FROM THE FCC’S FAIRNESS DOCTRINE TO RED LION’S FIDUCIARY PRINCIPLE

Probably no issue in the history of American broadcasting has evoked as much public discussion, criticism and agony as who should exercise effective control over the quality and content of television and radio programming. Central to the problem is concern about the influence enjoyed by private broadcasters over the political intelligence of the country; not only news broadcasts, but all programs in some way affect the public’s perceptions, impressions, opinions and understandings of contemporary life. Thus, as many commentators have noted with increasing emphasis, what is at stake in this debate is not only the future of broadcasting’s multibillion dollar private investment, but also the generations of minds that the media will influence.

Traditionally, the FCC has eschewed direct regulation of programming in favor of controls over station location, ownership limitations and employment requirements that have only an indirect and problematical influence over programming content. Straightforward regulation has been avoided for three primary reasons. First, in terms of resource capacity, the Commission has been understaffed from its inception and restricted in its

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1 This point was vividly illustrated with respect to one major contemporary problem, race relations, by the Kerner Commission:
The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in his newspapers or sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American. By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 383 (Bantam Book ed. 1968).


3 See, TELEVISION FACTBOOK passim (1966).

4 The example of employment illustrates the Commission’s approach. In a pending rule making proceeding “to require broadcast licensees to show non-discrimination in their employment practices,” 33 Fed. Reg. 9960 (1968), it was observed by the American Civil Liberties Union that the hiring of racial minority group members such as Negroes and American Indians “could very well help to balance the present preponderance of white interests and white points of view on the air.” Letter from the American Civil Liberties Union to the F.C.C., Oct. 4, 1968, at 2, on file with F.C.C., Docket No. 18244. The proposed rule making proceeding was announced shortly after the Commission renewed the license of a southern station accused of presenting racially biased programming. The renewal was reversed in United Church of Christ v. FCC, 38 U.S.L.W. 2002 (D.C. Cir. June 20, 1969).
ability to supervise programming practices by individual licensees. But most importantly, the Commission has evinced a high degree of concern over whether direct regulation of programming oversteps the constitutional bounds of the First Amendment. Embodied in the Communications Act of 1934 is the specific admonition that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the rights of free speech by means of radio communication." However compelling the Commission's purpose might be in improving the quality of programming, that purpose cannot be served by unnecessarily broad or burdensome restrictions on the freedom of FCC licensees. It seems that, as a result, a majority of the seven FCC Commissioners "do not regard it as the Commission's proper role to give serious scrutiny to the performance of applicants before granting their requests for renewal.

A dramatic turning point may have been signaled, however, by the Supreme Court's decision in two cases consolidated for hearing in the last term of court. In Red Lion Broadcasting Co. v. F.C.C. and United States v. Radio Television News Directors Association, the court faced squarely and for the first time the question whether the FCC, relying on its "fairness doctrine," could constitutionally compel a licensee to adhere to certain minimal programming requisites. In holding, 7 to 0, "that the specific application of the fairness doctrine in Red Lion, and... in RTNDA, are both authorized by Congress and enhance rather than abridge

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5 The FCC staff numbers approximately 1500 employees and operates on an annual budget of about $20 million. Interview with Mr. Robert Thorpe, Assistant to FCC Commissioner Nicholas Johnson, November 13, 1969; see also, MacNeil, supra note 2, at 259. The volume of correspondence regarding broadcasting programming may be illustrated by an inter-office memorandum circulated to the Commissioners in July, 1968. The memo reported that in the previous month 4,807 letters had been received of which 1,948 were treated as complaints about some aspect of programming. Of this number, 258 related to the problem of violence on television, presumably in reaction to the death of Senator Robert Kennedy. MEMORANDUM OF THE BROADCAST BUREAU, Item No. 3, July 23, 1968.


7 47 U.S.C. § 326 (1964). See generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964) [hereafter cited as Fairness Primer]. For a lively discussion among the Commissioners during the hearing into renewal of a station license where the licensee allowed, inter alia, a lengthy panel discussion of homosexuality and the reading of literature thought to be offensive, see Pacifica Foundation, 36 F.C.C. 147 (1964).


