STANDING TO PROTEST AND APPEAL THE ISSUANCE OF BROADCASTING LICENSES: A CONSTRICTED CONCEPT REDEFINED*

THAT periodically denounced and long-despaired-of agency, the Federal Communications Commission,[1] has encountered judicial rebuff on yet another question—who has standing to contest the issuance of broadcasting licenses?

Directed by statute to allocate available frequencies so as to promote "the public interest, convenience, or necessity,"[2] the FCC requires every applicant for a license to establish his financial, legal, and technical capacity to operate a station.[3] If only one application meets these requirements, the Commission

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*Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 79 Sup. Ct. 350 (1959), *reversing* National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957).

1. *E.g.*, ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT 202-07 (1943); SIEPMANN, RADIO'S SECOND CHANCE 212-38 (1946); *Hearings Before the House Select Committee To Investigate the Federal Communications Commission*, 78th Cong., 1st Sess. (1943) (acting under H. Res. 21, "A Resolution Directing the Select Committee To Conduct a Study . . . of the Federal Communications Commission . . . To [Determine] . . . Whether or Not Such Commission . . . Has Been, and Is, Acting in Accordance With the Law and the Public Interest"); *Hearings on S. Res. 251 Before the Senate Committee on Interstate Commerce*, 76th Cong., 3d Sess. (1940); Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549 (1957); Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 YALE L.J. 135 (1957); Note, *Radio and Television Station Transfers: Adequacy of Supervision Under the Federal Communications Act*, 30 IND. L.J. 351 (1955).

2. The public-interest standard is found throughout the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609 (1952), *e.g.*, in § 307(a) (granting licenses), § 303(c) (assigning frequencies), § 307(d) (renewing licenses). [Hereinafter the act is cited as Communications Act; where the Statutes at Large and United States Code section numbers are identical, only one section number is cited.] For relevant legislative history, see S. REP. No. 772, 69th Cong., 1st Sess. (1926), quoted in 1 RADIO REG. 20:59-:61 (regulation of restricted broadcasting facilities necessary to prevent industry from destroying itself).

> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; . . . the radio spectrum simply is not large enough to accommodate everybody. . . . In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943).

As interpreted, the act authorizes the FCC to regulate all forms of broadcasting—standard radio broadcasting (AM), frequency modulation (FM), and television. Allen B. Dumont Labs., Inc. v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

3. 47 C.F.R. § 1.547(a) (1958). An applicant is held to be financially qualified if he can demonstrate that he has sufficient funds to build a station and operate it for an initial period of at least three months before revenues begin to come in. Sanford A.

will, almost as a matter of course, grant or renew a given license without a hearing or further investigation.[4] When two or more such applications are received for either a single outlet or mutually exclusive ones, the FCC conducts a "comparative hearing"[5] at which it may determine the need for the proposed services, the character, competence and community activities of the applicant, his holdings in the communications industry, his prior broadcasting experience, and the scope and balance of the proposed programming.[6] In practice, these standards have been inconsistently applied and their relative importance left undefined.[7] The Commission has tended to rely exclusively upon information found in the applications themselves,[8] to renew automatically licenses once granted,[9] to accept passively the issues as framed by the

Schafitz, 14 RADIO REG. 852, 864b (FCC 1958); *accord,* Kaiser Hawaiian Village Television, Inc., 15 RADIO REG. 85, 87 (FCC 1957) (reasonable period).

Legal qualification refers to the statutory requirement in § 310(a) of the act that the applicant be, or be predominantly owned by, American citizens. See, *e.g.,* WKAT, Inc., 10 RADIO REG. 471 (FCC 1954). The Commission will also consider whether the applicant is authorized to hold a broadcasting license under state corporate law. Lamar Broadcasting Co., 9 F.C.C. 157 (1942).

Finally, the applicant has the burden of showing that the proposed facilities will comply with the Commission's technical standards. Hamtramck Radio Corp., 7 RADIO REG. 485, 487 (FCC 1951).

4. See Smith, *Practice and Procedure Before the Federal Communications Commission as Viewed by a Hearing Examiner,* 7 OKLA. L. REV. 276, 280-81 (1954). Even when the Commission later discovers that the information contained in the application was fraudulent, it has not been disposed to revoke the license. See SIEPMANN, RADIO'S SECOND CHANCE 226-27 (1946). *But see* WOKO, Inc., 10 F.C.C. 454 (1945), *rev'd,* 153 F.2d 623 (D.C. Cir.), *rev'd,* 329 U.S. 223 (1946).

5. Although the Communications Act does not specifically provide for the comparative procedure, the Supreme Court has held that the purposes of the act require consolidated hearings when there are two or more conflicting applications each of which, standing alone, would be granted. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). FCC regulations now provide for comparative hearings to resolve multiple applications for a single outlet, 47 C.F.R. §§ 1.361, 1.106 (1958), or if two requested outlets are electronically exclusive so that the grant of one would preclude the grant of another, *ibid.*; see Radio Cleveland, 11 RADIO REG. 352 (FCC 1954) (interference too slight to require comparative hearing).

6. For a discussion and analysis of these factors, see EDELMAN, THE LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947, at 35-92, 101-13 (1950) [hereinafter cited as EDELMAN]. See also National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

7. See EDELMAN 220.

8. "In the performance of our duties we must . . . determine whether the operation of proposed stations, or the continued operation of existing stations, would serve the public interest, and . . . we are, of necessity, required to rely to a large extent upon statements made by licensees . . . ." Western Gateway Broadcasting Corp., 9 F.C.C. 92, 102 (1942); *accord,* Calumet Broadcasting Co., 3 RADIO REG. 115, 123-24 (FCC 1946). Compare Kennedy, *Programming Content and Quality,* 22 LAW & CONTEMP. PROB. 541, 545 (1957).

