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## VI. WHO REALLY CONTROLS TELEVISION?

MARCUS COHN\*

There is no categorical answer to the question of who really controls television. Because there are many different transient forces at work, control is never absolute in any sense of the word. I will talk primarily about what I see as one very significant trend. Although this trend has just begun, it may, in the future, be the controlling force in television.

I begin by pointing out two recent indications of this particular trend. The first occurred on September 4th when the FCC announced a revision of the *Broadcast Procedure Manual*, stating: "We are hopeful that the (revised) manual will encourage participation by members of the community (in the programming of stations)." The previous manual, published about two years ago, stated that the manual was "an effort to outline the respective roles of the broadcast station, the Commission, and the concerned citizen in the establishment and preservation of quality programming service."

The second event was judicial. Recently the United States Court of Appeals for the Second Circuit, in reversing the FCC's prime-time access rule, said that the Commission should solicit and consider the views of consumer groups, minority groups, playwrights, actors, and actresses. It went on to note that "[t]he list is not binding and certainly not exclusive."<sup>1</sup> This decision was an admonishment to the FCC that it should operate within the framework of a participatory democracy and that the citizen's point of view should be given heed.

Thirty years ago the Commission published a document entitled *The Public Service Responsibility of Broadcast Licensees*. This document set out precisely what the Commission expected of broadcast licensees. Included was a list of program categories, such as religion, news, public affairs, sports, and discussion, which the Commission expected to be fully represented in the licensee's broadcasts. This was an implicit, if not explicit, statement that the FCC, the wise fathers, would be the ultimate judges of what would be offered to the public because they knew what was best for the public.

Twenty years ago the Commission received very few complaints from the public. When I was at the FCC in the early 1940's, I headed a section which received such complaints. If we got 20 to 30 complaints a month, it was a tremendous number. We replied to these complaints with a form letter which said, in effect, "We received your complaint about station WXYZ, and will take it under consideration; but we, the FCC, will be the judges of what to do with your complaint."

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1. National Ass'n of Indep. Telev. Producers and Distribs. v. FCC, 502 F.2d 249, 258 (2d Cir. 1974).

Ten years ago, the Commission established a new institution called the Complaint and Compliance Section. It started with two individuals, but there are now 45 people in the Section. The FCC now receives an average of 6,000 letters a month from the public, and the Complaint and Compliance Section does not give those complainants the perfunctory treatment which was given 30 years ago. The Complaint and Compliance Section today is listening attentively to what the public is saying and is following through on the complaints as well as requiring the stations to answer them.

The FCC is also requiring stations, in connection with their applications for license renewal, to make surveys of the needs, tastes, and desires of their communities. The stations are required to announce that an application for license renewal has been filed, and moreover, affirmatively to advise the public that every citizen has the right to object to the license renewal.

A copy of the application must be at the station offices where the public can see it; you no longer have to come to Washington to look at the application for renewal of licenses. The station is also required to have a public file which contains a large amount of other material that the public can look at. For example, the ownership of each and every one of the radio and television stations in Miami is available in the stations' public files; the public may now find out who the proprietors of these stations are and then have the opportunity to complain to them directly. In addition the public has the right, today, to examine the program logs of radio and television stations for the past three years, not just the week's logs filed with the application for license renewal.

Moreover, there is currently a push to make available to the public the annual financial reports which every radio and television station presently files in confidence with the Commission. There was a case, taken to the United States Court of Appeals for the District of Columbia, challenging the confidentiality of those annual financial reports. For reasons which are not now germane, the complainant withdrew his appeal. There is no doubt in my mind that during the next two or three years, the public will have the opportunity to examine these annual financial reports and, based thereon, draw conclusions as to whether or not the quality of a station's programming reflects the profitability of the station.

The public's participation in the affairs of the Commission has had, sometimes, very dramatic and traumatic results. It was one individual, Mr. Banzhaf, who originally filed a complaint with the Commission raising the question about cigarette advertising. His complaint was rejected by the Commission and so he went to the court of appeals. The court of appeals reversed,<sup>2</sup> holding, in effect, that Mr. Banzhaf had a right to insist that the anti-smoking view be presented on radio and television stations.

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2. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

It should be emphasized that the FCC did not voluntarily create this participatory democracy. In *Office of Communication of United Church of Christ v. FCC*<sup>3</sup> a Mississippi television station was ultimately found guilty of having discriminated against blacks, not only in hiring practices, but in reporting news concerning blacks. The station argued that the Church of Christ, which was the complainant, had no standing to raise the controversy before the Commission or the court. The court spent a great deal of time dealing with this particular matter because up until then, in order to have this holy thing called "standing," one had to prove an economic interest in the controversy. The court swept this aside and said, in effect, that any significant body in the United States, whether it had an economic axe to grind or not, had standing to complain to the Commission which had to pay attention to what that complainant was saying. The court now welcomes appeals from FCC decisions, even though the individual involved has no economic interest in the controversy.

