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BROADCAST ADVERTISEMENTS

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HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 8316, H.R. 8381, H.R. 8729, H.R. 8896, H.R. 8980, and H.R. 9042

BILLS TO AMEND THE COMMUNICATIONS ACT OF 1934 TO PROHIBIT THE FEDERAL COMMUNICATIONS COMMISSION FROM MAKING CERTAIN RULES RELATING TO THE LENGTH OR FREQUENCY OF BROADCAST ADVERTISEMENTS

NOVEMBER 6, 7, AND 8, 1963

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BROADCAST ADVERTISEMENTS

WEDNESDAY, NOVEMBER 6, 1963

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
SUBCOMMITTEE ON COMMUNICATIONS AND POWER,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 1334, Longworth House Office Building, Hon. Walter Rogers, of Texas (chairman of the subcommittee) presiding.

Mr. ROGERS of Texas. The Subcommittee on Communications and Power will come to order for the consideration of pending business. These hearings have been scheduled for the purpose of holding public hearings on bills H.R. 8316 by Mr. Rogers of Texas; H.R. 8381, by Mr. Purcell of Texas; H.R. 8729, by Mr. Broyhill of North Carolina; H.R. 8896 by Mr. Langen of Minnesota; H.R. 8980 by Mr. Roberts of Alabama; and H.R. 9042 by Mr. Kornegay of North Carolina. Each of these bills is to amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length and frequency of broadcast advertisements.

The bills are identical and only H.R. 8316 along with agency reports will appear at this point in the record.

(H.R. 8316 and agency reports follow:)

[H.R. 8316, 88th Cong., 1st sess.]

A BILL To amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length or frequency of broadcast advertisements

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 303(b) of the Communications Act of 1934 (47 U.S.C. 303(b)) is amended by inserting immediately before the semicolon at the end thereof the following: "; except that the Commission may not by rule prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast service".

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., November 7, 1963.

HON. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of September 12, 1963, for the comments of the Bureau of the Budget on H.R. 8316, a bill to amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length or frequency of broadcast advertisements.

The bill would bar the Federal Communications Commission from prescribing by rule any standards with respect to length or frequency of advertisements which may be broadcast by all or any class of station in the broadcast service.

The Federal Communications Commission, in its report, opposes enactment of H.R. 8316. The Commission maintains that if the bill is enacted, it would be "stripped of desirable authority and a great deal of its flexibility" in its efforts to deal with the problem of overcommercialization. It is our belief that the present procedure of dealing with such problems on a case-by-case basis would be extremely cumbersome if a compelling need to act in the public interest in this area were demonstrated. The Commission also points out that it has reached no conclusions as to what course will best serve the public interest, and, therefore, urges that legislative consideration of this subject await the outcome of the Commission's proposed rulemaking proceeding to regulate broadcast advertising.

In view of the above, the Bureau of the Budget recommends against enactment of H.R. 8316.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., November 1, 1963.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR CHAIRMAN HARRIS: This is in reply to your request seeking this Commission's comments on H.R. 8316, a bill to amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length or frequency of broadcast advertisements.

Enclosed please find a copy of our comments on H.R. 8316. We are advised by the Bureau of the Budget that from the standpoint of the administration's program there is no objection to the presentation of this report to your committee.

Yours sincerely,

E. WILLIAM HENRY, *Chairman.*

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON H.R. 8316

H.R. 8316, introduced by Representative Walter Rogers, of Texas, is a bill to amend section 303(b) of the Communications Act to provide that the Commission may not by rule prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of station in the broadcast service.

The Commission opposes enactment of H.R. 8316 for the reasons set forth herein. However, before turning to these reasons, we believe that a brief recitation of certain background information pertinent to our comments will be helpful to the committee in its consideration of this matter.

The Commission recognizes the importance of advertising revenue to the American system of broadcasting. But it and its predecessor, the Federal Radio Commission, have also long recognized that the advertising practices of broadcast stations must be consistent with overall operation in the public interest. The Commission has over the years, therefore, dealt with this issue of excessive advertising on a case-by-case basis.[1]

In May 1963, the Commission (Commissioners Hyde, Bartley, and Ford dissenting) issued a notice of proposed rulemaking, requesting comments on proposed rules to limit the amount of time which could be devoted to commercial advertising in appropriate time segments. As can be seen from the attached copy of that notice, the Commission's proposal is based essentially on the standards presently set forth in the television and radio codes of the National Association of Broadcasters, since that appeared to be a realistic point of departure for our study. The notice stressed that the Commission had received complaints from the public concerning commercial announcements and that a rule might have a number of advantages, such as definiteness, providing guidance to li-

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[1] The line of decisions runs from *Great Lakes Broadcasting Co.* in 1929 ("advertising must be accepted * * * as the sole means of support of broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege," to *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 258, in 1962 ("* * * WDKD's programing was frequently saturated with commercial announcements. The conclusion is compelling that [the licensee] tailored his operation more to the convenience of his advertisers than to the need of the public")). As to other cases during the period between 1929 and 1962, see footnote 1 of the attached notice of proposed rulemaking, docket No. 150083, FCC 63-467.

censees, and applying equally to all competitors in a given market. At the same time, the notice recognized the need for flexibility and requested comments as to specific categories or circumstances warranting special treatment or waiver (e.g., AM stations licensed to operate only during daytime hours, stations licensed to sparsely populated communities, or stations located in communities with seasonal economies).

Through extensions of time, interested persons had from May 15 until September 30 to file comments, with replies due October 14. A considerable volume of material has been received which will, of course, be thoroughly studied by the Commission. We wish to stress that the Commission, in view of the posture of the rulemaking proceeding, has reached no conclusions in docket No. 15083. Only after its consideration of the material submitted, and after any other procedures which it believes will facilitate resolution of the issues raised in the proceeding, will the Commission be in a position to determine what course will best serve the public interest. There is, of course, at this stage a wide range of possibilities (e.g., no rule and thus continuation of the case-by-case approach; issuance of a policy statement setting forth definite guidelines to be employed by the Commission at the time of renewal; a comprehensive rule dealing with various categories of stations; a rule directed only to certain categories, with the other stations treated on a case-by-case basis, etc.). The foregoing list is no exhaustive but is set out merely to point up the very large area of possible judgment involved. Indeed, in our public notice of March 28, 1963, on this subject, we emphasized:

"The Commission does not desire to limit its consideration of proposed policies in any way. Rather it wishes to obtain public comment on the widest range of alternatives, so that it may have an adequate basis upon which to adopt the policies which would best serve the public interest in this area."