9 Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 FCC 2d 1, 12 (1969) (separate statement of Commissioners Cox and Johnson) [hereinafter cited as Oklahoma Case Study].

the freedoms of speech and press," the Court may have significantly mitigated the constitutional obstacle to more effective and direct program regulation.

I

As it has evolved through FCC administrative decisions, policy reports and, since 1965, codified regulations, the fairness doctrine imposes on all broadcast licensees the obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Red Lion and RTNDA involved two particular aspects of the doctrine: the rules governing licensee editorializing and "personal attacks" during the discussion of public issues. In both instances, licensees who have broadcast expressions of the kind embraced by the rules are required to preserve evidence of the nature of the remarks and to offer free reply time to groups or individuals with contrasting viewpoints.

The fairness obligation was thought by many to have been compelled by the language of the Federal Radio Act of 1927. Although primarily concerned with the novel engineering problems involved in finding an optimum employment of the spectrum space, Congress also focused its attention on the difficult question of who should have access to the air waves. Reflecting the anxiety of some that "big city" interests would monopolize radio, the Act instructed the Federal Radio Commission to

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11 Id. at 375.
12 The Court may also have indicated how staff inadequacies and the dilemma of an absence of standards may be mitigated. See p. 101 infra.
15 The personal attack rule provides that an attack "made upon the honesty, character integrity or like personal qualities of an identified person or group" during the discussion of a controversial issue obligates a licensee to notify the subject of the attack within a week after it is made. 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1969) (all identical). The editorializing rules establish a similar obligation on licensees who endorse or oppose candidates for public office, except that the notification periods are shorter. Id.
16 These codified rules are not exhaustive of the fairness doctrine. Thus, a licensee editorial not related to a candidate for public office but clearly adopting a controversial viewpoint raises similar obligations to offer responsive reply time. See generally Fairness Primer, supra note 7.
17 Ch. 169, § 4, 44 Stat. 1162.
18 Prior to 1927, the frequencies for radio were generally left on a first come, first serve basis. E. Barnouw, A TOWER IN BABEL, 211 et seq. (1966).
19 Then as now, New York City appears to have represented evil incarnate. Compare Address by Vice-President Spiro Agnew, supra note 2 (New York is "the most unrepresentative community in the entire United States") with the remarks of one Southwestern Congressman debating with Rep. Cellers of New York in 1928: "I am
regulate its use "as public convenience, interest, or necessity requires...." 20 From the outset, the Commission interpreted this statutory command to compel a critical view of stations which presented only one side of controversial questions. 21 It has been widely supposed that when Congress incorporated substantially the same "public interest" standard in the successor Act of 1934, 22 "the basic policy of the 'standard of fairness' which is imposed on broadcasters...." was reaffirmed. 23 In 1959, moreover, after several decades of Commission experience with the fairness principle, Congress ratified it in major part by amending the Act to exempt certain kinds of broadcasts from its coverage. 24

The history of enforcement by the FCC has not quieted disagreement over the scope of the fairness obligation and the extent to which the Commission may constitutionally go in enforcing it. It was this disagreement, in fact, which the Court sought to resolve in the Red Lion-RTNDA litigation.

Red Lion arose late in 1964 when a Pennsylvania radio station broadcast a 15-minute "Christian Crusade" program featuring Reverend Billy James Hargis. In the course of the program, Hargis discussed a book written by Fred J. Cook, entitled, "Goldwater—Extremist on the Right" and made several allegations about the author's ethics as a journalist and his previous political affiliations. The Commission, citing Times-Mirror Broadcasting Co., 25 concluded that Hargis's remarks constituted a personal attack and ordered the station to provide Cook with an opportunity to respond free of charge. 26 The RTNDA litigation was commenced by a petition seeking to set aside the FCC's newly adopted codification of its

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20 § 4, 44 Stat. 1162 (1927).
21 When the Federal Radio Commission was established, many active radio stations previously licensed under the 1912 legislation were found to be owned and operated in the interests of specific groups, such as labor unions, churches, newspapers, etc. Barnouw, supra note 18. The FRC refused to license such stations almost immediately. See Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), rev'd on the other grounds, 59 App. D.C. 197, 37 F.2d 993, cert. denied, 281 U.S. 706 (1930); Chicago Federation of Labor v. FRC, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, 41 F.2d 422 (D.C. Cir. 1930).
26 The Red Lion Broadcasting Co. at first refused on the ground that Cook had not shown to the station that he was unable to pay for his reply time or that a commercial sponsor for it could not be found. Red Lion Broadcasting Co. v. F.C.C., 381 F.2d 908, 911 (D.C. Cir. 1967).
licensee editorializing rules. In a lengthy opinion issued in September, 1968, the Seventh Circuit Court of Appeals granted the petition on the grounds that the Commission's enforcement procedure compelling broadcasters to provide free reply time "will impose unconstitutional burdens on the freedom of the press protected by the First Amendment."²⁷

