13}WHDH, Inc., 22 FCC 861 at 871 (1957).

emergencies or to fill in between program periods; and later in the year it amended the regulation to prohibit even such use of records by Class B stations.\footnote{FCC, \textit{Public Service Responsibility . . .}, p. 36.}

On August 9, 1927, the Federal Radio Commission issued General Order No. 16 which required the identification of mechanical reproductions. In its Second Annual Report the Commission explained the reasons for this action. The Radio Commission said:

By its General Order No. 16, issued on August 9, 1927, the commission, while not condemning the practice of using mechanical reproductions such as phonograph records or perforated rolls, required that all broadcasting of this nature be clearly described in the announcement of each number. The commission has felt, and still feels, that to permit such broadcasting without appropriate announcement is, in effect, a fraud upon the public. It is true that in the smaller communities which do not have adequate original program resources the use of phonograph records may fill a need; it is true also that there may be developments in specially produced phonograph records which can be made use of to advantage by radio. On the whole, however, the commission is inclined to believe that the use of ordinary commercial records in a city with ample original program resources is an unnecessary duplication of service otherwise available to the public, and the crowded channels should not be wasted in this manner.\footnote{FRC, Second Annual Report - 1928, p. 19.}

The memorandum outlining undesirable program materials issued by the Communications Commission in 1939 termed too much use of recordings undesirable.\footnote{ Variety, CXXXIII:13, p. 40.} By the time the Blue Book was released in 1946, however, the Commission took a somewhat more liberal view. The Commission said:

Through the years the phonograph record, and to a lesser extent the transcription, have been considered inferior program sources.
No good reason appears, however, for not recognizing today the significant role which the transcription and the record, . . . can play in radio programming.¹⁸

Recordings have been criticized chiefly because they may be used as a substitute for local live programs designed to meet specific community needs. While frowning on excessive use of recordings, the Commission has allowed "news and music" stations to exist. These will be discussed later.

**Ratio of Films to Other Programs.**—The advent of television has introduced another program source. In a 1956 decision the District of Columbia Court of Appeals held the Commission should consider a station's proposed use of films. Returning a case to the Commission for rehearing the court said:

The second factor necessitating a rehearing is WJR's modification of its program schedule. It proposed a different network affiliation with a great increase in network programming. To make room for the additional network programs, WJR cut its film programming by one-third and made various changes in its proposed local live programs, though the amount of local live programming was left substantially unaltered. The Commission erroneously disregarded the sharp curtailment of film programming upon the ground that the film programs proposed by an applicant are not "the Commission's concern." . . . Some television stations devote only an insignificant portion of their time to live programming. If the network and film programs which occupy the bulk of their broadcast time are not "the Commission's concern," then the Commission has little left to consider in determining the relative merit of such stations.¹⁹

¹⁸ FCC, Public Service Responsibility . . . ., pp. 36-37.
Variety in Programming.—Both the Radio Commission and the Communications Commission have emphasized service to the entire public. Since tastes differ, this demands variety in types of programs. In the 1928 Great Lakes opinion the Radio Commission said:

The tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place.20

The Communications Commission has continued to advocate the need for variety in programming. Applications for construction permits, license renewals, and the like request a program break-down according to categories; and some aspects of variety have been dealt with on an individual basis.

In a 1935 opinion the Communications Commission held that too much use of foreign language broadcasts results in program imbalance. WARD, Brooklyn, New York, was one of three applicants for full-time on the same frequency.21 During a hearing the Commission discovered that WARD devoted nearly half its program time to foreign language broadcasts, many of them "highly objectionable." For this, and other shortcomings, WARD was taken off the air in 1940 and full-time status granted to another applicant.

In a 1949 opinion involving competing applications for a radio station in Boston, a Commission hearing examiner ruled against

20FRC, Third Annual Report - 1929, p. 31.

an applicant proposing up to 27 percent foreign language programs. The examiner felt this would not provide a balanced program schedule, and that so many foreign language programs tended to destroy the incentive to learn English. The Commission did not comment on this statement, but it did follow the examiner's recommendation.

The Communications Commission has concluded that devoting too much time to sports broadcasts causes program imbalance—particularly condemning programs which might aid illegal gambling. In 1946 the Commission refused license renewal to WWDC, Washington, until the station discontinued a three-hour daily program of race track results. When three other Washington stations scheduled "race track" programs shortly thereafter, WWDC asked the Commission whether the shows were in the public interest. The Commission refused to reply on grounds it could not rule on programs in advance. However, when WWDC's license again came up for renewal the Commission explained that so long as racing was legal, broadcasting results and descriptions of races was not against the public interest, provided the shows would not aid illegal gambling. At the same time, the Commission suggested that devoting too much time to these programs would be against the public interest. In a 1952 opinion involving WTUX, Wilmington, Delaware, the Commission arrived at much the same conclusions.

22 Pilgrim Broadcasting Co., 5 RR 861 (1949).
23 Capitol Broadcasting Co., 4 RR 21 (1948).
24 Fort Frere Broadcasting Co., 5 RR 1137 (1952).
The Commission has also held that overemphasis on baseball and other sports is not in the public interest. In 1951 two radio stations in Charleston, West Virginia, filed applications for increased power on the same frequency.\textsuperscript{25} Hearing revealed that WCAW, an independent station, had devoted as much as 30 percent of its time to broadcasts of sports events; while the competing applicant, WGKV, had an excellent record of cooperation with local groups. The Commission approved the application of WGKV.

News and music stations, and other special interest stations, are in a separate category. A news-music, agriculture, or other type of concentrated format has been permitted in communities where other stations offer the necessary variety in programming; or where enough stations are possible to provide balance through specialized stations. In the Blue Book the Commission commented:

In metropolitan areas where the listener has his choice of several stations, balanced service to listeners can be achieved either by means of a balanced program structure for each station or by means of a number of comparatively specialized stations which, considered together, offer a balanced service to the community. In New York City, a considerable degree of specialization on the part of particular stations has already arisen—one station featuring a preponderance of classical music, another a preponderance of dance music, etc.\textsuperscript{26}

Recently, however, the idea of special interest stations has been questioned. During March, 1958, the Commission sent a letter of inquiry to nine Atlanta stations due for license renewal. Broad-

\textsuperscript{25}\textit{"Charleston Case,"} Broadcasting-Telecasting, XLII:1 (January 7, 1952), p. 56.

\textsuperscript{26}\textit{FCC, Public Service Responsibility} . . ., p. 13.
casting reported the stations' logs for a composite week showed a
new-music format with little or no educational, agricultural or
religious programming.27

In June, 1958, Commissioner Lee issued a dissenting opinion
in a decision to renew the license of WCRT, Birmingham, Alabama,
which had a format of "good music" and news. Lee said he wanted
"more information developed on whether a solely music-news schedule
should be considered as 'program imbalance,' even though the music
is of the 'good' variety."30 He questioned the fairness of dele­
gating the responsibility for other types of programs to stations
not limited to a music-news format. He also felt to approve the
Birmingham renewal was to prejudge the Atlanta decision, not yet
handed down.

Carrying Programs "Essential" to the Public Interest

In addition to advocating service to the entire public
through a balanced program schedule, the Commission has singled out
certain types of programs as virtually essential to the public in­
terest. The most frequently mentioned are local live programs—a
basic part of the concept of community service.

Local Live Programs.—The Report on Chain Broadcasting ob­
served that local programming is a necessary ingredient of "good"
program service. The report said:

Local program service is a vital part of community life.
A station should be ready, able, and willing to serve the

27"Closed Circuit, Broadcasting, LIV:13 (March 31, 1958),
p. 5.
28"FCC Renews WCRT License," Broadcasting, LIV:25 (June 23,
1958), p. 6u.
needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.29

In the Blue Book the Commission again discussed the importance of local live programming:

In granting and renewing licenses, the Commission has given repeated and explicit recognition to the need for adequate reflection in programs of local interests, activities and talent. Assurances by the applicant that "local talent will be available"; that there will be "a reasonable portion of time for programs which include religious, educational, and civic matters"; that "time will be devoted to local news at frequent intervals, to market reports, agricultural topics and to various civic and political activities that occur in the city" have contributed to favorable decisions on many applications.30

Local live programming has been a determining factor in many decisions. In a 1955 television grant favoring the Odessa Television Company, Odessa, Texas, over a competing applicant, the Commission maintained the applicant proposing the greatest quantity of local live programming should receive preference. The Commission said: "As between two mutually exclusive television applicants, applicant which proposed a greater amount of local live programming of a superior character was preferred."31

Local live programming has been considered of greater importance than local residence of the owner. In a 1956 decision involving three mutually exclusive applications to construct a television station on the west coast of Florida, the Commission favored

an absentee owner "who proposed a greater quantity of localized programming" over a local applicant. When the Commission's decision was appealed, the District of Columbia Court of Appeals held:

That order of the Communications Commission awarding a permit to construct a television station, to the applicant who proposed a greater quantity of localized programming, and which in content and assurance of effectuation was strikingly superior, was proper notwithstanding local ownership of rejected applicant and the absentee ownership of the successful applicant.32

The Communications Commission has said that evaluation of plans for local live programming is the most important program consideration in deciding between mutually exclusive applications because "it is mainly in this area that applicants demonstrate their capacity to meet community needs and serve as an outlet for local self expression."33 Local live program plans are a factor in every opinion of the Commission involving an application for a construction permit, modification of facilities, license renewal, or station transfer. When competing applications are submitted to the Commission, the importance of local live programming is magnified.

News, Discussion, and Political Broadcasts.--Both the Federal Radio Commission and the Federal Communications Commission have considered the carrying of news, discussion, and political broadcasts an important aspect of public interest. Chapter VI of this study will be devoted entirely to a discussion of this area of programming. In the 1928 Great Lakes opinion, the Radio Commission


33Hi-Line Broadcasting Co., 13 RR 1017 at 1018 (1957).
referred to the carrying of "important public events, discussions of public questions, weather, market reports, and news" as essential to a balanced program schedule.\textsuperscript{34} The Communications Commission pointed out in the Blue Book that broadcasting is not just an entertainment medium; it is also "an unequaled medium for the dissemination of news, information, and opinion, and for the discussion of public issues."\textsuperscript{35} The Commission would not approve the transfer of the Blue Network to Edward Noble until he submitted a statement to the Commission saying he would not refuse to sell time for the discussion of controversial public issues.\textsuperscript{36} In a letter written to an Albuquerque, New Mexico, station in 1946, the Commission said that a policy of refusing to allow time for political broadcasting is not in the public interest.\textsuperscript{37}

\textbf{Educational and Cultural Programs.--}Another area of programming specifically referred to in the Great Lakes decision was "education and instruction." A spokesman for the National Association of Broadcasters said in Congressional hearing:

\begin{quote}
It is the manifest duty of the licensing authority . . . to determine whether or not the applicant is rendering, or can render an adequate public service. Such service necessarily includes broadcasting of a considerable proportion of programs devoted to education, religion, labor, agricultural and similar activities concerned with human betterment. In actual practice over a period of seven
\end{quote}

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\textsuperscript{34}FRC, Third Annual Report - 1929, p. 34.
\textsuperscript{35}FCC, \textit{Public Service Responsibility} . . ., p. 39.
\textsuperscript{36}Radio Corporation of America, Transferor, and American Broadcasting System, Transferee, 10 FCC 212 (1943).
\textsuperscript{37}John J. Dempsey, 6 RR 615 (1950).
\end{flushright}
years this has been the principal test which the Commission has applied in dealing with broadcast applications. 38

In the Blue Book the Communications Commission suggested that with sustaining programs broadcasters provide programs which are inappropriate for commercial sponsorship, and programs for significant minority tastes and interests; and that cultural and educational broadcasts may sometimes fall into this category. 39 The Blue Book also deplored the fact stations so often refuse to carry network sustaining programs of outstanding cultural and educational value. 40

The Commission's application forms request a breakdown on "educational" shows. In exercising its licensing duties the Commission has attempted to evaluate the extent to which an applicant will provide, or in the case of existing stations has been providing, educational and cultural programs. The Commission has granted an applicant preference who proposed "superior news and educational programs." 41

In a 1954 decision involving mutually exclusive applications for a television station in Des Moines, Iowa, the Commission said: "An applicant is to be preferred who proposes to devote substantially more time to educational programming and whose proposal, by virtue of extensive preparation, offers greater assurance of implementation." 42

38 U.S. House, Committee on Interstate and Foreign Commerce, Hearings, on H.R. 8301, Regulation of Interstate and Foreign Communications by Wire or Radio, 73d Cong., 2d Sess., 1934, p. 117.

39 FCC, Public Service Responsibility ..., p. 17.

40 Ibid., p. 32.


42 Television City, Inc., 14 RR 333 (1957).
Religious Programs.—The Great Lakes opinion included religious programs as another aspect of balanced programming. The application forms used by the Communications Commission also request a breakdown on religious programs. The Blue Book singled out religious broadcasts as a type of program which may be inappropriate for commercial sponsorship. The Communications Commission has long considered religious broadcasts as necessary to overall program balance. In 1952, however, the Commission took a more positive stand on religious programs. During January of that year the Commission announced that of seventy-eight television stations due for license renewal on February 1, twenty-six had received temporary, three months, license renewal. No reason was given, but a check revealed none of the twenty-six stations carried any sustaining religious broadcasts and only a few carried educational programs. Though the licenses were subsequently renewed for the regular time period, most of the stations "improved" their program schedules.

Program Factors of Doubtful Public Interest

Not only have the Federal Radio Commission and the Federal Communications Commission advocated practices important to the public...
interest, they have also indicated conduct of doubtful public interest. These include both program practices and program materials which have been termed "questionable."

**Questionable Program Practices**

For the most part questionable practices are actions designated by the Commission as not in the public interest. They are largely opinions of the Commission, carrying no weight of law. However, Congress, through the Communications Act, has promulgated a limited number of program regulations.

Section 315 of the Communications Act attempts to prevent bias in political broadcasts. This will be considered fully in the next chapter. Section 317, as will be shown in Chapter VII, is aimed at discouraging concealed sponsorship. Section 325 prohibits broadcasting "false or fraudulent" distress signals, and rebroadcasting the "program or any part thereof of another broadcasting station without the express authority of the originating station. The Communications Act originally prohibited obscene, indecent, or profane language; or broadcasting information concerning lotteries or similar games of chance. In 1948 these provisions were transferred to the United States Criminal Code. A provision was also added to the Criminal

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47 Ibid., sec. 317.
48 Ibid., sec. 325.
49 18 U.S.C. 1464 & 1304.
Code in 1952 prohibiting fraud by wire, radio, or television.50 "Lotteries" and "fraud" will be discussed later in this study.

**Attacks Against Individuals or Groups.**—It was probably inevitable that a new medium of mass communication would attract the quack and the rabble rouser. Neither the Radio Commission nor the Communications Commission have hesitated to take action against the use of broadcasting facilities for attacks against individuals or groups. The first station to lose its license because of "character" of program service was KVEP, Portland, Oregon.51 A Congressional candidate had bought two hours a day on the station, six days a week, both before and after a primary election, and broadcast attacks against leading Portland citizens—using such phrases as "damned" and "by God." On receiving a number of complaints the Radio Commission ordered a hearing on license renewal. In June, 1930, the station's license was withdrawn. The station maintained that once the time had been sold it had no control over the broadcasts, but the Commission decided the licensee is responsible for all programs.

The following year the Radio Commission denied license renewal to KTNT, Muscatine, Iowa, because its owner, Dr. Norman Baker, had used the station to attack the medical profession and broadcast fake cancer cures.52 The Commission held the station was not operating in the public interest. Baker appealed, but the District of Columbia Court of Appeals refused review.

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52 FRC, Fifth Annual Report - 1931, p. 78.
In November, 1931, the Radio Commission refused license renewal to KGEF, Los Angeles, operated by the Trinity Methodist Church South. Its pastor had been using the station to attack groups he considered "moral enemies" of society—the Jewish race, the Catholic Church, Christian Scientists, the Salvation Army, the Chamber of Commerce, and others. On appeal, the District of Columbia Court of Appeals upheld the Commission saying: "Refusing renewal of radio broadcasting license to one who has abused it by broadcasting defamatory and untrue matter is not denial of freedom of speech."53 The United States Supreme Court refused review.

The 1939 memorandum outlining undesirable program practices, called racial and religious intolerance undesirable. In 1947 the Communications Commission denied a license to WIBK, Knoxville, Tennessee, even though a construction permit had been granted and the station commenced operation.54 A major reason for the denial was the fact that the owner of WIBK, the Rev. J. Harold Smith, had previously bought time on a South Carolina station and broadcast such vicious attacks against other religious faiths the station had refused him further time. This case was cited in detail in Chapter IV of this study.

Obscene, Indecent, or Profane Material.—In addition to the prohibition against "obscene, indecent, or profane language" in the

Criminal Code, the Communications Commission has made statements or taken action against the use of such materials. Two incidents illustrate the Commission's attitude. In December, 1937, the Charlie McCarthy show on NBC included an "Adam and Eve" sketch between Charlie and Mae West. The show resulted in a flood of protesting letters to NBC and to the Commission. Early in January, Frank R. McNinch, chairman of the Commission, wrote to Lenox R. Lohr, president of NBC, and to the stations which had carried the show. McNinch rebuked NBC for originating the program, and cautioned affiliates they were not blameless just because it had been a network show. McNinch said that no action would be taken at the present time, but when affiliates applied for license renewal their carrying of the "Adam and Eve" show would be considered along with other aspects of public interest.

In July, 1938, another incident occurred. The Blue Network presented an adaptation of Eugene O'Neill's, "Beyond the Horizon." The script included such words as "hell" and "for God's sake." Two months later the Commission received one complaining post card signed by two listeners. Subsequently the Commission ordered hearings on license renewal of fourteen Blue Network stations. There was such a storm of protest over the action that the following week the order


was cancelled. The memorandum on undesirable program materials designated obscene programs or those bordering on obscenity as undesirable.

**Miscellaneous Practices.**—The memorandum on undesirable program materials also listed several practices as undesirable against which the Commission has never taken action. Included are programs depicting torture, excessive suspense in children's programs, and promiscuous solicitation of funds.

**Questionable Program Materials**

Not only have various program practices been considered questionable by the Commission, but certain types of programs have also been designated questionable. Lotteries, information which might aid illegal gambling, fortune telling, and astrology programs all fall into the questionable category.

**Lotteries and Information Concerning Lotteries.**—The 1927 Radio Act made no mention of lotteries. In 1931, prompted by complaints from the American Newspaper Publishers Association that stations were accepting advertising for lottery type schemes prohibited to newspapers by postal regulations, the Radio Commission released a statement on fortune telling and lotteries. The Commission's annual report for that year reviewed the problem:

During the year there has been widespread complaint against stations broadcasting fortune telling, lotteries, games of chance, gift enterprises, or similar schemes offering prizes dependent in whole or in part upon lot or chance. . . . After mature deliberation the commission announced that there exists a doubt that such programs are in the public interest and that complaint from a substantial number of listeners will result in the station's application for renewal of its license being set for a
hearing. Copies of this statement were mailed to each broadcasting station licensed by the commission.

It is believed that this warning has had the effect of materially limiting this class of program, and in such instances as came to the attention of the commission after its issuance the programs were discontinued voluntarily by the station after the matter had been brought to its attention.\(^7\)

When the Communications Act was passed, it forbade broadcasting lotteries or information concerning lotteries. In 1948 the section on lotteries was made a part of the Criminal Code.\(^8\)

The lottery provisions have been hard to interpret, especially in relation to quiz shows. On August 5, 1948, in an attempt to clarify the situation, the Commission issued proposed rules to govern lottery regulation. In a supplemental notice released August 27, 1948, the Commission pointed out that section 316 had now been transferred to the Criminal Code; and stated the proposed rules would assist the Commission, licensees, and other interested persons in giving effect to the public policy embodied in the determination of Congress.

The proposed rules defined the essential elements of a lottery: prize, chance, consideration.\(^9\) The Commission said that money, or any object of value, would constitute a prize. There would be chance if selecting a winner depended wholly or in part upon lot or chance. Consideration would be present if any of the

\(^7\)FRC, Fifth Annual Report-1931, p. 9.

\(^8\)18 U.S.C. 1304.

\(^9\)Proposed Lottery Regulations, 3 RR 231 (1949).
following were involved: money or thing of value; listening or viewing a program; answering a question, the answer to which depended on listening or viewing a program; and answering the telephone or writing a letter if the phone conversation or contents of the letter were to be broadcast.

ABC, CBS, and NBC challenged the regulations. During February, 1953, the United States District Court for the Southern District of New York ruled the proposed regulations were invalid on grounds the act of listening or viewing does not constitute consideration. The Commission appealed to the United States Supreme Court which upheld the lower court's decision stating the Commission's interpretation of consideration was too narrow. This might be considered the general history of lottery regulation, but the Commission has also interpreted the lottery provisions of the Communications Act in relation to specific cases.

