THE IMPACT OF THE FCC'S CHAIN BROADCASTING RULES

TEN years ago the Federal Communications Commission issued its Chain Broadcasting Rules.[1] These Rules were designed to curb the growing power of the networks and to eliminate specific restraints embodied in contracts between the networks and their member stations. In promulgating the Rules, the Commission was walking a tightrope. On the one hand, it wanted to give the networks enough control over affiliates to assure advertisers of simultaneous nationwide coverage.[2] At the same time, it sought to promote competition among stations and among networks,[3] and to increase the re-

1. The issuance of the Rules on May 2, 1941 was accompanied by an exhaustive report marshalling evidence adduced by the Commission during three years of investigation and explaining the aims of the eight regulations. FCC, REPORT ON CHAIN BROADCASTING, Docket No. 5060 (hereafter cited as CHAIN BROADCASTING REPORT). On October 11, 1941, the Commission amended three of the regulations in order to clarify them or to lighten their burden on the networks. At the same time the effective date of a fourth was postponed indefinitely. FCC, SUPPLEMENTARY REPORT ON CHAIN BROADCASTING (1941); 6 JOURNAL OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION 36 (1941). See notes 30, 31 *infra*.

In October, 1941, CBS and NBC brought suits under § 402(a) of the Communications Act of 1934, 48 STAT. 1064 (1934), *as amended*, 47 U.S.C. §§ 151–5, 201–22, 301–29, 401–16, 501–6, 601–9 (1946) (hereafter cited as COMMUNICATIONS ACT), to enjoin enforcement of the Regulations. The district court dismissed the suits for want of jurisdiction but granted a stay of the Rules pending appeal to the Supreme Court. Columbia Broadcasting System v. United States, 44 F. Supp. 688 (S.D. N.Y. 1942). On appeal the Supreme Court held that the suits could be maintained under § 402(a), remanded them to the district court, and continued the stay. Columbia Broadcasting System v. United States, 316 U.S. 407 (1942), noted in 56 HARV. L. REV. 121, 21 N.C.L. REV. 68, 10 U. of CHI. L. REV. 88. On remand the district court granted the government's motions for summary judgment and dismissed the suits on the merits. In February, 1943, the Supreme Court affirmed and the Rules became fully effective. National Broadcasting Co. v. United States, 319 U.S. 190 (1942); 41 MICH. L. REV. 316.

2. "This report is based upon the premise that the network system plays a vital role in radio broadcasting and has brought great benefits to it. We have carefully drawn our regulations so as not to interfere with any of the three major functions which a network performs—the sale of time to advertisers; the production of programs, both commercial and sustaining; and the distribution of programs to stations." CHAIN BROADCASTING REPORT 77.

3. "A constantly improving service to the public requires that all the competitive elements within the industry should be preserved. The door of opportunity must be kept open for new networks. Competition among networks, among stations, and between stations and networks, . . . must be set free from artificial restraints." *Id.* at 50.

The Communications Act does not specifically authorize the FCC to regulate competition in the radio industry and the legislative history is at best equivocal. WARNER, RADIO AND TELEVISION LAW 483–94 (1948). But Congress did include elaborate provisions on the subject of monopoly, which demonstrate that it relied upon the interplay of free competitive forces to assure utilization of radio in the public interest. *E.g.*, persons engaged in radio broadcasting shall not be deemed a common carrier (§ 153(h); the antitrust laws apply to radio (§ 313); FCC is authorized to refuse a license to any applicant who has been found guilty of violation of antitrust laws in radio communications (§ 311); free competition in commerce is to be preserved (§ 314). The Supreme Court has consistently supported the view that preservation of competition was one of the objectives of Congress and has upheld sponsibility of the individual licensee.[4]

The impact of the Rules on the industry has been slight. Although the formal contracts between networks and their affiliates have changed considerably in the past decade, the actual relationship between them is very much the same as before. Yet the FCC has done little to enforce the Rules. It has made but one thorough investigation of a network; and in that instance, after finding extensive violations, it refused to invoke any sanctions.[5] All in all, the Rules have not made network practices since 1941 substantially different from their practices before that date.

NETWORK BROADCASTING BEFORE THE RULES

Network broadcasting was developed to permit exploitation of the lucrative national advertising market and wide dissemination of cultural and "national issue" programs.[6] A central traffic agent was needed to line up key stations throughout the country and to reserve popular listening hours for nation-wide programs. As pioneers in this development, NBC with two

the Commission's efforts in this behalf. National Broadcasting Co. v. United States, 319 U.S. 190, 223–4 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474–5 (1940); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1946).

4. "It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. . . . The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest." CHAIN BROADCASTING REPORT 66.

In order to aid the Commission in selecting responsible operators, Congress requires that "[a]ll . . . applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station. . . ." Communications Act § 308(b). Similarly a station license may not be transferred without the Commission's permission. Communications Act § 310(b). The Commission has consistently held that a licensee may not delegate control over programming or business operations. The Yankee Network Inc., 5 PIKE & FISCHER RADIO REG. 216 (1949); Georgia School of Technology, 10 F.C.C. 110 (1943); *cf.* Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947) (Commission's reasoning upheld, but court recommended leniency for the offender). This principle has been codified in a Commission regulation. 47 CODE FED. REGS. § 3.109 (1949).

The Commission hoped that by augmenting station control over program content and by increasing the number of network companies, the Rules would promote freedom of speech in radio and the fair presentation of controversial public issues. *Hearings before Committee on Interstate Commerce on S. Res. 113*, 77th Cong., 1st Sess. 151 (1941) (hereafter cited as *Hearings on S. Res. 113*).

5. Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179 (1949). See pages 96–8, 104 *infra*.

6. There is some controversy as to whether chain broadcasting received its first impetus from the demands of advertisers for wide coverage or from the pressure of local audiences seeking service from New York. ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT 18 (1943). In any event, since 1923, when A.T. & T. first connected two stations for simultaneous broadcasting, the network system has been the keystone of American radio. On the early history of radio and the networks, see, WHITE, THE AMERICAN RADIO (1947); ARCHER, BIG BUSINESS AND RADIO (1939) and HISTORY OF RADIO TO 1926 (1938).

networks and CBS with one, rapidly attained a position of dominance.[7] Mutual entered the scene in the mid-thirties, but, in terms of coverage and revenue, was of relatively minor importance.[8] By 1938 national networks accounted for 62% of the full-time stations, 97.9% of the nighttime wattage, and 50% of the revenues of the radio industry.[9] Each network owned or leased a few key stations in large cities, but most network outlets were independently owned stations linked to the network by means of affiliation contracts.[10]

Prior to the issuance of the Network Rules, the affiliation contracts contained highly restrictive provisions.[11] The heart of the contract was an exclusive option clause. Under this provision the most desirable portions of the broadcasting day were designated "option time." [12] The network could re-

7. In 1938 NBC and CBS together accounted for 50 out of a total of 52 of the most powerful "clear channel" stations and 146 out of 305 regional, unlimited time stations. By and large, only the small 250-watt outlets were left for other networks or for independent operation. CHAIN BROADCASTING REPORT 31. Of a total of $100,892,259 proceeds from time sales received by the broadcasting industry in 1938, sales of network time by NBC and CBS amounted to $44,313,778, and stations which they owned collected an additional $6,734,772. *Id.* at 32. Furthermore, the operations of these two chains were not limited to the production and distribution of programs. Both engaged extensively in the management of radio artists whom they tied to exclusive contracts. NBC further insisted that all transcriptions of its programs be made by its parent company RCA despite contrary wishes of sponsors. *Id.* at 9–25, 30–34; ROBINSON, *op. cit. supra* note 6, at 208–19.

8. Although in number of affiliates Mutual by 1940 had surpassed Columbia and was not far behind National, its impressive total of 170 member stations was misleading. In fact, Mutual's coverage was very spotty and missed many important markets. Most of its affiliates were stations of 250 watts or less. It had but one Class I-A clear-channel station, with no sky wave interference, WGN of Chicago, and one Class I-B clear-channel station, WOR of New York, which shared its frequency with another Class I-B station. In 1938 the net profits of each of the other two networks exceeded Mutual's gross revenue from time sales. *Hearings on S. Res. 113*, 167.

9. CHAIN BROADCASTING REPORT 31, 32.

10. NBC was the owner of ten stations and CBS of eight, while affiliates totaled 214 and 121 stations respectively. The importance of the owned stations should not, however, be discounted, for they included 14 out of 30 of the highest power, clear channel stations in the country. *Id.* at 30, 32. Located exclusively in the richest metropolitan markets, networks-owned stations not only provide convenient studios for production of chain programs but also are the chief sources of revenue for the networks. *Hearings before Committee on Interstate Commerce on S.1333*, 80th Cong., 1st Sess. 66 (1947).

Mutual has always been organized in a different manner. It owns no stations but rather is itself owned by certain of its affiliates. In 1940 the 100 shares of Mutual stock were distributed as follows: 25, WOR; 25, WGN; 25, Don Lee Network; 6, Colonial Network; 6, United Broadcasting Co.; 6, Cincinnati Times-Star Co.; 6, Western Ontario Broadcasting Co., Ltd.; 1, Fred Weber (qualifying share). CHAIN BROADCASTING REPORT 28; see Comment, *FCC Regulation of Competition among Networks*, 51 YALE L.J. 448 (1942).

11. For copies of the affiliation contracts of all three networks, see *Hearings on S. Res. 113*, 107–126.

12. NBC typically reserved the following time:

Weekdays	*Sundays*
10:00 a.m.–12:00 noon	1:00–4:00 p.m.
3:00 p.m.–6:00 p.m.	5:00–6:00 p.m.
7:00 p.m.–7:30 p.m.	7:00–11:00 p.m.
8:00 p.m.–11:00 p.m.	

quire its affiliates, on 28 days' notice, to "clear" option time of any local programs previously scheduled and to substitute the network's commercial program.[13] The station owner [14] theoretically retained the power to reject any network program not in the public interest. But NBC required that he affirmatively justify his rejection,[15] and CBS insisted that he give the network notice of rejection three weeks before the scheduled date of the program.[16] An "affiliation exclusivity" clause prevented member stations from carrying programs of competing networks even during unoptioned time.[17] In return, the network granted "territorial exclusivity," promising not to supply programs to any rival station within an affiliate's primary service area—even programs rejected by the affiliate.[18] The chains generally controlled station rates for sale of time to network advertisers,[19] and NBC further retained the power to penalize an affiliate whenever its independent national advertising rates varied from those established for network sales.[20]

CBS, on the other hand, did not limit itself to specified hours, but reserved the power to demand clearance for any broadcasting hours desired. Thus Columbia affiliates were even more restricted than those of NBC. A proviso limiting Columbia's demands to a total of 50 "converted hours," or an average of 79 clock hours per week had no practical effect, as no CBS affiliated station had ever carried this many network programs. CHAIN BROADCASTING REPORT 37 n. 21, 64 n. 24.

Mutual had no time option provisions until 1940, and then the option power applied only to its seven stockholders, and expressly provided for termination upon FCC disapproval. Furthermore, option time was limited to 3½ to 4½ specified hours on week days and 6 hours on Sundays.

For exact terms of option clauses, see *Hearings on S. Res. 113*, 109, 113, 115, 118.

13. *Ibid.*

14. In this comment the terms "station owner" and "outlet" are used interchangeably with the term "licensee."

15. "[M]ost NBC and CBS affiliates are required to take network commercial programs unless such programs are not in the public interest. NBC even goes so far as to require that the licensee 'be able to support his contention that what he has done has been more in the public interest than had he carried on the network program.' Thus the burden of proof is placed upon the licensee." CHAIN BROADCASTING REPORT 65, 66.

16. See the text of the CBS contract in *Hearings on S. Res. 113*, 113.

17. *Id.* at 112, 114, 122.

18. Columbia and Mutual expressly incorporated this guarantee of exclusive service in their contracts. *Id.* at 113, 122. National, on the other hand, refused the protection of territorial exclusivity to all but a few key affiliates, granting it to them only after a "knock down and drag out fight." CHAIN BROADCASTING REPORT 58. In practice, however, NBC rarely supplied competing stations with network programs. *Ibid.*

19. In the case of NBC and CBS, station rates for network advertisers were set forth in the affiliation contracts or in the networks' "rate cards." Affiliates of these networks could not change their rates during the five year term of the contracts. But NBC retained the power to decrease an outlet's rate on one year's notice, although the station could usually choose to disaffiliate if the proposed reduction were too onerous. While the standard CBS contract was silent on this point, in some cases Columbia also retained the power to change station rates. Mutual affiliates on the other hand, set their own rates and were free to change them at any time. *Hearings on S. Res. 113*, 110; CHAIN BROADCASTING REPORT 43–4.