The broadcasters attacked the doctrine on two broad grounds. (1) First, it was suggested that the doctrine works an unconstitutional restraint on the broadcasters' freedoms of speech and press. (2) Second, it was argued that the Commission's chosen means for enforcement of the doctrine would encourage station owners to censor their own programming, thus abridging the public's right to an uninhibited forum for ideas.²⁸

(1) The doctrine as an abridgment of the broadcasters' rights. The broadcasters in Red Lion-RTNDA saw their own freedom of expression threatened by the severity of the sanctions for noncompliance, the vagueness of the fairness obligation and the potential the doctrine creates for administrative abuse of discretion. Because licenses to broadcast conceivably can be revoked or not renewed by the FCC on the basis of a single fairness violation, it was argued, the doctrine reposes in the government the ultimate censorial power to silence permanently a broadcaster for a solitary pecadillo.²⁹ The chilling effect of this prospect is compounded by the lack of clear standards by which station owners may gauge whether the FCC will consider a given expression "controversial" or of "public importance."³⁰ Confronted with close questions, for example while preparing documentaries or station editorials, broadcasters will feel constrained to avoid the heavy penalty of license denial by favoring the least controversial expression. Finally, it was argued, the potential for governmental abuse is clear. By selective enforcement of the doctrine, the FCC can protect certain expressions from the balancing requirement while burdening others. Thus, licensees with a proclivity to express views at odds with the prevailing governmental opinion run a substantially higher risk of suffering the Commission's sanctions than licensees who program controversial utterances that coincide with the Commission's own judgment.³¹

²⁷ Radio-Television News Directors Association v. United States, 400 F.2d 1002, 1010 (7th Cir. 1968).
²⁸ The Seventh Circuit adopted the ingenious position that while the fairness doctrine could be part of the reasons for a denial of a license renewal, the rules requiring responsive reply time imposed burdens too onerous and immediate to withstand constitutional attack. Id. at 1013.
²⁹ Revocation of licenses is provided for in 47 U.S.C. § 312(a) (1964).
³⁰ It is not clear, for example, whether the doctrine requires responsive reply time for personal attacks uttered apart from a discussion respecting a controversial issue. See Note, The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 144 (1969). The editorializing rules, however, are less susceptible to this objection since they tend to operate somewhat more mechanically. But see McCarthy v. F.C.C. 390 F.2d 471 (D.C. Cir. 1968) (whether equal opportunity should be afforded Senator McCarthy following address by Pres. Lyndon Johnson in December, 1967).
The Court quickly disposed of these objections. First, it pointed out, the Commission has available a range of sanctions less drastic than license denial. The responsive reply time rules, in themselves, represent a sanction developed by the FCC to mitigate the effects of biased programming without permanently excluding a broadcaster from the air waves. Other sanctions may range from a mild rebuke to a monetary forfeiture.\(^{32}\) Second, the Court dismissed the vagueness argument as spurious, pointing out that the Commission has developed a line of administrative precedents which establish clear and reasonable bounds for the doctrine.\(^{33}\) For example, the FCC has repeatedly expressed its intention to deal reasonably with inadvertent violations;\(^{34}\) and recently, the Commission affirmed that nothing in the fairness rules requires broadcasters to alert either the Commission or the public in advance of a controversial broadcast or a personal attack.\(^{35}\)