In a 1936 opinion involving WRLB, Columbus, Georgia, the Communications Commission held that a sales promotion scheme giving chances to customers and a prize for the winning ticket was a lottery, and that carrying advertising for the promotion violated the lottery provisions of the Communications Act. WRLB had broadcast advertising for a promotion in which a used car dealer gave tickets to purchasers,

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and a used car to the holder of the winning ticket. The Commission said:

The essential elements of a lottery are chance, prize and consideration. Consideration exists when a chance on a prize drawing is given with purchase of legitimate goods even though the goods are in fact priced no higher because of the issuance of the prize chances.62

Since the station's record was otherwise good, and the advertising had been discontinued, license renewal was granted.

In 1937 a situation arose involving KXL, Portland, Oregon.63 The station had carried advertisements for chain-letter, "Prosperity Clubs" which stated an investment of one dollar would bring the listener twenty-seven. The commercials also claimed the clubs were licensed and bonded, which was not true. The Commission held that such financial schemes constituted a lottery within the meaning of the Communications Act. Since the station had voluntarily discontinued the advertising after a few days, however, license renewal was granted.

In an opinion concerning WMBQ, Brooklyn, New York, the Commission concluded broadcasting information about a lottery is not in the public interest.64 A group of Brooklyn merchants had a promotion scheme whereby they gave tickets to persons buying in their

63 KXL Broadcasters, 4 FCC 186 (1937).
64 Metropolitan Broadcasting Corp., 5 FCC 501 (1938).
stores, and held a series of drawings—with prizes for the names drawn. Station WMBQ had broadcast, on paid time, the numbers of the winning tickets and the names of the winners. The Commission held this violated the lottery provisions of the Communications Act. For this and other program shortcomings, license renewal was denied.

In 1956 the Folger Coffee Company evolved a promotion which the Commission decided was questionable. A company representative would call on a housewife. If she had a can of Folger coffee in the house, she was asked a question. A correct answer was worth one dollar to three hundred dollars. Learning of the scheme, the Commission sent letters of inquiry to thirty-four stations. Twenty-eight replied they did not carry the advertising or had discontinued the advertising. The six which continued to carry the advertising were put on temporary license because the Commission felt prize, chance, and consideration were involved. So as not to cause trouble, Folger discontinued the requirement that the housewife have a can of Folger's coffee.

"Prize-giving" schemes are not necessarily lotteries. A federal court in Illinois concluded a game involving identification of musical numbers was a game of skill, not of chance. The Kroger Company had contracted with WMBD, Peoria, Illinois, to broadcast a


syndicated bingo-type game called "Mu$ico." Listeners obtained cards from the sponsoring company, identified songs broadcast on the station, and entered the answers on the cards. The station cancelled the contract, fearing the game was a lottery. The owner of the game took the matter to court. In 1939 the Federal District Court, District of Northern Illinois, ruled that "Mu$ico" involved skill and was not a lottery. The station was ordered to fulfill the contract.

In a 1956 opinion the Commission decided the act of going to the store constituted consideration, but its opinion was reversed by the courts. The Caples Company of Chicago syndicated a game called "Play Marco," a television edition of Bingo. Those who wanted to play got a card from a local store. No purchase was necessary. Numbers were read over the air, and the first person to fill all the numbers in a vertical or horizontal line won. The Commission claimed going to the store was consideration, but the Court of Appeals held: "The fact that cards necessary for participation can only be obtained from the sponsor's stores or outlets is not enough to satisfy the element of consideration for the purposes of a criminal statute."^68

Race Track Information which Might Aid Illegal Gambling.—

The Commission has also concluded that broadcasting information which might aid illegal gambling, or devoting too much time to race track programs, is not in the public interest. The Commission's decision in the WWDC case has already been discussed in relation to

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balanced programming. In that instance the Commission said that
devoting too much time to any type of race track program is not in
the public interest; but, so long as racing is legal, descriptions
of races or information about racing are not ipso facto against the
public interest. However, information which might aid illegal gambling
is. The statement concluded:

The broadcasting of prices . . . giving detailed information on "scratches" . . . interruption of programs to
announce results, . . . are all factors which bear on
whether the programming is being slanted to the interests
of a relatively small group in the community . . . to the
neglect of others.69

The Commission has arrived at the same conclusion on a number of occasions.
In a 1948 opinion the Commission said: "It would not be in the public
interest for a radio station to broadcast information designed to assist
illegal betting or gambling on horse races."70

WTUX, Wilmington, Delaware, was involved in an obvious
evidence of program imbalance and aid to illegal gambling.71 After
the Wilmington Superintendent of Public Safety filed a protest, the
Commission discovered WTUX was devoting six hours a day to race track
information. The police claimed "bookies" depended on WTUX for
information on winners, track conditions, and betting odds. Following
a hearing on license renewal, in October, 1950, the Commission revoked
the station's license. The owners petitioned for rehearing, claiming
other stations in the area were broadcasting similar information.

69 Capitol Broadcasting Co., 4 RR 21 (1948).
70 Joliet Broadcasting Co., 4 RR 1225 (1948).
71 Port Frere Broadcasting Co., 5 RR 1137 (1952).
The Commission sent a questionnaire to all stations in the area, and placed sixteen additional stations on temporary license. When a station submitted an agreement to the Commission promising to discontinue the broadcasts, it was taken off temporary. Finally in 1952, after WTUX had corrected program imbalance and discontinued the broadcasts in question, the Commission also renewed its license.

In a similar action the Commission revoked the license of WWBZ, Vineland, New Jersey, because of broadcasts which might aid illegal gambling and failure to carry educational programs. However, after program shortcomings were corrected the station's license was renewed.72

Programs Featuring Fortune Telling and Astrology.—The 1931 statement of the Federal Radio Commission on lottery programs, mentioned earlier, also singled out fortune telling as questionable material for programs.73 The 1939 memorandum outlining undesirable program materials suggested fortune telling and similar shows are not in the public interest. In a 1935 opinion the Communications Commission ruled that advice programs are not in the public interest because they are in effect private communication, and stations are licensed to serve the entire public; and because they exploit the credulity of listeners.74 The program in question was an advice

74 Scroggin and Company Bank, 1 FCC 194 (1935).
program broadcast by KFBQ, St. Joseph, Missouri, on which a "Doctor" Richards posed as a psychologist, scientist, and astrologer; giving advice on business, marriage, and the like. Because of this program the Commission ordered a hearing on license renewal. When the station promised to discontinue the broadcast, license renewal was granted.

Another incident concerned KTWI, Twin Falls, Idaho, and a show called the "Friendly Thinker." The "personality" claimed no supernatural powers; but was free with advice on love, marriage, and business affairs. The Commission called a hearing on license renewal. After the station promised to cancel the program, the Commission approved a new license, but took the opportunity to observe:

Programs of this nature, although allegedly intended for amusement only, are not in the public interest. In condemning such broadcasts, the Commission takes the view that the listening public need not be deceived by the analyses or the forecasts. It is sufficient that the program, as presented, has even the tendency to mislead or injure the public.75

This chapter has reviewed the application, by the Commission, of the concept of public interest to the regulation of general program content. The Commission has considered both positive and negative criteria of "programming in the public interest." It has been said, for instance, that stations should provide programs of interest to the entire public in their service area. This has led the Commission to

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75 Radio Broadcasting Corp. 4 FOC 125 (1937).
insist on a balanced program schedule, and to consider such factors as the ratio of sustaining to commercial time, of network to local programs, and of recordings and films to other programs. The Commission has even indicated certain kinds of programs that it considers virtually essential to a balanced program schedule: local live shows, news, discussion, educational and cultural programs, and religious programs.

The Commission has also designated conduct it believes to be of doubtful public interest. The Commission has outlined questionable program practices, conduct prohibited by the Communications Act, attacks against individuals or groups, programs depicting torture, and others. There are also program materials the Commission has termed questionable: lotteries and information concerning lotteries, prohibited by the Communications Act; race track information which might aid illegal gambling; and programs featuring fortune telling or astrology.

A majority of the program practices which have been considered under the heading of general program content have been concerned with the entertainment aspects of broadcasting. The Commission has dealt specifically and at length with what might be called informative materials: news, discussion, and political broadcasts. Chapter VI will consider this area of the Commission's activities.
CHAPTER VI.

PUBLIC INTEREST IN RELATION TO NEWS, DISCUSSION,
AND POLITICAL BROADCASTING

Broadcasting provides both information and entertainment, but it is chiefly as a source of information—news, discussion, and the like—that radio and television qualify for protection under the First Amendment. The relation of broadcasting to the First Amendment was discussed in Chapter II. It was pointed out that "freedom of broadcasting" is complicated by the limited frequencies available. This has become an acute problem in television.

Scarcity of frequencies has caused the Commission to actively promote a concept of freedom of information. Both the Radio Commission and the Communications Commission have maintained that freedom of speech in broadcasting is not merely freedom of the broadcaster from censorship, it is freedom for the public to hear news, discussion, and other informative materials. According to the Commission, a broadcaster operates in the public interest only if he accepts and fulfills this responsibility. The Commission on Freedom of the Press outlined a similar doctrine:

The need of the consumer to have adequate uncontaminated mental food is such that he is under a duty to get it; and, because of this duty, his interest acquires the statute of a right. It becomes legitimate to speak of the moral right of men to the news they can use.
Since the consumer is no longer free not to consume, and can get what he requires only through existing organs, protection of the freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered.¹

Both the 1927 Radio Act and the 1934 Communications Act forbid the Commission to censor broadcasting; but, at the same time, attempt to insure equal access to the microphone by candidates for public office. Neither act contains direct reference to news or discussion. While neither the Radio Commission nor the Communications Commission have ever attempted to designate specific programs stations should carry, the Commission, chiefly the Communications Commission, has repeatedly maintained stations should broadcast news and discussion programs. This includes a responsibility to present, seek out if necessary, various shades of opinion on important public issues. The study on Freedom of the Press summarized the responsibility in a statement which mirrors the attitude of the Communications Commission:

Today our society needs; first, a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning; second, a forum for the exchange of comment and criticism; third, a means of projecting the opinions and attitudes of the groups in the society of one another; fourth, a method of presenting and clarifying the goals and values of the society by the currents of information, thought, and feeling which the press supplies.²

¹Commission on Freedom of the Press, op. cit., p. 125.
²Ibid., pp. 20-21.
Public Interest in Relation to News

The most "popular" informative material is news. It is not quantity of news which has concerned the Commission. The public's interest in news is such that most stations carry a number of news shows each day. The Commission's interest in news has been based on the fear that station owners may use their facilities to provide a "one-sided" picture of important events. The Commission first became deeply involved with this problem in its "Mayflower" decisions, and later in the "Richards" news slanting case.

The "Mayflower" decisions, which were discussed briefly in Chapter II, dealt with editorializing by broadcasters. "Editorial view" is an accepted policy of newspapers. This freedom to editorialize is based on the laissez faire theory that any individual or group may start a newspaper. Thus, every view has equal opportunity for expression. Broadcasting is in immediate conflict with this doctrine because of limited facilities. The Commission has maintained this obligates the licensee to preserve competition in ideas. In 1941 the Commission released its first opinion on editorializing.3

During 1937 and 1938 John Shepard III, owner of WNAC and WAAB in Boston, had used his stations to broadcast his views on public questions and to support political candidates. The following year the Mayflower Broadcasting Corporation applied for WAAB's facilities. It claimed Shepard's license should be revoked because

3Mayflower Broadcasting Corp., 8 FCC 333 (1941).
of his editorial practices. In 1941 the Commission granted license renewal, since the station had discontinued editorial comment, but the Commission took the opportunity to express the belief that editorializing is not in the public interest:

Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. . . . The public interest—not the private—is paramount. . . . While the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission.4

Though broadcasters had not been notoriously eager to editorialize, this statement resulted in a storm of protest; not only from broadcasters, but from newspapers. By 1948 criticism had reached sufficient proportions to prompt the Commission to hold a hearing on the pros and cons of editorializing. During June, 1949, the Commission issued a memorandum reversing its original opinion. The Commission concluded that a station might editorialize, but is obligated to provide equal opportunity for the presentation of opposing views.

The memorandum stated the freedom guaranteed by the first Amendment is

the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter.5

The Commission said it had decided

overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness . . . is not contrary to the public interest.6

However, the Commission made editorializing by a licensee subject to definite conditions:

The Commission believes . . . licensees . . . have the responsibility for determining the specific program material to be broadcast over their stations. This choice, . . . must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of . . . time to the discussion of public issues . . . designed so that the public has a reasonable opportunity to hear different opposing positions. . . . Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity . . . may not be utilized to achieve a partisan or one-sided presentation of issues.7

Within a few years, the Commission had altered its original view to the point of considering editorializing a positive factor in an application for improved station facilities. In a 1955 op-

5Editorializing by Broadcast Licensees, 13 FCC 1246 at 1249 (1949).
6Ibid., p. 1253.
7Ibid.
inion the Commission granted the application of the Key Broadcasting Company stating:

The station editorializes on major issues during newscasts; however, they are kept separate and distinct from the news. . . . WAVZ, by its editorial broadcasts, has been instrumental in promoting public action locally resulting in many improvements to the city of New Haven, such as the provision of a new school, slum clearance, combating juvenile delinquency, and new housing.8

Another aspect of editorializing is news slanting. In a sense the newscaster slants the news through his selection of news, delivery, and in other ways. This is unavoidable, and very different from conscious news slanting at the direction of the licensee. The attitude of the Communications Commission toward news slanting was revealed in the Richards case.9

Two employees who had been fired from the news staff of KMPC, Hollywood, claimed G. A. Richards, the station's owner, directed them to slant news against the New Deal, the Roosevelt family, Jews, and Communists. As a result of these charges the CIO of California, the American Jewish Congress, and James Roosevelt complained to the Commission. In May, 1948, the Commission placed KMPC and two other stations owned by Richards on temporary license. Because of the death of a Commission hearing examiner and the illness of Richards it was March, 1950, before hearings were begun. The hearings lasted seven months. Testimony from 290 witnesses covered 18,000 pages. It is estimated the hearings cost Richards two million dollars. However, Richards died before an opinion was given.

8Key Broadcasting System, Inc., 13 RR 159 at 175 (1955).
When his widow filed a statement with the Commission promising there would be no news slanting on the stations, the Commission granted regular license renewal and closed the incident without rendering a formal opinion.

The Commission has also maintained the licensee must accept complete responsibility for a station's news coverage. Outright transfer is prohibited by the Communications Act, but it is possible to relinquish actual control while retaining legal jurisdiction. Station KVOS, Bellingham, Washington, entered into such a contract. Hearing revealed that KVOS had arranged for an outside party to completely handle the station's news. Since the contract provided that either party could cancel the arrangement at any time, the Commission held the contract was not actually illegal. However, the Commission expressed disapproval of the arrangement.

Public Interest in Relation to Discussion

Discussion of public issues constitutes a second category of "informative material." The proper handling of discussion has caused many problems for the Commission and for broadcasters. In a 1951 opinion Justice Holmes of the United States Supreme Court outlined the role of discussion in a democracy:

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. . . . When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain

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10KVOS, Inc., 6 FCC 22 (1938).
few adherents. Full and free discussion ... encourages
the testing of our own prejudices and preconceptions.
Full and free discussion keeps a society from becoming
stagnant and unprepared for the stresses and strains that
work to tear all civilization apart.

Full and free discussion has indeed been the first
article of our faith. We have founded our political
system on it. It has been the safeguard of every religious,
political, philosophical, economic, and racial group
amongst us. ... We have deemed it more costly to liberty
to suppress a despised minority than to let them vent
their spleen. ... We have wanted a land where our people
can be exposed to all the diverse creeds and cultures of
the world.11

In a study of the interaction between government and mass
media, Zechariah Chaffee examined the functions of government with
respect to discussion of public issues. He concluded that govern-
ment is related to discussion in three ways: it may limit or sup-
press discussion, encourage better and more extensive discussion,
and contribute to the content of discussion.12 The Communications
Commission has attempted to encourage "better and more extensive"
discussion of public issues.

The Commission outlined its general views toward discussion
in the Blue Book. In that report the Commission pointed out that
broadcasting is "an unequaled medium for the dissemination of news,"13
information, and opinions, and for the discussion of public issues.

11 Dennis v. U.S., 331 U.S. 494 at 584-585 (U.S. Sup. Ct.,
1941).

12 Zechariah Chaffee, Jr., Government and Mass Communica-
tions (Chicago: University of Chicago Press, 1947), p. IX.

It recognized that such discussions may cause problems for the broadcaster: "Any vigorous presentation of a point of view will of necessity annoy or offend at least some listeners." The Commission did not, however, consider this a legitimate reason for a station to refuse to carry discussion programs; to operate in such a manner is to "thwart the effectiveness of broadcasting in a democracy." The Commission concluded that public interest clearly requires that an adequate amount of time be made available for the discussion of public issues; and the Commission, in determining whether a station has served the public interest, will take into consideration the amount of time which has been or will be devoted to the discussion of public issues.\footnote{14}{\textit{Ibid.}, p. 40.} \footnote{15}{\textit{Ibid.}}

In addition to this general statement of policy, the Communications Commission has considered specific aspects of handling discussion. The most frequently mentioned requirement is that broadcasters provide equal opportunity for the presentation of different views. The 1939 memorandum outlining undesirable program materials called refusing to give equal opportunity to both sides in a controversial discussion undesirable. The Blue Book emphasized that a basic criterion of discussion is that opposing point of views are presented fairly. When the Commission reversed its original Mayflower opinion, it said public interest demands that stations devote "reasonable . . . time to the discussion of public
issues . . . designed so that the public has reasonable opportunity to hear different opposing positions.\textsuperscript{16}

The Commission has also attempted to define "equal opportunity." The Commission has said that refusing to allow one side to broadcast because the other side will not appear is contrary to the public interest.\textsuperscript{17} While on strike against the Chrysler Corporation, the United Auto Workers tried to buy time on WWJ, Detroit, to present the issues of the strike. WWJ refused to sell time, but offered to donate an hour each week for a discussion between the UAW and Chrysler. However, it stipulated the UAW and Chrysler must jointly request the time. When Chrysler would not take part in the proposed program, WWJ still refused time to the union. The UAW complained to the Commission. On April 21, 1950, the Commission wrote to WWJ saying that if the information was important enough to merit free time on the station, it was too important to refuse to present one side because the other side would not appear.

The Commission has held that banning a view because it is unpopular is not in the public interest. In 1946 Robert H. Scott asked the Commission to deny license renewal to KQW, and two other San Francisco stations, because they had refused him time to discuss atheism. Scott maintained since the stations presented religious broadcasts, he was entitled to reply. The stations claimed


\textsuperscript{17}\textit{"Mayflower Reply," Broadcasting, XXXVIII:18} (May 1, 1950), p. 29.
it would not be in the public interest to air a discussion which would be "obnoxious" to a great majority of its listeners. The Commission granted renewals, but said: "If freedom of speech is to have meaning, it cannot be predicated on the mere popularity or public acceptance of the ideas sought to be advanced." Accordingly, during November of that year KQW agreed to a trial program on atheism. Following the show the station received more than five thousand letters, most of them criticizing the discussion. When KQW's license was again due for renewal, Scott petitioned the Commission a second time to refuse the KQW application. The Commission renewed the license without question. At the same time it wrote Scott a letter saying, in effect, no one had attacked his position and he had no right to demand time to reply. The Commission added that a licensee must decide what programs will best serve the public interest.

The Commission has insisted stations should not adopt a policy forbidding the sale of time for the discussion of public issues. This is an opinion with a long history; a history that began in 1939 when the radio standards of the National Association of Broadcasters forbade selling time for discussion on the assumption these programs should be sustaining. In 1943 a provision was added to the standards which prohibited solicitation of membership—except for charitable groups and the like. Labor unions claimed

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both provisions were aimed at unions and co-operative consumer leagues.

The attitude of one broadcaster was stated by Woods of the Blue network in a hearing conducted by the Commission. Commissioner Durr recalled that Woods took the view that

"anything at all about a labor union is controversial, prima facie." Hence Blue felt that it could not sell time to a labor union for any purpose. Woods did not think it was "controversial" within the meaning of the NAB Code when W. J. Cameron, in his intermission commentary during the Ford Symphony Hour, assailed organized labor, the President of the United States, or "anyone else Mr. Ford happened not to like." . . . On the other hand, he did not see how he could let a labor union sponsor a symphony, even if the union's name was never mentioned. "Things like that get around, you know."19

Variety bitterly attacked the code. In an article entitled "Plan for a Storm(y) Shelter," the entertainment paper charged:

The masterminds of the NAB have, in essence and by a single rap of the gavel, served notice on the American people that our broadcasting system is no longer open to any form of commercial solicitation unless it involves something like the transfer of a can of soup or a cake of soap. . . . Is radio to become an exclusive privilege of the merchant? Is an organization, movement or cause, regardless of how sound or deserving, to be barred from the ears of the American people just because the broadcaster, so unlike the newspaper publisher, prefers to slap down a blanket interdict rather than exercise his powers of discrimination? The amendment puts the thumb on organizations that have become the basic fabric of the economic and social life of the American community. To mention but one: organized labor.20

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19 Statement by Commissioner Durr quoted in: White, op. cit., p. 81.