20. *Hearings on S. Res. 113*, 111; ROBINSON, *op. cit. supra* note 6, at 135–40. This power worked both ways. If an affiliate offered national advertisers a rate more favorable for

The affiliation contracts were usually binding for five years on member stations, but could be terminated by the networks on one or two years' notice.[21]

The effect of these provisions was to restrict competition between stations and between networks and to make the individual station owner a less responsible operator in the public interest. The territorial exclusivity clause foreclosed independent stations from a large part of the national advertising market and denied them access to popular network programs.[22] The network option clause restricted affiliates' ability to enter into binding commitments with advertisers for sponsorship of local programs and national non-network, or "spot," programs.[23] In the case of NBC stations, the threat of being penalized for any variance between network and non-network rates further discouraged affiliates from independent solicitation of national advertising. The contracts were equally effective in hindering the growth of new chains. The affiliation exclusivity clause barred new networks from purchasing time during popular broadcasting hours on stations affiliated with National and Columbia,[24] and the five-year contract term made it well

spot (non-network) programs than the one established by the network, NBC could lower the rate for network commercials to equal the spot rate without giving the outlet the opportunity to disaffiliate. On the other hand, if an affiliate substituted a more profitable local or spot program for one offered by the network, NBC could claim as "liquidated damages" the amount by which the money received from broadcasting the substituted program exceeded the compensation set for the rejected network program. In practice NBC rarely if ever invoked these provisions, but the threat was an effective deterrent to affiliates who might wish to profit by a flexible rate schedule.

21. This was true of only NBC and CBS contracts. Mutual's contracts with its stockholding stations were binding on the network for five years, whereas the affiliate could sever connections on one year's notice at any time after the first two years. The remaining Mutual affiliation contracts bound both parties for only one year. CHAIN BROADCASTING REPORT 35.

22. Hence profitable operation was often contingent upon a station's joining a network. In 1938 the 310 stations not affiliated with any national network had a consolidated loss of about $149,000, while the 350 national affiliates together showed a profit of about $15,000,000. CHAIN BROADCASTING REPORT 48 n. 10. Comparison here might be misleading, however, unless one realizes that independent stations were, for the most part, lower powered and relatively less firmly established than network members.

Another unfortunate consequence of territorial exclusivity was that audiences were deprived of network programs rejected by a local affiliate despite the willingness of another station to carry them. For example, when Mutual outlets in Buffalo rejected a sustaining program series known as "The American Forum of the Air," an independent station, WBNY, was unable to broadcast the programs, and the Buffalo audience had no opportunity to listen to this worthwhile series. *Id.* at 58.

23. The NBC vice-president in charge of sales testified in the Chain Broadcasting hearings that by and large 13 weeks is the minimum time necessary for an advertising campaign to take hold. *Id.* at 63. Under these conditions a non-network advertiser would certainly be wary of sponsoring a program series to be broadcast during option time and thereby subject to displacement on only four weeks' notice.

24. Although Mutual was permitted to contract with 25 NBC and 5 CBS stations of low power, this was of minimal value to Mutual because its programs on these stations could be ousted by National or Columbia on 28 days' notice. Mutual's general manager testified that this disability resulted in the loss of potential advertising revenue. *Ibid.*

nigh impossible to wean stations away from these established networks.[25] Mutual, for example, had great difficulty attracting advertisers because of its inability to place its programs on the powerful outlets.[26] And when a fifth network threatened to enter the field in 1939, Mutual in turn adopted the same restrictive provisions.[27] The affiliation contracts further hampered a station licensee in building up a balanced program schedule and in developing local live programs.[28] The option clause forced him to abdicate control over much of the broadcasting day to the network or to its advertisers. And in practice his technical right to reject undesirable programs was often limited by inability to ascertain in advance the precise content of programs offered by the network.[29]

25. National and Columbia attempted to justify the exclusivity clause as necessary to prevent confusion for the listening public accustomed to finding only NBC or CBS programs on a particular station. But such confusion, if it did result, would be short-lived, ending as soon as listeners became accustomed to dual affiliation. Similarly the networks argued that the five year term of affiliation contracts were necessary for stable network operations to protect the investment of chain and outlet alike. But their actions belied their words, for stability was not important enough to induce the networks similarly to bind themselves. In more candid moments network officials admitted that these provisions were included specifically to check the competitive challenge of new networks. The older networks apparently felt that they deserved a kind of protective status because of their pioneering efforts. *Id.* at 46–50; ROBINSON, *op. cit. supra* note 6, at 140–58. But the Communications Act confers upon licensees no vested right to continuous operation, § 309(b), and network organizations can claim no rights superior to those of the stations of which they are composed.

26. CHAIN BROADCASTING REPORT 52, 63. Furthermore, wherever Mutual was unable to affiliate, audiences were deprived of its programs—even special features of outstanding interest. The classic example was the refusal of NBC and CBS to allow their affiliates to carry the World Series baseball games of October, 1939, to which Mutual had secured sole broadcasting rights. *Hearings before the Committee on Interstate Commerce on S. 814*, 78th Cong., 1st Sess. 16 (1943).

27. The chronology of the adoption by the major networks of long-term contracts with affiliation exclusivity clauses is persuasive that the networks' main incentive was to thwart the growth of new chains. Columbia almost from the first tied up its stations with five year exclusive contracts. Although NBC asserted that its network was held together by the superiority of its programs and by the demand of listeners for NBC service, the advent of Mutual in 1934 was immediately followed by the adoption of provisions similar to those of Columbia. Mutual, in turn, remained an adherent of a free station-network market only until 1940 when a fourth network organization, Transcontinental Broadcasting System, threatened to lure away some of Mutual's outlets. CHAIN BROADCASTING REPORT 49.

28. The importance of catering to local interests and developing local talent has long been emphasized by the FCC. *E.g.* Mid-American Broadcasting Corp., 3 PIKE & FISCHER RADIO REG. 1547 (1947); The Observer Radio Corp., 3 PIKE & FISCHER RADIO REG. 234 (1946); Missouri Broadcasting Corp., 3 F.C.C. 349 (1936). Its stand has received judicial support. Simmons v. FCC, 169 F.2d 670 (D.C. Cir. 1948), *cert. denied* 335 U.S. 846 (1948); Great Western Broadcasting Ass'n, Inc. v. FCC, 94 F.2d 244, 247–8 (D.C. Cir. 1937). For full development of the Commission's position on the carrying of local live programs, see FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 36–9 (1946); Comment, *Radio Program Controls, A Network of Inadequacy*, 57 YALE L.J. 275 (1947); Note, *Government Control of the Content of Radio Programs*, 47 COL. L. REV. 1041 (1947).

29. Advance notice of content was frequently limited to the name of the program series and the name of the sponsor. By the time more definite descriptions were obtained, it might

ENTER THE NETWORK RULES

After three years of exhaustive investigation,[30] the FCC in 1941 issued its Network Rules to deal with these abuses.[31] The Communications Act gives the Commission no direct authority over the networks.[32] But under that statute the FCC does have the power to grant, modify, or renew the licenses of individual stations if it finds that such action would be in the "public convenience, interest, or necessity." [33] Therefore the Rules took the form of statements of policy by the Commission that it would not grant a license to any station owner who entered into a proscribed arrangement with a network.[34]

be too late to reject either because no replacement could be found or because, in the case of CBS affiliates, three weeks' notice was required. ROBINSON *op. cit. supra* note 6, at 173.

30. During the year 1937 at least four resolutions had been introduced in Congress calling for investigations of monopolistic control over broadcasting. *Hearings on S. Res. 113*, 14–5. Preliminary hearing before the FCC commenced in November, 1938, and in the following six months' period 8,713 pages of testimony were taken. After issuance of a preliminary report, briefs were filed by the networks and oral arguments presented to the Commission. Finally supplementary briefs were accepted. With all this evidence at hand the Commission and staff worked over the material for another six months before issuing the final Chain Broadcasting Report containing the Rules. *Id.* at 16–8. During the course of the Commission investigation Congress repeatedly urged speedier action. *Hearings before Committee on Interstate Commerce on the Nomination of Thad H. Brown on Reappointment as Federal Communications Commissioner*, 76th Cong., 3rd Sess. 2 (1940). Yet despite the FCC's extraordinary procedural caution, one network official accused it of a "torpedoing operation." *Hearings on S. Res. 113*, 18.

31. The Rules, as originally issued on May 2, 1941, are reprinted in CHAIN BROADCASTING REPORT 91–2. Two Commissioners, Case and Craven, dissented from the Commission's decision. Their dissenting opinion appears in *id.* at 115–53.

During the summer of 1941 further evidence was presented in a Senate investigation and additional hearings before the FCC were granted to the networks. On the strength of arguments made at this time, the Commission substantially amended its regulations. FCC, SUPPLEMENTAL REPORT ON CHAIN BROADCASTING 1–3 (1941). See notes 35, 36, 38, and 42 *infra*.

The Rules have since been made applicable to FM and TV without significant modification. See pages 98–103 *infra*. The Rules in their present form appear in 47 CODE FED. REGS. §§ 3.101–108 (AM), 3.231–38 (FM), 3.631–38 (TV) (1949).

32. "[I]t should be pointed out that the authority of the Commission to deal with networks is rather limited. The Commission has no jurisdiction over networks as such and the Commission does not have authority to license or regulate networks. In attempting to cover problems which arise out of the relation of networks to affiliates, the Commission cannot enact regulations which apply directly to the networks." Communication to Honorable Edwin C. Johnson, Chairman, Senate Committee on Interstate and Foreign Commerce from the FCC, Feb. 15, 1949, 1 PIKE & FISCHER RADIO REG. 91:131.

33. Communications Act § 309(a).

34. There was considerable controversy at the time of the promulgation of the Rules as to whether violations by a broadcaster would inevitably lead to withdrawal of his license or would merely be weighed adversely in reaching a general determination as to his qualifications. The Commission's language seemed mandatory, providing that "[n]o license shall be granted to a standard broadcasting station" entering into any of the proscribed arrangements with a network. 47 CODE FED. REGS. §§ 3.101–108 (1949). The majority of the Supreme Court in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942),

Through the abolition of restrictive practices embodied in affiliation contracts, the Commission first of all sought to promote competition between stations. Territorial exclusivity was prohibited in order to give independent stations a chance at rejected network programs.[35] To enable affiliates to bargain more freely for non-network advertising, the broadcasting day was divided into four segments and option time was limited to three hours in each segment. The notice required before a network could demand clearance for its own programs during option time was increased from 28 to 56 days.[36] Outside of option time, stations were to be left free to make long-range commitments. Network control over the rates of time which it did not actually purchase was outlawed.[37]

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apparently assumed that this language meant automatic denial of a license to any stations not complying with the regulations. *Id.* at 422. Justice Frankfurter, however, insisted in his dissenting opinion that this was not true, arguing that "[u]nder § 309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest. . . . No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest." *Id.* at 431–2. This view was apparently followed by the Court in National Broadcasting System v. United States, 319 U.S. 190, 225 (1943), in which Justice Frankfurter wrote the majority opinion. The Commission's recent decision in Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179 (1949), should set all doubts at rest. Despite findings of flagrant violations, no license was withdrawn. See pages 96–8, 104 *infra*.

35. "No license shall be granted to a standard broadcasting station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This section shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization." 47 CODE FED. REGS. § 3.102 (1949). The last sentence was added in October, 1941, see note 1 *supra*, for the purpose of clarifying the meaning of the regulation. 6 JOURNAL OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION 36–7 (1941).

36. "No license shall be granted to a standard broadcasting station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day as herein described. The broadcast day is divided into four segments as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other net work organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations." 47 CODE FED. REGS. § 3.104 (1949).

This regulation was the most significant concession to the networks embodied in the Commission's amendments of October, 1941. The original Rules permitted no option power whatsoever. CHAIN BROADCASTING REPORT 92.

37. "No license shall be granted to a standard broadcasting station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs." 47 CODE FED. REGS. § 3.108 (1949).

Even more extensive efforts were made to foster network competition for stations and advertising. NBC was forced to divest itself of one of its networks.[38] Ownership by any network of two stations in one market or of one station in a market not otherwise adequately served was proscribed.[39] Under the Rules a network could not contractually bind a station to exclusive affiliation,[40] or require clearance of time sold to competing networks even during option hours.[41] Affiliation contracts themselves were limited to two years.[42]

Finally the regulations were designed to restore to the individual licensee a greater measure of control over programming. No longer could he option away his entire broadcasting day or bind himself to exclusive affiliation.[43] The requirement of increased notice for clearance orders assured greater continuity for local and spot programs. The Rules insisted that the licensee have full discretion to reject unsatisfactory or unsuitable network commercial offers and to substitute local interest programs.[44] The licensee was to

38. "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: Provided, that this section shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." 47 CODE FED. REGS. § 3.107 (1949).

In October, 1941, the effective date of this Rule was postponed indefinitely in order to give NBC time to negotiate a sale of its Blue Network. See page 000 *infra*.

39. "No license will be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing." 47 CODE FED. REGS. § 3.106 (1949).

40. "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization." 47 CODE FED. REGS. § 3.101 (1949).

41. See § 3.104, note 36 *supra*.

42. "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station for a period longer than 2 years: Provided, that a contract, arrangement, or understanding for a period up to 2 years may be entered into within six months prior to the commencement of such period." 47 CODE FED. REGS. § 3.103 (1949).

In the original Chain Regulations contracts were limited to one year. CHAIN BROADCASTING REPORT 91–2. In the October 1941 revision of the Rules, the Commission explained that the contract period was being lengthened because of the contemporaneous extension of the license period from one to two years in recognition of the maturity of the industry. 6 JOURNAL OF THE COMMUNICATIONS BAR ASSOCIATION 37 (1941).