With this background, we turn now to H.R. 8316. First, we respectfully urge that legislative consideration of this important area await the outcome of the proceeding in docket No. 15083. Thus, if the Commission determines, after study of the pleadings, that a rule is inappropriate, there would be no need for enactment of H.R. 8316. If, on the other hand, the Commission does determine that a rule is called for, it will, as the Administrative Procedure Act and good administration require, set forth the basis of that rule. The Commission's action will not only be subject to possible judicial review but Congress will then be in a position to review a precise rule, dealing specifically with various situations, and the factual and policy bases set forth in support of whatever rule may be adopted.

Second, we respectfully suggest that well-established and sound policy in this area indicates continuation of the Commission's present broad authority, rather than enactment of H.R. 8316. The area of overcommercialization in the broadcasting field, involving as it does changing complex economic and related factors, would appear to be the kind in which "the expert's familiarity with industry conditions" should be applied. (See *American Trucking Assn.* v. *U.S.*, 344 U.S., 298, 310.) The Commission, in the mentioned rulemaking proceeding, is in the process of acquiring up-to-date data and comments in order to put it in a position to make public interest judgments, utilizing the comprehensive, expansive powers and very broad flexibility which Congress bestowed upon it in order that it might deal effectively with this dynamic industry (*N.B.C.* v. *U.S.*, 319 U.S. 190, 215–219; *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–138).

Under H.R. 8316, the Commission would be stripped of desirable authority and a great deal of its flexibility in dealing with the ever-changing trends in this important area of overcommercialization. Of course, the Commission might still deal with such problems on a case-by-case basis, coupled with policy statements or guidelines to be applied to applications coming before it, if it thought this method was appropriate. But assuming that a compelling showing had been made that some form of a rule would best serve the public interest, the Commission would be precluded from issuing the rule. Further, such prohibition would be applicable not only to the pending proceeding (docket No. 15083), but also to the indefinite future. As the Supreme Court noted in the *Pottsville* case, *supra* (309 U.S. at p. 138), "[u]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

In sum, the Commission fully appreciates and recognizes Congress' interest in this vital and sensitive area. For the reasons stated, however, we oppose enactment of H.R. 8316. We urge that this one area not be singled out for special

prohibition against rulemaking; that the Commission not be deprvied, in this one area, of the broad discretion which Congress gave it to meet changing problems and circumstances in the communications field. We believe that there is no reason for not following the established policy of over a quarter of a century of permitting the Commission to act as, in its judgment, the public interest standard requires, subject to congressional and judicial review.

Adopted: October 16, 1963.

Mr. ROGERS of Texas. Let the Chair say that we have approximately 30 witnesses scheduled to testify on these measures and it is the hope of the Chair that the witnesses will address themselves to the subject matter and make their statements as brief and precise as possible so that everyone may be heard as there are people here from long distances. Since we only have 3 days for these hearings, we hope to move along with dispatch and speed.

Our first witness this morning, as is customary, are other Members of Congress who desire to be heard. The first witness scheduled to appear is the Honorable Graham B. Purcell, of Texas.

Mr. Purcell, do you have a written statement?

STATEMENT OF HON. GRAHAM PURCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. PURCELL. Mr. Chairman, I have a written statement which I will file with you and I have a few remarks which will take a very few seconds.

I want to thank the members of the committee for allowing me a few moments to appear here this morning. I sincerely urge the committee to act favorably on this pending legislation. It is my belief that the proposed action of the Federal Communications Commission to prescribe regulations on the length and frequency of commercials is most improper. It is completely outside the legal authority of the Commission, in my judgment. If such action is to be taken, it should be taken by the Congress, because the proposed regulations would be, in effect, rate regulation. The Communications Act of 1934 specifically states in section 3(h) that:

A person engaged in radio broadcasting shall not be deemed a common carrier.

Since the sole source of most broadcast stations' revenue is advertising, this action would regulate their rates for all practical purposes.

In addition, Mr. Chairman, none of the evidence I have seen up to this time indicates a need for the proposed type of regulation. I shall not take more of the committee's time in my oral statement. I would like to ask that my written statement be made a part of the record and thank you very much.

Mr. ROGERS of Texas. Without objection, your entire statement will be made a part of the record the same as if it had been read in full, Mr. Purcell. Thank you for appearing.

(The complete prepared statement of Hon. Graham Purcell follows:)

STATEMENT OF HON. GRAHAM PURCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

COMMERCIAL TIME STANDARDS—NOT AN FCC FUNCTION

Last May the Federal Communications Commission requested comments from interested parties on a proposed rule to regulate the length and frequency of radio and television commercials. It specially suggested adoption of the National

Association of Broadcasters' time standards as a Federal regulation, although other limitations will also be considered. Despite the opposition to this proposed Federal rule expressed in many comments submitted to the FCC and despite unfavorable editorials in many of the Nation's newspapers, FCC Chairman E. William Henry in a September speech before the International Radio and Television Society attacked present radio and television advertising practices and pointed to the need for Federal time standards.

It was in response to the Federal Communications Commission's proposed rulemaking that on September 10, I introduced H.R. 8381, a bill providing that the FCC may not prescribe standards with respect to the length or frequency of broadcast advertisements. The recent speech of Commissioner Henry makes enactment of this legislation—either my bill or H.R. 8316 introduced by Representative Walter Rogers—even more urgent.

The Federal Communications Commission seems to want to expand its authority in a totally unwarranted manner. There is no provision in the Communications Act of 1934 for the FCC to impose Federal regulation of advertising upon the broadcasting industry. In fact, section 3(h) specifically states: "but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Yet, the proposed FCC regulation is in effect rate regulation. For most broadcasting stations advertising is the sole source of revenue. Regulations restricting and limiting this revenue cannot help but have an effect on advertising rates.

The FCC is thus going far beyond the provisions and intent of the communications act. Yet the Federal Communications Commission is not a legislation body. It is an independent regulatory agency. It is up to Congress to make changes in its regulatory authority. If such a drastic step as imposition of Federal commercial time standards is required, the FCC should present its recommendations to Congress, and this body, not the FCC, should then determine the advisability of such regulation.

And what of the proposed Federal regulation? Is it necessary? Is it wise? I submit that the answer to both questions is negative.