9. "And, when it is all done, however well or ill, licenses are always renewed anyway, except when the management has acted scandalously or so wildly that the Commission

parties,[10] and to adopt the outlook of the regulated.[11] These tendencies have fostered the exploitation of the nation's limited broadcasting frequencies without regard for the views of groups other than the exploiters.[12]

Ordinarily, only members of the communications industry are able to gain standing to challenge the Commission's concept of its statutory responsibilities.[13] Although the Communications Act authorizes "any person . . . aggrieved" to appeal an FCC decision,[14] this phrase has been defined to include only those persons who can show direct and substantial economic injury.[15] So defined, it has also been construed to establish standing to protest as well as to appeal an FCC decision.[16] At first, standing to protest or appeal was limited

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has no choice." *Ibid.* For an extreme example of the Commission's propensity to renew licenses, see Thomas S. Lee Enterprises, Inc., d/b/as Don Lee Broadcasting System, 5 RADIO REG. 1179 (FCC 1949). Although the FCC found that ". . . it is apparent that the violations [of the Commission's Chain Broadcasting Regulations] were either deliberate or the result of complete indifference," *id.* at 1199, it renewed the licenses of Lee's outlets because of its admitted reluctance to deny renewals and Lee's promise to abide by the Commission's rules in the future, *id.* at 1200.

10. Although the Commission formally designates the issues to be heard, 47 C.F.R. § 1.140 (1958), the parties have great power to shape the ultimate course of the proceedings within these issues. See, *e.g.*, Brush-Moore Newspapers, Inc., 11 RADIO REG. 641, 644 (FCC 1956).

11. See EDELMAN 220-21; SIEPMANN, RADIO'S SECOND CHANCE 236-37 (1946). See also HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 177-78 (1936). Compare EDWARDS, MAINTAINING COMPETITION 252-59 (1949).

12. "TV is becoming a subsidiary, instead of a vehicle, of advertising." *The Structure of Entertainment*, Life, Dec. 22, 1958, p. 52 (editorial). See generally Murrow, *A Broadcaster Talks to His Colleagues*, The Reporter, Nov. 13, 1958, p. 32; SELDES, THE GREAT AUDIENCE 105-210 (1951). The early concept of broadcasting placed its commercial aspect in marked subordination to its public-service role. See the committee report on advertising and publicity at the Fourth Annual Radio Conference held in Washington in 1927, printed in *Hearings on S. 1 and S. 1754 Before the Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. 67 (1926). How far the industry's atttitude toward commercial announcements has changed is illustrated by the example of Station WTOL in Toledo, Ohio, which, while extreme, is not unique: "From 6:15 to 6:30 P.M. . . . a 15-minute program . . . was interrupted by seven spot announcements . . . . From 10:10 to 10:30 . . . a . . . program was interrupted by 10 spot announcements . . . ." FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 6 (1946).

13. See notes 17-20, 23 *infra* and accompanying text.

14. Communications Act § 402(b)(6).

15. Yankee Network, Inc. v. FCC, 107 F.2d 212, 215 (D.C. Cir. 1939). Electronic interference gives standing to appeal as of right. FCC v. National Broadcasting Co., 319 U.S. 239 (1943). By interpreting congressional intent rather than constitutional necessity, the courts have restricted the meaning of "person aggrieved" to persons suffering direct and substantial injury. See Yankee Network, Inc. v. FCC, *supra* at 215. Underlying this construction, however, is the fear that too broad an interpretation would violate the "case or controversy" doctrine. FCC v. National Broadcasting Co., *supra* at 265-66 (dissenting opinion).

16. The Communications Act was amended in 1952 to allow any "party in interest" to protest the authorization of any license granted without a hearing. § 309(c). Prior to the amendment, standing to protest could be gained through a petition to intervene, §

to FCC licensees whose financial stability was jeopardized by the grant of a license to another station broadcasting in the same medium—AM, FM, or television.[17] More recently, the concept of persons economically injured has been expanded to include both permittees whom the FCC has authorized to construct stations but who have not yet begun broadcasting,[18] and licensees or permittees whose medium is other than that of the challenged applicant's.[19] In a few instances, newspapers which would be in competition for advertising revenues with an applicant have been permitted to protest and appeal.[20] But the consequences of ordinary competition usually will not confer standing to protest.[21] Rather, a protestant must demonstrate that available listeners or

309(b), or a petition for rehearing, § 405. Even though "any person . . . aggrieved" could challenge a final FCC order in the courts whether or not he was permitted to participate in the FCC's proceedings, Congress enacted § 309(c) to counter the Commission's tendency to be dilatory and lax in considering third-party objections. See Fisher, *Communications Act Amendments, 1952—An Attempt To Legislate Administrative Fairness*, 22 LAW & CONTEMP. PROB. 672, 681 (1957); Note, 55 COLUM. L. REV. 209 (1955). The phrase "party in interest" has been interpreted *pari passu* with "person aggrieved." St. Louis Telecast, Inc., 10 RADIO REG. 1185, 1187 (FCC 1954). The Commission has suggested, however, that a person who was qualified to appeal under § 402(b) might not be a party in interest under § 309(c). Polan Industries, 8 RADIO REG. 471, 473 (FCC 1952). This interpretation would seem to violate congressional intent. See S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951). But the suggestion is consistent with the FCC's initial opposition to the 1952 amendment providing for the protest procedure. See Note, 55 COLUM. L. REV. 209, 211 (1955). Conversely, a person might have standing to protest but not to appeal. Such standing would be of dubious utility, however.