43. See § 3.101 note 40 *supra;* § 3.104 note 36 *supra*.

44. "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a) with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably be-

be free to build up a balanced program structure from a diversity of sources—network, spot, and local—in order to fulfill his statutory responsibility of operating his station in the public interest.

PRESENT STATUS OF BROADCASTING UNDER THE RULES

While the FCC hailed the Rules as the magna charta of radio,[45] network spokesmen prophesied the doom of chain broadcasting.[46] The networks warned that radio advertising revenues would dwindle; [47] that small stations in particular would suffer because businessmen would advertise, if at all, only through powerful outlets in rich markets; [48] that public service programs would be sharply curtailed; [49] and that the rules were in realty a prelude to government operation of radio in America.[50] Instead, under the Rules network revenues have soared,[51] broadcasters have more than trebled in number,[52] any diminution in sustaining programs can more accurately

lieves to be unsatisfactory or unsuitable; or which (b) with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance." 47 CODE FED. REGS. § 3.105 (1949).

45. Press Release from the FCC dated May 4, 1941, p. 2. The Commission, however, admitted that it was ". . . under no illusion that the regulations . . . will solve all questions of public interest with respect to the network system of program distribution." CHAIN BROADCASTING REPORT 88.

46. See, *e.g.*, CBS, WHAT THE NEW RULES MEAN (1941); TRAMMEL (president of NBC), STATEMENT BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE (1941). National and Columbia pointed in particular to the minority views of Commissioners Craven and Case, who had expressed their belief that the Rules might well "plunge the American broadcasting system from the known of good public service to the unknown in which all the consequences cannot be foreseen. It is, therefore, no exaggeration to predict that the decision of the majority instead of resulting in 'free competition,' would more likely create 'anarchy' or a kind of business chaos in which service to the public would suffer." CHAIN BROADCASTING REPORT 116–7. Mutual, on the other hand, defended the Rules. MBS, WHITE PAPER (1941).

47. Broadcasting Magazine, May 19, 1941, p. 40.

48. ROBINSON, *op. cit. supra* note 6, 185–9.

49. Opponents of the Rules argued that the responsibility for producing sustaining programs, such as world news round-ups, symphony concerts, and discussion forums, would be so diffused as to become "nobody's business." CBS, WHAT THE NEW RULES MEAN 31 (1941).

50. *E.g.*, editorial, Broadcasting Magazine, May 12, 1941, p. 18; report of speech of Mark Ethridge at the annual convention of the National Association of Broadcasters, Broadcasting Magazine, May 19, 1941, p. 17.

51. Network time sales have risen from $79,621,534 in 1941 to an estimated $127,590,–000 in 1949. Broadcasting Magazine Yearbook 12 (1950). The net income of all national networks, including income from network-owned stations, has risen from a total of $13,–705,043 for 1940 to a total of $15,280,131 for 1948. FCC, ANNUAL REPORT 61 (1941); FCC, ANNUAL REPORT 52 (1949).

52. In July 1941 there were 897 standard broadcasting stations, 49 commercial FM stations, and only 2 commercial TV stations, making a total of 948. FCC, ANNUAL REPORT 61–2 (1941). By September 1950 there was a total of 2,970 stations on the air, of which 2,178 were AM, 686 were FM, and 106 were TV. Broadcasting Magazine, Sept. 25, 1950, p. 92.

be attributed to increased expenditure for advertising,[53] and government operation of radio is no closer today than ever. But despite the disappearance of all prohibited clauses from affiliation contracts, the hopes of the FCC for a new era in the radio industry have proven largely illusory.

Competition on the station level

Competition between stations continues on extremely unequal terms. Since affiliation guarantees both a minimum of profitable network programs and a competitive advantage in bargaining for other advertising—national and local—the goal of most stations is still to join a network.[54] Occasionally an independent station can prosper by catering to minority tastes or foreign language groups,[55] or by specializing in local events. But in general unaffiliated stations must be content with advertising left-overs.[56]

53. Many programs which began as sustaining programs are now broadcast as commercials. For example, businessmen have shown an increasing readiness to back prestige programs like the Metropolitan Opera and the New York Philharmonic Symphony. SIEPMANN, RADIO'S SECOND CHANCE 72 (1947).

54. Approximately 60% of the money paid by advertisers for chain programs is retained by the network for line charges and other overhead costs. FCC, BROADCAST FINANCIAL DATA FOR NETWORKS AND AM, FM, AND TELEVISION STATIONS (1946). Consequently the rates per hour actually received by affiliates may not be as high as could be obtained in the national spot or local advertising market. But the affiliate incurs no production or sales expenses when network programs are carried, which compensates for the relatively low gross return. Of greater importance, however, is the assurance of popular, well publicized programs which will build up a station's audience, because it is the size of the audience that attracts local and national spot advertisers. Although few listeners stay tuned to one station merely because it is affiliated with a particular network, ROBINSON, *op. cit. supra* note 6, at 151–2, sponsors realize that a station break announcement will be more widely heard after a network favorite than after a disc jockey program. See Transcript of Hearings before FCC, pp. 148–9, 578–9, In the Matter of Representation of Affiliated Broadcast Stations by National Networks for the Sale of National Spot Advertising and Other Commercial Time, Docket No. 9080 (1948) (hereafter cited as Spot Sales Hearings). The experience of station WSAY, Rochester, see pages 89–90 *infra*, illustrates the advantages of carrying network programs. As soon as it became clear that WSAY would no longer carry American and Mutual programs, thousands of dollars worth of local and national spot advertising were withdrawn. Transcript of Record, pp. 50–3, Federal Broadcasting System v. American Broadcasting Co., 167 F.2d 349 (2nd Cir. 1948), *cert. denied*, 335 U.S. 821 (1948).

55. In most large metropolitan areas there are minority groups whose interests cannot be served by network programming. Independent local stations can, therefore, attract advertising money by directing their programs specifically at these groups. Examples of stations successful in this specialized broadcasting are WQXR, New York (classical music lovers); WTEL, Philadelphia (foreign language groups); WDIA, Memphis (Negro population).

56. One indication that independent stations have more difficulty than network affiliates in attracting advertising is that their station rates for spot sales are generally lower than those of affiliates. Of the 90 largest metropolitan areas in the country, 77 are served by both affiliated and independent stations. In all but one of these 77 areas, the average affiliate charges more for daytime station break announcements than does the average independent. NATIONAL ASSOCIATION OF RADIO STATION REPRESENTATIVES, SPOT RADIO ESTIMATOR (1949). Even better evidence of a broadcaster's competitive position is his

Although the tremendous expansion in the number of stations since the war has brought competition to areas where previously one or two broadcasters had a monopoly,[57] it has also made it increasingly difficult for independent stations to obtain network programs. In the pre-war period many markets were not served by a sufficient number of full-time outlets to permit all national networks to secure exclusive affiliates; hence unaffiliated stations in those areas could successfully bargain for network programs. Now there are stations eager for affiliation wherever coverage is sought.[58] The result is that any local station which is unwilling or unable to sign an affiliation contract must operate without network programs. The experience of station WSAY is illustrative. Prior to 1947 there were only three full-time stations in Rochester—a National affiliate, a Columbia

income in relation to that of other stations with identical technical facilities. The following table giving comparative incomes of 1313 AM stations in 1948 indicates that in every category except the very lowest—local part-time stations—affiliates made more money than independents.

COMPARATIVE INCOMES OF 1313[1] IDENTICAL STANDARD BROADCAST STATIONS
1948

CATEGORY OF STATION	NATIONAL NETWORK AFFILIATE		INDEPENDENT STATIONS	
	Number of stations	*Average income*	*Number of stations*	*Average income*
Clear channel 50 kw., unlimited time	46[2]	$341,257	0	
Clear channel 50 kw., part time	4[3]	171,278	0	
Clear channel 5–25 kw., unlimited time	18	87,592	11[4]	$67,961
Regional, unlimited	300	70,993	42	22,120
Regional, part time	31	12,542	154	5,577
Local, unlimited	500	14,055	141	7,101
Local, day and part time	8	3,484	58	4,599
All stations[1]	904	51,405	409	9,865

Source: FCC, STATISTICS OF THE COMMUNICATIONS INDUSTRY IN THE UNITED STATES 192 (1948).
[1] Does not include the operation of 11 stations owned by national networks.
[2] Includes two stations not serving as outlets for national networks.
[3] Includes one station not serving as an outlet for a national network.
[4] Includes one part-time station.

57. The Commission has encouraged the phenomenal postwar growth in the number of stations by licensing new stations without regard to the economic effect upon existing stations or upon the new station itself in a given community or area. The Voice of Cullman, 6 PIKE & FISCHER RADIO REG. 161 (1949) (possibility of competitive inroads is no basis for denying license to a new station in the same service area); FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING 1 (1947). This policy dates back to the Supreme Court decision in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), 8 GEO. WASH. L. REV. 1106; 13 SO. CALIF. L. REV. 450; 26 WASH. U.L.Q. 121 (1940).

58. In 1941, of 96 metropolitan districts in the United States with populations over 100,000, only 32 had four or more full time commercial stations. *Hearings on S. Res. 113*, 221 (1941). Now practically all metropolitan districts are served by six or more stations. WARNER, RADIO AND TELEVISION LAW 532 (1948).

affiliate, and an independent. The independent, WSAY, contracted for programs from American and Mutual on an individual basis and thus retained control of the rates charged to advertisers for network programs. Shortly after the war, the FCC licensed two new Rochester stations, which immediately affiliated with American and Mutual respectively. Thereafter, WSAY was deprived of all network service,[59] and, as a result, suffered a drastic decline in its revenues.[60]

Any expectation that the rule against territorial exclusivity would alleviate the competitive disadvantage of unaffiliated stations was short-lived. In the first place, networks are under no affirmative obligation to offer rejected programs to independents.[61] Secondly, popular commercial programs are rarely rejected by affiliates, and independents can seldom afford the expense of sustainers.[62] Finally, even if an independent station owner obtains a network program, his tenure is insecure, so that he may lose the program as soon as local popularity is achieved. An affiliate can reclaim the program at the end of the independent's contract term, which is usually limited to a period of a few months.

59. Gordon Brown, the licensee of station WSAY, had long been a thorn in the side of both networks, refusing to sign as a regular affiliate and demanding compensation greater than that paid to other comparable outlets. Hence it was not surprising that American and Mutual seized the first opportunity to break off with WSAY. When they did, Brown brought a treble damage action alleging conspiracy to boycott him from the national advertising market and requesting a preliminary injunction to restrain both networks from withdrawing their programs. The district court denied the motion for a preliminary injunction. The Second Circuit Court of Appeals, in affirming this denial, Federal Broadcasting System v. American Broadcasting Company 167 F.2d 349 (2nd Cir. 1948), started out with the proposition that networks are not common carriers and are under no obligation, in the absence of concerted action, to offer their programs on any but their own terms. The court then went on to reject Brown's contention that the uniformity of business practices and affiliation contracts amounted to conspiracy. Rather, the court felt, the similarity resulted from "common business solutions to identical problems in a competitive industry" and from the uniform "requirements of the Federal Communications Commission governing the stations." *Id.* at 352. After denial of certiorari by the Supreme Court, 335 U.S. 821 (1948), Brown gave up his court battle. While this particular station owner undoubtedly pitched his sights too high, his complete rebuff will serve as strong deterrent to any potential individualist.

60. In 1947 WSAY was earning in excess of $200,000 annually, Transcript of Record, p. 48, Federal Broadcasting System v. American Broadcasting System, 167 F.2d 349 (2nd Cir. 1948), *cert. denied*, 335 U.S. 821 (1948), but in the succeeding year it lost $52,000. *Hearings before Committee on Interstate Commerce on S. 1973*, 81st Cong., 1st Sess. 137 (1949).

61. Rule 3.102 is couched in purely negative terms forbidding affiliates to bind their network to territorial exclusivity. See note 35 *supra*. As a rule, a network will offer a program to competitors of its affiliates only as a last resort to satisfy a sponsor seeking nationwide coverage. This occurs only rarely, such as when an affiliate finds the advertising on a particular network program objectionable (*e.g.*, Duffy's Tavern, NBC variety program advertising Blatz beer, is broadcast in Kansas City by an independent, KCMO, because the NBC affiliate there refused to carry the program).

62. Networks generally charge independents a nominal fee, such as $100 an hour plus line charges to the nearest point on the regular network. But this expense coupled with the red tape involved in securing even one program has kept requests down to a negligible number.

Competition among stations for national advertising is further threatened by the networks' practice of representing certain key affiliates in the sale of non-network time to national sponsors in the spot market.[63] Ordinarily a station, affiliated or unaffiliated, deals with spot market advertisers through independent station representation agencies who are in direct competition with the networks for advertising money.[64] Within this framework all stations should have reasonable access to spot advertising. When a network represents its affiliates in the spot market, however, it is in a position to exercise powerful bargaining leverage on a national advertiser who is seeking choice hours for programs which he sponsors over the network.[65] As yet the networks' invasion of the spot field has been limited.[66] Indeed, the initial influence of their competitive challenge has forced independent representation agencies to improve their service. But there are dangers inherent in the possible expansion of network representation of key stations.