The broadcasting industry is not only subject to Federal regulation, but also to self-regulation. Broadcasters have recognized their special responsibilities to the listening public in their codes of good practices for both radio and television stations. Those codes include regulations covering the content and length of advertising. For instance, code subscribers may include only 4 minutes of advertising time plus a 70-second station break on a half-hour prime time television program, and on an hour-long radio program with a single sponsor they may have only 7 minutes of commercial time plus station breaks. An average of 14 minutes of commercial time, with a maximum of 18 minutes of advertising, is the standard for hour-long radio programs with multiple sponsors.

These standards were drawn up by broadcasters and are enforced by broadcasters through the National Association of Broadcasters' code boards. The standards are not mandatory, but apply only to members of the industry who become code subscribers.

The Federal Communications Commission has stated that the broadcasting industry's efforts at self regulation have not been successful, and proponents of Federal regulation point out that only 38 percent of the Nation's radio stations and 70 percent of its television stations are code subscribers. They seem to overlook the progress that the industry has been making, and is countinuing to make, to strengthen self-regulation.

For instance, in January 1959, only 60 percent as opposed to the present 70 percent of television stations were code subscribers, and the participation of radio stations has increased from 15 percent in January 1959, to 38 percent today. It is not only through increased coverage that the NAB codes have been strengthened. In meetings this summer NAB boards resisted efforts to weaken code standards to gain greater participation, and NAB president, LeRoy Collins is spearheading an industry drive for more effective self-regulation.

This year the broadcasting industry has begun to show advertising agencies the advantages of advertising on code subscribing stations. Commercials on these stations are not sandwiched between advertisements with misleading claims or ads of poor taste. Overcommercialization is not a problem on code subscribing stations, and the code subscribers' programs must be in good taste. As advertising agencies come to realize that commercials on these stations are more effective, there will be more incentive for agencies to advertise on these stations and for broadcasting stations to subscribe to the NAB time standards.

NAB monitoring of radio code subscribers was greater during the last 6 months than ever before. Forty-six percent of the 1,800 radio code subscribers were monitored, and 20 stations resigned because they failed to comply with the code. All television code subscribers will be monitored this year. The television code board has just ordered action against 17 code subscribers who have repeatedly violated prime time commercial time standards and is checking other possible violators.

Are Federal commercial time standards necessary? No, the broadcasting industry is making good progress in regulating itself. Is Federal regulation of commercial time wise? There are several reasons why it would not be.

It is important to realize that time standards of the National Association of Broadcasters are voluntary standards. They are not forced upon the industry, for it is recognized that although participation could be and should be greater, it need not be 100 percent. What are reasonable standards for most stations are not reasonable for all.

To impose time standards on all stations would bring great economic hardship. Broadcasting stations differ in power, in hours of broadcasting, and in type, stability, and size of market. The broadcasting station located in a resort area or an area of seasonal economic fluctuations must receive sufficient revenue during those times when its market is strongest in order that it may broadcast throughout the rest of the year. And, of course, there are many daylight stations who are quite dependent on the revenues from commercials presented during the longer operating hours of the summer. For some stations limitation of the maximum amount of advertising time during prime hours would be economically disastrous. Prime time advertising revenues are these stations' bread and butter, for it is more difficult to sell advertising during fringe hours.

During 1961, 1,372 radio stations lost money and 636 earned less than $5,000. Is this an industry whose main source of revenue should be limited by mandatory Federal time standards? The daytime and the small broadcasting stations should not be forced out of business or turned into network relay stations.

Quite apart from the economic consequences of the proposed FCC action, the imposition of this type of Federal regulation raises serious political questions. In the United States freedom of speech is one of our most important freedoms, and the broadcasting industry is a most important medium in providing information to the public and in presenting diverse and often conflicting opinions. If this industry is regulated by the Federal Government as a common carrier, if the length and frequency of commercial time is limited by the Federal Government, would not the next logical step be Federal regulation of advertising content or even program content?

Thus, the proposed FCC regulation has serious implications. It raises fundamental questions which should receive careful study and deliberation by Congress. Yet, the Federal Communications Commission is preparing to impose these regulations on its own, regardless of congressional intent. It is for this reason that I urge prompt enactment of legislation prohibiting FCC action on this vital matter.

Mr. ROGERS of Texas. Are there any questions on the part of any members of the subcommittee?

(No response.)

Mr. ROGERS of Texas. If not, thank you very much, Mr. Purcell.

Mr. John O. Marsh, Representative from Virginia, will be next.

Mr. Marsh, did you have a statement?

STATEMENT OF HON. JOHN O. MARSH, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. MARSH. I appreciate this opportunity to appear before this committee. Because there are other witnesses here, I would like to file a written statement in support of this legislation and thank the chairman for giving me this opportunity.

Mr. ROGERS of Texas. Without objection, your statement will be accepted and put into the record, Mr. Marsh, the same as if it had been read in full. Thank you very much.

(The complete prepared statement of Hon. John O. Marsh, Jr., follows:)

STATEMENT OF HON. JOHN O. MARSH, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

It is a privilege, Mr. Chairman, to appear briefly before this distinguished committee, for the members of which I have the highest respect. I might say that I am confident that the committee will make a determination consistent with the public interest in the matter now before it, and I am content to leave detailed testimony to others obviously better qualified in the field.

I find myself impelled, however, to take this opportunity to express my concern over a possible extension of control and influence by a regulatory agency established by the Congress, which extension would seem to go well beyond the intent of the Congress as expressed in the relevant statute.

It is a settled principle, of course, that the broadcasting medium is to be subject to Federal regulation, largely because of technological limitations, but the Congress has made plain, repeatedly, that it expects the fullest restraint in the application of the regulatory function to programing.

While prospective programing, on a basis of overall balance, would seem to be an appropriate concern of the regulatory agency in the consideration of an original license application, and programing on an overall basis—and I emphasize "overall basis"—may well enter into the determinations which must be made at renewal time, I believe it would be unwarranted and unwise for the Federal Communications Commission to be permitted to promulgate time content standards which, in effect, would place the licensee, a private businessman, in an economic straitjacket.

I should emphasize that my position in this regard extends not only to any regulation specifically limiting commercial time, but also to what might be expected to follow—time limitations on newscasts, public affairs discussions, or, for that matter, symphonic concerts, country and western music or comedy.

I find it particularly regrettable that the Congress must occupy itself at this time with the further regulating of a regulatory agency which, in the last analysis, is its own creature.

I have heard some suggestion that the problem of overcommercialization does not involve so much the networks or the major market stations as it does the independents in small communities.