20 Quoted in: Ibid., pp. 79-80.
The first salvo against the code came in 1943 when UAW-CIO Vice President Richard T. Frankenstein complained to the Commission that station WHKC, Columbus, Ohio, had discriminated against him and the UAW-CIO. Frankenstein charged that WHKC was guilty of censorship and operation contrary to the public interest. The details of this case were cited in Chapter III of this study as an example of pressure group activity in broadcasting. It was pointed out that even though the Commission refused Frankenstein's petition, it did act on a later petition to investigate WHKC submitted by the UAW-CIO. At the hearing, held during August, 1944, WHKC contended it was only following the **NAB Standards of Practice**. The association maintained WHKC had not interpreted the code properly. The president of the association said that when WHKC refused to accept the material on a sponsored basis because it was controversial, it should have offered the union sustaining time.21

Before the Commission could hand down an opinion WHKC and the union filed a joint motion for dismissal.22 The motion said that in the future WHKC agreed to: "consider each request for time solely on its individual merits," be open-minded and impartial on controversial issues, sell time for the discussion of controversial issues and not discriminate between "business concerns and nonprofit organizations," put any refusals for time in writing showing reasons why the request was denied, refrain from censoring

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22 United Broadcasting Co., 10 FCC 515 (1945).
scripts except for "reasons . . . in accordance with the law and existing regulations," and maintain balance in the discussion of controversial public issues. On June 26, 1945, the Commission granted the petition, but commented:

The operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations.23

Before the Commission would approve the sale of the Blue Network to Edward J. Noble, it required Noble to file a statement outlining his policy toward the discussion of public issues. Noble said:

My policy, . . . will be to refrain from adopting any restrictions which will automatically rule out certain types of programs on the basis of the identity or personality of the individual, corporation, or organization sponsoring or offering them. I propose to meet each request for time with an open mind and to consider such requests strictly on their individual merits and without arbitrary discriminations. More particularly, I think that the operation of a national network should follow a policy whereby all classes and groups shall have their requests, either for sponsored or sustaining time, seriously considered and network time determined in accordance with true democratic principles and with the aim of presenting a well-rounded and balanced broadcast service in the best interests of the public and of the network.24

During February, 1946, the Commission conducted a consolidated hearing on three applications for Pennsylvania stations. After the hearing was completed the Wyoming Valley Broadcasting Company requested permission to reopen the hearing and file an

23 Ibid., p. 518
affidavit outlining proposed policy toward discussion of public issues. Essentially, the affidavit promised the station would follow the principles of the WHKC statement. The Commission allowed the affidavit to become a part of the official record and later granted Wyoming Valley a construction permit.25

Public Interest in Relation to Political Broadcasts

When Congress enacted laws to regulate broadcasting it made few specific references to programming. One exception was political broadcasts. Evidently fearing broadcasters might support a candidate simply by refusing time to opposing candidates, the 1927 Radio Act included rules for political broadcasts:

Sec. 18. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.26

The first reference to section 18 by the Federal Radio Commission was in its second report to Congress. The Radio Commission directed the attention of broadcasters to the political provisions of the Radio Act: 

"Any violation of this section of the act will be considered as sufficient ground for the revocation or denial of

26 44 Stat. 1162 (1927), sec. 18.
a radio broadcasting license." In its third report the Commission attempted to justify section 18 as not a violation of free speech. The Radio Commission pointed out that a station does not have to carry political broadcasts. If it does schedule such programs, however, it would "not be fair, ..., to the public to allow a one‐sided presentation of the political issues of a campaign."28

Section 315 of the 1934 Communications Act was identical to section 18 of the Radio Act.29 The 1952 Communications Act Amendments added a provision designed to limit time charges to candidates to the regular commercial rate:

Sec. 315. (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.30

It is doubtful that any area of programming has caused stations or the Commission more difficulties than political broadcasts. The problems of interpreting the political provisions of the Communications Act have fallen primarily into two categories: (1) the equal time provision and (2) the relation of the no-censorship clause to political defamation.

30 Ibid., sec. 315 (b).
The Equal Time Provision

According to the Communications Act, if a station allows a "legally qualified candidate" for a public office to use its facilities, it must provide "equal time" to all other "legally qualified" candidates for the same office. The Commission has based a number of opinions on the equal time aspect of the political regulations.

Quality v. Quantity.—The Communications Commission has said equal time means time of equal quality as well as quantity. The Commission has held that if necessary, a station must cancel commercial shows to make this possible. During a Louisiana election, E. A. Stephens, part owner of WDSU and candidate for the Democratic nomination for senator, gave a series of talks over WDSU from 7:45 to 8:00 P.M. When his opponent, Senator John Overton, attempted to buy time he was told the only time available was after 10:30 P.M. Overton complained to the Commission which ordered a hearing on license renewal. When it was revealed the station manager took the action without the owners' approval, the license was renewed. However, the Commission commented that the equal time provision means quality as well as quantity of time. The Commission said a station "has the duty to cancel such previously scheduled programs as may be necessary to clear time for broadcasts of programs in the public interest."32

32 Ibid., p. 65.
Limiting Total Time.—The Commission has concluded, however, that the equal time provision does not prevent a station from limiting total amount of time allowed each candidate—provided candidates for the same office are treated alike. In the 1946 Texas primary there were fourteen candidates for governor. The Texas Quality Network, which included four leading Texas stations, adopted a policy of allowing each candidate two fifteen-minute periods. A candidate's specific time was chosen by lot. One candidate, Homer P. Rainey, complained to the Commission that this was unfair. During a hearing all candidates, except Rainey, testified they did not feel the policy was discriminatory. The Commission concluded it was not in the public interest for the stations to adopt a joint policy, but individually they had the right to limit total amount of time devoted to political broadcasts—so long as each candidate for the same office received the same treatment.

Sustaining Time and Political Broadcasts.—The Commission has held that if one candidate refuses to accept sustaining time a station may still offer sustaining time to other candidates. In answer to a request for clarification of the political regulations from WSAZ, Huntington, West Virginia, the Commission sent a letter to Leonard H. Marks, the station's counsel. The letter, dated June 13, 1956, said:

The refusal of one candidate to accept an offer of sustaining time does not preclude a station from making such time available to an opposing candidate on the same basis.34

34Leonard H. Marks, Esq., 11 RR 65 (1956).
Guest Appearances.--The Commission has maintained that if a station allows candidates from one party to appear without charge on a show sponsored by an outside group, such as a labor union, the station must furnish free time to all other candidates for the same office.\(^{35}\) In 1954 a Detroit commentator on a UAW-CIO sponsored show invited several Democratic candidates to appear as guests on his program; but no Republicans. When the Republicans complained, the Commission held the station must give time to all Republican candidates whose opponents had been guests on the show.

On October 1, 1958, the Communications Commission issued a "question and answer type" interpretation of the provisions of section 315. One of the "answers" seemed to indicate that an incidental appearance by a candidate in a film clip on a news show would not entitle other candidates to equal time:

Question. When a station, as part of a newscast, uses film clips showing a legally qualified candidate participating as one of a group in official ceremonies . . . has there been "use" under section 315?

Answer. No. Since the facts clearly show that the candidate had in no way directly or indirectly initiated either filming or presentation of the event, and that the broadcast was nothing more than a routine newscast by the station in the exercise of its judgment as to newsworthy events.\(^{36}\)

However, on February 18, 1959, the Commission released a ruling which was in direct opposition to its earlier statement.\(^{37}\)

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During December of 1958 five television stations in Chicago had carried film clips showing the mayor of Chicago, Richard J. Daley, opening the Chicago March of Dimes campaign; and, also in his capacity of mayor, greeting President Arturo Frondizi of Argentina. The following month Lar Daly, an independent candidate for both the Republican and Democratic nomination for mayor, asked each of the stations for equal time. Two of the stations complied, but three refused; holding that Daley's appearance was in his official capacity, and that Daly was not entitled to equal time. Daly then appealed to the Commission which ruled the film clips constituted use of a station by a qualified candidate, and that Daly must be given time to reply. In a press conference even the President of the United States called this decision "ridiculous."

Talks by Non-Candidates.—According to the Commission section 315 applies only to duly qualified candidates for the same office. A station is not obligated to carry programs by non-candidates. This problem arose during the 1936 presidential campaign. The Republican National Committee bought time on CBS for a talk by Senator Arthur Vandenberg, who was not himself a presidential candidate. CBS received the script only a few hours before broadcast time. The network discovered the show would feature recorded statements from Roosevelt's 1932 campaign with live comments by Vandenberg. In line with its policy against transcribed political

broadcasts CBS cancelled the show. However, a few minutes before broadcast time, the network reversed its decision and allowed the show to go on the air. Before master control in New York could be notified, twenty stations of the sixty-six station network controlled out of New York were cut off. The remainder of the stations carried the program.

The Republican Committee complained to the Commission that CBS had censored the broadcast in violation of section 315 of the Communications Act. In a letter dated October 20, 1936, the Commission said that since Vandenberg was not himself a candidate section 315 did not apply. The letter pointed out that a station "is not under a public utility obligation" to accept all program material offered.

The Meaning of "Legally Qualified."—To fall within the jurisdiction of section 315 a candidate must meet legal qualifications for candidacy. The Commission has ruled that this implies it must be possible to vote on the candidate. In 1950 Arnold Peterson, national secretary of the Socialist Labor Party, protested to the Communications Commission that WHNC, Canton, Ohio, refused to sell the Socialist candidate time. When the Commission investigated it found the candidate was not a qualified candidate. In a letter to Peterson the Commission concluded:

While a broadcast station must afford equal opportunities to all legally qualified candidates for public office, to be "legally qualified" a candidate must be one who could be voted for, and where a party does not qualify
for listing on the ballot and state law does not permit write-in voting, its candidates are not "legally qualified."39

Same Office and Same Election.—The Commission has ruled that the equal time provision applies only to candidates for the same office in the same election. The Rev. Sam Morris, Texas Prohibitionist candidate for the Senate, complained to the Commission that KRLD, Dallas, Texas, had refused to sell him time though it had sold time to the Democratic candidate during the primary election. In a letter to Morris dated October 22, 1948, the Commission replied that "equal opportunities need only be afforded to legally qualified candidates for the same office in the same election."40 It said the primary and general elections were separate elections.

Equal Time Regardless of Chance to Win.—The Commission has said a qualified candidate is entitled to equal time regardless of his chance to win.41 Prior to the 1952 national conventions, CBS presented a series of broadcasts featuring leading contenders for the presidential nominations. A St. Louis attorney, William R. Schneider, protested that CBS had refused to give him time even though he was a candidate for the Republican nomination. CBS argued Schneider could hardly be considered a possible nominee. Though he had entered two primaries, he had not campaigned and had received

39 Letter to the networks from the Federal Communications Commission, 7 HR 766 (1951).
40 Sam Morris, 4 RR 885 (1948).
41 "Candidates Like Schneider Entitled to Same Air Time as Taft and Ike," Variety, CLXXXVI:13 (June 4, 1952), p. 31.
few votes. The Commission ruled it was not for CBS to decide who was a serious contender, and said Schneider was entitled to time.

Minor v. Major Parties.—In the Commission's opinion the equal time provision applies to candidates from minor as well as major parties.42 In 1952 the Progressive Party complained because the networks did not cover its convention. The Commission replied that section 315 applies to candidates—not to conventions. The Commission said that only acceptance speeches would come within its jurisdiction so far as conventions were concerned. The Commission took this opportunity to point out that all legally qualified candidates for the same office must receive the same treatment whether they represent major or minor parties. The Progressive Party candidate was in jail at the time of his nomination. Since his wife read his acceptance speech, and she was not a candidate, the networks were not obligated to carry the talk.

"Non-Political" Talks by Candidates.—A talk by a candidate does not necessarily demand equal time for opposing candidates. There have been occasions, though rare, when the Commission has held that stations need not provide equal time. Such a situation occurred in 1950 when Dewey appeared on a CBS network of New York stations. In his capacity as Governor he gave a report to the people. The chairman of the New York Democratic Committee complained

to the Commission, which asked CBS to file a statement of its position. The following year, when renewing the license of WCBS, key CBS New York affiliate, the Commission said:

Whether or not a licensee must afford facilities for a reply to a broadcast by an office holder is a matter within the judgment of the licensee, depending on whether the broadcast can fairly be considered as controversial in nature. 43

On another occasion the Commission decided a report by the President on an international crisis is not a political speech within the meaning of section 315. During the 1956 Middle East crisis Eisenhower discussed the situation in a talk carried by all networks. When Stevenson demanded time to reply the networks wired the Commission for an opinion. On November 5 the Commission notified the networks:

When Congress enacted Section 315 of the Act it did not intend to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the nation on an international situation. 44

On the other hand, during the same election, the Commission decided a fund-raising appeal would be political. CBS asked the Commission if it allowed Eisenhower to broadcast an appeal for the United Community Funds, whether it would have to give equal time to other candidates. The Commission replied:

Section 315 of the Act contains no exception with respect to broadcasts by political candidates carried as a "public service" nor does it prescribe any requirements as to the "political" nature of the broadcast necessary to bring it within the provisions of the section. If

43Paul E. Fitzpatrick, 6 RR 543 (1950).
a station carries an appeal by the President of the United States, who is a candidate for reelection, on behalf of a fund-raising drive, it must afford equal opportunities to other legally qualified candidates.45

At another time the Commission concluded a report by a Congressman who has announced his candidacy is political. In a statement pointing up the strictness with which it interprets section 315 the Commission said:

Section 315 of the Communications Act draws no distinction between "political" and other broadcasts by a candidate, and any use of broadcast facilities entitles other candidates to equal opportunity.46

Defamation by Candidates

Before relating defamation by radio and television specifically to political broadcasts, it might be well to examine the subject of defamation generally. Action for defamation is considered to fall within the police powers of the state. This makes it a matter of local concern governed by state rather than federal laws.

There are two types of defamatory material. Slander refers to "defamatory words spoken." Libel has been defined as

a false and malicious publication . . . either in print or writing or by pictures, with intent to injure . . . reputation, or to expose to public hatred, contempt, ridicule, shame or disgrace.48

46 KNGS, 7 RR 1130 (1952).
48 Ibid., p. 176.
The distinction between libel and slander is important because

many charges which, if merely spoken of another, would
not sustain a suit for slander, will, if written or
printed and published, sustain a suit for libel. . . .

The reason for the distinction . . . lies in the
fact that in libel, the written or printed words are of
necessity attended with more deliberation and coolness,
and hence are indicative of stronger malice than oral
words, in addition to being embodied in a more permanent
and enduring form, and therefore calculated to do greater
wrong and much more harm. 49

Defamatory statements made on radio or television have
generally been considered libel if read from a script, and slander
if extemporaneous. In a 1935 article Lewis G. Caldwell observed:
"Since the advent of the broadcaster, a number of states have en-
larged the definition of slander so that, so far as radio is con-
cerned, it is coextensive with libel. 50 In 1954 the New York
Supreme Court said: "An action in libel is the proper remedy for
defamation resulting from a television performance based upon a
script." 51 The same court said in 1956: "A cause of action for
defamation based upon a telecast not read from a prepared script
sounds in libel and not merely in slander." 52 A United States
District Court in Kentucky ruled: "Dissemination of defamatory
remarks by television from a prepared transcript is libel and not

49 Ibid., pp. 178-179.
52 Shor v. Billingsley et. al., 14 RR 2053 (N.Y. Sup. Ct.,
1956).
slander.\(^5\) A possible exception is extemporaneous material. A New York District Court held: "Extemporaneous oral defamatory statements made on television broadcasts are slander and not libel.\(^5\)

\textbf{Liability for Defamation on Political Broadcasts.--}One of the most troublesome aspects of the political regulations is the prohibition against censoring a candidate's talk. The Commission has said this means a broadcaster may not even force a candidate to delete defamatory statements. Thus, a state court may hold a broadcaster responsible for material he is forbidden by federal regulation to censor. The Commission has claimed the provision forbidding censorship is not unfair because the federal government has occupied the entire field of political defamation; thus, relieving the licensee of responsibility under state laws.

In a 1948 opinion the Communications Commission explained why it considers the clause against censorship necessary:

If licensees are going to take it upon themselves to censor or restrict the broadcast of libelous material, they must either adopt a policy of requiring the elimination of all matter containing serious charges concerning the opposing candidates or parties, which would seriously limit the effectiveness of radio broadcasting as a medium of political expression, or they must, in effect, set themselves up as the sole arbiter of what is true and what is false, what is in fact libel and what is not, an exercise of power which may be readily influenced by their own sympathies and allegiances.\(^5\)


\(^5\)Port Huron Broadcasting Co., 12 FCC 1069 at 1072 (1948).
In this same statement the Commission said it believed

the prohibition of section 315 against any censorship by
licensees of political speeches by candidates for office
is absolute, no exception exists in the case of material
which is either libelous or might tend to involve the
station in an action for damage. 56

The Commission maintained this was not untenable because

the prohibition . . . against censorship . . . appears
clearly to constitute an occupation of the field by
Federal authority, which, under the law, would relieve
the licensee of responsibility for any libelous matter
broadcast in the course of a speech coming within sec­
tion 315 irrespective of the provisions of state law. 57

The Commission made it clear, however, that the prohibition against
censorship applied only to libelous or defamatory materials. The
Commission said this does not prevent a broadcaster from eliminating
obscenity or profanity; or any program materials forbidden by
the Communications Act or by any other Federal Law pertaining to
broadcasting.

This opinion concerned WHLS, Port Huron, Michigan. During
March, 1945, the station had sold time to Carl E. Muir, candidate
for City Council, and then refused to carry the broadcast because
his proposed talk included remarks the station considered defamatory.
Muir appealed to the Commission. It was June, 1948, before the
Commission released a decision which outlined its basic policy toward
political broadcasts. Two years later the Commission arrived at
much the same conclusions regarding an incident involving WDSU, New
Orleans. 58

56 Ibid., p. 1074. 57 Ibid.
58 WDSU Broadcasting Corp., 7 RR 769 (1951).
Like the Federal Communications Commission, legal theorists have also maintained that Congress has occupied the entire field of political defamation. A study of radio defamation in *Air Law Review* concluded:

> As broadcasting is interstate commerce, the Government of the United States may claim the right to enact measures governing radio defamation, including exemptions in favor of broadcasters from liability in proper instances. . . . It seems that Congress may fully and exclusively regulate the matter of liability of radio defamation and thereby substitute one universal rule for several diverse rules.  

Congress, however, has never enacted a law specifically exempting broadcasters from liability in cases of political defamation—unless the Communications Act does so by implication. Regardless of theory or the opinion of the Commission, state courts may still hold a broadcaster liable for defamatory statements made by a candidate on a political broadcast the licensee is forbidden by federal regulations to censor.

In 1932 the Nebraska Supreme Court ruled station KFAB, Lincoln, was liable for defamatory statements broadcast over its facilities even though the 1927 Radio Act prevented censorship. The court concluded that since a station is not a common carrier the licensee can, for the most part, control the use of his facilities. The incident occurred when Richard F. Wood, candidate for

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Attorney General of Nebraska, charged in a broadcast that his opponent was an "irreligious libertine, a madman and a fool." The United States Supreme Court refused to review the lower court's decision.

During 1942 a New York state court arrived at an opinion more favorable to broadcasters. The court said:

Since the Federal Communications Act prohibits discrimination among qualified candidates for public office in use of radio station's facilities and denies right of censorship to station, owner thereof should be given corresponding qualified privileges against liability for defamatory statements by such candidates in broadcasts therefrom.61

This case, which also included the principle of "due care" defense, involved station WMCA, New York City. When suit was brought against the station for remarks uttered on a political broadcast the management claimed it was powerless to prevent the defamation because of the Communications Act. The station said it had examined the script prior to the broadcast, and that the defamatory remarks were extemporaneous. In addition to concluding section 315 exempted the broadcaster from responsibility, the court pointed out that by requesting an advance script the licensee had exercised "due care." The court said:

A radio station's management, using due care in selecting lessee of its facilities and inspecting broadcaster's script, is not liable for extemporaneous defamatory remarks interpolated by broadcaster without such management's prior knowledge or any warning or indication that they were about to be interpolated.62

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62 Ibid.
The North Dakota Supreme Court concluded a station is not liable for defamatory statements it is powerless to prevent. In an April, 1958, decision, which has been upheld by the United States Supreme Court, the North Dakota court said:

Under Section 301 . . . complete regulatory power and control over channels of interstate radio and television communications are rested in the United States exclusive of station action. Section 315 of the Act requires stations to permit broadcast of certain political speeches and denies them the power of censorship. A broadcast station therefore cannot be held liable for defamatory statements made in such a political broadcast. Section 315 is not unconstitutional.63

The station involved was WDAY, Fargo, North Dakota, during the 1956 election campaign WDAY had sold time to the two leading candidates for senator. A third candidate on an independent ticket, A. C. Townley, demanded and was granted equal time. WDAY filmed his talk and allowed it to be broadcast, knowing it contained statements which were probably defamatory. The speech attacked not only the opposing candidates, but the Farmers Educational and Cooperative Union of America. After the election the Farmers Union brought suit, naming WDAY and Townley as co-defendants.64

July 29, 1958, a United States District Court in Nashville, Tennessee, released an opinion supporting the broadcaster’s position.

