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ABSTRACT

This report examines the public's role in determining the dimensions of the public interest in the regulation of broadcast services. Chapter II describes some of the avenues open to citizens to influence the Federal Communication Commission, including: (1) direct contact between broadcasters and citizens, (2) citizen participation in the Commission's rulemaking process, and (3) citizen involvement in the Commission's broadcast licensing activities. It also discusses allocation of citizen resources among the various avenues of participation. Chapter III focuses on two methods of participation which have gained popularity: petitions to deny and citizen settlements. These two methods have resulted in policy problems which are analyzed in Chapter IV. Chapter IV also critizes some commission policies and makes recommendations for additional or modified procedures. Chapter V examines and evaluates the application of "Proposed Agreements Rulemaking" to four cases and explores alternative grounds of decision. Chapter VI analyzes the final statement of Commission policy toward citizen settlement together with the "Reimbursement Report and Order." Chapter VII brings together major factors in the development of the Commission's policy and provides a set of recommendations for further research. Appendices reproduce portions of relevant documents and present an economic analysis of litigating a petition. (WBC)

CITIZEN PARTICIPATION IN BROADCAST LICENSING BEFORE THE FCC

PREPARED UNDER A GRANT FROM THE JOHN AND MARY R. MARKLE FOUNDATION

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PREFACE

This report is one of a number of studies supported under a grant from the John and Mary R. Markle Foundation to Rand's Communications Policy Program. Work in this field has included economic, social, and legal analyses of such areas as the development of cable television, the uses of telecommunications for the delivery of public services, the problems of media cross ownership, and the effect of television news on local political awareness.

The report treats an area of increasing concern in the federal regulation of television and radio broadcasting. In recent years numerous petitions based on complaints about employment practices or program content have been directed by citizen groups toward particular broadcast stations. In many cases these complaints are handled through mutual agreement between the broadcast station and the citizen group by specifying modifications in practices and procedures. In others, adjudication is required. However, this process raises a dilemma. On the one hand, the Federal Communications Commission is directed to regulate broadcast services so that the "public interest, convenience, and necessity" are served. In this decisionmaking process the public has a right to be heard. On the other hand, the potential problem arises of citizen groups using petitioning power in an irresponsible and abusive fashion, impairing the broadcaster's ability to serve the public interest as best he sees it.

With this dilemma as its central point of focus, this report has several components: (1) it describes some of the avenues open to citizens seeking to influence FCC policies; (2) it describes the history of citizen participation, through petition and settlement, in broadcast licensing; (3) it traces the evolution of an FCC policy statement regarding citizen agreements and analyzes it, especially in the light of four recent cases before the FCC; and (4) it makes recommendations for future Commission policy which suggest that considerable leeway remains for Commission approval of citizen settlements, without infringing on the rights and obligations of broadcasters.

SUMMARY

Prior to 1966 the Federal Communications Commission was able to regulate broadcast stations without any significant participation by local citizen groups in the Commission's licensing decisions. Then, in 1966, the courts ordered the Commission to grant standing to citizen groups so that they too could file petitions to deny the licenses of incumbent broadcasters.[1] The Court's action opened new avenues for citizen participation in the Commission's affairs, and at the same time raised policy issues that have forced a rethinking of the Commission's approach to broadcast regulation.

Citizen groups got off to a slow start in filing petitions to deny, and not until the early 1970s did citizen petitioning begin in earnest. In the early years of petitioning the Commission acted indecisively toward citizen petitions. It delayed action in so many cases that a large backlog of over 200 unsettled petitions was in the Commissioners' hands as of August 1975. The Commission also actively attempted to block greater participation by citizen groups, but was repeatedly and resoundingly rebuffed by the courts, which ordered the Commission to create a larger role for citizen groups in broadcast licensing procedures.[2]

While the petitioning process was developing, it became evident that defending against a citizen petition would be an expensive affair for broadcasters. Broadcasters would have to incur legal fees, detour station personnel from their usual tasks, and suffer delays in license renewals as a result of citizen petitions. To avoid the expense of defending against citizen petitions, broadcasters began entering

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[1] *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

[2] The best examples of such court decisions are the three separate *Office of Communication of United Church of Christ* v. *FCC* cases decided by the Circuit Court for the District of Columbia in 1966, 1969, and 1972, and reported, respectively, at 359 F.2d 994; 425 E.2d 543; and 465 F.2d 519.

agreements with those citizen groups that had filed petitions to deny their licenses. In these agreements the broadcaster typically undertakes to make certain changes in his station's operations. The broadcaster may promise to change his employment policies, to support the local production of broadcast programming, to refrain from broadcasting certain types of programming, to attempt to broadcast greater amounts of other types of programming, and occasionally to reimburse the citizen group for its expenses in prosecuting the petition to deny. In return for the broadcaster's promises, the citizen group usually agrees to file a motion with the Commission to withdraw its petition to deny and to encourage the Commission to renew the station's license.

The Commission became concerned over this process of petitioning and settlement for a variety of reasons. The Commission felt there was a danger that citizen groups would usurp some of the Commission's own regulatory functions through the device of citizen settlement. The possibility also weighed heavily in the Commission's thinking that citizen groups might abuse their new-found petitioning power; some agreements, through the inflexibility of their terms, might infringe on the broadcasters' ultimate responsibility to serve the public interest. Thus the Commission recognized a need to regulate the entire agreements process.

The Commission, however, did not find it easy to decide on an acceptable regulatory scheme. After a period of confusion and delay, the Commission finally issued the *Proposed Policy Statement and Notice of Proposed Rulemaking in the Matter of Agreements Between Broadcast Licensees and the Public*,[1] (hereinafter called the *Proposed Agreements Rulemaking*). Although the document was adopted by a unanimous vote, it was vaguely constructed and could support many conflicting interpretations. In fact, at the time the Commission adopted the *Proposed Agreements Rulemaking*, Commissioners Ben L. Hooks and James H. Quello each issued separate concurring opinions which strongly suggested that they had fundamentally different perspectives on many issues addressed by the *Proposed Agreements*

[1] Docket 20495, FCC 75-633 (June 10, 1975).

Rulemaking. Thus it would be difficult to predict Commission policy with any precision simply from a reading of the *Proposed Agreements Rulemaking*.

The Commission's actions in reviewing agreements following the adoption of the *Proposed Agreements Rulemaking* often underscored the document's inherent vagueness and capacity to support widely divergent interpretations. The Commission split in a series of 5-2 votes in which Commissioners Hooks and Glen O. Robinson formed the minority. Hooks and Robinson supported a reading of the *Proposed Agreements Rulemaking* that would adopt a policy of less stringent review of particular agreements and lead to approval of more agreements than the majority was willing to accept. Among the members of the majority, Commissioner Quello was notable as the most vocal proponent of a policy requiring review of all agreements and rejection of all agreements that impinge on broadcasters' flexibility or that contain overly specific clauses.

While the Commission was considering the *Proposed Agreements Rulemaking*, it also had before it the *Proposed Reimbursement Rulemaking*[1] dealing specifically with the problems raised by broadcaster-citizen agreements that called for payment of fees from broadcasters to citizen groups. The potential for improper and excessive payments to citizen groups and the danger of promoting extortionist behavior by citizen groups appeared to be a major concern for the Commission when it embarked on the inquiry.

The *Proposed Agreements Rulemaking* was concluded six months after it was initiated with the issuance of the *Agreements Report and Order*.[2] The *Agreements Report and Order* outlined the Commission's policy: citizen agreements could not inflexibly bind broadcasters or

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[1] *Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances*, Docket 19518, FCC 72-473 (June 7, 1972).

[2] *Final Report and Order in the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495, FCC 75-1359 (December 19, 1975).

allow for excessive delegations of responsibility to citizen groups; broadcasters must retain the right to modify agreements if they believe the modification is in the public interest; and all citizen agreements incorporated into license applications will be treated as representations to the Commission and enforced by the Commission's promise vs. performance standards.

The *Proposed Reimbursement Rulemaking* was closed shortly thereafter with the issuance of the *Reimbursement Report and Order*.[1] The *Reimbursement Report and Order* drew heavily on the principles stated in the *Agreements Report and Order* and simply noted that the Commission's policy toward reimbursements would be a direct extension of its policy toward citizen agreements.

The *Agreements Report and Order* and the *Reimbursement Report and Order* outline only the most basic principles that the Commission intends to apply to citizen participation in the licensing process. In doing so, they overlook a variety of specific and concrete measures which could lead to more effective citizen participation in broadcast licensing without infringing on the legitimate interests of licensees. For example, the Commission could have pointed out its ability to control abuses of the agreements process through the application of Sections 403[2] and 506[3] of the Communications Act, which outline various investigatory powers and criminal sanctions. At the same time, the Commission would have provided a more explicit statement of an intention to treat responsible, good faith citizen agreements on a par with commercial contracts signed by broadcasters and to enforce with special care any agreement that seems to rectify substantial faults brought to light by a petition to deny. By following a policy designed to deter abuse but to also promote legitimate

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[1] *Final Report and Order in the Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances*, Docket 19518, FCC 76-5 (January 9, 1976).

[2] 47 U.S.C. 403 (1970).

[3] 47 U.S.C. 506 (1970).

citizen participation, the Commission could do much to create a regulatory environment based on a philosophy of cooperation and negotiation between broadcasters and their audience in place of the present environment characterized by mistrust and adversary proceedings.

Beyond the immediate issues raised by the *Agreements Report and Order* and the *Reimbursement Report and Order* lie the more fundamental problems of creating and nurturing a responsible and effective citizen lobby. If the Commission is to treat citizen groups as an ally in promoting the public interest in broadcasting--as the Court has suggested[1]--then the Commission must begin considering various additional steps to promote citizen participation. Although citizen groups can exert a great deal of leverage over broadcasters, the fact remains that many such groups do not have access to the legal talent and resources necessary for effective representation before the Commission. The time seems ripe for the Commission to consider a variety of funding or compensation schemes which would reimburse public intervenors for good faith efforts in promoting and protecting the public interest in broadcasting.

Finally, large areas of relevant research yet to be undertaken deserve mention. Follow-up studies designed to measure the impact and success of citizen agreements are necessary for a better understanding of broadcaster-citizen relations. Data on the cost of litigation and representation at the Commission are sparse, and research designed to collect this information is critical to an understanding of the economic forces leading to petitioning and settlement.[2] The same data, in conjunction with a study of the internal management practices of the Commission, could lead to practical suggestions for streamlining the Commission's operation so that broadcasters, citizen groups, and the Commission alike could benefit.

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[1] See *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969) where the Court observed that a public intervenor was improperly treated as an opponent by the Commission, and not as an ally in promoting the public interest.

[2] See App. C for a discussion of the economic motivations underlying the litigation-settlement decision.

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I. INTRODUCTION

The Communications Act of 1934[1] directs the Federal Communications Commission to regulate broadcast services so that the "public interest, convenience, and necessity"[2] are served. This report examines the role the public plays in determining the dimensions of the public interest.

Few have ever been bold enough to attempt a precise definition of what Congress meant as the "public interest." It is a concept as vague and as hard to pin down as the meaning of obscenity, of which Mr. Justice Potter Stewart could only say, "I know it when I see it."[3] It is also a dynamic concept, constantly changing over time. As technology advances with the spread of cable television and with the opening of UHF and additional VHF frequencies, and as society becomes increasingly dependent on electronic media for news, education, and entertainment, the definition of the public interest in broadcasting must expand, adapt, and adjust to a new reality. Thus, even if it is possible to articulate today's public interest, it would take extraordinary prescience to be able to define it for all future circumstances.

Evidently, the "public interest" is a flexible standard, subject to artful interpretation. Whenever government is guided by such a malleable rule, two questions are of paramount importance: (1) Who decides? and (2) What procedure will be used in arriving at a decision? In the case of broadcasting, the courts have ruled that the "Commission of course represents and indeed is the prime arbiter of the public interest."[4] But in arriving at its final decision as

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[1] 47 U.S.C. 151, *et. seq.* (1970).

[2] 47 U.S.C. 307(d) (1970).

[3] *Jacobellis v. Ohio* (Stewart, J. concurring), 378 U.S. 184, 197 (1964).

[4] *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

to what is and is not in the public interest, the Commission's regulatory duties are "guided if not limited by our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life."[1]

Thus, the public is viewed as a competent and trustworthy party with a special ability to gauge and measure the dimensions of public interest. To make use of the public's perspective on the public interest the Commission has established a wide variety of procedures to facilitate public participation in the management and regulation of broadcasting. These procedures range in complexity from the most informal suggestion or complaint to the intricate, time-consuming, and extraordinarily expensive license challenge wherein a party seeks to oust a broadcaster from his channel and to take his place on the dial.

Chapter II describes some of the avenues open to citizens who wish to influence Commission policy and decisionmaking. Three broad categories of citizen participation are discussed: (1) direct contact between broadcasters and citizens; (2) citizen participation in the Commission's rulemaking process; and (3) citizen involvement in the Commission's broadcast licensing activities. The chapter also discusses how a citizen group might allocate its resources between the various avenues of participation.

Chapter III focuses on two methods of citizen participation that have recently gained popularity but that have also raised significant and intriguing policy issues for the Commission: (1) petitions to deny and (2) citizen settlements. The petition to deny can be used by citizen groups to question whether a broadcaster is serving the public interest. If a petition is successful, a broadcaster may lose his license as a result of citizen protest before the Commission. But rather than prosecute a petition through to its completion, broadcasters and citizen groups often reach understandings designed to resolve many of the issues raised in the petition. These understandings,

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[1] Ibid.

roughly analogous to out-of-court settlements in civil cases, are embodied in citizen agreements. It is the status of these private agreements designed to resolve issues of public concern that causes many problems for the Commission. The relation between the petition to deny and the citizen settlement is explored and some of the more frequently used procedures in arriving at citizen settlements are examined. The history of the petition to deny and settlement process is described, and special attention is given to problems raised by agreements that allow for reimbursement of citizen group expenses. Some of the statistics generated by the petition and settlement processes are also considered.

The Commission took explicit notice of the unique policy problems raised by petitions to deny and citizen settlements in June 1975 when it issued the *Proposed Policy Statement and Notice of Proposed Rulemaking in the Matter of Agreements Between Broadcast Licensees and the Public*[1] (hereinafter called the *Proposed Agreements Rulemaking*), described and analyzed in Chap. IV. Some Commission policies are criticized, and a series of recommendations for additional or modified Commission procedures are developed in the chapter.

Since release of the *Proposed Agreements Rulemaking*, the Commission has had the opportunity to apply its policies to a variety of renewal controversies. In Chap. V application of the *Proposed Agreements Rulemaking* to four recent cases is examined and evaluated. In some cases alternative grounds of decision are explored. The chapter also considers a recent citizen settlement which has not yet reached the Commission but which is sure to cause controversy when it does.

Chapter VI describes and analyzes the *Agreements Report and Order*,[2] which contains the final statement of Commission policy

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[1] Docket 20495, FCC 75-633 (June 10, 1975).

[2] *Final Report and Order in the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495, FCC 75-1359 (December 19, 1975).

toward citizen settlement. The *Reimbursement Report and Order*[1] is also considered in Chap. VI. Since the report tracks the history of these two rulemaking proceedings from the initial set of problems that led to the original inquiry through to the Commission's final rulemaking proceedings, some observations on the success of the rulemaking approach are also offered.

Chapter VII concludes the report, bringing together major factors in the development of the Commission's policy and providing a set of recommendations for further research.

Appendixes A and B reproduce relevant portions of the *Proposed Agreements Rulemaking* and of the *Agreements Report and Order*. Appendix C is an economic analysis of the factors that determine whether parties continue litigating a petition or whether they reach a settlement. The analysis is presented in a relatively nontechnical fashion, so no prior exposure to economic theory is necessary.

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[1] *Final Report and Order in the Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances*, Docket 19518, FCC 76-5, (January 9, 1976).

II. MECHANISMS FOR CITIZEN INVOLVEMENT

When Congress established the Federal Communications Commission in 1934,[1] it provided the Commission with two powerful tools to be used in regulating broadcasting in the public interest. The first is a broad rulemaking power which grants the Commission the authority to regulate and control the operating procedures of all broadcast stations within the United States.[2] The second is the Commission's power to grant, renew, and revoke broadcast licenses. Operating a broadcast station requires a license from the FCC.[3] Broadcast licensees hold their license for a maximum of three years and then apply to the Commission for a renewal if they wish to continue operating.[4] Under the terms of the Communications Act, the Commission cannot renew the license unless it first finds that the renewal would serve the "public interest, convenience, and necessity."[5]

Not only does the public have a right to make its voice heard in rulemaking and licensing procedures before the Commission; the public also has a right to approach broadcasters directly with ideas, comments, and suggestions and to examine documents which broadcasters must keep in a public file.[6] Moreover, broadcasters have an affirmative duty to seek out community reaction and to tailor parts of their programming to community needs and desires. Thus, the public can attempt to influence broadcasting either by: (1) approaching broadcasters directly; (2) becoming involved in the Commission's rulemaking procedures; or (3) entering the Commission's license renewal proceedings.

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[1] Communications Act of 1934, 47 U.S.C. 151, *et. seq.* (1970).

[2] 47 U.S.C. 303 (1970).

[3] 47 U.S.C. 301 (1970).

[4] 47 U.S.C. 307(d) (1970).

[5] Ibid.

[6] See 47 C.F.R. 1.526 (1974).

DIRECT CONTACT BETWEEN THE PUBLIC AND BROADCASTERS

There are three basic devices used by the Commission to ensure that the public has at least a minimal opportunity to make its opinions known to broadcasters: ascertainment, announcements inviting public participation in station affairs, and the public file.

Ascertainment

The Federal Communications Commission has stated that a broadcast licensee has an obligation to make a "diligent, positive, and continuing effort...to discover and fulfill the tastes, needs, and desires of his service area for broadcast service."[1] To ensure that broadcasters make at least a minimal effort toward ascertaining community broadcast needs, in 1960 the Commission issued the first in what was to become a long series of policy statements and opinions dealing with ascertainment.

As first outlined in the 1960 *Report*, ascertainment did not require licensees to file any material describing their attempts to gauge community needs as part of the renewal process. Then in 1965 and 1966 in an attempt to make ascertainment a more rigorous and formalized procedure, the Commission amended portions of the commercial broadcast application forms so as to require renewal applicants to outline the procedures they used in contacting community leaders.[2]

There followed a five-year period of uncertainty as to the precise nature of FCC ascertainment requirements. During this period, stretching roughly from 1966 to 1971, the details of ascertainment requirements for broadcast licensees were developed on a case-by-case basis.[3] However, by 1971 the Commission had received so many requests for

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[1] *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2316 (1960).

[2] The AM-FM Forms were amended by *Amendment of Section IV of Broadcast Application Forms 301, 314, and 315*, 1 F.C.C.2d 439 (1965), and the TV forms were amended by *Amendment of Section IV of Broadcast Application Forms 301, 305, 314, 315*, 5 F.C.C.2d 175 (1966).

[3] Some of the major cases involved were *Minshall Broadcasting Co.*, 11 F.C.C.2d 796 (1968); *Sioux Empire Broadcasting Co.*, 16 F.C.C.2d 995 (1969); and *City of Camden*, 18 F.C.C.2d 412 (1969).

clarification of its ascertainment rules, and the ad hoc procedure had grown so cumbersome, that it issued the *Primer on Ascertainment of Community Problems by Broadcast Applicants*,[1] (hereinafter called the 1971 *Primer*), which summarized the Commission's ascertainment policy in a question and answer format.

The 1971 *Primer* describes a four-step process to be followed by broadcast licensees. The first step is for the broadcaster to determine the demographic and socioeconomic composition of his city of license. The second step in the 1971 *Primer's* ascertainment process must take place within six months of filing a license renewal: management level employees or the principals of the station must interview community leaders representative of a cross section of the city of license as revealed by the demographic study.[2] At the same time, the station must undertake a random sample survey of the general public in order to collect its reaction to local broadcasting. The fourth and final step follows the completion of the surveys and requires the licensee to list the problems and needs ascertained, evaluate those problems, and then determine the steps it will take to relate broadcasting and station operation to conditions uncovered in the course of ascertainment.[3]

Although the 1971 *Primer* is the most complete available guide to ascertainment requirements, the Commission has continued modifying and amending its procedures. Perhaps the most significant

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[1] 27 F.C.C.2d 650 (1971)..

[2] The interviews may be held in person, through joint meetings (see *Southern California Broadcaster's Association*, 30 F.C.C.2d 705 (1971)) or through telephone interviews (see *Southern California Broadcaster's Association*, 41 F.C.C.2d 519 (1974)).

[3] The broadcaster is not obliged to broadcast programming treating all the problems uncovered as a result of ascertainment. The good faith judgment of the broadcaster is to determine which problems receive coverage. Programs must be scheduled so that they are reasonably effective in reaching target audiences. If a broadcaster proposes to deal with only one or two community needs, then a "prima facie" question as to the broadcaster's service of public interest is raised. See 27 F.C.C.2d 650, 684-685.

modification occurred in 1973 when the Commission released its Final Report and Order in Docket 19153, *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses.*[1] The Commission wanted to change ascertainment from a six-month process culminating in the tri-annual license renewal proceeding, to a continual, ongoing function requiring annual compilations. Licensees must now annually compile a list of the ten most significant problems and needs of their service areas and present a description of actual or proposed programming aimed at fulfilling those needs. The three annual lists corresponding to the license period must be submitted to the Commission as part of the renewal application. The station must also keep a copy of its list on file and open for public inspection.

Recently the Commission has outlined a further set of changes in ascertainment procedures which may be expected sometime in the future.[2] The demographic compositional study required by the 1971 *Primer* may be replaced by a more straightforward requirement for readily available demographic data. The Commission would then provide a "community element checklist" from which the community leader survey would be drawn.[3]

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[1] 43 F.C.C.2d 1 (1973); 44 F.C.C.2d 405 (1973). This Report and Order deals only with the commercial television renewal application form. The Commission has proposed adopting the same ascertainment reporting procedures for commercial radio renewal forms in its April 1, 1975, Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 20419, Revision of FCC Form 303, *Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, FCC 75-375 (1975).

[2] Further Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 19715, *Ascertainment of Community Problems by Broadcast Applicants*, FCC 75-540 (May 15, 1975).

[3] A checklist with 19 elements has been proposed. The elements are: agriculture, business, charities, civic, neighborhood and fraternal organizations, consumer services, culture, education, environment, government (local, county, state, and federal), labor, military, minority and ethnic groups, organizations of and for the elderly, organizations of and for women, organizations of and for youth and students, professions, public safety, health and welfare, recreation, and religion. The checklist would also ask for an indication of how many American Indians, Blacks, Orientals, Spanish-surnamed Americans, and women were interviewed.

The community leader survey interviews would no longer all have to be carried out by principals of the station or by management level employees: a certain percentage could be conducted by nonprincipals and nonmanagement level employees. And the blanket requirement that all broadcast stations adhere to all parts of the ascertainment requirement may be modified to exempt small market stations from record-keeping and reporting requirements.[1]

Although the goal of ascertainment--an ongoing and meaningful dialogue between broadcasters and the communities they serve--is seldom criticized, the Commission has been taken to task over the specifics of its ascertainment procedures. The criticisms take two general forms: (1) Ascertainment requirements are not strict enough and should be upgraded so as to increase broadcaster contact with the community, and (2) ascertainment requirements are not "cost-effective" in the sense that they set up a cumbersome mechanism which is ill-suited to the task at hand. It should be realized that these two criticisms are not necessarily at odds and that the Commission's ascertainment policies can, at the same time, be criticized for being inefficient in tapping community resources and insufficient in the degree of involvement they elicit.

Similar criticisms of the Commission's ascertainment policies have been voiced by Commissioner Glen O. Robinson in his Concurring Statement to the Commission's decision *In the Matter of Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants.*[2] Commissioner Robinson's concern is that the requirements of the 1971 *Primer* "impose burdens and costs out of proportion to any compensating public benefits."[3]

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[1] It has been proposed that any station licensed to a community with a population of 10,000 or less and located outside an SMSA according to the 1970 census be considered a small market station for ascertainment purposes. See *Broadcasting* 21 (December 22, 1975).

[2] FCC 75-923 (July 30, 1975). That decision dealt with the extension of ascertainment requirements to noncommercial educational broadcasters as well as to commercial broadcasters.

[3] Ibid. (Commissioner Robinson, concurring), p. 1.

Commissioner Robinson notes the lack of evidence supporting the hypothesis that ascertainment has had any beneficial effect on programming and focuses on what he considers to be one of the least cost-effective aspects of ascertainment: the public survey requirement. Commissioner Robinson suggests two new options for bringing public opinion to the attention of the broadcaster, instead of, or in conjunction with, the public survey often conducted by professional market research firms for the broadcasters: (1) conducting a call-in program held at regular intervals during prime time "during which members of the general public may call in and discuss the problems and needs of the station's community of license,"[1] and (2) having the broadcaster make time available to local citizens groups for discussion of problems in the community.[2] These alternatives, suggests Robinson, may prove to be more effective than the present ascertainment system, which has produced dubious benefits to the public while imposing significant costs on broadcasters and adding to the regulatory burden and paperwork at the Commission.[3]

Public Announcement Requirements

Twice a month all broadcast licensees are required to air announcements informing their audience of a broadcaster's responsibility to serve the public interest and inviting public comment on the station's performance.[4] These announcements are generally made on the first and sixteenth days of each month throughout the license period.

Six months before a station's license comes up for renewal, the station must begin substituting special license renewal announcements

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[1] Ibid., p. 3.

[2] Ibid.

[3] For examples of other studies of and views on ascertainment, see Joseph M. Foley, "Ascertaining Ascertainment: Impact of the FCC *Primer* on TV Renewal Applications," 16 *Journal of Broadcasting* 387 (1972), and Thomas F. Baldwin and Stuart H. Surlin, "A Study of Broadcast Station License Application Exhibits on Ascertainment of Community Needs," 14 *Journal of Broadcasting* 157 (1970).

[4] 47 C.F.R. 73.1202 (1974).

in the place of regular public participation announcements.[1] These license renewal announcements must inform the public of the date the station's license expires and must also inform the public of its right to inspect the broadcaster's new application in the station's public file. Furthermore, the announcement must also advise the public of its right to approach the FCC directly with information relevant to the broadcaster's ability to serve the public interest.

These public announcements do not actively guarantee any contact between the broadcaster and his community--as does ascertainment. Rather, they passively inform the audience of their right to become involved in broadcast regulation. Once the announcement is made, the public must take the initiative to come forward with comments, observations, and opinions as to the role of broadcasting in the community.

The Public File

Every licensee is required to keep a public file containing documents relating to the station's renewal application, ascertainment procedures, ownership, employment practices, and programming.[2] The file must be kept at an accessible place in the community of license and must be open for inspection during regular business hours.

In 1971 the Commission observed that some broadcasters requested members of the public to make advance appointments and to specify the particular documents they wished to examine. The Commission felt that these broadcaster practices inhibited "full and free access by all individuals and organizations to the public records file,"[3] and ordered broadcasters to eliminate any procedures that unreasonably hindered access to the file.

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[1] 47 C.F.R. 1.580(d) (1974).

[2] 47 C.F.R. 1.526 (1974).

[3] F.C.C. Public Notice 76880 (November 9, 1971).

To citizen groups the public file is an important and often irreplaceable source of information about local broadcasting. Effective participation in broadcast regulation can require a great deal of data, and without ready access to the public file, citizen groups can be confronted with almost insurmountable problems in appearing before the Commission. Thus, even though the public file is a rarely mentioned and little noticed aspect of public participation, it is hard to overstate its importance in providing critical information for informed citizen participation.

PUBLIC PARTICIPATION IN RULEMAKING

The FCC's Rules and Regulations[1] are an important device in controlling broadcasters. The rules are explicit statements of Commission policy and are supposed to apply uniformly to all parties under the Commission's jurisdiction. The Commission has, for example, issued rules designed to assure a reply to personal attacks,[2] regulate certain network practices;[3] and limit the duplication of programming on AM-FM combinations.[4]

These rules can be changed either on the Commission's own initiative or following an unsolicited suggestion from a broadcaster or member of the public.[5] If the Commission intends to change a substantive rule on its own initiative, it must publish a notice of the proposed rulemaking in the *Federal Register*.[6] Following the

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[1]The rules are contained in Volume 47 C.F.R. (1974). The major broadcast rules can be found in Subpart D of Part 1 and Parts 73 and 74 of 47 C.F.R.

[2]47 C.F.R. 73.123 (1974).

[3]47 C.F.R. Secs. 73.131-73.139; 73.231-73.239; 73-241; 73.658-73.659 (1974).

[4]47 C.F.R. 73.242 (1974).

[5]Rulemaking procedures are controlled by Sec. 4 of the Administrative Procedures Act, 5 U.S.C. 553 (1970), and 47 C.F.R. 1.411-1.427 (1974). Authority entitling an individual to file a petition for rulemaking can be found in 5 U.S.C. 553(e) (1970) and 47 C.F.R. 1.401-1.407 (1974).

[6]Except as provided for in 47 U.S.C. 553(a)(1), (a)(2), (b)(3)(A), and (b)(3)(B) (1970).

notice is a comment period during which members of the public can respond to the proposed rule changes. A reply period follows the comment period, and during this phase individuals may respond to previously filed comments. In some cases, hearings and oral arguments are also held.

After all public comments have been received, the Commission considers its proposed rule change in the light of public response. Thereafter the Commission may decide either not to change the rule at all, modify the rule it initially proposed, or accept the rule as it was initially proposed. If the Commission still desires more information, it may request additional comments by issuing a further notice of proposed rulemaking.

Public Petitions for Rulemaking

When a member of the public suggests a rule change, he typically files a "Petition for Rulemaking" which sets forth "the text or substance of the proposed rule...together with views, arguments, and data deemed to support the action requested."[1] Public notice of the petition is issued, and there follows a period of public comment. After receiving the comments, the Commission considers the proposed rule just as it would a rule change initiated by the Commission.

For example, much of the Commission's activity in the area of children's television can be traced directly to citizen involvement in the rulemaking process. A petition for proposed rulemaking originally filed in February 1970[2] led to a 1974 Commission policy statement designed to "clarify" broadcasters' responsibilities.[3] Over 100,000 letters were received by the Commission, and much of the credit for the Commission's involvement in children's television can be given to the citizen groups who brought the matter to the

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[1] 47 C.F.R. 1.401(c) (1974).

[2] See *Petition of Action for Children's Television (ACT)*, Docket 19142, 28 F.C.C.2d 368 (1971).

[3] See *Broadcasting* 6 (October 28, 1974) and *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1 (1974).

Commission's attention and maintained a constant, vigorous watch over its progress.[1]

Recently the Commission announced its intention of "insuring that a representative cross-section of public interest groups have the opportunity of providing meaningful comments in FCC proceedings."[2] Toward this end, the Commission will issue weekly summaries of major actions, mail these summaries to approximately 270 public interest groups, and invite the participation of those groups in the proceedings. This procedure marks a first for the Commission--a move from passively accepting public involvement in the rulemaking procedure to actively soliciting public participation.

Citizen Protest and the "Raised Eyebrow"

A highly informal but often powerful device for making broadcasters responsive to citizen protest is regulation by the "raised eyebrow"--a form of regulation by innuendo.[3] The raised eyebrow technique involves the cooperation of the Commission and the public in convincing broadcasters that certain steps toward self-regulation are in the broadcaster's own interests. In a typical case of regulation by raised eyebrow, the public may complain to the Commission about certain broadcaster practices. The Commission may find it impolitic or impractical to approach the broadcaster through formal rulemaking or notification channels and may instead indicate a "concern" over the practices through informal means: speeches, staff contacts, published articles, or dicta in opinions.

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[1] Many citizen groups are, however, unhappy with the Commission's decision because it does not adopt any rules firmly regulating children's programming. They also feel the decision is based on arbitrary distinctions and is not strong enough in its stance against some programming practices. See *Broadcasting* 6 (October 28, 1974). The Commission's decision had been appealed to the courts.

[2] F.C.C. Public Notice 53701 (August 7, 1975).

[3] The "raised" or "lifted eyebrow" is a phrase often attributed to Commissioner John Doerfer in his dissent in *Miami Broadcasting Co. (WQAM)*, 14. R.R. 125, 128 (1956).

If the Commission's informal concern is voiced loudly enough, then the broadcasters eventually get the message: either they clean house themselves, or some governmental action may become necessary.[1]

Regulation by raised eyebrow has not passed unnoticed or uncriticized by the courts. Judge David Bazelon has pointed to some of the "realities of the relationship between the Federal Communications Commission and radio licensees:"

> One first notes a pervasive regulatory scheme in which the licensees are dependent on the FCC and the government for their economic well-being. The main threat is, of course, that the government can put a licensee out of business but I suppose that the more pervasive threat lies in the *sub rosa* bureaucratic hassling which the Commission can impose on the licensee, i.e., responding to FCC inquiries, forcing expensive consultation with counsel, immense record keeping and the various attendant inconveniences. Next in rank in potential threats lies government refusal to grant economic and other related benefits which the licensees seek through the legislative or administrative process, such as the recent license renewal bill and the grant of renewal by the Commission without a hearing. For better or worse, a licensee confronted with the choice between an economic disadvantage and pleasing the government through curtailment of a constitutional right will generally choose curtailment. Thus, licensee political or artistic expression is particularly vulnerable to the "raised eyebrow" of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury. Examples of this process are legion [Footnote omitted].[2]

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[1] Glen O. Robinson, before he became a Commissioner, observed that the Commission can wield a great deal of control over an individual licensee since a "letter to the station from the Commission or even a telephone call to the station's Washington attorney... will generally be all that is necessary to bring the licensee around to the Commission's way of thinking..." and that the "practice of informal control over or influence on individual licensee practices is also followed on an industry-wide basis through statements of Commission concern over particular practices or announcements of proposed action." G. Robinson, "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation," 52 *Minnesota Law Review* 67, 119-121 (1967).

[2] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 407 (1975). For a recent discussion of broadcaster

Bazelon's major concern over raised eyebrow regulation is that it provides the Commission with a tool that is powerful and easily abused. A small amount of informal pressure magnified by the raised eyebrow can have a "chilling effect" on all broadcasters and thus allow the Commission to informally achieve an end which, if pursued through usual procedures subject to the review of the courts, could well be found illegal.[1]

The Family Viewing Hour, recently adopted by the National Association of Broadcasters, is an interesting example of how the raised eyebrow can lead to a form of broadcaster self-regulation that would be very difficult for the Commission to impose.[2] The Commission's desire to control sex and violence on TV was no doubt influenced by public complaints directly to the Commission and to Congress. It was reported that Chairman Richard E. Wiley of the FCC "negotiated the first draft of the concept with television network presidents,"[3] and a common view among broadcasters was that the Family Viewing Hour was purely the result of government pressure.[4]

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self-regulation see Note, "The Limits of Broadcast Self-Regulation Under the First Amendment," 27 *Stanford Law Review* 1527 (1975). As other examples of regulation by raised eyebrow; Bazelon pointed to *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, *cert. den.*, 414 U.S. 914 (1973), and *Lee Roy McCourry*, 2 R.R.2d 895 (1964).

[1] *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 423-425 (1975).

[2] The Family Viewing Hour plan commits broadcasters to voluntarily reduce sex and violence in early prime time viewing. See *Broadcasting* 24 (April 14, 1975). For the Commission to impose such rules itself, it would have to engage in a form of content regulation that might well be found unconstitutional. See *Robinson* v. *FCC*, 334 F.2d 534, *cert. den.* 379 U.S. 843 (1964) (Wright, J. concurring in the denial of rehearing *en banc*) and *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 424-425 (1975).

[3] *Broadcasting* 24 (April 14, 1975).

[4] Ibid., p. 25. Reflecting this view is the suit filed by the Writers Guild of America, the Directors Guild of America, the Screen Actors Guild, and various individual writers, producers, and directors alleging that the FCC encouraged the NAB to censor prime time programming in a Commission effort to waive the provision of the First Amendment and Section 326 of the Communication Act which forbids FCC censorship. The suit seeks a preliminary and permanent injunction and asks that

The Commission was understandably sensitive to the issue, and Chairman Wiley claimed the plan was not "government imposed."[1] Despite these protestations of innocence, there can be little doubt that the shadow of the Commission standing in the wings had a powerful effect on the broadcasters. The raised eyebrow seems to be a powerful Commission tool--one that citizen groups may at times persuade the Commission to use.

Complaints and Informal Objections

There are no hard and fast FCC rules for filing complaints against broadcasters.[2] The informality of the complaint procedure adds to its popularity--over 60,000 complaints concerning broadcasting were received by the Commission during its 1973 fiscal year.[3] The Commission will pursue complaints that allege "specific facts sufficient to indicate a substantial violation."[4] In most cases, the Commission limits its investigation to correspondence with the station, but in some rare instances it will initiate a field inquiry. If as a result of the complaint the staff finds a violation, it may ask the Commission to impose a forfeiture or require some form of remedial action by the station.

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the Commission be enjoined from taking any action against stations that do not comply with the family viewing hour. See *Broadcasting* 25-26 (November 3, 1975).

[1] *Broadcasting* 26 (April 14, 1975).

[2] Four types of complaints do, however, require special procedures or information: (1) Equal Time complaints (see 47 U.S.C. 315 (1970); 47 C.F.R. 73.120; 24 F.C.C.2d 832 (1970); 34 F.C.C.2d 510 (1972); and "Use of Broadcast and Cablecast Facilities by Candidates for Public Office" (F.C.C. Publication); (2) Fairness Doctrine complaints (see Fairness Report, 39 Fed. Reg. 26372 (1974)); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964), and "Everything You Always Wanted to Know About Fairness Doctrine Complaints," 10 Access 9 (1970); (3) Personal Attack complaints (see 47 C.F.R. 73.123 (1974)); and (4) Political Editorials (see 47 C.F.R. 73.123 (1974)). For a helpful overview of complaint procedures, see "Public and Broadcasting," rev. ed., Procedure Manual, 39 Fed. Reg. 32288, FCC 74-942 (September 5, 1974).

[3] "Public and Broadcasting," 39 Fed. Reg. 32288 (1974).

[4] Ibid., p. 32289.

Whereas complaints need not be related to the licensing of a broadcaster, informal objections must reflect on the broadcaster's ability to serve the public interest, convenience, and necessity.[1] If the objection doesn't raise a substantial public interest question, it is dismissed by the staff and the complainant is notified. If a substantial public interest question is raised, the matter is investigated, and the outcome of the investigation will reflect on the broadcaster's qualifications for renewal.

CITIZEN PARTICIPATION IN LICENSING AND APPEALS TO THE COURTS

Broadcasters do not occupy their frequencies as a property right in the same sense that railroads may own rights of way, that corporations may own factories, or that individuals may own their homes. Broadcasters are granted temporary licenses to transmit over their assigned frequencies. These licenses are assigned by the FCC, and each broadcaster must apply for a license renewal every three years.[2]

Broadcast licenses are not renewed in a single triannual burst of activity by the FCC. The Commission has staggered the renewal process so that every two months a new group of licenses come up for renewal. Licenses are grouped by state, and the Commission considers all licenses in a state or in a group of states at the same time. The Commission has specified the dates each state's licenses come up for renewal and has set time deadlines for filing renewal applications and formal citizen protest to those applications.[3]

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[1] See 47 C.F.R. 1.587 (1974) and "Public and Broadcasting," 39 Fed. Reg. 32288, 32291 (September 5, 1974).

[2] Section 307(d) of the Communications Act states that "No license granted for the operation of a broadcasting station shall be for a longer term than three years.... Upon the expiration of any license, upon application therefore, a renewal of such license may be granted from time to time for a term not to exceed three years...if the Commission finds that public interest, convenience, and necessity would be served thereby."