63. Following a complaint by the National Association of Radio Station Representatives, the FCC in July, 1948, launched a full scale inquiry into this network practice. Hearings were scheduled in November and December of 1948 to determine whether NBC, CBS, and ABC were violating chain rules 3.104 and 3.108 in their spot representation capacity, and whether, in the alternative, additional rules should be promulgated to eradicate or contain network representation as contrary to the public interest. On July 21, 1950, the Commission announced that the evidence adduced at the Spot Hearings was insufficient to support a finding of violation of the Chain Rules, but deferred its decision as to the desirability of new regulations on the subject. FCC, Public Notice No. 52837, July 21, 1950.

64. To some extent the media of spot and network radio serve different purposes and appeal to different types of advertisers. Only 40% of spot advertising takes the form of transcribed feature or local live programs of five minutes to an hours duration, the rest consisting of short commercial announcements of several minutes or less bracketing or interrupting other programs. Communication to the YALE LAW JOURNAL from the National Association of Radio Representatives, dated March 10, 1950, in Yale Law Library. Easily tailored in terms of cost and geographic scope, spot campaigns interest primarily those businessmen who plan intensive but short promotions, who seek only regional or selective coverage, or whose budgets are limited. The expensive but generally superior network service attracts only a relatively few large, nationwide advertisers—a total of 310 in 1944. FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING 64 (1947). But there is a broad area of overlap: many advertisers use both media and there is much switching back and forth. Within this area competition is and should continue to be brisk. For illustrations of intense competition between the two media and exhaustive argument concerning its importance, see Transcript of Spot Sales Hearings 18 *et seq.*

65. Networks charge advertisers different rates for different hours of the broadcasting day. Generally the top rates are for the hours between 6:00 p.m. and 11:00 p.m. See NBC affiliation contract in ROBINSON, *op. cit supra* note 6, at 247. But no rate distinction is made between the same hours on different days. For example, a particular hour on Sunday or Friday nights, which are the most popular with the radio audience, costs no more than the same hour on Saturday, when relatively few people turn to their radios. Of equal importance to the prospective time buyer is the popularity of the programs that precede and follow his own and of the programs being broadcast over competing networks at the same time. Obviously, a sponsor would expect a far larger audience if he followed the Jack Benny program than if he competed with it.

66. Excluding network-owned stations, ABC represents one standard and one TV affiliate in the spot market, NBC represents one AM and four television affiliates, and CBS

If ABC, CBS, and NBC were to represent only twelve to fifteen more of their affiliates, together they could control 50% of the spot market.[67] Furthermore, when a network represents an affiliate in the sale of spot advertising, it controls the great bulk of the affiliate's revenues [68] and is in the anomalous position of competing with itself for the sale of station time.[69] The Rules do not touch this problem.

Competition at the network level

The separation of the Blue Network from NBC and its transformation into the American Broadcasting Company represents the one solid achievement of the Rules.[70] No doubt the listening public has benefitted from the added diversity of program fare.[71] But American and Mutual are still far from being the competitive equals of National and Columbia.[72] Their

represents five AM affiliates and one TV. During the recent FCC investigation, NBC allowed representation contracts with four additional stations to lapse. Transcript of Spot Sales Hearings 922, 950, 343. But none of the three networks was willing to deny the possibility of expansion, though CBS suggested that for itself 15 stations might be a reasonable limit. *Id.* at 825. Absent FCC restriction, the networks may be expected to take full advantage of the fertile revenue opportunities of spot representation.

67. Brief for National Association of Radio Station Representatives (petitioner), p. 24, Spot Sales Hearings.

68. Those stations which are at present represented by a network in the spot market derive from 65 to 95 percent of their revenues from the network in its dual capacity as a seller of network and spot time. Transcript of Spot Sales Hearings, pp. 438–9, 516, 599, 1058.

69. All three networks protested that their network and spot sales departments were entirely separate and in fact did compete with one another. A similar claim of "intramural" competition between NBC's Red and Blue networks was summarily dismissed by the FCC at the time of the issuance of the Rules: "As long as all the efforts of the employees redound to the benefit of a single employer, there is merely the shadow of competition without its substance." CHAIN BROADCASTING REPORT 7.

70. The Blue Network was sold for $8,000,000 to Edward J. Noble, who reincorporated it as the American Broadcasting Co. in October, 1943. At that time the Blue Network owned stations WJZ, New York, WENR, Chicago, and KGO, San Francisco, and had affiliation agreements with 168 other stations. In the Matter of Radio Corp. of America, Transferor, and American Broadcasting System, Transferee, Docket No. 6536, Federal Communications Commission (1943). Subsequently ABC purchased KECA, Los Angeles, and WXYZ, Detroit, Edward J. Noble, 3 PIKE & FISCHER RADIO REG. 449 (1946), and by 1949 had increased the number of its affiliates to 272. FCC, ANNUAL REPORT 35 (1949).

71. For example, unlike National and Columbia, ABC's daytime programs are not a steady drone of "soap operas." FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 13–4 (1946). American has been a pioneer in selling time to labor unions and management groups. It has also originated instructive forays into the area of general public information, commencing with a reading of Hersey's "Hiroshima" and continuing with a series of forums on the teaching profession, slum conditions, and similar matters of national importance. These and other aspects of ABC's programming are praised in WILLIAMS, LISTENING 3–10 (1948).

72. Comparison of the gross radio advertising sales of the four networks demonstrates that NBC and CBS are still several lengths ahead of their competitors. During the first eight months of 1950, CBS was on top with $45,217,118 worth of radio advertising, followed

limited financial success in recent years reflects the prosperity of the times and radio's overall increased share of the advertising dollar,[73] rather than competitive inroads on their older rivals.

The newer networks are at a disadvantage in competing for advertising because NBC and CBS still control most of the nation's powerful stations.[74] Sponsors prefer to reach a particular market through one dominant outlet; the newer networks, however, have been able to serve many areas only by combining a number of small stations.[75] Conversely, the most powerful outlets cannot be induced to switch allegiance to American and Mutual[76]

closely by NBC with $41,931,767, while ABC and Mutual took in only $24,054,708 and $10,643,868 respectively. Broadcasting Magazine, Sept. 25, 1950, p. 94. NBC and Mutual do not publish net income figures, but figures for CBS and ABC indicate that the gap between these two networks, at least, is substantial. In 1949 CBS earned $4,184,079 and ABC lost $519,085. 1 Standard & Poor Corp. Descriptions 9520 (1950); 2 *id.* at 6796.

Furthermore, one of the avowed purposes of the Rules was to promote the development of new chains. CHAIN BROADCASTING REPORT 75; *Hearings on S. Res. 113*, 146; see Comment, *FCC Regulation of Competition among Radio Networks*, 51 YALE L.J. 448 (1942). But the only three attempts to establish new national networks—Transcontinental Network, Ed Wynn Network, and Associated Broadcasters Network—have been complete failures. At least one commentator thinks that a fifth network could not survive under present economic conditions. WARNER, RADIO AND TELEVISION LAW 531 (1948).

73. Radio accounted for 10% of the advertising gross billings distributed through the various media of communication in 1934. By 1940 its share had risen to 21%, and in 1946 to 25%. FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING 59-60 (1947).

74. There are three basic classes of standard broadcasting stations—clear channel, regional, and local. Clear channel stations typically have 50,000 watt transmitters, while regional and local stations are limited to 5,000 and 250 watts respectively. 47 CODE FED. REGS. § 3.21 (1949). Furthermore, clear channel stations are more or less protected from sky wave interference by the FCC's practice of licensing only one or two full time clear channel stations on each frequency. "I-A" stations are those clear channel stations with only one station on a frequency, whereas "I-B" stations are those with two. A I-A station may be clear channel either full time or part time; every I-B station, on the other hand, is clear channel full time. At night the effective service area of a clear channel station is greatly extended through sky wave propagation, but the coverage of regional and local stations is considerably reduced because of interference from nearby stations on the same channel. 47 CODE FED. REGS. § 3.22-7 (1949). WARNER, RADIO AND TELEVISION LAW 230-5 (1948).

NBC and CBS either own or have affiliation contracts with twenty-one of the twenty-three full time I-A stations in the country and twenty-one of the twenty-eight 50,000 watt I-B stations. ABC has a single full time I-A station and five 50,000 watt I-B stations. It has the equivalent of another full time I-A station, however, because in Chicago two part time I-A stations together control all the time on a particular clear channel, and ABC owns one of these stations (WENR) and is affiliated with the other (WLS). Finally, Mutual has only one full time I-A station and one 50,000 watt I-B station. BROADCASTING MAGAZINE YEARBOOK 69-325 (1950).

75. In order to cover all the important markets of the nation, Mutual has found it necessary to affiliate with 520 stations, American with 272, Columbia with 178, and National with 166. FCC, ANNUAL REPORT 35 (1949). For a graphic presentation of the relative position of the four networks, see the maps in BROADCASTING MAGAZINE YEARBOOK 379, 381, 389, 391 (1950).

76. Eight of the stations presently affiliated with ABC were formerly affiliated with CBS and three were formerly with NBC. But there is little reason to think that American

because these networks do not have the high-paying advertisers and the most popular programs.[77] The two year limitation on network-station contracts has in no way affected this basic dilemma, and the prohibition of exclusivity has not resulted in extensive dual affiliation.[78]

Since the four networks were not competitive equals at the time the Rules went into effect, the Rules, to the extent that they have made clearance less automatic, have actually hindered the development of the younger chains. By 1943 both National and Columbia were already distributing a full schedule of popular programs, but American and Mutual were still very much in the building process.[79] Inasmuch as affiliates are more likely to object to network requests for additional hours than to mere maintenance of the status quo, American at least has lost substantial advertising revenue because of failure or delay in securing the necessary number of outlets.[80]

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lured these stations away from the older networks. Instead the evidence suggests that in most cases the impetus for the switch came from National or Columbia. For in all but three of the markets involved, NBC and CBS affiliates are presently offering equal or better coverage than the affiliates of ABC. Since 1943 Mutual has affiliated with four former Columbia affiliates and no former NBC affiliate. Again, however, the older chain has not suffered from the change. Furthermore, it should be noted that none of the stations involved in any of these realignments was Class I-A and only one was Class I-B. BROADCASTING MAGAZINE YEARBOOK (1943-9) *passim.*

77. The results of the most recent of the monthly surveys by the A.C. Neilsen Co., official rater of national radio programs, indicates that National and Columbia distribute the great majority of the popular programs. Of the 55 programs with the highest Neilsen ratings, Columbia had 32, National 20, American 3, and Mutual none at all. The overwhelming predominance of the CBS and NBC programs in the top popularity ranks extends over almost the entire broadcasting week. Only during the daytime on Sundays do the smaller networks take the reins away from their older competitors. National Neilsen Ratings, Oct. 1-7, 1950, pp. 8-11.

78. As of December, 1949, only 16 small stations were members of two national networks. Half of these outlets were affiliated with both Mutual and ABC, and the others with Mutual and either National or Columbia. BROADCASTING MAGAZINE YEARBOOK 69-325 (1950). This represents a decrease from 1938, when Mutual had arrangements with 30 NBC or CBS stations. CHAIN BROADCASTING REPORT 31. The principal reason for this decline is, of course, the increase in the number of stations in most areas.

79. In 1942, for example, Mutual's gross advertising billings totalled $9,636,122 and the Blue Network's totalled $15,782,493, in contrast to gross billings for Columbia of $45,593,125. BROADCASTING MAGAZINE YEARBOOK 18 (1943). See also minutes of a meeting of various ABC affiliates, held on February 25, 1947: "Mark [Woods, President of ABC] explained that . . . when the network rules went into effect, our main competitors, namely NBC and CBS were set—the rules made no difference to them. But, for ABC they meant a lot because our network was just starting and needed the cooperation of all the stations in order to build itself into a great network. . . . Mark pointed out that their main competition is NBC and CBS and Mutual sometimes. The matter of local and network option time is no problem to NBC or CBS. Their stations always clear, because they have been filled up for years." Transcript of Spot Sales Hearings 75, 78.

80. In 1948 ABC lost contracts with advertisers totaling almost $4,000,000 because of affiliate recalcitrance. Communication from American Broadcasting Co. to the Federal Communications Commission, dated September 25, 1948.

Station responsibility

The Network Rules have not materially increased local station responsibility. Affiliation contracts have been revised so that they comply scrupulously with the FCC mandate.[81] But despite the fact that the Rules cover informal as well as contractual arrangements,[82] networks can subtly bring pressure to bear on affiliates in ways that are very difficult to uncover.[83] The pressure is effective because the networks still have a superior bargaining position. The manager of an affiliated station realizes that networks naturally prefer to deal with outlets that will accept without protest all commercial programs which are offered, whether inside or outside option time. He knows that if he protests too much he may fall into disfavor and ultimately be disaffiliated. As a result, any station associated with a network is strongly tempted to forget about local obligations and become a mere conduit for network programs. Moreover, chain representation of affiliates in the spot market involves yet another threat to independent operation. When a network assumes this dual function of selling network and spot time, it is in a position to influence non-network rates and to exert control over theoretically independent station time.[84]

81. See Current ABC and NBC affiliation contracts in Yale Law Library.

82. The prohibitions apply to "any contract, arrangement or understanding, express or implied. . . ." 47 CODE FED. REGS. §§ 3.101–8 (1949). The FCC has interpreted the word "implied" very broadly: "The Chain Broadcasting Regulations have clear application not only to prohibited relationships between network and stations which are expressed in formal written agreements, but to prohibited relationships which may be established through tacit understandings or courses of conduct which have the same effect as formal written agreements. . . . A tacit understanding imposed by a network upon its affiliates under which the stations affiliated with the network are expected to operate and do in fact generally operate contrary to the provisions of the Chain Broadcasting Regulations is as much a violation of those rules as if the forbidden course of conduct were the result of a formally written contract spelling out the forbidden practices." Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179, 1198 (1949).