My own association has been primarily with the small community independent broadcasters in Virginia—and I should emphasize that I have no proprietary or other financial interest in any broadcasting operation. Uniformly, I have found the managements of these Virginia broadcasting stations, both radio and TV, to be not not only ethical businessmen but also individuals with a persisting consciousness of their community responsibilities and an awareness of the public service obligation of their license. I cannot imagine that a broadcaster in the Shenandoah Valley of Virginia, for example, could survive long as a local businessman if he abused either the intelligence or the patience of his audience by excessive commercialization of his schedule.

I venture to hope, therefore, Mr. Chairman, that this committee will find it in the public interest to limit its designated deputy in this regulatory field to the broad concern of the public interest, as reflected in the total operation of a broadcasting enterprise, and restrain it from application of programing strictures inconsistent with the basic statute.

Mr. ROGERS of Texas. The next witness is the Honorable William Henry Harrison, of Wyoming.

Mr. Harrison, will you come forward?

STATEMENT OF HON. WILLIAM HENRY HARRISON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mr. HARRISON. Thank you very much, Mr. Chairman, for the privilege of appearing before this subcommittee.

Mr. Jack Rosenthal, who is president of the Wyoming Association of Broadcasters, is unable to appear and testify in person. He has

asked me to present to you his statement, which is short, and which I would like to read, with your permission, at this time.

The Wyoming Association of Broadcasters supports H.R. 8316 and identical bills and urges the amendment of the Communications Act of 1934 to make it clear that the Federal Communications Commission does not have authority to limit broadcast advertisements. We commend Chairman Rogers and the distinguished members of the subcommittee for their efforts to preserve freedom in broadcasting.

There are 33 commercial broadcasting stations in Wyoming—29 AM radio, 1 FM radio, and 3 television stations. These broadcasters serve a population that is distributed over an area of nearly 100,000 square miles. Because of the large distances between centers of population, and the remote location of some of our people, broadcast service is very important. Many of the residents of Wyoming do not have access to a daily newspaper, relying almost entirely upon radio and television for the news of the day.

Some Wyoming broadcasters operate dangerously close to the borderline between profit and loss. Restrictions upon the amount of time that can be devoted to advertising would put some of these broadcasters out of business and it would reduce the ability of the remainder to offer programs of high quality. The result would be to deprive the public of a unique and vital medium of information.

If, on the other hand, the FCC were given authority to make special exceptions or to grant waivers to prevent destruction of marginal stations, the effect would be to invest the staff of the governmental agency with power to pick and choose between stations and decide what the people of Wyoming should see and hear. The exercise of such power my minor employees of the Federal Government, sitting 2,000 miles away, unfamiliar with the State and its people, could hardly be responsive to the interests of Wyoming even if it were not capricious.

The broadcasters of Wyoming are sincerely trying to serve the public. They can achieve this goal only in an atmosphere of free speech and free enterprise. No Federal bureau is needed to intercede between the broadcasters and the people of Wyoming.

Mr. Chairman, may I add my own word in support of the position taken by the Wyoming Broadcasters Association. Wyoming is a large State, nearly 100,000 square miles. Our population is distributed over this area and we are not served as adequately with newspapers and other news media as other areas which are more densely populated. Most areas are only served by either a weekly newspaper or a twice-a-week newspaper and most of our residents in the remote areas, particularly, depend upon radio and television for the news and to keep them up with the happenings of the world today. These stations operate on a very narrow profit margin. The business people of the towns in which they are located and in the area which they cover are not wealthy businesses, not large businesses, and they cannot afford to pay heavy sums for the advertisements which they carry on the radio. For that reason, many of the advertisements must be short in length and small in cost. Therefore, we must, in order to keep our stations going, have leeway on the part of the stations as to the type of advertising which they receive and the amount which they charge for them and the number of such advertisements that they of necessity must run to keep their stations going.

I hope that this committee—and I am sure that it will—will give very serious consideration to the problem which confronts the broadcasters of our area. Once again, I thank you for the privilege of appearing before the committee.

Mr. ROGERS of Texas. Thank you, Mr. Harrison, for your presentation.

Our next witness will be the Honorable Odin Langen of Minnesota.

Mr. Langen, the subcommittee will hear your statement.

STATEMENT OF HON. ODIN LANGEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. LANGEN. Mr. Chairman and members of the subcommittee, I am most grateful for the opportunity of presenting this statement before this subcommittee. You are to be commended for your thoughtful consideration of this important legislation.

The bill under consideration today is identical to one also submitted by me because of the extent of complaints I have received from broadcasters in my district and representatives of those broadcasters relative to the proposed regulation of commercial announcements by the Federal Communications Commission. I even went so far as to visit some of the smaller local stations in my district of Minnesota and studied the programing of these stations to better acquaint myself with the problems they face.

I have copies of a number of excellent statements prepared by broadcasters for the scheduled FCC hearings on the proposed rules on commercials. They graphically tell of the hardships and other losses they would sustain if the FCC goes through with its proposed regulations.

The purpose of this statement is not to burden you with legal definitions or technicalities relative to the Commission, but to point out that the Commission's proposal has progressed to the extent that it is time for Congress to clarify its original intent and to show some of the effects of such controls on the hundreds of local stations across our country.

The Seventh District of Minnesota, which I represent, has many small radio stations and a number of local television stations. They serve a limited area and because of the limited amount of revenue they take in, they are necessarily limited in staff to as few as two or three persons in the smallest stations. Without exception and even with these handicaps, I believe they are doing a conscientious and commendable job of serving the public. They are dedicated servants who work long hours far beyond the monetary rewards that come their way. But it is my own opinion that the FCC proposal, which this legislation would prevent, discriminates against these small stations and would drive some of them out of business.

To understand the tragedy of such a loss to a community, consider for a moment the services their listeners have come to expect and would indeed demand if their local station should broadcast no more.

Consider the announcer who, on a blizzardy morning in Minnesota, answers the constantly ringing telephone with one hand while playing records with the other, pausing only long enough to read the list of schools that will be closed that day. This is an emergency message to those people. Indeed, it's a lifesaving message, preventing a small

child from standing on a windswept country road in 20-below temperatures waiting for a bus that isn't coming. The storm worsens and the rural phone lines break under the strain of ice and snow. A woman worries about her husband, 3 hours overdue from town, until her local TV or radio announcer tells her he's safe.

Rural America doesn't have the Triple A or the highway department at its immediate command, so you get your driving conditions and road information from your local station. Many a criminal has been apprehended and many a stolen car recovered because someone remembered the description provided by your local radio or TV announcer. Then there are the broadcasts of the local basketball games, the church choirs at Christmastime, and, yes, the price of bananas at Joe's grocery this morning and the price of wheat at the grain elevator, all important services to rural America, services they can get no other way.