[3] See 47 C.F.R. 73.34, 73.218, 73.518, and 73.630 (1974). Licensees must, however, file their renewal applications at least four months before their license renewal date. Petitions to deny in response to a timely filed application must be filed at least a

It is at the time of renewal, when broadcasters must demonstrate they have acted in the public interest, that citizen groups often find the Commission most receptive and the broadcaster most sensitive to their complaints.

The Petition to Deny

The petition to deny is specifically authorized by Sec. 309(d) of the Communications Act.[1] The Act provides that "[A]ny party in interest may file with the Commission a petition to deny any application...The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity."[2]

Once a petition is filed it must be examined by the Commission, and if the Commission "finds on the basis of the application the pleadings filed or other matters which it may officially notice that there are no substantial and material questions of fact," then the Commission shall grant the license, deny the petition, and "issue a concise statement of the reasons for denying the petition." The statement must "dispose of all substantial issues raised by the petition."[3]

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month before the renewal date of the station against which the petition is lodged. If a station fails to meet its deadline for filing an application, then petitions to deny may be accepted up to 90 days after the Commission has given public notice of its acceptance of the late application (see 47 C.F.R. 1.516(d)(1) (1974)). If a petition is filed past the appropriate deadline, it is treated as a complaint unless the Commission grants a waiver. The Commission's policy with regard to waivers has, however, been described by some as becoming increasingly strict as the number of petitions filed increases. See Albert H. Kramer, "An Argument for Maintaining the Current FCC Controls," 42 *George Washington Law Review* 93 n. 27 (1973).

[1] 47 U.S.C. 309(d) (1970).

[2] 47 U.S.C. 309(d)(1) (1970). Until 1966, the Commission refused to recognize citizen groups as parties in interest. For a description of the events that took place in 1966 and led to the Commission's acceptance of citizen groups as parties in interest, see pp. 35-39 below.

[3] 47 U.S.C. 309(d)(2) (1970).

If, on the other hand, the Commission does find a substantial and material question of fact as to the ability of the licensee to serve the public interest, then the Commission must designate the license for a hearing.[1] Thus, a petitioner does not automatically gain a hearing as a matter of right; a petitioner must first convince the Commission of substantial and material doubts as to the licensee's qualifications before the license can be designated for hearing.

But what does it take to raise a substantial and material question of fact sufficient to throw a broadcaster into a hearing? Some critics of the FCC would argue that only ironclad evidence of the most venal sin could force the Commission to throw a petition into hearing, and once the petition is placed in hearing, only the voice of God could move the Commission to actually deny renewal of a broadcaster's license.[2] Nevertheless, parties continue to file petitions, and licensees continue to take the threat of revocation and the cost associated with hearings very seriously.

Some factors that may convince the Commission that a broadcaster deserves to be thrown into hearing are evidence of misrepresentation to the Commission,[3] trafficking in broadcast licenses,[4] evidence of a serious offense or involvement in questionable business practices,[5] evidence of excessive concentration of ownership,[6]

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[1] Ibid.

[2] In the 39 years from 1934 to 1973 the Commission has reviewed tens of thousands of license applications and has revoked only 65. 39 *FCC Annual Report* 222 (1973).

[3] *Robinson* v. *FCC*, 334 F.2d 534 (D.C. Circ.) *cert. den.*, 379 U.S. 843 (1964).

[4] *Richard B. Gilbert*, 19 R.R. 574 (1960).

[5] *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28 (D.C. Cir. 1950), and *Fraudulent Billing Practices*, 6 R.R.2d 1540 (1965).

[6] For some of the FCC's rules as to ownership of broadcast properties, see 47 C.F.R. 73.35(b), 73.240(b), 73.636(b) (1974), and for the Commission rules as to multiple ownership and cross-ownership of newspapers and broadcast stations, see *In the Matter of Amendment of Sections 73, 35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard FM and Television Broadcast Stations*, 22 F.C.C.2d 339 (1970), and *Second Report and Order*, 50 F.C.C.2d 1046 (1975).

a violation of the Commission's equal employment opportunity rules,[1] or an abdication of licensee responsibility for the material broadcast over his station.[2] But unless a petitioner can come forward with evidence of such specific violations of established Commission rules and policies, the chances of placing a licensee in hearing are extraordinarily slim. Dean Burch, former chairman of the FCC, actually described the public interest requirement in a renewal case as nothing very rigorous, as just "sliding by."[3]

But should the petitioner succeed in reaching the hearing stage, he would still have to go through a full-fledged Commission hearing before a broadcaster's license could be revoked,[4] and if the license is revoked the broadcaster would be able to appeal the Commission's decision to the courts.[5] If the courts uphold the Commission, then the Commission's action in revoking the broadcaster's license becomes final, the frequency becomes vacant, and the Commission sets off on a search for a new occupant for the new silent frequency.

Prosecuting a petition to deny through its entire course can obviously be a tedious and costly affair for all involved. To avoid the cost and delay that is inevitable in seeing the petition to deny through to its completion, broadcasters and petitioners often attempt to settle their grievances without invoking full Commission process. This process of petition and settlement is explored in later chapters of this report.

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[1] See 47 C.F.R. 73.125(a), 73.301(a), and 73.680(a) (1974).

[2] See *Report and Statement of Policy Re: En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7295 (1960) and the Commission's rules as to network affiliation contracts: 47 C.F.R. 73.131, 73.135, 73.231, 73.235, and 73.658(a), (e) (1974).

[3] *Hearings on Broadcast License Renewal Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce*, 93d Cong. 1st Sess., Sec. 93-95, Pt. 1, 61 (1973), "Testimony of Dean Burch."

[4] 47 U.S.C. 309(e) (1970).

[5] See pp. 24-26 below for a description of the appeals process.

Competing Applications

The strongest challenge that can be mounted against an incumbent broadcaster is a mutually exclusive application for the broadcaster's frequency. Unlike in a petition to deny--in which the challenger asks the Commission to revoke the broadcaster's license and search for an appropriate licensee--in a competing application the challenger asks the Commission to depose the incumbent and grant the license directly to the challenger. The courts have ruled that a full comparative hearing is required for all competing applications.[1] Thus, a party who files a competing application is guaranteed a hearing as a matter of right, whereas a party who files a petition to deny must first demonstrate the existence of substantial and material questions of fact.

Not only are the requirements for a hearing different in petition to deny and competing application situations, but the public interest test applied to a licensee facing a competing application is stricter than the test applied to a licensee defending against a petition to deny. Although the public interest test in a competing application context is stricter, that does not mean it is any better defined than the weaker petition to deny standard.

Prior to 1970 the standard evolved on a case-by-case basis.[2] A major question was whether an incumbent deserved special treatment

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[1] *Ashbacker Radio Corp.* v. *U.S.*, 326 U.S. 327 (1945).

[2] See *Hearst Radio, Inc. (WBAC)*, 15 F.C.C. 1149 (1951); *Hearst Radio Inc.* v. *FCC*, 167 F.2d 225 (D.C. Cir. 1948); *Seven League Productions, Inc. (WIII)*, 1 F.C.C.2d 1597 (1965); *RKO General, Inc. (KGJ-TV)*, 5 F.C.C.2d 517 (1966); and the chain of cases leading up to the revocation of WHDH's license: *WHDH, Inc.*, 22 F.C.C. 767 (1957); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 261 F.2d 55 (D.C. Cir. 1958); *WHDH, Inc.*, 29 F.C.C. 204 (1960); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 295 F.2d 131 (D.C. Cir.), *cert. den.*, 366 U.S. 918 (1961); *WHDH, Inc.*, 33 F.C.C. 449 (1962); *WHDH, Inc.*, 25 R.R. 78 (1963); *WHDH, Inc.*, 16 F.C.C.2d 1 (1969); *WHDH, Inc.*, 17 F.C.C.2d 856 (1969); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971); *WHDH, Inc.*, 33 F.C.C.2d 432 (1972). (The length of this list of citations is an indication of how complex a hearing process can become.) For a narrative description of the WHDH case, see H. Geller, "The Comparative Renewal Process in Television: Problems

simply because he already occupied the frequency. The Commission was clearly willing to use incumbency for its probative evidentiary value, i.e., a broadcaster's past performance is a valid indicator of his ability to serve the public interest in the future, but it was uncertain whether that would be the full extent of the Commission's use of incumbency, or whether it would come to have a positive, substantive impact in the hearing process.

Then in 1970 the Commission issued a policy statement aimed at defining the standards to be applied in a comparative renewal.[1] According to that policy statement, a broadcaster would be entitled to renewal if "its program service...has been substantially attuned to meeting the needs and interests of its area."[2] In order for a challenger to be entitled to a comparative evaluation, the challenger would have to demonstrate that the broadcaster's past service was not substantial.

Because the concept of "substantial service" was vague and ill-defined, the Commission issued a Notice of Inquiry designed to elicit suggestions as to how to make the standard more precise.[3] But before the Commission could get its inquiry off the ground, the Court struck down the policy statement as a violation of the challenger's right to a hearing:[4] the Court read the law as requiring a full comparative hearing irrespective of the prior showing.[5]

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and Suggested Solutions," 61 *Virginia Law Review* 471, 478-483 (1975), and Comment, "The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?," 118 *University of Pennsylvania Law Review* 368 (1970).

[1] *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970).

[2] 22 F.C.C.2d 424, 425 (1970).

[3] *In Re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Notice of Inquiry*, 27 F.C.C.2d 580 (1971).

[4] *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

[5] This was an application of the Ashbacker doctrine. See p. 22 above.

Although the Court's decision has been criticized as a misreading of the Commission's policy statement,[1] its effect still stands, and a full comparative hearing is required. Equally important, the Commission has never completed its rulemaking, although encouraged to do so by the Court. Thus it remains without a definitive statement of policy and is in the same situation in which it found itself before 1970: dealing with competing applications without the guidance of objective standards.[2]

Appealing Commission Decisions to the Courts

The FCC does not always have the final say in licensing matters. After the Commission has issued a final order resolving a petition to deny or a competing application, either party may appeal the Commission's decision to the U.S. Court of Appeals for the District of Columbia.[3]

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[1] See Geller, op. cit., pp. 471, 486-487, where the Court is criticized for (a) misreading the Commission's definition of substantial service, and (b) falling prey to the same definitional problem for which the Commission was criticized--a vague definition of the incumbent's required public service showing.

The Commission itself claimed the Court misread its substantial service requirement as meaning minimal service. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 31 F.C.C.2d 443 (1971).

[2] For an analysis of two comparative renewal cases which the Commission decided during this period--*Moline Television Corp.*, 31 F.C.C.2d 263 (1971), and *RKO General, Inc. (KGJ-TV)*, 44 F.C.C.2d 123 (1973)--see Geller, op. cit., pp. 489-496.

[3] 47 U.S.C. 402(b) (1970). Declaratory rulings and rulemaking procedures can also be appealed to the Court. See *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 372-373 n. 3 (1969). Some Commission decisions may be appealed to courts other than the Court of Appeals for the District of Columbia. See 47 U.S.C. 402(a) (1970) and 28 U.S.C. 2343(1) (1970). Policy statements are not clearly "final orders" of the Commission, and it seems they can be appealed only if the courts find they are "ripe for review." The precise definition of ripeness is unclear, but one court has described it as "the fitness of issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). For further consideration of the "ripeness" issue, see *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1205 (D.C. Cir. 1971).

In appealing a case from the Commission to the Court, the parties can only raise issues that have already been presented to the Commission--the parties cannot expand the scope of the case to include issues on which the Commission has not had an opportunity to pass.[1] If an issue has not been considered by the Commission, the Commission must be given an opportunity to consider it prior to its coming before the Court.[2]

Furthermore, the scope of the Court's review is limited even when an issue has been fully considered by the Commission. The Court will "defer to the experience and expertise of the Commission within its field of specialty and [will] reverse only when the Commission's position is arbitrary, capricious or unreasonable."[3] And as to the Commission's interpretation of its own statutory authority, the Supreme Court has held that such interpretations "should be followed unless there are compelling indications that it is wrong."[4]

The right of judicial review is available to any person "who is aggrieved or whose interests are adversely affected" by a broadcast licensing decision.[5] Evidently this includes the parties filing a petition or a competing application. Furthermore, the Communications Act allows for intervention by any "interested person,"[6] so a party who has not been involved in Commission proceedings may be able to

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[1] 47 U.S.C. 405 (1970) provides that the "filing of a petition for rehearing shall not be a condition precedent to judicial review of any...decision...except where the party seeking such review... relies on questions of fact or law upon which the Commission...has been afforded no opportunity to pass." For an application of this provision, see *Office of Communication of the United Church of Christ* v. *FCC*, 465 F.2d 519, 523-524 (D.C. Cir. 1972).

[2] For example, in *Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204, 206-207 (D.C. Cir. 1956), *cert. den.* 76 S. Ct. 650 (1956), the appellant attempted to raise a new issue, and the Court refused to consider it.

[3] *West Michigan Telecasters, Inc.* v. *FCC*, 396 F.2d 688, 691 (1968), as cited in *Stone* v. *FCC*, 406 F.2d 316 (D.C. Cir. 1972).

[4] *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969).

[5] 47 U.S.C. 402(b)(6) (1970).

[6] 47 U.S.C. 402(e) (1970).

enter a case after it has been appealed to the courts.[1] A party who has not participated in the Commission's decisionmaking process may, however, have great difficulty raising a Commission decision for review.[2]

BUDGETING CITIZEN GROUP RESOURCES

No individual or group of individuals can devote limitless resources to attempts to influence the direction of broadcasting. Consequently, citizen groups must apply some discretion in allocating their resources so that they have the maximum desired effect on the Commission.

Ideally, a citizen group will budget its resources so that the first project it undertakes will be the one that is most cost effective, i.e. the one likely to yield the greatest possible return for the energies invested. To a citizen group the perceived cost effectiveness of a project depends on the likely outcome of the project and the cost of participation. The "likely outcome" of a project is a function of the probability of success (in the case of a petition

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[1] But there is no guarantee that every party to every Commission proceeding has a right to appeal. There may be legal limitations on standing before the courts that do not apply before the Commission. See *Sprunt & Son* v. *United States*, 281 U.S. 249 (1930). Note also that the Supreme Court has held that standing to appeal under the Administrative Procedures Act is available where a party alleges that an interest "arguably within the zone of interest to be protected or regulated" by the Commission has been adversely affected (*Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). For further consideration of the question of standing, see *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); E. Gellhorn, "Public Participation in Administrative Proceedings," 81 *Yale Law Journal* 359 (1972) and pp. 35-39 below.

[2] 47 U.S.C. 405 (1970). The party could file a petition for rehearing and thus become eligible to raise the issue for judicial review, but the Commission is of the opinion that in order to form adequate grounds for review, a petition for reconsideration must state the petitioner's grievance with particularity and demonstrate a good faith cause for failure to participate in earlier proceedings. 47 C.F.R. 1.106(b) (1974). The Commission's opinion is not, however, binding on the courts, and the courts may well review an action even though the Commission claims that a valid petition for rehearing must first be filed. See *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (1971).

for rulemaking, it would be the probability of the Commission adopting the proposal rule or a similar rule) and the value that the citizen group attaches to success (in the case of a petition for rulemaking, it would be the importance of having the Commission adopt the proposed rule or a similar rule). But a project with a very attractive likely outcome may be so expensive to undertake that citizen groups may either lack the necessary resources, or discover that they can accomplish more by undertaking a larger number of less expensive projects whose overall outcome is likely to be more cost effective than the outcome of the single expensive project.

Consequently, citizen groups cannot look to the probability of success alone in determining how they will attempt to influence broadcasting. They must also look to the costs of participation and make choices that appear most cost effective. After the most attractive project is selected, the citizen group should then turn to the next most cost effective project and proceed until its budget is exhausted. This process describes an optimal decision rule for a citizen group.

Both the cost of participation and the likelihood of success are under the Commission's control. The cost of participation may be affected by Commission rules as to the need for filing multiple copies, the high costs of transcripts,[1] and the strength of the evidentiary showing needed to prevail at the hearing, to throw a petition into hearing, or to convince the Commission to adopt a new rule. The likelihood of success is clearly a function of Commission policy and attitudes toward the type of petitions, applications, complaints, and proposals for rulemaking that citizen groups typically file.

Thus, if citizen budgets remain constant and Commission policy and the cost of appearing before the Commission remain constant but

[1] See Gellhorn, op. cit., pp. 359, 391-393, for a discussion of multiple copy rules, transcript costs, and various means of reducing these costs.

for a single mechanism that becomes more expensive, then citizen groups can be expected to reallocate their resources so as to use less of the more expensive mechanisms and more of the other, now less costly mechanisms. Similarly, if the Commission adopts a new, hard line toward a form of citizen participation, but keeps the costs of participation constant, then energies will be diverted to other forms where the likelihood of success is greater. So should the Commission decide to make one form of citizen participation relatively unattractive--either by increasing costs or decreasing the likelihood of success--then, unless citizen groups cut back on their budgets, the result will be to increase citizen participation through other channels.

The courts have virtually ensured the existence of at least some nontrivial means of citizen participation at the Commission. "[T]he Congressional mandate of public participation" is not limited "to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims or to mere non-participating appearances at hearings."[1] But at the same time, the courts have allowed the Commission wide latitude in shaping the form of that participation. "The Commission should be accorded broad discretion in establishing and applying rules for such public participation."[2] Furthermore, the courts have also noted that "the expense of participation in the administrative process" is "an economic reality which will operate to limit the number of those who will seek participation,"[3] thus by implication recognizing the Commission's ability to ration access to its own processes through the cost of proceedings.

The ability to ration between alternative means of citizen participation is not, however, the same as the ability to curtail overall

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[1] *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1004 (D.C. Cir. 1966).

[2] Ibid., pp. 1005-1006.

[3] Ibid., p. 1006. For a further discussion of legal rules as rationing devices, see K. Scott, "Standing in the Supreme Court--A Functional Analysis," 86 *Harvard Law Review* 645 (1973).

citizen participation. The Commission's ability to achieve the former is much greater than its ability to achieve the latter. Consequently, the Commission should realize that attempts to make certain forms of participation unattractive may simply result in greater demands for participation through other forms, and may not really result in a significant reduction of the overall citizen involvement in Commission affairs.

The implications of this observation are rather straightforward. The Commission has the opportunity to make participation more or less expensive and more or less likely to satisfy citizen group demands. Should the Commission either make participation more expensive or less likely to lead to satisfactory results for citizen groups, then there might be a tendency to believe that citizen participation will automatically diminish. Unless there are other changes in citizen group budgets or priorities, the preceding analysis demonstrates that such a conclusion would be incorrect: citizen participation might be redirected to other forms of participation and involvement, but its overall intensity would not necessarily decline. The chapters that follow consider alternative Commission policies as to citizen participation in the petition to deny and settlement process.

CAPSULE SUMMARY

Citizen groups can attempt to influence broadcasting (1) by approaching broadcasters directly; (2) by becoming involved in the Commission's rulemaking procedures; or (3) by entering the Commission's license renewal proceedings. Direct contact between broadcasters and the public is facilitated by the Commission's ascertainment process, public announcements by broadcasters that describe their duties and obligations to the community, and by the public file which must contain information describing the station's operations. Rulemaking proceedings can either be initiated by the Commission, or they may result from citizen suggestions. In either case the public has the right to comment on the proposed rule. Citizen groups can also participate in the Commission's licensing procedure by filing petitions

to deny or competing applications. In many instances a citizen group can appeal a final Commission decision to a federal court for judicial review.

III. GROWTH OF THE CITIZEN SETTLEMENT AND THE PETITION TO DENY

A citizen settlement is an agreement between a broadcaster and a citizen group in which the broadcaster makes certain assurances to the citizen group with regard to the operation of his station. In return for these assurances the citizen group agrees either to withdraw a formal complaint from before the Commission or not to file a formal complaint with the Commission. There is no formula or set procedure for citizen groups and broadcasters to follow in reaching a citizen settlement. Consequently, there are practically as many different ways of arriving at a citizen settlement as there are settlements.

Although individual settlements may differ widely in their terms and in the negotiating strategies leading up to their signing, two general patterns account for the majority of citizen settlements. The first can be described as a "pre-filing" settlement, and the second as a "post-filing" settlement.

In negotiations leading to a pre-filing settlement, the citizen group and the broadcaster typically engage in a series of conversations with either the tacit or explicit understanding that should the negotiations fail, the citizen group will file a formal complaint against the broadcaster. The complaint could conceivably take the form of either a petition to deny or of a competing application, but since most citizen groups lack the financial ability and technical expertise necessary to mount a credible competing application, by far the most frequently used form of complaint is the petition to deny. If negotiations are successful, the citizen group does not file a petition with the Commission and the broadcaster formalizes his understanding with the citizen group either through (1) an amendment to a license renewal application already filed with the Commission, (2) a change in an application yet to be filed with the Commission, or (3) a signed understanding between the parties to the settlement.

In the case of a pre-filing settlement, the Commission itself may never be aware of the fact that a broadcaster and a citizen group have reached a settlement. The Commission will be totally unaware of an agreement's existence if the settlement is cast in terms of a change in renewal applications which the Commission hasn't yet seen; or if the agreement results in an amendment to an application already before the Commission but the cause of the amendment is not identified for the Commission; or if a private understanding is signed but simply not brought to the Commission's attention. Evidently the fact that an agreement may be reached but never brought to the Commission's attention creates potentially serious problems for any Commission attempt to control and monitor agreements.

Post-filing settlements occur after the citizen group has filed a petition to deny with the Commission. Many petitions to deny were initially filed because early negotiations failed, i.e., a pre-filing settlement could not be reached so the citizen group filed a formal complaint. In a typical situation, negotiations continue even though a petition has been filed. Once an understanding is reached, the broadcaster files the agreement with the Commission as an amendment to its license application. The citizen group then files a motion for the withdrawal of its petition and urges the Commission to expeditiously grant the broadcaster's license.

Whereas pre-filing settlements may escape notice by the Commission, it is virtually impossible to conceal a post-filing settlement. If a broadcaster facing a petition to deny amends his renewal application and then the petitioners file a motion for withdrawal of their petition to deny, the Commission will infer that the changes in the application are consideration for the withdrawal of the petition and that a settlement has been reached.[1] The only way to avoid Commission notice of an agreement would be to cast it in terms of a private understanding between the broadcaster and the citizen group and have the citizen group withdraw its petition with

[1] The Commission has engaged in such inferences on numerous occasions. For a recent example, see *Letter to Frank Lloyd (KTTV)*, FCC 75-1028 (September 9, 1975), 3; and p. 123 below.

no action on the broadcaster's part that could be interpreted as quid pro quo for the agreement.

A further consideration in post-filing agreements is the fact that the Commission's staff may decide to pursue an investigation of a broadcaster's qualifications in spite of a request by a citizen group to withdraw its petition to deny.[1] If the Commission pursues an independent investigation, then the broadcaster may actually gain nothing from the citizen group's agreement to withdraw its petition. Thus, it may occur that broadcasters really receive little effective consideration from the withdrawal of a petition, in spite of having agreed to a settlement.

Figure 1 describes the flow of negotiations and Commission action leading to a citizen settlement and following Commission notice of that settlement. The flow begins with a citizen group complaint [1] that may be first taken to the broadcaster [2] or taken directly to the Commission [3]. If taken to the broadcaster, a pre-filing settlement with no Commission notice may result ([5] and then [10]). Alternatively, the Commission may receive notice of the settlement, and then the settlement may be reviewed by the Commission ([5] and then [7]).

If a pre-filing settlement is not reached, whether or not the citizen group has first approached the broadcaster, a petition to deny may be filed [3]. If the petition is not first dismissed by the Commission [4], a settlement may be reached [6] and the Commission either may [7] or may not [15] get notice of the settlement. If the Commission does get notice, it may either reject [8] or approve [9] the settlement. If the settlement is rejected, the

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[1] A recent case involving a settlement and Broadcast Bureau opposition to a citizen group motion for withdrawal of a petition and request for grant of an application without hearing involved WACT in Tuscaloosa, Alabama. There the Broadcast Bureau is opposing the citizen group's request and seeks to prosecute on its own initiative because it feels that substantial issues remain unresolved. See *In Re Application of New South Radio, Inc.*, Broadcast Bureau's Opposition to Joint Request for Grant of Application without Hearing, Docket 20463 (August 15, 1975).

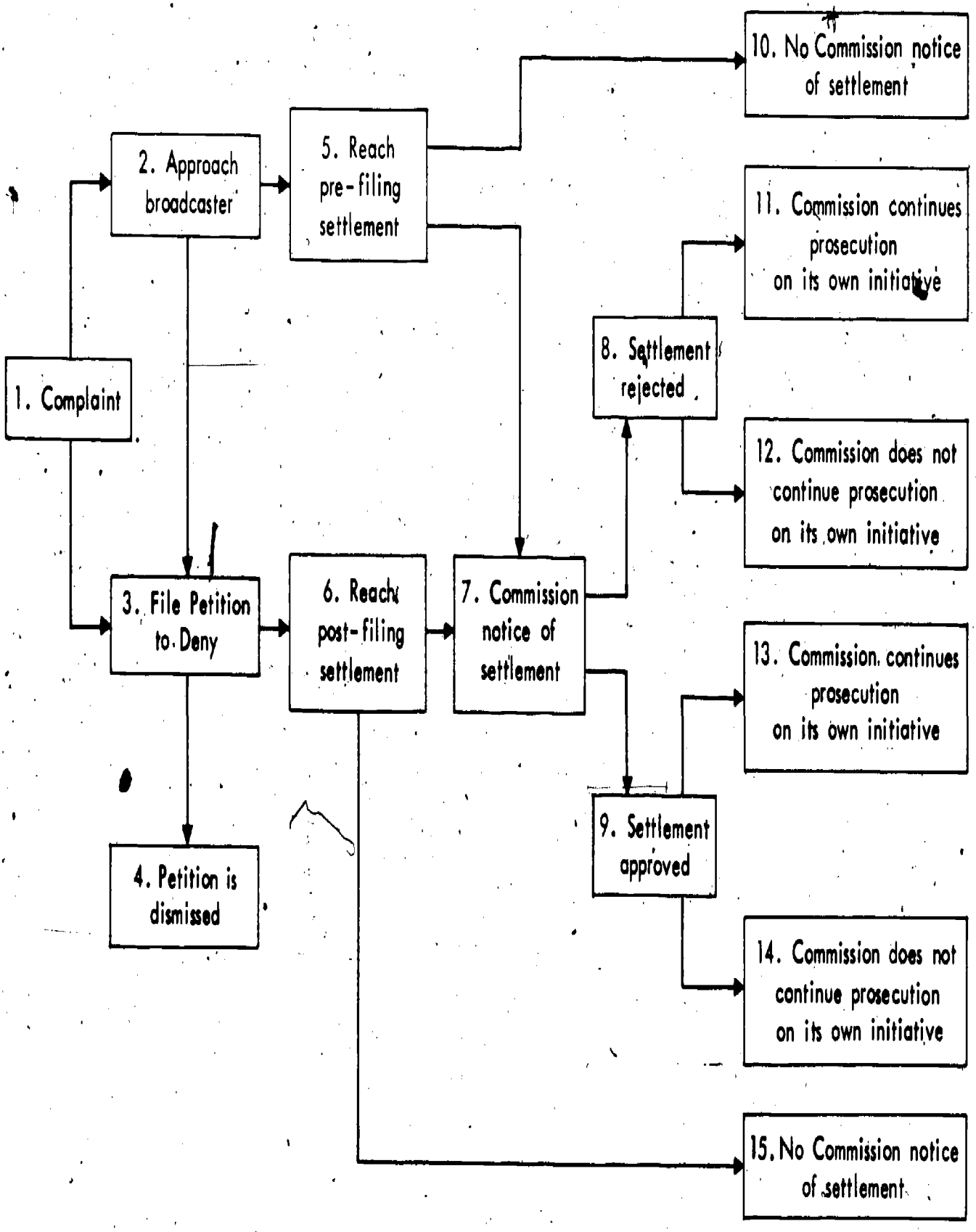

Fig. 1—Flow of events leading up to and following the signing of a citizen settlement

Commission may decide either to continue the prosecution on its own initiative [11] or it may just let events between the broadcaster and citizen group run their course [12]. And if the settlement is approved, then the Commission still has the option of prosecuting on its own initiative [13] or of letting events run their course [14] which would probably mean dismissing the petition and allowing the renewal.

Thus, there are six possible relations between the Commission and a settlement. In two ([10] and [15]), the Commission is unaware of the settlement's existence. In the remaining four, the Commission may either approve or reject the agreement and an independent Commission investigation may or may not be initiated ([11], [12], [13], and [14]).

A HISTORY OF SETTLEMENTS

The process of citizen settlements as just described is relatively young. The "birth" of settlements can be traced to March 25, 1966, when the U.S. Court of Appeals for the District of Columbia Circuit handed down its decision in *Office of Communication of United Church of Christ* v. *FCC*[1] (hereinafter cited as *UCC* I). That case decided the question of citizen group standing in the license renewal process and for the first time allowed citizen groups to formally enter the licensing process before the Commission.

Standing

Standing is a legal term that describes whether a party is permitted to enter a proceeding: a party granted standing by the courts may enter, whereas a party without standing has no grounds on which to enter the proceedings. In the context of a private two-party suit, the Supreme Court has explained that the purpose of allowing a third party to intervene is to prevent a "failure of justice."[2] Although license proceedings before the FCC are to be

[1] 359 F.2d 994 (D.C. Cir. 1966).

[2] *Krippendorf* v. *Hyde*, 110 U.S. 276, 285 (1884).

guided by the public interest and are therefore never purely private legal encounters, the Supreme Court's maxim that standing is appropriately granted when a "failure of justice" would result if standing were denied is nonetheless appropriate in the context of FCC proceedings.

In *UCC* I, standing was described as a "practical and functional" concept "designed to insure that only those with a genuine and legitimate interest can participate in a proceeding."[1] Prior to *UCC* I, the Commission granted standing in license renewal proceedings only to parties complaining either of transmission interference[2] or of economic injury.[3] Persons who were not threatened with transmission interference or economic harm as a result of a licensing decision did not have a genuine and legitimate interest in the Commission's eyes. Since citizen groups had no occasion to complain of interference or economic injury, standing before the Commission was effectively limited to broadcasters who could make such claims. Consequently, renewal battles were fought strictly between broadcasters and other commercial interests, with citizen groups left on the sidelines.

In *UCC* I the Court expanded standing before the Commission to include responsible representatives of the listening and viewing audience.[4] The Court realized that expanding standing to include citizen groups would not be viewed as an unmixed blessing: although on one hand the Court noted the special value of public participation before the FCC,[5] it also recognized the possible dangers of encouraging

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[1] 359 F.2d 994, 1002.

[2] See *NBC* v. *FCC (KOA)*, 132 F.2d 545 (1942), aff'd, 319 U.S. 239 (1943).

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

[4] The Court left to the Commission the task of determining who was and who was not a responsible representative competent to represent the interests of the station's audience. The Court suggested that the Commission use its statutory rulemaking powers to further refine the definition of standing. 359 F.2d 994, 1005-1006.

[5] 359 F.2d 994, 1004-1005.

"spurious petitions from private interests not concerned with the quality of broadcast programming" who "may sometimes cloak themselves with a semblance of public interest advocates."[1] On the balance, however, the Court felt the benefits of public participation outweighed the dangers of abuse and that the Commission was competent to control access to its own petitioning, hearing, and decisionmaking procedures so as to insure responsible representation of audience interests.[2]

Aside from serving a jurisprudential purpose, standing also serves a rationing function. As standing is granted to more litigants, the right of access to the courts is expanded and the volume of litigation can be expected to increase. As standing is restricted, the rights of access are narrowed and the volume of litigation can be

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[1] 359 F.2d 1006.

[2] The Court did, however, offer some examples of parties the Commission might find qualified to enter licensing proceedings. The examples cited by the Court were "community organizations (such as) civic associations, professional societies, unions, churches, and educational institutions or associations..." 359 F.2d 994, 1005.

Although the Court allowed the Commission great discretion in fashioning standing requirements, the FCC has not articulated a coherent policy as to standing. Most refinements in standing criteria have come largely through the courts as a result of appeals from the Commission's ad hoc procedure.

That a single individual could have standing as "a representative of the listening public" was decided in *Joseph* v. *FCC*, 404 F.2d 207, 210 (D.C. Cir. 1968). Furthermore, in *Hale* v. *FCC*, 425 F.2d 556 (D.C. Cir. 1970), standing was granted to individual residents of the licensee's service area. Thus, sheer numbers alone may not be dispositive of representativeness when it comes to determining standing.

Whether residence in the area of service is an important factor for standing purposes is as yet somewhat unclear. In *Martin-Trigona* v. *FCC*, 432 F.2d 682 (D.C. Cir. 1970), it was intimated that residence may be a factor, but the result of that case can be explained on other grounds--the issues raised in a licensing context were better posed as matters for a rulemaking. In *Alabama Educational Television Commission*, 24 R.R.2d 248 (1972), however, the Commission held that it was not necessary that a party be a resident of the community served by the licensee. In the *Alabama Educational* case the Commission determined that as long as the intervenor's participation would promote the public interest, residence in the service area was not a prerequisite for standing.

expected to decline.[1] The ability of the Commission to use standing and other procedural tools as rationing devices was implicitly recognized by the Court.[2] But rather than control access to Commission process by limiting the rights of particular individuals to appear before the Commission, the Commission seems to have decided to restrict the types of issues that may validly be raised in licensing procedures[3] and to increase the strength of the evidentiary showing a petitioner has to make in order to throw a broadcaster into hearing. The courts have noted and reaffirmed the Commission's wide discretion in setting the standards necessary for a hearing as result of a petition to deny.[4] And as to the subject matter that may warrant review of a petition through a hearing, the Commission has repeatedly required very strong showings in the areas of concentration of control, employment discrimination, and ascertainment.[5] The effective result of these policies has been to limit renewal hearings to specific instances of licensee misconduct or to especially egregious violations of Commission policy.

Along with standing to appear in license renewal procedures came what later turned out to be a more powerful--although procedurally similar--tool: standing to challenge the transfer of a

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[1]See K. Scott, "Standing in the Supreme Court - A Functional Analysis," 86 *Harvard Law Review* 645, 670-683 (1973).

[2]359 F.2d 994, 1004-1006.

[3]In two cases the courts have aided the Commission by deciding that certain issues are more appropriately dealt with in rulemakings than in license proceedings. See *Martin-Trigona* v. *FCC*, 432 F.2d 682 (D.C. Cir. 1970) and *Hale* v. *FCC*, 425 F.2d 556, 560-566 (D.C. Cir. 1970). In both cases the petitioner attempted to raise issues related to the concentration of media control.

[4]The statutory basis can be found in 47 U.S.C. 309(d) (1970) and was interpreted, for example, in *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972).

[5]For an analysis of Commission policy in these areas, especially in light of *Stone* v. *FCC*, 406 F.2d 316 (D.C. Cir. 1972), see "The Federal Communications Commission: Fairness, Renewal and the New Technology," 41 *George Washington Law Review* 683, 691-697 (1973).

broadcast license.[1] Broadcasters are sensitive to citizen group opinions at license renewal time, but when broadcasters seek to transfer their licenses, citizen groups have the ability to delay multimillion dollar transactions for months through the filing of petitions. Not surprisingly, broadcaster sensitivity to citizen opinion can be magnified when a multimillion dollar transaction hangs immediately in the balance.[2] The pattern outlined for petitions to deny in Fig. 1 is also applicable to petitions opposing transfers.

The First Settlement and Its Repercussions

In August 1968, KCMC, Inc., the licensee of KTAL-TV in Texarkana, Texas, filed an application for renewal of its license. On January 12, 1969, local citizen groups aided by the Office of Communications of the United Church of Christ filed a petition to deny KTAL's license. The citizens alleged that KTAL had failed to survey a single leader of Texarkana's black community as part of its ascertainment study, even though approximately 26 percent of Texarkana's community was black. Furthermore, the citizens charged that KTAL had failed to adequately serve Texarkana--KTAL's city of license--because of inconvenient placement of color origination equipment and failure to respond to citizen inquiries.[3]

While the petition was still pending before the Commission, KTAL and the local citizen groups embarked on a series of negotiations

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[1] 47 U.S.C. 310(b) (1970) states that "No...station license... shall be transferred...except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." Just as citizen groups can petition an application for renewal, they can petition an application for transfer.

[2] For an example of citizen participation in a transfer, see the description of citizen involvement in the Capital Cities sale, pp. 43-48 below.

[3] The Commission noted that none of these charges were effectively refuted (*KCMC, Inc.*, 19 F.C.C.2d 109 (1969)). Other charges included discriminatory advertising, inadequate local programming, inadequate news coverage, and equally discriminatory programming practices. See 19 F.C.C.2d 109, 112-113 (Commissioner Lee, concurring).

which resulted in a citizen agreement. On June 8, 1969, KTAL filed the agreement with the Commission as an amendment to its renewal application. In the agreement the station pledged to employ at least two full-time black reporters and to take other steps to achieve a balanced racial composition on its work force. The station also indicated it would present programming covering controversial topics and that there would be monthly meetings between station representatives and a local citizen advisory board.[1] In return for KTAL's agreement, the citizen groups agreed to withdraw their petition and actively support KTAL's request for a renewal.

On July 29, 1969, the Commission, acting in reliance on the citizen agreement, renewed KTAL's license.[2] In passing, the Commission said it believed it "should encourage licensees to meet with community-oriented groups to settle complaints of local broadcast service. Such cooperation at the community level should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission."[3]

Shortly after KTAL's license was renewed by the Commission, the United Church of Christ notified the Commission that KTAL had agreed to reimburse the Church for $15,137.11 in expenses the Church had incurred on behalf of the Texarkana citizen groups. The reimbursement arrangement specifically stated that payment of the funds would not be considered a condition precedent to the remainder of the agreement. By a vote of 4 to 3 the Commission decided not to allow the reimbursement.[4]

The Commission's decision not to allow reimbursement admitted that "the settlement of the issues between the station and the petitioner listener group is generally a desirable goal"[5] but argued

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[1] The text of the agreement can be found at *KCMC, Inc.*, 19 F.C.C.2d 109, 120-122 (1969).

[2] *KCMC, Inc.*, 19 F.C.C.2d 109 (1969).

[3] Ibid.

[4] *KCMC, Inc.*, 25 F.C.C.2d 603 (1970).

[5] 25 F.C.C.2d 603, 604.

that reimbursement was not necessary to effectuate settlement. The majority pointed to two possible dangers arising from reimbursement of citizen groups: (1) the danger of promoting "overpayments (e.g., inflated fees) or even opportunists motivated to file insubstantial petitions in order to obtain substantial fees," and (2) the danger that "settlement of the merits of the dispute might be influenced by the ability to obtain reimbursement of expenses from the licensee."[1] To avoid these dangers the Commission formulated a general principle--it decided that "in no petition to deny situation, whatever the nature of the petitioner, will we permit payment of expenses or other financial benefit to the petitioner."[2]

Commissioners Dean Burch and Nicholas Johnson, writing in dissent, argued that there was no reason to deny reimbursement when the public interest was served. To prevent the abuse of reimbursement which the majority feared, Burch and Johnson suggested four conditions that would have to be met before a reimbursement agreement could be approved:

1. That the petition to deny was filed in good faith by a responsible organization;
2. That the petition raised substantial issues;
3. That the settlement also entailed solid, substantial results; and
4. That there was a detailed showing that the expenses claimed were legitimately and prudently made.[3]

The Church appealed to the courts, and the Commission's decision was overturned. The Court ruled that "the public interest standard cannot mean that the Commission may totally prohibit reimbursement in all petition to deny situations."[4] In fact, the Court went even

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[1] Ibid.