83. Top network officials try sedulously to avoid flagrantly coercive acts. The FCC, however, has evidence that the president of one national network, at a meeting called by affiliates to protest disregard of their independence, strongly indicated his disapproval of the affiliates' failure to clear unoptioned time; and that the vice-president of another national network strongly criticized the attempts of an affiliate to secure advantageous spot advertising for time also sought by the network. Transcript of Spot Sales Hearings, pp. 74, 91. And of course a network can express its displeasure in more subtle ways, such as by insisting on an option to terminate a two year affiliation contract on six months' notice, or by discriminating against contumacious stations in negotiating with an advertiser who wants less than full network coverage.

These extra-contractual pressures are extremely difficult to isolate or prove. Station owners are loath to risk loss of their valuable network connections and hence rarely volunteer evidence. Communication to Honorable Edwin C. Johnson, Chairman, Interstate Commerce Committee from the FCC, Feb. 15, 1949, 1 PIKE & FISCHER RADIO REG. 91:131. Probably most affiliates who are enjoying a profitable relationship with a network feel that if their status is slavery, they are certainly happy slaves. See, *e.g.*, statement of Harry Bannister, General Manager, Stations WWJ, WWJ-FM, and WWJ-TV, Detroit, Michigan, *Hearings before Committee on Interstate Commerce on S. 1333*, 80th Cong., 1st Sess. 298 (1947).

84. For example, since a network's primary function is production and distribution of

An illustration of extreme network dominance of station operation was presented by the recent FCC hearings on renewal of licenses of stations belonging to Don Lee Broadcasting System, West Coast associate of Mutual.[85] Don Lee's affiliation contracts were in strict conformity with the Network Rules.[86] But by the exertion of constant pressure and thinly veiled threats of disaffiliation,[87] the network was able to vitiate the protection which the Rules were designed to afford member stations. Don Lee informed its member stations that they must choose between independent operation and affiliation, and that the contractual rights guaranteed affiliates by the FCC Rules were inimical to efficient operation and expansion of the network.[88] Affiliates were discouraged from carrying programs of other networks.[89] Demands for clearance on as little as two weeks' notice frustrated development of local programs.[90] Don Lee assured its members of only three and a

chain programs, it might well be tempted to subordinate spot sales to network sales, or to jockey spot programs in order to make room for new network features. See Brief for National Association of Radio Station Representatives (petitioner), pp. 27–31 Spot Sales Hearings.

85. 5 PIKE & FISCHER RADIO REG. 1179 (1949). While Don Lee is nominally only a regional network, it owns a substantial share of the outstanding stock of Mutual and accounts for all of Mutual's coverage of California, Oregon, and Washington.

The Don Lee proceeding began in February, 1946, when Don Lee's application for renewal of licenses of four stations owned and operated by the network was designated by the FCC for hearing. Among other things the Commission at that time had evidence that the management of Don Lee had caused its affiliates to violate Chain Broadcasting Rules 3.101, 3.104, and 3.105. Hence the Commission felt that the network management might not be of sufficiently high character to merit renewal of the licenses of the network-owned stations. *Id.* at 1181, 1198. The Commission held hearings from January 14 to 17, 1947. When it issued its final decision in December, 1949, however, the Commission refused to revoke any licenses. See page 104, *infra*.

86. *Id.* at 1183.

87. Don Lee had established a well defined routine for following up any refusal of an affiliate to clear time for network programs, whether inside or outside option hours. Patrick Campbell, executive in charge of station relations, apparently spent a major portion of his time in relentlessly harassing contumacious stations. *Id.* at 1191.

When KDON of Monterey, California, for example, objected to carrying network shows outside of option time, stating that it had to give some attention to local accounts, Don Lee commenced a barrage of "persuasive" correspondence. Finally the network pointed out that it had already been approached by persons who were interested in building a new station in Monterey and who promised 100% cooperation if granted affiliation. *Ibid.*

88. *Id.* at 1190.

89. Letters from Lewis Weiss, vice president, general manager, and a director of Don Lee, to various affiliates demonstrate that he objected strenuously to any of their attempts to carry programs of other networks despite their supposed freedom to do so under Rule 3.104, *supra* note 36. Thus when KVCV of Redding, California, contemplated carrying a Blue Network program at an hour not yet sold by Don Lee, Weiss insisted that he must be in a position to guarantee the whole network to any sponsor who sought the time in question. At other times Don Lee insisted on clearance even though certain stations were already carrying programs of the Associated Broadcasting Company, a competing regional chain. *Id.* at 1185.

90. It was the general practice of Don Lee to insist on clearance both inside and outside

half hours a day for non-network operations, insisting that almost all the popular listening hours be reserved for network programs.[91] No disruption of network schedules was tolerated even to permit coverage of such events as state election returns and political conventions, local news, and local athletic contests and religious services.[92] The network repeatedly tried to substitute its standards of taste and public interest for those of its affiliates.[93] In one instance Don Lee even tried to purge a local station of an executive who had in the past demonstrated his independence.[94] Although the FCC has

of option time on less than the 56 days notice provided for in the Chain Rules. On November 6, 1944, for instance, Don Lee informed its affiliates that a network program was to commence the following December 4. Station KFXM, San Bernardino, California, pleaded that this would disrupt local news presentation. Insisting that clearance be accorded nevertheless, Sidney Gaynor, Don Lee sales manager, admitted that other stations were also "unhappy about it," but concluded, "We can't hold up the wheels of progress." At another time, the network gave only 7 days notice before broadcasting a program called "What's the Name of That Song," and then a month later gave but 22 days notice before shifting the same program to another hour. *Id.* at 1186.

This practice also manifested itself in the refusal of the network to permit its affiliates to guarantee local sponsors more than one or two weeks notice of cancellation. When station KFRE, Fresno, California, pointed out that a local sponsor insisted on a 56 days notice provision, Gaynor advised the affiliate to grant the advertiser's wishes. He added, however, that if the network should decide later that it wanted this time, the station was to give its sponsor only as much notice as Don Lee had provided the station and let the advertiser sue if he didn't like it. *Id.* at 1187.

91. In a memorandum to affiliates, Don Lee indicated that it would guarantee only the following daytime hours for local programming:

7:30– 8:00 AM	Monday thru Saturday
9:30–10:00 AM	Monday thru Friday
12:00 Noon–1:00 PM	Monday thru Friday
12:00 Noon–1:00 PM	Sunday
1:30– 2:30 PM	Monday thru Friday
3:00– 3:30 PM	Monday thru Friday

During all other hours of the day Don Lee felt free to demand clearance for network programs. Thus in both the morning (8 a.m. to 1 p.m.) and afternoon (11 p.m. to 6 p.m.) segments of the day Don Lee in effect optioned from 3½ to 5 hours in disregard of the maximum of 3 hours per segment set by the Chain Rules. *Id.* at 1188.

92. *Id.* at 1192. Don Lee refused to permit KFRE of Fresno to broadcast its own V-E Day program, even though the affiliate promised to transcribe and broadcast at a later hour the two network commercials that would have been displaced. *Ibid.*

93. The network officials of Don Lee had definite ideas as to what was the best programming for their affiliates. For example, they tried hard to convince stations that it was preferable to shift local shows rather than network shows, even if this required transcribing special local programs like football and basketball games. *Id.* at 1193. Furthermore, when KFRE of Fresno threatened to cancel certain Mutual programs sponsored by laxative concerns which it found objectionable and against the public interest, Don Lee tried vociferously to persuade the station to reconsider and to defer to the standards of the networks. *Id.* at 1194.

The Commission found that practices such as these on the part of the network induced its affiliates to violate Rule 3.105, *supra* note 44. *Id.* at 1191–2.

94. Weiss made it clear to J. E. Rodman, licensee of KFRE, Fresno, that Don Lee would not affiliate with Rodman's Bakersfield station if Paul Bartlett, the "uncooperative" station manager of KFRE, were also made manager of the new station. *Id.* at 1195.

made no full-scale investigation of any other network, at least one Commissioner felt that parallel activities were indicated in other chains.[95]

NEW DEVELOPMENTS: FM AND TV

FM

At the time the Network Rules were issued, only 49 commercial FM stations were in operation.[96] Soon thereafter wartime restrictions temporarily halted development of this new broadcasting medium; but by 1945 the stage was set for full-scale expansion of FM,[97] and the FCC was deluged with applications for FM licenses.[98] It was reliably estimated that the FM spectrum could accommodate from 2,000 to 5,000 new stations free from interference with one another.[99]

If the Commission had taken the bull by the horns, it could have used FM to revolutionize the competitive structure of the radio industry. The key to this opportunity is that FM stations, in addition to providing better service, all cover an approximately uniform area.[100] The maximum effective

95. Concurring opinion of Commissioner Jones, *id.* at 1201–2. See note 83 *infra.*

96. FCC, ANNUAL REPORT 62 (1941).

97. The tremendous potential of FM was the major theme of SIEPMANN, RADIO'S SECOND CHANCE (1947). Informed members of the radio industry evidently concurred. For example, Hugh Beville, NBC's director of research, wrote in 1948, "The greatest significance of FM, to those interested in the field of mass communications, lies in the fact that it permits many more broadcasting stations to be operated than has been possible with the AM system of broadcasting. This is going to introduce greater competition in broadcasting than the newspaper field has ever known. . . . There is little question in the minds of most students of radio that FM will be the standard sound broadcasting system of the future. Its technical superiority seems to assure this. . . ." 25 JOURNALISM QUARTERLY 6 (1948). The predictions of Paul W. Kesten, Executive Vice-President of CBS, were even more extravagant: "FM contains in itself almost the whole future of audio broadcasting. Most of us at CBS have believed, from the very early days of FM, that, except in certain rural areas, FM was technically destined to replace AM transmission as surely and inevitably as the tungsten lamp was destined to replace the old carbon filament." Broadcasting Magazine, December 31, 1945, p. 22.

FM's major technical advantages are static-free reception, high fidelity, and freedom from interference with other stations. See SENATE COMMITTEE TO STUDY PROBLEMS OF SMALL BUSINESS: SMALL BUSINESS OPPORTUNITIES IN FM BROADCASTING 2 (1946).

98. By the time the wartime "freeze" on FM construction had been lifted in 1945, the Commission had accumulated about 600 applications for commercial FM stations. FCC, ANNUAL REPORT 15 (1946). As of December, 1946, the FCC had granted 605 conditional licenses, including 406 construction permits; and there were still 290 unprocessed applications pending. Broadcasting Magazine, December 23, 1946, p. 15.

99. Estimates vary as to the number of stations which could be allocated within the frequencies assigned to FM. See, *e.g.*, Testimony of Edwin H. Armstrong, inventor of FM, *Hearings before the Senate Committee on Interstate Commerce on S. 814*, 78th Cong., 1st Sess. 680 (1943) (many thousands); SIEPMANN, RADIO'S SECOND CHANCE 240 (1947) (5,000); WARNER, RADIO AND TELEVISION LAW 599 (1948) (2,000).

100. WARNER, RADIO AND TELEVISION LAW 599, 617 (1948). For technical details on classification and allocation of FM stations, see 47 CODE FED. REGS. 3.201–6 (1949).

service area of every FM station is about 100 miles in radius,[101] in striking contrast to the disparity between a 50,000-watt clear channel AM station and a 250-watt local AM station. If the Commission had determined upon a merger of AM and FM into a single integrated aural broadcasting system, it could have worked out a plan along the following lines. First, license only FM stations in the more populous sections of the country, such as the west coast and the region north of the Ohio and east of the Mississippi. Second, supplement this basic FM system by a sufficient number of clear channel AM stations so located as to assure adequate coverage, by each network, of the more thinly populated areas of the South and West.[102] A scheme of this sort would have alleviated any shortage of broadcasting frequencies, because FM's limited coverage would permit the same frequency to be used for a number of stations.[103] Furthermore, the scheme would have eliminated many of the basic competitive inequalities that exist among stations and among networks. Again because of FM's limited and uniform service area, most stations in the country would be on roughly the same footing,[104] and each network could secure equal nationwide coverage. Finally, all this could have been achieved with no further sacrifice of local control over programming.

Although the FCC seemed to favor the merging of AM and FM in the general manner suggested above,[105] it declined to take positive action to

101. Since the useful FM signal travels along the ground, the primary service area is bounded roughly by the horizon. Greater coverage can be obtained by raising the transmitting antenna and to a lesser extent by increasing the power. The 100-mile radius figure assumes a transmitter of 50,000 watts and an antenna 1,000 feet high. FCC, ANNUAL REPORT 67 (1940). The average radius has been estimated as 50 miles. *Hearings before Committee on Interstate and Foreign Commerce on H.J. Res. 78*, 80th Cong., 2nd Sess. 76 (1948).