Turning to the third objection, the Court did not deny that the doctrine imposes burdens on licensees who otherwise would be free to broadcast only the views they found desirable.\(^{36}\) But this limitation, the Court indicated, does not necessarily implicate the government in censorial activity. A broadcaster may still exercise absolute freedom to air his own views; the rules limit only his monopolization of the air waves to exclude contrary expressions. In justifying the burdens attached to the exercise of free expression, the Court relied heavily on the special nature of the broadcasting medium. Since the spectrum space available for private use is limited, it reasoned, the Government has a special warrant to regulate access in order to insure that optimum use of the frequency is achieved.\(^{37}\) In pursuit of that objective, it has conferred on some a monopoly power over the resource. But there is no absolute right to enjoyment of this power over the channels of communication. Because it springs from the governmental licensing process, it must be conditioned upon what the Court termed a "proxy or fiduciary" duty to give adequate coverage to all competing views without distinction as to content or ideology.\(^{38}\)

Yet frequency limitations of the spectrum, which the Court described at considerable length, are only some among the many impediments to greater public access to the broadcasting media. In fact, given the present availability of frequency space in many radio and television markets, they


\(^{33}\) 395 U.S. at 395.

\(^{34}\) E.g., Report on Editorializing by Broadcast Licensees, supra note 13, at par. 10.


\(^{36}\) 395 U.S. at 386.

\(^{37}\) "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. at 388.

\(^{38}\) Id. at 389.
are not the major obstacles. Two others loom large as well: the high cost of access to ownership and the FCC's own licensing policies, which have not consistently encouraged diversity of ownership. But there can be little doubt that broadcasting is a severely restricted medium, whatever the causes. The award of a license by the government to a private broadcaster elevates him to a potentially preferred position in the public forum. Conditioning retention of that position upon observance of a fiduciary duty to program responsive replies to editorials or personal attacks does not seem unreasonable when the interest served is an increase in the volume of ideas and controversial expressions available to the public.

In redressing the imbalance between licensees and those excluded from ownership, the Court in Red Lion-RTNDA adopted what one commentator has termed a "positive" dimension to First Amendment theory. This approach emphasizes not the individual right of the speaker but the more fundamental interest in "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences. . . ." As a result, it restores to prominence the cardinal purpose of the First Amendment: the assurance of a multiplicity of ideas and experiences.

(2) The doctrine as an abridgment of the rights of the public. The broadcasters further asserted that the rules would actually work to inhibit public discourse. Invoking a variation of Gresham's Law, they argued that licensees anxious to avoid the burdens of compliance or the penalties of noncompliance will meticulously purge their programs of any matter likely to provoke a demand for free reply time. At the same time, conscientious

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39 47 C.F.R. § 73.606 (1968) contains a table of assignments of television channels. Despite the apparent availability of VHF and UHF frequencies, however, the Court correctly noted that there is no assurance that all demands on the spectrum space can be served. Demand for frequencies grows apace with the population and increasingly sophisticated land-mobile, industrial and medical uses. 395 U.S. at 396.

40 See, e.g., Television Factbook 10C-21C (1966).

41 Cf., Jaffe, supra note 6, at 1697-98; Johnson, The Media Barons and the Public Interest, ATLANTIC, June, 1968, at 43. In 1968, less than ten percent of VHF television stations were owned by entities that did not have interests in other media. Id. at 48. Such concentration poses a danger that viewers in the local community will be deprived of the opportunity to hear conflicting views on important issues. Existing regulations on multiple ownership are lenient, but several recent cases suggest a shift in FCC attitude. E.g., Chronicle Broadcasting Co., 17 F.C.C.2d 245, 15 P & F Radio Reg. 2d 993 (1969); WHDH, Inc., 16 F.C.C.2d 1, 15 P & F Radio Reg.2d 411 (1969).

One proposed rule would limit further applicants to one AM, FM or television station per market. 33 Fed. Reg. 5315, April 3, 1968. Applied prospectively, such a rule would take many years to achieve a significant reduction in concentration of ownership of the media. Johnson, supra at 51. The Justice Department Antitrust Division has suggested the FCC consider divestiture of existing concentrations and extension of the rule to include newspapers. N.Y. Times, Aug. 2, 1968, at 67, col. 3.