[2] Ibid., p. 605.

[3] Ibid., pp. 605-606.

[4] *Office of Communication of United Church of Christ* v. *FCC*, 465 F.2d 519, 524 (D.C. Cir. 1972).

further to claim that voluntary reimbursements may actually serve the public interest because "public participation in decisions that involve the public interest is not only valuable but indispensable" and such "public participation is necessarily furthered"[1] by allowing responsible reimbursements.

The Court did not, however, specifically find that reimbursement was appropriate in the KTAL agreement. Rather, the Court remanded the question to the Commission "for a determination of whether the expenses" incurred by the Church of Christ were actually "legitimate and prudent."[2] Upon remand, the Commission decided that the expenses were indeed legitimate and prudent, and the reimbursement was allowed.[3]

On June 7, 1972, only two and a half months after the Court's decision, the Commission issued a Notice of Inquiry and Proposed Rulemaking looking into the issues raised by reimbursement to citizen groups.[4] Although the inquiry was narrowly focused on reimbursements for future citizen group consultant services to

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[1] 465 F.2d 519, 527 (1972). A large portion of the Court's opinion relies on an analogy extending 47 U.S.C. 311(c) (1970), which allows reimbursements when a competing applicant withdraws his application, to situations in which a petitioner withdraws his petition to deny. The Commission itself had previously extended the "spirit" of 311(c) to cover situations in which it did not actually apply (see *National Broadcasting Co.*, 25 R.R. 67 (1963)), and the Court was of the opinion that an extension of 311(c) to cover reimbursement in the petition-to-deny context would also be in the public interest. See 465 F.2d 519, 525-527.

[2] 465 F.2d 519, 528 (1972).

[3] *KCMC, Inc.*, 35 F.C.C.2d 240 (1972).

[4] *Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances*, Docket 19518, FCC 72-473 (June 7, 1972). Two other reimbursement cases cited in the Notice are: (1) the WGKA case (see *In Re Application of Strauss Broadcasting Co. of Atlanta*, 31 F.C.C.2d 550 (1971), *Letter to GCC Communications of Atlanta, Inc.*, FCC 71-886, and *Citizen Committee* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970); and (2) the KBTV case (see *Letter to the Vice President of CCC*, 33 F.C.C.2d 625 (1972)).

broadcast stations, it raised substantially the same issues that would be encountered in a more broadly defined examination of reimbursements. The Commission specifically requested comments on six issues:

1. What showing should be required to establish a good faith agreement?
2. Should there be a limit on the dollar amount to be reimbursed?
3. Should the agreement between the broadcaster and the group specify what services the group is expected to perform?
4. Should there be a limit on the period for such consultancy agreements?
5. Should there be a periodic review of the arrangement?
6. What review procedures, if any, should be specified by the Commission...(e.g., filing reports or detailed accounts of sums paid or work done)?[1]

While the KTAL case was making its way through the Commission and the courts from 1969 to 1972, other petitions were being filed, other agreements were being reached, and policies were being set in novel contexts.

Transfers and Citizen Involvement: The Capital Cities Sale

On February 26, 1971, the Federal Communications Commission approved a landmark agreement which was part of an intricate $110 million transfer of broadcast stations from Triangle Publications, Inc., to Capital Cities Broadcasting Corporation, and from Capital Cities to various third-party publishers. The carefully negotiated contract involved combined AM-FM-TV operations in Philadelphia, New Haven, and

[1] *Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses*, Docket 19518, FCC 72-473 (June 7, 1972), 2. A final decision in Docket 19518 was finally reached in January 1976--three and a half years after the inquiry was opened. The Commission's final decision is discussed on pp. 148-150 below.

Fresno, as well as TV stations in Albany, New York, and Huntington, West Virginia.[1]

The transfer did not pass unopposed. A Petition to Intervene and Deny was filed by the Citizens Communications Center (CCC) on its own behalf and on behalf of the Law School Study Group. The petition questioned the propriety of the package transaction with its spinoffs to third-party buyers[2] and challenged the transaction on the grounds that it violated the Commission's Top-50 policy.[3]

Under the Top-50 policy, a transaction involving an increase in the concentration of control of large market television stations, such as those in the Capital Cities sale, could not be approved unless there was "compelling public interest showing" that the benefits of the transfer would outweigh the detriments.[4] Thus, to consummate the transaction and overcome the required "compelling public interest showing," Capital Cities would have to convince the Commission that the petitioners' objections were groundless and that the public interest would, in the balance, be served by the transaction.

The stage was then set for a series of meetings between Capital Cities, CCC, and minority group representatives in Philadelphia,

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[1] See *In Re Application of Triangle Publications, Inc., and Capital Cities Broadcasting Corp.*, 28 F.C.C.2d 80 (1971). The stations involved in the transaction were: WFIL (AM, FM, TV), Philadelphia, Pennsylvania; WNHC (AM, FM, TV), New Haven, Connecticut; KFRE (AM, FM, TV), Fresno, California; WTEN (TV), Albany, New York, and its satellite station WCDC in Adams, Massachusetts; and WSAZ (TV), Huntington, West Virginia. Also included in the exchange was Triangle's syndication operation. Capital Cities was to sell the Huntington and Albany stations to third-party buyers. The contract was written in such a manner that each transaction was contingent on every other transaction, i.e., if one part of the deal fell through, the entire deal was off.

[2] CCC charged that the transaction from Triangle to Capital Cities which would immediately spin-off stations to third-party purchasers violated the Commission's policy against trafficking in broadcast licenses.

[3] *Television Multiple Ownership Rules*, 5 R.R.2d 1609 (1965); Report and Order in Docket 16068, 12 R.R.2d 1501 (1968). The Commission's Top-50 policy emerged from a concern over the trend toward increased concentration of ownership in the 50 largest markets.

[4] 12 R.R.2d 1501, 1507.

New Haven, and Fresno. Capital Cities wanted some arrangement that could help it make the "compelling public interest showing" required to overcome CCC's Top-50 objections to the transfer. CCC and the minority groups wanted greater responsiveness to community needs and concerns from the new owner of the Philadelphia, New Haven, and Fresno stations. The end result of over a month of round-the-clock negotiations between the parties was a million dollar, three-year Minority Program Project which involved a commitment to develop programs responsive to the problems, aspirations, and cultures of the black and Spanish-surnamed communities in Philadelphia, New Haven, and Fresno.[1]

Capital Cities expected the project to generate at least six hours of programming per year per station and that at least half of the programs would be broadcast in prime time. Control over the expenditure of funds and program scheduling and production was to remain in Capital Cities' hands, but Capital Cities promised to consult extensively with advisory committees in each of the three cities affected by the agreement. In the event Capital Cities declined to accept an advisory committee's programming proposal, Capital Cities was obliged to provide a written statement of its reasons for rejecting the proposal.

Furthermore, expenses of approximately $5,000 incurred by the minority group representatives with whom Capital Cities was to confer in its ascertainment procedure were reimbursed by Capital Cities. At the time of the decision in the Capital Cities case, the original KCMC decision had been issued by the Commission,[2] but the appeal to the Court was still pending.[3] Thus, at the time the reimbursement

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[1] According to the terms of the agreement, annual payments of $333,333 were to be deposited in accounts controlled by minority groups. The annual payments were to be allocated in the following manner: $135,000 for Philadelphia; $110,000 for New Haven; and $88,333 for Fresno.

[2] *KCMC, Inc.*, 25 F.C.C.2d 603 (1970).

[3] *Office of Communication of the United Church of Christ* v. *FCC*, 465 F.2d 519 (1972).

question came up for review, the Commission's policy with regard to reimbursement of petitioners' expenses was even more inhospitable than it is today.[1]

The Commission admitted that the reimbursement "raised a question" under its *KCMC* decision; nevertheless, it managed to approve the reimbursement and at the same time avoid the issue of the payment's validity under *KCMC* by stating that the payment in the Capital Cities' case was "fully consummated" and "of minimal significance in the present context." This sufficiently distinguished *KCMC* from the Capital Cities' transaction, in the Commission's mind, so that the Commission felt it unnecessary to "decide whether it [the Capital Cities reimbursement plan] comes within our *KCMC* holding."[2]

As a result of the understandings reached between Capital Cities, CCC, and the local minority groups, CCC withdrew its Petition to Deny in January 1971. The understandings between the parties were presented to the Commission as amendments to Capital Cities' applications. CCC then informed the Commission that it felt the amended applications indicated that the public interest could be served by prompt approval of the transfer.[3]

The Commission considered the amendments to the application and weighed them against the dangers of further concentration in the

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[1] See pp. 39-41 above.

[2] 28 F.C.C.2d 80, 82 n. 2 (1971). Whether the Commission's distinction of the KCMC and Capital Cities reimbursement is adequate is not as simple and straightforward as the Commission makes it sound. The Commission could just as easily have found great similarities in the two cases and decided against compensation in Capital Cities as it did in KCMC. The hitch in this case seems to be the Commission's desire to see a $110 million deal go through, and not see it fail because of a $5,000 payment. Thus the emphasis on the "minimal significance" of the payments "in the present context." In a different context in 1971 the Commission could well have quashed an identical reimbursement scheme.

[3] CCC noted that it still had reservations over the package form of the transaction and over the spinoffs, but claimed that these reservations were outweighed by the public interest benefits of the agreement.

Top-50 markets and was "persuaded that Capital Cities has made the required 'compelling public interest showing.'"[1]

In a Concurring Opinion[2] Commissioner Nicholas Johnson characterized the $1 million Minority Program Project as a commendable innovation to be encouraged. Johnson also said that but for the agreement he would have opposed the transaction.[3] To Johnson:

> The Capital Cities agreement clearly amounts to an important breakthrough for public participation in the process of administration and governance of the public airwaves. It may well be that FCC licensees have the responsibility under law to provide such programming--and more--already. But the fact remains that they don't do it, and the FCC doesn't insist upon it. At a time of mounting public outrage against the excesses and abuses of the corporate dominance of American broadcasting, it is at least heartening to see that humble citizens can extract *some* public service commitment from big broadcasters. [Footnote Omitted][4]

Not all the Commissioners were this enthusiastic over the Minority Program Project. In a short Concurring Statement, Commissioner Robert T. Bartley expressed some concern over broadcaster control of programming.[5] Bartley "would have preferred to see Capital Cities remain more flexible in its determination of community needs and programs to meet such needs."[6] But Bartley felt that Capital Cities' representation that "it will retain control over programming under the Minority Program Project" was sufficient to overcome his doubts as to the delegation of broadcaster responsibility.[7]

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[1] 28 F.C.C.2d 80, 84.

[2] Ibid., pp. 80, 90-94.

[3] Ibid., p. 90.

[4] Ibid., pp. 92-93.

[5] Ibid., pp. 80, 89-90.

[6] Ibid., pp. 89-90.

[7] Ibid., p. 90.

Early Problems with Settlements

From 1966, when citizen groups first obtained standing before the Commission, until 1971, the Commission had no occasion to formally question the substance of a citizen agreement. But then in December of 1971 the Commission for the first time expressed disapproval of a citizen agreement.[1] Stations WAVO-AM-FM in Decatur, Georgia, were to be transferred from Bob Jones University, Inc., to Robert W. Sudbrink, but a petition to deny filed by the Community Coalition of Broadcasting (CCB) of Atlanta was delaying the transfer. On November 18, 1971, WAVO filed an amendment to its assignment application. The amendment contained the terms of an agreement reached between the citizens and the station.

The agreement touched on the stations' hiring practices, but more importantly to the Commission it also provided that the licensee would "make maximum use of all available network programming of special interest to the Black community," that the programming would be aired "at the regularly scheduled time," and that it would not be "pre-empted without advance consultation with representatives of the CCB."[2] Furthermore, the agreement observed that:

> Licensee understands that in deciding what constitutes the tastes, needs, desires and interests of the various public served, the views, opinions and leaders which are representative of their members, and the authenticity of portrayals of minority life, culture and values, the ultimate judge must be the minority community itself.[3]

The Commission refused to read the preceding clause literally for it would, in the Commission's eyes, abandon far too much broadcaster responsibility. Instead, the Commission construed the language of the agreement to mean that:

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[1] *Bob Jones University, Inc.*, 32 F.C.C.2d 781 (1971).

[2] Ibid.

[3] Ibid.

> The licensee, in determining the problems, needs and interests of the minority groups and the authenticity of portrayals of minority life, culture and values, will consult with and seek the views and opinions of the leaders of representative minority groups in the community.[1]

As for the broadcaster's commitment to air regularly scheduled network programs of interest to the black community, the Commission said that the language of the agreement "would appear to improperly curtail the licensee's flexibility and discretion in the matters of programming and program scheduling."[2] But in spite of these reservations with the agreement, the Commission did not reject it outright and proceeded to approve the transfer.

The second instance of the Commission's questioning an agreement occurred in August 1973 when the Commission reviewed an agreement between the Boston Community Media Committee (BCMC) and WROR-AM.[3] Again, the major ground of the Commission's objection was that the agreement amounted to an impermissible delegation of the broadcaster's responsibility. A second cause for concern by the Commission focused on WROR's promise to make various contributions to community groups. The agreement signed by WROR required it to pay an annual "subscription fee" of the greater of either (a) $1,000 or (b) 1 percent of the station's net profits. The Commission voiced "serious concern" over this payment provision and said that while it had "no objection to licensees reimbursing anyone for services rendered in assisting it in the operation of its facility," it did object to the present agreement because "it in no way appears to relate to services rendered nor does it bind BCMC to do anything. Consequently, our approval of such a provision would be clearly contrary to the public interest."[4]

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[1] Ibid., pp. 781-782.

[2] Ibid., p. 781.

[3] *Heftel Broadcasting-Boston, Inc.*, 42 F.C.C.2d 1076 (1973), *recon. denied as moot*, 29 R.R.2d 396 (1974), *rev'd, BCMC Minority Caucus* v. *FCC*, 32 R.R.2d 599 (D.C. Cir. 1975).

[4] 42 F.C.C.2d 1076, 1077.

The third case of Commission disapproval of citizen settlement also raised the by-now familiar theme of broadcaster responsibility and delegation, but this time the issue was framed in a novel context. Instead of the familiar complaints and settlements focusing on minority group hiring and programming, the Twin States Broadcasting cases dealt with the problem of format changes.[1]

In February 1972 the Commission granted an application for the assignment of the license of WXEZ-FM, Sylvania, Ohio, from Twin States Broadcasting, Inc., to Midwestern Broadcasting Company, Inc. WXEZ had been a progressive rock station under Twin States, but the new owners intended to change its programming to a more "middle-of-the-road" format. Concerned over the loss of their station, rock fans in Sylvania formed the Citizens Committee to Keep Progressive Rock and filed a petition for reconsideration of the grant. The Citizens Committee claimed that the format change affected the public interest and requested that the Commission hold an evidentiary hearing. The Commission denied the request,[2] and the Citizens Committee appealed to the courts. On May 4, 1973, the Court overruled the Commission and remanded the case for further proceedings.[3]

Before hearings could begin, the Citizens Committee and Midwestern negotiated a settlement under which WXEZ agreed to conduct a program preference survey of the Toledo area. The survey was to be conducted in the event WIOT, the only other source of progressive rock in the area, ceased to provide adequate rock programming prior to October 1976. If the survey revealed that either (1) 20 percent of the population expressed an unsatisfied desire for progressive rock or (2) a progressive rock format would be economically feasible, then "Midwestern *shall* change the format of Station WXEZ-FM to

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[1] *Twin States Broadcasting, Inc.*, 42 F.C.C.2d 1076 (1973) and 45 F.C.C.2d 230 (1974).

[2] 35 F.C.C.2d 969 (1972).

[3] *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973).

provide such a progressive rock format."[1] [Emphasis added by the Commission.]

The Commission was of the opinion that the use of the single word "shall" caused Midwestern to improperly "relinquish its flexibility to make programming decisions during the upcoming license term."[2] The Commission therefore refused to approve the agreement.

Following the Commission's decision, a second round of negotiations between WXEZ and the Citizens Committee took place. These negotiations resulted in an agreement which was substantively similar to the one earlier rejected by the Commission, save for one factor--instead of obliging the station to follow the results of the survey, the station now agreed to examine the survey results and "exercise licensee discretion in determining whether...changes in its programming practices would be consistent with its obligations as a licensee."[3]

The change in wording seemed to turn the trick with the Commission. Under the new agreement, the Commission found that Midwestern had "relinquished none of its programming responsibilities"[4] and the agreement was approved.[5]

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[1] 42 F.C.C.2d 1091, 1092.

[2] Ibid., p. 1092.

[3] Ibid., pp. 230, 231.

[4] Ibid., p. 232.

[5] Although the WXEZ case was the first case of citizen settlement being used to resolve a format change controversy, it was not the first time the petitioning process had been used by citizen groups in an attempt to prevent a station from changing formats. On September 4, 1968, the Commission approved the transfer of WGKA-AM-FM in Atlanta from Glenarken Associates to Strauss Broadcasting Company. WGKA had been a classical station, but Strauss planned to convert it to a "blend of popular favorites, Broadway hits, musical standards, and light classics." An Atlanta Citizens Committee opposed the format change and filed a petition for reconsideration on September 25. The Commission allowed the transfer and refused to block the format change on August 25, 1969. The issue was, however, remanded for hearing after the Citizens Committee appealed the Commission's action. See *Citizens Committee* v. *FCC*, 436 F.2d 263 (1970). In *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973), and in

THE CONTENT OF SETTLEMENTS

Although the pace of petitioning and settlement increased, the Commission avoided any serious confrontation of the policy issues raised by citizen settlements until June 1975 when it issued the *Proposed Policy Statement and Notice of Proposed Rulemaking in the Matter of Agreements between Broadcast Licensees and the Public* and opened Docket 20495[1] (hereinafter called *Proposed Agreements Rulemaking*). In the meantime, the Commission seemed to face only the simplest issues and to delay consideration of any complex matters.[2]

Categories of Agreements

By the time the *Proposed Agreements Rulemaking* was promulgated, the Commission had enough experience with settlements and petitions that it could see agreements beginning to fall into five major categories: (1) employment, (2) programming, (3) program production, (4) community involvement in station policymaking, and (5) reimbursements.

1. Employment. The most usual complaint with regard to employment was that minority groups and women were underrepresented on the station's workforce. To remedy this situation, citizen groups often obtained assurances from broadcasters that they would strive to reach minority employment goals by a certain date.[3]

Citizens Committee to Save WEFM v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974), the Court also considered the format change question and, after some initial confusion and inconsistency, seems to have reached the position that a format change, when opposed by listeners, may be cause for an evidentiary hearing. For a more complete examination of the format change problem, see Note, "Judicial Review of FCC Program Diversity Regulation," 75 *Columbia Law Review* 401 (1975).

[1] FCC 75-633 (June 10, 1975).

[2] See pp. 64-68 below for an examination of the resulting backlogs and delays in the petitioning process.

[3] See Commitment of McGraw-Hill Broadcasting Company, Inc., term 24 (1972), and references in 33 F.C.C.2d 1099 (1972); and the description of the KABL Agreement in *Broadcasting*, April 24, 1972, p. 32. For a discussion of some measurement problems in determining the representativeness of a station's workforce, see *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972).

At times, stations may commit themselves to hiring minority group members for specific positions,[1] and to make special efforts to place minority groups in higher level positions.[2] Generally, as can be seen from the Commission's comments in the *Proposed Agreements Rulemaking*,[3] the more specific and precise the station's commitments to hiring and the stronger the voice allowed to citizen groups in hiring decisions, the more likely is the Commission to be disturbed by the nature of the agreement.

2. Programming. The content of a broadcaster's programming is often criticized by citizen groups for having unfavorable representations of minority groups or excessive violence, or for insufficient programming aimed at the needs of the station's minority group audiences. In broadcaster-citizen group agreements, broadcasters often promise to increase the number of hours of programming aimed at minority group audiences, to improve the image and portrayals of minority groups on the programs they present, and to be more sensitive to the problems of sex and violence on television. In at least one agreement a station promised *not* to broadcast any of 42 animated television programs because they were deemed "unsuitable for younger children." The station, KTTV,[4] also promised to air a "caution to parents" before broadcasting any program that might be harmful to

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[1] Specific mention of positions such as reporter, community affairs director, and editorial board member can be found in the KTAL Agreement at term 1 (see *KCMC, Inc.*, 19 F.C.C.2d 109, 121 (1969); the WJAS Agreement between Cecil Heftel...and Create, Inc., and Pittsburgh Community Coalition for Media Change, term 8 (1972); and in the Commitment of McGraw-Hill Broadcasting Company, Inc., term 24 (see *Time-Life Broadcasting and McGraw-Hill, Inc.*, 33 F.C.C.2d 1099 (1972)). (Note: Some of the documents cited in this footnote and in following footnotes are not readily available in any publicly distributed documents. To examine these documents, anyone may ask to see the appropriate station file in the public reading room of the FCC in Washington, D.C.)

[2] See Commitment of McGraw-Hill Broadcasting Company, Inc., term 22 and 33 F.C.C.2d 1099 (1972).

[3] See Appendix A, ¶15.

[4] Los Angeles, California.

children. The agreement specified 81 programs that required such a warning.[1]

With the rise of format change complaints, agreements as to station formats have also become more common. The agreements generally attempt to commit the broadcaster to make a good faith effort to maintain the availability of a certain format in a community. Again, the greater the specificity and inflexibility of the agreement, the more likely Commission disapproval.

3. Program Production. Along with complaints as to the types of programs that stations broadcast, citizen groups often feel that the lack of facilities and trained individuals in local communities limits the ability of broadcasters to obtain programming especially suited to local community needs.[2] Thus, citizen groups often seek station support for training programs and commitments for equipment and technical assistance so that local community groups can acquire the ability to produce their own programming. Often stations agree to broadcast a certain percentage of the programs produced by these local groups.[3]

4. Community Involvement in Station Policymaking. Citizens frequently complain of station insensitivity to the needs and problems of local communities and that ascertainment procedures are insufficient guarantees of station involvement. Furthermore, citizens are aware of areas of station operation in which they desire to become involved but which cannot be effectively included in any agreement. Therefore, citizen groups often attempt to gain some voice in ongoing station policymaking procedures.

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[1] Commitment of Metromedia, Inc. (KTTV), 4-10. See *Letter to Frank Lloyd*, FCC 75-1028 (September 9, 1975), and pp. 120-125 below.

[2] See the KTAL Agreement, terms 1, 3, and 11, 19 F.C.C. 2d 109, 121-122.

[3] In an agreement reached with WPIX, a community-involvement program was adopted. See pp. 125-132 below; *WPIX, Inc.*, FCC 75-929 (August 12, 1975); and the discussion of the Capital Cities Agreement, p. 45 above.

Citizen group participation may range from a promise by the station to conduct periodic interviews with community leaders[1] to an elaborate system of advisory councils[2] to actually granting a seat to an outsider on the station's board of directors.[3]

5. Reimbursements. As previously mentioned, citizen groups at times attempt to be reimbursed by broadcasters for the expenses incurred in the course of prosecuting the petitions or competing applications.[4] Citizen groups also attempt to recover the costs that may be incurred as a result of their providing advisory services to the broadcaster or as the result of their serving on various citizen committees.[5]

Although these five areas cover most terms that can be found in citizen settlements, broadcasters and citizen groups at times may also include terms that are not as widely used. These miscellaneous terms often deal with rather innocuous subjects such as radio talk shows[6] and truthful advertising.[7] Recently, however, a clause has been appearing in citizen agreements that is sure to draw attention from the Commission--an arbitration clause. Under the terms of an arbitration clause, the broadcaster and citizen groups agree to submit any grievances or disputes over the execution

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[1] Commitment of Metromedia (KTTV), 3. See *Letter to Frank Lloyd*, FCC 75-1028 (September 9, 1975), and pp. 120-125 below.

[2] Commitment of McGraw-Hill Broadcasting, terms 1-15. See 33 F.C.C.2d 1099 (1972).

[3] See *WPIX, Inc.*, FCC 75-929 (August 12, 1975), and pp. 125-132 below.

[4] Cases involving reimbursement are *KCMC, Inc.*, 35 F.C.C.2d 240 (1972); *Office of Communication of United Church of Christ* v. *FCC*, 465 F.2d 519 (D.C. Cir. 1972); *WPIX, Inc.*, FCC 75-929 (August 17, 1975); *In Re Application of Triangle Publications, Inc., and Capital Cities Broadcasting Corp.*, 28 F.C.C.2d 80 (1971); and *Heftel Broadcasting-Boston, Inc.*, 42 F.C.C.2d 1076 (1973).

[5] See Docket 19518 discussed on pp. 42-43 above.

[6] See Draft Agreement between Northwestern Indiana Broadcasting Corp. (WLTH) and Gary Human Relations Commission, p. 6 (1973).

[7] See Agreement between Sheridan Broadcasting Corp. and Create, Inc. (WAMO), term 15 (1972).

of an agreement to an arbitrator and to abide by the ruling of that arbitrator. It seems that this clause is being inserted by some citizen groups in an attempt to circumvent Commission review. Given the Commission's sensitivity to the problem of broadcaster responsibility and delegation, it seems that arbitration clauses that appear to bind the broadcaster to the judgment of a third party will be viewed as suspiciously by the Commission as are agreements that seem to bind the broadcaster to the judgments of a citizen group.[1]

Capsule Summary

In 1966 citizen groups gained the right of standing in the Commission's licensing Procedures as a result of the Court's decision in *UCC* I. The first citizen settlement growing out of the petitioning process involved KTAL-TV in Texarkana and also raised significant problems with regard to reimbursement arrangements between citizen groups and broadcasters. In the early days of settlements some sizable agreements were reached--most notably in the case of the Capital Cities Transfer. Shortly thereafter, however, the Commission began to express concern over the possibility that citizen settlements were coming to involve excessive delegations of authority from broadcasters to citizen groups. Commitments as to employment, programming, program production, community involvement in station policymaking, and reimbursement began appearing regularly in citizen agreements. The Commission did not have an explicitly stated policy toward citizen agreements, and as a result of its prolonged indecision, a large backlog of unresolved petitions and settlements began to pile up at the Commission.

STATISTICS OF THE RENEWAL, PETITION TO DENY, AND AGREEMENT PROCESS

An Application of the Caseload Change Theory

Lawyers and economists have recently begun studying the processes of judicial administration and the incidence of litigation with the

[1] For examples of arbitration clauses, see WJAS agreement, term 35, and Draft WLTH Agreement, p. 4.

type of rigor previously applied to analyses of more substantive provisions of the law. Out of these studies has grown a theory of caseload change that has great descriptive value for this examination of the growth of the petition to deny and settlement process.[1]

The volume of litigation over any subject can be related to two factors: the volume of the underlying activity and the predictability of the associated law. The volume of the underlying activity and the volume of litigation are positively correlated, whereas the predictability of the law and the volume of associated litigation are inversely correlated. Thus, if we concentrate on litigation associated with automobile driving, then as more people take to the road the volume of auto litigation will *increase*; and as the law surrounding auto driving becomes more established, the volume of auto litigation will *decrease*.[2]

In the case of petitioning and settlement, the underlying activity is almost any event that involves broadcasters, and for which the Commission allows citizen participation. For all practical purposes this amounts to license renewals, approval of transfers, and an occasional grant of a new channel. Since these activities have been increasing over time, they can be expected to account for at least part of the growth of the petitioning process.[3]

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[1] In the discussion of the theory of caseload change, the report follows the exposition of G. Casper and R. A. Posner, "A Study of the Supreme Court's Caseload," 3 *Journal of Legal Studies* 339, 346-349 (1974).

[2] The increased relationship between the certainty of the law and the volume of litigation can be ascribed to two factors: (1) as people become aware of the law, they engage in fewer "marginal" activities that are eventually deemed illegal; and (2) as the probabilities associated with winning a case become more predictable, the chances of reaching an out-of-court settlement increase. For an examination of the latter point, see App. C.

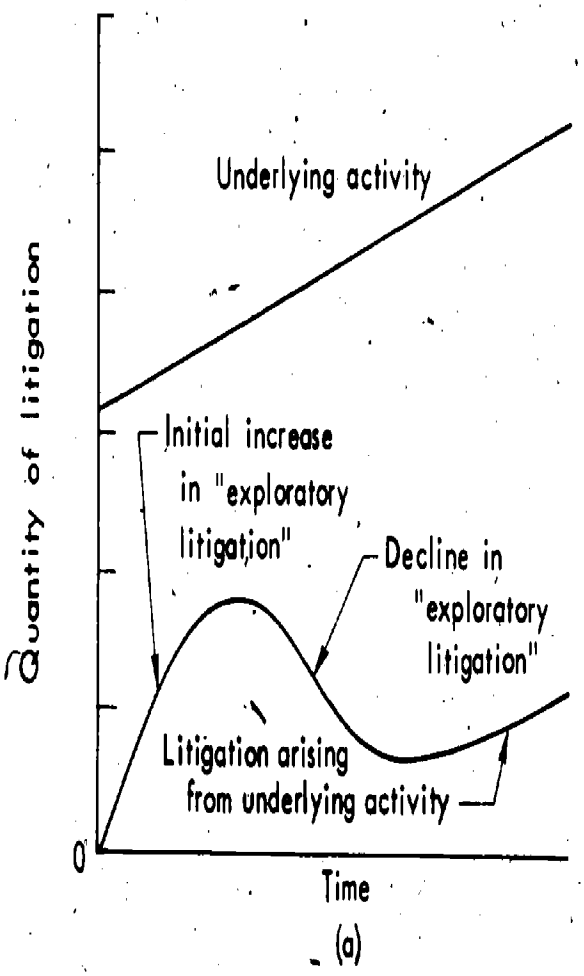
[3] From 1963 to 1973 the number of commercial television stations licensed increased from 525 to 695; the number of commercial AM stations increased from 3,999 to 4,367; and the number of commercial FM stations increased from 1,090 to 2,412. Along with this growth in the number of licensed stations has come an increase in the volume of renewal and transfer applications filed with the Commission. See 39 *FCC Annual Report* (1973).

But citizens did not have the legal right to enter licensing disputes until 1966.[1] And once they gained that right there was practically no precedent available to them that could be used as a guide to prospective Commission decisions. Consequently, the law was not very predictable, and a certain amount of "exploratory litigation" could be expected until a body of precedent accumulated.

Figure 2a demonstrates the general relationship between the volume of litigation, the volume of the underlying activity, and the certainty of the law. When a right is first defined, at time zero, there is relatively great uncertainty as to the outcome of particular cases. Thus there is a quick initial rise in the volume of litigation--this initial rise is exploratory litigation--and as experience and precedent accumulate, uncertainty declines and the level of litigation begins to track the underlying activity more closely.

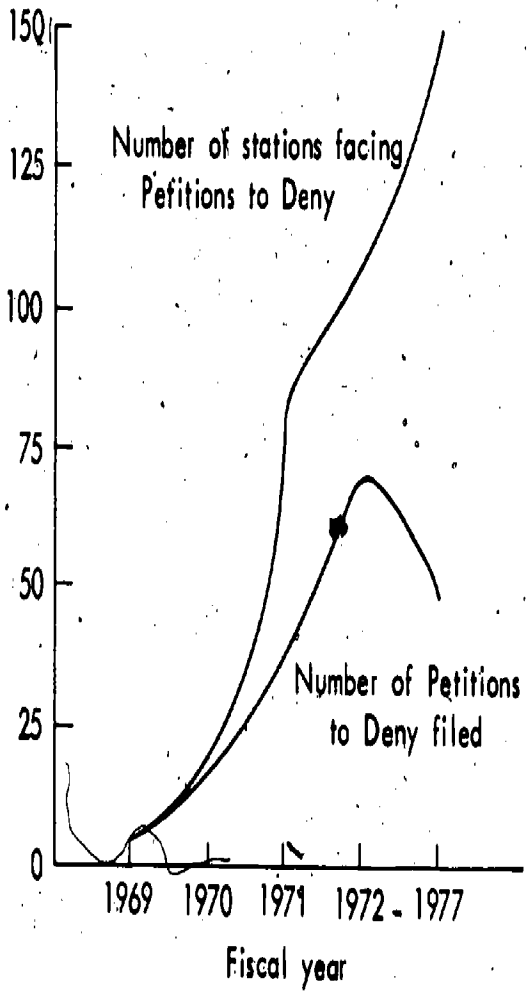
Figure 2b presents two measures of the volume of petitioning litigation--the number of petitions to deny actually filed and the number of stations against which the petitions were filed--and plots them against time. The number of petitions to deny seems to have first increased and then declined, but the total number of stations facing petitions has risen steadily from 1969 to 1973. The difference in these two trends can be explained in terms of economies of scale in petitioning. A single petition to deny can be addressed at more than one station. Since petitions often allege that a station has not responded to the needs and desires of its community of service once a petitioning group has determined what it feels to be the needs and desires of the community, the marginal cost of demonstrating that an additional station has not fulfilled those needs may be relatively small. Therefore, in terms of maximizing "returns" for petitioning energy (if returns are measured as the number of stations against which a petition is filed), the ideal situation would be to file a single petition against all stations serving a given community. It seems that

[1] See pp. 35-39 above.



(a)

NOTE: A similar illustration appears, in G. Casper and R.A.Posner, "A Study of the Supreme Courts Caseload," 3 Journal of Legal Studies 339, 347 (1974)



(b)

SOURCE: Data for this graph were drawn from information supplied by the FCC's Broadcast Bureau as reported in M. Kutler, "Citizen Participation in Broadcast Regulation: A Study of the Local Agreement Process," unpublished master's thesis, University of Pennsylvannia (May 1, 1974).

Fig. 2—Caseload change over time

such a strategy was applied by citizen groups who filed a market-petition against 28 stations serving Philadelphia.[1]

Because of the economies of scale reflected in the number of stations defending against petitions, the number of petitions filed seems a more accurate measure of the volume of petitioning activity. The 1969-1973 trend shows a steady increase in petitioning activity from only two petitions in 1969 to 68 in 1972, followed by a decline to 50 petitions in 1973. Although a decline in the number of petitions filed in a single year is hardly conclusive proof that the petitioning activity graphed in Fig. 2b actually tracks the hypothesized trend depicted in Fig. 2a, it is an initial indication that petitioning activity may be slacking off.

There is, however, an additional factor operating in the petitioning process which is not explicitly accounted for in the caseload change theory and which may lead to a prolonged growth in petitioning activity. An implied assumption of the caseload change theory is that potential parties are aware of their rights and that changes in the underlying activity and certainty of the law alone affect individuals' desires to vindicate their rights. In the case of petitioning activity, many citizen groups may still be relatively unaware of their rights to petition the Commission. The very right to enter licensing proceedings is not yet ten years old, and the substantive law to be applied in such cases is yet younger, or in some cases even nonexistent. Therefore, a continuous process of education and information is taking place among citizen groups. New groups are forming, and older groups are still discovering new rights. As new parties discover legal rights--even if the underlying activity remains constant and even if a great deal of relevant precedent is generated by a small amount of initial litigation--the total amount of litigation may well increase with time.

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[1] See *Broadcasting* 30 (August 7, 1972). The major complaint of the petition related to the employment practices of Philadelphia stations. There the citizens group had to analyze the Philadelphia labor market only once and then compare each station's employment practices against the Philadelphia profile.

Incidence of Petitioning and License Revocation

To a broadcaster one of the critical questions raised by the petitioning process concerns the chances of being confronted with a petition to deny. And once a broadcaster is confronted with a petition, he will want to know what the chances are of actually losing a license.

The theory of caseload change, although related to these questions, is really unable to answer them fully because it focuses on the trend of litigation over time and doesn't specify the amount of litigation that can be expected at a given point in time. To answer these questions, data such as those contained in Table 1 are required.

Table 1 reveals that for the 1971-1973 period the chances of any given renewal application being subject to a petition to deny were less than 1 in 25, the chances of being designated for hearing for any cause (regardless of whether a petition was filed) were about 1 in 200, and the chances of having a license renewal application denied were less than 1 in 600.

According to Table 1, the FCC received 10,250 renewal applications and granted 9,557 of them. Over the same three-year period, 156 petitions to deny were filed against 342 stations. Thus the probability of having a petition to deny filed against any given renewal application was 3.34 percent, and the probability of actually having a license renewed during this period was 93.24 percent. Fifty-six renewal applications were designated for hearing--0.55 percent of all renewal applications filed--and only 16 renewal applications were denied--0.16 percent of all renewal applications filed.

The chances of facing a petition to deny seem to be very small, and the chances of being designated for hearing or of having a renewal denied verge on the infinitesimal.

Table 1 also generates a surprising estimate as to the probability of losing a license purely as a result of a petition to deny. The Commission must first designate a petition for hearing and go through its hearing process if it is to finally revoke a license.

Table 1

BROADCAST LICENSE RENEWALS, PETITIONS TO DENY, AND DESIGNATIONS FOR HEARING

Activity Before the Commission	Fiscal Year			Three Year Totals
	1971	1972	1973	
Renewal applications filed	3,297	3,254	3,699	10,250
Renewals granted	3,518	3,113	2,926	9,557
Petitions to deny filed	38	68	50	156
Stations against which petitions were filed	84	108	150	342
Petitions set for hearing	1	1	0	2
Renewals set for hearing	19	20	17	56
Renewals denied	5	4	7	16

SOURCE: *Hearings before the Subcommittee on Communications of the Committee on Commerce*, United States Senate, 93d Cong. 2d Sess., Part 1, Ser. No. 93-93, p. 352, "Statement of Charles M. Firestone."

NOTE: Since a single petition to deny may be addressed at more than one station, the total number of stations subject to petition is generally greater than the total number of petitions filed.

Table 1 allows us to estimate the probability of a petition being designated for hearing. Since only two petitions were designated, that probability is on the order of 0.02 of 1 percent. Table 1 also allows us to estimate the probability of having a license revoked once it is placed in hearing. If it is assumed that all licenses that were revoked were first in hearing, then there are 16 chances in 56 of losing a license once it is placed in hearing. Thus the probability of losing a license, given that it is already in hearing, is roughly 29 percent. Now if the probability of getting into a hearing as a result of a petition is multiplied by the probability of having a license revoked once it is already in hearing, the resulting estimate of the probability of a petition leading to a revocation is 0.0058 of 1 percent.[1]

But basing such calculations solely on the data in Table 1 may well be misleading. The FCC is noted for the delay involved in its proceedings, and many cases that began during the three-year period mapped in Table 1 were not resolved in that same three-year period. A petition to deny filed in 1972 may still be under consideration in 1975, and many of the renewals denied may have initially been filed long before 1971. From 1970 to September 1974 a total of 247 petitions to deny were filed, but as of September 1974, only 116 (46.96 percent) were resolved and 131 (53.04 percent) were still pending.[2] More recent data indicate that as of July 1, 1975, the

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[1] Applying this method of calculation also assumes that the two probabilities are independent, i.e., the fact that a station's license was designated for hearing following a petition to deny has absolutely no influence on the chances of the hearing leading to a revocation. Since the Commission requires a fairly strong showing before it will designate a petition for hearing, this assumption is probably not satisfied: a station designated for hearing as a result of a petition could well be *more* likely to lose its license than a station designated for hearing because of other factors. But even if a licensee who is designated for hearing as a result of a petition is twice as likely to have his license revoked, the overall probability of petitioning leading to revocation is still only 0.0116 percent.