The Government would lose, too, if some of these stations went out of business.The stations in my district contribute many hours a year to public service announcements, and the Federal Government is the biggest customer in this "free" department.

Even if the proposed FCC ruling caused only one station in my district to go off the air, it would be too much because it would deprive one community of these important services. And I believe I know the answer we'd get if we went out and asked the people which choice they would make.

These small stations, with their limited staffs, are already bogged down in paperwork, and these proposed controls would add to that burden and result in an extra cost to the station in administrative work plus reducing income because of the restrictions on commercials. The result, when you consider the small margin with which they operate now, is obvious.

These stations also have unique problems due to the nature of the market areas they serve. For instance, we have a station located in a sparsely populated area that doesn't even break even throughout most of the year, but still provides a valuable service to its listeners. But a tourist influx during the summer months enables the station to make a profit. Another station in my district is of the same size, but serves a farm area where most of the revenue comes during the winter months. But this second station can operate daytime only, which means it must leave the air by as early as 4:30 in the afternoon during its most lucrative months. No rule from Washington could be interpreted to the satisfaction of these two stations, or to the satisfaction of the people served by them.

Gentlemen, it is my opinion that the public interest comes first, and that the enforcement of the Commission's proposal would make it mandatory for the Congress to pass this legislation in order to insure that all communities will have the benefit of local broadcast services.

Thank you for your most kind attention to this important matter.

Mr. ROGERS of Texas. Thank you Mr. Langen.

Next we have with us today the Honorable John W. Davis from the State of Georgia. Welcome to the committee, Mr. Davis.

STATEMENT OF HON. JOHN W. DAVIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. DAVIS. Thank you, Mr. Chairman.

It gives me great pleasure to present this testimony to your subcommittee and to assure you of my wholehearted and unqualified support of the bill, H.R. 8316, of which my esteemed colleague and good personal friend, Mr. Walter Rogers, is the author.

I feel that this bill strikes at the root of a problem which besets Americans in many areas of government. It strengthens the liberty and incentives for individual initiative that form so important a part of our way of life.

I do not wish to burden you with lengthy testimony, but I feel you should have the benefit of a resolution adopted by the Georgia Association of Broadcasters on October 30, 1963. With your permission, I will include it in the record at this point.

Mr. ROGERS of Texas. If there is no objection, the resolution may appear at this point in the record.

(The resolution mentioned follows:)

GEORGIA ASSOCIATION OF BROADCASTERS, INC., RESOLUTION

Adopted October 30, 1963

The Federal Communications Commission rapidly is moving to usurp the rights of Congress to make laws by virtue of its recent proposals to limit radio-TV commercials and to set license fees for radio-TV and other applications. The doctrine of separation of powers and the prerogatives of the Congress are in danger should these FCC proposals take effect.

The Honorable Walter Rogers, Congressman of Texas, recognizing the dangers inherent in recent FCC actions has introduced legislation which would rescue the processes of our republican form of government. The Rogers bills, H.R. 6697 and H.R. 8316, should be supported by every broadcaster and every Member of the Congress.

Therefore the Georgia Association of Broadcasters (GAB) formally endorses the Rogers bills and vows to devote its every resource to passage of these measures. The GAB urges its members, and the entire Georgia congressional delegation to appear before the House Subcommittee on Communications and Power on November 6–8 and testify in behalf of H.R. 8316. GAB further urges its congressional delegation to vote for H.R. 8316 and H.R. 6697 when they come to the floor of Congress.

Copies of this resolution will be forwarded to Congressman Rogers and all members of the Georgia congressional delegation.

Mr. ROGERS of Texas. Thank you very much Mr. Davis.

Our next witness will be the gentleman from Minnesota, the Honorable Albert H. Quie.

STATEMENT OF HON. ALBERT H. QUIE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. QUIE. Thank you Mr. Chairman for the opportunity to testify in favor of your bill, H.R. 8316. I understand it would specifically prohibit the proposed rule of the Federal Communications Commission to limit the commercial time of broadcasting stations, as outlined in FCC docket No. 15083.

It is obvious that there is nothing in the Communications Act giving the FCC power to set the amount of time devoted to commercials or does that act give it any price-setting powers over commercial time.

There is no question of public protection here, since the listener or viewer can easily control what he hears or sees simply by turning a dial. It would seem unlikely to me that any person listening or viewing would continue tuning to a station which broadcast an interminable string of commercials.

In fact, I do not agree in principle that the FCC should in any way interfere with the program content of stations in any area of programing. I believe that the role of the FCC is to regulate the mechanical operation of stations to avoid mechanical difficulties, such as overlapping, etc. However, what a station wishes to program should be left to the discretion of the broadcaster and any pressures put on him to change that programing should come from his listening audience and not from any Government agency.

Therefore, I am firmly opposed to that portion of FCC Docket No. 15083, which would limit the commercial time of privately owned and operated broadcasting stations. I am in full support of H.R. 8316, which would specifically forbid such interference.

Mr. ROGERS of Texas. Thank you for your statement Mr. Quie.

We will next hear our friend and colleague from the State of Virginia, the Honorable Richard H. Poff.

STATEMENT OF HON. RICHARD H. POFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. POFF. Thank you Mr. Chairman.

I want to register my concern over FCC regulation of commercial advertising and voice my support for corrective legislation. I feel that the proposal constitutes an unwarranted intrusion by a Federal agency upon private enterprise; that the rule could not be fairly and equitably administered and policed; that the proposal would impose a serious financial handicap upon broadcasters; that the proposal would impinge upon the right of private business concerns to advertise their products and services; and that any evils complained of can be and will be corrected by the industry itself under its Code of Good Practices.

Small radio stations in the district I am priviliged to represent have been more than generous in providing local civic clubs and other community organizations with free public service time. That generosity sometimes forces them to crowd commercial advertisements into restricted time frames which may occasionally give the impression of excessive frequency. However, I suggest that any problem which this might create will solve itself by natural process. The broadcaster knows that the value of the service he sells depends upon the size of his station's audience. Accordingly, he will not sell—because he knows the advertiser will not continue to buy—so many commercials that his station will lose its audience.

If the FCC undertakes to regulate the number and frequency of radio commercials, what is to keep the FCC from regulating radio programs? I truly feel that this is an adventure the FCC would do well to avoid.

Mr. ROGERS of Texas. The subcommittee appreciates your statement, Mr. Poff.

Let us next hear from our colleague, the Honorable Don H. Clausen, from the State of California.

STATEMENT OF HON. DON H. CLAUSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CLAUSEN. Thank you Mr. Rogers, I am honored to appear before you today.