102. Releasing AM from metropolitan service would open up new frequencies for such clear channel stations. For testimony as to the need for more service to farm and ranch areas, see, generally, *Hearings before the Senate Committee on Interstate Commerce on S. 2231*, 80th Cong., 2nd Sess. (1948).

103. WARNER, RADIO AND TELEVISION LAW 597–599 (1948).

104. Since frequency modulation would be the sole aural medium in the densely populated and hence most profitable markets of the Northeast and Pacific Coast, the FM stations in any community would each have equal coverage. In other areas where extensive rural coverage is needed, there would be instances were FM stations with community coverage would compete with clear channel AM stations which cover several states. But the AM stations would be expected to devote much of their time to the special needs and interests of the farmers, ranchers, and miners for whose benefit these stations were licensed. Hence the local FM outlets would play a necessary role and would be able to attract advertisers aiming at the urban or community market.

105. The Commission's view as to the most desirable use of AM and FM was expressed as early as 1940 when it said: "The Commission believes that this [FM] is one of the most significant advances that has been made in aural broadcasting in recent years. . . . [A]mplitude modulation stations in the standard broadcast band may be required indefinitely for the purpose of giving widespread rural coverage. For coverage of centers of population and trade areas, the new class of station offers a distinct improvement." FCC, REPORT, May 20, 1940, quoted in Edward G. Noble, 3 PIKE & FISCHER RADIO REG. 449, 459 (1946). See also WARNER, RADIO AND TELEVISION LAW 617 (1948).

force the radio industry to effect any change. Instead, by moving FM frequencies to a new band in 1945,[106] the Commission actually impeded FM's postwar expansion. This untimely Commission action, undertaken for technical reasons of questionable validity,[107] rendered all receivers and transmitters then in use obsolete and put FM back where it began in 1940.[108] By the time FM could make a new start, the television craze was on, and public interest in a new purely aural system had flagged.[109]

Moreover, in the past few years the networks have done their part to impede the development of FM by severely restricting the operations of those network affiliates which own both AM and FM stations. All four networks have insisted that if such an affiliate broadcasts any network program simultaneously over its AM and FM stations, it must duplicate all its network programs. The affiliate, however, receives no extra compensation for the FM coverage.[110] Under these conditions, AM affiliates

The FCC position on the advisability of FM and AM integration was also expressed in its policy of favoring those applicants for FM licenses who were already owners of standard outlets and in its refusal to require any unduplicated programming of joint AM-FM licensees. FCC, REPORT, August 24, 1945.

106. FM was moved from the 42–50 megacycles band to its present position between 88 and 108 megacycles on June 27, 1945. FCC, ANNUAL REPORT 20–1 (1945).

107. The move was motivated by the Commission's fear that FM, in the lower frequencies, would be subject to extreme ionospheric interference during the maximum intensity of the sunspot cycle. But informed supporters of the new medium, insisting that the change was entirely unwarranted and that operations at such high frequencies will be inefficient, continue to press for revision. *Hearings before Committee on Interstate Commerce on H.J. Res. 78*, 80th Cong., 2nd Sess. 13–17 (1948).

108. *Ibid.*

109. From January 1949 to April 1950, 3,641,327 television sets were produced. During this same period 2,148,757 receivers were made with FM bands, but only 32,240 of these were FM-only sets. Statistics collected by the FCC from reports submitted by Radio Manufacturers Association, on file in Yale Law Library.

110. This policy was made possible by the FCC's refusal, in 1945, to require any separate programming of joint AM-FM licensees. FCC, REPORT, August 24, 1945. Three years later, however, the Commission pointed out to the networks that by conditioning use of any network programs over affiliates' FM stations on complete duplication, the networks were violating the letter if not the spirit of Chain Regulation 3.235, which guarantees affiliates a right of rejection. The networks replied that since their practice was to charge no extra for FM coverage, they felt that there would be discrimination among advertisers if some programs were duplicated while others were not. See Communications to the FCC from American Broadcasting Co., Columbia Broadcasting Co., Mutual Broadcasting System, and National Broadcasting System, dated March, 1948, copies on file in the Yale Law Library. Since that time the FCC has taken no further action to check this network practice.

As early as 1946 Commissioners Durr and Walker expressed some scepticism as to statements by the networks that they felt FM would replace AM as the chief medium. Edward J. Noble, 3 PIKE & FISCHER RADIO REG. 449, 458 (1946). The Commission approved the sale to ABC of 5,000 watt, regional AM station, WXYZ of Detroit, for $2,800,000, of which $2,155,000 represented "good will." At the same time ABC planned to build at a cost of only $33,460, an FM station in Detroit which admittedly would provide superior service over a wider area. In his dissenting opinion, Durr pointed out that ABC have had no economic incentive to build FM stations [111] and listeners have been discouraged from purchasing FM receiving sets because they would hear few, if any, new programs.[112] Furthermore, because of the limited sale of receivers, independent station owners have had difficulty attracting advertising for exclusively FM programs because those programs reach only a small fraction of the potential audience. The net result is that network affiliates view their FM stations as financial drains, and successful operation of an FM station unconnected with AM or network service is virtually impossible.[113] Hence FM itself is being squeezed out of existence.[114]

would hardly be foolish enough to invest so large a sum in the "good will" of an AM station if it expected that FM was soon to become the dominant medium. *Id.* at 460.

In 1948 Dr. Edwin H. Armstrong, inventor of FM, charged that RCA had purposely obstructed the progress of FM. These charges touched off a series of inconclusive Congressional hearings. *Hearings before the Committee on Interstate Commerce on Certain Charges Involving Development of FM Radio and RCA Patent Policies*, 80th Cong., 2nd Sess. (1948).

111. Another factor contributing to this result was the former requirement of the American Federation of Musicians that double the number of musicians be employed whenever an instrumental musical program was to be released over AM and FM facilities under common operation. During 1946 and 1947, the years during which this requirement was enforced, live musical programs were effectively banned from most FM stations. See generally, *Hearings before Committee on Education and Labor on restrictive practices of the American Federation of Musicians—H.R. 111*, 80th Cong., 1st Sess. (1948).

112. Radio manufacturers, in turn, have made little or no effort to push the sale of FM receivers and have failed noticeably to come out with inexpensive sets. WARNER, RADIO AND TELEVISION LAW 618 (1948).

113. These consequences were foreseen by Commissioners Durr and Walker. In their dissent in the *Noble* case, see note 110 *supra*, they alluded to evidence that ABC planned to follow a policy of complete duplication of programs and that it would not consider setting up an FM station in competition with an AM affiliate. They then went on: "[t]o summarize the tendency of such a course of action, if followed broadly in the broadcast industry: the network AM affiliate will not be encouraged to establish an FM station because—at least so far as network operations are concerned—he will receive no additional compensation whatsoever for his FM operations in the earlier stages and will later receive only a slight increase in rates to reimburse him for his out-of-pocket expenditures; the listener will not be encouraged to buy receiving sets with FM bands because it will enable him to hear few, if any, programs not available through his AM receiver; and the newcomer will be discouraged from attempting to enter the field of broadcasting through the medium of FM because his listening audience will be limited by the scarcity of FM receivers, he will have little hope of a network affiliation, and he will not be able to compete for advertising revenue either with the standard broadcaster who has a wider listening audience or with the broadcaster who operated both AM and FM but offers both services for the price of one." *Id.* at 462.

114. The number of FM stations on the air is now actually declining. In September 1946, 65 commercial FM stations were in operation. This number rose to 278 in 1947, 619 in 1948, and 738 in 1949; but by November 1950 the peak had been passed and only 672 stations remained on the air. Broadcasting Magazine, Sept. 30, 1946, p. 71; Sept. 15, 1947, p. 41; Sept. 20, 1948, p. 93; Sept. 26, 1949, p. 84; Nov. 20, 1950, p. 78. Furthermore, there is almost a complete dearth of new applications to the FCC for FM licenses. In September 1950 there were 275 applications pending for AM stations as against 17 for FM. Broadcasting Magazine, Sept. 25, 1950, p. 92. Finally, most FM stations presently licensed are operating at a deficit. FCC, ANNUAL REPORT 40 (1949).

TV

Television, on the other hand, is destined ultimately to supplant radio as the primary medium of telecommunication.[115] But the promised expansion is a long way off,[116] and the immediate prospect is one of an acute scarcity of stations. At present 62 communities are served by television stations.[117] Only 40 of these communities are interconnected by coaxial cables or microwave relay and hence available for simultaneous programming to the four TV networks, American, Columbia, DuMont and National.[118] Of the 40 interconnected markets, 37 have less than 4 stations.[119] Since access to these inadequately served markets is extremely important to the networks, TV stations are at present in a superior bargaining position and, as a result, typically have affiliation contracts with several networks.[120]

Despite multiple affiliation, however, today NBC occupies in television a position of dominance far more complete than it ever enjoyed in standard broadcasting. In a recent survey of 26 interconnected television communities served by less than four stations, the FCC found that NBC accounted for 52.1% of the network programs distributed by all four networks.[121] In one-station markets, National's share was 65.8% while DuMont was limited to 3.8%.[122] The most extreme example of monopoly coverage was Wilmington, Delaware, where NBC supplied the only station with 27¼ of its 28¼ hours

115. "In all probability, [television] will be the primary medium of communications to the public during the peak listening hours. . . . The eventual displacement of aural broadcasting by television during the peak listening hours is attributable to the inherent advantages of sight and sound compared to sound alone and the funneling of the bulk of advertising appropriations into television." WARNER RADIO AND TELEVISION LAW 670 (1948).

116. The present scarcity of TV stations is due to a "freeze" on new applications imposed by the FCC in September 1948 because serious tropospheric interference had appeared in many areas. FCC, ANNUAL REPORT 43 (1949); Statement of Chairman Coy before an Industry-Commission Conference, September 13, 1948, I PIKE & FISCHER RADIO REG. 91:91. It is highly doubtful that the freeze will be lifted before the spring of 1951. Even after the FCC begins to accept new applications, construction of additional stations will not begin until these applications have been processed, administrative hearings held, and, in some cases, appeals to the courts decided. Long delays are most likely to occur in important metropolitan markets, because applications for licenses in these areas will surely outnumber the allotted frequencies.

117. Broadcasting Magazine, Sept. 25, 1950, p. 76.

118. FCC, NOTICE OF PROPOSED RULE MAKING, Docket No. 9807, 1 (1950).

119. *Ibid.*

120. In its recent survey of 26 interconnected markets served by less than four stations, see note 121 *infra*, the FCC found that 25 of the 41 stations surveyed were affiliated with two or more networks. Of these 25 stations, 10 had contracts with all four networks, 5 with three networks, and the other 10 with two networks. *Id.* Appendix Exhibits J, K (1950).

121. *Id.* Appendix Exhibits B, D, F (1950). The survey, which took place during the week of May 14–20, 1950, covered 17 one-station markets, 3 two-station markets, and 6 three-station markets.

122. *Id.* Appendix Exhibit B.

of network programs carried during the survey week.[123] In all likelihood NBC's preeminence in TV is due chiefly to superior programming and selling initiative. DuMont, however, has complained to the FCC that it is hampered by two artificial restraints. It contends, first, that NBC and, to a lesser extent, CBS are able to exercise undue leverage on TV outlets owned by their AM affiliates;[124] and, second, that the all-important but as yet inadequate system of coaxial cables is apportioned so favorably to National and Columbia that American and DuMont could not expand even if they were able to clear time on additional stations.[125]

Without passing on the merits of these contentions, the FCC is considering taking steps to remedy the extremely unbalanced competitive situation which has developed. The Commission realizes that present patterns of competition and standards of programming will shape the future of television.[126] It fears that NBC's dominance, if allowed to continue, may so stunt the growth of other networks that they will be incapable "of fulfilling future needs when there are additional TV stations on the air."[127] Therefore, the Commission has recently proposed adoption of a new regulation limiting the number of hours which television stations may take from any single network until a community is served by at least four stations.[128]

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123. *Id.* Appendix Exhibit J. In the other 16 one-station communities, NBC provided 30.6 to 86.9% of the total network programs.

124. Broadcasting Magazine, Sept. 25, 1950, p. 69 and Oct. 2, 1950, p. 60. Dumont explained that NBC and CBS have been able to persuade some of these stations to accept affiliation contracts under which no compensation is paid for as many as the first 30 hours of network commercial programs each month. This is the standard provision for payment for distribution expenses and network sustaining programs in AM broadcasting. The effect of such a provision on a TV station, however, differs greatly from its effect on an AM station. Since AM affiliates generally broadcast 18 hours a day and take programs from only one network, they have no trouble building up enough network commercial time each month to make their contracts profitable. TV stations, on the other hand, rarely telecast more than 200 hours a month and are typically affiliated with several networks from each of which they presumably plan to take programs. But if they are to make any money at all from a National or Columbia contract which pays nothing for the first 30 commercial hours, they must take so many NBC or CBS programs that they have little or no time left for programs of other networks.