[2] The data were supplied by the FCC and were reported in L. Gross, "Citizens With Clout," *TV Guide* 31, 33 (March 8, 1975).

number of unresolved petitions to deny had grown to 158, and 248 stations' licenses were affected by these petitions.[1]

Evidently the Commission is sitting on a large backlog of petitions to deny, and there is no firm evidence indicating exactly how the Commission will rule on these petitions. An examination of the 116 petitions resolved between 1970 and September 1974 indicates that 67 (57.76 percent) were unsuccessful, 48 (41.38 percent) were withdrawn, and only one (0.86 percent) was able to get into hearing.[2] Although it is tempting to extrapolate from these figures and conclude that the Commission will resolve its backlog petitions in the same proportions, such a projection would be dangerous because the more complex the issues raised by a petition the more time the Commission will take in resolving that petition. Thus, the 116 resolved petitions probably raised simpler issues on the whole than the 158 petitions presently pending at the Commission.

The statistics with regard to the disposition of the 116 petitions between 1970 and 1974 may, however, be useful in determining the incidence of post-filing citizen settlements.[3] Since a citizen settlement is generally accompanied by a withdrawal of a petition to deny, but since a petition may be withdrawn for a variety of reasons unrelated to settlement, it would stand to reason that the 48 withdrawn petitions approximate an upper bound for the number of post-filing settlements revoked during that period. Therefore, it can be estimated that at most 19 percent of the petitions filed between 1970 and 1974 were resolved by citizen settlements.

Delay in the Licensing Process

Delay is an unfortunate fact of life in dealing with the FCC. Broadcasters claim that the delay caused by petitions to deny is extremely costly, has a demoralizing effect on station staff, and

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[1] Data supplied by FCC staff, August 1975.

[2] Data supplied by FCC as reported in Gross, op. cit.

[3] See pp. 31-35 above for the distinction between pre-filing and post-filing settlements.

is a strain on community relations.[1] From the citizens' point of view, delay often means that they are trapped in limbo and uncertain of the state of their petitions for long periods of time.

Table 2 provides recent data describing the delay involved in the renewal process. As of June 1975, there were 1,828 license renewals pending before the Commission, and 1,187 (or 64.93 percent) of all pending renewals were pending for more than 90 days. Since December 1973 the percentage of applications pending 90 days or more has ranged from a low of 51.74 percent in September 1974 to a high of 72.42 percent just three months later in December 1974. Thus the delay for June 1975 seems fairly typical of the Commission's proceedings over the preceding year and a half. In Table 2 the Commission's own notes explaining fluctuations are revealing. In May 1974 and June 1975 the Commission noted the relationship between delay and the lack of articulate, substantive principles to be applied in renewal proceedings. Both ambiguity in policies such as Equal Employment Opportunity (EEO) and "promise vs. performance" and intricate review standards were cited as factors causing additional delay. In June 1975 the Commission also noted that an increase in the number of petitions to deny caused additional delays in Commission proceedings.

The delays encountered by licensees subject to petitions to deny are more severe than those usually encountered by broadcasters. As of August 15, 1975, the Commission had readily available data as to the status of outstanding petitions against 140 stations. Of these 140 stations, at least 116 (or 82.86 percent) were facing delays of 90 days or more in obtaining their licenses, whereas only 64.93 percent of the total population of licensees faced delays greater than 90 days. Table 3 indicates that the oldest petition as yet unresolved by the Commission dates from December 1970 and that the average delay for a license with a petition outstanding is at least 16 months.[2]

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[1] Comments of the National Association of Broadcasters, *In the Matter of Agreement between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975), p. 3.

[2] For an analysis of some of the effects of indecision and delay on the decision whether to continue fighting a petition or to reach a settlement, see App. C.

Table 2

THE STATUS OF AM-FM-TV RENEWALS

Item	Receipts	Disposals	Total Pending	Pending 90 Days or More	Percent Pending 90 Days or More
Total for 1973	3,972	3,661	1,928[a]	1,241[a]	64.37[a]
1974: January	382	377	1,933	1,170	60.53
February	136	154	1,915	1,171	61.15
March	330	355	1,890	1,215	64.29
April	168	126	1,932	1,347	69.72
May	450	335	2,047	1,256	61.36
June	163	60	2,150	1,354	62.98
July	555	487	2,218	1,234	55.64
August	424	228	2,414	1,271	52.65
September	287	455	2,246	1,162	51.74
October	277	89	2,384	1,481	62.12
November	171	516	2,039	1,372	59.42
December	135	100	2,074	1,502	72.42
Total for 1974	3,428	3,282	NA	NA	NA
1975: January	210	246	2,038	1,426	69.97
February	219	120	2,137	1,416	66.26
March	196	365	1,968	1,298	65.96
April	132	124	1,976	1,316	66.60
May	158	418	1,716	1,136	66.20
June	259	147	1,828	1,187	64.93
Total for first half of 1975	1,174	1,420	NA	NA	NA

NA = Not applicable.

SOURCE: Federal Communications Commission, Office of the Executive Director, *FCC Management Data Notebook*, Washington, D.C. (1975), p. 9.

[a]Measured as of December 1973.

COMMISSION NOTES: In addition to main stations, applications pending figures include auxiliary transmitters (AM-FM-TV), alternate main transmitters (AM-FM-TV), and subsidiary communications authority (FM only). Under FCC rules, separate renewal applications are required for each of the above transmitters.

May 1974: May receipts exceed 1974 average monthly input by 150, causing "under 90 days" category to increase substantially. It is expected that as Commission provides guidelines for policy issues such as EEO and "promise vs. performance" fewer cases will be referred to Commission, thereby expediting renewals processing.

June 1974: "Under 90 days" backlog has increased with receipt of renewal applications from Texas stations. Texas contains 159 more broadcast stations than states (Kansas, Nebraska, and Oklahoma) submitting applications during previous renewal period.

Notes to Table 2 (continued)

July 1974: Deadline for filing renewal applications, previously three months before expiration of license, has been changed to four months before expiration. As a result of this change, applications were received during the month for two distinct filing periods. Overlap of filing periods has temporarily inflated backlog.

August 1974: "Under 90 days" portion of backlog continues to increase as a result of the change in deadline for filing renewal applications.

September 1974: Temporary increase of backlog due to overlap of filing periods has subsided.

October 1974: A task force of 6 attorneys has been assigned to renewals processing. Once attorneys complete training, significant reductions in backlog are expected.

February 1975: Work during the month was focused on applications which had been deferred from previous months. While total backlog increased, the number of applications pending 90 days or more was reduced.

June 1975: Total of applications pending at end of June (1,828) is 419 short of June 75 goal. Failure to achieve goal is attributed to: (1) the requirement for greater in-depth analysis of station employment practices and affirmative action plans which, in turn, require a more in-depth analysis of the demographic characteristics of the areas in which stations are located, and (2) an increase in petitions to deny and competing applicants.

Table 3

AGE OF UNRESOLVED PETITIONS TO DENY

License Period for which Petition Was Initially Filed	Number of Stations Facing Unresolved Petitions, as of 8/15/75
1975: August 1	5
June 1	16
April 1	3
February 1	3
1974: December 1	31
October 1	8
August 1	10
June 1	2
April 1	6
February 1	7
1973: December 1	3
October 1	4
August 1	4
June 1	5
April 1	6
February 1	1
1972: December 1	0
October 1	4
August 1	10
June 1	10
1970: December 1	2
Total stations facing outstanding petitions	140

SOURCE: Federal Communications Commission, Broadcast Bureau, August 1975.

Broadcaster Reaction to Petitioning and Settlement

Broadcasters are understandably concerned over the growth of petitioning and settlement, and many are becoming quite vocal in expressing their displeasure with the entire process. Aside from the additional cost and delay that a petition can force on a broadcaster, broadcasters claim there is a danger of the petition's being used as an instrument of extortion. Before an audience of his colleagues, one broadcaster claimed that broadcasters as a group "have allowed the benefits of our openness, of our responsiveness, to be frequently twisted by small, vocal minorities that may or may not have the good of the entire community at heart."[1] Following the Capital Cities transaction, there were also fears that a pattern had been set, a fear that citizen groups "could foresee this as a harbinger, with other stations being laid siege to for a lump sum of money." There was also suspicion as to the circumstances surrounding the transaction. How much blackmail was involved can only be guessed at, because "no one will say these things outside of the executive lunch."[2]

In a filing before the FCC, the National Association of Broadcasters has claimed that:

> As the Commission is fully aware, many agreements are not always the product of good faith bargaining and public spirited motives. Too often a broadcaster moving the filing of an application for renewal or transfer of license encounters, for the first time, individuals or groups which claim to "represent sizable portions" of the licensee's community of service. The "public interest" group thereupon makes demands ranging from ascertainment...to the ridiculous...[and] A[ny] reluctance on the part of the licensee to the above demands brings forth from the group threats of a Petition to Deny.[3]

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[1] John Schneider, President of the CBS Broadcast Group, Address before the Georgia Association of Broadcasters, as quoted in Gross, op. cit.

[2] Ibid.

[3] Comments of the National Association of Broadcasters, *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495 (July 29, 1975), pp. 2-3.

The Storer Broadcasting Company has been much more specific in its claims of abuse. Storer claims that:

(a) In one market a "public relations" firm offered to see that no petition to deny would be filed if the firm were retained for $2,000 per month.

(b) In another market persons purporting to make demands on behalf of a particular group were not in fact authorized to do so...

(c) Finally, Storer (as well as many others) has several times been presented with ultimatums which, if acceded to, would delegate away its licensee responsibility. This often results from competition between groups claiming to represent the same constituency and, in consequence, seeking to impress that constituency rather than conduct a dialogue.[1]

Storer feels that "undisciplined and irresponsible dialectics have combined with flawed procedures to create unrealistic expectations and a coercive bargaining situation." The results, according to Storer, have been a "polarizing and counter-productive exercise directing the licensee's efforts and resources from its primary public service efforts."[2]

But not all broadcaster reaction has been negative. The president of the broadcast division of Capital Cities made the following comment on citizen settlements and the programs that result from settlements:

> You can't judge these programs or their effectiveness by the same standards you would use to judge entertainment programs. The very fact that minorities had the

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[1] Comments of Storer Broadcasting Company, *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495. (July 25, 1975), pp. 5-6.

[2] Ibid., p. 6.

> opportunity to present their message from their viewpoint, that can't be judged in rating points. The input we received, the awareness, the sensitivity that all of us who participated received can't be judged that way.
>
> We would like to think that we made a contribution to the entire community--to the minority community, and the area we're licensed to. It's made us better broadcasters, and, frankly, as we've gone through these individual experiences, hopefully it's made us better human beings.[1]

And NBC observed that it has

> entered into agreements with groups representing substantial segments and interests in the community, and believe[s] that those agreements have served salutary purposes. Discussions leading to those agreements have seemed to sharpen NBC's programming and operational objectives in a manner consistent with both the goals and objectives of community groups and the public interest; at the same time, they avoided unnecessary proceedings at the Commission which would have directed the efforts of the parties as well as the Commission from other endeavors.[2]

Evidently there are two camps in the broadcasting community: those who fear the petitioning and settlement process and those who view it as a potentially constructive opportunity for improving community relations. Although some broadcasters are willing to defend their particular experiences in petitioning and settlement, the majority seem ready to condemn the procedure and would like to see the Commission restrict citizen participation in licensing as strictly as the courts will allow.

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[1] Joseph Dougherty, President of the Broadcast Division of Capital Cities, as quoted in Gross, op. cit., pp. 31, 34.

[2] Comments of National Broadcasting Co., Inc., *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975), pp. 1-2.

Capsule Summary

The statistics of the petitioning and settlement process indicate that broadcasters as a group face a low probability of being confronted with a petition to deny and a practically infinitesimal probability of losing their licenses as a result of the petitioning process. The large backlog that has developed in the Commission's review procedures seems to have become a more significant cost factor for broadcasters than has the probability of losing a license. While the backlog of petitions accumulated, broadcasters began voicing a broad concern over the inroads citizen groups are making in the licensing process.

IV. THE 1975 *PROPOSED AGREEMENTS RULEMAKING*

By the time the Commission finally issued a Proposed Policy Statement, the problem of citizen settlements had become relatively severe. Broadcasters were calling for Commission action to protect them from allegedly extortionist citizen group petitions and settlement. Citizen groups were unsure of the legal status of many hard-won agreements and of the negotiating strategies they should follow with broadcasters. The Commission itself was staring at a sizable backlog of petitions that had accumulated over years of indecision and delay. In such an environment it would be hard for the Commission to avoid addressing the problem raised by citizen settlements.

Drafts of possible Policy Statements were being prepared as early as February 1975,[1] but strong differences of opinion among the Commission and staff put off a final decision for four months. At one point the Commission seemed so divided that it was doubtful whether any Policy Statement could be reached. The possibility of issuing a Notice of Inquiry simply stating a series of policy issues and requesting comments--but offering no direction to broadcasters or citizen groups--was explored.[2]

Months of internal disagreement finally came to an end when the Commission adopted its *Proposed Statement and Notice of Proposed Rulemaking in the Matter of Agreements between Broadcast Licensees and the Public*[3] (hereinafter the *Proposed Agreements Rulemaking*). The Commission's vote was unanimous in approving the document. But with such a history of divisiveness, how could the unanimous vote be explained? Had the Commission finally reached a strong policy consensus as to a difficult problem or was there some other rationale for a unanimous decision in such a controversial area?

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[1] *Broadcasting* 15 (February 10, 1975).

[2] *Broadcasting* 6 (February 24, 1975).

[3] Docket 20495, FCC 75-633 (June 10, 1975).

The explanation for the Commission's unanimity in adopting the *Proposed Agreements Rulemaking* rests in the document's ambiguity. The document is vaguely phrased and allows for many potentially contradictory readings. A strong opponent of citizen agreements who fears the danger of citizen extortion and seeks to protect broadcasters' control could vote for the document almost as readily as a strong supporter of the constructive benefits resulting from citizen participation in broadcasting through the petitioning and settlement process.[1]

MAJOR TOPICS OF THE *RULEMAKING*

The full text of the *Proposed Agreements Rulemaking* is set out in App. A. Unfortunately, the *Proposed Agreements Rulemaking* is a poorly organized document which skips from policy issue to policy issue with no apparent design. If closely read, it seems that the *Proposed Agreements Rulemaking* actually deals with four major topics that troubled the Commission in dealing with settlements: (1) the standards for broadcaster responsibility, delegation, and accountability; (2) the procedures to be followed by the Commission in enforcing citizen settlements; (3) the procedures to be used by the Commission in deciding whether or not to review agreements along with the strictness of the scrutiny to be applied in the event of review; and (4) the conditions under which reimbursement may be allowed, and the threat of abuse of Commission process. Under each of these major topic headings the *Proposed Agreements Rulemaking* seems to make a variety of points:[2]

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[1]This did in fact happen. Commissioner James H. Quello who opposes agreements and Commissioner Ben L. Hooks who supports agreements both issued concurring opinions when the *Proposed Agreements Rulemaking* was adopted. See pp. 78-79 below for an analysis of their concurring opinions.

[2]The ¶ citations refer to paragraphs in the original document and as reproduced in App. A.

Broadcaster Responsibility, Delegation, and Accountability

1. *The Ultimate Responsibility for Station Operations Lies with the Broadcaster.* The ultimate responsibility for the planning, selection, and supervision of all matters broadcast must remain with the licensee and his standard of service must be the public interest. A licensee cannot be held accountable to essentially private interests. ¶¶ 4, 5, 6, 9, 10, 12, 15
2. *Broadcasters Have a Right to Enter into Private Agreements which Serve the Public Interest.* A broadcaster has the discretion to sign private agreements concerning the programming and operation of his station in the public interest. ¶ 5
3. *Licensees Have the Right and Obligation to Modify Agreements in the Public Interest.* Since a licensee cannot be inflexibly bound by an agreement, he must be able to modify the agreement if a reasonable good faith judgment indicates the public interest would be served. ¶¶ 12(a), 15
4. *The Broadcaster Has No Duty or Obligation to Enter into Agreements.* Although local discussion and dialogue is to be encouraged, the dialogue need not result in formal undertakings by the broadcaster. ¶ 7

Enforcement of Settlements

5. *The Commission Will Construe Agreements in a Manner Favorable to their Implementation.* Whenever a question of ambiguity or interpretation arises in a citizen settlement, the Commission will construe the language of the settlement so that it will be consistent with Commission policies. The Commission notes, however, that sometimes when the terms of an agreement clearly run counter to

Commission policy, it will reject the agreement.[1] There are no inherent limits on the scope of permissible agreements.[2] ¶¶ 8, 12(b), 16, 17

6. *To the Extent an Agreement Surrenders Licensee Discretion It Has No Force or Effect.* If an agreement entails an inflexible, binding obligation which runs afoul of the requirement of licensee responsibility, the Commission will consider the agreement as having no force or effect. ¶¶ 10, 17

7. *Agreements Included in Renewal Applications Will Be Treated as Representations to the Commission.* The agreement embodies a representation to the Commission and not a binding contract with the citizen group. A significant modification of the representation should be brought to the Commission's attention, and the Commission may inquire into any modifications on its own motion. ¶ 12(a)

8. *An Agreement Should Not Be Viewed by the Parties as Insulation Against Future Challenge.* Simply because a settlement has been signed, the citizen group should not be considered as having abandoned its right to petition. The decision to file must remain in the citizen's discretion. ¶ 8 n. 1, ¶ 15

Procedure and Strictness of Commission Scrutiny

9. *Agreements Must Be in Writing, and It Is Preferable that They Be Included in a Station's Renewal Application.* The Commission will not honor agreements and will ordinarily ignore documents that represent negotiations only leading

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[1] The Commission cites *Twin States Broadcasting, Inc.*, 42 F.C.C.2d 1091 (1973) for this proposition.

[2] But the Commission does note that there are activities clearly extraneous to its regulatory junctions and refers to the contribution arrangement noted in *Black Identity Association*, FCC 71-378 (1971).

up to the filing of a renewal application or of an amendment to an application. ¶¶ 13, 14

10. *The Commission Will Not Act as a Local Mediator Nor Will It Draft an Inclusive Set of Regulations Defining Permissible Agreements.* The Commission lacks the resources to monitor all aspects of the settlement procedure, and it will not attempt to certify groups as bargainers on behalf of the public. ¶ 11

11. *The Commission Does Not Expect Agreements to Be Filed with the Commission Unless They Are Part of an Application or Accompany a Complaint. All Agreements, However, Should be Deposited in a Station's Public Files.* ¶ 14

Reimbursement and the Possibility of Abuse

12. *"Good Faith" on All Sides is a Key Assumption and a Claim of Abuse of Process Will Be Examined by the Commission.* The Commission recognizes the danger of groundless complaints and upon a showing of reasonable cause to believe that there has been an abuse of community dialogue, the Commission will consider appropriate action. ¶¶ 7, 15

A selective reading of these 12 points can either give the impression that the Commission wants to restrict the agreement process or that it wants to see the process expand. By emphasizing points 1, 3, 4, and 6, the *Proposed Agreements Rulemaking* seems to say that a broadcaster has an ultimate, nondelegable responsibility which cannot be limited by citizen agreements, and any agreement that does not allow for sufficient discretion or unilateral modification by the broadcaster has no force or effect. On the other hand, by emphasizing points 2, 5, 7, and 8, the *Proposed Agreements Rulemaking* seems to say that a broadcaster may enter into an agreement that will be treated as a formal, binding representation to the Commission; that any ambiguities will be construed in favor of implementation of the agreement;

and that even after the agreement is signed, the citizen group retains the right to file further petitions.

THE CONCURRING OPINIONS

Evidently, when it comes to the *Proposed Agreements Rulemaking*; policy is much more in the eyes of the beholder than in the rulemaking of the Commission. Witness the concurring opinions of Commissioner Hooks and Quello. Their attitudes and convictions as to the merits and dangers of citizen agreements are so different that it is often hard to believe both are concurring to the same *Proposed Agreements Rulemaking*.

Commissioner Hooks[1] downplayed the potential for citizen agreements impinging on licensee discretion. To Hooks, citizen settlements restrict a license "no more than network or union employment contracts" or than "the FCC's programming dictates." Hooks would like to see "the rules and policies finally adopted give the highest legitimate stature and widest breadth permissible to such agreements." As to some of the "tentative restrictions on allowable items for agreements," Hooks would "like to see those lifted in [the] final order" because they "appear to be unduly protective" of broadcast interests.[2]

Whereas Hooks would like to legitimatize agreements, Quello would rather see the Commission rely on existing ascertainment policies and complaint procedures as the primary mechanism for citizen involvement. Quello also suggests that there be "no official acknowledgment of private agreements...except upon complaint that a licensee has abrogated his responsibility...as a result of such agreements," and that such Commission review "should be strictly limited to a determination as to whether there has been an abrogation of responsibility."[3] Thus Quello urges the Commission not to "concern itself

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[1] *Agreements between Broadcast Licensees and the Public* (Commissioner Hooks, concurring), FCC 75-633, p. 1 (June 10, 1975).

[2] Ibid., p. 2.

[3] *Agreements Between Broadcast Licensee and the Public* (Commissioner Quello, concurring), FCC 75-633, p. 1 (June 10, 1975).

with the existence or non-existence of any private agreement so long as the licensee meets his overall public responsibility."[1] Quello also observes that "individual groups that demand agreements are not accountable to the public, to this Commission nor even to the licensees with whom they negotiated"[2] and are therefore potentially disruptive influences in the broadcasting and should be given little credence before the Commission.

Thus at the outset it was clear that the Proposed Policy Statement was subject to two widely divergent interpretations. Hooks could vote for the statement and see it leading to a larger role for citizen agreements in Commission policy; Quello could also vote for the statement and see it leading to a sharp limitation of the role of citizen agreements; and in doing so, both could point to the *Proposed Agreements Rulemaking* for support.

BROADCASTER AND CITIZEN GROUP RESPONSE

When the Commission issued its *Proposed Agreements Rulemaking*, it also called for interested parties to file comments with the Commission. With just a few exceptions, the comments filed by broadcasters and citizen groups followed a predictable pattern.

Broadcasters emphasized those portions of the *Proposed Agreements Rulemaking* which seemed most threatening to broadcaster freedom and most likely to strengthen the hand of citizen groups. The broadcasters consistently called on the Commission to remove any qualifications on their discretion and also requested Commission action to protect them from the threat of "citizen blackmail." In a fairly typical filing CBS echoed Commissioner Quello:

> CBS has certain basic reservations about the value of private agreements and the Policy Statement, by institutionalizing the review of such agreements, serves only to intensify our concerns. We believe there is a great deal more to be gained by maintaining a

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[1] Ibid., p. 2.

[2] Ibid.

> continuing dialogue with the public and ascertaining community needs and interests than can be derived from entering into accords with fragmented segments of the community "represented" by groups which often appear only at license renewal time. CBS urges the Commission to make no official acknowledgment of agreements, first, because there is no necessity for giving agreements such recognition, and second, because there will be serious adverse repercussions. In any event, we urge the Commission to make unmistakably clear that it is not the purpose of the Policy Statement to regiment or institutionalize the relationship between licensees and "citizen's groups" to the detriment of more informal, on-going, good faith relationships.[1]

Citizen groups emphasized the danger that the *Proposed Agreements Rulemaking* would stifle effective public participation in broadcast regulation. A typical comment was that the "proposed statement reflects an oversolicitous protectionism toward licensees" and that the "Commission should recognize citizen agreements as a form of self-regulation."[2] There was a belief that "the Commission has mistakenly characterized...citizen agreements as being potential instruments for usurping broadcaster discretion"[3] when no such threat really exists, and that broadcasters were hoping that the Commission would insulate them from a growing wave of "broadcast consumerism."

AN ANALYSIS OF THE *PROPOSED AGREEMENTS RULEMAKING*

When broadcasters and citizen groups become involved in commenting on a proposed rulemaking, they assume the role of advocates, not objective analysts, and tailor their observations as to best serve their own purposes. Thus neither side has an incentive to propose a "balanced" solution to the problem. Each side strives to influence

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[1] Comments of CBS, Inc., *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495, (July 25, 1975), p. 21.

[2] Comments of the Public Interest Research Group et al., *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975), p. 9.

[3] Comments of National Citizens Committee for Broadcasting, *In the Matter of Agreements between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975), p. 2.

the Commission to adopt its own recommendations, and the task of steering a middle course falls on the Commission.

It appears that an optimal policy for the Commission should recognize at least three factors: (1) the value of a clear unambiguous statement of Commission policy--so that valuable broadcaster and citizen group resources are not consumed divining the Commission's true intent through protracted litigation in the Commission and in the courts; (2) the need to protect broadcasters from abuse of process and to prevent irresponsible delegations of authority--so that broadcasters will not have to fear bad faith dealing, threats of extortion, and a loss of control over their own stations; and (3) the value of effective citizen participation in broadcast licensing--so that licensees and the Commission may benefit from citizen groups' good faith attempts to improve the quality of broadcast service. But it is clear that there will be inevitable trade-offs between the need to protect broadcasters and the freedom given to citizen groups to enter into agreements. A policy too protective of broadcasters' interests would choke off effective citizen participation, and a policy too lax in controlling citizen participation could leave broadcasters vulnerable to abuse of process and lead to problems with delegation of broadcaster responsibility.

The problem of deciding on an optimal policy therefore raises difficult questions of degree: How much protection do broadcasters require? How much credence should be given to citizen agreements and participation? And how should the Commission balance the trade-off between legitimate broadcaster calls for protection and equally legitimate citizen desires for effective participation? These problems arise in each of the four major topic areas treated by the Commission in the *Proposed Agreements Rulemaking*: (1) broadcaster responsibility, delegation and accountability; (2) enforcement of settlements; (3) Commission procedure and the strictness of its scrutiny; and (4) reimbursement and the possibility of abuse.

This chapter of the report examines Commission policy in each of these four areas as it is reflected in the *Proposed Agreements Rulemaking* and other Commission actions. Within each area the

Commission's policy is described and evaluated. In each of the four areas, suggestions are presented as to how the Commission might reduce ambiguity and inconsistency in its own policy, increase its protection of legitimate broadcaster interests without significantly restricting citizen participation, and improve citizens' ability to play an effective role in broadcast licensing without threatening legitimate broadcaster interests. Thus, the main goal of the analysis is to outline procedures that stimulate responsible and effective citizen participation while protecting legitimate broadcaster interests.

STANDARDS FOR BROADCASTER RESPONSIBILITY, DELEGATION, AND ACCOUNTABILITY

No other portion of the *Proposed Agreements Rulemaking* is as difficult to interpret as those sections treating broadcaster responsibility. In a single paragraph the Commission uses the terms "responsibility," "delegation," and "accountability" to describe substantially the same principle.[1] "Responsibility," "delegation," and "accountability" are, however, quite distinct concepts, and the Commission's overall approach in the *Proposed Agreements Rulemaking* suffers because of failure to adequately distinguish between these three terms.

It is entirely possible for a broadcaster to delegate large and significant amounts of authority and yet remain fully responsible and accountable for his station's operations. Most any broadcaster delegates duties and responsibilities to his employees and allows them to make significant operating decisions. Although this undeniably constitutes delegation, it is not necessarily inflexible and irresponsible delegation, nor does it imply a lack of accountability--the broadcaster remains liable for his employees' actions. On the other hand, it is of course possible for a broadcaster to delegate duties in an irresponsible fashion. But then the broadcaster remains accountable to the Commission for the responsibility of his delegation and can be penalized for his actions.

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[1] *Proposed Agreements Rulemaking*, See App. A, ¶9.

A more precise description of the broadcaster's situation is that the broadcaster must remain accountable for the responsibility of his delegations. To lump "delegation," "responsibility," and "accountability" together serves only to confuse matters. Delegation per se is not the issue: it is the responsibility of the delegation which is at the heart of the matter.

Consider the relationship between a network and an affiliate. When a broadcaster signs an affiliation agreement with a network, he delegates a certain amount of discretion over the content of his own programming. The Commission has noted that "in reality, the station licensee has little part in the creation, production, selection, and control of network program offering."[1] Yet the Commission states that the broadcaster "has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty...to the network."[2] In the context of network affiliation, the Commission has reconciled the realities requiring delegation and the responsibilities governing delegation by requiring the licensee not to "lawfully bind himself to accept programs in every case when he cannot sustain the burden of proof that he has a better program."[3] The test in the Commission's eyes is that a broadcaster is not operating in the public interest "if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory."[4]

Thus the Commission has in the past recognized that broadcasters delegate significant amounts of responsibility. The Commission has not forbidden the delegation; rather it has outlined standards to be applied for testing the responsibility of the delegations. Why not apply the same standards of broadcaster responsibility in the area

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[1] *1960 Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 R.R. 1901 (1960).

[2] *National Broadcasting Co. v. United States*, 319 U.S. 190, 205-206 (1943).

[3] Ibid.

[4] Ibid.

of citizen settlements that are applied to commercial network contracts? Is there any reason to distinguish the test for responsible delegation in the business sphere from a test for responsible delegation in dealing with citizen groups?

No doubt delegations arising in commercial contexts can be distinguished from delegations arising out of citizen settlements. A delegation resulting from a commercial contract is the outgrowth of a decision based on economic considerations largely independent of Commission control. A delegation resulting from a citizen agreement is the outgrowth of a decision based on legal and administrative considerations almost totally within the Commission's control.[1] But is this distinction a valid ground on which the Commission can build two separate standards of broadcaster responsibility: one standard for commercial contracts and one for citizen settlements?

It would seem not. As long as a citizen group is petitioning in good faith and not abusing Commission process, the only pressure brought to bear on a broadcaster is pressure sanctioned by the Commission and deemed to be in the public interest. This pressure is no less virtuous, legitimate, or responsible than the pressure of legitimate economic forces which dictate commercial decisions by broadcasters. To argue otherwise would be to undercut the Commission's authority by arguing that the will of the broadcaster in the marketplace should be accorded a special status which allows delegations that cannot be made as a result of Commission regulations and procedures. This is quite an untenable position. Consequently, whatever standards are applied in testing the legitimacy of broadcaster responsibility and delegation and the adequacy of accountability in the commercial sphere should apply directly to citizen agreements. A conscious double standard is indefensible.

Commercial contracts often contain clauses designed to overcome the Commission's concern over broadcaster delegation of authority. The National Association of Broadcasters cites the following

[1] See App. C for an examination of the Commission-dominated factors that influence parties to settle rather than litigate.

language as a typical "savings clause" in a commercial contract:

> Anything in this agreement to the contrary notwithstanding, it is understood and agreed that the licensee retains ultimate and complete authority with respect to all programming, employment, and other operational policies and that the licensee may, and shall, change, alter, modify or delete any of its undertakings herein when, in its judgment, the public interest requires.[1]

Since such a provision assuages the Commission in commercial contracts, a similar provision in citizen agreements should also overcome Commission concern over undue delegation or inflexibility. In cases where a citizen agreement does not already contain such a "savings clause," the Commission may follow one of three courses of action: (1) it may reject the agreement;[2] (2) it may suggest to amend the agreement on its own motion and request the parties to agree to the amendment; or (3) it may simply infer that all agreements have an appropriate "savings clause."[3]

Rather than reject an agreement and cause concern, expense, and delay for all parties involved, or rely on a tacit reinterpretation of an agreement--a reinterpretation which may not be clearly understood by the citizen groups and broadcasters--the Commission should preferably suggest that the parties agree to add a savings clause to their agreement. If the parties agree to a savings clause drafted by the Commission, then there can be no cause for concern over inflexible delegation of broadcaster responsibility. Only if a citizen group refuses to accept a savings clause similar to the one signed by networks and other commercial organizations might the Commission object to potentially inflexible delegations.

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[1] Comments of the National Association of Broadcasters, *In the Matter of Agreements between Broadcast Licensees and the Public* (July 25, 1975), p. 8.

[2] As per *Proposed Agreements Rulemaking*; see App. A, ¶10.

[3] As per *Proposed Agreements Rulemaking*; see App. A, ¶8.

Administratively, this procedure should be easy and inexpensive to administer. A copy of a Commission-drafted savings clause is sent to the citizen groups withdrawing their petition as well as to the broadcasters party to the agreement. The savings clause could be worded so as to make it clear that it supersedes all other understandings. Once the document is signed and returned to the Commission, it could be appended to the agreement and made part of the licensee's renewal file. In fact, the Commission may find it expeditious to adopt a policy of requiring *all* parties to *all* citizen agreements to sign savings clauses. That way the Commission could even avoid the task of reviewing agreements to determine whether they raise the possibility of inflexible delegations.

If the Commission does not adopt a standard savings clause but instead approves certain types of clauses and rejects other clauses, then broadcasters, citizen groups, and their lawyers will eventually discover an appropriate formula for a savings clause that will invariably pass Commission review. The end result would be substantively the same as a Commission-drafted savings clause. However, without an initial clear statement of what the Commission requires in the form of a savings clause, resources will have to be devoted to finding the appropriate clause, and some agreements may be invalidated in the course of searching for the appropriate clause. By providing a standardized savings clause at the outset, the Commission could save broadcasters and citizen groups the costs of searching for the appropriate formula and at the same time save itself from the task of reviewing a variety of savings clauses in search of those that fit the Commission's mold.

It should be noted that at the same time the Commission was considering the *Proposed Agreements Rulemaking*, it also had before it Docket 19743, *Inquiry into Subscription Agreements between Radio Broadcast Stations and Musical Format Service Companies*.[1] That docket focuses on music format companies which supply radio stations

[1] FCC 73-540 (May 29, 1973).

with pre-packaged formats and require their subscribing stations to sign contracts which may "hinder or inhibit the exercise of licensee discretion and flexibility in matters of the selection and presentation of non-musical programs."[1] As examples of potentially restrictive terms in such a contract, the Commission notes the following provisions:

> (6) All discussion, talk, sports or special events programs broadcast...will be of a public affairs or religious nature.
>
> (7) Stations' regular news programs will originate from non-network and non-oral sources which normally will exclude the use of "actuality" phone or tape reports. Station plans to devote five (5) percent or less of the total time station's on the air to news programs. During the hours 8:00 A.M. to midnight, station plans to have one newscast each hour of two (2) minutes duration or less.[2]

These terms are much more specific than most terms found in citizen agreements or network affiliation contracts.

The issues raised in Docket 19743 as to the legitimacy of music format contracts cannot be separated from the policy the Commission adopts as to broadcaster delegation in citizen agreements. If the Commission allows such music format contracts when they contain appropriate savings clauses, then it must also allow citizen agreements modified by similar savings clauses. If the Commission eventually decides to deny the validity of music format contracts in spite of savings clauses, then the test applied by the Commission should be identical to the test applied to determine the acceptability of citizen settlements.[3]

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[1] Ibid., p. 1.

[2] Ibid., Appendix, "Example of Restrictive Provisions in Subscription Agreement between Broadcast Licensee and Musical Format Company," p. 1.

[3] The Commission has observed that music format contracts contain savings clauses that allow the station to make modification

COMMISSION PROCEDURES FOR ENFORCING AGREEMENTS

Whenever an agreement is reviewed by the Commission, it may be accepted or rejected in whole, or in part. But how will the Commission decide which terms to enforce? How will the Commission enforce acceptable terms of agreements? How will the Commission treat unacceptable terms? Should the Commission penalize broadcasters for entering into irresponsible agreements? And how will the Commission treat citizen group pledges not to file petition to deny?

The *Proposed Agreements Rulemaking* suggests that acceptable terms of agreements will be enforced as any promise made to the Commission and will be judged on the Commission's promise vs. performance standard.[1] Unacceptable agreements, which inflexibly bind the broadcaster, would be treated as having no force or effect.[2] The only criterion distinguishing acceptable from unacceptable terms as far as the *Proposed Agreements Rulemaking* is concerned is whether an inflexible delegation has taken place. Is this distinction, based solely on a test of inflexibility, sufficient for purposes of enforcement?

A distinction based solely on a test of inflexibility seems to overlook the fact that agreements may conceivably contain terms which allow for great broadcaster flexibility but at the same time purport to bind the broadcaster to actions over which the Commission would not exert control on its own initiative. Consider, for example, an agreement that contains (1) an appropriate savings clause; (2) a statement that the station will not broadcast violent programming; and (3) a list of programs considered violent which the station promises not to broadcast.[3] The agreement as

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in programming if the "public interest concurrence and necessity, or the efficient operation of the station so require." Ibid., p. 1.

[1] *Proposed Agreements Rulemaking;* see App. A, ¶12a.

[2] Ibid., ¶10.

[3] This hypothetical agreement is similar to one actually signed by a Los Angeles television station, KTTV. See pp. 120-125 below for a discussion of that agreement.

a whole does not bind the broadcaster inflexibly because it contains an appropriate savings clause. Thus it would seem that the promise vs. performance test should be applied in enforcing the agreement.

But this reasoning leads to a contradiction. Section 326 of the Communications Act[1] specifically, and the First Amendment[2] more generally forbid censorship over broadcast media. The Commission itself has attempted to avoid any charges that it regulates the content of broadcast programming. Thus the Commission has stated its policy with regard to programming in rather general terms and has not required specific programs to be shown, or forbidden the broadcast of other programs. Yet if this hypothetical agreement is enforced on the Commission's promise vs. performance standard, then the Commission will be inquiring into the decision to broadcast a specific program. The result would be that citizen groups, through suitably constructed agreements, could attempt to exert control over broadcasters' programming which the Commission itself would not exert.[3]

To avoid this possibility, the Commission should distinguish terms that fall within the Commission's ambit from those that fall outside the Commission's ambit. It could enforce the former by the appropriate promise vs. performance standard and ignore the latter except as evidence of bad faith arises.

The term within the Commission's ambit refers to broadcaster activity over which the Commission exerts some control independent of any citizen agreement; i.e., it is within the Commission's independent jurisdiction. Thus agreements relating to equal employment opportunity, or to a general mix of news and public affair programming, fall within the Commission's ambit because the Commission will examine these factors regardless of the existence of a citizen agreement. In these areas citizen groups cannot maneuver the Commission

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[1] 47 U.S.C. 326 (1972).

[2] Amendments to the Constitution of the United States, Article I, December 15, 1791.

[3] An almost identical concern was voiced by the Commission in its review of the KTTV agreement. See pp. 120-125 below.

into a position of enforcing a policy for a third party which the Commission would not enforce for itself. Thus application of a promise vs. performance standard in enforcement is appropriate.

The term "outside the Commission's ambit" refers to activities that affect broadcaster performance in ways not particularly subject to Commission control. For example, the Commission does not regulate the broadcast of specific programs nor does it regulate the color of carpets in news directors' offices; any agreement concerning the broadcast of specific programs or the color of news directors' carpets would therefore fall outside the Commission's ambit. To these terms the Commission would not even apply its own promise vs. performance standard because it would then be scrutinizing aspects of broadcaster behavior that it would not examine on its own initiative. If the promise vs. performance standard was applied, the Commission would then be in a position of attempting to enforce agreements over aspects of broadcasting in which the Commission either has no interest or in which it feels that it should not become involved.

Although terms of agreements that fall outside the Commission's ambit should not be enforced under the promise vs. performance standard, they should not be entirely ignored. To the extent that a broadcaster fails to adhere to such terms because of bad faith and failure to demonstrate concern for the public interest, any breach of those terms should be treated as a reflection on the broadcaster's character and suitability as a licensee. Thus a broadcaster who signs an agreement containing terms outside the Commission's ambit could not imperviously and willfully refuse to adhere to those terms simply to spite the citizen group--to do so would constitute bad faith and reflect poorly on his character qualifications as a broadcaster.[1]

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[1] The Commission could limit its task in examining claims of bad faith by requiring extrinsic evidence of bad faith or some egregious circumstances indicating bad faith. By raising or lowering the threshold level of evidence required to raise an issue of bad faith, the Commission could regulate the extent to which it deals with issues falling outside the ambit of its review.

Similarly, penalties for broadcasters who engage in irresponsible delegations in the commercial sphere should be commiserate with the penalties for irresponsible delegations resulting from citizen agreements.[1] Unfortunately, the Commission's policy with regard to promise vs. performance and penalties for irresponsible delegation are vaguely stated in all areas of policymaking--not just as they apply to citizen agreements. Therefore, although it can be argued that consistency should apply, a clear referrant from which a consistent policy can be drawn is not available.