The basic requirement of a representative democracy is the free flow of information. All government operation in the day-to-day business of a representative Government must be available for the information of the people and their representatives. The only possible exceptions are military secrets, the disclosure of which to the public and other nations would pose a threat to the security of our Republic. Otherwise, how can the people accurately assess the aims, policies, and successes of the Government? How can the voters decide the merits of the programs of the political party in power as opposed to the aims and proposals of the party seeking to unseat it?

Contrariwise, the first step toward totalitarian government, whether it be under communism, facism, or military junta, is to control the news by one means or another. This includes the "management" of news and information that is given to the public as well as government takeover of newspapers and radio and television stations for complete control of information.

Based on these truths, Mr. Chairman, I must say that I am alarmed about increasing efforts by the U.S. Government to restrict the information that is made available to the American public, to manage that which is made public, and to restrict the news media itself. It is my fervent hope that this honorable body will act surely and swiftly to reject all such moves aimed at restricting or controlling the flow of information to our people.

Begging the indulgence of the committee, Mr. Chairman, may I enumerate a few examples that I have noticed in recent months:

(1) Mr. E. William Henry, Chairman of the Federal Communications Commission, has proposed that the FCC adopt regulations dealing with the length and frequency of commercials. While it is difficult to defend commercials per se—indeed, some seem to be obnoxious by design in order to gain sharper attention—there is no excuse for extending Federal control over broadcasters. Up to now, the broadcasting fare has been controlled by the measure of public acceptance or rejection. It should continue to be controlled by the public and the simple expedient of leaving a dial on or turning it off. In this area, I endorse the proposal of the gentleman from Texas—Mr. Rogers—H.R. 8316, to prohibit the FCC from entering this field.

(2) The FCC requirement putting stringent restrictions on broadcast stations, ranging from specified staffing to requirements for free public service announcements, has put an onerous burden on some stations. I especially resent FCC hints to broadcasters, either overt or covert, that the requirements for public service announcements can be met to FCC satisfaction by the free broadcast of Presidential press conferences or Department of Agriculture announcements urging approval of the wheat referendum. As of August 22, 1963, a total of 68 radio and television stations in California have applied for FCC license renewals but action by the FCC has been deferred.

(3) The proposal to insert Government control over broadcast announcements and editorials would be another extension of power into an area where public reaction is adequate and controlling. Broad-

casters should have the same right as printed news media to editorialize to express opinions on issues as a public service without notifying the subject of the editorial in advance. Broadcasters in my district have informed me that editorials would be discontinued rather than accept Government invasion in this area. The so-called fairness doctrine is just another way of injecting Government controls.

There is much more that could be said regarding the danger of extending Government controls over news media and the flow of information. But in summary, Mr. Chairman, let me say only that there has been an increasing tendency under the administrations of both political parties to classify Government information in restricted categories when it does not properly fall in such categories.

There always is the tendency to cover up mistakes to avoid embarrassment and, possibly, rejection. There always is the temptation to "gild the lily" by releasing only favorable information.

But despite the counterpressure of these human frailties, Mr. Chairman, we must reject Government control of the news media. We must be shocked and aroused into rejecting the immoral idea that the Government has the "inherent right to lie to save itself." We must reject adjusted or withheld statistics or any other form of news management aimed selfishly at self-perpetuation.

We must reject thought control and reaffirm freedom of the press as a basic factor in preserving representative government.

Mr. ROGERS of Texas. We appreciate your statement, Mr. Clausen.

Are there any questions of any of the members?

(No response.)

Mr. ROGERS of Texas. The next witness is our colleague from North Dakota, the Honorable Don L. Short. Mr. Short, we will be glad to have your testimony at this time.

STATEMENT OF HON. DON L. SHORT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. SHORT. Mr. Chairman, I would like to present my statement in support of H.R. 8316, H.R. 8381, and H.R. 8729, bills introduced by Congressman Walter Rogers of Texas, Congressman Graham Purcell, of Texas, and Congressman James T. Broyhill, of North Carolina, respectively, to amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length or frequency of broadcast advertisements, by inserting in section 303(b) of the Communications Act of 1934 (47 U.S.C. 303(b)), before the semicolon at the end thereof, the following:

; except that the Commission may not by rule prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast service.

The whole subject of adding additional controls to present rules and regulations of the Federal Communications Commission seems to me to be a mistake. First of all, it is an infringement on the freedom of speech guaranteed to us by our Constitution. It is setting a dangerous precedent, which is bound to create fear in the minds of broadcasters and the general public that once additional controls are accepted, more and more will gradually be added. At this time in our Nation's history, it seems to me all the more important to prove

to other nations of the world that we can truly remain a free nation, unhampered in our expression of assent or dissent with governmental policies. This is no time to go backward in our course of history, to the days when only a favored few could express an opinion, and then only in favor of what the ruling class proposed. Therefore, if we are to exemplify a free republican form of government, we must guard our freedoms, and cherish them all the more in the face of the false and dictatorial ideology of communism.

Along with this protection of our freedoms pertaining to speech, goes the protection of our free enterprise and competitive economy, which has produced the strongest and most productive, as well as the wealthiest nation in the history of the world.

This proposed legislation today has a direct bearing on what may come out of the December 9, 1963, hearing set up by the Federal Communications Commission. This is the time set for interested parties to present oral arguments for or against the proposed change in rules and regulations which would amend part 3 of the FCC rules and regulations now in force, with respect to advertising on standard, FM, and television broadcast stations.

To support my statement, I would like to include excerpts from letters I have received from several of my constituents in North Dakota who are directly connected with the broadcasting industry. These constituents present their points of view from the standpoint of those who are experienced in the problems connected with the broadcasting industry.

KXJB–TV, which is owned by the North Dakota Broadcasting Co., Inc., and whose president is Mr. John W. Boler, of Fargo, N. Dak., broadcast an editorial on October 15, 1963, which stated, and I quote:

> Perhaps because newspapers and the broadcast industry compete for advertising dollars and for the attention of listeners and readers, the two industries don't spend a lot of time saluting each other.
>
> But during National Newspaper Week, the management of this station wants to extend a salute to a sister industry which shares many of the same burdens and responsibilities.
>
> One of the basic functions of newspapers and broadcasters is to insure the public's right to know. Only an informed public can act intelligently, and in our form of government the intelligent participation of citizens is the key to success. And perhaps even to survival.
>
> There is the temptation at times for the members of one medium to suggest restrictions on the other medium, but the responsible members of both media are aware that any restriction on the freedom to disseminate information is in effect a defeat for all those who fight for the right to know.