17. Versluis Radio & Television, Inc., 9 RADIO REG. 104 (FCC), *amended*, 9 RADIO REG. 102 (FCC 1953).

18. Salinas Broadcasting Corp., 9 RADIO REG. 192 (FCC 1953).

19. Versluis Radio & Television, Inc., 9 RADIO REG. 102 (FCC 1953).

Applicants for licenses have not yet been allowed to contest other licenses. The FCC has successfully maintained that their interests are too remote to establish the requisite economic injury. Mansfield Journal Co. v. FCC, 173 F.2d 646 (D.C. Cir. 1949); Versluis Radio & Television, Inc., 8 RADIO REG. 808 (FCC 1952).

20. Ohio Valley Broadcasting Corp., 10 RADIO REG. 452 (FCC 1954), *rev'd on other grounds sub nom.* Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (D.C. Cir. 1955); Elyria-Lorain Broadcasting Co., 13 RADIO REG. 116a (FCC 1955); Richland, Inc., 13 RADIO REG. 113 (FCC 1955).

21. Originally, the Commission took the position that a protestant was sufficiently aggrieved if his economic interests were adverse to the proposed grantee's. WHEC, Inc., 9 RADIO REG. 172 (FCC 1953). Even absent such an allegation, standing was conferred if the protestant was a broadcaster in the same small community as the applicant. T. E. Allen & Sons, Inc., 9 RADIO REG. 197 (FCC 1953). More recently, however, the Commission has emphasized the statutory necessity of specific allegations, see Communications Act § 309(c), and required more than unsupported statements of economic loss. "The protestant alleges that WEHT's ability to identify itself as an Evansville station will increase its attractiveness to advertisers and result in 'substantial amounts of revenue' being lost to protestant and gained by WEHT . . . . But these allegations are pure speculation and conjecture . . . ." WEHT, Inc., 15 RADIO REG. 861, 864 (FCC 1957); *accord*, United Broadcasting Co., 13 RADIO REG. 1309 (FCC 1956); Confederate Radio Co., 13 RADIO REG. 389 (FCC 1956), *dismissed as moot sub nom.* Valley Broadcasting Co. v. FCC, 237 F.2d 784 (D.C. Cir. 1956); see Note, 55 COLUM. L. REV. 209, 218-22 (1955).

advertisers are insufficient to support the prospective licensee and existing communications facilities as well, and that the grant of the contested license will therefore result in a definite, substantial loss to the protestant.[22] Though economic injury has not been held a *sine qua non* of protest, standing has never been conferred on any other ground.[23]

The recent decision of the District of Columbia Circuit in *Philco Corp. v. FCC* radically extends the concept of economic injury.[24] The Commission had renewed the Philadelphia television license of the National Broadcasting Company (NBC), a wholly-owned subsidiary of the Radio Corporation of America (RCA), without a hearing.[25] Philco had been denied standing to argue that, because numerous antitrust suits were pending against RCA and because NBC had allegedly abused its dominant position as a major network,

22. Metropolitan Television Co. v. United States, 221 F.2d 879, 881 (D.C. Cir. 1955) (loss of listeners), *reversing* Alvarado Broadcasting Co., 10 RADIO REG. 382a (FCC 1954); Richland, Inc., 13 RADIO REG. 113 (FCC 1955) (limited advertisers). For an account of the courts' continuing attempts to broaden the Commission's interpretation of injury needed to achieve standing, see Fisher, *supra* note 16, at 682-89.

23. See Note, 55 COLUM. L. REV. 209, 214 (1955). Although the FCC stated in Capital Broadcasting Co., 8 RADIO REG. 229, 231 (FCC 1952), that ". . . electric interference and economic injury may not be the only bases upon which to found an interest," an association of bus riders was denied standing to protest the renewal of a license to an FM station engaged in "transitcasting." *Accord*, National Broadcasting Co., 8 RADIO REG. 647 (FCC 1952) (listener has no standing to protest because station failed to give prize won on quiz show); Paul A. Brandt, 8 RADIO REG. 409 (FCC 1952) (individual failed to state his interest as member of the public); Kansas State College of Agriculture & Applied Science, 8 RADIO REG. 261 (FCC 1952) (association of radio and television broadcasters has no standing to protest grant of license to noncommercial, educational television station).

Standing has been extended to parties whose legal and economic interests would be affected by the assignment of a broadcast license. Granik v. FCC, 234 F.2d 682 (D.C. Cir. 1956) (holder of option to purchase station given standing to protest assignment to third person); Greater Huntington Radio Corp., 14 RADIO REG. 270 (FCC 1956) (union alleging that assignment of station will jeopardize rights under a collective bargaining agreement is party in interest; however, protest dismissed without hearing because union failed to show why grant was not in public interest); Good Music Station, Inc., 14 RADIO REG. 512 (FCC 1956) (stockholder party in interest to protest assignment when he alleges sale was breach of fiduciary obligations).

24. Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 79 Sup. Ct. 350 (1959), *reversing* National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957).