The court concluded a broadcaster should not be held liable for remarks he can't censor:

No express provision in the section grants immunity to a licensee for defamatory remarks by a candidate for public office during a political broadcast. But it would appear that such immunity is necessarily implied.

The denial of the right of censorship is complete, including any portions of the material deemed by the licensee to be defamatory. If the licensee, as the section clearly provides, is deprived of all right to censor or to delete any portions of the material to be broadcast by a political candidate, it logically follows that it was the intention of Congress to immunize the licensee from liability for defamation arising from remarks made by such candidate while using its facilities. It cannot fairly be supposed that Congress meant to leave licensees exposed to a continued liability for defamation and at the same time to deprive them of the power to avoid such liability.65

In this instance suit was brought by Edward Lamb against Pat Sutton, candidate for the United States Senate in 1954, and stations WSM and WLAC, both in Nashville. Sutton had charged in a broadcast that Lamb was "a known Communist and that his licenses to operate radio and TV stations had been revoked by the FCC."66 A jury awarded Lamb verdicts against the stations; but the same federal court, on a motion for rehearing, reversed the decision.

In addition to interpretations of section 315 by the courts, thirty-six states, according to an August, 1958, summary by the National Association of Broadcasters, have enacted laws providing protection to broadcasters in the case of defamatory statements by candidates.67 It can readily be seen the consensus is that the

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66 Ibid.  
67 Ibid.
intent of Congress, in section 18 of the 1927 Radio Act and section 315 of the Communications Act, was to exempt broadcasters from liability for defamatory statements made on political broadcasts the licensee is forbidden to censor. However, until Congress clarifies its intention broadcasters who carry talks by candidates do so with the knowledge they may be held liable for material they are powerless to prevent.

"Censorship" of Political Broadcasts.—Though a broadcaster may not censor a talk by a candidate, the licensee does have certain rights in respect to political broadcasts. In a 1950 decision the United States Court of Appeals, Third Circuit, held that a station may censor a talk by a man who is not himself a qualified candidate. The court said:

The section itself and its legislative history compel the conclusion that the section applies only to the use of a broadcasting station by a candidate personally and that it does not apply to the use of such station by other persons speaking in the interest or support of a candidate. 68

This ruling resulted from an October, 1949, broadcast by William F. Meade, chairman of the Philadelphia Republican Central Committee. The recorded talk was carried by three Philadelphia stations. The speech included statements implying David H. Felix, Democratic candidate for municipal office, had Communist leanings. Felix sued the stations for libel. The stations claimed they could not censor the talk, and the district court upheld their contention. In December,

1950, the Court of Appeals reversed the lower court's decision. The United States Supreme Court refused review.

In a 1952 opinion the Federal Communications Commission said, in reply to a request for information, that a broadcaster may ask a candidate for a script, but that he may not censor that script. However, this does give the broadcaster an opportunity to examine a talk for possible defamatory material. By pointing out to a candidate that his remarks may result in a libel suit, it might be possible to persuade him to delete the defamatory statements. Moreover, a New York state court has ruled that examination of an advance script constitutes "due care" defense.

During the 1952 election campaign, the Commission ruled that a station may not cancel a political talk because it deals with matters other than a candidate's qualifications for office. The Socialist candidate for president of the New York City Council had contracted with station WMQA for time to present six broadcasts. The station cancelled the final program because the script dealt with the philosophy of socialism rather than the candidate's qualifications for office. The Socialist party complained to the Commission. On May 15, 1952, the Commission wrote a letter to WMCA holding:

The station was not justified in refusing to permit ... broadcast on the ground that it did not relate to the individual's candidacy or to the qualifications of the candidate or any other person. Section 315 is not limited

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70 This case was discussed earlier in this chapter: Josephson v. Knickerbocker Broadcasting Co., Inc., 38 N.Y.S. (2d) 985 (1942).
to broadcasts relating to the qualifications of particular candidates and a licensee may not determine how a candidate may campaign.\textsuperscript{71}

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In the discussion of general program content, it was evident that many of the attitudes of the Communications Commission were shaped by the Radio Commission. For instance, it was the Radio Commission which first condemned attacks against individuals or groups. The Radio Commission had little to say, however, about news, discussion of public issues, and political broadcasts. The Communications Commission has been largely responsible for this area of regulation.

The Communications Commission has attempted to prevent bias in the presentation of news. Through the "Mayflower" decisions and the "Richards" case, the Commission has stressed that since frequencies are limited, stations are obligated to present the news without bias. The Commission has suggested that when a licensee does editorialize, he should label editorial opinion and make sure that other views are also presented.

The Commission has maintained that stations should broadcast discussions of public issues which give all major points of view an equal opportunity to be heard. The Commission has suggested that a licensee cannot discharge this responsibility with

\textsuperscript{71}WMCA, Inc., 7 RR 1132 (1952).
a set of rules or a code; he must exercise judgment and consider each request on its merit. Though this constitutes the "official" attitude of the Commission toward the discussion of public issues, it has seldom been "enforced." The Commission has never revoked a license because a station failed to carry discussion programs, or handled them "improperly."

On the other hand, the Commission has been strict in its interpretation of the political provisions of the Communications Act. Though neither the Federal Radio Commission nor the Federal Communications Commission ever refused to renew a license because of a station's handling of political broadcasts, a number of stations have been involved in license renewal hearings as a result of political programs. A majority of the problems center around two aspects of the political provisions: the equal time provision and the prohibition against censorship.

This study has considered the regulation of general program content, and of informative materials. Another area of concern has been the quantity and presentation of advertising. Chapter VII will examine the manner in which the Federal Radio Commission and the Federal Communications Commission have applied the concept of public interest to the regulation of advertising practices.
CHAPTER VII

PUBLIC INTEREST IN RELATION TO ADVERTISING PRACTICES

Advertising pays the bill for broadcasting. Economist E. A. Lever has defined commercial advertising as "those activities by which visual or oral messages are addressed to the public at large, or to a selected number of people, for the purpose of informing them about, and influencing them to buy, the merchandise or services featured in the advertising."¹ He maintained advertising is "an integral part of a free-enterprise economy in which entrepreneurs are striving constantly to find new products and new product differentiations which consumers will want."² Lever suggested that advertising

is probably the most important method used commercially to influence choice. . . . Recent inquiries seem to show that it has three different kinds of effects. The most frequent is a preserving effect--keeping people, already sold, from changing their minds. Less frequent is the conversion effect--making people do something they had not thought of doing before. Between these is the activating effect--making people already predisposed to a product become aware of their predisposition and act accordingly.³

A study of the functions of advertising in our economy conducted by Neil Borden, Professor of Advertising, Graduate School

²Ibid., p. 121.
³Ibid., p. 17.
Advertising's outstanding contribution to consumer welfare comes from its part in promoting a dynamic, expanding economy. Advertising's chief task from a social standpoint is that of encouraging the development of new products. It offers a means whereby the enterpriser may hope to build a profitable demand for his new and differentiated merchandise which will justify investment.4

In a 1941 decision the Court of Appeals, 6th circuit, pointed out:

Advertising goes hand in hand with volume of production and retail distribution. It operates to increase the demand for the availability of goods and to develop quickly consumers' acceptance of the manufactured products. Expressed another way, it breaks down consumers' acceptance and develops consumers' demand.5

The emergence of advertising as the chief financial support of broadcasting was traced in the discussion of the climate of regulation. It was shown that during the early days of broadcasting the Radio Commission tended to regard radio advertising as a "necessary evil." By 1946, however, the Communications Commission was willing to say in the Blue Book that, while overcommercialization is not in the public interest, advertising makes an important contribution to our economy:

Advertising in general, ... and radio advertising in particular, plays an essential role in the distribution of goods and services within our economy. ... Finally, informative advertising which gives reliable factual data concerning available goods and services is itself of direct benefit to the listener in his role as consumer. Consumer knowledge of the new and improved

5Ford Motor Company v. FTC, 120 F (2d) 175 at 183 (C.C.A., 6, 1941).
products which contribute to a higher standard of living is one of the steps toward achieving that higher standard of living.®

Broadcasters have maintained that promoting the sale of goods in itself serves the public interest. A letter written by A. D. Willard, Jr., formerly Executive Vice-President of the National Association of Broadcasters, said:

Does he [the advertiser] not, in selling as much of his produce as he can, serve the public interest? I realize, of course, that those who coined the chain-reaction phrase, "in the public interest, convenience and necessity," have not been called upon to define it. . . . But if we are to consider the public interest, must we not weigh all the factors of social practice: fair and full employment, freedom to work in freedom, liberty to seek after one's aspirations? Are not all of these democratic principles woven into the cloth of public interest? And if such is true, is not that vague but significant interest served in our economy by the free movement of goods? For in commerce, there is prosperity, and advertising serves well the cause of commerce.7

The attitude of the consumer toward radio advertising was studied by Paul Lazarsfeld. He found that "about a third of the radio listening public is anti-advertising."® The study revealed that "only 23% really like it, while a third exhibit varying degrees of opposition to it."9

6FCC, Public Service Responsibility . . . , p. 41.
7Albert N. Williams, Listening (Denver: University of Denver Press, 1948), p. 82.
9Ibid., p. 24.
Congress has given few directions concerning the regulation of radio and television advertising. Section 19 of the 1927 Radio Act stated:

Sec. 19. All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.\(^{10}\)

This same provision was included in the Communications Act.\(^{11}\) In 1952 the Communications Act Amendments added a section to the United States Code prohibiting fraud by wire, radio, or television.\(^{12}\)

This does not mean that the regulation of radio and television advertising has been limited to matters dealing with sponsor identification. Using the public interest concept as a guide the Communications Commission, and its predecessor the Radio Commission, have considered almost every aspect of radio and television advertising—from quantity of advertising to the form in which advertising is presented. This chapter will consider the application of the concept of public interest to the regulation of advertising practices. The discussion cannot be limited, however, to activities of the Radio Commission and the Communications Commission. The Federal Trade Commission has also had an important influence on radio and

\(^{10}\) 44 Stat. 1162 (1927), sec. 19.

\(^{11}\) 48 Stat. 1064 (1934), sec. 317.

\(^{12}\) 66 Stat. 711 (1952), sec. 18.
television advertising practices—chiefly in the area of advertising claims. Though the actions of the Trade Commission are directed toward the advertiser, the Trade Commission often works closely with the Communications Commission.

The five man Federal Trade Commission was created by Congress in 1914.13 The Federal Trade Commission Act said:

That unfair methods of competition in commerce are hereby declared unlawful. The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate Commerce, from using unfair methods of competition in commerce.14

The Act empowered the Trade Commission

to issue orders against unfair methods of competition in commerce, and . . . to investigate economic conditions, including among other things, combinations in restraint of trade, unfair practices and business conditions and to report the same to Congress, the President, the Attorney General, or the public.15

The Federal Trade Commission could act, however, only when injury to a competitor could be proved.

In 1938, the Wheeler-Lea Act, an amendment to the original 1914 Act, substantially increased the powers of the Trade Commission.16 Under this act the Commission became the defender of the consumer. The Commission no longer had to prove injury to a competitor to take action. It was given the additional authority to


prevent "unfair or deceptive" acts or practices in commerce. The 1938 Amendment also designated food, drug, cosmetic, and device advertising as an area of special concern, specifying the use of the criterion "misleading in a material respect."\(^{17}\)

The Federal Trade Commission's 1955 Annual Report summarized methods of competition the Commission has considered "unfair." Included among the group were: "false or misleading" advertising of products as to quality, purity, origin, therapeutic, and corrective properties; making "false and disparaging" statements about competitors' products and business; "false or misleading" use of the word "free"; and using "false and misleading representations and practices" which give products a value they would not otherwise have, such as misleading "scientific tests," or falsely indicating that a product is made in accordance with government standards.\(^{18}\) The term "false and misleading" will be discussed at greater length in the portion of this chapter dealing with the content of advertising.

During September, 1934, the Federal Trade Commission asked stations and networks for copies of commercial announcements broadcast during a specified week— a practice it has continued since at intervals of two or three times each year. In its annual report

\(^{17}\)Ibid., sec. 13. Under section 13 of the amended act the Federal Trade Commission may obtain an immediate injunction against false advertising of foods, drugs, devices, or cosmetics.

for that year the Trade Commission outlined reasons for checking broadcasting copy:

In its examination of the radio continuities, . . . the Commission's sole purpose is to curb unlawful abuses of the freedom of expression guaranteed by the Constitution. It does not attempt to dictate what an advertiser shall say, but rather indicates what he may not say. Jurisdiction is limited to cases which have a public interest as distinguished from a mere private controversy.19

In 1939 the Trade Commission began to monitor ad lib commercials.

The extent to which the Federal Trade Commission has examined radio and television advertising is indicated by a summary of the amount of copy reviewed during the 1950 fiscal year:

- Radio continuities examined: 759,729
- Radio continuities considered questionable: 13,384
- TV continuities examined: 35,422
- TV continuities considered questionable: 714

The method of review followed by the Trade Commission at the time this study was made was specified in a letter sent by the Commission to all radio and television stations during May, 1955. The letter said:

> Effective May 1, 1955, a scientific sampling technique will be used to provide more effective surveillance of the advertising broadcast on radio and television stations . . . Stations will be advised individually at intervals throughout the year of their reporting requirements . . .

> Supplementing this sample of the advertising continuities, the Commission will also monitor programs from time to time.21

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The copy furnished is checked by the Trade Commission. If found to be false or misleading, cease and desist orders are issued to the advertiser. If the advertiser refuses to comply he is subject to fine, or imprisonment, or both. The Trade Commission may not proceed directly against a station.

During October, 1956, a special radio-television unit of the Federal Trade Commission was formed to investigate more carefully false, misleading, and deceptive radio and television commercials. This unit organized a monitoring system with 125 "attorney-investigators"—regular Federal Trade Commission staff attorneys. In the course of their visits to cities on investigative business they spend time, not otherwise taken up, monitoring local radio and television commercials about which complaints have been received. Under a special arrangement, the Trade Commission furnishes the Communications Commission the identity of stations carrying advertising challenged by the Trade Commission in a formal complaint, or against which the Federal Trade Commission has issued cease and desist orders. The annual report of the Communications Commission for 1957 described this arrangement:

In order to permit the FCC to apprise broadcast stations of advertising found to be false and misleading, a cooperative arrangement was arrived at early in 1957 whereby the FTC advises the FCC of questionable advertising broadcast over radio and TV stations, together with the call letters and locations of the stations responsible.

The FCC communicated such information to these stations so that they may be fully informed and be in a position to consider taking action consistent with their operation in the public interest. 23

Thus, in applying the concept of public interest concept to the regulation of advertising practices, the Federal Communications Commission receives assistance from the Federal Trade Commission.

**Quantity of Advertising**

The Radio Commission and the Communications Commission have considered two aspects of quantity in relation to radio and television advertising: (1) the overall ratio of commercial to sustaining time; and (2) the number, frequency, and length of commercial announcements. The aim of the Commission has been to prevent overcommercialization—a concept never clearly defined.

In its Second Annual Report the Federal Radio Commission said:

> While it is true that broadcast stations in the country are for the most part supported or partially supported by advertising, broadcasting stations are not given these great privileges by the United States government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public. 24

In his study of government and mass communication Zechariah Chafee maintained:

> Another point often forgotten is that the First Amendment was not adopted to protect vehicles of advertising

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and entertainment. They are legitimate and beneficial activities, but so are stockbroking and circuses, which receive no constitutional immunity. The more newspapers and radio allow advertising and miscellany to swamp news and ideas, the greater the risk of losing some of their privileged position.\textsuperscript{25}

The 1939 memorandum of the Communications Commission which outlined undesirable program materials called too lengthy and too frequent advertisements undesirable.\textsuperscript{26} In the Blue Book the Commission concluded:

The fact that advertisers have a legitimate interest and place in the American system of broadcasting does not mean that broadcasting should be run solely in the interest of the advertisers rather than that of the listeners. Throughout the history of broadcasting, a limitation on the amount and character of advertising has been one element of "public interest."\textsuperscript{27}

The Commission has maintained, however, that it cannot limit the amount of advertising to a specific quantity. When asked by Congress about the possibility of limiting advertising the Federal Radio Commission replied that any attempt to "reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time" would require additional legislation.\textsuperscript{28} The Radio Commission did not believe that under existing law it could limit advertising. Nevertheless, quantity of advertising has been considered when evaluating the operation of a station in the public interest.

\textsuperscript{25}Chafee, op. cit., p. 795.
\textsuperscript{26}Variety, CXXXIII:13, p. 40.
\textsuperscript{27}FCC, Public Service Responsibility . . ., p. 41.
\textsuperscript{28}Senate, Commercial Radio Advertising.
Ratio of Commercial to Sustaining Time

According to the Blue Book broadcasters must depend on sustaining programs to achieve balanced programming. This role of sustaining programs was discussed in Chapter V. In addition to their balance wheel function, the Commission has maintained that sustaining programs help prevent overcommercialization by limiting the total quantity of advertising.

Validity of the Distinction.—The validity of this distinction between commercial and sustaining time has been questioned not only by broadcasters, but also by members of the Commission. The idea that sustaining programs are vital to the public interest was first outlined in detail in the Blue Book. Two months later Justin Miller, president of the National Association of Broadcasters, issued a reply to the Blue Book charges.

Miller maintained the Commission has no authority to consider programming. He said this is censorship, and the Commission is forbidden to censor broadcasting. Even if the Commission did have such authority, Miller believed "the standards suggested by the Commission to distinguish between 'commercial' and 'non-commercial' are unsound." He pointed out:

Carried as a sustainer, the Metropolitan Opera Broadcasts become 2½ or 3 hours on the credit side of the station's

29 FCC, op. cit., p. 12.
31 Ibid., p. 6.
program ledger, but sponsored by Texaco, the Opera becomes merely a cipher, 150 or 180 min. of NC (network commercial) to be counted against the station's commercial vs. sustaining position. The broadcasts of public interest programs of high cultural value, have been materially benefited by sponsorship. More money is spent on their promotion, their time segment is assured, and more care and attention can be given to their production. As a result, more people can and do listen to these sponsored broadcasts than ever heard them as "sustainers." That the Commission glorifies the "sustainer" and brands the "commercial"--even though they be the same program--is a patent injustice which has no basis in reason.

The standards are faulty in other respects. The Commission seeks to evaluate the public interest aspects and program structure of radio by reducing them to a statistic. By such a tight standard the Commission cannot possibly evaluate or review the programs of a station in any respect except the proportion of time which it devotes either to sustaining, commercial or recorded programs.

Regardless of broadcasters' objections the Communications Commission has considered the ratio of commercial to sustaining programs to be one aspect of operation in the public interest. However, the concept has been challenged even by Commissioners.

In a 1956 dissenting opinion Commissioner Doerfer questioned evaluation of programming. He said:

To be sure, there is grave doubt that this Commission has such responsibility. The essence of my dissent is that such responsibility has been sloughed off without a determination of the extent of our jurisdiction or lack of it. In my opinion, the Commission should have taken this opportunity to determine first the extent of its powers to require a broadcast license to be used as a public trust, and if so then to determine whether or not this broadcaster and others may convert the "public trust concept" into a pure business enterprise.

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32 Ibid., pp. 6-7.
33 Miami Broadcasting Company, 14 RR 125 (1956).
In December, 1958, the Commission proposed new program classifications which would simplify record-keeping of stations. The notice was accompanied by a six-page dissent by Commissioner Craven. He declared the Commission is actually telling broadcasters what kinds of programs they should carry through the listing of program categories in the form.

He called for the Commission to withdraw from the program field by discontinuing the use of program proposals as one of the criteria on which it bases approval or disapproval of an application. He declared that the FCC should call only for program information when or if it has information that the law is being violated.34 When the Commission released the proposed changes it invited broadcasters to submit comments. A brief submitted by a group of broadcasters called the distinction between commercial and sustaining programs a "vestigial remnant of a by-gone day."35 The brief maintained the program structure of broadcasting has changed to such an extent the commercial-sustaining classification is no longer meaningful. It was suggested that this is particularly true in radio where spot announcements are the major form of commercial, and five and ten-minute shows are common; but broadcasters also felt the commercial-sustaining criterion had little meaning for television.