The issue of enforcement has, to this point, been considered only as it affects broadcasters. But in a typical agreement both broadcasters and citizen groups make representations. How will the Commission enforce citizen group representations made as part of citizen settlements?

The most common promise made by a citizen group is that it will withdraw its petition to deny in return for the broadcaster's agreement. The *Proposed Agreements Rulemaking* seems to imply that there is some limit on the extent to which a citizen group can be held to a promise not to file a petition, but the form of the restriction is vague. The *Proposed Agreements Rulemaking* says that "neither licensees nor citizen-negotiators could justifiably rely on any provision of an agreement which purports to preclude the filing of a petition to deny."[2] The Commission notes that a broadcaster's signing an agreement might "obviate any desire on the part of citizens to file a petition," but that such a decision must be left to the discretion of the citizens involved.[3] Taken at face value, the Commission seems to be implying that it would give as much consideration

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[1]The *Proposed Agreements Rulemaking*, ¶15, n. 5, notes that "in cases where the licensee improperly has abdicated its responsibility, it will be our obligation to consider the licensee's continued fitness to serve as a public trustee." See App. A.

[2]*Proposed Agreements Rulemaking*; see App. A, ¶15.

[3]Ibid.

to a petition filed by a citizen group the day after it reached an agreement with a broadcaster as it would to a petition filed against a station that had no agreement with the citizen group. If this is the Commission's intent, then there would be little incentive for a broadcaster to sign an agreement: he receives no consideration from the citizen group because a new petition may be filed the next morning.

Furthermore, once a petition is filed and once an issue is brought to the Commission's attention, the Commission may decide to pursue the matter on its own motion regardless of the participation of citizen groups. Thus even the most well-intentioned citizen group may not truly be able to guarantee effective consideration in return for a broadcaster's participation in a citizen settlement. Alternatively, once an agreement is signed, a totally independent citizen group may file a new petition against the same broadcaster. The new petition may restate many of the objections originally voiced by the citizen group that settled with the broadcaster, but the new citizen group may claim that it is not bound by the terms of the first group's settlement.

It is evidently very difficult to insulate a broadcaster from the petitioning process without either limiting the Commission's own power of review or potentially imposing severe restrictions on separate citizen groups' right to file petitions.

It seems the best the Commission can do to protect broadcasters from redundant petitioning is to restrict the opportunity for a citizen group which is party to an agreement from filing a petition that restates material previously contained in a petition that was withdrawn as part of a settlement; unless, of course, there is some indication of a breach on the broadcaster's part. Although the filing cannot be forbidden, the Commission can state that it will not treat these petitions as seriously as other matters coming before it. The

citizen group should be allowed to file a new petition based on original material not addressed by the agreement, just as it may file a new petition based on alleged breaches of an agreement. But once an agreement is signed, the Commission could recognize the responsibilities that exist on both sides and allow broadcasters as well as citizen groups the benefit of their bargain. Furthermore, if the Commission finds that a citizen agreement substantially disposes of issues raised in a petition to deny, then the Commission may wish to accept that agreement as dispositive of similar issues raised in future petitions by independent citizen groups.

COMMISSION SCRUTINY AND REVIEW

To this point, nothing has been said about the procedures the Commission might follow in scrutinizing agreements. With over two hundred petitions to deny outstanding and with each one of those petitions a candidate for settlement, the task of reviewing settlements term by term and clause by clause could easily mushroom into a sizable regulatory effort. Furthermore, a policy of strict scrutiny opens the Commission to the role of "a local mediator, resolving differences and recommending agreements,"[1] which the Commission wants desperately to avoid.

One approach would be to accept all settlements at face value and apply the policy statement only if a party claims there has been a breach of the agreement. Such a retrospective approach would avoid interpreting all agreements and concentrate only on ones that cause difficulty between the parties.

There are a variety of reasons why this approach could lead to difficulties. In the first place, it would permit agreements in violation of Commission policy as long as no disputes arose between the parties. Secondly, it would not be surprising to find that misunderstandings as to the nature of the duties and obligations arising from citizen settlements would be a major cause of disputes. Thus

[1] *Proposed Agreements Rulemaking*; see App. A, ¶11.

the Commission would find itself in the unfortunate position of mediating disputes that could have been avoided had Commission policies been clearly understood at the outset.

Consequently, some degree of Commission scrutiny or involvement seems desirable. The problem is to structure the involvement so that the Commission can avoid a careful exegesis of all agreements, yet remain reasonably certain that it is not allowing Commission policy to be violated.

It has already been suggested that the Commission adopt a standard "savings clause" outlining the Commission's stance as to delegation of broadcaster responsibilities and that a copy of the savings clause be sent to all parties to an agreement for confirmation that Commission policy will supersede any contradictory provisions of the agreement. An efficient review policy might be to expand the savings clause so that it also contains statements of Commission policy with regard to the enforcement of agreements through the promise vs. performance criterion, the Commission's policy toward agreements outside its ambit, the citizen group's ability to file further petitions to deny against the same broadcaster during the license period in question, and any other caveats or qualifications the Commission feels necessary. Again this understanding would specifically supersede all contradictory provisions in the agreement. When an agreement is filed, a copy of the notice would be sent to all parties. The parties would then specifically affirm that they understand Commission policies as they relate to their agreement. If the parties have any questions as to the application of Commission policies to their agreement, then these questions may be raised before the Commission. Once the understanding is signed and returned to the Commission, the Commission may discuss those parts of the petition resolved by the agreement.

By following such a procedure, all parties to an agreement will be given effective notice as to Commission policy, and the Commission need not review each and every term of the agreement for potential violation of Commission policy. Only when a party raises a specific

question as to the interpretation of a provision of the agreement, or when a breach is claimed, will the Commission's staff have to engage in a careful review of the agreement. As to all other portions of the agreement, the Commission can then presume that its policies are not being violated.

PROBLEM OF LEVERAGE AND THE POTENTIAL FOR ABUSE IN PETITIONING AND SETTLEMENT

Broadcasters often complain they are at the mercy of citizen groups because a citizen group can force a broadcaster to expend large sums defending a license against a petition to deny, whereas filing a petition is relatively inexpensive to the citizen group. The alleged ability of citizen groups to force large broadcaster expenditures as a result of a small citizen group expenditure gives the groups a form of financial leverage in dealing with broadcasters. Either the broadcaster settles, or he resigns himself to a long, expensive legal battle.[1]

Furthermore, a citizen group can utilize this leverage without actually going through the process of petitioning. Broadcasters claim that a citizen group need only threaten to file a petition to deny in order to mount a credible threat and immediately gain a strong bargaining position. The threat of a petition alone may be sufficient to convince the broadcaster to enter into an agreement with the citizen group.

To the extent citizen group leverage exists it springs from two sources: (1) the possibility that the petition will succeed, consequently forcing the broadcaster to lose his license and (2) the ability to force the broadcaster into large legal expenditures in attempts--successful or not--to save his license.

Historically the Commission has been loath to revoke broadcasters' licenses. From 1934 to 1973 the Commission has reviewed tens of thousands of licenses, but only sixty-five have been

[1] For a more complete treatment of many of the issues raised in this section, see App. C.

revoked.[1] Unless the Commission's behavior changes drastically, the probability of license revocation as a result of petition is minute[2] and thus is only a small component of the leverage that citizen groups can exert over broadcasters.

Therefore, a citizen group's leverage must stem largely from its ability to credibly threaten substantial legal fees and costly delays. Unfortunately, a variety of factors make it difficult to obtain objective data regarding the cost of litigating before the FCC. There are three possible data sources--attorneys, broadcasters, and citizen groups--and there are severe problems in collecting data from each. Attorneys have a confidential relationship with their clients and are reluctant to part with billing data. Broadcasters are often confused or uncertain as to the amount of their legal bills and the purposes for which they were incurred. Furthermore, broadcasters have a strong incentive to bias their expenditure reports upward so as to create the impression that citizen groups have greater leverage than is actually the case. Citizen groups, on the other hand, have an incentive to overstate their costs so that their leverage will seem smaller. Also, citizen groups are often the recipients of pro-bono legal advice and can make use of foundation-supported legal aid firms. Both these factors reduce the out-of-pocket cost of filing a petition to deny, while leaving the real cost of filing a petition unchanged. Thus the value of free service given to a citizen group filing a petition to deny would have to be imputed in order to obtain the actual resource cost and not just the out-of-pocket cost of filing a petition.

In spite of these real difficulties, it is nevertheless possible to obtain some reasonable estimates of the cost of litigating before the Commission.

Table 4 lists estimates of legal costs that have appeared in the general and academic press. Some of these estimates were made

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[1] 39 *FCC Annual Report* 222 (1973).

[2] See pp. 61-64 above for more detailed estimates of the probability of license revocations resulting from petitions to deny.

Table 4

THE COST OF LITIGATING BEFORE THE FCC:
ESTIMATES APPEARING IN THE PRESS

Source	Amount	Description
Broadcasting, June 16, 1975, p. 36	$ 150,000	Settlement between KRON-TV and former employees covering expenses of petitioning from 1968 to 1975. License was designated for hearing in 1969, and in 1973 the FCC affirmed the Administrative Law Judge's decision in favor of the station.
Wall Street Journal, January 2, 1975, p. 1	500,000	"A station may be forced to spend up to $500,000 in legal fees to defend itself before the FCC (the petitioners usually get free legal aid from public interest law firms)."
New York Times, August 20, 1975	120,000	Estimate of cost to two petitioners and one license challenger in opposing WNCN's switch to classical music.
Wall Street Journal, July 11, 1975	100,000	Minimal estimate of cost to WNCN of defending its license
Ibid.	500,000	Maximal cost to WNCN if case had gone to hearing.
New York Times, September 8, 1975 p. 55	200,000	William F. Buckley's estimate of WNCN's actual legal costs.
New York Times, April 1, 1975	1,500,000	Estimate of Leavitt J. Pope, WPIX executive, of WPIX's expenditures in defending against a license challenge.

(continued)

Table 4--(continued)

Source	Amount	Description
Hearings Before the Committee on Communications of the Committee on Commerce, 93d Cong., 2d Sess., Part 1, p. 324.	$ 200,000	Cost to WMAL to prepare one set of license applications that was subject to a petition to deny.
	400,000	Cost to WMAL of proceeding "full route through the courts."
Testimony of Richard J. Stakes, Executive Vice President of *Washington Star* Station Group	1,000,000	Total cost of license litigation to WMAL from 1969 to 1974.
E. Gellhorn, "Public Participation in Administrative Proceedings," 81 *Yale Journal of Law*, 359, 394 (1972)	100,000	Minimal cost of a major licensing contest before the FCC.
Comment, "Public Participation in Administrative Proceedings," 120 *University of Pennsylvania Law Review*, 702, 771 n. 466 (1972)	350,000 - 400,000	Cost of a full-scale renewal hearing.

by parties to a dispute; therefore, they may be biased. However, a series of informal interviews with other parties involved in some of the cases revealed that the estimates were by and large accurate thus they were included in the table. As shown by the estimates in Table 4, it is not difficult for a citizen-broadcaster controversy to generate legal fees greater than $100,000. At the upper extreme, an especially intricate challenge and defense may force a broadcaster into expenditures in the area of $1.5 million.

Other sources of information as to legal fees are the reimbursement arrangements listed in Table 5. Most of the data in Table 4 pertain to the cost of defending a license--not of challenging one. By contrast, Table 5 describes costs incurred by non-incumbent broadcasters. Unfortunately, only one reimbursement request in Table 5 was in the context of a petition to deny. That occurred in the precedent-setting KCMC case. The rest were made to unsuccessful competing applicants. Since petitions to deny are almost certainly cheaper to prosecute than a competing application and since the amount of the reimbursement proposed seems closely related to the stage the litigation had reached, it is hard to draw any firm generalizations as to the cost of petitioning. Perhaps all that can be said is that it is possible for significant sums to be spent in petitioning and challenging, but the amount spent in defending a license is generally larger.

By combining the data in Tables 4 and 5, it is, however, possible to generate precise estimates of the leverage in the WNCN and WPIX controversies.[1] In the WNCN case the citizen groups spent roughly $120,000, and WNCN spent about $200,000. The ratio of expenditures, or leverage, was 1.67 to 1: for every dollar spent by the citizens, the incumbent spent $1.67. According to Tables 4 and 5, in the WPIX case the challenger's expenditures amounted to $310,886 and broadcaster expenditures were $1,500,000. The ratio of expenditures, and thus the leverage, was on the order of 5 to 1.

[1] Both these cases are discussed in greater detail on pp. 129-137 below.

Table 5

THE COST OF LITIGATING BEFORE THE FCC:
RECENT REIMBURSEMENT REQUESTS
BEFORE THE COMMISSION

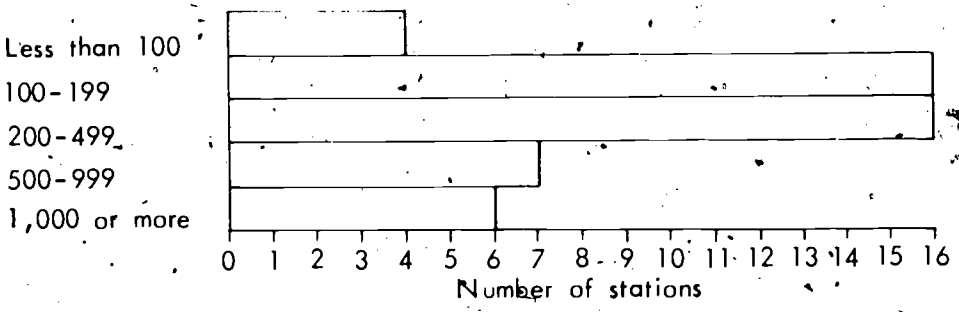
Source	Amount	Description
Office of Communications of United Church of Christ v. *FCC*, 465 F.2d 519, 521 (1972) [KCMC]	$15,137.11	Cost incurred by the United Church of Christ in aiding Texarkana citizen groups in filing a petition to deny and in litigating through the Commission and courts.
WPIX, FCC 75-929 (August 12, 1975)	310,885.81	Expenses incurred by the Forum in challenging the license of WPIX-TV in New York. An initial decision had been issued prior to the settlement.
Post-Newsweek Stations, 26 F.C.C.2d 982 (1970)	63,500.00	Cost to challenger of processing a competing application up to the point of a comparative hearing.
Greensboro Television Co. v. *FCC*, 502 F.2d 474 (D.C. Cir. 1974)	44,195.00	Cost of preparing a competing application for a TV license prior to the hearing stage.
Prairieland Broadcasters, FCC 75M-492 (1975)	8,400.00	Legitimate and prudent expenses in preparing a competing TV license application. Application withdrawn prior to hearing.
Thunder Bay Broadcasting Corp., FCC 74-782 (1974)	6,992.82	Expenses claimed for preparation of a competing application. Application withdrawn prior to hearing.

There is a significant difference between a leverage of 1.67 to 1 and one of 5 to 1, but with only two observations it is impossible to determine whether the WNCN or WPIX leverage ratio is more typical, or whether both are wide of the mark. Again, all that can be safely said is that citizen groups can exert leverage, but its degree is uncertain.

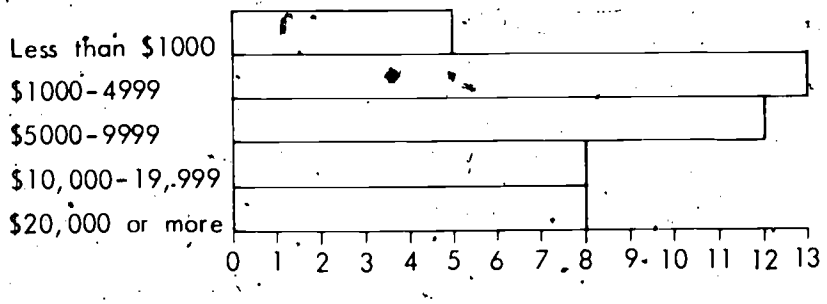
Another source of data as to legal fees is a survey conducted in 1973 by the National Association of Broadcasters. The NAB study polled 97 licensees who were subjected to petitions to deny and 22 licensees who were subject to competing applications. Forty-seven of the petitioned licensees and nine of the challenged licensees responded to the questionnaire. The questionnaire, which is reproduced as App. D, requested five pieces of information: (1) the number of additional hours of labor spent responding to the filing; (2) the additional out-of-pocket cost caused by the filing; (3) whether the challenge was resolved or not; and for all challenges or petitions that were not resolved as of the date of the survey, (3a) the additional hours of labor, and (3b) the additional out-of-pocket expenses expected to be incurred as a result of the petition.

Figure 3 depicts the distribution of responses to questions 1, 2, 3b, and 3c for the 47 licensees who were subject to petitions to deny and who responded to the questionnaire. The respondents were almost equally divided between those who had already resolved their petitions (23 respondents) and those who still had unresolved petitions outstanding (24 respondents). On the average, the stations spent 443 hours of personnel time and $11,539 in out-of-pocket expenses in either resolving their petitions or in defending as yet unresolved petitions. The maximum number of hours spent was 4,000, and the maximum expenditure was $50,000. Among those stations facing unresolved petitions it was estimated that an average of 618 hours of personnel time and $15,800 in out-of-pocket expenses were yet to be incurred. At the maximum, stations expected that it would take another 2,160 hours and $65,000 to resolve outstanding petitions.

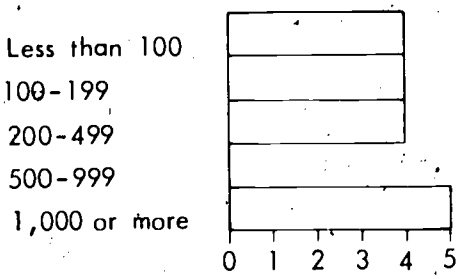
Personnel hours spent responding to the petition (Q.1)



Out-of-pocket expenses incurred responding to the petition (Q.2)

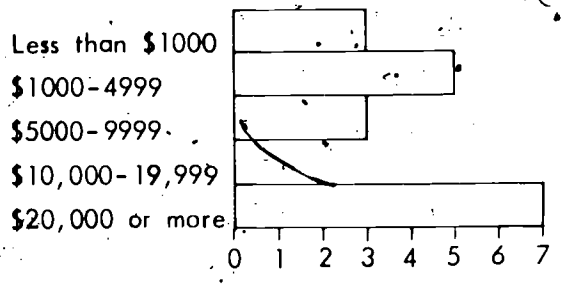


Expected additional expenditure of personnel hours, if petition is not settled (Q.3b)



NOTE: See App. D for a copy of the questionaire.

Expected additional out-of-pocket expenses if petition is not settled (Q.3c)



(Source: National Association of Broadcasters)

Fig. 3—Results of the NAB survey

When expected costs are added to already incurred costs for stations still defending against petitions, the total expected outlay in terms of station personnel time is 865 hours and $28,616 in out-of-pocket expenses. Stations that have already completed their defense incurred personnel costs of 427 hours and out-of-pocket costs of $8,068. Thus, comparing averages, unresolved petitions were expected to be more expensive by 438 hours and $20,548 than those already resolved. And for the sample as a whole, the total cost of defending against a petition when expected costs are added to costs already incurred, averages to 651 hours of station labor and $19,837.

Only nine stations subject to competing applications responded to the NAB survey. Of the nine respondents, five had completely resolved the challenges, and four expected to incur additional expenses in defending their licenses. The nine responding stations had already spent an average of 3,814 hours of station personnel time and $445,533 in resolving or defending against challenges, and the four stations that expected to incur additional expenses estimated that an average of 8,650 additional hours of personnel time and $1.215,000 would have to be spent defending against the challenge.

REIMBURSEMENT AND LEVERAGE

In spite of the difficulty involved in arriving at precise cost estimates, there is a general consensus among broadcasters as well as citizen groups that citizens do have leverage over broadcasters--an opinion supported by the preceding data. The controversy is over the magnitude of the leverage, and more importantly, over the responsibility with which citizen groups utilize that leverage. Broadcasters often claim that leverage gives rise to improper pressure by citizen groups: it allows citizen groups to threaten broadcasters with large legal fees even though the citizen groups do not have legitimate public interest concerns.[1] Citizen groups, on the other

[1] See, for example, Comments of Storer Broadcasting Company, *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975).

hand, argue that they use their leverage responsibly and in the public interest and that in any case they really do not have very strong leverage over broadcasters.

The question of reimbursement of citizen group legal fees is raised in *Office of Communication of the United Church of Christ* v. *FCC*[1] (*UCC* III) and in Docket 19518 and is closely related to the controversy surrounding leverage.[2] The effect of allowing reimbursement of certain citizen group expenses is to reduce the effective cost to the citizen group prosecuting a petition to deny. At the same time, reimbursement raises the possibility of a further increase in litigation costs to broadcasters by the amount of legitimate and prudent expenses which may have to be reimbursed to citizen groups. The decrease in citizen group litigation costs and the concurrent increase in broadcaster litigation costs resulting from reimbursement will increase citizen group leverage over its present levels. Therefore, whatever complaints broadcasters have over leverage and the potential for improper citizen pressure can only be magnified by the possibility of Commission-approved reimbursement.

Citizen group leverage before the FCC is a fact of life, and there is little the Commission can do to eliminate it. When a broadcaster is faced with a challenge to his license, his livelihood is placed at stake, and the decision to spend more defending against a challenge than it costs to mount a challenge will be the result of a rational decisionmaking process on the broadcaster's part.[3] From a purely economic standpoint, the broadcaster will be willing to protect his investment in his license with legal expenditures as large as the value of the economic rents associated with his station operations. In the case of major market VHF operations, these rents easily run into the millions of dollars. These expenditures can be forced by citizen group expenditures which, though substantial

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[1] 465 F.2d 519 (D.C. Cir. 1972).

[2] See pp. 42-43 above for a discussion of Docket 19518.

[3] See App. C for a more complete analysis of this process.

to the citizen groups, pale in comparison with the size of broadcasters' expenditures.

Only by severely limiting the ability of citizen groups to file, or by dramatically increasing the evidentiary showing needed to support a petition can the Commission cut deeply into the citizen group's leverage. But for a variety of reasons--political as well as legal--both of these alternatives are largely unavailable to the Commission.[1]

The problem confronting the Commission, then, is how to limit the potential for abuse of leverage. In *UCC* I the Court allowed wide discretion to the Commission to control "spurious petitions...not concerned with the quality of broadcast programming."[2] If the Commission could design procedures that would either effectively reduce the possibility of spurious petitions or the cost involved in responding to spurious petitions, then the leverage that seems inevitable in the petitioning process can largely be limited to meritorious claims. Since the leverage inherent in a spurious petition would decrease, the possibility of using leverage to exert improper pressure would be sharply reduced. The following three procedures provide means for reducing the chance of abuse of citizen groups' inherent leverage while not unduly restricting the rights of citizen groups to file bona fide petitions:

1. Allocation of Resources to Reduce the Backlog of Petitions at the Commission.

With a backlog of over 1,000 renewal applications and 147 petitions to deny, any party filing a petition--almost regardless of its substance--can be sure of causing the broadcaster a period of uncertainty and protracted legal fees. If the Commission simply reduced the backlog and turnaround time in the renewal and petitioning process; then the delay that can be caused by a petition would be reduced. The effect will be to reduce the short-term leverage of

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[1] And if the Commission does cut into leverage, it may simply cause citizen groups to turn to other forms of participation. See pp. 26-29 above.

[2] 359 F.2d 994, 1004 (D.C. Cir. 1966).

all petitions. But in the long run, it can be expected that petitions that raise insubstantial issues or that fail to make a sufficient showing will be disposed of more quickly than petitions that raise novel or substantial issues which will be retained for further review. Consequently, the leverage inherent in relatively trivial petitions will be reduced by a larger factor than the leverage inherent in more substantial petitions. This would protect broadcasters from being "nickel-and-dimed" to death by insubstantial petitions.

The Commission is well aware of the large backlog it faces and has taken steps to reduce delay in its proceedings. Recently the Commission introduced a monthly "Petition to Deny Day" designed to expedite the processing of petitions.[1] Chairman Richard E. Wiley has also attempted to speed up dispositions of petitions to deny by the Commission's staff. In spite of these efforts, the Commission continues to face a backlog of cases which causes counterproductive delays.

More drastic in-house procedures at the FCC would help to further reduce the petition backlog. Additional staff assigned to help dispose of the existing backlog, and additional Petition to Deny days could be assigned till the backlog is brought under control. Once the backlog is reduced, the number of Petition to Deny days can also be reduced, and resources can be reallocated to other functions at the Commission.

2. Adoption of New Summary Judgment Proceedings.[2]

Before designating a petition for hearing, the Commission must find that the petition raises "substantial and material questions of fact."[3] If a petition does not raise a substantial and material

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[1] For an example of the wholesale manner in which the Commission disposes of petitions during a Petition to Deny Day, see *Broadcasting* 27 (December 22, 1975).

[2] Summary judgment procedures for cases already designated for hearing are described in *Summary Decision Procedures*, 34 F.C.C.2d 485 (1972).

[3] 47 U.S.C. 309(d)(2) (1970).

issue, then the Commission must "issue a concise statement of the reasons for denying the petition which...shall dispose of all substantial issues raised by the petition."[1] All petitions that compose the Commission's backlog are presently being examined to see whether they make a sufficient showing to warrant designation for hearing. Is there some way of speeding up the process so that insubstantial petitions can be disposed of quickly and petitions that show promise of raising substantial issues still receive full and comprehensive Commission review?

The courts have allowed the Commission wide latitude in defining the standards necessary to place a petition in hearing,[2] and this latitude could be put into profitable use by defining a set of summary procedures which could be applied to all petitions. These summary procedures could be viewed as threshold levels of evidence which a petition must meet in order to warrant further consideration. Petitions containing unsubstantiated or weak factual allegations could be immediately dismissed in whole or in part. The Commission could also take some first steps toward defining the bare minima necessary for a prima facie showing that granting the renewal would not be in the public interest. To a large extent these procedures would simply amount to a more precise and prompt application of the Commission's own Rule 1.580.[3]

By articulately stating the minimal criteria necessary to raise substantial and material questions of fact, the Commission could not only reduce its own workload but could also provide constructive guidance to citizen groups in the preparation of future petitions to deny.

3. Application of Sections 403 and 506 of the Communications Act.

Section 506[4] of the Communications Act is a criminal provision

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[1] Ibid.

[2] See pp. 19-21 above and 47 U.S.C. 309(d) (1970) as interpreted in *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972).

[3] 47 C.F.R. 1.580 (1974).

[4] 47 U.S.C. 506 (1970).

declaring it unlawful "to cause, compel or constrain a licensee" by "the use of express or implied threat of the use of...intimidation or devices" to (1) "employ or agree to employ...any person or persons in excess of the number of employees needed by such licensee to perform actual services,"[1] or (2) "to pay or give...any money or other things of value in lieu of giving...employment to any person or persons...in excess of the number of employees needed...to perform actual services,"[2] or (3) "to pay or give...any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensees which are not to be performed."[3]

Anyone in violation of these provisions is subject to imprisonment for not more than a year, or to a fine of not more than $1,000, or both.

Section 506 was added to the Act in 1946. It originated as a bill to "Prohibit Interference with the Broadcast of Non-Commercial Cultural or Educational Programs," but its scope was later expanded after coercive practices relating to labor union behavior were uncovered in the course of congressional hearings.[4]

It seems that no one has ever attempted to apply Section 506 to the situation of a citizen group allegedly blackmailing a licensee. Under this provision of the Act, the licensee could claim that a threat to file a groundless, unmeritorious petition to deny unless the broadcaster acceded to certain citizen group demands constitutes a coercive practice within the meaning of Section 506. If the demand was that the broadcaster hire individuals or consultants, then the broadcaster would seem to have a stronger case under Section 506. Furthermore, a State Court has observed that Section 506 carries a criminal sanction and does not define any civil remedies. Therefore, the Court argued that any coercive behavior on the part of individuals against broadcasters would still be actionable under

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[1] 47 U.S.C. 506(a)(1) (1970).

[2] 47 U.S.C. 506(a)(2).

[3] 47 U.S.C. 506(a)(4).

[4] See 93 *Congressional Record* 2341 (1945).

state laws, and the broadcaster might be able to claim civil damages.[1]

Since Section 506 carries a criminal penalty, it is understandable why there might be reticence to apply the provision in citizen cases. Furthermore, the provision has never been applied outside the area of labor negotiations, and it is not certain that the courts would be willing to expand the applicable context of Section 506 to citizen negotiations. A less drastic step for the Commission would be to initiate an inquiry into any alleged abuses by invoking Section 403.[2] The threat of investigation alone, should the Commission make it credible, would likely deter some questionable or improper pressures on broadcasters. Furthermore, if the Commission discovers the problem is chronic and persistent, it could, based on its investigatory findings, introduce new measures designed to limit abuse.

Each of the above suggestions would reduce the leverage inherent in all petitions to deny, but the leverage of a weak petition to deny would be reduced by a greater degree than would the leverage inherent in a stronger petition. Broadcasters would thus gain greater protection from weak petitions but would remain accountable to substantial citizen group petitions. In such an environment, where the threat of blackmail or abuse of Commission process is reduced, the argument in favor of allowing reimbursement for legitimate and prudent citizen group expenses becomes stronger.

The Commission has long held that it will allow reimbursement only for legitimate and prudent expenses, and that parties reporting reimbursement must document their expense for the Commission.[3] The Commission has also suggested the possibility of placing a dollar

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[1] *General Teleradio Inc.* v. *Manuti*, 133 N.Y.S.2d 362, 365 (1954). The case found that picketing of a station constituted coercive action within the meaning of the statute, and the Court issued an injunction ordering the picketing stopped. The Court also appointed a referee to determine what damage had been suffered by the broadcaster and ordered that the union pay those damages to the broadcaster.

[2] 47 U.S.C. 403 (1970).

[3] See *Seven (7) League Productions, Inc. (WIIC)*, 7 F.C.C.2d 513 (1967).

limit on reimbursements made in the form of consultancies.[1] If a dollar limit is to be imposed at all, an interesting possibility the Commission seems to have overlooked is that of placing a dollar minimum on the reimbursement arrangements the Commission would allow.

Two distinct arguments can be made in favor of placing a dollar minimum and not a maximum on allowable reimbursements.

The first is an administrative rationale. By placing a dollar floor on permissible reimbursement, the Commission will avoid the task of scrutinizing relatively small and unimportant reimbursements. The dollar minimum would then act as a rationing device controlling access to the Commission's regulatory resources so that the Commission does not become inundated with petty reimbursement requests.[2]

The second rationale is policy oriented. If a citizen group knows that in order to be allowed reimbursement it will have to show legitimate and prudent expenses greater than a predetermined amount, then the group will not undertake relatively minor expenditures in the hope of gaining reimbursement. If the cost involved in an action is relatively minor, the group can reasonably be expected to cover its own costs without a need for reimbursement. The broadcaster will at the same time be protected from penny-ante attempts at abuse of process where a group requests a relatively small reimbursement in return for not filing a trivial petition. Thus reimbursement could be limited to substantial issues of concern.

Furthermore, since a citizen group may expend a great deal of time and money in a legitimate effort to vindicate its rights, and since the expenditure may well be legitimate and prudent, it seems more difficult to find a valid rationale for setting a ceiling to reimbursement requests than setting a floor. The effect of a ceiling

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[1] FCC 72-473 (June 7, 1972), p. 2.

[2] See K. Scott, "Standing in the Supreme Court - A Functional Analysis," 86 *Harvard Law Review* 645 (1973) for an analysis of standing as a rationing device along these lines. Note that the federal courts place a dollar minimum of $10,000 on some cases that they will hear. 28 U.S.C. .1332 (1970).

will be to limit the willingness of groups to prosecute major claims--which are often likely to be infused with significant public interest considerations. The effect of a floor will be to exclude minor claims--which are less significant to the public interest and which can probably be financed by the citizen group itself. Since the objective of the Commission should be to promote the prosecution of valid claims in the public interest and discourage the filing of nuisance claims designed simply for the purpose of reimbursement, a minimal reimbursement level seems more reasonable than a maximal level.

SUMMARY OF RECOMMENDATIONS

The preceding analysis suggests a number of weaknesses in the *Proposed Agreements Rulemaking*. The document is vague and potentially contradictory in its substantive provisions, and procedurally it offers little hope of expeditiously dealing with a large backlog of petitions to deny and proposed citizen agreements. Furthermore, it appears that many issues considered in the *Proposed Agreements Rulemaking* have either already been considered by the Commission in other areas or will arise again in various policymaking contexts. Consequently, there is the danger of the Commission adopting inconsistent policy positions on virtually identical issues.

To deal with these problems, the following measures seem most appropriate:

- The standard for broadcaster responsibility should be defined consistently across commercial contracts and citizen settlements. Thus the savings clauses which operate effectively in commercial contracts should be accepted in citizen agreements, and the issues of broadcaster responsibility raised in Docket 19743 should be resolved with the *Proposed Agreements Rulemaking* in mind.
- The Commission should distinguish between agreement terms within the Commission's ambit and terms that fall outside its ambit. It should enforce the former on a promise vs. performance standard and enforce the latter insofar as

any breach may constitute evidence of bad faith. By relying on this distinction, the Commission would not have to reject agreements simply because they contain terms outside the Commission's ambit, nor would the Commission have to fear being cast in the role of censor through the enforcement of citizen agreements.

- Citizen groups who sign agreements should be discouraged by the Commission from refiling petitions that restate the claims of previously withdrawn petitions. Exceptions should be made in cases where the citizen group alleges there has been a breach of an agreement. The purpose of this policy is to ensure that broadcasters as well as citizen groups receive the reasonable benefits of their bargain.
- As a procedural device to cut down on the need for careful review of all agreements and at the same time to ensure that Commission policy is not being violated, the Commission should draft a "Notice of Understanding" which unambiguously outlines the Commission's policies toward the acceptability and enforceability of agreements and also contains all appropriate savings clauses. The notice should be drafted so that it supersedes all potentially contradictory sections of an agreement. A copy of the notice should automatically be sent to all parties to agreements for their signature. If the parties accept the terms of the notice, then, unless the agreement raises unique problems, there should be no need for careful review of the agreement itself.
- New summary procedures are necessary for distinguishing petitions that make sufficient showings from those that are deficient. The Commission may begin developing these procedures by simply applying various rules it has already adopted.

- Section 506 of the Communications Act provides for sanctions against parties who attempt to coerce broadcasters. This provision may be applicable to alleged cases of citizen group extortion. The Commission might notify citizen groups as well as broadcasters of the availability of this sanction.
- Given the availability of sanctions against irresponsible behavior, such as in Sections 403 and 506, the Commission should adopt a more positive attitude toward reimbursement in the context of petitions to deny. When a reimbursement request is for prudent and legitimate expenses and is made by a bona fide citizen group with the approval of the broadcaster, then there is no reason to reject the reimbursement.
- If the Commission wishes to control the amount of legitimate and prudent reimbursement that takes place, then it seems more sensible to place a dollar minimum on allowable reimbursements than a dollar maximum. From a procedural standpoint, this will focus the Commission's resources on more important reimbursement issues. From a policy standpoint, it will discourage minor, potentially nuisance attempts at influencing broadcasters in the hopes of reimbursement and encourage more substantial attempts at influencing broadcasting. Furthermore, it is more reasonable to expect citizen groups to bear small expenses without reimbursement than to bear legitimate and prudent, but nevertheless substantial, expenses greater than some dollar ceiling.

V. COMMISSION EXPERIENCE FOLLOWING THE *PROPOSED AGREEMENTS RULEMAKING*: FIVE CASE STUDIES

When the Commission adopted the *Proposed Agreements Rulemaking*, it made it clear that "all cognizable agreements entered into by licensees and citizen groups subsequent to the issuance of the proposal, even though it is not final"[1] would be subject to the proposal's terms. In the weeks following the proposal's adoption, the Commission had many opportunities to apply the *Proposed Agreements Rulemaking*. With each application, the Commission would have to interpret it so as to fit an actual fact situation; thus the Commission would no longer be able to hide behind broad and imprecise principles which could easily draw a consensus. Specific agreements raise well defined problems, and as will be seen below, the unanimous majority that adopted the *Proposed Agreements Rulemaking* quickly fell apart when it came to applying the rulemaking principles.

Following the adoption of the *Proposed Agreements Rulemaking*, the Commission had the opportunity to apply the *Rulemaking* to at least three agreements of the type to which the document was specifically addressed. Furthermore, two other events occurred which relate significantly to the Commission's policy as to citizen group involvement in licensing affairs. The first was the settlement of a challenge to the license of WPIX-TV in New York. In that case the Commission touched on questions dealing with reimbursement and the public interest which, although not directly covered by the *Proposed Agreements Rulemaking*, are closely related to problems encountered in the citizen settlement area. The second event was a citizen agreement that resolved a challenge to the license of radio station WNCN in New York. The WNCN case has not yet been considered by the Commission, but when it does come up on the agenda it will raise some novel issues of reimbursement, format change, and broadcaster flexibility.

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[1] *Proposed Agreements Rulemaking*; see App. A, ¶17.

This chapter discusses three citizen agreements that have been interpreted under the *Proposed Agreements Rulemaking*; and the Commission treatment of the WPIX agreement. In each case the agreement itself is outlined, some of the history leading up to the agreement is provided, and the Commission's action is reported. The Commission's action is then considered in light of the analysis and recommendations of Chap. IV. A description of the WNCN case and a discussion of possible Commission rulings conclude the chapter.

AGREEMENTS SUBJECT TO THE *PROPOSED AGREEMENTS RULEMAKING*

1. WAUD: Auburn, Alabama

On March 11, 1973, the Human Relations Council of Alabama and two individuals filed a petition to deny the license of WAUD in Auburn, Alabama. Following the filing of the petition, the parties negotiated a settlement which was filed as an amendment to WAUD's pending renewal application on October 12, 1973. Then on October 23, the petitioners filed a motion for withdrawal of the petition to deny.

Almost two years later, the Commission notified the parties that it could not act upon the motion to withdraw because the motion was predicated on an agreement which "taken as a whole is inconsistent with the letter and spirit of the *Proposed Policy Statement*."[1] The Commission vote was 5 to 2, with Robinson and Hooks dissenting and arguing in favor of the agreement. Thus less than a month after the unanimous adoption of the *Proposed Agreements Rulemaking*, dissension as to its interpretation and application had already surfaced.

In the opinion of the majority, what made the WAUD agreement inconsistent with the letter and spirit of the Policy Statement? The agreement stipulated that "at least 35 percent of all nonmusical programming will be locally produced and have Blacks dealing with the interest, problems, and issues that are of concern to Blacks." In the case of news, "at least two-fifths of the total news broadcast

[1] *Letter to Ellen S. Agress*, FCC 75-781 (July 1, 1975).

by the licensee will be committed to state and local news." Furthermore, with regard to hiring, the station agreed that "whenever a full-time vacancy occurs, a Black person will fill that position."

But none of these specific terms seemed to bother the Commission as much as the fact that the contract did not contain an adequate savings clause and seemed to constrain broadcaster flexibility. To the Commission "the agreement appears to bind the licensees of WAUD to fixed and unchangeable types and amounts of programming and to fixed and unchangeable employment policies and, thus, improperly infringes on the licensee's responsibility in these areas. Such provisions can only be regarded as a potential abdication of licensee responsibility."[1]

An attempt to incorporate a savings clause noting that the licensee "retains full responsibility for broadcast over its airways and...nothing herein abrogates that responsibility"[2] did not greatly impress the Commission. It still saw licensee responsibility improperly curtailed, and therefore the agreement was deemed to have "no force or effect before this Commission."[3]

Thus in the opinion of the majority, the terms of the agreement itself were not as bothersome as its allegedly binding effect.

