No, We Don't

by Nicholas Johnson

Few men have contributed as much scholarship and creativity to the field of administrative law as my friend and former colleague in this vineyard, Professor Louis L. Jaffe. It is, therefore, with considerable hesitation that I respond to *The New Republic*'s request that I "answer" his article.

There is much in Professor Jaffe's argument with which I agree. I agree that there is a "role for government in the improvement of broadcasting"; that "the objective of diversifying the media is absolutely sound"; that "there are possible ways of reducing network power and of reducing multiple ownerships of the broadcast licenses." I agree that "we can encourage CATV . . . [and] promote more competition and more voices." I of course agree that "we should strive for improvement and for diversification within the limits of the possible." I agree that "we cannot do much about quality," that we do not "want the bureaucrats of the FCC judging programs," but that "we can lay down rules requiring stated minimum amounts of public service programming" – including network "prime time . . . public service programs." I agree that "public and educational broadcasting can provide something" in addition to commercial fare. I agree that "maximum advertising standards could be established," and that "advertising during children's programs [should] be severely limited." I agree that "local publics" should be permitted (he says "encouraged") "to participate in renewal proceedings."

I most emphatically disagree, however, that "*what we now need is precisely something like the Pastore Bill.*" Let's begin with a few basics.

Virtually every country in the world treats broadcasting as an activity possessed of unique public responsibilities. In many places – Scandinavia among them – all stations are owned and programmed by an agency of government or a public corporation. Other countries have supplemented their public broadcasting facilities with the competition of privately owned, commercial stations (subject to government regulation). Japan is an example. When England supplemented its world-famous BBC service with "Independent Television," the new stations continued to be publicly owned. They are merely programmed, during portions of the week, by various programming companies licensed for fixed terms by the Independent Television Authority (ITA). (Unlike the Federal Communications Commission, the ITA has been quite freely encouraging competition by refusing to renew some companies' authority.)

These special responsibilities of broadcasters are based upon a number of considerations. (1) Only one broadcast signal can operate on a given frequency, at a fixed time and place; some rules are necessary. (2) Presumbly the rules could have been evolved by courts (as we regulate the use of air space for buildings and other purposes); but it has been generally conceded that administrative regulation of some kind seems to have worked better. (3) There tends to be a much greater demand for broadcast stations than the supply. This is due in part to the technological limits upon the number of stations in a given advertising market, and the resultant opportunity for monopoly or oligopoly profits. (4) Most countries have concluded that it is inappropriate to permit the "homesteading" of this public resource through ownership from use. They have, instead, utilized public licensing when private use is permitted at all. (5) They also recognize the awesome potential of such a powerful instrument of enlightenment or propaganda to do a nation's people good or ill. They recognize that in any country in which public opinion is relevant to public policy, the power of those who control the mass media is far greater than that of elected officials. (6) Most countries have not limited profits, or exacted significant fees, for the use of frequencies. They have, instead, established some minimal standards of fair play and insisted that

the public be repaid through public service programming; service above and beyond what profit-maximizing in the marketplace would produce.

Such concerns and standards have their analog in the history of broadcast regulation in the United States. During the debates on the Radio Act of 1927, and the Communications Act of 1934, fears were often expressed that (as Congressman Johnson put it in 1927) "American thought and American politics will be largely at the mercy of those who operate these stations." A six-month license term was originally specified. Later (as the industry gained political power) this was extended to one year and then three years. (Recently the industry has been urging – and former FCC Chairman Hyde supported – a five year term.) Even the National Association of Broadcasters acknowledged in the early years that: "It is the manifest duty of the licensing authority in passing upon applications for licenses or the renewal thereof, to determine whether or not the applicant is rendering or can render an adequate public service. Such service necessarily includes broadcasting of a considerable proportion of programs devoted to education, religion, labor, agricultural, and similar activities concerned with human betterment." The FCC was established as the people's representative to see to it that the licenses would, indeed, "render adequate public service."