Interpretation of the Commercial-Sustaining Classification.— Application forms used by the Communications Commission define a commercial program as any program "the time for which is paid for

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by a sponsor or any program which is interrupted by a commercial
spot announcement, . . . at intervals of less than $1\frac{1}{2}$ minutes. 36 A sustaining program is defined as any program "which is neither
paid for by a sponsor nor interrupted by a commercial spot an-
nouncement" at intervals of less than $1\frac{1}{2}$ minutes. 37 The program
unit in television today is $\frac{1}{2}$ rather than $1\frac{1}{2}$ minutes. An applicant
for a construction permit must indicate the percentage of time he
proposes to devote to sustaining programs in a typical week. Appli-
cants for license renewal are asked to give the percentage of time
which was sustaining during a composite week, and to estimate the
amount of time which will be sustaining during a composite week in
the future.

The Communications Commission has never specified a definite
amount of time which should be sustaining. It has, however, cited
examples of overcommercialization. In the Blue Book the Commission
condemned WTOL, Toledo, because 91.8 percent of its programs during
the week of November 13, 1944, were commercial. 39

In a 1947 decision the Commission favored the Cur-Man
Company over Bay State Beacon. In its application Cur-Man promised
40 percent of its programs would be sustaining, while Bay State
Beacon proposed to devote 20 percent of its air time to sustaining

36FCC, Form 301. 37Ibid.
38FCC, Public Service Responsibility . . ., p. 6.
39Ibid., p. 7.
The details of this case were cited in the discussion of general program content.

During August, 1947, the Commission granted regular license renewal to WTOL, Toledo, a station cited in the Blue Book. Because of alleged shortcomings WTOL had been operating on a temporary license since November, 1944. One charge against the station was that a general manager had been hired to work on a commission—making his salary dependent on the station's revenue. The Commission felt this arrangement was not in the public interest because it would tend to encourage overcommercialization.

In November, 1955, the Commission placed 17 radio stations in Illinois and Wisconsin on temporary license. Each station was asked to explain a lack of balance between commercial and sustaining programs, and to show why this should not be considered overcommercialization. Either the answers satisfied the Commission or the stations corrected program imbalance. In May, 1956, all of the stations were granted regular license renewal.

The Blue Book suggested that another indication of overcommercialization is "excessive profit." The Commission concluded:

A review of the economic aspects of broadcasting during recent years indicates that there are no economic considerations to prevent the rendering of a considerably broader program service than the public is currently afforded.

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41 Community Broadcasting Company, 12 FCC 85 (1947).
43 FCC, Public Service Responsibility . . ., p. 47.
The Blue Book included statistics on the profit margin of stations from 1937 through 1944. The Commission suggested the huge increase in profit during the years reviewed was not due solely to the increase in advertising revenues but is also attributable in considerable part to the fact that the industry has progressively retained a larger and larger proportion of each revenue dollar as profit and has spent a smaller and smaller proportion for serving the public.44

The Commission found that among stations with annual time sales of $25,000 or over, the proportion of the revenue dollar devoted to serving the public declined from 83 cents to 64 cents between 1938 and 1944, while the proportion retained as profit, subject to Federal income tax, increased from 17 cents to 36 cents.45

The Commission also pointed out:

In 1939, the first year for which comparable data are available, the industry earned a return of 37 percent on the original cost of its tangible broadcast property and a return of 67.1 percent on the depreciated cost. By 1944, the comparable rates of return were 108.8 percent on original cost and 222.6 percent on depreciated cost.46

Broadcasting is not a public utility. The Commission has no authority to regulate the revenue of a station. The Commission has implied, nevertheless, that stations should devote a portion of their earnings to the preparation and presentation of worthwhile sustaining programs.

44 Ibid., p. 48.
45 Ibid., p. 49.
46 Ibid.
Length, Number, and Frequency of Commercial Announcements

It was pointed out earlier that the application forms used by the Commission request a breakdown between commercial and sustaining time. An applicant for a construction permit or license renewal is also asked to provide information on the number and length of spot announcements. In its concern with the commercial-sustaining ratio the Commission has not ignored other aspects of quantity. The Commission has considered the length of individual commercial announcements, the number of announcements throughout the day, and the frequency of commercials in a given segment of time. It is these latter aspects of quantity which have received the primary attention of broadcasters. While the Commission appears to be trying to prevent overcommercialization, broadcasters seem chiefly interested in limiting advertising to an amount which will not "drive away" the audience.

In the Blue Book the Commission examined problems of advertising. Included were length, number, and frequency of commercial announcements. The Commission suggested that extremely long commercials are not in the public interest, and cited a commercial that ran for "five minutes, without program interruption of any kind."47 The Commission said that even though some advertisers seem to feel the longer the commercial the greater the impact, there

47FCC, Public Service Responsibility • • , p. 43.
is evidence to indicate that unduly long commercials tend rather to drive the audience away.\textsuperscript{48}

The Commission said the number of commercials in a broadcasting day or week is a problem when the total is excessive.

The extreme case of an excessive number of spots noted to date is Station KMAC, which broadcast 2215 commercial announcements in 133 hours on the air.\ldots This was an average of 16.7 spots per hour. Spot announcements in excess of 1,000 per week have been noted on a number of stations.\textsuperscript{49}

The Blue Book pointed out that the frequency of commercial announcements may also be a problem. By frequency the Commission was referring to the number of announcements in a given segment of time, whether spot announcements or commercials on a sponsored show, and the length of time between commercials. Considering the first part of this problem the Commission maintained that piling up commercials is not in the public interest:

The listener who has heard one program and wants to hear another has come to expect a commercial plug to intervene. Conversely, the listener who has heard one or more commercial announcements may reasonably expect a program to intervene.\textsuperscript{50}

The Blue Book included examples of piling up of commercials. The Commission cited WTOL, Toledo, which interrupted a 15-minute program of transcribed music with seven spot announcements, and a 20-minute program of transcribed music with ten spot announcements.\textsuperscript{51}

\textsuperscript{48}Ibid., p. 44.

\textsuperscript{49}Ibid.

\textsuperscript{50}Ibid.

\textsuperscript{51}Ibid., p. 6.
Piling up of commercials contributed to the charge of overcommercialization against WBAL, Baltimore:

An example—not unique—of the piling up of spot announcements is found in the 45-minute period from 8:15 a.m. to 9:00 a.m. on Monday, April 24, 1944, during which 16 spot announcements were broadcast or one every 2.8 minutes.\textsuperscript{52}

Another aspect of the problem of frequency is the length of time between commercials. The Commission has suggested:

Listener satisfaction may depend in part upon the length of the intervals between commercials. . . .

Some stations and some advertisers are becoming aware of the value of uninterrupted listening. Thus the WOL program on July 9, 1945, from 7:30 to 7:58 p.m. made a point of announcing that the four movements of a symphony would be played "without interruption."\textsuperscript{53}

**Placement of Advertising**

The placement of advertising may be examined in relation to the spacing of commercials throughout the broadcast day, or in relation to the placement of advertising in a specific program. In the former sense "placement" is closely related to quantity of advertising—piling up of commercials, frequency, and the like—which has already been discussed. In the latter sense placement of advertising refers to such problems as interruption of artistic programs with advertising, and the middle commercial in news broadcasts. The Commission has never called a station to task solely...
because of its placement of advertising, but it has managed to make its views on the subject known to broadcasters.

The 1939 memorandum outlining undesirable programs materials called interruption of artistic programs with advertising undesirable. The regulations governing station identification announcements indicate the attitude of the Commission toward interruption of certain types of programs. They provide that station identification be made on the hour, and again either on the half hour or quarter hours. Identification need not be made, however, if to do so would interrupt "a single consecutive speech, play, religious service, symphony concert, or operatic production of longer duration than 30 minutes."\footnote{Statutes-Regulations-Standards, I RR, Part I (1946), p. 53-226, par. 3.117 (b).} In such instances as those outlined above, identification should be made at the beginning and end of the program and during the first natural break in the entertainment. In the case of variety shows, baseball games, and the like which run more than 30 minutes, identification should be made within five minutes of the specified times.\footnote{Ibid., par. 3.117 (d).} Though the regulations apply only to station identification announcements, it seems logical to conclude they would also mirror the attitude of the Commission toward the interruption of such programs with commercial announcements.
The Blue Book expressed disapproval of the intermixture of program and advertising content because "a listener is entitled to know when the program ends and the advertisement begins." In the Blue Book the Commission quoted from an article which appeared in the New York Times:

The virtual subordination of radio's standards to the philosophy of advertising inevitably has led the networks into an unhealthy and untenable position. It has permitted Gabriel Heatter to shift without emphasis from a discussion of the war to the merits of hair tonic. It has forced the nation's best entertainers to act as candy butchers and debase their integrity as artists.56

The Commission has particularly criticized the practice of having newscasters present commercials.

Another "placement problem" considered in the Blue Book was the middle commercial. The Commission claimed most persons don't like middle commercials. In evidence it cited a study by the Radio Council of Greater Cleveland in which more than 95% of the respondents said they "preferred commercials only at the beginning and end."57 The Commission especially deplored the interruption of news. It said newscasters, the public, and the industry all dislike the middle commercial in news shows:

Some sponsors, . . . have made a sound asset of actual elimination of the middle commercial; their opening announcement ends with some such phrase as: "We bring you now the news--uninterrupted." It may well be that such emphasis upon the essentials of good programming, made explicit to listeners by appropriate announcement over

56FCC, Public Service Responsibility . . . , p. 47.

57Ibid., p. 45.
the air, will do much to eliminate inferior procedures indulged in by other networks, stations, or sponsors.58

Content of Advertising
Advertising is the chief source of income for broadcasting.

In order to deliver a message to the radio or television audience, the sponsor is willing to pay the cost of an entire program. Naturally he is vitally interested in the advertisement, and is probably less amenable to suggestions about the content of a commercial than about other aspects of a program.

The first "Code of Ethics" written by broadcasters dealt primarily with the acceptability of products for advertising and the content of advertising. Many decisions of the Radio Commission were concerned with this aspect of programming. In addition to the Radio Commission and the Communications Commission, the Federal Trade Commission has also exerted a tremendous influence on the content of radio and television advertising. Application of the concept of public interest to the regulation of advertising content will be considered under four categories: preventing false or fraudulent advertising, acceptability of products for advertising, advertising claims, and the form in which commercials are presented.

False or Fraudulent Advertising

The memorandum on undesirable program materials called "false, fraudulent or misleading" advertising undesirable.

58 Ibid.
In its Twenty-third Annual Report the Commission observed it has consistently held that the selection and presentation of program material to the inclusion of advertising is the responsibility of the individual broadcast station licensee, subject to statutory obligation to operate in the public interest. Station licensees, therefore, are under an obligation to exercise reasonable care and prudence with respect to advertising copy to assure that no material is broadcast which will deceive or mislead the public. Where findings are made by an authoritative body in the field of advertising claims, such as the Federal Trade Commission, that particular advertising matter is deceptive, its continued broadcasting by station licensees raises a serious question as to whether they are operating in the public interest. 59

Both the Radio Commission and the Communications Commission have cited instances of false or fraudulent advertising. It has been up to the courts, however, to define the meaning of "false or fraudulent"—largely in relation to decisions of the Federal Trade Commission. A Maryland District Court ruled the test for false or fraudulent advertising is the impression the advertisement will have on the public. The court said:

Under Federal Trade Commission Act, test of falsity of advertisement is not whether it could be basis for civil action for deceit or for criminal proceedings for obtaining money by false pretenses, but is what is likely to be net impression made upon general public by the advertisement, considered in its entirety and as read or understood by those to whom it would appeal. 60

The Circuit Court of Appeals, fourth circuit, held that by telling

less than the whole truth an advertiser may be guilty of false advertising:

To tell less than the whole truth in an advertisement is a well known method of deception, and he who deceives by resorting to such methods cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which the deception has been accomplished.\(^6\)

In a case involving Ford Motor Company the Circuit Court of Appeals, sixth circuit, concluded that determination of whether or not advertising is false "does not depend upon the purpose of the advertisement nor upon the good faith or bad faith of the advertiser."\(^6\)

In dealing with instances of false or fraudulent advertising, a practice for which license renewal has been refused, the Radio Commission and the Communications Commission have been particularly strict when medicine or medical products were involved. In 1931 the Federal Radio Commission held that advertising fake medical cures is not in the public interest.\(^6\) The Radio Commission refused to renew the license of KTNT, Muscatine, Iowa, because Dr. Norman Baker, the station's owner, was using the station to advertise a "cure" for cancer and to attack the medical profession.

That same year the Radio Commission refused to renew the license of KFKB, Milford, Kansas, because its owner, Dr. John R. Brinkley, was prescribing medicines over the air for symptoms described by listeners in letters, and advertising a "goat gland"

\(^6\) Lorillard Co. v. FTC, 186 F. (2d) 52 at 53 (C.C.A., 4, 1950).


\(^6\) FRC, Fifth Annual Report - 1931, p. 78.
operation he claimed to have developed. Because of these practices the American Medical Association had revoked his medical license and filed a complaint with the Radio Commission. Following a hearing the Commission denied license renewal—in part on grounds the medical "Question Box" constituted private communication, and the "goat gland" commercials were obscene and indecent. On appeal the United States Court of Appeals upheld the Commission.

In 1935 the Communications Commission designated the license renewal applications of five Los Angeles area stations for hearing because they had broadcast advertising for the Alhambra Electronic Institute, later known as California Electronic Institute. This was the trade name for the operation of Fred Bezuzi and Stephen T. Mayes, who claimed to have developed a machine which would "cure all ills." They offered to "treat" the first ten customers for only one dollar. Aside from the fact the machine could not possibly perform as described; the Commission discovered all customers, including the first ten, were charged the regular ten dollar fee. The Commission held the advertising was not in the public interest, but since it has been discontinued the stations were granted regular license renewal.

In a 1936 decision the Commission concluded extravagant advertising claims are not in the public interest. Station WGBZ,
York, Nebraska, was sharing time on the same frequency with station KMA in Shenandoah, Iowa. In 1935 KMA applied for full time on the frequency. To grant the KMA request would mean taking WGBZ off the air. Hearing revealed that WGBZ had been broadcasting extravagant claims for patent medicines, promoting the sale of questionable stocks, and carrying commercials for "Texas Crystal Salts" which claimed the salts would cure nearly any known ailment. The Commission held that such practices were not in the public interest and granted KMA full time, taking WGBZ off the air.

During a 1936 hearing on the renewal application of KFRC, San Francisco, the Commission concluded that a station should investigate the accuracy of advertising claims, and possible harmful effects of a product. KFRC had broadcast commercials for a weight reducing preparation which claimed the medicine was harmless. Investigation revealed it could have harmful effects. The station said it had contacted the Federal Trade Commission before accepting the advertising, and had been informed an action against the manufacturer had been dropped. However, the Trade Commission replied that it had warned the station the drug should be taken only on advice of a physician. Since the advertising had been discontinued, the station's license was renewed.

In a 1935 hearing involving WMCA, New York City, the Communications Commission condemned offensive medical advertising.  

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67 Don Lee Broadcasting System, 2 FCC 6h2 (1936).
68 Knickerbocker Broadcasting Co., 2 FCC 76 (1935).
The advertisements in question were for "Birconjel," a contraceptive product. The Commission said the commercials were offensive, not in the public interest, and provided sufficient cause for refusing license renewal. Since the advertising had been discontinued and the station had an otherwise good record, the Commission granted license renewal.

While a majority of the opinions of the Commission relating to false or fraudulent advertising have dealt with advertising for medical products, they have not been limited to this area. In a 1936 decision the Communications Commission maintained a broadcaster should examine the legal status of an advertiser. The Commission questioned WAAE, Hammond, Indiana, about commercials it had carried for Pur-Erb Laboratories; because the latter was under investigation by the Post Office Department for fraud. The station claimed it did not know of the fraud charges. The Commission concluded that the actions of the Post Office Department are a matter of public record, and that stations should investigate the legal status of an advertiser before accepting his business. Since the advertising had been discontinued and the station's record was otherwise good, the Commission renewed the license.

Bait and switch advertising has also been condemned. This is the practice of offering an item for sale at a ridiculously low price to lure customers into a store, and then attempting to sell

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them a more expensive article. The product advertised may not even be available. In 1955 the Commission renewed the license of WOL, Washington, D. C., without hearing. Commissioners Lee, Hennock, and Doerfer dissented on grounds the Commission should have investigated the station's apparent overcommercialization and the carrying of bait and switch advertising. The station was broadcasting commercials which offered vacuum cleaners to the first twenty buyers for $14.95. When a customer went to the store the salesman attempted to sell him a $125.00 model. Virtually the same thing was being done with sewing machines.

Product Acceptability

A study of the content of advertising soon reveals that a chief area of controversy is the acceptability of products for advertising. The controversy exists, not between the broadcaster and the Commission, but between the broadcaster and the public. The acceptability of products is governed primarily by mores and social custom. This is evidenced by nearly identical statements in the radio and television codes of the National Association of Broadcasters:

Each . . . broadcaster should refuse his facilities to the advertisement of products and services, or the use of advertising scripts, which the station has good reason to believe would be objectionable to a substantial and responsible segment of the community.71

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When Congress approved the Communications Act in 1934 it prohibited only one kind of advertising. Section 316 of the act states:

Sec. 316. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.\(^72\)

When the "Communications Act Amendments" were passed in 1952 this section was recodified as Section 1304 of the United States Criminal Code.\(^73\) The unacceptability of lotteries as program material was discussed in Chapter V. Advertising for lottery schemes is also unacceptable.

When the Radio Commission released its 1931 memorandum on fortune telling and lotteries it indicated the carrying of advertisements for lotteries would be sufficient cause to call a hearing on license renewal.\(^74\) In 1936 the Communications Commission designated the renewal application of WRLB, Columbus, Georgia, for hearing, charging the station had advertised a merchandising scheme

\(^{72}\) 48 Stat. 1064 (1934), sec. 316.
\(^{73}\) 18 U.S.C. 1304.
\(^{74}\) FRC, Fifth Annual Report - 1931, p. 9. Note: Commission decisions relating to lotteries were reviewed in detail in Chapter V. They will be mentioned only briefly in this discussion of product acceptability.
containing all the elements of a lottery.\textsuperscript{75} Since the station's record was otherwise good, regular license renewal was granted. The following year hearing was held on renewing the license of KXL, Portland, Oregon, on grounds KXL had advertised a "chain letter" scheme.\textsuperscript{76} Since the advertisements had been discontinued after a few days, and the station's past performance was good, the Commission approved license renewal. In 1938 the Commission refused to renew the license of WMBQ, Brooklyn, because the station had broadcast commercials for a prize drawing the Commission termed a lottery, and for other program shortcomings.\textsuperscript{77} In a 1956 opinion concerning a promotion sponsored by the Folger Coffee Company the Commission said that advertising a promotion which has the characteristics of a lottery is not in the public interest.\textsuperscript{78}

In addition to advertisements for lotteries, prohibited by law, the Radio Commission and the Communications Commission have designated other products as unacceptable or questionable for advertising on radio and television. In labeling certain medical advertising false or fraudulent the Commission has, by implication, prohibited advertisements for these products. As was pointed out earlier the Commission has condemned the carrying of advertising

\textsuperscript{75}WRIR Radio Stations, Inc., 2 FCC 687 (1936).
\textsuperscript{76}KXL Broadcasters, 4 FCC 186 (1937).
\textsuperscript{77}Metropolitan Broadcasting Corp., 5 FCC 501 (1938).
\textsuperscript{78}Broadcasting-Telecasting, LI:26, p. 40.
for fake medical "cures," drugs or other medical products which might prove harmful, and offensive medical advertising. Since these cases were discussed earlier in this chapter they will not be reviewed again.

In a 1936 opinion the Communications Commission denounced advertising by doctors.79 When two chiropractors who had advertised over Atlanta stations and been in repeated difficulties with Georgia health authorities asked for a construction permit, they were refused. The Commission said there was every reason to believe they would use the station to promote their practice, and the Commission had found doctors who advertised their services were generally not reputable.

In a 1939 opinion the Commission said that advertising on behalf of doctors who have violated state medical laws is not in the public interest.80 Following complaints from the local medical society, hearing was ordered on the license renewal application of KMPC, Beverly Hills, California. Investigation revealed that KMPC had broadcast advertisements for two questionable medical organizations: the "Basic Science Institute," a group of chiropractors who diagnosed and prescribed for various illnesses; and the "Samaritan Institute," which claimed a 48-hour cure for alcoholism. One promoter of the "Basic Science Institute" had been convicted of vio-

79Liberty Broadcasting Company, 3 FCC 218 (1936).
80The Station of the Stars, 6 FCC 729, modified nunc pro tunc, 7 FCC 449 (1939).
lating the Medical Practices Act. Several employees of the "Samaritan Institute" were practicing without a license. The Commission concluded the advertising was hardly in the public interest, and that the records of the organizations were such the station should have investigated thoroughly before accepting the advertising. However, since the advertising had been dropped and the management of the station had changed, the Commission granted license renewal.