Commissioner Quello, in the majority, issued a separate statement which distinguished his objections to the terms of the agreement from his objection to the binding effect of the agreement.[4] One of the terms of the agreement most bothersome to Quello was the employment provision which he thought "requires unlawful discrimination in hiring." As to the binding effect of the agreement, Quello felt it "improperly places responsibility for programming and/or hiring in the hands of a party other than the licensee." Quello emphasized the broadcaster's duty to the entire community and

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[1] Ibid., p. 1.

[2] Ibid., p. 2.

[3] Ibid.

[4] *Letter to Ellen S. Agress* (Commissioner Quello, concurring), FCC 75-781 (July 1, 1975).

argued that a binding agreement might hinder broadcasters' ability to respond to public needs. Broadcasters, argued Quello, are cast in a "fiduciary role" and must realize that "In making firm commitments to one party...the rights of other parties within the Community can be affected." Consequently, "great care must be taken to insure that judgments are reasonably based upon the facts at hand rather than simply upon the pressures which are brought to bear."

Commissioner Robinson, who was joined by Commissioner Hooks in the minority, issued a dissenting opinion. Robinson was puzzled by the Commission's reasoning. To Robinson, the *Proposed Agreements Rulemaking* clearly determined that all agreements that surrendered excessive broadcaster discretion would be of no force or effect. It just as clearly determined that "the obligation for determining and serving the public interest is nondelegable."[1] Therefore, "if a broadcaster believes it to be in his interest and the public interest to sign an agreement with a citizen's group," Robinson sees "no *a priori* reason to look over his shoulder and tell him to do otherwise."[2] Any delegation running counter to the broadcaster's sense of the public interest would be unenforceable regardless of whether or not the delegation resulted from a citizen agreement or any other contract or device. Robinson therefore resisted the notion that the Commission should "supervise citizen's agreements either to approve or disapprove them."[3]

Robinson's reading of the *Proposed Agreements Rulemaking* would have the Commission get out of the business of reviewing all agreements and would rely on all parties to an agreement to understand how their rights and duties were constrained by the *Proposed Agreements Rulemaking*. The other Commissioners either did not have Robinson's faith in the ability of broadcasters and citizen groups

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[1] *Letter to Ellen S. Agress* (Commissioner Robinson, dissenting) FCC 75-781 (July 1, 1975), p. 1.

[2] Ibid.

[3] Ibid.

to correctly interpret the *Proposed Agreements Rulemaking* and apply it consistently to their own agreements, or they simply wished to keep the hammerlock of review on the entire process.

In the case of WAUD it is likely that the station and citizen group will simply modify the agreement by adding an appropriate savings clause and then resubmit the agreement for Commission approval.[1] The new agreement will again be examined, and if the savings clause is adequate it will be approved. In such a procedure, the Commission will be implicitly suggesting agreements and will thus be assuming the role of local mediator--two developments the Commission claims it wanted to avoid. At the same time it will be adding to its backlog because rejected agreements may be amended and scrutinized again and again until the broadcaster and citizen group strike an agreement that meets with Commission approval.

Rather than accept the majority position that all agreements be carefully scrutinized or Robinson's position that no review is necessary and that because of the *Proposed Agreements Rulemaking*, declaratory rulings as to the validity of agreements are superfluous, the Commission could consider adopting an intermediate procedure suggested in the preceding chapter. All parties to an agreement would sign a Commission-drafted memorandum of understanding outlining Commission policy and stating that the Commission policies supersede all potentially contradictory portions of the agreement. The Commission could then largely avoid a case-by-case scrutiny of original and refiled agreements, but still remain confident that no Commission policies are being violated by the agreement. This procedure would seem to answer the majority's concerns over the appropriate wording of a savings clause and at the same time avoid the case-by-case review that Commissioner Robinson feels is unnecessary.

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[1] This sequence would be similar to the Twin States cases (described on pp. 50-51 above) where a rejected agreement was modified so as to overcome the Commission's objections.

2. KMJ: Fresno, California

The same day the Commission reviewed the WAUD agreement, the Commission also considered an agreement between the Television Advisory Committee of Mexican Americans (TACOMA) and KMJ-TV in Fresno, California. But instead of rejecting the agreement as in the WAUD case, the Commission approved it.

In terms of programming, the agreement called for (1) daily programming in English and Spanish between 6:15 and 6:30 a.m. to include a job call, consumer information, and news; (2) the dedication of one program a month to minority subjects; (3) KMJ to produce and broadcast at least one half-hour special documentary on minority affairs every 90 days; and (4) KMJ to air at 9:00 a.m. each Sunday morning a half-hour program to be provided by TACOMA with the technical assistance of KMJ. In other areas KMJ agreed to modify its affirmative action plan, to have periodic meetings with TACOMA, and to reexamine its ascertainment procedures.[1]

Although the terms of the KMJ agreement appear to be at least as specific as the terms of the WAUD agreement, the savings clause in the KMJ agreement seemed to allow more discretion to the broadcaster, and the Commission therefore approved the agreement.

The savings clause in the agreement reads as follows:

> TACOMA understands that communication law and the rules of the Federal Communications Commission require that the final responsibility for all program decision must remain with station management and nothing contained in the agreement shall be construed to be inconsistent with that requirement.

The Commission was unanimous in its approval. The only separate statement came from Quello, who again voiced a fear that unrepresentative citizen groups would abuse the agreement mechanism and thus distort programming and policies. Quello was "concerned that a single, highly vocal group, with an indeterminate constituency, can exert a

[1] *Letter to Paul Rivera, Chairman, TACOMA*, FCC 75-780 (July 1, 1975).

disproportionate influence on programming for the entire community." Quello believed that the licensee must determine the bona-fides of the group with whom he is negotiating by "determining, first, the representative nature and legitimacy of the group he is dealing with, and, second, the reasonableness of the demands he is being asked to accede to."

When the KMJ and WAUD agreements are considered in tandem, it seems that the Commission is more concerned over the binding nature of agreements than their specificity. As long as agreements do not tightly bind broadcasters, the specificity of the terms to which the broadcaster is not tightly bound is virtually irrelevant. However, in taking such a position the Commission appears to be reverting to an earlier age in the law when terms of art and the appropriate seal on a contract were more significant than the substance involved. The new term of art, or seal, in the Commission's eyes is the savings clause, and it must be worded "just so" for an agreement to garner Commission approval.

3. KTTV: Los Angeles, California

About two months after the Commission considered the KMJ and WAUD agreements, the Commission was called on to review an agreement between KTTV and a coalition of citizen groups including the National Association for Better Broadcasting. The controversy first came to the Commission's attention on November 15, 1972, when the citizen groups filed a petition to deny KTTV's license. Thereafter, the parties filed numerous further pleadings while negotiations continued. The negotiations resulted in a citizen agreement, and on October 1, 1973, the citizen group filed a motion for withdrawal of its petition to deny and indicated that the withdrawal of the petition was contingent on KTTV's adherence to the citizen settlement.

In this case, the terms of the agreement finally reached are more interesting than the process leading up to the agreement. The agreement was divided into six parts: (1) children's programming, (2) cartoon programming, (3) other entertainment programming, (4) local programming, (5) public service announcements, and (6)

employment. The first four parts of the agreement are closely interrelated and are intriguing because of the novel provisions they make as to permissible and impermissible programming.

Large parts of the agreement stem from the citizens' concern over the effects of broadcast violence on younger viewers. Included in the agreement is a list of forty-two cartoons judged to be "unsuitable for younger children because of excessive and/or other possible harmful program content."[1] KTTV promised not to televise or acquire rights to any of the cartoons appearing on the "forbidden list." Three of the cartoons on the list--"Batman," "Superman," and "Aquaman"--were being broadcast by KTTV, and as a result of the agreement those programs were pulled off the air.

Along with the list of forty-two cartoons not to be aired, there was a list of eighty-one programs which "because of excessive violence and/or other possibly harmful content therein,"[2] must be preceded by a broadcast caution to parents every time they are aired. Any other program with content possibly harmful to children must also be preceded with a caution.

KTTV also made an affirmative promise to televise a minimum of six special programs from May 1, 1973, through December 1, 1974. These programs were to fill a "need for encouragement of local performers and the development of 'cultural resources.'" The agreement listed eight projects that would most probably be suited to the task, including broadcasts of events such as an annual festival emphasizing black art, music and drama; Nisei Week, a celebration of Los Angeles oriental communities; and Tiatro de Campesino, a presentation of the Field Workers Theater.

The agreement contained the following savings clause, which can be seen to be different from the standardized clause noted by the NAB,[3] and the one approved by the Commission in the KMJ agreement.

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[1] Commitment of KTTV, October 1, 1973, p. 4.

[2] Ibid., p. 8.

[3] See p. 85 above.

> (I)t is understood that nothing contained in this Agreement shall be deemed to foreclose KTTV from changing its program schedule, times of broadcast or varying the format of any of its programming, *subject, of course, to Metromedia's compliance with its obligations referred to in the preceding paragraphs*. It is further understood that Metromedia, consistent with its responsibilities to the total area served by Station KTTV, continues to remain solely responsible for determining what is to be broadcast over its facilities, *subject as aforesaid*. [Emphasis supplied.]

When the agreement finally came up for Commission review, two provisions were found troublesome.[1] First was the by now familiar problem of broadcaster delegation. The Commission did not find an acceptable savings clause in the agreement and therefore felt that the agreement bound "the licensees of KTTV-TV to fixed and unchangeable types and amounts of programming," and thus improperly infringed on the licensee's responsibility in this area.[2] Again, the Commission failed to interpret the provisions of the agreement "in a manner favorable to...implementation,"[3] presumably because the agreement's provisions "clearly and improperly curtailed the licensee's fundamental responsibility."[4]

As a subsidiary point, the Commission noted that the agreement attempted to bind future assignees of KTTV's license. The Commission claimed that Metromedia and the citizen groups "have no right or authority"[5] to enter into such an understanding because the assignment of licenses is controlled by the Commission.[6]

The second difficulty the Commission had with the agreement focused on KTTV's promise "not to broadcast certain programs because of their allegedly harmful content."[7] Here the Commission feared

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[1] *Letter to Frank Lloyd*, FCC 75-1028 (September 9, 1975).

[2] Ibid., p. 3.

[3] *Proposed Agreements Rulemaking*; see App. A, ¶8.

[4] Ibid.

[5] *Letter to Frank Lloyd*, p. 3.

[6] The Commission cited 47 U.S.C. 310 (1970).

[7] *Letter to Frank Lloyd*, p. 3.

that it was being cast in the role of a censor: that Commission process was being invoked to forbid the broadcast of programs. The Commission said it was unwilling to permit "licensing procedures to become a vehicle for placing the Commission in the role of a censor."[1] The Commission saw "the inherent dangers" in permitting such a practice to develop "as self-evident."[2]

Consequently, the Commission determined that the agreement had "no force or effect." The Commission noted that the citizen group's withdrawal of its petition to deny was predicated on acceptance of the agreement; therefore, the Commission decided it could not consider the citizen group's motion to withdraw its petition to deny. With the agreement rejected and the petition to deny still before the Commission, the Commission then referred the matter back to the citizen group and requested that "further action...be communicated promptly to the Commission."[3]

Again the Commission's decision was a 5-2 split with Robinson and Hooks dissenting. Commissioner Robinson issued a separate dissenting statement in which he again questioned the majority's procedural approach to the entire agreements problem. Echoing his WAUD dissent, Robinson expressed consternation at the Commission's decision "to read, weigh, analyze, and pass upon the validity of each agreement entered into and submitted"[4] to the Commission. Robinson felt that "it is unnecessary to disapprove individual agreements containing terms which apparently conflict"[5] with the *Proposed Agreements Rulemaking*, and that it would be sufficient "to declare a general policy that insofar as any agreement purports to bind the licensee to the doing of things inconsistent with its view

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[1] Ibid., pp. 3-4.

[2] Ibid., p. 4.

[3] Ibid.

[4] *Letter to Frank Lloyd* (Commissioner Robinson, dissenting), FCC 75-1028 (September 9, 1975).

[5] Ibid.

of the public interest, the agreement is without force and effect."[1] Rather than review each and every term of an agreement, Robinson would only note the agreements "as no more than memoranda of understandings...which we neither approve nor disapprove."[2]

A special case for Robinson is a licensee who signs an agreement which so clearly "relinquishes control over the station that questions arise as to whether there has been an abdication of responsibility as a public trustee."[3] For a licensee signing such an agreement, Robinson "would contemplate some appropriate disciplinary action."[4]

In Robinson's opinion it is paradoxical for the Commission to disapprove of an agreement because of excessive abdication of responsibility, but at the same time not penalize the licensee for abdicating responsibility. If an agreement is disapproved because it entails excessive delegation, then the licensee should be censured. If it does not involve excessive delegation, then it should merely be noted and neither approved or disapproved. To disapprove an agreement without censure is a non sequitur, according to Robinson's reading of the *Proposed Agreements Rulemaking*.

Here again it seems that the recommendations of Chap. IV of this report could be profitably applied in a case such as KTTV's. The parties could be asked to sign an understanding reaffirming the broadcaster's ultimate responsibility for programming. There would then be no problem of an inflexibly binding agreement, and the Commission could avoid a case-by-case review of each clause of every agreement. As to the second charge of the agreement being used as a sub rosa instrument of censorship, the Commission could simply note that any specific terms as to permissible or forbidden programming fall outside the ambit of Commission review. According to the recommendations of the preceding chapter, these terms should not be enforced on a promise vs. performance basis but should be considered by the

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[1] Ibid.

[2] Ibid., p. 2.

[3] Ibid.

[4] Ibid.

Commission only insofar as there is reason to believe that the broadcaster violated one of these terms in bad faith. With these two procedures in hand, the Commission could then have safely approved the KTTV agreement, thus maintaining broadcaster flexibility and refusing to allow citizen groups to use the Commission's process as a vehicle for censorship.

4. Settling a License Challenge: WPIX in New York City

Although competing applications are not directly subject to the *Proposed Agreements Rulemaking*, the settlement of a competing application can raise issues closely related to the settlement of petitions to deny. Such was the case in August 1975 when the Commission considered a settlement between WPIX and Forum, Inc., a challenger for WPIX's license.

Forum leveled a series of charges against WPIX, including allegations as to deceptive news programming, violations of sponsor identification rules, and a series of other violations of Commission rules. Subsequently, the mutually exclusive applications were designated for hearing on October 28, 1969.[1] The hearings stretched on to January 11, 1973, when the record was closed. The Administrative Judge released his initial decision on December 10, 1974.[2]

The Initial Decision was not favorable to the challenger's case. Aside from disposing of many of Forum's allegations against WPIX, the Initial Decision found that Forum was financially unqualified to operate the station and that Forum's ascertainment study was deficient. Inflation had badly upset Forum's financial structure so that its cash needs for operating the station were understated by $900,000. The community leader survey and the correlation of proposed programming to ascertain community problems were the weak links in Forum's ascertainment study. Therefore, Forum was found doubly disqualified to be a licensee. The Initial Decision recommended that WPIX's license be renewed.

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[1] *In re Application of WPIX, Inc.*, 20 F.C.C.2d 298 (1969).

[2] FCC 74D-62 (December 10, 1974).

Six years had passed from the date of designation to the issuance of an initial decision, and the matter was not yet resolved. Forum and WPIX could still pursue their case to the Commission and then to the courts. Thus if the parties intended to continue the controversy through all available channels, another six years could easily elapse before reaching a final resolution. Instead of continuing the legal battle, the parties sought a truce.

WPIX's decision to settle with the challengers and sign the agreement was described as "a straight economic decision."[1] WPIX's costs to the point of settlement were approximately $1.5 million. The prospect of continuing the battle and possible doubling litigation costs did not appeal to WPIX. WPIX officials noted that defending their license had cost them "5 to 10 times more"[2] than it cost Forum to challenge that license. Also WPIX saw itself seriously threatened and as "fighting for our life, while the offense has been in the position of a gambler."

In the meantime, Forum was also growing weary of the battle and eager for a settlement. It had spent over $300,000 in pursuing a challenge that had been largely unsuccessful. For a group whose financial capacities were questioned by the Initial Decision, $300,000 was most likely not a trivial sum. The president of Forum said that Forum "could have pursued an appeal down the seemingly endless path of litigation through the FCC and the courts. Instead [it] chose to accept a settlement that will enable WPIX to involve Forum's principals in the station's operations."[3]

On March 31, 1974, Forum and WPIX filed a joint request that the Commission approve an agreement that would effectively settle their dispute. In the agreement Forum promised to dismiss its

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[1]Leavitt Pope, President of WPIX, as quoted in "WPIX Buys Out Challenger, Will Keep Channel 11 in New York," *Broadcasting* 74 (April 7, 1975).

[2]Leavitt Pope, as quoted in "WPIX Will Accept Outside Director," *New York Times* (April 1, 1975).

[3]Lawrence J. Grossman, President of Forum, as quoted in *Broadcasting* 74 (April 7, 1975).

application for a construction permit. In consideration for the withdrawal, WPIX would (1) reimburse Forum for legitimate expenses incurred in prosecuting Forum's application (the reimbursement was not to exceed $310,885.81); (2) elect Forum's managing partner, who is also Forum's single largest stockholder, to WPIX's board of directors; and (3) start a $100,000 Program Development Fund to be dedicated to the development of programs and projects to benefit the New York area and to allow these projects to use WPIX's studio and personnel resources up to a value of $50,000. In the agreement WPIX did not oblige itself to broadcast any program or accept any suggestion growing out of the Program Development Fund.

Both Forum and WPIX characterized the agreement as being in the public interest because the Program Development Fund would result in immediate benefits to New York's viewers, and the involvement of a Forum principal at a high policy and programming level would give previously "outside" interests an effective "inside" voice in the station's management. Forum and WPIX also claimed that the public interest would be served by terminating a long and drawn-out procedure in which an Initial Decision has already determined one of the applicants to be unqualified. Thus the licensing process would be quickly stabilized because WPIX would no longer have a cloud hanging over its assignment, and this, argued the parties, was consonant with the 1970 *Renewal Policy Statement*.[1]

The Commission's Broadcast Bureau didn't see eye to eye with WPIX and Forum on many aspects of their argument. The Bureau noted that the agreement would remove Forum from contention for WPIX's license and would therefore deprive the Commission of a choice of applicants. Reducing the number of applicants for a license is not in the public interest, according to the Broadcast Bureau, and unless

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[1] 22 F.C.C.2d 424 (1970). WPIX and Forum claimed that the 1970 statement later formed the basis for approval of agreements in *National Broadcasting Co.*, 24 F.C.C.2d 218 (1970) and *Post-Newsweek Stations Fla., Inc.*, 26 F.C.C.2d 982 (1970), and that these cases were relevant precedent supporting the approval of their agreement.

there are countervailing public interest considerations, such an agreement cannot be approved.

The Bureau rejected all of WPIX's and Forum's public interest arguments supporting their agreement. The Bureau claimed that (1) Forum's representative had no guarantee of a *significant* voice in WPIX's operations; (2) WPIX's veto power over programs gave no *assurance* that Forum will be allowed program input; and (3) the Bureau would file exceptions to the Initial Decision's conclusion that WPIX is qualified to be a licensee and that Forum was therefore a potentially qualified applicant.

It was in this curious posture that the issue finally came before the Commission: On one side were the two former antagonists, WPIX and Forum, now allies, who had reached a mutually acceptable arrangement and who wanted to resolve their controversy promptly. Opposing them was the Commission's Broadcast Bureau, which wanted to see the battle continued till either WPIX or Forum emerged victorious.

The Commission's decision was released on August 12, 1975.[1] Again by a vote of 5-2 the settlement was rejected. The Commission first rejected all of WPIX's arguments based on the 1970 *Renewal Policy Statement*.[2] The Commission noted that the 1970 *Renewal Policy Statement* was struck down by the Court.[3] Following that reversal the Commission claims to have returned to the policy enunciated in its 1963 *NBC, Inc.* decision.[4] Under the older doctrine, WPIX and Forum would have to demonstrate strong public interest benefits resulting from the agreement and could not significantly rely on the contention that the settlement of a dispute, per se, was in the public interest.[5]

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[1] *In the Matter of Application of WPIX, Inc., and Forum Communications, Inc.*, FCC 75-929 (August 12, 1975).

[2] 22 F.C.C.2d 424 (1970).

[3] *Office of Communication of the United Church of Christ* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

[4] 25 R.R. 67 (1963).

[5] The majority distinguished the two prior cases, where settlement of competing applications was allowed, on the grounds that

The Broadcast Bureau's position that the agreement contains "no assurance that additional or improved public interest programming will result" was accepted, and the public interest benefits of the proposed agreement were characterized as "too vague and indefinite."[1] Finally, the Commission rejected the argument that settlement in this case was per se in the public interest. The Commission noted that the Broadcast Bureau intended to pursue its position against WPIX and that would prolong the hearings whether or not Forum was a party to the case. Since the settlement "would not significantly shorten the proceeding,"[2] the Commission concluded it could not "find that the WPIX-Forum dismissal agreement assures sufficient public interest benefit to counterbalance the detrimental loss of choice between applicants."[3]

Commissioners Robinson and Hooks took quite a different view of the settlement. Their major difference with the majority was over the application of the public interest test. Whereas the majority would require a positive showing of definite public interest benefits, Robinson and Hooks would simply require a showing that a proposed agreement does not harm the public interest.[4] Nothing in the proposed agreement would harm the public interest; therefore they concluded the agreement should be approved.

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those cases involved the formation of new corporate entities in which the challenger would have an equity interest. There the Commission saw a public interest benefit in stabilizing the station's finances that it failed to find in the WPIX agreement. See *Blue Island Community Broadcasting Co., Inc.*, 1 F.C.C. 2d 629 (1965) and *Seven (7) League Productions, Inc., (WIII)*, 7 F.C.C.2d 513 (1967).

[1] FCC 75-929 (August 12, 1975), p. 4.

[2] Ibid.

[3] Ibid., p. 5.

[4] The dissent points to 47 U.S.C. 311(c) (1970), which requires the Commission to find that a dismissal agreement is "consistent with the public interest." Robinson and Hooks read "consistent" in a neutral sense so as to imply the public interest is not harmed. The majority evidently reads "consistent" in an affirmative sense so as to require a demonstrable public benefit.

But Robinson and Hooks took their argument a step further. They contended that even if the majority's requirement of an affirmative showing is accepted in the course of the argument, there *is* enough of a public benefit in settlement per se to support approval of the WPIX agreement. Obviously Robinson and Hooks read the 1963 *NBC, Inc.* decision quite differently from the majority. To buttress their position that settlement is in the public interest, they point to *Office of Communication of United Church of Christ* v. *FCC*,[1] where settlement is encouraged especially when the bona-fides of the original objection are not found questionable.[2] Since Forum's bona-fides were not called into question, Robinson and Hooks saw a public benefit from the settlement of litigation sufficient to meet even the majority's positive-benefits standard.

Furthermore, Robinson and Hooks argued that there is precious little common sense in the majority's position that the public interest could be served by maintaining a choice between WPIX and Forum as applicants. The dissent points to the Initial Decision's questioning of the financial capacities of Forum, as well as to the fact that Forum had already spent $300,000 prosecuting its case and that seeing the proceeding through to a final decision "could conceivably double that expense." For a party already in financial difficulty, further litigation costs are out of the question. Consequently, Robinson and Hooks believed that there was "substantial reason to doubt that Forum was 'a viable competitor,' "[3] and that the majority was being naive in claiming that the public interest was being served.

Finally, the dissenters touched on a point raised by the Broadcast Bureau but avoided by the majority: the possibility that approving the agreement creates "improper incentives for strike applications or other unmeritorious competing applications."[4] To the dissenters,

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[1] 465 F.2d 519 (D.C. Cir. 1972).

[2] Ibid., p. 527.

[3] *In the Matter of WPIX* (Commissioner Robinson, dissenting), p. 2.

[4] Ibid.

this is a "definite possibility" which however is "too remote and speculative to worry about." And in any event, they point to the Commission's power to deal with strike applications involving complaints that are not bona fide as sufficient insurance against a spate of nuisance applications designed to extract settlements.

The resolution of the WPIX case raises many troublesome issues. The Commission's position that the guarantees of public interest benefits were too vague is difficult to reconcile with the *Proposed Agreements Rulemaking*'s emphasis on broadcaster responsibility. The Commission rejected the WPIX agreement because the agreement ostensibly was not a strong enough guarantee. But if the agreement had been phrased more emphatically, it could have drawn Commission disapproval because of the potential for excessive and inflexible delegation of the broadcaster's responsibility. Thus the Commission seems ready to strike down agreements because they are too weak just as it strikes down agreements because they are too strong without offering any articulate explanation of what constitutes an appropriate degree of delegation. It is as though the Commission is asking all parties to walk a legal tightrope and then not telling anyone where the tightrope is hidden.

The Commission's attitude in denying the reimbursement is also troublesome. At no point does the Commission imply that Forum's expenses were not prudent and legitimate or that Forum was not actually a bona fide applicant. Although the majority never clearly addresses the point, Robinson and Hooks imply that the fear of stimulating strike applications was at least partially responsible for the Commission's decision to reject the agreement and deny any reimbursement. But what sense does it make to deny prudent and legitimate voluntary reimbursements because of a fear of stimulating speculative extortionist demands? This is a logic that punishes the innocent as an example to the guilty.

With this reasoning, the Commission would cease to approve almost all settlements. If the Commission is to retain integrity in its approach to reimbursement, it cannot let the fear of illegitimate petitions or applications totally dominate the valid public policy

considerations supporting reimbursement cited in *Office of Communication of United Church of Christ* v. *FCC*.[1] At the minimum, the Commission must stand ready to approve legitimate reimbursement arrangements. If there is reason to fear abuse of the process, the preceding chapter outlines procedures that can be applied to limit the potential for illicit payments, while allowing legitimate reimbursements to continue. The solution is not to restrict all reimbursements but to distinguish the provident from the improvident and to discourage the latter while allowing the former.

5. A Case Yet to be Considered: Format Changes and WNCN, New York City

On November 7, 1974, WNCN, New York City, segued out of Mozart's *Requiem* and into Chuck Berry's "Roll Over Beethoven." The move from Mozart to Berry signaled a shift in WNCN's programming from classical music to rock and a change in call letters from WNCN to WQIV. This format change was the result of a long and carefully considered process and occurred in spite of the attempts of many citizen groups to save WNCN's classical programming.

WNCN's owner, the Starr Broadcasting Group, decided to change to a rock format because it saw continuing losses resulting from WNCN's classical programming. The format change was planned and carried out in spite of assurances made to the FCC when Starr purchased the station in 1972 that it would retain WNCN's classical format.

Two listener groups quickly petitioned the FCC to deny the renewal of WQIV's license,[2] and a separate competing application for WQIV's frequency was filed.[3]

Further complicating matters was the chairman of Starr's own Board of Directors, William F. Buckley, Jr. Mr. Buckley's fondness for classical music is somewhat stronger than his affection for rock,

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[1] 465 F.2d 519 (D.C. Cir. 1972). See pp. 41-42 above.

[2] The two petitioning listener groups were the WNCN Listeners Guild and Classical Radio for Connecticut.

[3] The competing application was filed by a Chicago-based organization, Concert Radio, Inc. Concert Radio pledged to return WNCN's format to classical music if it obtained Starr's license.

and he began a campaign to "Save WNCN." Buckley's plan was to gather a half million dollars from public contributions and donate the fund to a New York area noncommercial radio station. The noncommercial station would then acquire WNCN's classical record library and recreate WNCN's classical format while the new WQIV continued to program rock.

Mr. Buckley had an easier time raising a half million dollars than selling his idea to local noncommercial stations. The money was gathered in about ten days, but as time passed and no replacement station was found, support for Mr. Buckley's plan waned. Classical music fans then shifted their energies from Buckley's plan to the citizen groups challenging Starr's license at the Commission.

The citizen groups' activities affected Starr both by increasing its legal costs before the Commission and by placing a cloud over the station's license--the two classic sources of citizen group leverage. Furthermore, the new rock format was not proving as profitable as Starr had hoped.[1] Thus, Starr found itself in the unenviable position of having to expend relatively large sums in order to protect an essentially unprofitable broadcast operation.

The stage was then set for Starr to attempt to back out of its uncomfortable predicament. Starr decided to solve its problem by selling the station. In May 1975 Starr and the GAF Corporation announced they had reached an agreement in principle whereby GAF would purchase the station for $2.2 million, return WQIV to its old classical format, and resume its old WNCN call sign.

Starr claimed that it was selling the station reluctantly because the petitioners and the challenger "filed so much and raised so many questions that it became too time-consuming and too costly for the company to pursue this [controversy] to its resolution."[2] The merits of the case were allegedly not in question; it

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[1]Buckley stated that WQIV could not "make a success of the format." D. Vidal, "Congratulations Pour into Station WNCN," *New York Times* (August 27, 1975).

[2]Michael Starr, Executive Vice President of the Starr Broadcasting Group, as quoted in M. J. Connor, "Classical Music Likely

was simply the cost of litigating the matter through to its conclusion that prompted the sale: "We were never less than optimistic about winning, but we simply can't afford the time and energy any more."[1]

GAF, on the other hand, took a philanthropic view of its acquisition of WNCN. It didn't expect to profit from owning the station and saw its acquisition of WNCN as a service to New York's classical music audience.

When the terms of the transaction were finalized on August 19, 1975, GAF and Starr were not the only parties involved in the transaction--the citizen groups had written themselves into the transaction so as to help insure WNCN's classical format. In the contract GAF agreed to the formation of a citizen advisory committee to include members of the two groups that filed petitions to deny with the station. GAF also gave assurances that it would make an effort to hire former WNCN employees when restaffing the station for its classical format.

The contract includes a relatively complex reimbursement plan wherein Starr, GAF, and a neutral group known as the WNCN Advisory Committee undertake to compensate the two petitioning groups and the challenger for at least 75 percent of their legitimate and prudent expenses. The total expenses of the three citizen organizations have been estimated at $120,000.[2]

Appended to the sale contract between Starr and GAF is an option contract between GAF and Concert Radio, the challenger, which includes some provisions on which the Commission never before had a chance to pass. Under the option agreement, Concert has the right to purchase WNCN for $2.2 million, plus the cost of any capital improvements, in the event GAF either (a) decides to cease operating the station primarily as a classical music station; or (b) decides to sell WNCN.

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to Return to FM Station in New York, Thanks to Loyal Listeners' Fight," *Wall Street Journal* (July 11, 1975).

[1] Ibid.

[2] J. J. O'Conner, "WNCN to Return as Classical Music Station," *New York Times* (August 20, 1975).

The purpose of these clauses is to ensure the availability of classical music over WNCN for the five-year life of the option contract.

The contract is, however, subject to approval by the FCC. The Commission has never before considered a contract similar to the Starr/GAF agreement, and it is interesting to examine the policy alternatives available to the Commission.

The most innovative section of the contract is the option clause which allows Concert to buy the station in the event of a format change or in the event of a sale to a third party. The closest the Commission has ever come to considering such a question is the Twin States controversy.[1] In the Twin States cases, a broadcaster wanted to change the format of his station but encountered citizen opposition. An agreement was finally reached whereby the broadcaster promised to conduct an audience survey to inform him of the unsatisfied demand for his old format. The broadcaster was not, however, bound by the results of the survey. Even if the survey showed a sizable unsatisfied demand for the broadcaster's old format, he could still exercise his judgment and decide to retain his new format and not return to the old.[2]

In the present case, however, the broadcaster is bound to offer the station for sale at a fixed price should the format change. If the Commission applies its reasoning from the Twin States cases to the present case, then at first glance it would seem an a fortiori argument that the option clause should be disapproved. When the broadcaster was bound to the results of a survey to determine the format of his station, the agreement was disapproved; so when the broadcaster is bound to retain a format, irrespective of any survey results, or sell his station so the format can be retained, surely the agreement must be disapproved.

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[1] 42 F.C.C.2d 1076 (1973) and 45 F.C.C.2d 230 (1974). See pp. 50-51 above.

[2] The Commission initially disapproved of the agreement because it seemed to bind the broadcaster to the results of the survey. The agreement was redrafted to allow greater broadcaster flexibility and then resubmitted to the Commission.

But is this extension from Twin States as straightforward as it seems? There are a variety of factors that could act to set WNCN apart from Twin States so as to allow Commission approval of the WNCN agreement. The first consideration is the fact that GAF has made an explicit promise to retain WNCN's classical programming and has entered the transaction fully aware of the likelihood that a classical music WNCN may be an unprofitable venture. GAF could have decided not to promise to retain classical music, but the fact that GAF did acquire WNCN of its own free will, and voluntarily accepted the option contract, acts to set the WNCN case apart from Twin States. In Twin States the station was not under a firm commitment to maintain a specific type of programming under any circumstances. The new owner acquired the station under a contingent arrangement which required a demonstration that the old format would be profitable before any format change would be made.

GAF's position therefore seems more imbued with the conscious and premeditated assumption of a duty to serve a specific audience than was Twin States'. Any shift from classical programming by GAF would be a direct repudiation of all promises made upon WNCN's acquisition, and could readily be interpreted as bad faith on GAF's part. In such a case the Commission could argue that the option to sell the station to Concert is allowable in light of GAF's strong promises to maintain classic music and in light of the fact that GAF acquired the station with full awareness of the special community interest in classical music. The grounds for such a decision could be that GAF had of its own volition evidenced a desire to maintain classical programming in New York and that the option contract is merely another device for achieving GAF's prime goal. Should GAF prove incapable or unwilling to continue providing classical music, GAF would allow another group to attempt to serve that audience. The important point in such an opinion would be that GAF's discretion is not being curtailed because it was GAF's choice to promote classical music, and the option clause in the contract is simply another means toward GAF's goal.[1]

[1] A change of circumstances in the New York radio market--such as the entry of a new classical music station generally accepted

The second part of the WNCN agreement likely to cause controversy is the reimbursement clause. Citizen groups have been notably unsuccessful in obtaining reimbursements from the Commission. It would be possible for the Commission to borrow some of its reasoning from the WPIX decision and disallow the WNCN reimbursement out of a fear of promoting strike petitions. But such a decision would be most unfortunate. The more reasonable approach for the Commission would be to examine the arrangement and decide whether it is prudent and legitimate. If the reimbursement seems just, then the Commission should not be paralyzed by the fear that it will be encouraging strike petitions--it must approve the reimbursement. The Commission could, however, easily couple its approval with warnings outlining its position toward any attempts to abuse the reimbursement process.

Finally, the entire area of format change has only recently come under careful consideration by the courts and is one in which Commission policy is still unsettled.[1] Before the WNCN case is decided, the courts may have further opportunities to review format change controversies, and the Commission may take some steps toward a more definite policy in the area. If so, all these developments must be weighed by the Commission, and it must avoid the danger of deciding the WNCN case without careful consideration of its place in a much larger policymaking framework.

CAPSULE SUMMARY

Following the adoption of the *Proposed Agreements Rulemaking*, the Commission had the opportunity to apply the principles of the *Proposed Agreements Rulemaking* to a variety of concrete agreements. The KMJ and WAUD cases revealed that behind the unanimous vote of the Commission there remained disagreement as to the treatment of citizen settlements. The WAUD and KMJ cases also demonstrated the

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as a close substitute for WNCN's programming--could, of course, change the nature of GAF's commitment. In such a case, it could be argued that GAF's special commitment to classical programming would no longer be critical.

[1] See p. 51, n. 5, above.

Commission's concern over the wording of savings clauses and maintaining broadcaster control over station operations. The terms of the KTTV agreement raised relatively novel issues, but again the issue was resolved largely in the context of maintaining broadcaster control. The Commission's treatment of the WPIX-Forum challenge reiterated the Commission's reluctance to allow reimbursement of citizen group expenses and highlighted the difficulties that challengers and incumbent broadcasters can expect in obtaining Commission approval of settlements. The WNCN case introduces a novel set of considerations in broadcaster-citizen group relations in the context of format changes. The terms of the WNCN agreement do not seem to fall neatly into any category yet treated by the Commission and may eventually force the Commission to expand its reasoning in new directions.

VI. FINAL COMMISSION DECISIONS

The period from October 1975 to January 1976 was an active time for the Commission in the area of broadcaster-citizen relations. *The Final Report and Order in the Matter of Agreements Between Broadcast Licensees and the Public*[1] (hereinafter, *Agreements Report and Order*) was adopted, as was the *Final Report and Order in the Notice of Inquiry and Proposed Rulemaking in the Matter of Reimbursement for Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances*[2] (hereinafter *Reimbursement Report and Order*). A final decision was also reached in the *Inquiry into Subscription Agreements between Radio Broadcast Stations and Musical Format Service Companies.*[3] Thus, three areas of Commission inquiry with widely divergent origins but all touching on common policy issues of significant importance to citizen participation were resolved within two months of each other. The controversy generated as a result of expanded citizen petitioning and settlement seems most responsible for stimulating the Commission to finally resolve inquiries as old as three and a half years.[4]

THE *AGREEMENTS REPORT AND ORDER*

The major topics originally dealt with in the *Proposed Agreements Rulemaking*[5] were again addressed in the *Agreements Report and Order*, but this time they were approached in light of public response to the *Proposed Agreements Rulemaking* and with the experience of interim cases such as those discussed in Chap. V.

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[1] FCC-1359 (December 19, 1975). Portions of the *Agreements Report and Order* are reproduced in App. B below.

[2] FCC 76-5 (January 9, 1976). See pp. 42-43 above.

[3] *Report and Policy Statement*, FCC 75-1234 (November 7, 1975). See pp. 86-87 above.

[4] *The Reimbursement Inquiry* dates from June 7, 1972.

[5] See pp. 74-77 above.

1. Standards for Broadcaster Responsibility, Delegation, and Accountability

In the *Agreements Report and Order*, the Commission focused on broadcaster responsibility as the main consideration in determining the validity of citizen agreements. This emphasis is consistent with the *Proposed Agreements Rulemaking* and with the Commission's thinking in reviewing agreements during the period between the issuance of the *Proposed Agreements Rulemaking* and the adoption of the *Agreements Report and Order*.

The Commission, in no uncertain terms, requires that "licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation."[1] Delegation of this responsibility is forbidden, "and a licensee cannot (even unilaterally) foreclose its discretion and continuous duty to determine the public interest and to operate in accordance with that determination."[2]

Various citizen groups[3] questioned the Commission's failure to distinguish responsibility from delegation and accountability and also raised the question of treating citizen agreements in a manner consistent with commercial agreements. In many places these comments closely parallel the analysis of Chap. IV.[4] The Commission responded to the first point--the distinction between responsibility, delegation and accountability--by stating it has "long held that it is responsibility, and not just accountability, that is nondelegable."[5] Despite the Commission's protestations that it operates under a longstanding

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[1] *Agreements Report and Order*, ¶18.

[2] Ibid.

[3] Most notable are the Comments of the National Citizens Committee for Broadcasting, *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 29, 1975).

[4] See pp. 82-84 above.