25. National Broadcasting Co., 15 RADIO REG. 965, 966-67 (FCC 1957). The broadcasting channel at issue was orginally licensed in 1932 to the Philadelphia Broadcasting Co., Philco's predecessor, as an experimental television station. In 1943, it was licensed to Philco, which assigned the license to Westinghouse Radio Stations, Inc., in 1953 for $8,500,000. In 1955, NBC transferred its stations in Cleveland and paid $3,000,000 to Westinghouse stations of NBC network affiliation. A district court decision dismissing a civil antitrust suit brought by the United States on account of this transaction has recently been reversed by the Supreme Court. United States v. Radio Corp. of America, 27 U.S.L. WEEK 4179 (U.S. Feb. 24, 1959), *reversing* 158 F. Supp. 333 (E.D. Pa. 1958). The district court had dismissed the suit because the FCC had approved the transaction.

renewal would not serve the public interest.[26] Philco's claim of standing to raise these issues rested on the argument that RCA had used its control of NBC and the Philadelphia outlet to gain unfair advertising preferences for RCA products, and had thereby caused direct and substantial injury to Philco as a competing manufacturer of radio and television receivers.[27] Specifically, Philco had charged that the use of "RC" in the station's call letters, continual reference to the Philadelphia outlet as "a service of RCA," preferential reporting of RCA developments as news, and the prohibitive price of advertising over the NBC network gave RCA a competitive advertising advantage.[28] The FCC had dismissed the protest, however, having found no direct and substantial injury attributable to the Philadelphia license itself.[29] On appeal, the District of Columbia Circuit reversed and remanded by a two-to-one vote, and held that Philco's claim of preferential advertising practices was sufficient to confer standing.[30]

The appellate court's *ratio decidendi* is questionable. Although Philco had asserted that RCA's advertising practices caused Philco to lose sales revenues,[31] it had shown neither the extent nor the cause of its losses, and had thus failed to establish any injury.[32] Moreover, earlier decisions which the court cited but did not distinguish had conferred standing on only those broadcasters claiming that the grant or renewal of a challenged license would, by itself, cause advertising revenues to decrease significantly.[33] In contrast, Philco's loss was

26. Protest by Philco Corp., pp. 3-24, National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957).

27. *Id.* at 23.

28. *Id.* at 5-7.

29. National Broadcasting Co., 15 RADIO REG. 965, 973 (FCC 1957).

30. Philco Corp. v. FCC, 257 F.2d 656, 659 (D.C. Cir. 1958). The dissenting judge felt that, since the injury lay totally outside the broadcasting industry, the protest was properly denied by the FCC. He further stated that the basic problem was whether or not those who have interests other then broadcasting should be allowed to hold licenses.

31. Protest by Philco Corp., p. 23, National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957).

32. According to NBC, Philco's pretax earnings, as stated in its annual report to stockholders, fell from $33,703,616 in 1950 to $557,690 in 1956, and earnings after taxes from $8,423,329 in 1955 to $398,690 in 1956. Opposition of National Broadcasting Co. to Protest of Philco Corp., pp. 4-5, National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957). If Philco did, in fact, sustain these losses, it made no attempt to relate them to RCA's and NBC's practices.

While the Commission has been willing to assume economic loss if two stations would be in direct competition in the same community, T. E. Allen & Sons, Inc., 9 RADIO REG. 197, 198 (FCC 1953), it has denied protests when the alleged injury depends on other, more tenuous factors. "In the instant case, we cannot find that [the protestant] . . . has established the requisite causal relationship between the alleged economic injury . . . and the grant . . . ." Spartan Radiocasting Co., 10 RADIO REG. 177, 180 (FCC 1954) (economic injury alleged to stem from inability to obtain network affiliation).

33. See notes 21-22 *supra* and accompanying text. For a criticism of the doctrine that the injury must stem from the grant itself, rather than the way in which the license is actually used, see Note, 55 COLUM. L. REV. 209, 220-22 (1955).

allegedly caused by NBC's *use* of its broadcasting license to secure customers for the products of RCA.[34] Certainly, the FCC is not equipped to determine the extent to which one company's advertising practices are the efficient cause of another company's claimed loss.[35]

Nonetheless, this case reaches a desirable result. One who protests the issuance of a license must do so in the public interest and hence ordinarily cannot make his own personal injury the substance of his complaint. Generally, therefore, he must contest the license on some ground other than that by virtue of which he achieves standing to do so.[36] Since no relationship exists between standing to protest and the merits of a protestant's case, much time may be lost in determining who may challenge a license, time which could be more profitably devoted to the crucial issue of whether the license serves the public interest.[37] Moreover, prior to *Philco,* standing was almost exclusively restricted to broadcasters seeking to advance their private goals by eliminating competitors [38]—a pursuit frequently inconsonant with the public interest. And, if no one was injured economically, as in metropolitan areas where advertising

34. Protest by Philco Corp., p. 2, National Broadcasting Co., 15 RADIO REG. 965 (FCC 1957).

35. Compare WEHT, Inc., 15 RADIO REG. 861, 864 (FCC 1957); Paramount Pictures, Inc., 8 RADIO REG. 135 (FCC 1952); Note 55 COLUM. L. REV. 209, 217 (1955). Courts are especially reluctant to find an injury which depends upon a consumer's frame of mind. See, *e.g.,* United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943).

36. See Colorado Radio Corp. v. FCC, 118 F.2d 24, 28 (D.C. Cir. 1941) (concurring opinion) ("He appears only as a kind of King's proctor, to vindicate the public interest"). The Supreme Court originally held that economic injury, the only ground upon which standing can at present be achieved, was not in and of itself a factor which the FCC had to consider in issuing licenses. But the Court indicated in dictum that such injury might properly be taken into account as it related to the public interest. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). In Southeastern Enterprises (WCLE), 13 RADIO REG. 139 (FCC 1957), the FCC refused, as a matter of law, to consider economic injury. For a criticism of this position, see Note, 67 YALE L.J. 135 (1957). The protestants ultimately dismissed their appeal, Fisher, *supra* note 16, at 695 n.96, and the doctrine has not been overruled. The Commission has since tempered its statement by saying that, as a matter of policy as well as of law, it will not consider economic injury. West Ga. Broadcasting Co. (WWCS), 14 RADIO REG. 275, 283-84 (FCC 1957).