The Commission has questioned the advisability of broadcasting advertisements for alcoholic beverages. After the 18th Amendment was repealed the Radio Commission announced that license renewal hearings would be ordered on stations carrying advertisements for "intoxicating liquors." The 1939 memorandum outlining undesirable program materials called commendation of the use of "hard" liquor undesirable.

Actually the Commission has had little occasion to chastise stations for advertising "intoxicating liquors." Both broadcasters and liquor manufacturers have been too fearful of public, and possibly Congressional, reaction to risk advertisements for "hard" liquor. As public pressure against drinking has relaxed, beer and wine advertising have become acceptable. It is probably just a matter of time before "hard" liquor advertising will appear on radio and television. In 1949 Senator Edwin C. Johnson, Chairman of the Senate Interstate and Foreign Commerce Committee, asked the Com-

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81 Bellows, loc. cit., p. 703.
communications Commission to review the situation in regard to advertising of alcoholic beverages. The Commission replied:

In states where sale is prohibited advertising would not be in the public interest. Where not illegal, problems raised are those raised by any other programs which may have limited appeal to the radio audience. In some circumstances the broadcasting of liquor advertisements may raise serious social, economic and political issues in the community thereby imposing an obligation upon the station to make available time, if desired, to individuals or groups desiring to promote temperance and abstinence.\(^{82}\)

**Advertising Claims**

Regulation of advertising claims is largely the responsibility of the Federal Trade Commission. As was pointed out earlier, the Trade Commission directs its activities toward the advertiser in an attempt to prevent "unfair methods of competition" and "unfair or deceptive" acts or practices in commerce. The broadcaster does not escape blameless, however. The Trade Commission furnishes the Communications Commission a list of stations carrying "false and misleading" advertising.

Advertising claims have seldom been a determining factor in decisions of the Commission. However, a major reason given by the Communications Commission for refusing license renewal in the WGBZ case, discussed earlier in this chapter, was the station's broadcasting of fraudulent and extravagant advertising claims for patent medicines.\(^{83}\) In the KFRC decision, also cited previously,

\(^{82}\) 5 RR 593 (1949).

\(^{83}\) WGBZ Broadcasting Co., 2 FCC 599 (1936).
the Communications Commission concluded inaccurate advertising claims are not in the public interest.84

In an address before the Advertising Federation of America during February, 1959, Commissioner Doerfer warned advertisers they must practice restraint in commercials. His talk was summarized by Sponsor magazine.

The NAB broadcasting codes had unprecedented backing from the government, and indicated it behooved all stations and advertisers to live up to the dictates of the codes. He acknowledged that only two stations licenses had ever been cancelled, but the clear implication of his remarks was that the number could grow. He said he regretted the fact that only one in four broadcasting stations adheres to the code formally, but added that most observe its spirit.

At one stage, the FCC chairman described the Commission's procedure in this respect as "regulation by lifted eyebrow," meaning that expressions of disapproval scare stations. . . .

His remarks to advertisers directly were pointed, to the effect that it is a privilege for them to be allowed to use the nation's airwaves for sales of their client's products. He seemed to infer that it is a privilege which can be withdrawn.85

A broadcaster is responsible for advertising claims only in the sense he is responsible for all material broadcast over his facilities. Nevertheless, the activities of the Federal Trade Commission are extremely important to radio and television. Since advertising is the life blood of broadcasting, anything which affects the advertiser affects the industry. No attempt will be made to review the work of the Trade Commission in detail. The follow-

84Don Lee Broadcasting System, 2 FCC 642 (1936).

ing discussion will review some "typical" examples of the regulation of advertising by the Trade Commission.

The Federal Trade Commission has ruled that an advertiser may not misrepresent the composition of his goods. The Trade Commission directed Pacific Coast lumber dealers to stop advertising pine as "California White Pine" when it was "Western Yellow Pine." The Circuit Court of Appeals annulled the order of the Trade Commission, but the United States Supreme Court reversed the lower court's decision.

An advertiser may not imply government approval or connection if such is not the case. The Federal Trade Commission ordered a correspondence school distributing courses designed to prepare students for civil service exams, to cease using the trade name Civil Service Training Bureau, Inc., because it might be mistaken with the United States Civil Service Commission.

An advertiser may not misrepresent the price of his product. The Trade Commission commanded the Standard Education Society to stop making false claims about the price of encyclopedias it was selling. The company was offering a set of reference books for $69.50. The purchase price included a yearly supplement for ten years. The salesmen claimed the books were free and the customer only paid for service—all of which was false.

The Commission has held it is unfair to misrepresent the origin of a product. A perfume manufacturer was told to stop giving the impression his perfume was imported, when actually it was bottled in the United States.

Misrepresentation of the advertiser's business status is not allowed by the Trade Commission. The Education Association was ordered to stop implying it was selling reference books strictly for public enlightenment when its chief motive was profit.

To misrepresent the results a product will achieve is contrary to good advertising practice. The Rhodes Pharmacal Company was ordered to cease advertising the drug compound "Imdrin" would "cure" neuritis and similar ills. The Trade Commission said they might claim "Imdrin" would relieve, but not "cure" an illness.

A 1952 Trade Commission administrative interpretation placed a ban on the use of the word "free" in advertising unless the advertiser actually means free. The Commission said:

The use of the word "free," . . . to designate . . . merchandise sold or distributed in interstate commerce that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the commission to be a violation of the Federal Trade Commission Act.

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89 Floret Sales Co., Inc. v. FTC, 100 F. (2d) 358 (C.C.A., 2, 1938).

90 Educators Association Inc. v. FTC, 108 F. (2d) 470 (C.C.A., 2, 1939).

91 Rhodes Pharmacal Co., Inc. v. FTC, 208 F. (2d) 382 (C.C.A., 7, 1953).

The Trade Commission has also forbidden advertisers to claim a survey has been conducted unless it has.

**Advertising Form**

Like product acceptability, the form in which advertising is presented on radio and television is largely governed by public opinion. In this area of control the broadcaster, rather than the Commission, has exercised the strongest influence. The Commission's chief concern has been with separation of advertising and content.

It is the advertiser with which the industry must deal. The sponsor has one goal—to sell his product. He may not realize, or care, that copy which is acceptable in a newspaper advertisement may not be acceptable on a television show seen by the entire family. The industry makes use of the codes of the National Association of Broadcasters to "pressure" advertisers into avoiding commercial forms which might offend large segments of the audience or result in action by the Communications Commission or the Trade Commission.

The Communications Commission has expressed disapproval of the intermixture of advertising and program content. In its *Third Annual Report* the Federal Radio Commission observed that radio stations are licensed to serve public, not private, interests. The Commission pointed out the one exception is advertising because it pays the bill in broadcasting. The Commission said, however:

Advertising must, of course, be presented as such and not under the guise of other forms on the same principle that the newspaper must not present advertising
as news. It will be recognized and accepted for what it is on such a basis, whereas propaganda is difficult to recognize. 93

The Blue Book suggested that intermixture of program and advertising is not in the public interest. The Commission maintained this is especially true in relation to news programs. 94 With this one exception the Commission has not concerned itself with the form of advertising.

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Both the Federal Radio Commission and the Federal Communications Commission have recognized the special status of advertising, and maintained that advertising must be properly limited and controlled. The Commission has been concerned with the quantity of advertising, the placement of advertising, and the content of advertising.

The chief consideration relating to quantity has been with preventing overcommercialization—a term never clearly defined. Only a few statements have been made concerning the placement of advertising. The Communications Commission has criticized the interruption of artistic programs with advertising, and the interruption of news with advertising. Regulation of the content of advertising has been influenced by the actions of the Federal Trade Commission. False or fraudulent advertising and advertising for

93 FRC, Third Annual Report - 1929, p. 35.

94 FCC, Public Service Responsibility ..., p. 47.
"lotteries" are forbidden by law. The Radio Commission and the Communications Commission have also designated certain products as unacceptable for advertising. Regulation of advertising claims has been largely a matter for the Federal Trade Commission.

The "official" position of the Commission and the extent to which the Commission actually enforces its position often differ widely. Chapter VIII will consider the effectiveness of Federal Communications Commission, and Federal Radio Commission, program regulations.
CHAPTER VIII

EFFECTIVENESS OF REGULATION OF PROGRAMMING
BY THE FEDERAL COMMUNICATIONS COMMISSION

In the Blue Book the Federal Communications Commission observed that a station's actual performance is often vastly different from the promises made in its application for a license. The Commission suggested that carrying out promises made in applications should be a necessary condition of license renewal. Earlier chapters of this study have considered the stated position of the Federal Communications Commission, and its predecessor the Federal Radio Commission, of how public interest should be interpreted in respect to program content. Just as stations' "promise and performance" often differ, there has frequently been a wide difference between what the Commission has "said" and what the Commission has "done" about programming. This chapter will consider the extent to which the Commission's stated requirements with respect to programming have been given application and enforcement in actual practice.

There are several ways to examine the extent to which the Commission has enforced its views on programming. A comparison of the actual programming of radio and television stations with the Commission's concept of programming in the public interest would indicate the effectiveness of its program regulations. However,
such a comparison is not within the scope of this study and another method of analysis must be used. This chapter will summarize the major elements of programming, considered in detail in previous chapters, which the Commission has stated are essential to operation in the public interest, and indicate the extent and consistency of the efforts made by the Commission to enforce each of these standards.

**Balanced Programming**

In a 1941 study Giles Penstone attempted to discover whether public interest had developed a well established meaning with respect to the regulation of broadcasting.¹ Penstone analyzed selected decisions of the Communications Commission made between the years 1937 and 1940. He then combined his findings with a similar study by Maurice M. Jansky which covered the years 1934 through 1936. A total of 167 cases were examined. Penstone reported that "meritorious" proposed program service had been considered a positive factor by the Commission in 104 decisions. On 25 occasions the Commission had held against an applicant the fact that proposed program plans were unacceptable.

As previous chapters of this study have shown, the Commission has frequently considered "meritorious" program service to be

virtually synonymous with balanced programming. The importance of a balanced program schedule was first suggested by the Federal Radio Commission in the 1928 Great Lakes decision. The Commission concluded that propaganda stations would not be in the public interest because they would serve only a limited portion of the audience. The Radio Commission maintained a station should provide programs of interest to the entire public in its service area. In 1938 the Communications Commission refused to approve the application of the Young Peoples Gospel Association for much the same reasons. The basic principle of "good" programming outlined by the Communications Commission in the Blue Book was balance. In the 1957 Hi-Line decision the Commission observed that when comparing the program proposals of competing applicants, primary reliance would be placed upon a balanced format. The term balance, however, is an extremely general concept. A clearer indication of the extent to which the Commission has attempted to promote balanced programming may be obtained by summarizing the various aspects of balance which have been defined by the Commission.

Variety in Programming

The first requisite of a balanced program schedule was suggested by the Federal Radio Commission in its Second Annual

\(^2\)Note: Since the cases involved have already been reviewed, specific cases will merely be identified as briefly as possible by the "title" of the case or the call letters of the station or stations involved, and the date. The source of the reference, or the particulars of the case, will not be cited again.
Report. The Commission cautioned stations to avoid too much duplication of programs and types of programs. A major reason for refusing to approve propaganda stations was the fear they would devote too much time to a single type of program. This principle has been extended by the Commission to include overemphasis of many kinds.

In the 1935 Brooklyn case WARD lost a competitive bid for increased facilities, in part because its programming included too many foreign language broadcasts. In the 1949 decision involving competitive applications for a construction permit in Boston, the Communications Commission decided against the applicant which proposed to devote 27 percent of the station's program time to foreign language programs. In its 1948 opinion concerning WWDC, Washington, the Commission refused to renew WWDC's license until the station had cancelled a 3-hour daily program of race track results; on grounds the station was devoting too much time to a single kind of program, and that the show might be used to aid illegal gambling. In 1951 WCAW in Charleston, West Virginia, lost a competitive application for increased power because of overemphasis on baseball.

A conspicuous exception to this insistence on variety in programming has been the Commission's permitting the use by large numbers of radio stations of a predominantly "music-news" format. In the Blue Book the Communications Commission explained that variety in programming may be obtained in two ways. When the number of stations in a community is limited, individual stations must
offer the necessary variety. In large communities, however, with many stations, the Commission said that it might be possible to achieve balanced programming through several specialized stations. Recently the Commission has questioned the propriety of a news and music format. In March, 1958, the Commission sent a letter of inquiry to nine Atlanta stations which had program schedules consisting primarily of news and music, and placed all nine of the stations on a temporary license basis—a status which still exists at the time this summary is being written. During June, 1959, Commissioner Lee issued a dissenting opinion when the Commission renewed the license of WCRT, Birmingham—a news and music station. Lee maintained the Commission should have determined whether a news and music format is in the public interest; whether it is fair to demand that other stations in a community provide the necessary variety in programming.

**Programs "Essential" to the Public Interest**

In addition to insisting on variety, the Commission has termed the carrying of certain types of programs virtually essential to a balanced program schedule. The Federal Radio Commission first assumed this position in its Great Lakes decision. The Commission said, in a statement which was quoted in Chapter V, but deserves perhaps to be mentioned again:

> The tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program in which entertain-
ment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and of matters of interest to all members of the family find a place.\(^3\)

As was pointed out in an earlier chapter, application forms for a construction permit, including requests to expand facilities, for license renewal, and for permission to transfer a station, ask for a percentage breakdown according to types of programs. Included are entertainment, religious, agricultural, educational, news, discussion, talks, and other programs. The application forms also request information as to the percentage of time to be devoted to local programming and as to the ratio of commercial to sustaining time.

The category of shows most frequently singled out by the Commission as important has been local live programming. Both the Radio Act and the Communications Act directed that stations be licensed in a manner that would provide "fair and equitable" distribution of service. The Radio Commission and the Communications Commission have interpreted this to mean providing local service whenever possible. As early as the Great Lakes opinion in 1928 the Radio Commission advocated this principle.

A local outlet has been considered important because it makes possible the presentation of local live programs. In the Blue Book the Communications Commission explained that local live

\(^3\)FRC, Third Annual Report - 1929, p. 34.
programs serve two functions: first, they provide an opportunity for local talent to be heard; second, they provide programs designed to be of special interest to the local community. In the 1955 television grant favoring the Odessa Television Company, the Communications Commission said that an applicant proposing a greater quantity of local live programming should receive preference. In the 1957 Hi-Line decision the Commission held that when deciding between mutually exclusive applications, evaluation of local program plans is the most important factor. The Commission suggested that it is chiefly here that an applicant demonstrates his ability to "meet community needs and serve as an outlet for local self expression." Through its licensing activities the Commission, particularly the Communications Commission, has attempted to promote service to the local community.

In a 1947 opinion the Communications Commission held that a program schedule made up almost entirely of network programs would not be in the public interest, because it could not adequately serve community needs. In the 1957 opinion favoring WHDH, Boston, which has been remanded to the Commission for rehearing, the Commission held that outstanding plans for local programming combined with a past record of service to the community are more important than a network affiliation.

The Commission has also encouraged local programming by giving preference to local applicants—on the assumption that local residents will be more familiar with, and more interested in,
the needs of the community. Penstone reported that lack of familiarity with the local community was held against an applicant in 21 instances.\footnote{Penstone, loc. cit.} In the Hi-Line decision, the Commission said that a local applicant should be granted preference. In the decision favoring the Cleveland Broadcasting Company over Scripps-Howard, an element of preference was given the Cleveland Company because of the local residence of the applicant. However, in the 1956 television grant involving three applicants on the west coast of Florida, the Commission favored an absentee owner who proposed a greater quantity of local programming over a local owner. The Commission concluded that local programming is of greater importance than local ownership.

The presentation of news, discussion, and political broadcasts has also been considered important to balanced programming. The Commission has insisted that broadcasting is not just a means of entertainment. In the Great Lakes decision the Radio Commission referred to the carrying of "important public events, discussions of public questions, weather, market reports, and news" as essential elements of a balanced program schedule. The Communications Commission pointed out in the Blue Book that broadcasting is an unequaled medium for the "dissemination of news, information and opinion, and for the discussion of public issues."
There is enough listener and viewer interest in news that the Commission has not found it necessary to "force" stations to carry news broadcasts. The Commission has, however, concerned itself with the "proper" handling of news. This will be discussed in another section of this chapter.

Stations have been less anxious to carry discussion programs. In the Blue Book the Commission insisted that the problems involved in presenting discussion programs did not provide sufficient justification for refusing to carry these programs. Except for the Blue Book statement, the Commission seems to have been more interested in the method of presenting discussion than in whether or not stations carried discussion programs. For instance, the Commission insisted when the Blue Network was sold, that the buyer file a statement regarding the policy he would follow with respect to discussion of controversial public issues. The "proper" handling of discussion will also be considered later.

Just as with news and discussion, the Commission has concerned itself more with the methods of presenting political broadcasts than with whether or not a station carried such programs. However, in 1946 the Commission wrote a letter to an Albuquerque, New Mexico, station saying that a policy of refusing to carry any political broadcasts would not be in the public interest. The views of the Commission toward the handling of political broadcasts will also be considered in another section of this summary.
In the Great Lakes decision the Radio Commission called the carrying of educational and cultural programs essential to the public interest. In the Blue Book the Communications Commission deplored the fact that stations so often fail to carry outstanding network sustaining programs which have educational and cultural value. In the 1957 decision involving mutually exclusive applicants for a television station in Des Moines, the Communications Commission concluded that preference should be given an applicant who proposes superior educational programs.

In the Great Lakes decision the Radio Commission also mentioned religious broadcasts. In the Blue Book it was suggested that one function of sustaining programs is to provide material not appropriate for sponsorship, and that religious programs might fall into this category. When the Communications Commission placed 26 television stations due for license renewal on 3-months' temporary license in 1952, the indication was that the action had been taken because none of the stations were carrying religious programs, and only a few were carrying educational broadcasts.

**Ratio of Commercial to Sustaining Programs**

The importance of sustaining programs and the functions they serve was first stressed in the Blue Book. In relation to programming, the Commission has suggested that sustaining programs have a balance wheel function—making possible experimentation with new program forms, service to minority groups, and the like. Sus-
taining programs as a factor in preventing overcommercialization will be summarized in a later section.

Though broadcasters have maintained the distinction is misleading, the Commission has continued to use the commercial-sustaining classification in its application forms. The Commission has, however, refused to designate any specific amount of time which should be devoted to sustaining programs. In the 1948 Brockton opinion the Commission favored an applicant proposing to limit commercial time to 60 percent of its broadcast week over an applicant proposing an 80 percent commercial schedule.

Effectiveness of the Commission's Efforts to Promote Balanced Programming

As was pointed out in the discussion of general licensing criteria, the situations in which the Commission is able to effectively enforce its views are almost limited to competitive applications for construction permits and competitive applications to expand facilities. In these instances, the Commission makes a point-by-point comparison of each applicant's ability to operate in the public interest. An examination of cases in Radio Reports or in Federal Communications Commission Reports shows that under these circumstances the Commission has consistently compared the program proposals of competing applicants.

For instance, when choosing between competing applicants for a television station in Odessa, Texas, the Commission compared the applications on the following points, directly and indirectly related to programming: local ownership, participation by the ap-
applicant in civic affairs, preparation of program proposals, plans for local live programs, program proposals in general, and responsiveness to community needs. In a 1957 decision involving competing applicants for a construction permit for a radio station in Wolf Point, Montana, the Commission considered local ownership, participation in civic affairs, program plans, and proposals for news broadcasts. To decide between competing applicants for permission to construct a television station in Toledo in 1958, the Commission compared local residence, participation in civic affairs, availability of network programs, program plans, and plans for news broadcasts.

Superior program plans have not always been the determining factor. Outstanding program plans, or a past record of good programming, have always counted in an applicant's favor, however. Inadequate program plans have usually been held against an applicant. Of the factors considered within the concept of balanced programming, service to the local community has generally been accorded the greatest importance. Penstone reported that the need of the local community for service was considered in each of the 167 cases he examined.

Past programming and future program plans are also evaluated in noncompetitive licensing situations: noncompetitive applications

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6Hi-Line Broadcasting Co., 13 RR 1017 (1957).
8Penstone, loc. cit.
for a construction permit, including expansion of existing facilities; applications for license renewal; and applications for permission to transfer facilities. On only one occasion has approval of a noncompetitive application been refused solely because programming was not balanced. In 1928 the Radio Commission refused to renew the license of WCRW because of overcommercialization. On a number of occasions license renewal has been withheld until a program shortcoming has been corrected—for instance the 1948 WWDC case, or the 1952 action placing 26 television stations on temporary license.