Mr. Boler wrote me on November 18, 1963, in connection with the legislation being considered by this committee, stating that he gave blanket approval of my vote against any and all legislation giving the FCC or any other agency restrictive powers against broadcasting. He added that—

> If the FCC controls advertising copy, the next thing they would want would be control of news and editorials. If we are to have a free America, we must have freedom of the press, which includes radio and television, a media more dominant in molding public opinion now than even the newspapers.

While there might be some argument as to whether or not radio and television is indeed more dominant in molding public opinion than the newspapers, Mr. Boler certainly has a point in expressing the fear that one control accepted would bring on more even dangerous controls.

KANSAS STATE UNIVERSITY LIBRARY

Mr. F. E. Fitzsimonds of KBOM radio in Bismarck, N. Dak., has this pungent and cogent statement to make:

We contend that the only proper way to control commercials is through economics. A radio or television station that carries too much commercial automatically loses listeners and when it loses listeners, it loses advertisers. It has a built-in balancer that is far more effective and fair than any governmental regulation could possibly be. Our contention is, too, that it is more the quality of the commercial, rather than the length, that determines its flavor so far as the listener is concerned.

Mr. Chairman, I believe wholeheartedly in the free and competitive economic system that developed this country from 2 or 3 small colonies to 50 States, teeming with life, prosperity, and most of all, freedom. I can say a clear and loud amen to the statement made by my constituent, Mr. Fitzsimonds.

Mr. E. C. Krebsbach of radio station KGCX, Inc., with studios in Williston, N. Dak., and Sidney, Mont., had this to say about the proposed rule to limit commercials on radio and television:

I feel the proposed rule is beyond the powers which the Congress has delegated to the Federal Communications Commission. The rule, I feel, would be unequal and unfair. It would tend to destroy free enterprise in broadcasting. We at KGCX feel the National Association of Broadcasters Code of Good Practice, to which we subscribe is sufficient self-regulation in this matter.

And with that statement, Mr. Chairman, I add that I fully agree.

Mr. Chester Reiten, president of KXMC–TV of Minot, N. Dak., offers some pretty graphic statistics with respect to the proposed rule to require all television stations to abide by an FCC ruling on commercial content of television programs and spots:

It is my feeling that the NAB code provides for sufficient commercial time within the program. * * * I feel the proposed FCC restrictions on the spots allowed in the station breaks would cause economic hardship on television stations attempting to serve small markets and the rural farm areas. The reasons are as follows, using our station as an example: The market covered by KXMC–TV is the smallest market in the continental United States having two television stations. According to Television magazine's Research Department, there is a total of 38,500 television sets within our coverage area. The city of Minot has a population of 33,000. This city is served by two television stations, three radio stations, and two newspapers. On this basis, I feel we well represent a small market station whose primary service is to small towns and farm families. The invested cost of our station is a little over $1 million. On the basis of 38,500 sets, this indicates a cost of $36 per set. A comparison with a major market station would indicate our relative size. The Minneapolis, Minn., market has 750,000 sets.

On the basis of our invested cost per set, a Minneapolis station would cost out at about $20 million. * * * Yet in many instances our costs serving a remote market are larger. The networks, at a relatively small cost, deliver the network service to the large markets. Because of our small size, it is not economically feasible for the network to deliver live service to our station. Our network comes over a system of over 600 miles of private microwave. Were we to buy this service from A.T. & T., the cost would be two to three times our total network income. Our tower at 1,053 feet is higher than any in Minneapolis, and our power of 247,000 watts is greater than most television stations. Our transmitter is 15 miles from our studio, necessitating two separate engineering crews, one at the studio and one at the transmitter. Our people are just as competent as any in the major markets, so must be paid accordingly. As news is just as important to us as any other station, we must maintain a complete news staff with remote cars, radios, news wires, etc. Our station carries three half-hour locally produced news segments per day. Over 20 percent of our local business is derived from selling advertising to the smaller towns located on an average of 70 miles from Minot. This necessitates the added cost of maintaining salesmen on the road at all times. Our power bill alone is over $1,200 per month.

Mr. Reiten points out that the basic cost of operating a television station in a small market is much the same, with some costs even higher, than a station in the major markets. Even though costs are higher in major markets, these added costs are primarily frills added to this basic cost. The area of income is where the small television station gets hurt the worst. Minot is listed as having 0.0176 percent of the U.S. population and 0.0181 percent of the U.S. income. As most national advertisers buy the big markets first, the number of national orders received by his station is very small. With only 0.0176 percent of the total population, most big advertisers can see no need of purchasing facilities Mr. Reiten can offer, on a spot basis. Consequently, his income from this source is very limited. Whereas, most major markets get from 40 to 60 percent of their income from national spots, his income in 1962 was 4.5 percent from national spots, and 8.7 percent from regional advertisers. Mr. Reiten then pointed out that his primary source of income is local business, sold almost exclusively to retailers in Minot and surrounding small towns. Over 60 percent of his business in 1962 came from that source. Yet, it is because they serve primarily the local small advertisers that they would get penalized the most under an arbitrary restriction on the number of spots they could legally carry.

Mr. Chairman, in rural areas in North Dakota, few retailers purchase advertising on Saturday since retail stores are closed on Snuday. This leaves 6 days to carry advertising. Most merchants concentrate on Thursday and Friday for selling days, and this causes an overload of advertising on Wednesday and Thursday, and a corresponding underload on Sunday, Monday, and Tuesday.

Another problem that Mr. Reiten pointed out was our severe winters in North Dakota, which cause merchants to reduce advertising to a great extent during January, February, and early March. Farmers in this area primarily grow small grain crops. They are in the field from sunup to long after sundown during summer months, and the merchants consequently reduce their television advertising during the summer because it would largely be wasted effort and expense. The area also is subject to severe droughts from time to time. When this happens, it is considered a disaster area and this again results in a reduction in advertising during such periods.

I believe, Mr. Chairman, that it is clear an advertising limit in spots to cover individual daytime periods would cause broadcasters in my State great hardship. I do not believe the FCC either realized or intended to bring about such a result when they proposed the changes in their rules and regulations. I believe the FCC should consider this problem from all angles, not just from the angle of the large city broadcasting stations. You might suggest that the broadcasters could solve their problem by raising advertising rates, but here again, this is unfair to the merchants in the small towns who are fighting to keep rural cities in existence. Likewise, this same situation would exist in major cities where a raise in rates would work against the small merchants. The familiar sight of small business suffering because of forced competition with big business would once again appear. There is hardly any point in the Congress setting up a Small Business Administration, and working through a small business committee as we do, only to supervise the destruction of small business, whether it is in the broadcasting business, the newspaper

business, the retailers and merchants business, or whatever type is threatened. There should be room enough in this tremendous country of ours for some of each, and the rules and regulations that would apply and benefit one group would not necessarily suffice to protect and benefit the other. We must not tie the hands of our broadcasting industry by rules and regulations which simply are not feasible or practical.