For a variety of reasons the system hasn't worked. As in so many other instances of government "regulation" of an industry, the FCC has performed as the ally of the broadcasters in every light skirmish with the public. The FCC once decided that a radio station with more than 30 minutes of commercials per hour was serving the public interest. It approved the renewal of a station that quite candidly reported it proposed to program no news, and no public affairs. It first refused public participation, and then ignored protests about racist programming from a station in Mississippi – only to be roundly reversed, repeatedly, by the United States Court of Appeals. Seldom has the FCC found even the most exclusive monopoly control of the mass media to violate the public interest – notwithstanding the vigorous protests of the Antitrust Division of the United States Department of Justice. It examined the record of a station guilty of bilking advertisers out of $6000 in fraudulent transactions – while on a one-year, probationary status for similar offenses earlier – and found that the station had, nonetheless, "minimally met the public interest standard." And recently the Commission showed its reluctance to enforce even its technical and business standards, when it refused to consider license revocation for a licensee who had been charged with not paying his employees, stealing news, ordering his engineer to make fraudulent entries in the station's logbook, operating with an improperly licensed engineer and 87 other technical violations over a three-year period. Despite the questions raised about technical operation, the extent of licensee control, and financial qualifications, the Commission decided to keep the licensee in business.

The broadcasters, meanwhile, look at this record of FCC performance and are concerned that the standards have been too onerous. They certainly have never, to my knowledge, complained that the kind of intellectually corrupt decisions just mentioned are as much of a disservice to the industry as to the public – as I believe to be the case. The industry has for decades deluded itself into believing, as National Association of Broadcasters Chairman Willard Walbridge put it on "Face the Nation" the other day, that "the public says that the programming is fine . . . that they like broadcasting pretty much the way it is."

This refusal to face facts has been, in my judgment, the greatest single handicap broadcasters confront. It is a blind spot that has been created and purveyed to the great profit of the broadcasting subgovernment in Washington (*Broadcasting* magazine's full page ads and collection of downtown real estate; the NAB's rising dues, lobbying funds, handsome expense accounts, and new multi-million-dollar building). But it has led the broadcasters themselves – jovial, prosperous, martini in hand – down a jungle road into the largest ambush from an outraged citizenry ever confronted by an American industry.

I have been warning broadcasters since I came on the Commission in 1966 that they were going to pay a very severe price for ignoring the rising chorus of complaints from their audience. A growing minority of responsible broadcasters have responded. They recognize their obligations, and their problems, and are trying to reform. But an uncomfortably large number still practice haughty, arrogant disregard of public, critics, government, professional standards – everything, indeed, but ever-escalating profits.

Virtually every aspect of television is under attack from some quarter. Television does to your mind what cotton candy does to your body. It attracts your attention, makes you want it, and then leaves you with nothing but an empty feeling and a toothache. The resulting frustration and anger are manifest in many ways. Some people are concerned about the violence on television. (They include the Eisenhower Commission on Violence; the chairman of the Senate Subcommittee on Communications, Senator Pastore; the Surgeon General; and the National Institute of Mental Health – along with thousands of scholars and parents.) Some complain about television's impact upon our moral values, the obscenity and so forth. Some

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believe the newsmen are biased – either for the establishment (Abbie Hoffman) or against it (Vice President Agnew). Blacks complain about the failure of the media to serve their needs and interests (picket signs read, "Soul Music Is Not Enough"), and to employ qualified minority group members (the industry's record is one of the worst in American business – the Department of Justice, the Equal Employment Opportunity Commission and the Community Relations Service are all concerned). Mothers are angered by the lack (or impact) of children's programming and commercials. (Action for Children's Television recently picketed WHDH in Boston for cancelling part of "Captain Kangeroo.") Action on Smoking and Health is attempting to enforce the fairness doctrine requirement that stations carry anti-smoking spots – something the FCC refuses to do. (Broadcasters argued to the Supreme Court that the requirement violated their First Amendment "right" to keep information about health hazards from their audience. They did not prevail.) Local groups in Atlanta, Chicago and Seattle protested the loss of classical music from radio. My mail comes from all age groups, all educational and economic levels, all sections of the country, and all positions on the political spectrum. That television needs some improvement, and that the profiteers of the public airwaves are not living up to their responsibilities, are propositions for which Agnew's army and the "effete intellectual snobs" march arm in arm.