Another situation in which a record of "meritorious" program service may be extremely important is when a station is called to task for a particular misconduct. Otherwise good programming has been used as justification for license renewal despite the misconduct—the 1935 case involving WNCA in New York, the 1936 WWAE case, and the 1936 KFRC case. On the other hand, "poor" programming in combination with a specific misconduct has caused the Commission to refuse license renewal—as in the 1938 case involving station WMBQ in Brooklyn.

There are three situations in which the Commission has completely ignored the requirement of balanced programming by individual stations. The most obvious example is afforded by the multiplicity of news and music radio stations. In 1954 the Communications Commission announced that it would accept applications
for "satellite" television stations. The stations would not be required to present any local programming, but would be approved only when such a station would provide service in a community which could not otherwise have television service. In a 1956 order the Commission said that it would consider the approval of low-powered "repeater" stations if they would extend service into communities which had no adequate television service.

It seems possible to conclude that the Commission has strongly "encouraged," but never "forced," stations to provide balanced programming. A detailed comparison of future program plans, and past programming, has been an important aspect of deciding between competing applicants for the same facilities. In noncompetitive situations several methods have been used by the Commission to promote balanced programming. The official application forms request considerable information on programming. The Commission has attempted to define its views on balanced programming through such statements as the Blue Book. From time to time the Commission has also made an "example" of stations guilty of program imbalance. Probably the strongest argument for balanced programming with existing stations is the licensee's knowledge that if he should become involved in a competitive situation, or if he should ever be guilty of some misconduct, "meritorious" programming could be the decisive factor.
However, since television has achieved a position of dominance in the field of broadcasting, the Communications Commission has paid less and less attention to balanced programming in radio. Unless the Commission should reverse its position toward news and music stations, it is unlikely that balanced programming will ever again be an important criterion of programming in radio.

**Preventing the Use of "Questionable" Program Materials**

Another major element of programming which the Commission has stated is essential to operation in the public interest is the avoidance of "questionable" program materials. Certain materials are prohibited by law. Others, the Commission has termed not in the public interest. The Commission has strictly enforced its views toward "questionable" program materials.

**Obscene, Indecent, or Profane Language**

The broadcasting of obscene, indecent, or profane language was prohibited by both the Radio Act and the Communications Act, in a provision later transferred to the Criminal Code. Specific incidents involving these program materials have occurred, however, primarily in the early days of broadcasting. Profane statements by a political candidate were a factor when the Radio Commission refused to renew the license of KVEP, Portland, Oregon, in 1930. The Brinkley case, which also came before the Commission in 1930 and resulted in loss of the station's license, involved indecent
advertising for a "goat gland" operation. The 1931 Baker case, in which the Radio Commission refused to renew the license of KTNT, Muscatine, Iowa, included a charge of indecent language.

In a letter of censure sent to NBC affiliates which had carried a network show featuring Charlie McCarthy and Mae West in an "Adam and Eve" sketch, the Communications Commission called the program "vulgar and indecent, and against all proprieties." The Commission also protested the inclusion of such phrases as "hell" and "for God's sake" in a 1938 NBC adaptation of "Beyond the Horizon." The 1939 memorandum on undesirable program materials called "obscene programs or those bordering on obscenity" undesirable.

With these exceptions, the use of obscene, indecent, or profane language has not been a real problem in broadcasting. This is true in part, perhaps, because it is prohibited by law. A stronger deterrent to the use of such materials has probably been broadcasters' fear of public reaction. The self-regulatory codes of the National Association of Broadcasters are particularly strict in this respect.

**Attacks Against Individuals or Groups**

Another practice for which the Commission has refused license renewal is the broadcasting of attacks against individuals or groups. A factor involved in the KVEF case, in addition to profanity, was attacks against civic groups and leaders in the com-
munity. The grounds for refusing license renewal in the Baker case included the broadcasting of attacks against religious groups. The 1931-1932 Shuler case resulted in license renewal being refused because of attacks against individuals and religious groups. The memorandum on undesirable program materials called "racial and religious" intolerance undesirable. When the Communications Commission refused an initial operating license to WIBK, Knoxville, Tennessee, even though a construction permit had been granted, it did so because it discovered the applicant had a past record of attacking religious groups and causing racial disturbances.

Lotteries or Information Concerning Lotteries

The broadcasting of lotteries or information about lotteries was prohibited by the Communications Act, in a provision since transferred to the Criminal Code. Though the 1927 Radio Act did not mention lotteries, the Federal Radio Commission released a statement in 1931 saying that broadcasting information on lotteries would constitute sufficient reason to call a hearing on license renewal.

The Communications Commission has given the lottery provision of the Communications Act strict interpretation. In the 1936 decision involving WRLB, Columbus, Georgia, the Commission ruled that a prize drawing requiring a purchase to obtain a chance was a lottery, and that broadcasting advertising for the scheme violated the lottery provision. The Commission concluded in the
1938 Brooklyn case, concerning station WMBQ, that broadcasting the
names of the winners of a lottery-type drawing was broadcasting
information about a lottery.

In 1949 the Communications Commission issued its proposed
lottery regulations, which were later declared invalid by the United
States Supreme Court. The court maintained the Commission had
erroneously concluded the act of listening or viewing constitutes
consideration. The court also held the regulations were an "im-
proper" attempt by the Commission to "legislate." In a 1956 de-
cision concerning the game "Play Marco," the Commission concluded
the act of going to the sponsor's store to secure an entry blank
involves consideration, but the Court of Appeals disagreed.

Race Track Information Which Aids Illegal Gambling

The Communications Commission has concluded that broad-
casting race track information is not in the public interest when
it occupies too much of a station's program time, or when it might
aid illegal gambling. In 1937 the Communications Commission called
a hearing on renewing the license of station WAAT in Jersey City,
because of programs giving racing results in code. Station WWDC
was refused license renewal in 1946 until it discontinued a 3-hour
daily broadcast of race track results. In similar incidents oc-
curring in 1948, 1952, and 1957 respectively, the Commission with-
held license renewal of the stations involved until "questionable"
race track programs had been cancelled. No station has lost its
license for broadcasting race track information which might aid illegal gambling, but if brought to the attention of the Commission, this is a practice for which the Commission will call a hearing on license renewal.

**Programs Featuring Fortune Telling and Astrology**

In addition to denouncing lotteries, the 1931 memorandum issued by the Federal Radio Commission criticized programs featuring fortune telling or other similar materials. In a 1935 action of the Communications Commission station KFBIQ in St. Joseph, Missouri, was granted license renewal only after promising to discontinue an "astrology" program. The Commission held that not only was the program material objectionable, but in effect it constituted private communication. In 1937 the Commission refused license renewal to KTWI in Twin Falls, Idaho, until the station canceled an "advice" program. The 1939 memorandum called fortune telling or similar programs undesirable.

**Effectiveness of the Commission's Efforts to Prevent the Use of "Questionable" Program Materials**

In attempting to promote its views toward balanced programming the Commission has frequently been opposed by broadcasters, by members of Congress, and even by the general public, who have maintained the Commission has no authority to consider such aspects of programming. The Commission has met with little opposition, however, in its efforts to prevent the use of "questionable" program materials. A majority of broadcasters would refrain from
broadcasting "questionable" materials, even if not prevented by law or the Commission, because of the fear of public reaction. In the few instances where the use of "questionable" materials has come to the attention of the Commission, and the Commission's difficulty in obtaining information about programming will be discussed later, the Commission has not hesitated to take action against the station. Generally, this has taken the form of calling a hearing on license renewal. In some instances, particularly with respect to attacks against individuals or groups, or the use of obscene program materials, this has resulted in loss of a station's license.

"Fairness in the Presentation of News and Discussion Programs"

Freedom of the press is a long established tradition in the United States. Despite the fact that broadcasting facilities are limited, any attempts by the Commission to regulate news or discussion were bound to meet with opposition. The Commission has, however, tried to encourage fairness in the presentation of these program materials.

News

The Commission has seldom interfered with the handling of news. Two notable exceptions were the "Mayflower" decisions and the Richards "news slanting" case, both of which were discussed in detail in Chapter VI. In the original 1941 "Mayflower" decision, the Commission concluded that it would not be in the public interest
for a licensee to editorialize. Owing to considerable criticism of this ruling by the broadcasting industry, and by the press, the Commission reconsidered its original opinion, and in 1949 announced that a broadcaster might editorialize provided every effort was made to ensure that other points of view would also be expressed. In the 1950 WLIE ruling the Commission suggested that a licensee taking an editorial position was obligated to "seek out" opposing views.

The Richards case involved charges that G. A. Richards, owner of KMPC, Hollywood, and other stations, had ordered employees of KMPC to slant the news so as to create opposition to the New Deal, the Roosevelt family, Communists, and Jews. In 1948, because of these alleged practices, the Commission placed KMPC and two other stations owned by Richards on temporary license, and ordered a license renewal hearing on all three stations. Because of Richards' death the case was dropped in 1951, when his widow filed a statement with the Commission that there would be no "news slanting" on the stations.

Discussion of Public Issues

The Commission has been less reluctant to express its views toward the discussion of controversial public issues. In the Great Lakes opinion the Federal Radio Commission pointed out that it would not be fair to allow a one-sided presentation of public issues. The 1939 memorandum of the Communications Commission called the espousal by a station of one side of a controversial topic unde-
sirable. In the Blue Book the Commission observed that stations should broadcast discussion of controversial public issues. When the Commission reversed its original "Mayflower" decision, it said that stations should devote "reasonable" time to discussion, designed so that the public has a "reasonable" opportunity to hear various sides of a question. The Commission has attempted to promote "fairness" in the discussion of public issues by insisting that stations provide equal opportunity for the expression of different points of view, and that stations not adopt a policy which would prohibit the sale of time for discussion.

The Commission has stressed equal opportunity on grounds that this will ensure a balanced presentation of public issues. In addition to the general statement summarized above, the Commission has also considered specific aspects of equal opportunity. In the 1949 opinion concerning the demands of Robert H. Scott to discuss atheism on stations in San Francisco, the Commission concluded that refusing to allow the expression of a point of view solely because it was unpopular was not in the public interest. However, in this particular instance, the Commission said that permitting religious broadcasts did not "force" a station to provide time for a discussion of atheism. In the 1950 opinion involving WWJ in Detroit, the Commission concluded that refusing to permit the discussion of one side of an important question because the other side would not appear was not in the public interest.
Another problem, closely related to equal opportunity, is that of selling time for discussion. As was shown in Chapter VI, this question first arose because of a provision in the 1939 code of the National Association of Broadcasters which forbade selling time for discussion. The Association maintained discussion should be presented on sustaining time. It was generally charged, however, that this provision of the code was aimed against labor unions and consumers' cooperative leagues. Before the Commission would approve the sale of the Blue Network in 1943, it insisted that the prospective buyer file a statement with the Commission that he would not adopt a policy against selling time for discussion. In the 1945 opinion involving WHKC, Columbus, Ohio, the Commission concluded that a policy of refusing to sell time to labor unions and other organizations was not in the public interest.

Effectiveness of the Commission's Efforts to Ensure "Fairness" in the Presentation of News and Discussion

The Commission's efforts to ensure "fairness" in news broadcasts have been limited primarily to the "Mayflower" decisions and the Richards case. There are probably a number of reasons why the Commission has so seldom tried to enforce its views toward news programs. First, of course, because the Constitution guarantees the freedom of the press, and the courts have held that broadcasting is included in the term press. However, it would certainly be possible for the Commission to take a more active interest in news programs without resorting to censorship. There is probably a very
real hesitancy, though, on the part of a government agency such as the Communications Commission to interfere with the handling of news. As will be shown later, efforts to "regulate" news programs have also been limited by the amount of information available to the Commission.

The Commission has made more frequent attempts to influence discussion programs. However, here too it has limited its efforts to isolated cases. For instance, the Commission has never attempted to include questions on the handling of discussion programs in its application forms, or made this an important factor when evaluating competitive applications. No station has ever lost its license because of the manner in which it presented discussion programs, and on only one occasion, the WHKC case, has the handling of discussion ever been considered sufficient cause for conducting a hearing on license renewal.

**Equal Opportunity for Political Candidates**

As was shown in Chapter VI, both the 1927 Radio Act and the Communications Act contained provisions designed to assure equal access to the microphone for candidates for public office, and to prevent censorship of candidates' talks by broadcasters. In 1928 the Radio Commission said that any violation of the political provisions of the Radio Act would constitute sufficient cause to revoke a station's license or refuse license renewal. In more recent years the Communications Commission has strictly enforced the political provisions of the Communications Act. The two aspects
of the political regulations that have been the most difficult to interpret are the equal time provision and the prohibition against censorship.

In the 1936 Vandenberg case the Communications Commission held that the equal time provision does not apply to noncandidates. In the 1948 opinion involving KRLD, Dallas, the Commission said that equal opportunity applies only to candidates for the same office in the same election. In 1950 the Commission determined that a report to the people of New York by Governor Dewey was not a political talk demanding time for reply. In 1952, following receipt of a complaint from William R. Schneider, the Commission held that a legally qualified candidate was entitled to equal time regardless of his chances to win. When the Progressive party registered a complaint, also in 1952, the Commission determined that minor as well as major parties are entitled to equal opportunity. In 1954 the Commission ruled that guest appearances by candidates on a Detroit news program entitled other candidates for the same office to equal time. In the 1959 Lar Daly case, the Commission insisted that even an incidental appearance by a candidate in a film clip on a television news program entitled other candidates to equal opportunity.

Equal opportunity, according to a 1944 opinion of the Commission involving WDSU in New Orleans, means time of equal quality as well as quantity. However, the Commission said in a 1946 ruling concerning the Texas Quality Network, a station may limit the total amount of time given to a candidate—provided all other candidates
for the same office in the same election receive identical treat-
ment. In a 1956 decision the Commission said that if one candidate
refuses sustaining time, this does not prevent the station, in this
case WSAZ in Huntington, West Virginia, from offering sustaining
time to other candidates.

As was shown in Chapter VI, the prohibition against censor-
ship has caused particular difficulties. In the 1948 Port Huron
case the Commission held that a station may not censor a talk by
a candidate even to delete libelous material. However, the Commis-
sion said that this applies only to defamatory statements. It does
not prevent a station from eliminating obscenity or profanity, or
any other material prohibited by the Communications Act or other
Federal Law. In 1952 the Commission concluded that a station may
request a script from a candidate but that it may not censor that
script. That same year the Commission held that a station, WMCA,
New York City, may not cancel a political talk because it deals
with matters other than the candidate's qualifications for office.

Effectiveness of the Commission's Regulation
of Political Broadcasts

On the basis of the preceding summary it is possible to
conclude that the Commission has interpreted the political pro-
visions of the Communications Act very rigidly. Since candidates
are quick to report to the Commission any violation of their rights
under the Communications Act, this is one area of programming where
the Commission has not lacked for information. Another reason for
the strict enforcement of the political provisions has probably
been due to the fact that the Commission is an "arm" of Congress.
It is dependent on Congress for operating funds, and even its very
existence. Since Congressmen are, have been, or will be candidates,
the Commission has a special interest in "guarding" the rights of
political candidates.

Preventing Overcommercialization

In the Great Lakes decision the Radio Commission concluded
that propaganda stations would not be in the public interest. The
Commission suggested, however, that there was one exception to this
"rule" against propaganda--advertising. Because advertising fur-
nishes the support for broadcasting, it occupies a privileged posi-
tion. At the same time, the Commission observed that the amount of
advertising should be limited to an amount consistent with the
public interest. In the Blue Book the Communications Commission
"warned" broadcasters to eliminate advertising excesses. Application
forms used by the Commission request a percentage breakdown
on the ratio of commercial to sustaining programs, and information
on the use of spot announcements.

Both the Radio Commission and the Communications Commission
have criticized overcommercialization. In 1928 the Radio Commis-
sion refused to renew the license of WCRW because the station was
carrying too much advertising. The 1939 memorandum of the Commu-
nications Commission termed "too lengthy and too frequent" advertise-
ments undesirable. The Blue Book severely criticized overcommercialization and singled out a number of "horrible" examples. The Blue Book also suggested that an important criterion of public interest is the ratio of commercial to sustaining time, and that one function of sustaining programs is to prevent overcommercialization. In 1947 the Commission placed one of the "horrible examples," WTOL, Toledo, on temporary license, but granted regular license renewal after shortcomings had been corrected. That same year the Commission favored an applicant for a construction permit who proposed to devote 40 percent of his station's time to sustaining programs over an applicant proposing a 20 percent schedule of sustaining programs. In a 1955 action the Commission placed seventeen radio stations in Illinois and Wisconsin on temporary license on grounds of overcommercialization. Regular license renewal was later approved.

In addition to discouraging overcommercialization in general, the Commission has condemned specific aspects of overcommercialization. In the Blue Book the Commission cautioned broadcasters to control the length of individual commercials, the number of commercial announcements throughout the broadcasting day, and the frequency of commercials in a given segment of time. The Commission also criticized WTOL because it had employed a general manager to run the station on a commission basis.
Effectiveness of Attempts to Prevent Overcommercialization

Statements made by the Commission in the Blue Book, in annual reports, and in relation to specific cases, suggest that the Commission considers overcommercialization one of the greatest problems in broadcasting. An examination of cases in which overcommercialization was a factor reveals that the Commission has seldom attempted to enforce this view. Here, certainly, is an instance where the Commission's "promise and performance" have differed widely. The National Association of Broadcasters has made, through its industry codes, a more serious effort to control the amount of advertising on radio and television than has the Commission. This can be explained, in part, by two factors. The Commission has consistently maintained that it lacks authority to limit the quantity of advertising to any definite amount. The second, and more significant reason, is the economic plight of many broadcasters. This latter problem will be discussed in Chapter IX.

Products "Questionable" for Advertising

The Communications Act forbids advertising for lotteries or similar schemes. Station WRLE, Columbus, Georgia, was subjected to a hearing on license renewal because of advertisements it had broadcast for a merchandising scheme the Commission termed a lottery. Hearing was held on renewing the license of KXL, Portland, Oregon, because of advertisements for a chain letter "Prosperity Club." Both of these stations were granted regular license renewal after the hearings. In 1938 station WMBQ, Brooklyn, lost a competitive
application for full time, in part because of advertisements it had broadcast for a prize drawing the Commission termed a lottery. This station was eventually taken off the air.

The Commission has also discouraged advertising by doctors, or by persons in any profession where it is considered unethical to advertise. In 1936 the Commission refused to grant a construction permit to two chiropractors in Athens, Georgia, because there was evidence they would use the station to promote their practice. In 1939 the Commission held a hearing on renewing the license of KMPC in Beverly Hills, California, because the station had broadcast advertising on behalf of doctors who had violated state medical laws.

The Commission has condemned "questionable" medical advertising, particularly when the product advertised might be dangerous to health. KFKB was refused license renewal by the Radio Commission in 1931, in part because of advertisements for a "goat gland" operation. When the Commission refused to renew the license of KTNT, also in 1931, advertisements for a "fake" cancer cure were a contributing cause. In 1935 the Communications Commission held a hearing on renewing the license of WMCA because of offensive commercials for a contraceptive product, but later approved regular license renewal. In a 1936 opinion involving station KFRC in San Francisco, the Commission held that a station should investigate the accuracy of advertising claims and any possible harmful effects of a product.
Immediately after prohibition was repealed, the Radio Commission issued a memorandum to the effect that broadcasting advertisements for "hard liquor" would constitute sufficient grounds to call a hearing on license renewal. In its 1939 memorandum the Communications Commission termed advertisements for "hard liquor" undesirable. However, the Commission has never had occasion to chastise a station for "hard liquor" advertising. Both manufacturers and broadcasters have been too afraid of public opinion to risk advertising "hard liquor" on radio and television. When this study was made, the possibility of such advertising was seriously being considered for the first time.

**Effectiveness of Attempts to Prevent "Questionable" Advertising**

In the early days of radio the "questionable" advertiser was undoubtedly attracted to broadcasting. The Federal Radio Commission refused license renewal for "dangerous" medical advertising. With these early exceptions, the Commission has not had to be too concerned with advertising for "questionable" products. The task of policing radio and television advertising has been taken over by the Federal Trade Commission, which has taken much of the responsibility off the shoulders of the Communications Commission. This is in addition to the fact that a majority of broadcasters have recognized that carrying advertising for questionable, possibly harmful, products would probably result in unfavorable public opinion. The first "Code of Ethics" written by the National Association of Broadcasters dealt with the acceptability of products
for advertising. Preventing "questionable" advertising has been one goal of every code written by the association since that time.