42 See Note, The Supreme Court, 1968 Term, supra note 30, at 143-47.


44 395 U.S. at 390.
station owners will be put to the Sisyphean task of counterbalancing every expression even remotely controversial. The resultant programming blandness of the former and economic and artistic burdens suffered by the latter will achieve a result directly the reverse of the Court's intention.\footnote{The Seventh Circuit was impressed with this argument taking note of the "substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply." 400 F.2d at 1012.}

The Supreme Court found this argument "speculative":

[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.\footnote{395 U.S. at 393.}

The Court's summary treatment of this argument seems unconvincing. Occasions when individual stations as well as networks have chosen to be silent rather than speak out on controversial issues are not unknown. In some instances, the decision to say nothing has clearly been based on the impracticality of affording responsive reply time.\footnote{The dilemma may be particularly acute where there is a proliferation of minor candidates for public office. See, Use of Broadcast Facilities by Candidates for Public Office, 31 Fed. Reg. 6660, 6667-69 (1966); Barrow, The Equal Opportunities and the Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U. CINCINNATI L. REV. 447, 480-81 (1968). Further complications can arise in a different context when a candidate for office is in addition an on-the-air personality. Recently, the FCC awarded 22 hours of free time on a Panama City, Florida station to a candidate for tax collector because his opponent had been a local newscaster and variety show emcee. The windfall was used, in part, to air amateur music shows and other entertainment, featuring the non-station employee as "host." Apparently, however, the "Public response was so bad he . . . dropped the entertainment." The candidate was quoted by the Associated Press as remarking optimistically, "As we get nearer election date, I'll use the 50 minutes a day I'm entitled to. If I've got a good band we'll have the band on." See generally New York Times, Oct. 2, 1968, at 78. Other candidates have had to be more pragmatic. See, A. Kendrick, Prime Time, 49-60 (1969): During the production of Edward R. Murrow's notable See It Now attack on Senator Joseph McCarthy, several network newsmen expressed the fear that programming the attack would only increase McCarthy's popularity in the end, due both to his exposure on See It Now and his subsequent reply program. However, Murrow eventually decided to go ahead with the program, heeding the advice of Chairman Frank Stanton to offer McCarthy equal time. Murrow, in fact, opened the broadcast with that offer. Interestingly, McCarthy attempted to have his equal appearance filled by columnist William F. Buckley, but the network insisted that McCarthy make his reply personally.}

But the Court may be correct in suggesting that generally the doctrine is not the principle cause for licensee timorousness. Data drawn from two recent studies indicate that on the con-
trary, broadcasters often fail to air controversial issues for reasons unrelated to the effect of the balancing requirement. A Senate subcommittee polling over 5,000 licensees found that approximately 9 per cent felt the doctrine inhibited them from engaging in public interest programming. 49 Another survey conducted by the National Association of Broadcasters in 1967 revealed that nearly 30 per cent of all licensees sampled had experienced at least one threat from an advertiser after broadcasting a political editorial. 50 The two surveys strongly suggest that commercial considerations rather than the fairness obligation account for much of the dearth of tendentious programming among commercial broadcasters. 51

But the Supreme Court went beyond finding that the broadcasters' gloomy predictions of blandness were speculative. In a single passage likely to have a nearly revolutionary impact on the industry, it stated:

[I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. . . . To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. 52

The Commission power which the Court apparently had in mind is the FCC's general requirement "that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance." 53 Clearly, this affirmative duty goes beyond the obligation to present a contrasting viewpoint once a controversial expression has been broadcast. In effect, it would seem to require all licensees to engage purposely in programming likely to trigger the reply time rules. Such an extension of the fiduciary principle would probably mitigate the discriminatory effects the fairness rules otherwise would have on conscientious licensees. But it remains to be seen whether this obligation is pragmatically or constitutionally enforceable.

50 Broadcasters and Editorializing, A Study of Management Attitudes and Stations Practices by the Research Department of the National Association of Broadcasters (1967), quoted in MacNeil, supra note 2, at 236.
51 The generally higher standard of public service broadcasting among educational outlets would seem to support this conclusion. However, recently 25 primarily southern educational outlets refused to clear the first program of NET's Public Broadcast Laboratory apparently because of its controversial nature. The program included a short drama of a small racist town acted entirely by a Negro company in "white face." Kendrick, supra note 48, at 18.
52 395 U.S. at 393-94 (dictum).
II

The obligation to devote a reasonable amount of programming to public interest questions has languished throughout most of the Commission’s history, although the FCC has frequently referred to it as a necessary concomitant of the reply time rules or as a component of the fairness doctrine itself.\[^{54}\] Apart from the constitutional entanglements, the Commission has been unsuccessful in arriving at an enforcement procedure that would be both meaningful and even-handed.