[5] *Agreements Report and Order*, ¶19. To support its proposition, the Commission cited *United States Broadcasting Corporation*, 2 F.C.C. 208, 205 (1935); and *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 205-206, 218 (1943).

policy, the fact remains that delegations of responsibility in commercial dealings are common in the broadcasting business. The *Agreements Report and Order* attempts to deal with this argument by treating the case of delegations of responsibility in the context of employer-employee relations.[1] The Commission claims that "the employer-employee relationship contains ample opportunity for the direction of employees and the supervision of their work, and the employer retains flexibility to change or end the warrant of authority to act in its behalf."[2] But the separation of management and ownership, which is not uncommon in broadcasting, and situations in which station operators are not station employees[3] seriously undermine the argument that the licensee maintains active control over his employees. In theory the doctrine of active responsibility may be appealing, but in practice many licensees are little more than absentee owners having little daily contact with their broadcast properties. Thus delegations of responsibility in the commercial sphere will occur such that if they were subject to Commission review by the same standards that are applied to citizen agreements, the Commission would have little choice but to find them irresponsible delegations of licensee authority. Consequently, though the Commission claims that no double standard exists between citizen agreements and commercial contracts, the very structure of the broadcast industry indicates that greater delegations may regularly occur in the commercial sphere.

In the *Agreements Report and Order* the Commission reiterates its position that the broadcaster must retain the right to modify any agreement, even after it is approved by the Commission, if the modification is thought to serve the public interest.[4] Again, the Commission says major modifications should be accompanied by notice to

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[1] *Agreements Report and Order*, ¶23.

[2] Ibid.

[3] The Commission itself cites two such instances: *International Good Music*, F.C.C. 60-1340 (1960); and *WSKP, Incorporated*, 2 R.R.2d 1103 (1964). See *Agreements Report and Order*, ¶23.

[4] *Agreements Report and Order*, ¶¶24, 38. See App. B for ¶38.

the Commission and the Commission reserves the right to ask for explanation of "any deviations that appear to be substantial."[1]

The question of an agreement's specificity and its relation to broadcaster responsibility was not treated directly in the *Proposed Agreements Rulemaking* but was considered in the *Agreements Report and Order*. The comments of the National Organization of Women (NOW)[2] and cases such as KTTV[3] and KMJ[4] seem most directly responsible for this development. In the *Agreements Report and Order* the Commission decided that "specificity *per se* is not improper", but when "detail may give rise to *expectations* of inflexibility which, if imposed, would be improper"[5] [emphasis in original] the specificity of an agreement's terms may cause difficulty before the Commission.

Again this principle raises the question of whether a double standard actually exists between commercial contracts and citizen agreements. Surely commercial contracts often "give rise to expectations of inflexibility which, if imposed, would be improper." But these contracts are allowed by the Commission provided they contain the appropriate savings clause.[6]

2. Enforcement of Settlements

The *Agreements Report and Order* proposes to treat "substantive terms incorporated into an agreement" as "representations to the Commission" and to treat them identically with all other "promises of future performance."[7] Thus, the Commission rejected a proposal

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[1] Ibid., ¶38.

[2] Comments of the National Organization of Women, *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975).

[3] See pp. 120-125 above.

[4] See pp. 119-120 above.

[5] *Agreements Report and Order*, ¶25.

[6] See pp. 84-85 above.

[7] *Agreements Report and Order*, ¶24.

by CBS that breaches of terms in citizen agreements be treated differently than other representations made in the course of standard licensing procedures.[1]

Interestingly, the concept of distinguishing between terms within the Commission's ambit from terms outside the Commission's ambit[2] which was largely overlooked in the *Proposed Agreements Rulemaking* did gain a cursory mention in the *Agreements Report and Order*. In the *Agreements Report and Order* the Commission notes that

> in areas where licensees have public interest duties cognizable by the Commission...[i.e., areas within the Commission's ambit] a licensee is obliged to modify any prior practice or proposal when in the reasonable exercise of its good faith judgment it believes that the public interest so requires. The consequence of this principle is that no proposal in such an area can be immutable, whether presented unilaterally in an application or undertaken pursuant to a commercial or citizen agreement.[3]

It was previously suggested that terms within the Commission's ambit be enforced by the Commission's promise vs. performance standard and that terms outside the Commission's ambit be considered only insofar as they reflect on the licensee's character and qualifications to continue as a public trustee. In the *Agreements Report and Order* the Commission states only that broadcasters have an affirmative duty to modify agreement terms within the Commission's ambit when the licensee finds that a modification is in the public interest. No specific mention is made of different enforcement policies for terms within the Commission's ambit from those outside its ambit, but it seems reasonable to expect that the Commission will be more vigorous in enforcing the former than the latter.

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[1] Comments of CBS, Inc., *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 29, 1975).

[2] See pp. 89-90 above.

[3] *Agreements Report and Order*, ¶24.

The *Agreements Report and Order* also considers the question of penalizing licensees who enter into improper agreements which delegate excessive authority. Broadcaster concern over such penalties was probably stimulated by the observations of Commissioner Robinson who argued that excessively inflexible delegations could be of no force or effect and that their only probative value related to the fact that the licensee was willing to enter into such inappropriate delegation.[1] In the *Agreements Report and Order* the Commission reassures licensees that it will not generally penalize broadcasters for entering into inappropriate agreements but that "serious abdications of licensee responsibility will raise a question about the licensee's basic fitness."[2]

3. Procedural Matters and the Strictness of Commission Scrutiny

Administratively and substantively the question of when the Commission will review a proposed agreement is an important one. A wide-ranging review policy would add to the Commission's administrative burden and at the same time inject a large amount of government oversight into citizen-broadcaster dialogue, whereas a narrow review policy leaves open the possibility that agreements counter to Commission policy will come into effect. In the *Agreements Report and Order* the Commission decided that because of its "determination not to cast the shadow of government over the process of local discussion" and because of "the Commission's limited resources"[3] the Commission will review agreements only "upon complaint or request for formal ruling or review."[4]

All written agreements, whether or not Commission review is requested, will become part of the station's public files.[5] The

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[1] See the discussion of Robinson's opinion in the KTTV case, pp. 123-124 above.

[2] *Agreements Report and Order*, ¶¶27, 39. See App. B for ¶39.

[3] *Agreements Report and Order*, ¶29.

[4] Ibid.; see App. B, ¶38.

[5] Ibid., ¶¶22, 41. See App. B for ¶41. 47 C.F.R. 1.526 is amended to that effect by the *Agreements Report and Order*.

Commission feels that local filing of the agreement is sufficient and that no publication of notice Commission filing is necessary. In the event a broadcaster wishes to bring an agreement directly to the Commission's attention, the *Agreements Report and Order* suggests that the agreement be filed as an amendment to the station's most recent broadcast application.[1]

Oral agreements raise special problems for the Commission. Their existence and precise content would be very difficult for the Commission to discuss or enforce. The Commission recognizes that "oral understandings and agreements may be a common practice,"[2] and feels that "extending filing and other requirements to oral agreements...may inhibit informal dialogue, contrary to our policy of encouraging it."[3] Therefore, the Commission decided not to review these agreements nor to require that station files contain information about oral agreements.[4]

The suggestion that the Commission adopt a standardized savings clause was rejected in the *Agreements Report and Order*. In rejecting the proposal the Commission stated that it was "not willing to specify how citizen agreements should ensure that licensee responsibilities are not abridged," and preferred "to leave citizens and licensees free to work out whatever arrangements they believe appropriate in their circumstances."[5] At the same time the Commission also noted that in a case by case review of agreements it would not be willing to "strain the plain language of agreements to construe away provisions inflexibly binding licensees."[6]

Thus it seems that the Commission will continue the policies set forth in the KMJ, WAUD and KTTV[7] cases and leave it to the

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[1] Ibid., ¶22.

[2] Ibid., ¶42. See App. B.

[3] Ibid., ¶30.

[4] Ibid., ¶42. See App. B.

[5] Ibid., ¶26.

[6] Ibid.

[7] See pp. 115-125 above.

parties to attempt to draft appropriate savings clauses.[1]

A major concern of broadcasters was that the Commission would outline an affirmative duty to negotiate with citizen groups.[2] One citizen group argued that "a broadcaster's refusal to meet [citizen groups] without explanation...should raise an issue of an inadequate ascertainment, and that the failure to engage meaningfully in discussions of station performance should be an issue cognizable by the Commission."[3] The Commission's policy in this respect is clear-cut. The Commission requires community ascertainment, but beyond ascertainment "a licensee is not obliged to negotiate toward or to conclude an agreement."[4] No broadcaster will be penalized for failure to negotiate with a citizen group.

The issue of whether a citizen agreement can restrict the right of a citizen group to file a petition to deny was raised in the *Agreements Report and Order*, and as outlined in the *Proposed Agreements Rulemaking* the Commission decided that clauses restricting the right to file are improper. However, "a statement that the agreement satisfies objections which otherwise might have generated a petition to deny" would be accepted by the Commission. More specifically, the Commission notes that "complaints that a licensee's operating proposals are inadequate might well be mooted by agreement undertakings, and could be resolved more easily."[5]

Thus the Commission seems to be attempting to recognize the fact that a citizen agreement may well have a positive influence on a station's behavior and effectively resolve a variety of potential grounds for the filing or continuation of a petition to deny while

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[1] See p. 86 for an outline of an argument supporting a standardized savings clause in the context of citizen settlements.

[2] See the Comments of CBS, Inc., Storer Broadcasting, and Orion Broadcasting, Inc., *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975).

[3] *Agreements Report and Order*, ¶7, citing the comments of the National Black Media Coalition, *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975).

[4] Ibid., ¶20.

[5] Ibid., ¶33.

maintaining its reluctance to specifically limit anyone's right to file. The compromise is a delicate one and the Commission's policy will most likely be fleshed out on a case by case basis. But underlying the Commission's attitude in this area is the Commission's duty to "consider the allegations of petitions to deny, once filed, even if the petitions request their withdrawal."[1] Consequently, broadcasters and citizen groups alike must remember that once an issue is formally raised in a petition before the Commission it may be exceedingly difficult to resolve the matter through a citizen settlement. Therefore, there may be great advantages to broadcasters and citizen groups alike to settle their differences without filing a petition to deny with the Commission.[2]

Closely related to the issue of refiling is the question of whether a citizen settlement must be related to the particular grievance of the petitioning group in order to be effective. Commissioner Quello at various points contended that nonrepresentative groups might come to dominate the petitioning and agreements process.[3] The same concerns were shared by broadcasters in their filings. Most notable was Metromedia for its suggestion that before approving an agreement the Commission require a showing that the citizen group is either representative of the community or "that the racial, sexual or interest group involved was entitled to privileged treatment... and that such special treatment would not disadvantage the other elements of the community."[4] This suggestion was rejected by the Commission for two reasons. First, and most significant, is the Commission's opinion that "even a group whose individual membership appears non-representative may raise views, concerns, or problems

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[1] Ibid.

[2] See the discussion of "pre-filing settlements," pp. 31-35 above.

[3] See, for example, the discussion of Quello's opinion in the WAUD case, pp. 116-117 above, and in the KMJ case, pp. 119-120. above.

[4] Comments of Metromedia, Inc., *In the Matter of Agreements Between Broadcast Licensees and the Public*, Docket 20495 (July 25, 1975). Cited in *Agreements Report and Order*, ¶11.

that should be dealt with. It is the proposals themselves--rather than their proponents--which the licensee ought to consider in relation to its public interest duties."[1] Second is the Commission's consistently expressed desire to avoid excessive regulation of the agreements procedure.[2]

THE *REIMBURSEMENT REPORT AND ORDER*

When the Commission initiated the original *Notice of Inquiry and Proposed Rulemaking* dealing with the reimbursement of citizen group expenses, it was rather expansive and detailed in its analysis of possible Commission regulations. The *Reimbursement Report and Order* stands in sharp contrast to the original *Notice*: it is short (only four paragraphs long), adopts no specific rules regulating reimbursements, makes no new policy statements describing the Commission's attitude toward reimbursements, and resolves all the issues originally raised in the reimbursements inquiry solely in terms of the *Agreements Report and Order*. In the *Reimbursement Report and Order*, the Commission specifically states that it does "not believe that reimbursement for the future expenses of a consultant require the adoption of separate rules. The general principles set forth in our *Report and Order* in Docket 20495 apply with equal force"[3] to reimbursement.

But are the principles expressed in the *Agreements Report and Order*, Docket 20495, adequate or even germane to the types of problems likely to arise in the context of reimbursement arrangements? The *Agreements Report and Order* is founded primarily on the Commission's view that there can be no excessive delegation of broadcaster authority and that broadcasters must retain a final right to modify agreements when they feel modification is in the public interest. These principles must be stretched to great lengths when applying them to reimbursement agreements.

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[1] Ibid., ¶21.

[2] Ibid., ¶26.

[3] *Reimbursement Report and Order*, ¶3.

Consider the hypothetical case of a relatively innocuous reimbursement arrangement that calls for a broadcaster to pay a citizen group $1,000 a year for consulting services and community relations work. Suppose then the broadcaster discovers that the citizen group is engaging in local activities of which the broadcaster disapproves. Does the broadcaster's right to modify agreements in the public interest give him the right to cut off or restrict funds flowing to the citizen group because he feels that they are not being used in the public interest? If so, is there some obligation on the broadcaster's part to actually monitor the activities of all citizen groups receiving reimbursements, so as to determine whether the funds are being used to serve the public interest? And if the broadcaster has an active role to play in observing citizen group activities and in continually determining whether reimbursement funds flow to the citizen group, how can a citizen group receiving reimbursements maintain its independence from a broadcaster who has in the past typically been the citizen group's adversary? The principles of the *Agreements Report and Order* seem out of place in this context--much has to be added to those principles before they can acquire any operative effect in regulating reimbursements.

A slow case-by-case consideration of reimbursement arrangements therefore seems inevitable before the Commission eventually arrives at an articulate policy toward reimbursements. The rulemaking procedure that is supposed to obviate the need for a case-by-case approach to a problem thus seems to have failed in its major purpose. The Commission policy toward reimbursements is now no clearer than it was three and a half years ago when the reimbursements docket was just opened.

In such circumstances, it is difficult to predict the evolution of Commission policy. The only consistent theme in the Commission's thinking throughout its consideration of the reimbursement issue has been the fear of stimulating petitions and challenges, fueled by the prospect of eventual reimbursement of expenses by the broadcaster.[1]

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[1] This history extends from the original KCMC decision (see pp. 39-42 above) through to the recent WPIX decision (pp. 125-132 above).

If this one consistent trend is extrapolated into the future, it seems that the Commission could have little trouble in construing the principle of the *Agreements Report and Order* in such a way as to tightly restrict the ability of citizen groups to gain reimbursements.

THE FORMAT SERVICE STATEMENT

In May 1973 the Commission noted the existence of contracts between broadcasters and format service companies providing broadcasters with pre-packaged programming.[1] The Commission felt that there was a distinct possibility that these contracts were excessively inflexible and might involve improper delegations of broadcaster responsibility. The Commission closed its inquiry in November 1975,[2] and then it explained that the principles of broadcaster responsibility that apply to citizen agreements apply equally to music format service contracts. Thus the Commission claimed that it would stand ready to scrutinize music-service contracts when they appeared in renewals, transfer, assignment, or complaint actions and that "adequate means" were available for dealing with the problem of licensees who violate their public trust and sign excessively inflexible agreements.[3]

Although on its face the Commission seems to be treating citizen agreements and music service contracts on an equal footing, a basic and perhaps unavoidable distinction in fact remains: when an inflexible citizen agreement comes to the Commission's attention, the entire agreement may be found of no force or effect, but when an inflexible commercial music format contract comes before the Commission it may not be able unilaterally to void the commercial agreement simply because of its inflexibility.

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[1] *Inquiry into Subscription Agreements between Radio Broadcast Stations and Musical Format Service Companies*, Docket 19743, FCC 73-540 (May 23, 1973). See pp. 86-87 above for a more complete discussion.

[2] *Report and Policy Statement*, FCC 75-1234 (November 7, 1975).

[3] *Broadcasting* 32 (November 10, 1975).

VII. CONCLUSIONS

RECOMMENDATIONS

From the beginning, the Commission has never taken the initiative in encouraging citizen participation in broadcast licensing procedures. In *UCC* I[1] the Court had to overturn the Commission's ruling in order to grant standing to citizen groups so that they too could file petitions to deny. In *UCC* II the Court chastised the Commission for treating public interest intervenors as "interlopers"[2] and for exhibiting a "curious neutrality-in-favor-of-the-licensee."[3] The Court also criticized the Commission for a "pervasive impatience--if not hostility"[4] toward the public intervenors and noted that the public intervenors in the case were actually attempting to aid the Commission in performing its mandated duties to serve the public interest, but instead of welcoming their participation, "an ally was regarded as an opponent."[5] And in *UCC* III the Court described a Commission policy which set an absolute bar against reimbursement in petition to deny situations as totally "inexplicable."[6]

Evidently, there was a time in the not too distant past when the Commission was less than enthusiastic over the prospect of citizen groups playing an active role in broadcast licensing procedure. Each step forward for citizen groups was won only after appeal to the courts for review of Commission decisions. Following each of these decisions, the Commission had no choice but to

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[1] *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

[2] *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969).

[3] Ibid., p. 547.

[4] Ibid., p. 548.

[5] Ibid., p. 549

[6] *Office of Communication of United Church of Christ* v. *FCC*, 465 F.2d 519, 527 (D.C. Cir. 1972).

abide by the Court's ruling and grant greater rights to citizen groups.

Recent actions by the Commission indicate that it has progressed from its early staunch opposition to citizen participation and has adopted a less hostile attitude toward citizen groups. The *Agreements Report and Order* and the Commission's actions following the issuance of the *Proposed Agreements Rulemaking* demonstrate a cautious willingness to at least experiment with some effective forms of citizen participation, provided that the citizen groups respect broadcasters' ultimate control over their stations.

The *Agreements Report and Order* outlines a set of principles to be applied by the Commission in evaluating the validity of citizen agreements and in enforcing their terms. Although these principles provide some rough guidance as to the Commission's policy, they are flexible enough to allow the Commission a great deal of latitude in treating citizen agreements. The Commission could either take significant steps toward greater involvement of citizen groups, or freeze citizen involvement at a low level, all the while remaining within the bounds set by the *Agreements Report and Order*. Thus, a realistic assessment of the Commission's attitude toward citizen participation must await additional experience with the application of the *Agreements Report and Order*.

Discerning the Commission's policy toward reimbursement of citizen group expenses suffers from additional handicaps. The *Reimbursement Report and Order* relies entirely on the policies outlined in the *Agreements Report and Order* and can therefore be no more specific than the *Agreements Report and Order*. But the policies that allow great flexibility in application when considered in the context of citizen agreements, turn out to be even less helpful when applied to reimbursement.

Thus the Commission seems to have concluded two important rulemaking proceedings, not by issuing a set of firm rules, but by outlining a set of general principles which will require a great deal of application in practice before they can acquire real substance. Although it can be argued that the issues raised by

citizen participation are intricate and not generally amenable to a rulemaking approach, it must be pointed out that the Commission's history of indecision and delay is only perpetuated by rulemakings that outline general principles and do not firmly resolve basic issues. In these proceedings, the Commission was faced with a clear opportunity to break with its history and to take the initiative in providing for citizen participation. But instead of following that path, the Commission has chosen a more conservative route which at least seems mindful of court decisions that were instrumental in the growth of the citizen movement.

There is much that can be done by the Commission to promote effective citizen participation while still protecting the rights of broadcasters. First, it must be realized that although citizen groups can exert great leverage against broadcasters, the two are hardly evenly matched opponents in Commission proceedings. Broadcasters are frequently better financed and are more likely to be represented by large amounts of legal talent. A reasonable application of the *Reimbursement Report and Order* so as to allow voluntary payment of legitimate and prudent expenses could prove extraordinarily valuable in helping to right the balance.

A more imaginative approach for the Commission to follow would be to request legislation either allowing the Commission to award costs, including attorney's fees, to citizen groups that have contributed significantly to the resolution of a matter in the public interest, or to request that a "citizen's legal fund" be set up, from which the Commission itself could fund citizen group efforts designed to promote the public interest. The Commission has in the past exhibited at least some interest in proposals to help defray the legal expenses of parties involved in Commission proceedings.[1]

Changes in internal Commission procedures could also provide for more effective citizen participation. The Court has observed that "challenging groups have limited resources and no procedural tools, since discovery is allowed only when a Petition to Deny is

[1] "Closed Circuit," *Broadcasting* (October 7, 1974).

set for hearing."[1] Therefore, in many cases a petitioning citizen group is caught in a Catch-22: it cannot get a license designated for hearing until it makes a sufficient evidentiary showing, but it cannot make a sufficient evidentiary showing until it gains the rights of discovery, which come only after a license has been designated for hearing. As the Court observed, "new approaches are clearly necessary."[2]

The Court noted that "providing challengers with the power to take depositions"[3] might be one means of avoiding this procedure, in which it finds that a petition raises sufficient questions about the licensee's capacity or operations so as to warrant a further investigation but not so strong as to require a designation for hearing. In such a case, the Commission could grant the citizen group various powers of discovery and once the discovery process is complete, determine whether the license should be set for hearing.

Lest it be thought that these measures promote irresponsible behavior on the part of citizen groups, it should be emphasized that they could all be made subject to strict Commission control. Citizen groups that receive legal costs from the Commission or from a broadcaster could be held liable for at least the amount of the award in the event the Commission uncovers evidence of abuse. Strict rules governing the use of information gained in the course of pre-hearing discovery, and the possibility of imposing sanctions, could help guarantee that discovery processes are not abused. Furthermore, the provisions of Chap. IV previously discussed could be invoked in case of the suspicion of an abuse.

In all, a variety of measures are available to the Commission for providing for more effective and constructive citizen participation in

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[1] *Bilingual Bicultural Coalition of Mass Media, Inc.* v. *FCC*, 492 F.2d 656, 659 (D.C. Cir. 1974). There the Court cited *Report and Order*, 11 F.C.C.2d 185, 187 (January 11, 1968): "These procedures may be used for purposes of discovery in any case of adjudication... which has been designated for hearing." The Court also cited "The F.C.C.'s New Discovery Procedures," XXII *Federal Communication Bar Journal* 3 (1968).

[2] Ibid.

[3] Ibid.

licensing proceedings. Adopting these measures does not necessarily imply that the Commission will be encouraging or promoting irresponsible citizen behavior. Legitimate broadcaster interests can and should be vigorously protected by the Commission. But at present, it appears the Commission is following a cautious course, wary of directly violating the Court orders that were instrumental in gaining citizen groups their rights before the Commission, but not actively seeking to help citizen groups expand or strenuously assert those rights. This could well be a propitious time for the Commission to turn its back on its history of denying citizen participation and of acting in an indecisive and dilatory fashion and instead to affirmatively promote responsible, effective citizen participation fully respectful of broadcasters' legitimate rights.

SUGGESTIONS FOR FURTHER RESEARCH

Many aspects of citizen group involvement before the FCC, which have not been adequately explored in this report, merit further research.

A Follow-Up Study of Citizen Group and Broadcaster Behavior After the Signing of Agreements

Throughout this report attention has been focused on the process leading up to the signing of agreements and the terms of agreements that are finally signed. Nothing has been said about the effect of agreements: How well do agreements work out? Are citizen groups satisfied with broadcaster behavior following the signing of an agreement? What are broadcasters' reactions and experiences following the signing of agreements? How is broadcasting changed by the agreements process?

The after-effects of citizen agreements have not been ignored because they are unimportant. In fact, it is impossible to fully assess the value and impact of the petitioning and settlement process without considering the changes caused by citizen settlements. But data as to the effects of settlement on broadcaster and citizen group behavior are sparse and relatively unreliable. At present it is

therefore impossible to write what would ideally be the final chapter of this report: an examination of agreements that have "succeeded," agreements that have "failed," and an analysis of why some agreements are more successful than others.

To collect the required information it will probably be necessary to sample matched pairs of citizen groups and broadcasters who have been involved in citizen settlements and to test their reactions to the effects of the settlements to which they are parties. A variety of questions can be asked of both broadcasters and citizen groups in order to gauge the post-agreement experience. A sample of broadcasters relatively unaffected by the petition and settlement process could be used as a control.

If the agreement contains a quantitatively measurable term, such as one concerning the hiring of minority groups, then data as to minority group employment at the station can be collected and compared with employment data at similarly situated stations to test the hypothesis that signing a citizen settlement has a significant impact on minority employment. Comparable tests can be constructed to measure the effects of other terms of agreements on programming, community involvement, and station finances.

Subjective broadcaster, general audience, and citizen group reactions would also be valuable measures of an agreement's success. An agreement that gives rise to a stronger, mutually constructive and mutually satisfactory dialogue between broadcasters and citizens will almost certainly be described differently by both citizens and broadcasters than an agreement that has been followed by misunderstandings, suspicions of bad faith, and continued tensions on both sides. Agreements that do not give rise to claims of breach are also likely to be more constructive and stable arrangements than those marked by charges that a party has reneged on his promises. Agreements leading to changes in broadcast operations that are appreciated by the station's general audience are also likely to be viewed as relatively beneficial and constructive.

Once such data as to the success or failure of a citizen settlement is collected, then research can turn to the question of why some

agreements are more successful than others. Is it a function of the terms of the agreement? Of the atmosphere of the negotiations leading up to the signing of the agreement? Of citizen group characteristics? Of broadcaster characteristics? Of the characteristics of the community in which the station is located? Or of other factors that are not readily explainable?

If these questions are answered, then citizen groups, broadcasters, and the Commission alike all stand to benefit. Citizen groups and broadcasters might have a better conception of how to draft and implement agreements which are successful in that they cause fewer broadcaster-citizen tensions and result in more constructive improvements in broadcast service, and the Commission would at the same time have a more accurate sense of the effects of citizen settlements on broadcasting and be better able to match its policies to realities of the situation.

The Cost of Litigation

At various points in the analysis it became clear that the size of legal fees involved in appearing before the Commission is a major factor in giving citizen groups leverage over broadcasters and in the decision to settle a petition rather than see it through the Commission's process. It became equally clear that accurate data describing the cost of litigation before the Commission are largely nonexistent.

The lack of such data places real and limiting restrictions on the ability to analyze the settlement process. It is impossible to estimate citizen group leverage with any precision, and it therefore is impossible to assess the impact of policy changes on citizen group leverage. Similarly, without data as to the cost of litigation, it is difficult to apply any model that describes settlement behavior.[1]

Some of the problems involved in collecting such data have been described. To recap: lawyers are bound by confidentiality to their clients and would therefore be very reluctant to part with any

[1] Such as the model described in App. C.

specific billing information; citizens and broadcasters have incentives to bias their estimates of legal fees, and often may not seem to be fully informed of the nature of the costs they have incurred or are likely to incur.

A promising solution to this problem is to construct a series of hypothetical petitioning scenarios beginning with a simple petition and progressing through more intricate petitions and challenges. These scenarios could be submitted to members of the Communications Bar and lawyers who have experience in representing citizen groups. These lawyers could then be asked to rely on their past experience in order to estimate the costs of prosecuting and/or defending each of the hypothetical cases. This procedure will not require the violation of any confidentiality requirements and has the further advantage of providing a set of estimates of the cost of prosecuting comparable, although admittedly hypothetical, cases.

The data generated by such a procedure would be of most immediate value to studies of FCC operations; the methodology, however, could conceivably be extended to studies of other federal, state, and municipal agencies. At each level of government the cost of appearing before regulatory bodies exerts a significant effect on the behavior of parties with standing before the agency. By quantifying the costs of appearing before agencies and systematically relating those costs to the behavior of regulated firms and individuals, regulatory bodies would gain more effective insight into their own ability to control the industries they are supposed to regulate.

Internal Management at the FCC

Delay seems inevitable in most proceedings before the FCC.[1] To some extent this delay may simply be the result of a large workload at the Commission, but it is also likely that management

[1] See pp. 64-68 above.

efficiencies could make significant inroads and help clear many of the Commission's bottlenecks. To approach this problem coherently, an overall analysis of the tasks confronting the Commission, the costs of completing each of those tasks, and the benefits resulting from the completion of each of the tasks would be required. With such data an efficient allocation of resources at the Commission could be attempted.

Doubtless the most difficult part of such a study would be determining the benefits resulting from each of the Commission's activities. Among the Commissioners themselves there can be sharp differences of opinion as to, say, the value of close regulation of cable systems and their operators, as opposed to increased monitoring in the area of telecommunications. Although it is unlikely that a universally acceptable set of priorities exists, it should nevertheless be possible to match outcomes of Commission regulation to their corresponding costs in an organized fashion that will at least help pinpoint areas where there seem to be overly concentrated allocations of resources as opposed to areas with relatively light allocations of resources.

By reallocating its own resources, the Commission could change the costs faced by parties appearing before it. Thus, should the Commission decide to focus more energy on reviewing agreements and to reduce the resources devoted to cable regulation, then the costs of appearing before the Commission can be expected to rise for cable operators and decline for parties to agreements. This would probably increase the number of agreement cases coming before the Commission and reduce the number of cable television cases. The courts have recognized the ability of agencies to restrict or expand access to their own process through the device of changing the cost of appearing before the Commission. For example, in *UCC I* the Court observed that "the expense of participation in the administrative process" is "an economic reality which will operate to limit the number of those who will seek participation."[1] By

[1] *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

undertaking a broad study of its own internal management procedures and by developing an ability to reallocate resources among its varying tasks, the Commission would be better able to use the "economic reality" cited by the Court as a policy-related means of controlling access to the Commission's services.

Citizen Group Organization and Funding

Data describing broadcasters and broadcasting are relatively easy to come by. The FCC's file cabinets are packed with forms and applications describing most aspects of every broadcast station's operations. Libraries are also filled with materials analyzing broadcasting, its economics, its effects on society, and a host of other broadcasting-related topics. But almost nothing has been written about the phenomenon of citizen group involvement before the FCC: Who are these groups? How are they organized? How large are their memberships? What are their goals and priorities? How are they funded?

Since the petitioning process is relatively young and since the people's growing concern over the control of broadcasting is also a relatively new development, it is likely that many citizen groups have only recently been formed and that many new groups will emerge in the future. At the same time, more established groups are continually shifting their priorities, reassessing their strategies, and engaging in new activities. These groups may grow to become a powerful force in broadcast regulation, and an understanding of their operation would be valuable in constructing appropriate policy at the Commission.

The first problem that should be addressed by a study should be an identification of citizen groups and a description of their organization, membership, priorities, and financing: a citizens' census. Once the census is completed, a subsample can be studied in greater depth. For each citizen group in the subsample, the study can examine the group's past experiences in dealing with broadcasters, the Commission, and other community organizations and attempt to clarify them as "failures" or "successes" along a

variety of dimensions. Hopefully, by studying enough citizen groups, patterns of failure or success will emerge so that conclusions can be drawn about the factors leading to effective and responsible citizen group participation in broadcast regulation.

Appendix A

PROPOSED POLICY STATEMENT AND NOTICE OF PROPOSED RULEMAKING

RE: AGREEMENTS BETWEEN BROADCAST LICENSEES

AND THE PUBLIC

Adopted: May 29, 1975; Released: June 10, 1975

By the Commission: Commissioners Hooks and Quello concurring and issuing a statement.

¶1. The Commission has under consideration its policies and practices with respect to agreements entered into by broadcast licensees and the public relating to the program service and operation of the licensees' stations.

¶2. It has long been the policy of this Commission to encourage affirmative dialogue between broadcast licensees and members of the public served by the licensees' stations. We have advocated this position in the belief that such activity "should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission." *KCMC, Inc.*, 19 FCC 2d 109 (1969). To say that these broadcaster-citizen contacts should continue throughout the license term--even in untroubled times--is simply to reaffirm the inherent public orientation of broadcasting, with the licensee as a responsible trustee on behalf of his fellow citizens. In the event of disagreement and dispute, the value of sustained communication "to promote local resolution of complaints as they arise" is all the more apparent. *Final Report and Order*, Docket 19153, 38 Fed. Reg. 28762, 28764 (1973).

¶3. Even then, not all complaints concerning broadcast service or operation lend themselves to easy or rapid solution. Particularly in the recent past, large increases in the numbers of formal petitions to deny renewals of licenses have testified not only to general social discontents but to deep-seated differences between broadcasters and their critics--and among various groups of citizens themselves--over

the role and the control of this country's electronic media. Not surprisingly, the local broadcaster-citizen dialogue has begun to adjust itself to this qualitatively different state of affairs. Contacts are leading to informal negotiations and, upon occasion, to more or less formal understandings between the broadcaster and members of the public in his community. It behooves the Commission, at this time, to speak to these developments, and to seek comments in response.

¶4. We have mentioned the advantage that local broadcaster-citizen discussions have over the imposition, from above, of strict guidelines by the F.C.C. Another salutary aspect of the discussion process should be its recognition of the licensee's broad discretion--under the First Amendment, the Communications Act and the Commission's rules--to program and operate his station according to his reasonable, good faith determination of the public interest. A broadcaster therefore has discretion to enter into agreements with others concerning the programming and operation of his station in the public interest. Certainly the Commission, constrained by the very charters which grant the broadcaster his freedom, cannot itself mediate every local dispute.

¶5. The difficulty with some broadcaster-citizen agreements that recently have come to the Commission's attention lies in their attempt to hold the licensee accountable to essentially private interests. But the basic scheme of the Communications Act is otherwise; for under it the licensee alone must assume and bear ultimate responsibility for the planning, selection and supervision of all matter broadcast. And his standard of service must be the public interest.

¶6. Agreements which spring from any contrary premise cannot endure and, indeed, their fundamental unsoundness threatens the entire process of local broadcaster-citizen dialogue which the Commission has sought to encourage. Accordingly, we have determined to set forth at this time--and to seek comment upon--some tentative views regarding

the place of broadcaster-citizen agreements in improving and maintaining service to the public interest.

¶7. The key assumption in the discussion which follows is the "good faith" of the parties engaging in dialogue. We reiterate our recognition of the danger that "broadcasters may feel compelled to yield to organized pressure groups without regard to the merits of their complaints." 38 Fed. Reg. at 28764. There is no way for the government to eliminate such threats entirely, without becoming so heavily involved in the business and the freedoms of the broadcaster and the citizen as to constitute, itself, a greater threat. However, on a showing of reasonable cause to believe that either party has abused the process of community dialogue, we will seek to ascertain whether action by the Commission would be appropriate. For the purposes of this document, let it be clearly stated that we express neither favor nor disfavor for broadcaster-citizen agreements, as such. Certainly no licensee need feel, as a result of this proposed policy statement, any greater need to conclude agreements on matters of citizen interest. What we have encouraged, and reaffirm here, is local discussion and dialogue. Whether the process of dialogue results in express undertakings by the broadcaster and citizen parties is a matter for the parties to decide, in light of the additional discussion herein.

¶8. Agreements and understandings between broadcasters and citizens groups have arisen in differing contexts and varying forms. Some have been tendered in lieu of formal petitions to deny. Others have been filed to resolve matters set forth in pending protests.[1]

[1] Where the agreement is the *quid pro quo* for the withdrawal of a pending petition to deny, we have also carefully examined--and will continue to examine--the allegations set forth by petitioner, to determine if any substantial and material question of fact has been raised as to whether a grant of the challenged application would serve the public interest, convenience and necessity. Moreover, as discussed in Paragraph 15, *infra*, we caution parties against viewing an agreement as protection or insulation against future challenge.

Wherever possible, we have construed the provisions of these accords in a manner favorable to their implementation. Even where understandings have been susceptible to differing interpretations, we generally have declined to have the parties redraft their agreements. We did not wish, by dispelling ambiguities in language, to inhibit the development of the local discussion process. In several instances, however, we have been constrained to reject agreements whose provisions clearly and improperly curtailed the licensee's fundamental responsibility over the programming and operation of its station. See *Twin States Broadcasting, Inc.*, 42 FCC 2d 1091 (1973) and 45 FCC 2d 230 (1974).

¶9. The ultimate responsibility with respect to programming and station operation rests upon the individual licensee. This duty cannot be delegated and a licensee cannot, even unilaterally, foreclose its discretion and continuous responsibility to determine the public interest and to operate in accordance with that determination. Indeed, the Communications Act of 1934, as amended, holds licensees alone accountable for the operation of their stations in the public interest. Accountability denotes responsibility. As we stated in the 1941 Report on Chain Broadcasting, later approved in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 205-206 (1943):

> 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. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obligated to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept

programs on any basis other than his own reasonable decision that the programs are satisfactory.[2]

¶10. Were the Commission to permit licensees to bargain away parts of their discretion for commercial reasons, in order to obtain the dismissal of a petition to deny or for any other reason, this fundamental doctrine of licensee responsibility would be emasculated. For this reason the Commission has uniformly rejected agreements which would operate to restrict the right of a licensee to make and implement decisions respecting station operations. For example, we have proscribed network agreements which unduly restrict the carriage of programs of any other network (Section 73.658(a)(b)), and trade agreements which impair a licensee's obligation to retain control over program matter at all times (*Filing of Agreements*, 33 FCC 2d 653 (1972); *WGOK, Inc.*, 2 FCC 2d 245 (1965); *United Broadcasting Co. of New York, Inc.*, 4 RR 2d 167 (1965)). We have also pointed out that "private agreements cannot be construed to limit a broadcaster's responsibilities and obligations imposed by the Communications Act ..." *Golden West Broadcasters*, 8 FCC 2d 987 (1967). There is, of course, no rule of law or policy which prohibits a licensee, in the exercise of its discretion, from determining not to broadcast certain programs or to broadcast other programs which it believes better serve the public interest. It is the fixed determination, binding and unchangeable, which runs afoul of the requirement of licensee responsibility. To the extent that any agreement surrenders this discretion to others, it cannot be considered by this Commission as having any force or effect.[3]

¶11. How the Commission implements these principles in an environment where broadcaster-citizen agreements are becoming more

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[2] See also *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7295 (1960), *Fairness Report* in Docket No. 19260, 39 Fed. Reg. 26372, 26375; 48 FCC 2d 1 (1974).

[3] See Letter to Public Communications, Inc., regarding KCST(TV), San Diego, California, September 30, 1974. FCC 74-1041.

frequent is a matter of considerable importance. Clearly, we cannot allow ourselves to be cast in the role of a local mediator, resolving differences and recommending agreements affecting each aspect of station operation. We have neither the staff nor the financial resources to assume such a herculean task. More importantly, the Commission is neither authorized nor willing to become a program censor, mediating a dispute as to whether a particular program or announcement should be presented at some specified time in the future. The dangers inherent in permitting ourselves to be drawn through our licensing procedures into such a role are self-evident. Some have suggested we might seek to adopt specific rules governing the local agreement process, defining the issues and matters that could be discussed and the persons or groups qualified to participate in these discussions. However, we question not only the practicability of fashioning such an inclusive set of regulations, but also the desirability of such pervasive governmental intrusion in this area. We shun, for example, any suggestion that the Commission "certify" individuals or groups as bargainers on behalf of the public.[4] Moreover, we are concerned that any rules which might be devised would be so detailed and cumbersome as to distract the parties from focusing their efforts on resolving their legitimate differences.

¶12. Balancing our concern for the preservation of the broadcast licensee's non-delegable accountability to the whole public against our determination not to cast the shadow of government over the process of local discussion--and in the realistic light of the Commission's limited resources--we propose to take cognizance of agreements between licensees and members of the public only to the following extent:

> (a) Where such agreements result in a written amendment to, or entry within, a past or current (pending) renewal or other broadcast license application, we will

[4] At the same time, we do expect the licensee to consider the extent to which the demands of a particular group reflect general public, and not merely private, interests.

treat that amendment or entry as we would any other information in such an application--namely as a representation by the licensee upon which the Commission can rely. As in the case of a renewal applicant's proposals for future levels of non-entertainment programming, for example, we would leave the licensee free to modify the representations, asking only that the Commission be informed if the modifications are significant. Upon our own motion, we may ask for explanation of any deviations that appear to be substantial.

(b) Where we are asked to determine whether a particular agreement is contrary to law, Commission policy or our rules, we shall review it in conformity with the principles of this proposed policy statement.