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It is evident from the preceding review that the elements of programming designated by the Commission as "essential" to operation in the public interest have been enforced in varying degrees. The use of program materials forbidden by law, or strongly condemned by public opinion, has brought swift action against a station. The broadcasting of obscene, indecent, or profane language, prohibited by both the Communications Act and the Radio Act, has caused the Commission to refuse to renew a station's license. The carrying of lottery schemes or information concerning lotteries, has resulted in a hearing being called on license renewal. The broadcasting of false or fraudulent advertising, particularly advertising for a product which might be injurious to health, has been a contributing factor to denial of license renewal. However, it should be noted that a majority of broadcasters would refrain from using these program materials as a matter of good public relations even if they weren't prohibited from doing so by law.

The political provisions of the Communications Act, and the Radio Act, have also been strictly enforced. At times, the Lar Daly case for instance, it would seem the Commission has interpreted the "letter of the law" almost to the point of absurdity. The Lar Daly case, however, is obviously an attempt by the Commission to force Congress to modify the political regulations. The Commission
has called a hearing on license renewal for violation of the political regulations, but more frequently, when the meaning of the law has been involved, the Commission has merely given a ruling on the matter.

There are also program practices, not necessarily prohibited by law, but condemned by public opinion, which the Commission has termed "not in the public interest." These include the broadcasting of programs featuring fortune tellers or astrologers, the carrying of race track information which might aid illegal gambling, and attacks against individuals or groups. Against such practices the Commission has not hesitated to take action. The Commission has refused to renew a station's license until programs featuring fortune tellers or astrologers have been discontinued. The Commission has called a hearing on license renewal because a station broadcast information which could aid illegal gambling. License renewal has been refused for broadcasting attacks against individuals or groups. Most broadcasters, however, voluntarily prohibit the use of these materials because of public reaction against them.

Thus, the Commission has consistently "punished" stations for broadcasting materials prohibited by law, or almost universally condemned by public opinion, when such practices have come to its attention. The most drastic form of "punishment" has been revoking a station's license or refusing license renewal. This the Commission has seldom done. More frequently, a hearing has been called
on license renewal. Since a hearing is a time-consuming and costly ordeal, the threat of a hearing is a strong deterrent to "misconduct." The Commission has placed stations on temporary license as a form of "punishment," generally refusing to renew the station's license until the particular misconduct has been corrected. The Commission has also sent McFarland letters (or letters of inquiry), as a form of "punishment."

Application of the concept of public interest to the regulation of programming has not been limited to practices "prohibited" by law or public opinion. Balanced programming, variety in types of programs, "fairness" in the presentation of news and discussion, the prevention of overcommercialization, local live programming, and the like have all, at one time or another, been termed by the Commission "essential" to operation in the public interest. These are the more "controversial" elements of "good" programming. The industry has resisted efforts of the Commission to enforce program criteria of this type, charging that it amounts to censorship. For the most part, no strong public opinion exists to back up the Commission. The Commission has made no consistent attempts to put these program criteria into effect. It has promoted these elements of "good" programming primarily in competitive licensing situations, through statements such as the Blue Book, and occasionally by making an "example" of a station. Commissioner Doerfer has called this kind of regulation "regulation by lifted eyebrow." Thus, in relation
to the less concrete elements of "good" programming, the Commission's "promise" has been vastly different from its "performance." The final chapter of this study will attempt to suggest reasons why the Commission has not been consistent in applying its concept of public interest to the regulation of radio and television programming.
CHAPTER IX

POSSIBLE CAUSES OF THE COMMISSION'S INTERPRETATION
OF PUBLIC INTEREST

The preceding chapter examined the extent to which the Federal Communications Commission, and its predecessor the Federal Radio Commission, have regulated radio and television program practices within the concept of public interest. It was shown that the Commission has strictly enforced provisions of the Communications Act relating to programming. Stations have regularly been "punished" for broadcasting lotteries or information concerning lotteries; false or fraudulent advertising; obscene, indecent, or profane language or program materials; and for failure to observe the regulations as to political broadcasting. In addition, the Commission has consistently "punished" stations for broadcasting program materials, not prohibited by law, but generally condemned by public opinion. Included in this category have been attacks against individuals or groups, shows featuring fortune tellers or astrologers, and "offensive" advertising. However, most broadcasters would not carry these materials anyway, for fear of antagonizing the audience.

In relation to program materials not prohibited by law or public opinion, where interpretation of the meaning of public interest has been involved, the Commission has never consistently
enforced its "stated" views. For instance, the Commission has made only sporadic attempts to promote balanced programming, even though it has frequently said that balance is a necessary characteristic of "good" program service. The importance of balance was first suggested by the Federal Radio Commission as early as 1928. However, the most ambitious effort to enforce balanced programming was made during the 1940s, about the time the Blue Book was released.

The major program elements considered within the concept of balance have been variety, the carrying of programs "essential" to the public interest, and the overall ratio of commercial to sustaining time. In its concern for variety the Commission has refused to approve propaganda stations, because they would be likely to serve a limited audience; and discouraged overemphasis on foreign language programs, or sports. While the Commission has never "officially" changed its attitude toward variety in programming, when this study was made there were a large number of "news and music" radio stations on the air.

Various kinds of programs have been termed "essential" to balance. The category of shows stressed most frequently has been local live programs. The Commission has often encouraged local service by giving preference to local applicants in competitive licensing situations, and by attempting to provide a local outlet whenever possible. However, the existence of a local station does not automatically assure a community of local live programming, and
the Commission has made little effort to "persuade" local stations to provide these shows.

Neither has the Commission seriously tried to "force" stations to broadcast other "essential" programs; news, discussion, political broadcasts, educational and cultural shows, and religious programs. The Commission's application forms request a breakdown as to these program areas, but few stations have been "punished" for failure to carry such shows. Even when the Commission has made an "example" of a station, "punishment" has generally been mild—a letter of inquiry, or placing the station on temporary license until programming has been improved.

The Commission has also stressed that sustaining programs are an important ingredient of a balanced program schedule. Application forms used at the time this study was made request a commercial-sustaining breakdown. Despite the "stated importance" of sustaining shows, the Commission has rarely attempted to enforce this criterion.

"Fairness" in the presentation of news and discussion has been considered another indication of "programming in the public interest." The Communications Commission concerned itself with this problem primarily during the 1940s. This was the era of the "Mayflower" decisions on editorializing, and the Richards "news slanting" case; and, relative to the proper handling of discussion programs, the stipulation in the 1943 sale of the Blue Network, the 1945 WHKG case, the Blue Book, and the 1949 Scott atheist decisions.
Another standard of "good" program service which the Commission has made only isolated attempts to put into effect has been the prevention of overcommercialization. In 1928 the Federal Radio Commission refused license renewal to WORW because of overcommercialization. The 1939 memorandum on undesirable program materials, the Blue Book, the Brockton case, the 1955 action of the Commission placing seventeen radio stations in Illinois and Wisconsin on temporary license, were all attempts to discourage overcommercialization.

It is evident that when it has been necessary to interpret the meaning of public interest as used in the Act, the Commission has shown a lack of consistency. In some areas, there have been changes in interpretation, or changes in degree of enforcement with the passage of time—the concern with discussion programs during the 1940s. In other areas the Commission has simply been spotty in enforcement, as with efforts to prevent overcommercialization.

Possible Causes

Undoubtedly many factors have influenced the manner in which the Federal Communications Commission has applied the concept of public interest to the regulation of radio and television programming. However, this author would like to suggest four basic reasons why the Commission's "promise" and "performance" have differed so widely.
Changes in Philosophy of Membership of the Commission

At any given time, the philosophy of the Federal Communications Commission as to the meaning of public interest is likely to be determined by two factors: (1) the philosophy of the individual commissioners, (2) the philosophy of the administration in power.

The regulatory guide, public interest, convenience, or necessity, provided by Congress in both the 1927 Radio Act and the Communications Act is extremely vague. It is on this concept, however, that the Commission must base its authority to consider radio and television programming in the exercise of its licensing activities. The use of this term in the acts to regulate broadcasting was discussed in Chapter II.

With such an indefinite standard as public interest, changes in the make-up of the Commission will have a tremendous influence on the Commission's interpretation of public interest. Even the courts have recognized that this is true. The Court of Appeals for the District of Columbia said: "Commissioners themselves change, underlying philosophies differ. . . . Two diametrically opposite schools of thought in respect to the public welfare may both be rational."¹

During the 1940s for instance, there were a group of enthusiastic regulators on the Commission who believed in rigorous program regulation. This was the time of the Blue Book, of concern with such factors as "fairness" in the discussion of public issues, and balanced programming. At the time this study was made program

standards had been considerably relaxed. It is significant that two members of the Commission have questioned the legal authority of the Commission to even consider programming. In a 1956 dissenting opinion, cited previously, Commissioner Doerfer observed that "there is grave doubt" that the Commission should evaluate such factors as balanced programming. When the Federal Communications Commission proposed new program classifications in 1948, Commissioner Craven argued that by classifying programs the Commission was attempting to tell broadcasters what programs they should carry. He maintained the Commission should withdraw from the program field and concern itself with programming only when there is evidence that a law is being violated.

Another factor which directly affects the Commission's interpretation of public interest is the philosophy of the administration in power. Though Commissioners are appointed for terms of seven years, only seven men in the history of the Communications Commission have ever completed a full term. Members of the Commission are selected by the President, subject to the approval of the Senate. With the average Commissioner serving only a few years, this means that within a single term of office the President may appoint a majority of the Commission's members. Theoretically an independent Commission is nonpolitical. Not more than four members of the seven-man Communications Commission may belong to the same political

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2 Miami Broadcasting Co., 14 RR 125 (1956).
3 Broadcasting, LV:22, p. 72.
party. Obviously, however, the President is likely to appoint men whose philosophy of regulation most nearly resembles his own.

In addition to his power to appoint members of the Commission, the President may influence a commission in other ways. In his study of independent commissions Doyle reported:

President Harding ... apparently sought to influence the action of the United States Tariff Commission. In fact, it was testified that he sought to "make over the Commission" itself by a variety of expedients, such as offers of other federal posts to existing members and requests for undated letters of resignation before appointing new members.  

Robert Cushman said that a member of the Communications Commission had told him that the Commission "had always complied with all orders and requests made of it by the President, and had never raised any question about its obligation to do so."  

Thus, the philosophy of the Commission toward the regulation of programming is very likely to reflect the philosophy of the administration in power. William Costello, formerly White House correspondent for Mutual network, summarized a study conducted for the Association of Radio-Television News Analysts. Costello observed:

From the quasi-liberalism of the Porter era [under Franklin D. Roosevelt], the FCC has steadily grown more conservative, more property-conscious. . . . The tendency, starting under Truman, was accentuated when the Eisenhower Administration took office. Since 1952, al-

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4Doyle, op. cit., p. 17.
5Cushman, op. cit., p. 682.
most all pretense of regulation of programming has been abandoned, and the . . . doctrine of laissez-faire embraced.®

Pressure of Other Problems

When Congress created the Federal Radio Commission in 1927, there were 733 AM radio stations on the air. Up to 1934 the Radio Commission never had to deal with more than 800 stations. The Communications Act extended the authority of the Commission to include all "interstate and foreign commerce in communication by wire and radio," creating a much wider area in which the Commission had to concern itself. In addition to regular broadcasting stations, the Commission was given jurisdiction over interstate telephone and telegraph service, and all forms of point-to-point communication by radio, except that carried on by government agencies and as military service. This means that the Federal Communications Commission must license—separately—all radio transmitters on ships, radio transmitters used by airlines, by taxi companies, by various businesses, as well as amateur radio stations.

Since 1945, especially, the size of the Commission's task had increased tremendously. By adopting new engineering standards the Commission has made possible hundreds of new AM radio stations. In 1945 there were roughly 1,000 AM radio stations. When this study was made there were more than 3,000. There has also been an enormous increase in the use of commercial point-to-point radio;

taxis, industrial concerns, airplanes, and the like. Moreover, two additional areas of regulation have been added to the Commission's jurisdiction—FM radio, and television. In recent years, the development of television has demanded much of the Commission's attention. The Commission has had to make such policy decisions as what to do about the allocation of television facilities. For three and a half years the Commission placed a "freeze" on new television stations in an attempt to work out a pattern for allocations. When this study was made, the Commission was trying to deal with the failure of UHF, and the demands of the military for additional television facilities. All of this leaves the Commission much less time to consider activities of individual stations.

An idea of the extent of the Commission's task may be obtained from its Twenty-fourth Annual Report. The Commission observed that at the end of 1958 there were 2.1 million radio authorizations on its books, that there were 644 million telephones in use in the country, and that during 1958, 113.9 million telegraph messages had been handled by Western Union.7 The Commission pointed out that in 1958 "broadcast authorizations" collectively had passed the 9,000 mark: "Of this number, 874 were TV stations, 791 were FM, and 3,353 AM; auxiliaries, etc., made up the remainder."8 The report added that

8Ibid., p. 4.
during the year the Commission had received 537,000 applications of all kinds, and handled 1,378,12 pieces of mail. In addition to its licensing activities the Commission must formulate policies. Moreover, members of the Commission spend a significant amount of time away from their regular tasks testifying, and preparing to testify, before Congressional committees.

In a statement to the House Appropriations Committee's Independent Offices Subcommittee, in May, 1959, Broadcast Bureau Chief Harold Cowgill told members of the committee that AM applications of all types were behind 7 to 7\frac{1}{2} months, with a total of 1,200 applications pending. Cowgill said that action on television applications took from 40 to 45 days. Despite the tremendous increase in its work, the Commission had to operate with 150 fewer employees in 1958 than it had in 1948.

In a 1941 analysis of regulatory commissions, Robert Cushman concluded that the chief problem of commissions is the enormous volume of day-to-day work. The Task Force on Regulatory Commissions reported in March, 1949, that the major fault of regulatory commissions is that they "become too engrossed in case-by-case

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9Ibid., pp. 17-18.


11FCC, op. cit., p. 20.

12Cushman, op. cit., pp. 729-733.
activities."\(^\text{13}\) The report pointed out that the work load of these Commissions is so huge they don't have time to formulate policy.

The large volume of work has also tended to discourage the Commission from getting involved in hearings unless absolutely necessary. Thus, unless some "drastic" misconduct has been brought to the attention of the Commission, applications for license renewal are generally approved without question. Costello maintained:

Those with an intimate knowledge of the regulatory problem in broadcasting insist that the question of hearings goes to the very heart of the matter. There can be no possibility of reform in station programming until station managers know they may be compelled to defend their programming the next time they apply for renewal of their licenses.\(^\text{14}\)

**Lack of Information**

A third factor which has tended to lessen the extent to which the Commission has enforced its views toward programming has been the lack of information available to the Commission about programming. As was shown in Chapter IV, with the exception of competitive licensing situations, where rival applicants may "investigate" one another's claims, the only information available to the Commission about programming is that required on the Commission's application forms. Information obtained from these forms is "quantitative" rather than "qualitative." The only other source


of information is complaints sent in to the Commission by listeners. These are extremely limited.

It would be possible, of course, for the Commission to obtain additional information about programming by monitoring stations, but Congress has disapproved of this practice. As Costello pointed out:

Congress has never, since the creation of the FCC, voted enough money to hire examiners, engineers and attorneys for all the de novo hearings on renewals that would be required to give careful scrutiny to program standards.15

This lack of information about programming does not make rigid application of the program standards particularly easy, or even possible.

Economic Situation

In 1958 the Court of Appeals for the District of Columbia held that economic injury to an existing station should be considered by the Commission before approving an application for a new station in the same community, if such injury would result in less service to listeners. The Commission has appealed this decision to the Supreme Court, because through the years the Communications Commission has refused to consider economic injury as a factor in licensing. The Commission has maintained that economic injury is speculative and can't be proved. Even if it could, the Commission has felt that competition is more important than any

15 Ibid., p. 13.
possible economic injury which might result. In this 1958 ruling, which concerned WGCC, Bremen, Georgia, the Court of Appeals pointed out: "If the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations."\(^{17}\)

This decision emphasizes one of the gravest problems facing broadcasting today—lack of revenue. A majority of the public seems to think that broadcasters are "fabulously" wealthy, and it is quite true that many stations do earn huge profit. It is also true that roughly one-third of all stations are operating in the red. The 1958 Broadcasting Yearbook reported that during 1957, the latest year for which figures were available, 168 of 450 television stations operated at a loss.\(^{18}\) The latest figures available for radio covered the year 1956. During that year, 849 out of 2,902 AM radio stations reported that they had finished the year in the red.\(^{19}\) Virtually all FM radio stations were operated at a loss. However, since in a joint AM-FM operation licensees are not required to report FM stations' expenses separately, no figures are available on the exact number of FM stations operating at a loss. The 51 FM stations operated

\(^{16}\)Note: The question of economic injury was discussed in detail in Chapter IV.

\(^{17}\)Broadcasting, LV:2, p. 33.


\(^{19}\)Ibid., p. B-140.
by non-AM licensees, reported total expenses during the year 1956 of $1.8 million, and total revenues of only $1.4 million.\textsuperscript{20}

This situation is very different from that which existed when the \textit{Blue Book} was written. Television and FM radio were still a novelty. There were fewer than a thousand radio stations on the air, and nearly all of these stations were making money. The \textit{Blue Book} indicated that during the year 1944, owners of AM radio stations had earned an average of 108.8 percent on their original investment, and 222.6 percent on the depreciated cost of facilities.\textsuperscript{21} Only 41 stations reported losses for the year.\textsuperscript{22} The Commission could well afford to insist that stations devote some of this revenue to providing better programming.

The situation has changed considerably today. As was pointed out earlier, since the end of World War II the Commission has modified engineering standards to make possible the licensing of many additional AM radio stations. The Commission took an active interest in the promotion of FM radio; and when allocating television facilities, provided channels for many markets too small to permit profitable operation of a television station. The Commission also assigned stations to UHF channels, which have not generally been successful. The combined policies of the Federal

\textsuperscript{20}Ibid.

\textsuperscript{21}\textit{FCC, Public Service Responsibility} . . ., p. 49.

Communications Commission have been aimed at providing service in as many communities as possible, and at insuring competition within the broadcasting industry. At the conclusion of 1958, there were 3,253 AM radio stations, 548 FM radio stations, and 556 television stations on the air. Since, as was shown previously, roughly a third of these stations are operating in the red, apparently there is not sufficient advertising revenue to adequately support such a large number of stations.

This situation has placed the Commission in a difficult position. By insisting on balanced programming, local live shows, and similar elements of "good" programming, it could run the risk of "driving" many marginal stations off the air, and perhaps depriving some communities of their only local outlet. On the other hand, it could follow a more lenient policy with respect to balanced programming, overcommercialization, and the like. Obviously the Commission has chosen the latter course of action. The difficulty of the situation lies in the fact that it would be almost impossible to use a double standard—i.e., being lenient with marginal stations, but requiring other stations to provide "better" program service. Thus, the Commission has tended to be lax when enforcing standards of "good" programming.

General Conclusions

Congress has given the Communications Commission broad discretionary powers to regulate broadcasting. The regulatory guide, "public interest, convenience, or necessity," is as indefinite a standard as could have been chosen. With the exception of the political broadcasting regulations, and the prohibition of certain materials "obviously" not appropriate for broadcasting—such as obscenity, the Communications Act includes few specific references to programming.

Though the Communications Act forbids the Commission to censor broadcasting; the Commission has insisted that, under the mandate to regulate broadcasting in the public interest, it has the right, even the obligation, to evaluate program service. The courts have upheld the authority of the Communications Commission to consider such factors as past programming, future program plans, and the quality of proposed service.

The program standards established by the Commission fall into two categories: those prohibited by law or strongly condemned by public opinion, and less concrete factors, such as balance, where interpretation of the meaning of public interest is involved. The Commission has attempted to enforce these program criteria primarily through its licensing activities. Of the seven licensing situations in commercial broadcasting, however, there are only two in which the Commission carefully examines an applicant's claims: a competitive
application for a construction permit, and a competitive application to expand facilities. In these situations the Commission has regularly compared proposed program plans, and past programming, of the applicants. On occasion, superior program plans, or a "meritorious" record of past performance, has been the determining factor in a license grant.

The number of competitive licensing situations is limited. Though an applicant promises superior programming, the station's actual program service may be far different from the promises made in the original application. If the Commission hopes to effectively promote standards of "good" programming, it must make use of other licensing situations—especially applications for license renewal, and other enforcement techniques.

The Commission has not been consistent in its efforts to enforce program standards. Stations have nearly always been "punished" for broadcasting program materials prohibited by law or universally condemned by public opinion. Where interpretation of the meaning of public interest has been involved, the Commission has made only isolated attempts to put its views into effect. "Punishment" of stations for failure to carry religious broadcasts, or lack of balance, has been more in the nature of an object lesson to other stations than actual chastisement for the stations involved. Because of the economic situation existing in broadcasting, the pressure of other problems, the constant changes in the make-up of
the Commission, and the lack of information available, the Commis­sion has been unable and presumably will continue indefinitely to be unable to apply rigid standards of public interest to programming. In reality then, the development of the concept of public interest as it applies to the regulation of radio and television programming has been largely a matter of statements of policy—not given actual enforcement.
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