Two polar approaches have received the Commission’s most serious attention. One approach would require all licensees to commit a minimum percentage of their air time to certain programming types, such as local news shows, documentaries, panel discussions, station editorials and public service announcements.\[^{55}\] Congressman Reuss introduced a bill to this effect in 1960, which would have required broadcasters to devote at least twenty percent of their programming, including one hour a night of prime time, to public service programs.\[^{56}\] Such a proposal could create a vast increase in the diversity of programming, since it would alleviate commercial pressures on broadcasters to limit their efforts to bland, inoffensive programming with mass appeal.\[^{57}\] Imposing a minimum public affairs programming standard on broadcasters seems appropriate, too, since they may be insulated from competitive challenges to their licenses, as proposed by the “Pastore bill.”\[^{58}\] The proposal has the advantage of being relatively easy to administer, since any station falling below the required minimum levels could be readily detected at renewal time. Licensees are already familiar with programming breakdowns similar to the kind that would accompany industry-wide minimums.\[^{59}\] Furthermore, concrete standards

\[^{54}\] Report on Editorializing by Broadcast Licensees, supra note 13, at par. 6.

\[^{55}\] Jaffe, supra note 6, at 1701.

\[^{56}\] H.R. 9549, 86th Cong., 2d Sess. (1960). “Public service programming” would be defined by a special committee in the Office of Education.

\[^{57}\] “The serious side of life, controversial issues, racial problems, the information necessary to cope with the exigencies of the period are deemed too ‘downbeat’ (sad and gloomy) to attract viewers and leave them with a happy, bright image of the sponsor and his product.” Barrow, Private Interest, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 54 (J. Coons ed. 1961). Ore advertiser turned down a talented writer’s script on the grounds he wanted “happy shows for happy people with happy problems.” In the Matter of the Study of Radio and Television Broadcasting, FCC Docket No. 1278, Hearings, at 558.


\[^{59}\] Similar categories of “program types” are included in license renewal application forms. FCC Form 303, Section IV-A, p. 2.
for a station’s obligations afford licensees a high degree of security for their investments.\footnote{The economic dislocations resulting from unpredictable “lurches” in FCC decision-making are explored in Jaffe, supra note 6 \textit{passim}.}

But the industry-wide approach is not entirely rational or fair. Although a station may meet the minimum time standards, short of an exhaustive investigation into daily programming practices, there is no way for determining whether a broadcaster’s treatment of public issues is robust or what the late A. J. Leibling disdained as “on-the-one-hand-this-on-the-other-hand-that” journalism.\footnote{Leibling, \textit{THE PRESS} (paper edition) at 226-39 (1961). Another solution that has been suggested to solve this problem is that members of the public have direct access to the media. Barron, \textit{Access to the Press—A New First Amendment Right}, 80 HARV. L. REV. 1641 (1967); Barron, \textit{An Emerging First Amendment Right of Access to the Media?}, 37 GEO. WASH. L. REV. 487 (1969). This view may be based on the doubt whether, even under the fiduciary doctrine of \textit{Red Lion}, the public should be entirely dependent on the judgment of broadcasters to determine whose voices are representative of the community. The fundamental right to speak to the public on matters of public concern should not be restricted to those advocates wealthy enough to purchase broadcasting time. Broadcasters could be required to offer a few hours a week free to members of the public, with speakers chosen by some nondiscretionary method such as a lottery.}

Moreover, industry-wide time minima may fall most heavily on stations in rural areas, since often it is these licensees who have neither the artistic nor the pecuniary resources to support a high level of public service programming.\footnote{The problem has been thought to be particularly acute for marginally operated UHF stations. However, L. William White, general manager of a Boston station, observed that the burdens for reply time in both radio and television are nominal. According to White, a single part-time employee is placed in charge of handling the notification requirements on the frequent occasions when his stations editorialize. One letter is sent immediately after the broadcast, and another follow-up letter one week later. White also observed that public service programming apart from editorializing is expensive, however, involving as it does the expense of obtaining qualified news and program personnel and various technical equipment such as mobile cameras, etc. Interview with L. William White, November 20, 1969.}