37. The first case in which a newspaper was allowed to protest shows the extent to which the determination of standing can slow Commission action. The period from the original grant of a construction permit without a hearing to its final affirmation required over three years. Ohio Valley Broadcasting Corp., 15 RADIO REG. 41 (FCC 1957). In the principal case, the FCC's original decision was released Sept. 16, 1957, and the question of standing finally resolved some sixteen months later by a Supreme Court denial of certiorari. 27 U.S.L. WEEK 3215 (U.S. Jan. 26, 1959).

38. "The latter [a commercial broadcaster] is likely to utilize the public interest as a vehicle for protecting his private standing, however tentative that may be in legal status. Few business institutions rush to the defense of the public weal when they are not affected in any private way." National Broadcasting Co. v. FCC, 132 F.2d 545, 548 (D.C. Cir. 1942), *aff'd,* 319 U.S. 239 (1943).

revenues can support many stations,[39] and if a given license neither modified an existing one nor involved the denial of an application,[40] the Commission's action could not be challenged. By broadening the basis for standing, the *Philco* decision forces the FCC to consider the public interest as urged upon it by a wider class of litigants than the broadcasters themselves.

Because the FCC relies upon individual protestants to raise relevant issues and bring forward the necessary facts with respect to a contested license,[41] the parties to a proceeding have great power to shape the course of the inquiry and, necessarily, any appeal.[42] As a result, private litigants largely determine the development of the public-interest standard. The most striking consequence of this reliance upon outside initiative has been the Commission's indifference toward program quality and content. True, it once declared that licenses would not be issued to stations which carried too few programs of educational or experimental content, or of local origin and interest.[43] In prac-

39. While no decision has been found denying a protest on the ground that the area to be served was sufficiently populous to support both stations, neither has any been found which conferred standing to protest solely on the basis of general allegations of increased competition. *Cf.* St. Louis Telecast, Inc., 10 RADIO REG. 1185 (FCC 1954). In at least one case, however, the FCC granted the protest in the absence of an allegation of economic injury. T. E. Allen & Sons, Inc., 9 RADIO REG. 197 (FCC 1953). There, the Commission was willing to infer standing because the protestant and applicant would be in direct competition in a community with a population of 71,311. Where a larger area was involved—population 248,674—the Commission found standing because "the station proposed . . . will be in direct competition with the protestant's station, *and . . . protestant has alleged with specificity that economic injury will result from the grants complained of . . . .*" Cherry & Webb Broadcasting Co., 9 RADIO REG. 1093, 1096 (FCC 1953). (Emphasis added.)

40. Modification or denial gives the right to a hearing and to an appeal. Communications Act §§ 309(b), 312(c), 316, 402(b)(1)-(3), (5). See note 23 *supra* and accompanying text.

41. See notes 8-11 *supra* and accompanying text. Compare Smith, *supra* note 4, at 281.

42. The Radio Act of 1927 allowed the court of appeals to adduce additional evidence on appeal, revise the decisions of the Federal Radio Commission, and enter such judgment as it deemed just. 44 Stat. 1169. The Supreme Court held that it could not review such a judgment because it was not of a judicial nature. Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930). The appeal provision was thereupon amended to limit the reviewing court's power to affirming or reversing the Commission's decision upon the record before it. 46 Stat. 844 (1930). Review of this sort was held to be of a judicial nature. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933). The Communications Act similarly limits the scope of review to the record. Communications Act § 402(g). Thus, parties allowed to appeal but not to participate in the Commission's proceedings would be unable to raise issues not contained in the record.

43. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 55-56 (1946) [hereinafter cited as BLUE BOOK]. For a discussion of the BLUE BOOK and its application, see SIEPMANN, RADIO, TELEVISION, AND SOCIETY 37-40 (1950).

The industry reacted violently to the BLUE BOOK, charging that program content and quality were no concern of the Commission. EDELMAN 79. The courts, however, have long upheld the Commission's authority to consider program standards. See BLUE BOOK 9-12 (collecting cases and outlining legislative history authorizing Commission super-

tice, however, responsibility for regulating program quality and content has devolved upon the broadcasters themselves,[44] with the result that commercial considerations govern programming.[45] Similarly, although the Commission is directed by statute to effectuate antitrust goals,[46] and although its announced objective is to promote the diversification of station ownership,[47] these aims rarely achieve expression in comparative hearings. Rather, applicants having network affiliation or other interests in the communications industry often serve as the FCC's sole source of information,[48] and simply fail to raise the relevant antitrust and diversification policies.[49]

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vision of program service). But, in fact, the BLUE BOOK has never been enforced, despite some flagrant abuses. See, *e.g.*, Eugene J. Roth, 3 RADIO REG. 1377 (FCC 1947) (94% of time devoted to commercial programs); Howard W. Davis, 3 RADIO REG. 1371 (FCC 1947) (over 2,200 spot commercials in one week); Community Broadcasting Co. (WTOL), 3 RADIO REG. 1360 (FCC 1947) (only 20 minutes a week devoted to live, non-sponsored programs after 6:00 P.M.). In these cases, the Commission renewed the licenses upon the stations' promises to provide better service in the future. But the FCC has said that the important consideration is the performance of the stations and not their promises. See McClatchy Broadcasting Co., 9 RADIO REG. 1190, 1220g (FCC 1954).