¶13. It should be noted that both subsections of Paragraph 12 above refer to accords which have been reduced to writing. We cannot and will not allow ourselves to become embroiled in disputes as to the existence or the terms of oral agreements between licensees and citizen groups. Accordingly, where the parties have declined to formalize their understandings in writing, we propose to give no consideration whatever to those understandings. Moreover, we wish to make it clear that the writing referred to in Paragraph 12(a) is the expression that appears in the renewal application itself, as amended if that be the case. Ordinarily, therefore, we would take no cognizance of an agreement--even if reduced to writing--that is the basis for, or represents the genesis of, an entry in a renewal or other license application. For us, the best evidence of any commitments alleged to rest upon a broadcaster-citizen agreement will be the licensee's understanding of that accord as reflected in his application representing it to the Commission.

¶14. Except as contained in such an application, we would not expect agreements between licensees and the public to be filed with us unless accompanying a complaint or other request for specific and formal action. We propose, however, that the significance and the wide citizen interest in such accords be recognized by requiring their

deposit in the public files of broadcast stations which enter into them. Accordingly, we propose an appropriate amendment to Section 1.526 of our rules, and invite suggestions as to its content.

¶15. Assuming there is placed before us a writing of which we intend to take cognizance under the terms of Paragraph 12, our scrutiny will be careful and thorough in light of the principles set out above. We want to ensure that its provisions do not constitute an abdication of licensee responsibility or are otherwise incompatible with the Communications Act, the Commission's policies and regulations, and other applicable federal statutes, e.g., 18 U.S.C. 1304, 1343, 1464. For example, agreements whose provisions bind the licensee to broadcast a fixed amount of programming directed to a particular segment of the community or a particular number of citizen-initiated or issue-oriented messages at stated periods of time would improperly infringe upon the licensee's discretion in matters of programming and program scheduling and, thus, would be regarded as an abdication of licensee responsibility.[5] Similarly, a requirement that the licensee hire an individual from a list of candidates supplied by a citizen group or that the licensee's selection of a particular program host be subject to the approval of a citizen group would constitute a curtailment of the licensee's ultimate responsibility over its station's employment practices. Proposals relating to a station's program service and employment policies and practices, which are agreed to by licensees and citizen groups, must not bind licensees inflexibly. Licensees must retain the right--indeed, they have the obligation--subsequently to modify these proposals when in the reasonable exercise of their good faith judgments they believe the public interest requires it. The licensee's obligation, on the other hand, is to make only those agreements which he genuinely believes to be in the public interest.

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[5] In cases where the licensee improperly has abdicated its responsibility, it will be our obligation to consider the licensee's continued fitness to serve as a public trustee.

An agreement properly should be based on an honest acceptance of the merits of a proposal and not on any desire on the part of the licensee to further his own private interests or to avoid Commission scrutiny of his trusteeship. For this reason, neither licensees nor citizen-negotiators could justifiably rely on any provision of an agreement which purports to preclude the filing of a petition to deny. It may be that an agreement would obviate any desire on the part of citizens to file a petition, but a decision with regard to such filing must be left to the discretion of the citizens involved.

¶16. Our previous comments have focused on the licensee's responsibility in matters of programming and employment, which areas are most frequently the subject of licensee-citizen agreements. Our decision to proceed in this manner should not be misconstrued as a limitation on the scope of agreements coming under our scrutiny. Indeed, we have specifically declined to limit these accords by defining the matters that can be discussed and assented to by licensees and members of the public. However, there are activities which are clearly extraneous to the Commission's regulatory functions. See *Black Identity Association*, FCC 71-378, 21 RR 2d 746 (1971). However laudable such activities may be, we prefer neither to approve nor disapprove agreements covering matters of this sort.

¶17. It is the judgment of the Commission that the principles and practices set forth in this proposed policy statement should be applied to all cognizable agreements entered into by licensees and citizen groups subsequent to issuance of the proposal, even though it is not final. In the same vein, pending agreements which have been submitted as the *quid pro quo* for the withdrawal of an unresolved petition to deny will also be evaluated in accordance with the aforenoted principles and practices. Agreements, heretofore either implicitly accepted or explicitly considered by the Commission in disposing of a petition to deny or similar protest, need not be revised by the parties or re-examined by the Commission. Instead, we will interpret these existing agreements in a manner consistent with our

announced role and with the fundamental principle that the licensee has a non-delegable responsibility over the programming and operation of its station. Of course, provisions of existing agreements which may operate to improperly curtail this fundamental responsibility, will have no force or effect before this Commission. Finally, we believe that our announced course of action can and should be applied to any pending complaint concerning the licensee's implementation of a previously filed agreement.

¶18. This action is taken pursuant to Section 403 of the Communications Act of 1934, as amended. Interested parties responding to this Notice of Inquiry may file comments on or before July 25, 1975. Reply comments may be filed on or before August 11, 1975. An original and eleven copies of each formal response must be filed in accordance with the provisions of Sections 1.49 and 1.51 of the Commission's rules. However, in an effort to obtain the widest possible response in this proceeding from licensees and members of the public, informal comments (without extra copies) will be accepted. Copies of all pleadings filed in this matter will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

Appendix B

AN EXCERPT FROM THE *FINAL REPORT AND ORDER IN THE MATTER OF AGREEMENTS BETWEEN BROADCAST LICENSEES AND THE PUBLIC*

SUMMARY OF POLICY

34. Finally, the key assumption in successful dialogue and possible agreement is the good faith of the parties. We reiterate our recognition of the danger that "broadcasters may feel compelled to yield to organized pressure groups without regard to the merits of their complaints." *Final Report and Order*, Docket 19153, 38 Fed. Reg. 28762, 28764. There is no way for the government to eliminate such threats entirely, without becoming so heavily involved in the business and the freedoms of broadcaster and citizen as to constitute, itself, a greater threat. However, on a showing that either party has abused the process of community dialogue, we will seek to ascertain whether Commission action would be appropriate. 14/

35. Our consideration of the comments in this docket, as well as examples of citizen agreements that have come before us, has led us to the following conclusions. Citizens in a station's service area can make valuable contributions to broadcasting by communicating to the station licensee their perceptions of what the public interest requires. Licensees, for their part, have an obligation to seek out citizens' views, weigh them, and propose programming and operating practices to serve the public interest. The Commission's role is to establish procedures to facilitate these processes, and to determine whether licensees have, in fact, reasonably served the public.

36. One recent result of the dialogue between citizens and broadcasters has been more or less formal agreements, in which licensees undertake to operate in certain ways perceived by the parties

14/ See *Northwestern Indiana Broadcasting Corporation*, FCC 75-1085 (1975).

to the agreement as serving the public interest. While we encourage community dialogue, a licensee is not obliged to undertake negotiations or agreements. However, if a licensee does enter an agreement, the following policies will apply.

37. The obligation to determine how to serve the public interest is personal to each licensee and may not be delegated, even if the licensee wishes to. Therefore, agreements must not take responsibility for making public interest decisions out of the hands of a licensee. Nor may they prevent it from changing the way the station serves the public interest as the licensee's perceptions change. The Commission, however, does not want to intrude unnecessarily into the processes of local dialogue and the exercise of licensee discretion. Therefore, considerable deference will be given a licensee's determinations of how to serve the public interest, and the Commission will not prescribe or prohibit any particular agreement terms, so long as they are not unlawful or violative of particular Commission rules.

38. To avoid unnecessary government interference, we will examine only written agreements, which either are incorporated in the licensee's renewal or other application, or which come to us upon complaint or request for formal ruling or review. Such agreements will be considered to the following extent:

(a) We will review them to determine whether they improperly delegate nondelegable licensee responsibilities, whether they improperly bind future exercise of the licensee's nondelegable discretion, and whether they otherwise comply with applicable statutes, rules, and policies.

(b) Substantive agreement terms constituting proposals of future performance will assume the status of representations to the Commission, if made in an application submitted to us, and will be treated by the Commission as are all promises of future performance. The licensee will be free to modify the representations later, but we would ask to be informed if the changes are

significant. We may ask for explanation of any deviations that appear to be substantial.

39. If the Commission finds an agreement improper, it will so advise the parties, who may wish to correct the defects. Provisions of any agreement that rely on invalid terms will have no force and effect before the Commission. Serious abdications of licensee responsibility will raise a question about the licensee's basic fitness.

40. The success of the dialogue and agreement processes depends on the good faith of citizens and licensees. The Commission will consider appropriate action if there is evidence any party abused the processes or acted in bad faith.

41. Because citizen agreements may be of interest to members of the public in the station's service area, written citizen agreements must be placed in the station's public file, as specified by the amendment to Section 1.526 set forth in Appendix B.

42. The Commission recognizes that oral understandings and agreements may be a common practice. However, because of inherent problems in establishing the existence and terms of such agreements, the Commission will not consider them. (Of course, if an oral agreement is the basis for a license application representation, the Commission would treat that representation like any other, without reaching the underlying agreement.) The Commission, likewise, will not require that station public files contain information about oral agreements.

43. Finally, the Commission will accept a statement that an agreement satisfies objections which otherwise might have generated a petition to deny, but we cannot give effect to an agreement purporting to preclude the filing of a petition to deny. The parties' basis for their agreement should be a good faith determination that it promises to serve the public interest.

44. Once a petition to deny is filed, the Commission is bound to consider its merits, even if the petitioner requests its dismissal. A petitioner is free to withdraw his challenge at any time, but such an action would not necessarily dispose of the issues raised.

45. For the foregoing reasons, the policy set forth above is ADOPTED; and Section 1.526 of our Rules IS AMENDED as shown in Appendix B. [Appendix B is not reproduced.] Authority for these actions is found in Sections 4(i), 303 and 307 of the Communications Act of 1934, as amended, effective January 22, 1976.

46. IT IS FURTHER ORDERED, That the proceedings in Docket 20495 are terminated.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Attachments

NOTE: Rule changes herein will be covered by T.S. I (74)-4.

Appendix C

WHY SETTLEMENTS OCCUR--AN ECONOMIC APPROACH

Note: The basic purpose of this appendix is to provide a nontechnical description of some of the economic factors operating in the petitioning and settlement process. The material is organized and presented in a manner which will hopefully be of use to readers with little or no prior exposure to economics. Therefore, at some points in the presentation it is necessary to gloss over fundamental but relatively technical aspects of the analysis. Readers interested in a more complete and rigorous discussion of the economics of litigation and settlement should refer to: J. G. Cross, *The Economics of Bargaining*, Basic Books, New York City (1969); J. P. Gould, "The Economics of Legal Conflict," 2 *Journal of Legal Studies* 279 (1973); W. M. Landes, "An Economic Analysis of the Courts," 14 *Journal of Law and Economics* 61 (1971); R. A. Posner, "The Behavior of Administrative Agencies," 1 *Journal of Legal Studies* 305 (1972); R. A. Posner, *Economic Analysis of Law*, Little, Brown & Co., Waltham, Massachusetts (1973), especially Chapters 23 and 24; and R. A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 2 *Journal of Legal Studies* 399 (1973).

Why do parties decide to settle out of court rather than continue litigating? Although the question is a complex one, as an initial proposition it is safe to assume that a party will not settle if he feels he has something to gain by litigating. More precisely, the utility a party expects to derive from a settlement must be greater than the utility he expects to derive from litigation if a party is to consider settlement. And since a settlement requires an agreement between both parties, it stands to reason that both parties must feel that their respective benefits from settlement would be greater than, or at least equal to, their expected benefits from litigation if a settlement is ever to occur.[1]

[1] The requirement that both parties view a settlement as being more profitable than litigation is a necessary but insufficient condition for the settlement of a case. It is conceivable that both parties may agree that settlement is in their mutual best interests but cannot agree on the terms of the settlement.

Therefore, in order to gain some insight into conditions that lead some cases to be settled immediately, others to be settled after part of the litigation process has been completed, and still others to go through the entire litigation procedure, it is necessary to compare the broadcaster's expected losses from litigation with the petitioner's expected gains. If the broadcaster believes he stands to lose more from continuing litigation than the cost of a settlement, and if the citizen group believes it stands to gain more from settlement than from continuing litigation, then the foundation for a settlement exists.

The Four Phases of Litigation

For purposes of this analysis the litigation process involved in prosecuting a petition to deny or a competing application is divided into four distinct phases. The first phase involves the initial citizen group filing and the broadcaster's response. The second phase encompasses the Commission's internal hearing and decisionmaking process. The third phase begins when the issue is appealed from the Commission to the courts. The final phase is not a procedural, juridical phase in the sense of the first three phases, but describes the outcome of the litigation process. For example, if at the end of the first three phases the broadcaster is required to pass his license to the challenger, the fourth phase describes the effect of that transaction on the broadcaster and challenger.[1]

The Decision to File

The decision to file a petition to deny is in the hands of the citizen group, not of the broadcaster. In deciding whether to file a petition to deny or whether to approach a broadcaster in some other

[1]Cases often skip back and forth between phases. A case may, for example, go from the Commission to the Court, be remanded to the Commission, and then pass to the Court again for a final resolution. The analysis could be expanded to account for such possibilities, but the exposition would be much more complex and the underlying model would not be affected. Therefore, a simpler four-stage model is used.

fashion, a citizen group will estimate the benefits it stands to gain from filing a petition and compare those benefits against the benefits that would result from attempting to influence braodcasting through alternate means. If the formal petition to deny process seems the most effective route, then the citizen group will file the petition. But if other procedures promise to be more productive, for example, informal negotiations with the broadcaster or a petition for rulemaking through the Commission, then citizen groups can be expected to engage in these other activities before embarking on the formal petitioning process.[1]

For purposes of the model presented in this appendix, it is assumed that a citizen group has already decided to file a petition to deny. Thus any agreement reached would, as described in Chap. III be a "post-filing" agreement. The model begins with a consideration of the alternatives facing a broadcaster once he learns his renewal application has been challenged by a petition.[2]

The Costs of Litigation to the Broadcaster

An incumbent licensee has nothing to gain from a license challenge or petition to deny.[3] He can only lose the license he already has, plus the costs of attempting to defend that license before the Commission and in the courts.

Once a petition or challenge is filed, the broadcaster finds himself in phase one of the litigation process. He realistically has no choice but to incur some legal fees in responding, and he will incur these costs with a probability of one--they are a certainty.

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[1] Chapter II of this report contains a more complete description of the alternatives available to citizen groups, as well as a discussion of the allocation of consumer group resources.

[2] The model could be expanded to include the possibility of "pre-filing" settlements but again the notation would be made more complex and the substantive results would be unaffected.

[3] The small probability of the broadcaster benefitting from a valuable precedent strengthening his position against future challenges is discussed on pp. 189-190 below.

Let the costs of litigation in general be denoted by X and double subscripted to indicate: (1) the party who will incur those costs with the subscript b indicating the cost will be borne by the broadcaster; and (2) the stage at which the costs are incurred with the subscript 1 indicating the costs are associated with the first stage in the litigation process, the subscript 2 indicating the costs are associated with the second stage, etc. Thus the litigation costs expected to be incurred by the broadcaster in replying to the citizen group in phase one can be written as X_{b1}. These costs can be interpreted as the sum of legal fees plus management and station personnel time consumed during the first phase.[1] X_{b1} can also be interpreted as including the cost of any programming change which the broadcaster makes as a result of being placed in phase one of the litigation process.[2]

If the matter continues to the second stage and goes to hearing, then the expected costs to be incurred by the broadcaster are X_{b2}. But when the citizen group files its initial documents, the broadcaster is uncertain whether the matter will ever get as far as a hearing. The petition or challenge may be dismissed by the Commission for a variety of reasons. It is also possible that the citizen group will withdraw from the proceeding. But if the citizen group withdraws, the broadcaster must also consider the possibility that the Commission's staff will enter the case and prosecute in place of the citizen group. Let the broadcaster's estimate of the probability of the complaint ever reaching phase two, including the probability that the Commission's staff will enter the case and prosecute on its own initiative, be described as P_{b2}.[3]

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[1] For an attempt at estimating these costs, see pp. 93-103 above.

[2] The amount the citizen group decides to spend in prosecuting its case may well affect the amount the broadcaster decides to spend in defending his case. Thus X may also include a factor sensitive to the strength of the citizen group challenge. For a more complete treatment of this "interaction" effect, see pp. 191-192 below.

[3] For present purposes, these probabilities are measured as of the moment the citizen group files its first motion. The probabilities will change with time as the case progresses and more information is gathered. This complication is dealt with at pp. 183-184 below.

Beyond the second stage, the hearing stage, is the possibility of a court appeal and further litigation outside the Commission. The broadcaster's expected litigation costs if the controversy ever reaches stage three are X_{b3}, and his estimate of the probability of the controversy ever reaching stage three are p_{b3}.

Finally, after the controversy has passed through all three stages of litigation, there is the possibility that the broadcaster will lose his license as a result of the petition or challenge. The broadcaster's perceived probability of this event occurring is p_{b4}. If the license is lost, the cost to the broadcaster is the value of his station's frequency rents plus whatever value the broadcaster places on his being a broadcaster owning the license in controversy. This loss is denoted by X_{b4}.[1]

Thus, at the moment a citizen group files a petition to deny, a broadcaster can estimate the cost of defending his license as (1) the sum of the legal fees, station personnel time, and the cost of programming changes to be incurred at each stage in litigation, multiplied by the probability of the controversy ever reaching that stage of litigation; plus (2) the probability of eventually losing his license multiplied by the value he places on the license he may lose.[2] Denoting this expected cost to the broadcaster as C_b,

$$(1) \quad C_b = X_{b1} + p_{b2}X_{b2} + p_{b3}X_{b3} + p_{b4}X_{b4}$$

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[1] This is not to be confused with the market value of the station. The market value can be considered as the absolute minimum value that can be placed on X_{b4}. The broadcaster must value his station at a price equal to or greater than its market price or else he would sell the station. For a discussion of the problems created by evaluating property at its market value in the legal process, especially in eminent domain proceedings, see Posner, *An Economic Analysis of Law*, op. cit., pp. 21-24.

[2] Since the litigation process is spread over time, the broadcaster will discount the actual costs he expects to incur to yield estimates of X_{b2}, X_{b3}, and X_{b4}. Thus, it is implicit that the broadcaster is also making an estimate of how long it will take to reach each stage of litigation in order to arrive at an expression such as Eq. 1.

Evidently, if the citizen group is willing to settle for an amount less than or equal to C_b, then the broadcaster will be interested in negotiating and not litigating. But for a citizen group to accept a settlement with a value less than or equal to C_b, it must believe that the value of the settlement is greater than the value of litigation. Therefore, if the perceived value to the citizen group of litigating is denoted as V_c, and if the cost of arranging a settlement is zero, then there will be no settlement unless $V_c \leq C_b$, i.e., unless the value of litigation to the citizen group is less than or equal to the cost of litigation to the broadcaster. The determinants of C_b have been described in Eq. (1), but what are the determinants of V_c?

The Benefits of Petitioning for the Citizen Group

When a citizen group initially embarks on a petition to deny, it must value the benefits that it believes will result from the petition more than it values the associated costs. Thus, if the sum of costs and benefits to the citizen group at each stage is denoted as X_{c1}, X_{c2}, X_{c3}, and X_{c4} (where X_{c4} is defined as the value to the citizen group of prevailing in its petition and having the Commission depose the broadcaster from his frequency), and if the citizen group's perceived probabilities of reaching each stage of litigation are denoted as p_{c2}, p_{c3}, and p_{c4}, then,

$$(2) \quad V_c = X_{c1} + p_{c2}X_{c2} + p_{c3}X_{c3} + p_{c4}X_{c4},$$

the total expected value of the petitioning process, must be greater than zero.[1]

[1] It is, however, possible for the net benefits at a certain stage to be negative. In that case the net positive benefits at some other stage(s) must be large enough to offset those negative benefits. Should the benefits ever drop below zero, it would be in the citizen group's best interest to simply abandon the petition.

Again, since the various costs and benefits will occur at future stages, the citizen group will have to discount expected costs and benefits so as to express them in terms of present values.

Thus, the necessary condition that $V_c \leq C_b$ can also be written as:

$$(3) \quad X_{c1} + p_{c2}X_{c2} + p_{c3}X_{c3} + p_{c4}X_{c4} \leq X_{b1} + p_{b2}X_{b2} + p_{b3}X_{b3} + p_{b4}X_{b4}$$

Settlement at Various Phases of Litigation

Equation (3) describes a necessary condition for a settlement as perceived by the parties at the instant immediately preceding the citizen group's filing of a petition or challenge. But that is not the only point at which a settlement may occur. The parties may settle during any phase or upon the completion of any phase. In the WPIX settlement, for example, the parties reached an agreement after a hearing was completed but before a final Commission decision was entered.[1] In terms of the model, the settlement took place during phase two.

Why may a settlement occur after the parties have embarked on litigation but not before?

As the litigation runs its course, each party will revalue and reassess the merits of its case, its interests in the outcome, and the probability of prevailing at each stage. A loss at a hearing may, for example, cause a party to decrease his estimate of a favorable outcome and may thus make him willing to offer more in a settlement if he is a broadcaster or accept less in a settlement if he is a citizen group. Thus the parties' estimates of p and X at the beginning of litigation may be very different from their estimates of p and X made on completion of the first or second stages of litigation.

In order to indicate that the variables in Eq. (3) describe the parties' estimates as of the moment litigation begins, the superscript 1 is added to each variable. Equation (3) can then be rewritten as Eq. (3a).

$$(3a) \quad X^1_{c1} + p^1_{c2}X^1_{c2} + p^1_{c3}X^1_{c3} + p^1_{c4}X^1_{c4} \leq X^1_{b1} + p^1_{b2}X^1_{b2} + p^1_{b3}X^1_{b3} + p^1_{b4}X^1_{b4}$$

[1] See pp. 125-126 above.

At the end of the first stage of litigation, X_{c1}^1 and X_{b1}^1 will already have been incurred. As of the beginning of the second phase, these are sunk costs and neither party can recover them. Since the outcome of the first stage may have altered each party's estimates of p_2, p_3, p_4, X_2, X_3, and X_4 when the time comes to consider a settlement at the end of the first stage of litigation, the necessary condition changes from that described in Eq. (3a) to the one described in Eq. (3b):

$$(3b) \quad X_{c2}^2 + p_{c3}^2 X_{c3}^2 + p_{c4}^2 X_{c4}^2 \leq X_{b2}^2 + p_{b3}^2 X_{b3}^2 + p_{b4}^2 X_{b4}^2 .$$

Note that each variable is superscripted with 2 to indicate it is an estimate made at the time of entering the second stage of litigation. Note also that p_{b2}^2 and p_{c2}^2 have been omitted since they now equal one: if the parties decide to continue litigation, then entering phase two is a certainty, since that is the next step in the litigative process.

Similarly, the necessary condition for settlement at the beginning of the third phase is:

$$(3c) \quad X_{c3}^3 + p_{c4}^3 X_{c4}^3 \leq X_{b3}^3 + p_{b4}^3 X_{b4}^3 .$$

And upon the close of the litigative process, if the citizen group has prevailed, there still remains the possibility that some side arrangement may be worked out between the parties. The necessary condition for a settlement at that late stage is

$$(3d) \quad X_{c4}^4 \leq X_{b4}^4 .$$

Thus the four-equation system of Eqs. (3a), (3b), (3c), and (3d) describes some necessary conditions for reaching a settlement at each step of the process, and it can be seen why a settlement may be possible at a late stage but impossible at an early stage.

The Circumstances that Give Rise to Settlements: A Simple Model

Up to this point the necessary conditions for settlement have been described only in general terms. When will the conditions of Eqs. (3a)-(3d) be satisfied so that a settlement actually results?

One means of approaching this question is to examine Eqs. (3a)-(3d) and consider what happens as each party's estimates of p change while the estimates of all other variables remain fixed. Suppose that in Eq. (3a), $X^1_{c1} = X^1_{b1}$, $X^1_{c2} = X^1_{b2}$, $X^1_{c3} = X^1_{b3}$, and $X^1_{c4} = X^1_{b4}$.[1] Then at each stage each party expects his own costs of litigating to be equal to his opponent's costs of litigating. The only factor that can differ between the parties now is their estimates of p. If each party's estimates of p equal his opponent's estimates of p at each stage of the process, then Eq. (3a) will be satisfied as an identity. The parties will then be indifferent between litigating and settling.[2]

If the citizen group is relatively pessimistic of its chances of prevailing, then its estimates of p_c will decline.[3] If the broadcaster is relatively pessimistic as to his chances of prevailing, then his estimates of p_b will increase. In either case, the effect is to decrease the value assigned to V_c as compared to the value assigned to C_b; thus the inequality of Eq. (3a) will more likely be satisfied.

Consequently it can be seen that when two parties either agree as to the probability of the outcome of their suit or when each party is relatively pessimistic as to his chances of prevailing, if all other factors are held constant, the possibility of a settlement exists.

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[1] It is not necessary for the equality to hold at each stage. The assumption is made only for the sake of expositional convenience.

[2] Implicit in this statement is an assumption as to the risk aversity of the parties. The effect of attitudes toward risk is discussed on pp. 187-188 below.

[3] This must hold for estimates of p_c associated with stages where the citizen group expects net positive benefits.

If instead of each party's agreeing on their estimates of p or being relatively pessimistic as to their estimates of p, each party is relatively optimistic as to his chances of prevailing, then Eq. (3a) will not be satisfied. Instead, $V_c > C_b$, and the broadcaster would not be willing to offer the citizen group as much as the citizen group feels it could gain by litigating. No settlement would result because each party feels that litigation is in its best interests.

Precisely the same analysis can be applied to Eq. (3b), (3c), and (3d), and the results would be identical. If at any stage of the process, the parties agree as to their estimates of p, or each is relatively pessimistic as to his estimate of p, then the foundation for a settlement exists.

When can the parties' estimates of p be expected to conform to a pattern that would give rise to settlements?[1] One way of answering this question is to begin by assuming that both broadcasters and citizen groups initially have the same information available to them. Most of this information is in the form of past decisions on similar cases, i.e., relevant precedent. If both parties are also equally capable in interpreting relevant precedent, then any disagreement between the parties would be attributable to vagueness in the precedent. When precedent is an uncertain guide, there will be room for reasonable men to differ as to the outcome of a case; but when precedent is firm and unambiguous, reasonable men will generally agree on the outcome.[2] Since there is no a priori reason to believe that disputants will tend to have either mutually optimistic or mutually pessimistic estimates of p, the only possible generalization is that a solid body of precedent will lead to equality in the parties' estimates of p. Since all other things are constant, equality in the parties' estimates of p will lead to settlements. Therefore, it seems

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[1] See Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 2 *Journal of Legal Studies* 399, 421-427, for a discussion of a similar topic.

[2] A firm body of precedent can be thought of as generating a distribution of p's with a low variance from which p_b and p_c are drawn. A vague body of precedent can be thought of as generating a distribution of p having a large variance.

that a firm, well-established body of precedent would promote settlements, whereas vagueness or uncertainty in precedents would promote litigation.[1]

Now, instead of considering the effect of changes in p as X remains constant, consider the effect of changes in X as p remains fixed, and when all broadcaster p's are equal to all citizen p's.[2] If $X_{c1} = X_{b1}$, $X_{c2} = X_{b2}$, $X_{c3} = X_{b3}$, and $X_{b4} = X_{c4}$, then the equality of Eq. (3a) will be fulfilled.[3] Thus, when citizen groups feel they stand to gain only as much as broadcasters stand to lose, both sides are indifferent between settlement and litigation.

If X_b is consistently greater than X_c, meaning that the broadcaster has more to lose than the citizen group stands to gain, then V_c will tend to be smaller than C_b, and the inequality of Eq. (3a) will be satisfied. But if the stakes are larger for the citizen group than for the broadcaster, then settlement will be impossible since the broadcaster will not be willing to make a large enough offer to the citizen group to convince them to forego their litigation.

The analysis can be repeated at each stage of the litigative process with the identical result: If both sides have the same amount at stake, the parties will be indifferent between litigation and settlement. If the broadcaster has more at stake than the citizen group, then he will be willing to enter into a settlement. But if the citizen group has more at stake than the broadcaster, then no settlement will be possible.

The Effect of Attitudes Toward Risk

Engaging in litigation is a risky proposition: no matter how

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[1] See pp. 56-60 above for a discussion of similar points in the context of the caseload change theory.

[2] Again, it is not necessary to assume all p's on one side of the equation to be equal to the corresponding p's on the other side of the equation, but it is a useful assumption for expositional purposes and does not change the analysis.

[3] Again this indifference depends on attitudes toward risk. See below.

confident a party is, there is always the possibility that the outcome of trial will prove that all prior expectations were incorrect. Since litigation is always a risky affair and since the alternative--settlement--is a relatively riskless proposition, the parties' attitudes toward risk play an important role in their decision whether to settle or litigate.

Suppose an individual has a choice between a 50 percent chance of winning $10,000 and a certain payment of $5,000. The expected value of the 50 percent chance of winning $10,000 is $5,000 and thus is equal to the expected value of the certain payment. But there is always the unattractive chance of winning nothing, and the much more appealing chance of winning $10,000. Whether an individual prefers the gamble to the "sure thing" depends on his attitude toward risk.

If an individual always prefers the certain payment of the expected value of a gamble to the gamble itself--that is, in the preceding example, if the certain payment of $5,000 is preferred to the 50 percent chance of winning $10,000, then the individual is said to be risk averse. Risk aversity is an important factor to consider in analyzing the litigation-settlement choice. Since a risk-averse party prefers a certain payment to a risky payment, he will in effect be willing to pay some amount in order to avoid risk. In terms of the example, a risk averse party may prefer a certain payment of $4,900 to a 50 percent chance of winning $10,000. The $100 the party foregoes is similar to an insurance premium and is related to the degree of the party's risk aversity. In the context of litigation where there is some risk associated with the expected value of litigation and no risk associated with a settlement, a risk-averse party may well be willing to accept a settlement smaller than the expected benefits of litigation, or offer a settlement greater than the expected cost of litigation, simply to avoid the risk associated with litigating. Thus, if the parties are risk averse, there is an additional stimulus to avoid litigation and settle out of court.[1]

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[1]For an analysis of the effects of a positive affinity for risk--that is, litigants who are gamblers at heart--see J. P. Gould,

The Precedent Effect and Deterrence

Few lawsuits are prosecuted in a legal vacuum. There is generally some body of law that is at least tangentially relevant to the case at issue and those precedents, through the power of *stare decisis*, may influence the outcome of the case.

Just as parties to an active case look to the past for relevant precedent, they also consider the possibility that the case at issue will set some new precedent or strengthen a weak, old precedent and thereby affect controversies yet to arise. Since an active case may set a valuable precedent for use in controversies in which a party expects to be involved, a party who is considering the long run implications of a lawsuit may decide to see it through litigation, even though a cheap immediate settlement may be possible, simply to cut down his expected future outlays in litigation or settlement. In effect, a party who follows this strategy has decided to "make an example" of an early case in the hope of deterring similar cases in the future.

In the context of petitions to deny and settlements, broadcasters have indicated a concern that agreement with citizen groups will lead to escalating numbers of threatened petitions and a continuous stream of settlements. Broadcasters recognize that they are setting precedents by either settling or litigating. If the broadcaster feels there is a real danger that a settlement in a given case will lead to an increased number of petitions to deny, he may wish to litigate in spite of the fact that in the case at hand it would be cheaper for him to settle with the citizen group.

Perhaps the most effective means of including this effect in the model is to reduce X_b, the cost of litigation for the broadcaster, at each stage by the value of future litigation and settlement payments which the broadcaster feels he has deterred by litigating up to that point and not settling earlier, and adjust X_c correspondingly. Thus, if the broadcaster feels that immediate litigation will have a strong deterrent effect on future citizen challenges by placing citizen groups

"The Economics of Legal Conflicts," 2 *Journal of Legal Studies* 279, 291-293 (1973).

on notice that a settlement cannot be cheaply bought, the true cost of litigating the present controversy is reduced by the amount of future litigation and settlement costs that are deterred. Consequently, C_b declines. Then if V_c remains fixed, the chances of a settlement decline as the broadcaster's perceived deterrent effect increases.[1]

Interaction Effects Between the Cost of Litigation (X) and the Probability of Reaching a Phase of Litigation (p)

The amount of money a broadcaster or citizen group spends at one stage of the litigation process is not independent of the probability of reaching the next stage in litigation or of eventually prevailing. For example, a citizen group that spends a relatively large sum in preparing and arguing the early phases of a petition to deny may have a better chance of making the substantial and material showing of fact necessary to put a broadcaster's license in hearing. Thus a relatively large expenditure on X_{c1} will increase p_{c2}. Conversely, a relatively large expenditure by a broadcaster in defending an early phase of litigation may reduce the chances of the case advancing to a more advanced phase. Thus an increase in X_{b1} would decrease p_{b2}.

The interaction between earlier X's and later p's for the same party does not give rise to serious analytical difficulties in the model. All that is necessary is the reasonable assumption that at any point in the litigative process each party will allocate his resources so as to place himself in the best possible position. The citizen group will strive to maximize V_c, and the broadcaster will attempt to minimize C_b. Each party's expenditures on X will therefore be computed with effects on p in mind.

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[1] The value to a party of strong precedents may also be related to the party's risk preference. A risk-averse party who is willing to pay for a reduction in uncertainty may actually be willing to undertake some very risky and uncertain litigation simply because the outcome of that litigation will clear some muddy legal waters and hopefully reduce future risks.

Interaction Effects Between the Parties' Legal Expenses (X_b and X_c)

A party's expenditure on legal services at any stage of litigation not only influences the probability of the case advancing to a later stage and the probability of the party eventually prevailing, but may also influence the optimal legal expenditures of his opponent. Thus, a decision by a citizen group to mount a strong petition to deny backed by careful monitoring of station programming and relatively large expenditures on legal services may call for a different strategy on the broadcaster's part than a decision by a citizen group to mount a more modest monitoring and legal effort supporting their petition to deny.

It is therefore entirely plausible that each party's optimal expenditure on litigative services is a function of the other party's expenditure on litigative services. If we assume that both parties are continually adjusting the levels of their own expenditures in response to changes in their opponent's expenditures, then there may not be a stable equilibrium level of expenditures on X. The values associated with V_c and C_b may be continually fluctuating and analytically unpredictable.[1]

A variety of assumptions can be added to the model so as to eliminate this difficulty. One assumption is that one of the parties does not change his own behavior in response to changes in his opponent's strategy. A stable level of expenditures will then result.[2] This assumption may well be realistic in the context of citizen settlements. Citizen groups generally operate on fixed budgets and lack the financial ability to make a significant response in their

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[1] The problem is analogous to the one faced by a duopolist in determining his optimal production and/or marketing strategy. In the case of a duopoly, each firm's production decision may affect the optimal production decision of his competitor just as in this case one litigant's decision to change his expenditures on legal talent may affect his opponent's optimal strategy. Nash or Cournot type bargaining solutions can be applied in such contexts.

[2] This assumption has been made in W. M. Landes, "An Economic Analysis of the Courts," 14 *Journal of Law and Economics* 61 (1971), and R. A. Posner, "The Behavior of Administrative Agencies," 1 *Journal of Legal Studies* 305 (1972).

own litigative expenditures in response to a change in broadcaster expenditures. Thus, citizen groups seem strategically fixed with respect to the maximum amount they can spend on litigation. With the citizen group's budget largely fixed and with the broadcaster free to manipulate his own expenditures, an equilibrium can generally be found, and the process described by the model will be stable.

Policy Implications of the Model

Much of the Commission's concern over citizen agreements centers on broadcasters' apparent willingness to sign agreements that seem to include substantial concessions to citizen groups. The Commission fears these concessions impinge on broadcaster responsibility. But why do broadcasters agree to settlements that have the potential for eroding the broadcaster's firm control over his own station?

As outlined in the model, when the cost of each stage of the litigative procedure for the broadcaster weighted by the broadcaster's probability of reaching that stage, sums to an amount greater than the citizen's benefits at each stage weighted by the probability of reaching that stage, then a necessary condition for settlement exists. Under these circumstances if the expected cost for the citizen group is subtracted from the expected cost for the broadcaster, the difference, say Z, is the maximum value of the settlement the broadcaster will offer the citizen group. When the Commission objects to the large concessions being made by broadcasters, it is in effect complaining over the allocation of Z between broadcasters and citizens and complaining that the value of Z offered to citizen groups is actually too large.

Unfortunately for the Commission, this problem is largely of its own making and is not the fault of broadcasters or citizens. As was demonstrated in the body of this report, the costs of litigation for broadcasters can be fairly large and are generally greater than the equivalent costs for citizen groups. In the model's terminology, this implies that $X_b > X_c$ and that, all other factors equal, a necessary condition for settlement exists. The amount by which X_b exceeds X_c partially determines the size of Z. But since the

Commission itself exerts a great deal of influence over the magnitude of X_b and X_c and since the Commission is in large part responsible for the high cost of using its own legal processes, when the Commission objects to the size of a settlement, it is actually criticizing itself for allowing the conditions to arise in which such settlements are made possible.

This point deserves emphasis. It is not the weakness of broadcasters or the avarice of citizen groups that allow large settlements to arise. If broadcasters and citizen groups simply act as rational optimizers, then it is the nature of the process in which they are involved that generates large settlements--not any irresponsible behavior on their part. It is the Commission that is responsible for the nature of its legal processes. If the Commission took steps to reduce the cost of defending and prosecuting petitions to deny, the size of settlements could be expected to decrease.

More fundamentally, the model demonstrates that for litigation to develop there must be a difference of opinion between parties. If two parties are certain of the outcome of a case, then either a settlement will be reached or the issue will never be raised through litigation. Thus, when precedent is well established, the law can fend for itself and doesn't require pervasive caretaking by administrative or judicial bodies. But when the law is vague, reasonable differences of opinion abound, and the volume of litigation will increase.

Thus, the Commission's own inability to firmly resolve cases and set forth articulate policy statements can be seen as a major factor contributing to the volume of litigation and settlement. Furthermore, uncertainty in Commission behavior generates risk for all parties involved, and if broadcasters are risk averse, then they have a further stimulus to choose a settlement with a certain outcome over litigation with an uncertain result.

In all, the model demonstrates that much of the perceived settlement behavior by broadcasters and citizen groups can be explained in terms of rational optimizing behavior in a world of complicated, expensive litigation with uncertain outcomes. No

untoward abuse of Commission process by citizen groups or irresponsible giving-in by broadcasters to citizen group demands is necessary in order to explain the magnitude and frequency of settlement. If the magnitude and frequency of settlement is viewed as a problem, responsibility for that problem should be placed on those who have created a complex and indecisive system of litigation--not on citizen groups and broadcasters who have no choice but to operate in that world. If the Commission does not like what it sees occurring in the settlement process, it might be more profitable to turn its energies inward and examine means of reducing the cost and uncertainty of its own litigation procedures than to criticize parties appearing before it.

Appendix D

THE NATIONAL ASSOCIATION OF BROADCASTERS

LICENSE RENEWAL SURVEY

The purpose of this questionnaire is to determine how much extra time and money stations are forced to spend to defend themselves against challenges to their licenses--either petitions to deny, or competing applications. The questions below refer to expenditures *in addition to* those that were made as part of the regular application for license renewal.

1. To date, approximately how much extra time have station personnel spent in connection with the challenge to your license?

   _____ man-hours

2. To date, approximately how much extra out-of-pocket expense (attorney's fees, trial, etc.) has your station incurred as a result of the challenge to your license?

   $ _____

3. Has the challenge to your license been resolved?

   ____ yes ____ no

   If not: Please estimate the total out-of-pocket costs and expenditures of station personnel time that will be incurred before the challenge to your renewal is settled.

   Station personnel = _____ man-hours

   Out-of-pocket expenses = $ _____

Thank you very much for your help. Please return this questionnaire to:

Research Department
N.A.B.
1771 N Street, N.W.
Washington, D.C. 20036