When the court reversed the Commission in the Mississippi case, it warned the Commission that it must not, in the future, have "an attitude of indifference or hostility toward public interest interveners." The right to be heard before the Commission should not be restricted only to those who are "wealthy and powerful." The court was saying that there are two-hundred million people in the United States to whom the FCC must pay attention.

At the same time that this judicial revolution was going on, several public interest law firms in Washington had been established. Financed primarily by the Rockefeller and Ford Foundations, these firms provided competent legal services to members of the public who had complaints concerning the performance of stations. In 1972 these very fine foundations, and others, contributed \$1,200,000 to aid in the efforts of public interest law firms dealing basically, if not exclusively, with FCC matters. These firms, along with the United Council of Churches, published pamphlets advising the public of its rights to protest applications for license renewal or proposals by stations to change the format of their programming.

There have been other institutions which have given impetus to the participation of the public. The Cable Television Information Center, in Washington, has a budget of about \$1,000,000 a year and 31 individuals who advise and counsel throughout the United States concerning the establishment of cable television in particular communities. The Rand Corporation, the Urban Institution, and a host of other institutions have stepped forward to provide expertise and legal assistance to citizens who have complaints against the broadcast media.

Thus far the role of the United States Supreme Court in the evolution

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3. 359 F.2d 994 (D.C. Cir. 1966).

of media control has not been discussed. I believe the Supreme Court has accelerated interest in all the media, but particularly in broadcasting. In *Red Lion Broadcasting Co. v. FCC*<sup>4</sup> the Court went out of its way to point out that it is not the licensee, but rather the public, that possesses first amendment rights: "It is the right of the viewers and listeners, and not the broadcasters, which is paramount."<sup>5</sup>

The *Red Lion* case had a very dramatic effect upon the FCC. The Commission adopted a host of rules and regulations which invited public participation. For example, there is now a requirement that radio and television stations invite viewers to make suggestions as to what the problems and needs of the community are. The stations are further required to take action in accord with those suggestions.

Today, instead of filing applications for license renewal three months in advance, stations are now required to file four months in advance. This gives the public even greater opportunity to examine the application and to write the FCC concerning anything in the application which is either untrue or which, in the complainant's opinion, does not serve the public interest.

Beginning six months before the application for renewal is filed—and that is six months before the four months—stations are required to announce that the application will be filed. In those announcements, the stations are required to advise the public of its right to protest to the Commission. They must advise the public that they have in their files a pamphlet published by the FCC which tells how to protest the renewal of station licenses. Stations are also required to make an annual list of the ten most significant problems and needs in the community, and each station must keep that list in its public files. There are a number of other provisions all of which lead in only one direction: the public's involvement in, power over, and relationship to broadcast stations.

When I went to law school in the late 1930's, I was taught that one of the advantages of administrative agencies, such as the FCC, was that they were composed of experts who knew what was best for the public. The whole theory of administrative delegation was to have experts in positions of authority who were not only familiar with what the act itself said, in terms of precise words, but also familiar with the thrust, the guts, and the feel of what Congress was driving at. This orthodox concept of administrative actions has been completely shattered.

In my judgment, the very reason for an agency's existence has now given way to the idea that it is the public which has the rights, rather than the experts, to direct the activities of the industry. This revolution has had dramatic effects. There is a new sensitivity and awareness on the part of the public as to its rights. Consumerism has affected all businesses.

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4. 395 U.S. 367 (1969). The Court upheld an FCC regulation which gave a political candidate who was attacked on the air the right to reply over the same broadcast facilities.

5. *Id.* at 390.

Even non-profit institutions have been faced with a brand of consumerism. Whether it is school, church, or state, all are listening more and more to what the public, their constituents, are saying.

Of course, with this increase of public input, there has been a concomitant decrease in the station owner's freedom to run his business as he wishes. Some entrepreneurs have become disillusioned with broadcasting as a whole. I know of specific cases of men who have gotten out of the broadcasting business during the past five or ten years because they could not "do their thing." The public's rights over them were becoming so pervasive and so dynamic that they felt impeded, or strangled, in terms of their own acts of creativity.

There was a time when broadcasting in America, as in other countries, could be discussed in terms of private and public ownership. However, we, in America, have now developed a new concept. Broadcasting is no longer private enterprise in the sense that we formerly thought of it, but rather semi-private enterprise. The decisionmaking policies of broadcasters are caught up with such phrases as "the public's right to know" and "the public's right to access." The public today does have access to the broadcast media and the trend is toward greater and greater access.