An alternative approach would have the Commission consider in detail the programming practices of each licensee before granting renewal of his license.\footnote{The suggestion is advanced in \textit{Oklahoma Case Study}, supra note 9, at 13-25.} Although this approach might avoid the problems of discrimination against poorer stations and self-serving but bland coverage of important issues, it suffers from the defects suggested earlier; viz, the lack of standards, staffing inadequacies and the censorial dangers inherent in full-blown government inspection of the content of speech by broadcasting.\footnote{See pp. 89-90 supra.}

More by default than design, a third alternative to these polar approaches has recently been advanced. In \textit{United Church of Christ v.}
The District of Columbia Circuit Court held that the Commission is compelled by its statutory authorization to require renewal candidates to shoulder the burden of proving that a renewal license is in the public interest. The decision reverses the traditionally insecure position of public interest representatives who oppose the interests of broadcasters. Noting that such representatives should not be treated as “interlopers” in a private sanctum, the Court declared:

Rather, if analogues can be useful, a “Public Intervenor” who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

Reliance on the complaints of the public may well provide a solution to the problem of how to detect a failure in affirmative performance of the fiduciary duty: the Commission may simply wait for alleged transgressions to be called to its attention. But this path also has its difficulties. However conscientious, no licensee is capable of satisfying every conceivable programming interest in his audience. Some interests may be entirely idiosyncratic or insubstantial. In larger and more diverse metropolitan areas, licensees may as a practical matter be forced to choose among a variety of equally substantial programming interests. To revoke a license or deny renewal because a licensee wrongly guessed which interests he should consider paramount might lead to an undesirable instability of investment.

However, the Red Lion-RTNDA Court’s promotion of the community proxy concept may offer an escape from this dilemma. The Court’s declaration that broadcasters have a fiduciary duty “to present those views and voices which are representative” of their communities is reminiscent of one of the most fundamental policies of the FCC: the encouragement of local program service. It was anticipated that by favoring a nation-wide system of low powered stations as opposed to a few super power facilities the industry would be made more responsive to the desires of each station’s respective audience. Localized minority viewpoints which might

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66 Id.
67 The United Church of Christ case involved easily identifiable racial and political programming interests. But other interests, especially those with limited influence, may be more difficult to identify. Cf. “The Limits of Technology,” Address by former FCC Commissioner Lee Loevinger before the New Jersey Broadcasters Association Convention, Atlantic City, N.J., October 10, 1966 (it is unrealistic to expect technological advances to serve every programming desire.)
68 395 U.S. at 389.
69 See, e.g., Courier-Post Publishing Co. v. F.C.C., 104 F.2d 213 (D.C. Cir. 1939).
be overlooked in a regional audience would be more apparent to a broadcaster covering a smaller geographic area. The vision failed for a number of reasons, including the growth of national networks and the ascendance of advertisers as a major influence on programming decisions. At bottom, however, the local service concept was allowed to falter on confusion over the identity or definition of the audience to be served by a given licensee. Thus, as Alexander Kendrick has recently observed, many stations have become beholden to commercial and political forces which bear no relationship to the station audience and which "may not be representative of the community as a whole, or consonant with its best interests."  

The fiduciary principle of Red Lion–RTNDA suggests that the task before the FCC is not to divine what kinds of programming are consonant with those interests, but to develop administrative procedures which will allow those interests to assert themselves without at the same time threatening the stability of the industry.

III

The Commission already possesses what may prove to be the foundation for such a procedure. Applicants for a construction permit to commence broadcasting are now required to submit to the FCC evidence that they have undertaken to survey the needs of their local communities. It is a rudimentary system at best, however, compromised principally by the haphazard nature of most surveys.

But the scheme does suggest an appropriate line for further development. It might be refined to require from every applicant for a license: (1) a catalogue of the component programming interests he perceives in his community; (2) a declaration outlining which of these he proposes to serve as his programming "constituency"; (3) a reasonably specific description of what steps he will take to serve this constituency; and (4) an explanation why other interests were excluded. In this manner, the definitional problem involved in reducing multifarious communities to their component parts is left in the first instance to the broadcasters. If the definition is accepted by the FCC, the licensee can rely on the subsequent renewal of his license so long as the interests he has identified are adequately served.