125. The coaxial cable system is owned by the American Telephone and Telegraph Company which leases use of the cables to the several networks for three-month periods. As yet the system is still far too incomplete to accommodate all four networks at the same time, and the shortage will not be eliminated for at least several years. Brief for National Association of Radio Station Representatives, p. 33, Spot Sales Hearings (1949). For a report on the progress A.T. & T. is making in its plans to provide nationwide coverage, see FCC, ANNUAL REPORT 94 (1949). Under the allocation which A.T. & T. has made for the last quarter of 1950, NBC and CBS are granted use of over 75% of the available cables during the all-important evening hours. Broadcasting Magazine, October 2, 1950, p. 60.

On October 18, 1950, the FCC announced that it would start hearings on November 20 to investigate the allegations of unfairness in the current allocation of A.T. & T. facilities and to formulate a basis for future allocations. FCC Release No. 56531, October 18, 1950.

126. FCC, NOTICE OF PROPOSED RULE MAKING, Docket 9087, 1 (1950).

127. *Id.* at 3.

128. The Commission's proposal, in greater detail, is for "a rule providing that with the

ENFORCEMENT OF THE RULES

The Chain Broadcasting Rules have had little effect on network-affiliate relations partially because of the Commission's weak enforcement policy. Never has the FCC revoked or refused to renew a license of a network-owned or affiliated station because of violation of the Rules. Only once has it even held hearings on the question. In that instance a unanimous Commission found that the Don Lee Broadcasting System had repeatedly induced its affiliates to violate at least three of the Rules.[129] A majority of the Commissioners, however, refused to invoke any sanctions against the network.[130] Last year several stations owned by NBC and ABC were put on

exception of one five hour segment a week (to be chosen by the station), no station in a one-station community shall carry the programs of any one network for more than two hours a segment in either the afternoon or evening time segments, no station in a two-station community shall carry the programs of any one network for more than three hours within one segment, and no station in a three-station community shall carry the programs of any one network for more than four hours within one segment, such rule to be similar in form to Section 3.634 of the Commission's Rules and Regulations, the segments referred to being the 1:00 p.m. to 6:00 p.m. and 6:00 p.m. to 11:00 p.m. segments set forth in Section 3.634." *Id.* at 4.

On one occasion the Commission has invoked the Chain Rules against a television network. In the winter of 1949–50, NBC was promoting a 2½ hour Saturday night TV revue, "Show of Shows." National originally offered the whole 2½ hours as a block without informing affiliates of the exact nature of the programs to be included or the names of the sponsors. This offer was extended to a number of outlets in one- and two-station towns, whose acceptance would have precluded other networks from many Saturday night audiences. Acceptance by affiliates was to be immediately binding on them, but binding on NBC only if the offer were accepted by a sufficient number of stations to justify proceeding with the show. Spurred by a complaint from DuMont, the Commission informed NBC that this arrangement in effect created an exclusive option over these important hours and unreasonably impaired licensee responsibility. After the Commission had rejected a compromise plan, National backed down and offered the revue in half-hour segments with full advance information as to program content and sponsorship. FCC, Public Notices 46462, Feb. 16, 1950, and 51694, June 22, 1950.

129. 5 PIKE & FISCHER RADIO REG. 1179 (1949). The Commission's decision came down on December 28, 1949. The Rules in question were 3.101, 3.104, and 3.105. See pages 96–8 *supra*.

130. *Id.* at 1200. The majority consisted of Commissioners Hyde, Sterling, Jones (concurring); Chairman Coy and Commissioner Hennock dissented; Commissioner Walker did not participate.

In reaching its conclusion, the majority gave some weight to a promise of future good conduct made by Lewis Allen Weiss, Don Lee's general manager, who had been chiefly responsible for the network's past policies. *Id.* at 1200. His assurance would seem belated and of doubtful reliability in view of his open declaration "that he did not believe in the enforcement of the regulations which he felt were inconsistent with the economic interests of Don Lee." *Id.* at 1199.

Commissioner Jones concurred in the majority decision because he felt that to do otherwise would be discriminatory against Don Lee, in view of the fact that no hearings had been designated on the licenses of other networks against whom comparable prima facie evidence was at hand. It is interesting to note, however, that his was the swing vote in this test case, which can now be used as precedent to thwart license reprisals against other networks. In fact, the Commission itself suggested that the fate of NBC and ABC depended at least in temporary license because those networks were suspected of engaging in similar practices.[131] But since that time the Commission has taken no further steps.

This lack of enthusiasm for enforcement is traceable in some degree to the harassed development of the Commission itself. The vagueness of the Communications Act in outlining FCC authority [132] has subjected every move to jurisdictional attack.[133] Congressional committees, critical of FCC policy, have precipitated exhausting investigations tying up Commissioners for as long as a year and a half at a time.[134] Continuity of administration

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part on the outcome of the Don Lee hearings. FCC, Public Notice 42574, pp. 3, 5 Oct. 31, 1949.

131. In the fall of 1949, action on the renewal of the licenses of 11 stations owned by American, National, and Columbia was delayed pending decision in the spot sales hearings. See pages 91–2 *supra*. The Commission also pointed out to ABC and NBC that it had evidence indicating practices comparable to those involved in the Don Lee hearings. *Ibid.* In 1950 the Commission decided that no violation of the Chain Rules had been shown in the spot hearings and Columbia's licenses were renewed. FCC, Public Notice No. 52837, July 21, 1950. Stations licensed to National and American remain on temporary license, however, pending disposition of other complaints still outstanding. Since temporary licensing involves no discomfort and is by no means a rare occurrence, this action has little meaning in itself.

132. The touchstone of FCC regulation is the standard of "public interest, convenience, and necessity" Communications Act §§ 303, 307(a), 309(a), 319(a).

133. *E.g.*, National Broadcasting Co. v. FCC, 319 U.S. 190, 225 (1943) (promulgation by Commission of Chain Broadcasting Rules regulating relationship between networks and affiliates); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (refusal to consider competitive effect on existing stations that would result from granting license to new station); FCC v. Pottsville Broadcasting Co. 309 U.S. 134 (1940) (refusal to give priority to technically and financially qualified applicant whose original application was delayed by judicial review when subsequent applicants seemed generally better qualified).

134. Resolutions to investigate the FCC were introduced in Congress in 1934, 1936, 1937, 1938, 1939, 1940, 1941, and 1942. SIEPMANN, RADIO'S SECOND CHANCE, 213 (1947). The investigation to end all investigations began on July 2, 1943, and lasted for 18 months. *Hearings Before House Select Committee to Investigate the Federal Communications Committee Pursuant to H. Res. 21*, 78th Cong., 1st Sess. (1943). This inquisition was instigated and initially chairmaned by Representative Cox, who seized the opportunity to vent his resentment at being exposed by the Commission for illegally accepting a fee from a Georgia radio station for services before the FCC. WHITE, THE AMERICAN RADIO 202 (1947). Other opportunities for Congressional criticism of Commission personnel and practices have occurred, of course, at appropriation and confirmation of appointment hearings. See, *e.g.*, *Hearings before Committee on Interstate Commerce on the Nomination of Thad H. Brown on Reappointment as Federal Communications Commissioner*, 76th Cong., 3rd Sess. (1940). See generally, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE: MONOGRAPH No. 3, 117–20 (1940); FRIEDRICH & STERNBERG, STUDIES IN THE CONTROL OF RADIO 797, 803–7 (1944); SIEPMANN, RADIO'S SECOND CHANCE 212–38 (1947).

But Congressional criticism has been dwarfed by the torrents of invective hurled by the broadcasting industry itself. See, *e.g.*, testimony of Mark Ethridge, Louisville station owner, in *Hearings on S. Res. 113*, pp. 321–46 (1941); Broadcasting Magazine, May 12, 1941, p. 18 (editorial). Despite severe criticism on the part of the industry, however, the FCC has been accused of identifying itself with the special interests supposedly being policed by it, and losing sight of the public interest. COMMISSION ON ORGANIZATION OF GOVERNhas been hampered by rapid turnover in Commission membership.[135]

But perhaps the main reason for the Commission's leniency in enforcing the Rules is that the only available sanction is too harsh. In this situation the statute provides but one enforcement device: withdrawing [136] the licenses of individual stations.[137] If the Commission were willing to use this weapon, it should have no difficulty persuading the networks to comply with the Rules, despite its lack of direct jurisdiction over them. Revocation or refusal to renew the licenses of network-owned stations would fast bring the networks to terms,[138] for these stations account for a large portion of network revenue.[139] But throughout its history the Commission has felt that

MENT: TASK FORCE REPORT ON THE FCC III–53 (1949) (edited by Golub). See also speech on Senate floor by Senator Edwin C. Johnson, 95 CONG. REC. 4782 (1949).

135. Commissioners are appointed for seven-year terms, but only one Chairman has lasted more than three years and the tenures of other Commissioners have been equally brief. See *Hearings before House Select Committee to Investigate the Federal Communications Commission pursuant to H. Res. 21*, 78th Cong., 1st Sess. 1577–8 (1943); COMMISSION ON ORGANIZATION OF GOVERNMENT: APPENDIX N 40, 94 (1949).

136. As used in this comment, the term "withdrawal" includes both (1) revocation of a license under § 312 of the Communications Act and (2) refusal to renew a license under § 309.

137. Communications Act § 309. The Act provides other enforcement devices: § 401(a) gives district courts power to issue writs of mandamus commanding persons to comply with the Act's provisions; § 401(b) gives the FCC authority to apply to a district court for an enforcement order whenever any person has failed to obey a Commission order; § 501 makes wilful violation of the Act a criminal offense punishable by fine and imprisonment; and § 502 makes wilful violation of "any rule, regulation, restriction, or condition made or imposed by the Commission under authority of the Act a criminal offense punishable by a fine of $500 per day." None of these provisions apply to a licensee's "violation" of the Chain Broadcasting Rules, however, because the Rules, by their very terms, do not order a licensee to do or refrain from doing anything. but simply define the policies which the Commission itself will follow in the exercise of its licensing power. See page 84 *supra*.

138. The licenses of network-owned stations could be withdrawn even though these stations had not themselves entered into any of the proscribed arrangements. This was the situation in the Don Lee Case, 5 PIKE & FISCHER RADIO REG. 1179, 1198 (1949). "The Commission can and does consider the qualifications of the networks in passing upon applications for renewal of license of their stations. And the Commission would be warranted in refusing a renewal of license on the ground of lack of qualifications if a network compelled its affiliates to violate the network regulations." Communication to Honorable Edwin C. Johnson, Chairman, Interstate Commerce Committee from the FCC, February 15, 1949, 1 PIKE & FISCHER RADIO REG. 91–131.

For judicial affirmance of Commission's discretion in weighing character qualifications of licensees, see Mester v. United States, 70 F. Supp. 118 (E.D. N.Y. 1947), *aff'd*, 332 U.S. 749 (1947) (application for transfer of control denied in part because of violations of Pure Food and Drug Act and Price Control Act); FCC v. WOKO, 329 U.S. 223 (1946) (renewal denied because of misrepresentation of financial control).

139. The networks do not publish financial reports indicating what portion of their income stems from station ownership. However, Charles Denny, former Chairman of the FCC and presently executive secretary of NBC, made the following statement in response to a proposal that network ownership of stations be curtailed: "[T]he economics of network broadcasting are such that if we are to have network broadcasting as we know it today [the networks] . . . have to have enough stations in order financially to support a network.

imposition of a death sentence on stations is too drastic a step.[140] For many years this policy was justified in terms of a refusal to deprive listeners of service.[141] Inferior stations were considered better than none. But the promptness with which the vacated franchises would be snapped up today has made this reasoning inapposite.[142] Today the Commission's policy seems to be based simply upon the notion that the sudden termination of a licensee's operations is too blunt an instrument. In the Don Lee case, for example, withdrawal of licenses would have ended the service of four stations.[143] But the FCC's reluctance to use its statutory weapon means that its "raised eyebrow" techniques—temporary licenses, letters of interpretation, warnings, and the like [144]—are becoming increasingly ineffective because the networks do not fear that more drastic action will follow.

As long as the Commission persists in this policy, some new intermediate

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They do not make money on their network operations. They lose money on those. Where they make money is from the management of the stations that they own." *Hearings before Committee on Interstate Commerce on S. 1333*, 80th Cong., 1st Sess. 66 (1947).

140. The FCC has refused to revoke licenses even after finding a clear violation of the Communications Act. The Florida Cases, 9 F.C.C. 208, 223 (1942) (misrepresentation in application for license—violation of § 312(a)); The Texas Cases, 8 F.C.C. 445, 459, 473, 479 (1940) (misrepresentation in transfer of licenses—violation of § 310(b)). Similar reluctance has been shown in renewal proceedings. Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179 (1949)(violation of Chain Broadcasting Regulations); Hiawathaland Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 44 (1945) (engineering violations and failure to file financial reports); First Baptist Church, 6 F.C.C. 771 (1939) (rebroadcasting without permission of originating station—violation of § 325(a)); Joseph C. Callay, 5 F.C.C. 345 (1938) (misrepresentation in transfer of license—violation of § 310(b)).

141. In declining to revoke the licenses of five Texas stations which had been found guilty of gross misrepresentation of facts concerning ownership and control, the Commission rationalized its decision on this ground: "Moreover we are faced with the circumstance that in none of the areas wherein these stations are located, excluding Austin, Tex., is there any other station to serve as a medium for community expression excepting said stations." Red Lands Broadcasting Association et al., 8 F.C.C. 473, 474–5 (1941).