What the people have discovered during the past few years is that writing letters – to advertisers, networks, stations, and FCC – while helpful, is not enough. Looking about for alternative remedies – short of bombing the RCA building – they have seized upon "the fairness doctrine" and the license renewal process.

The requirements of the fairness doctrine are loose. It does not require the presentation of any particular spokesman. It only requires that a broadcaster be "fair" in his presentation of all points of view on controversial issues of public importance. If not, any citizen can file a "fairness complaint" with the FCC. The complaint must be acted upon. If it is accepted, the broadcaster – and all others like him – must present the omitted point of view. If rejected, the complaining citizen can appeal to the United States Court of Appeals and ask that the FCC ruling be reversed.

But many complaints are not covered by the fairness doctrine: minimal quantities of local programming, excessive commercialization, failure to carry network documentaries, and so forth. And citizens unwilling to have their legitimate protests treated like junk mail soon found relief in the FCC's license renewal process.

In 1927 and 1934 the Congress purposefully provided that an FCC license would only be "for the use . . . but not the ownership" of the assigned frequency. The license would be for a term. After that term the FCC could refuse to renew; it could grant the license to another party. The licensee's relation to the government was to be very much like that of a highway contractor – he is free to bid against others for an extension of the profitable relationship, but he is not entitled to an additional term as of right. The US Court of Appeals has said he must, like a public official, literally "run on his record" – an analogy Professor Jaffe professes to find "amazing."

All that is different today from thirty years ago is that citizens' groups all across the country have dusted off this old legal machinery, found the "push-to-start" button, and have begun to make it work as Congress intended. License renewal challenges are now pending in New York, Los Angeles, Boston – and other cities. It is not, as Professor Jaffe says, that the Commission has recently come up with a whimsical decision "that a broadcaster's license would be up for grabs every three years!" It is rather, as he goes on to explain, "that the Communications Act of 1934 as it was drafted would support such a reading."

The broadcasting industry's response has been to say, in effect, that "all these public rights were acceptable so long as no one knew about them or used them; now that they do we must have some protection." It is rather like a businessman supporting the theory of small claims court until claims are filed against him.

In fact the broadcasting industry, and Professor Jaffe, are premature in their concern. For all the talk, the FCC has yet to transfer a single license from a broadcaster to a protesting group because of poor programming performance. (WHDH is easily distinguishable, as the Commission pointed out in a subsequent opinion, and as Professor Jaffe knows. KHJ has not yet been decided by the Commission. WLBT is still on remand from the court. The other cases are in various stages of development.)

There are 7500 stations in this country. All the licenses in a given state come up for renewal at the same time. With three-year terms, this means roughly 2500 a year. Even if the FCC were to take away two or three licenses a year – something it has yet to do during its 42-year history – we would still be providing rubber stamp renewals to 99.9 percent of the stations. Professor Jaffe poses the question "whether a communication industry financed by private capital can be run on a three-year basis." Given an industry-wide average 100 percent rate of return annually on depreciated tangible investment, and a 99.9 percent (or better) probability of license renewal, I would agree with Professor Jaffe that "once the question is asked it appears to be almost rhetorical." At the least, it is scarcely grounds for Professor Jaffe's concern that the "Commission will have an easy opening for censoring the licensee and keeping him in constant terror." (The Commission has repeatedly made clear its unanimous position that it will not second-guess its licensee's

programming content, whether Democrats complain about coverage of the 1968 Convention, or Republicans complain about comments following President Nixon's November 3 Vietnam speech.)