Of course, inequities may arise from imperfectly conceived community surveys. The Commission recognizes this problem now, and has on occa-
sion expressed a preference for one survey technique over another.\textsuperscript{74} One important deterrent to poor surveys springs from the fact that many communities are served by more than one licensee. In these areas, marked differences in survey descriptions of community interests may warrant further inquiries. An additional check is available through the liberalized standing rules for public interest representatives.\textsuperscript{75} Citizens who believe their interests are improperly excluded from a licensee constituency could seek inclusion through the hearing procedure. The effects of a decision that the constituency should be amended to include a new interest, moreover, presumably would be less shattering to a licensee than the loss of his license for failure to serve those interests in the past.

The advantages of a system such as this one are several. It resolves the troublesome question of the "community" to which a broadcaster stands as a proxy;\textsuperscript{76} it provides a measure of stability to ownership while at the same time increasing public influence over program content; it relieves much of the bureaucratic burden of the Commission by providing it with measurable standards for judging past performance records; and it maintains a desirable flexibility "geared to the situation in each community."\textsuperscript{77}

Perhaps most important, the procedure would seem to mitigate the threat of government censorship. Rather than having to define the bounds of "good" programming in each given instance, the Commission is confronted only with the primary task of identifying the community interests to be served, a judgment more amenable to cognizable standards of proof and procedure.\textsuperscript{78}

It should be noted, finally, that a practice similar to the one envisioned has been informally executed by the Commission in two recent renewal proceedings. In Texarkana, Texas, and Rochester, New York, television stations applying for renewal have appeared before the Commission with formal agreements hammered out between the station owners and members of their audiences. The policy agreements cover a surprisingly wide


\textsuperscript{76} See, \textit{Broadcasting}, May 5, 1969, at 42 \textit{et seq.}

\textsuperscript{77} Jaffe, \textit{supra} note 6 at 1701.

\textsuperscript{78} Moreover, it might be noted that the Courts would thus be provided with a more rational basis for review. Inevitably, surveys seeking to ferret out all community programming interests will at least in part tend toward empirical research. Broadcast advertisers have already developed sophisticated means for plumbing the interests of television viewers in every market in the country, and it might be anticipated that the learning gained from these techniques could be applied to program, as opposed to product, interests with a minimum of difficulties. See, \textit{e.g.}, The American Research Bureau "Explanation of Survey Method and Sources" on the back page of any \textit{ARB Market Report}.
range of matters including, *inter alia*, the number of color cameras located in adjunctive studios, the use of the station to publicize the legal rights of the poor, the provision of toll-free telephones in some nearby cities to facilitate audience inquiries, the pledge to program regular local “live” programs involving participants from the service area and monthly meetings between the station management and representatives of the several constituent groups. It remains to be seen whether these modest beginnings will lead to an institutionalized procedure for assuring that broadcasters discharge their fiduciary duties.

It remains to be seen whether the FCC will correct the present inequities in media access. But it is clear from the *Red Lion* decision that should the Commission neglect its duty, the courts will enforce it themselves, and in perhaps a more vigorous manner than the broadcasting industry would like.

—John C. Barrett
—Mary Louise Frampton

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79 Statement of Policy of Station KTAL-TV, Texarkana, Texas, Adopted as an Agreement with 12 Community Organizations of Texarkana and Filed at the FCC on June 9, 1969.

80 We may be on the verge of a technological solution to the constitutional problem of television regulation. It is possible that such developments as community antenna television, satellite-to-home broadcasting, or “wired-city” TV will eliminate the scarce-frequency problem and so reduce the cost of transmission that the public can be assured of a wide variety of programming and of reasonable access by the citizen. See generally Note, *The Federal Communications Commission and the Regulation of CATV*, 43 N.Y.U. L. REV. 117 (1968); For a discussion of satellite technology generally see Johnson, *New Technology and Its Effect on Use and Management of the Radio Spectrum*, 1967 WASH. U.L.Q. 521 (1967); Barnett and Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1 (1968). Analysis of these alternatives is beyond the scope of this comment. But there is disagreement over the number of channels such innovations might provide and the degree to which they can reduce costs. Some commentators suggest that even with a large number of channels there will continue to be a need for the “fairness doctrine” in its various aspects. E.g., Barrow, *The Equal Opportunities and Fairness Doctrines of Broadcasting: Pillars in the Forum of Democracy*, 37 U. CINCINNATI L. REV. 447, 490-93 (1968).