"[T]he report [BLUE BOOK] should be regarded as another in the long series of vain and unenforced Commission attempts to assure broadcasting in the public interest." EDELMAN 79; *cf.* SIEPMANN, RADIO, TELEVISION, AND SOCIETY 336 (1950). The cases digested at 2 RADIO REG. ¶ 53:24(R), at M-2370 to -2388 (1953-1958), indicate that comparative hearings almost always involve otherwise qualified applicants making claims for their own programming rather than criticizing the service or proposed service of other applicants. One writer has said: "The FCC receives from every applicant . . . glowing descriptions of past performance and future plans. These plans are produced cynically, almost whimsically, by some applicants . . . ." Kennedy, *supra* note 8, at 545.

44. See Brush-Moore Newspapers, Inc., 11 RADIO REG. 641, 697 (FCC 1956); SELDES, THE GREAT AUDIENCE 160 (1951) ("Without . . . hesitation, the American people have given over control of television to the networks, the stations, and the sponsors who have established the standards of radio broadcasting.").

45. See Murrow, *A Broadcaster Talks to His Colleagues*, The Reporter, Nov. 13, 1958, p. 32, at 35: "I am frightened by the imbalance, the constant striving to reach the largest possible audience for everything; by the absence of a sustained study of the state of the nation. . . . I would like television to produce some itching pills rather than this endless outpouring of tranquilizers."

Charles R. Denny, a former chairman of the FCC, invited the industry to draw up its own code for regulating programming. EDELMAN 80. The resulting code's commercial orientation is apparent in its insistence that nothing broadcast upset anyone, its lenient advertising policies, and its general concern with the medium as a selling agent. Code of the National Association of Radio and Television Broadcasters, 1 RADIO REG. ¶ 53:24 (1954); see COMMISSON ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 72-73 (1947).

46. Communications Act §§ 313, 314; Note, 44 VA. L. REV. 1131, 1136-39 (1958).

47. 47 C.F.R. § 3.35 (1958); Superior Television, Inc., 11 RADIO REG. 1173, 1230c (FCC 1956).

48. Currently, any person may submit information in writing to the FCC. 47 C.F.R. §§ 1.10, 1.11 (1958). But this provision is virtually unknown and cannot, in any event, guard against errors of law or FCC malfeasance. A survey sponsored by the National Association of Broadcasters revealed that only 50% of those interviewed knew that the Government had anything to do with the operation of radio. Of those, only 69% knew

Its present effectiveness in subverting the public-interest standard dictates that the standing-to-protest doctrine be revised. Revision should implement the statutory policy that the listening public has a vital interest in the Commission's activities.[50] Indeed, the annual purchases of radio and television receivers and replacement parts far exceed the industry's annual gross receipts.[51] Of even greater significance is the public's nonmonetary stake in the industry, for broadcasting policies profoundly affect attitudes and behavior throughout the entire community.[52]

Any member of the public who can demonstrate injury, be it economic or noneconomic, should enjoy standing to protest and appeal the FCC's disposition of a license application.[53] To be constitutionally justiciable, an injury need not be economic,[54] but simply must form the basis of a "case or contro-

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that the Government assigns frequencies. LAZARSFELD, THE PEOPLE LOOK AT RADIO 115 (1946). Furthermore, the Commission has been lax in considering complaints made by third parties. See Fisher, *supra* note 16, at 681. If the Commission refuses to act favorably upon the complaint of a third party, he is not thereby a "person aggrieved" and has no standing to appeal the Commission's ruling.

49. The industry violently opposed the FCC's first attempt, FCC, REPORT ON CHAIN BROADCASTING 91-92 (1941) (embodying FCC's Chain Broadcasting Regulations), to curb monopolistic practices within the industry. See SIEPMANN, RADIO'S SECOND CHANCE 223-24 (1946). Charges of antitrust violations have been limited to disputes in which one party has interests outside broadcasting, see, *e.g.*, Lorain Journal Co., 9 RADIO REG. 406 (FCC 1953) (newspaper), or in which the antitrust violation is unrelated to the broadcasting industry and is used as a reflection upon an applicant's character, see, *e.g.*, Lycoming County Broadcasting Co., 4 RADIO REG. 264 (FCC 1948) (earlier violation of Robinson-Patman Act by applicant).

The erratic treatment accorded the problem of diversification in the mass communications industry is discussed in Comment, 66 YALE L.J. 365 (1957).

50. 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 151 (1952).

51. Television sets alone produced in 1957 had a factory value of $850 million, and replacement parts for radio, television, and phonographs totalled $900 million at retail prices. 1958 AMERICAN ANNUAL 643. In 1955 (latest available FCC figures) the gross receipts of the industry—networks and AM, FM and TV broadcast services—were $1,198.1 million. 1958 BRITANNICA BOOK OF THE YEAR 578.

In 1943, the public's investment in receiving apparatus was more than twenty-six times as great as the value of the industry's tangible assets. SIEPMANN, RADIO'S SECOND CHANCE 159 (1946).

52. See Kennedy, *supra* note 8, at 543. See generally SELDES, THE GREAT AUDIENCE 105-91 (1951); SIEPMANN, RADIO'S SECOND CHANCE (1946); SIEPMANN, RADIO, TELEVISION, AND SOCIETY (1950). See also Grandin, *The Political Use of the Radio*, 10 GENEVA STUDIES No. 3 (1939) (a study of governmental use of radio for propaganda purposes).

53. The present regulations of the Commission allow interested persons who do not achieve the status of parties to give "relevant, competent, and material" evidence at hearings. 47 C.F.R. § 1.105 (1958). This provision is useless unless a hearing has been designated and unless the issues are so framed that the information sought to be submitted is "relevant, material, and competent."

54. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (defamation); Waugh v. Board of Trustees of the Univ. of Miss., 237 U.S. 589 (1915) (prohibition of membership in Greek-letter fraternity); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (threat to health).

versy."[55] Justiciability does not require that the injured party have an independent cause of action against the FCC,[56] for the Communications Act authorizes "any person . . . aggrieved" to appeal FCC decisions.[57] The construction of that phrase having been left by Congress to the courts,[58] they

55. See U.S. CONST. art. III, § 2; Muskrat v. United States, 219 U.S. 346, 356 (1911) ("exercise of the judicial power is limited to 'cases' and 'controversies' ").

56. The conventional doctrine holds that, in the absence of a statutory provision for judicial review, the action of an administrative officer can be attacked only by those persons who would have an independent cause of action against the officer were his conduct not authorized by statute. See Associated Indus., Inc. v. Ickes, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). A statute such as the Communications Act, which employs the standard of the public interest, has been held to confer no private rights upon members of the public which they could sue to protect, absent provision in the statute for judicial review. See Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942); *cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). *But cf.* WARNER, RADIO & TELEVISION LAW § 84d.3 (1948) (Communications Act creates private rights in licensees against other broadcasters).

57. Communications Act, § 402(b)(6). For cases construing this type of provision, see American Power & Light Co. v. SEC, 325 U.S. 385, 390-91 (1945); Joint Anti-Fascist Refuge Comm. v. McGrath, *supra* note 56, at 151 (concurring opinion by Frankfurter, J.); Associated Indus., Inc. v. Ickes, *supra* note 56.

58. The present appeal section of the Communications Act is derived from § 16 of the Radio Act of 1927, 44 Stat. 1169, as amended, 46 Stat. 844 (1930). None of the reports which accompany subsequent legislation define aggrieved parties. The early debates reflect considerable vagueness about what the framers of the bill intended by the appeal provision:

> Mr. Cummins. . . . I can not conceive of what will be tried in an appeal even if it were constitutional, possibly. What can be tried in an appeal from the Commission to the Court? Mr. Robinson. The question is whether the commission has complied with the policy of the law . . . . Mr. Cummins. . . . I really do not care a snap whether it [the appeal provision] goes in or out. . . . I want to see the bill pass and get into conference . . .[or] we will have no radio legislation at this session . . . .

67 CONG. REC. 12355 (1926). See also 68 CONG. REC. 2869 (1927) (remarks of Senator Dill) (bill simply provides for appeals without attempting to define nature of appeals).

The Senate report on the 1952 amendment providing for protest procedure defines it thus: "[T]he purpose of the section . . . [is] to make definite and certain the procedural rights and remedies of those who oppose . . . a new instrument of authorization." S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951).

The reports accompanying the 1956 amendments to the Communications Act specifically state that the committees had declined to delimit the class of persons aggrieved. S. REP. No. 1231, 84th Cong., 1st Sess. 3 (1955); H.R. REP. No. 1051, 84th Cong., 1st Sess. 3 (1955). The Senate report on the 1952 amendments establishing the protest procedure states that economic injury had been defined by FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), and FCC v. National Broadcasting Co., 319 U.S. 239 (1943); but these criteria were not advanced as exclusive. S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951). (The House report, H.R. REP. No. 1750, 82d Cong. 2d Sess. (1952), is silent on the question of who may protest.) In each of those cases, the Court simply held that the injury which they were considering was sufficient to give standing. Thus, it would seem that Congress did not wish to undertake the difficult task of determining in advance who was a "person aggrieved," but left the interpretation of that phrase to the Commission and the courts.

should find that noneconomic injury can give rise to a sufficient adverse interest to meet the "case or controversy" requirement.[59] For example, the interest of an advertiser denied nondiscriminatory access to the public (as in *Philco*), or of a parent in programs which are harmful to his children, or of a minority toward which a station is exhibiting bias, or of a special group which a station fails to allot promised broadcast time,[60] should be deemed the basis of a case or controversy with the Commission or a licensee. Furthermore, the courts should not construe "person aggrieved" narrowly by invoking the doctrine that, in order to conserve judicial energy, standing will be limited to the persons most directly affected in a given situation.[61] Underlying this theory is the assumption that those who sustain the greatest injury are most likely to litigate all issues fully and effectively.[62] In FCC cases, however—in which the parties have hitherto been granted standing solely on the basis of economic injury—all aspects of the public interest have not, in fact, been presented. Nor is there any likelihood that persons with economic interests would effectively represent those with noneconomic ones.[63] Precedents under the Pure Food and Drug Act and state liquor license statutes

59. In the *Associated Industries* case, note 56 *supra*, the court reasoned that, when a "person aggrieved" is authorized by statute to appeal administrative action, a resulting controversy is between the Government—acting through a "private attorney general" (the "person aggrieved")—and the allegedly wrongdoing official. The court later held that the mere allegation of official misconduct under these circumstances revealed a "case or controversy." Reade v. Ewing, 205 F.2d 630, 631-32 (2d Cir. 1953). Compare the following criticism of Adler v. Board of Education, 342 U.S. 485 (1952): "One whose interests are *in fact* subjected to or imminently threatened with substantial injury from governmental action satisfies the requirements of standing . . . to challenge the legality of that action unless for reasons of substantive policy the interests are undeserving of legal protection." Davis, *Standing, Ripeness, and Civil Liberties: A Critique of Adler v. Board of Education*, 38 A.B.A.J. 924 (1952).