142. See note 57 *supra*. Commissioner Payne, dissenting in *The Texas Cases, supra* note 140, said: "The Commission seems to be much worried about leaving certain areas in Texas without broadcasting service, if these revocation orders were affirmed. This, in my opinion, is an unnecessary worry. It has been my experience that new stations spring up quickly without coaxing and without the need of sending out engraved invitations." East Texas Broadcasting Co., 8 F.C.C. 479, 484 (1941).

143. Stations KGB, San Diego; KDB, Santa Barbara; KRFC, San Francisco; and KHJ and KHJ-FM, Los Angeles. Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179 (1949).

144. The Commission has at times used these devices to point out to the networks possible violations of its rules and regulations. In a letter which it sent to the networks in March, 1948, for example, the Commission expressed its belief that the networks' insistence that affiliates duplicate all network programs over their FM stations, involved a violation of Chain Broadcasting Regulation 3.235. But the FCC has made no further effort to check this network practice. See note 110 *supra*. The Commission also used the interpretive letter device to eliminate restrictive features from NBC's promotion of its 2½ hour Saturday night television revue, "Show of Shows." In that instance NBC obeyed the FCC's warning and modified its offers to affiliates so as to comply with the Chain Rules. See note 128 *supra*

sanction must be authorized if the Rules are to have any force. The Commission itself has indicated that some lesser penalty would be used without hesitation.[145] Perhaps the most effective step that could be taken would be to amend the Communications Act so as to give the Commission power to issue cease and desist orders.[146] These orders, if not complied with, should be enforceable by the courts in the same manner as the orders of the N.L.R.B.[147] Explicit authorization to issue cease and desist orders against networks as well as licensees would obviate the necessity of the present indirect enforcement procedure.[148] Other proposals that have been made for amending the Act would empower the Commission to levy fines and suspend licenses for a limited period of time.[149] The fine and suspension devices would avoid the difficulties and delays of proving initial violations at a Commission hearing and subsequent violations in a contempt proceeding, before the actual imposition of any real penalty. Congressional approval of administrative fines is doubtful,[150] however, and license suspension is subject

145. The majority of the Commission stated in the *Don Lee* decision: "Had we authority to order a suspension, assess a penalty or impose some other sanction less than a 'death sentence' we should have no hesitancy whatsoever in doing so in this case." Don Lee Broadcasting System, 5 PIKE & FISCHER RADIO REG. 1179, 1200 (1949).

146. Several bills that would give the Commission this power have been introduced in Congress in recent years. S. 1333, Sec. 14(b), 80th Cong., 1st Sess. (1947); S. 1973, Sec. 11(b), 81st Cong., 1st Sess. (1949); H.R. 6949 and H.R. 7310, 81st Cong., 1st Sess. (1950). S. 1973, which passed the Senate in August, 1949, and was then referred to the House Committee on Interstate and Foreign Commerce, is still pending. 95 CONG. REC. 11090, 11233 (1949).

At the hearings on all these bills, the cease and desist provision was favorably received by the Commission and broadcasters alike. See, *e.g.*, *Hearings before Committee on Interstate Commerce on S. 1333*, 80th Cong., 1st Sess. 51, 82 (1947); *Hearings before Committee on Interstate Commerce on S. 1973*, 81st Cong., 1st Sess. 20, 52, 101 (1949).

147. None of the bills referred to in note 146 *supra* makes specific provision for court enforcement of the cease and desist orders which the FCC would be empowered to issue. Presumably § 401 of the Communications Act would apply to such orders, however. That section provides that if any person fails to obey any FCC order, the Commission may apply to a district court for enforcement; and if the court, after hearing, determines that the order "was regularly made and duly served, and that the person is in disobedience of the same," it shall enforce obedience to the order. This section is deficient in several respects. For one thing, it requires that the FCC wait until its own order has been violated before it can seek a court order enforcing it. The NLRB, by contrast, can petition a court of appeals for an enforcement order as soon as it has issued its own order. 49 STAT. 453 (1935), as amended, 61 STAT. 146 (1947), 29 U.S.C. § 160e (Supp. 1949). Furthermore, § 401 of the Communications Act is far from explicit in stating just what review the district court is to accord an FCC order. The Taft-Hartley Act, on the other hand, provides that "the findings of the (N.L.R.B.) with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive" and that the court may enter a decree "enforcing, modifying, . . . or setting aside in whole or in part the order of the Board." *Ibid.*

148. H.R. 7310, *supra* note 146, contained such a provision.

149. See, *e.g.*, H.R. 6949 and H.R. 7310, 81st Cong., 1st Sess. (1950) (suspension for a period not to exceed 90 days and/or fine of $500 for each day of violation).

150. GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 322–39 (1947).

to the objection that it penalizes the listening public as well as the transgressing station.[151]

CONCLUSION

Revamping the Rules is particularly vital because the networks seem to be safe from both government and private suits under the antitrust laws. In 1941 the Justice Department filed an indictment against NBC and CBS, alleging extensive violations of the Sherman Act.[152] As soon as the Supreme Court upheld the FCC's authority to issue the Rules, however, the Justice Department withdrew its indictment because it considered the question as moot.[153] The networks have been equally immune from treble damage suits. A treble damage action was instituted in 1947,[154] alleging that network practices excluded independent stations from the national advertising market and that network power to set station rates for network commercial programs amounted to illegal price fixing. In denying preliminary injunctive relief, the Second Circuit implied that it would be improper for a court to condemn these practices which are tacitly condoned by the FCC.[155] Hence the networks seem safe in assuming that the supervision of the Commission will protect them from interference by the courts under the antitrust laws.

Many of the problems of competitive inequality at both network and station levels could be solved by a change in the Commission's station allocation policies. The most effective, but at the same time most drastic, step would be to set a deadline before which all AM stations except clear

151. If a license were merely suspended, it is unlikely that anybody else would take over the franchise during the suspension period because of the limited tenure. As a result, the public would be deprived of programs during that time.

152. United States v. CBS, Civil Docket 3762 and United States v. R.C.A., Civil Docket 3763 (filed in the District Court of the Northern District of Illinois, December 31, 1941). 6 JOURNAL OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION 85 (1942). The allegations in the Justice Department's indictment closely paralleled the findings of the Chain Broadcasting Report.

153. CCH, FEDERAL ANTI-TRUST LAWS 268 (1949).

154. Federal Broadcasting System v. American Broadcasting Co., 167 F.2d 349 (2nd Cir. 1948), *cert. denied,* 335 U.S. 821 (1948). See note 59 *supra.*

The only other treble damage suit ever brought against the networks was one instituted by Mutual on January 10, 1942, against RCA and NBC. ROBINSON, *op. cit. supra* note 6, at 74. This action was dropped when the Chain Broadcasting Rules were affirmed.

155. Federal Broadcasting System v. American Broadcasting Co., 167 F.2d 349, 352 (2nd Cir. 1948), *cert. denied,* 335 U.S. 821 (1948). The FCC felt that this decision "reflect[ed] a serious misapprehension as to the intent and scope of the Commission Chain Broadcasting Regulations." Quoted in Brief for United States as *Amicus Curiae,* p. 4, Federal Broadcasting System v. American Broadcasting Co. In response to the Commission's suggestion, the Government filed an *amicus* brief in support of the plaintiff's petition to the Supreme Court for certiorari. In that brief the Government pointed out that the FCC had not intended to sanction any practices which might otherwise be violative of the antitrust laws, and that the Commission had neither the power nor the desire to supersede the Justice Department or private treble damage litigants in the enforcement of those laws. Brief for United States as *Amicus Curiae,* Federal Broadcasting System v. American Broadcasting Co., 335 U.S. 821 (1948).

channel stations serving primarily rural areas must convert to FM. Obviously such a change-over would entail great expense not only to station owners [156] but also to listeners who would be forced to purchase FM receivers. Much of this waste could have been avoided by a foresighted FCC in 1945 when there were far fewer AM stations [157] and many prewar receiving sets were in need of replacement.[158] Perhaps 1950 is a bad time to force such a change in view of the uncertainty as to the full economic effects of television.[159] But if the Commission waits another 10 years until adjustments have been made to reflect the influence of TV, this will probably mean the sacrifice of the 700 odd FM stations which are now struggling for existence. In any event, since the possibility of a dominant FM system declines with the construction of each new AM station and the purchase of each new AM receiver, the time for Commission action, if action is ever to be taken, is now.

Short of ordering a shift to FM, the Commission could replace those high-powered clear channel stations which are located in densely populated areas, and hence are neither designed nor needed to serve rural listeners, with 5,000-watt regional stations.[160] In the essentially metropolitan northeastern section of the country there are 12 Class I-A and 13 Class I-B clear channel stations, most of them affiliated with NBC and CBS.[161] If these clear chan-

156. The cost of the FM equipment itself would not be prohibitive to more profitable AM stations, but conversion might well be too expensive for those postwar licensees who are just beginning to make ends meet. Estimates of costs made by the FCC in 1945 ranged from $8,000 for a 250-watt FM station to $79,050 for one with 50,000 watts. SENATE COMMITTEE TO STUDY PROBLEMS OF SMALL BUSINESS, SMALL BUSINESS OPPORTUNITIES IN FM BROADCASTING 9, 15–17 (1946). No doubt licensees of powerful AM stations would object strenuously to the loss of their AM franchises, especially if they paid heavily for "good will" or prestige. See note 110 *supra*. Since the Communications Act expressly negatives any vested right to operate a station beyond the term of the license, § 309(b)(1), these objections would have no basis in law.

157. From 1945 to 1949, the number of AM licenses has risen from 931 to 1,963. FCC, ANNUAL REPORT 30 (1949).

158. As of January 1, 1946, an estimated 58,000,000 AM sets were in use. By March 31, 1950, another 46,665,364 AM-only sets had been produced. Statistics collected by the FCC from reports submitted by Radio Manufacturers Association, on file in Yale Law Library. It is impossible to say how many of these forty-six million sets were replacements, but the percentage is probably high.

159. For prediction that aural broadcasting will soon be relegated to a relatively minor role, see WARNER, RADIO AND TELEVISION LAW 670–1 (1948). Hugh Beville, NBC's director of research, presents a more optimistic view for aural broadcasting. 25 JOURNALISM QUARTERLY 3–9 (1948).

160. There has already been considerable agitation in favor of this type of action by the Commission. In 1948 a bill was introduced by Senator Johnson of Colorado providing for the licensing of additional stations for full-time operation on frequencies which are at present clear channel. 94 CONG. REC. 1727 (1948). But the bill, which was opposed by the Clear Channel Broadcasting Services (a trade association), was never reported out of committee. *Hearings before Committee on Interstate Commerce on S. 2231*, 80th Cong., 2nd Sess. (1948).

161. Of these 25 stations, 8 are located in New York state, 5 in Chicago, 3 in Pennsylvania, 3 in Ohio, and one each in Baltimore, Boston, Detroit, Ft. Wayne, Hartford, and

nel frequencies were redesignated as regional channels, at least 200 new regional outlets could be licensed in addition to those needed to replace the deleted stations.[162] This action would lessen the competitive advantage of NBC and CBS in the profitable northeastern market and would put all the stations in that area on a far more equal footing.

But if the Commission is unwilling to take either of these steps, there are several less ambitious measures which it should take in an effort to breathe new life into the Chain Rules.

In order to reduce the inequality of competition at the station level, the FCC should:

a) require the networks to provide a uniform and convenient mechanism by which independent stations can obtain, with assurance of reasonable tenure, network programs rejected by an affiliate;

b) restrict network representation of stations in the spot market to stations actually owned and operated by the network.

As long as networks exist, affiliates will probably have a competitive advantage over independents. But adoption of these proposals would temper the competitive disparity, without unduly hindering efficient network operations.

To promote competition among networks, the FCC should:

a) favor American and Mutual affiliates whenever applications for increased power are made; and

b) adopt, as quickly as possible, its proposed rule to limit the number of hours which TV stations may take from any single network until a community is served by at least four stations.

The task of safeguarding licensee independence is largely one of enforcement. In order to strengthen the Commission's enforcement policy, Congress should:

a) arm the FCC with intermediate sanctions; and

b) give the Commission jurisdiction over the networks to enable it to take direct action against any network which violates the Rules.

Finally, the most effective step that could be taken to revitalize the Rules would be a change of attitude on the part of the FCC. Until the Commission demonstrates that it will punish networks which unduly coerce their affiliates, and licensees who disregard their public service responsibilities, the Network Rules will never cut their baby teeth, much less their six-year molars.

Washington, D. C. NBC and CBS control sixteen, either through outright ownership or affiliation contracts, ABC and Mutual control six, and the remaining three are independent. BROADCASTING MAGAZINE YEARBOOK 69–325 (1950).

162. An average of 20 regional stations can be allocated to each regional channel. Hence about 240 stations could be licensed on the frequencies vacated by the 12 Class I-A northeastern stations. The 13 Class I-B channels could not be opened up to regional stations, however, without causing interference with the remaining Class I-B stations on each of these channels. Vacancies on I-B channels could be filled by licensing new I-B stations or by elevating remaining I-B stations to Class I-A stations in areas where wider rural coverage is needed.