The Pastore bill is a three sentence bill. It provides, in pertinent part, that ". . . the Commission . . . may not consider the application of any other person for the facilities for which renewal is sought. . . . If the Commission determines . . . that a grant . . . would not be in the public interest . . . applications . . . by other parties may then be accepted. . . ." In short, the Commission would be precluded by law from accepting the assistance of the people with the greatest incentive to evaluate whether "a grant . . . would not be in the public interest" – namely, those who stand to gain economically by obtaining the station if they can convince the FCC the broadcaster's license should not be renewed.

Let us assume for a moment that there may be a kernel of legitimate concern buried beneath the broadcasting industry's pile of propaganda, irresponsibility, public relations, arrogance, greed, political power, and general confusion. Let us assume that there are responsible broadcasters with a spectacular record of local and public-service programming who are frightened because any disgruntled member of their audience can throw them into a burdensome and expensive hearing. Let's say they believe that during that hearing their performance will be measured against standards that have never been articulated.

In the first place, the outstanding broadcaster has little to fear. He knows the people of his community and they know him. He heads off legitimate complaints before they become serious. He is seeking out representatives from all segments of his audience, including potential protestors, even more than they are looking for him. He knows such an approach is just good, audience-building business – as well as public service. Any group seriously looking for a license to challenge is going to go after the station with the lousiest record in town, not his station. In the second place, there is no reason why the FCC need hold long, useless, harassing hearings. Administrative practice is flexible enough to permit the FCC to draft hearing issues tightly, and to use informal pre-hearing procedures, to enable the frivolous cases to be disposed of quickly. (In fact, the most innovative current development has been the negotiated "settlements" in Texarkana and Rochester between outraged citizens and local broadcasters. Renewal hearings were contemplated, and then dropped, in exchange for concessions by the stations. This innovative means of self help involved little burden on the broadcaster.) Finally, if anyone in or out of the industry is seriously interested in helping to draft standards for the comparative evaluation of stations' license renewal their contribution will be most welcome. So far Commissioner Cox and I have been unable to pick up a single additional vote for the proposition that stations proposing less than one percent public affairs programming ought to be asked why they believe that serves the interests of their local community! We have followed that with our book-length studies, and proposed standards, in the Oklahoma, New York, and now Mid-Atlantic renewals. Some standards were suggested by Professor Jaffe (which we have been using for some time in slightly altered form). As he quite correctly points out, the fact that it is virtually impossible to evaluate quantitatively the quality of a given program does not mean that it is impossible to evaluate the programming performance of a broadcaster.

We can all look forward, with Professor Jaffe, to a day when there is greater diversity and competition in the audio and visual programming product. The Public Broadcasting Corporation, subscription television, cable television, direct satellite-to-home broadcasting, common carrier channels, standards for "public access" to the mass media in accordance with the Supreme Court's *Red Lion* decision, FM and UHF station development, more educational stations, community supported stations like Pacifica, home access to audio and video libraries of programs, home video recorders, and tape and disc players – all these developments, and more, hold out hope for the future. If the totality of the broadcasters' product were truly offered to the audience as magazines are today – subscriptions, newsstand sales, and libraries – much, if not all, of the need for program performance regulation would vanish. But that day is not yet here. It is not even near. And until it is we are left with the contrast between the intention of the drafters of the 1927 and 1934 Acts and the current practice of the FCC and the broadcasting industry.

The FCC has demonstrated conclusively, for all to see, its inability to serve the public interest without the active participation of public groups. Chief Justice Burger knew this, and said as much in the first *United Church of Christ* case (involving WLBT in Jackson, Mississippi). The broadcasters know it; they are much more comfortable with their friends at the FCC than when confronting their hostile audience. Senator Pastore and Professor Jaffe ought to know it.

The broadcasting lobbyists, Senator Pastore, Professor Jaffe, and other supporters of S. 2004 ought to know that, after the rhetoric is cut away, the net effect of the Pastore Bill will be to remove from the people the only thin small reed to which they now cling in their self-defensive struggle against the combined force of the broadcasting industry and the FCC. They ought to know that its passage will leave a frustrated people with no recourse, except to engage in more violent protests and other actions that serve the interests of no one.