60. A station's proposals to represent local groups—civic, religious, agricultural, educational—are often the decisive factor in awarding licenses. See, *e.g.*, Petersburg Television Corp., 10 RADIO REG. 567 (FCC 1954). When the station's performance falls short of its promises, those groups which did not receive the stipulated representation should be allowed to protest the renewal of the license. The Commission has further stated that it is the duty of stations to fairly represent minority interests in the community; and when a station has affirmatively alleged that it will do so, evidence on the subject is particularly admissible. WBNX Broadcasting Co., 12 F.C.C. 837 (1948).

61. For the doctrine, see United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116, 120 (2d Cir. 1943); National Broadcasting Co. v. FCC, 132 F.2d 545, 548 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943). Compare Murphy v. United States, 252 F.2d 389, 394 (7th Cir. 1958).

62. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 151 (1951) (concurring opinion by Frankfurter, J.). See also Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892). The ability and likelihood of the party most directly affected to represent efficaciously the interests of those less directly affected also influence the courts. *Compare* Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942), *with* Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946).

63. Compare American Power & Light Co. v. SEC, 325 U.S. 385, 388-91 (1945).

should therefore be followed, and all injured members of the public allowed to challenge and appeal FCC administrative action.[64]

A procedural refinement would further aid the Commission in safeguarding the public interest: the Commission could institute informal hearings on all applications,[65] each hearing to be conducted by a regional examiner in the area served by the license at issue. Persons seeking to renew licenses might be required to broadcast notice of such hearings and the conditions under which they hold their licenses. And applicants for initial licenses could be directed to publish similar announcements in local newspapers. Any interested person should be allowed to appear at a hearing, put questions to an applicant, and introduce facts and opinions bearing upon the applicant's qualifications. The hearings should be informal, and the examiners should have wide discretion to expedite them.[66] Reports of the local proceedings should be forwarded to the Commission to aid in shaping the issues at an FCC comparative hearing,[67] and in determining whether a license should be granted.

The abandonment of economic injury as a prerequisite to standing and the institution of regional hearings would not prove burdensome, for the FCC has the power to deny without a hearing any protest petition which, even if the facts alleged are taken as true, does not justify the denial of a license.[68] Thus, the Commission may summarily dispose of all petitions failing to raise issues relevant to the public interest. Moreover, since the Commission may continue a challenged license until its proceedings are concluded,[69] dilatory, bad-faith protests need not keep a competitor off the air. In any event, those

64. The Pure Food and Drug Act utilizes a public-interest standard and allows "any person . . . adversely affected," 52 Stat. 1046 (1938), 21 U.S.C. § 341 (1952), to challenge administrative action, 52 Stat. 1055 (1938), 21 U.S.C. § 371(f)(1) (1952). Accordingly, a consumer has been allowed to protest an order permitting vitamins from artificial sources to be added to oleomargarine; the consumer's standing derived from his argument that his family's health was endangered. Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953). State courts have accorded individuals suffering no economic injury the right to challenge, in the public's behalf, the grants of liquor licenses. *E.g.*, Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P.2d 983 (1953); Whissen v. Furth, 73 Ark. 366, 84 S.W. 500 (1904); Kamerman v. LeRoy, 133 Conn. 232, 50 A.2d 175 (1946); Littleton v. Fritz, 65 Iowa 488, 22 N.W. 641 (1885).

65. For an explanation of the FCC's current procedure in processing license applications, see Smith, *supra* note 4, at 280-81. Unless a hearing is held, the only information at the Commission's disposal is the applicant's own statements and whatever information the public may have submitted.

66. For a discussion of this "town meeting" type of hearing, see generally Davis, *The Requirement of Opportunity To Be Heard in the Administrative Process*, 51 YALE L.J. 1093 (1942).

67. 47 C.F.R. § 1.111 (1958) provides for prehearing conferences at which issues may be framed. Such conferences are similar to the pretrial proceedings authorized by FED. R. CIV. P. 16.

68. Communications Act § 309(c); see S. REP. No. 1231, 84th Cong., 1st Sess. 3 (1955.)

69. Communications Act § 309(c); see S. REP. No. 1231, 84th Cong., 1st Sess. 1, 3 (1955).

persons most interested in harassing licensees are the ones presently granted standing.[70]

Most important, the proposed extension of standing would expose the Commission to a variety of points of view. Thus, the protestant in *Philco*, having achieved standing by demonstrating NBC's discriminatory advertising practices, would have developed antitrust issues relevant to the license in question. To be sure, local hearings and a liberal criterion for standing might invite abuse by articulate, organized pressure groups. On the other hand, the broadcasting industry should serve the interests of minority groups and not function merely as an opiate of the consumer masses.[71] Of course, no remedy is a substitute for a vigorous, public-spirited Commission. But the foregoing proposals could at least serve to bring the weight of public opinion to bear on—and increase judicial review of—the FCC, and thus to hasten the day when that agency will assume a more forceful role in the progress of the broadcasting industry than it has in the past.

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70. See text at note 13 *supra*. The Senate report on the 1956 amendments to § 309(c) of the Communications Act—the section authorizing the FCC to treat protests as on demurrer and to continue protested licenses in effect—reveals that Congress enacted this section in order to expedite the Commission's business rather than to limit standing. S. REP. No. 1231, 84th Cong., 1st Sess. 3 (1955); *accord*, H.R. REP. No. 1051, 84th Cong., 1st Sess. 3 (1955).

71. "It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time." BLUE BOOK 15. Compare SELDES, THE GREAT AUDIENCE 217-32 (1951) (criticizing the industry's conception of a mass audience with uniform tastes).