Mr. Reiten pointed out further that during the period from 1950 to 1960, the U.S. census indicated that almost all small farm service towns in North Dakota showed a decided decrease in population. This is one of the things I am very familiar with in my work on the House Agriculture Committee, and one of the things countless Members of Congress deplore in public and private statements. Small towns have been the bulwark of this Nation. I think it is no accident that many of our great leaders came from small towns or small communities. One of the reasons Mr. Reiten cited for the loss in population was that better advertising facilities were available to the larger cities in our State, and it naturally follows that restrictions on television advertising would further cramp the ability of these small towns to survive.

Some offer as a solution the use of more syndicated programs and less network. However, as Mr. Reiten again stated, to replace an hour network show with an hour syndicated film would not only cause them to lose the $60 network income but the syndicated show likewise would cost an additional $60. The end result of this would be that broadcasters would be $120 in the red before they even got started. This means the most efficient method of income for the small rural areas radio and television stations is to use spot announcements on the breaks, and selling locally produced news, weather, and sports programs. This is the area where the proposed new FCC rule would hit the hardest.

Farmers in North Dakota, and elsewhere, need advertising and information on where seed can be purchased, auction sales held, specials offered on farm machinery, the need to use insecticides, and other advertised services. If the small TV stations serving rural remote areas are to continue in operation, their ability to sell advertising must not be controlled.

Some specific statistics on charges and costs were pointed out by Mr. Reiten. This indicates local advertising rates average $25 a minute, $17 for 20 seconds, and $15.75 for a 10-second class A time. Class B rates average $12.75 a minute, $8.50 for a 20-second broadcast, and $6.50 for a 10-second broadcast. The class C rates average $6.50 for 1 minute, $4.30 for a 20-second spot, and $3.25 for a 10-second spot. National rates average less than their local rates, and the network average income for a spot is about one-third that of local. Yet it costs these same stations $1,200 a day to operate.

These are hard facts of life in the broadcasting industry, Mr. Chairman. These radio-television broadcasters do not ask the right to run their stations with no regard for the viewers. They know they are to operate in the public interest, and they know they have a responsibility to local communities. This they gladly accept. However, the FCC and the public has a corresponding responsibility to the radio-television people, to allow them to operate at a profit; to serve

rural and city people of the areas with freedom; to be given sufficient flexibility to schedule their spots to allow them to continue to operate in the public interest and to provide the service expected of them. In other words, this is not a one-way street. If restrictions are needed, my constituents have suggested such restrictions might more fairly be applied as to total number of spots on a weekly or monthly basis, rather than on a day part basis. Special consideration should be given to these small market stations. If, instead, arbitrary restrictions are placed on the number of commercials they can run during their station breaks, they could not possibly continue to operate in a satisfactory manner.

Mr. Henry O. Nybo, the general manager of radio station KSJB, in Jamestown, N. Dak., expressed his opposition, very briefly, to the proposed FCC ruling concerning limitation of commercial time. He summed up generally the arguments buttressed by the statistics offered by Mr. Reiten previously, when he stated:

> We feel such a ruling, if adopted, would impose a financial hardship on our area advertisers, as well as being contrary to the free enterprise system. As you know, the Dakotas are sparsely populated and merchandising is done during one or two peak periods of the year. The proposed ruling would limit time to many of our advertisers. Please give this matter your utmost consideration.

I feel we should do more than merely give it utmost consideration. I feel we should insist that special problems of my rural area be considered, as I would likewise consider those affecting any other Member's area of the country. In this I am somewhat in the position, though I am not claiming an actual comparison by any means, of the famous and beloved Englishman, Winston Churchill, who stated when an effort had been made to substitute the irrelevant action of a "war of pamphlets" in lieu of actual defense measures, in 1942, "We mean to hold our own. I have not become the King's First Minister in order to preside over the liquidation of the British Empire."

I have not, nor has any other Member of the House of Representatives been sent here by our constituents, to preside over the liquidation of any of their freedoms and the right to compete freely and fairly without undue hampering rules and regulations by any Government agency or department.

Mr. Chairman, this places me on record as supporting the legislation being discussed here. It places me on record as supporting the right of our North Dakota broadcasting industry to carry on their business in a responsible fashion, for the benefit of their own business as well as for the benefit of the public they serve.

Thank you for permitting me to appear on their behalf.

Mr. ROGERS of Texas. We appreciate your appearance, Mr. Short, and the information you have presented. Are there any questions? If not, thank you Mr. Short.

Mr. SHORT. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Our next witness is the Honorable E. William Henry, Chairman of the Federal Communications Commission, of Washington, D.C.

Mr. Henry, if you would, please introduce the other members of the Commission that are here and such staff members as you have that you think properly should be identified in the record.

STATEMENTS OF HON. E. WILLIAM HENRY, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; FREDERICK W. FORD, COMMISSIONER; ROBERT T. BARTLEY, COMMISSIONER; KENNETH A. COX, COMMISSIONER; LEE LOEVINGER, COMMISSIONER; AND ROBERT E. LEE, COMMISSIONER; ACCOMPANIED BY MAX D. PAGLIN, GENERAL COUNSEL; HENRY GELLER, DEPUTY GENERAL COUNSEL; GERARD M. CAHILL, ASSOCIATE GENERAL COUNSEL; JOEL ROSENBLOOM, LEGAL ASSISTANT TO CHAIRMAN; JAMES B. SHERIDAN, CHIEF, BROADCAST BUREAU; AND HYMAN GOLDIN, ASSISTANT CHIEF, BROADCAST BUREAU

Mr. HENRY. With your permission, I will sit down while I do it, Mr. Chairman, so that I am at the microphone.

The other Commissioners with me this morning are Commissioner and ex-Chairman Frederick Ford, on my far right; Commissioner Lee Loevinger, on my right; Commissioner Robert Bartley, on my immediate left; and Commissioner Cox to his left; and Commissioner Robert E. Lee.

Commissioner Rosel Hyde had a longstanding engagement in Florida which he felt he must keep, so he will not be with us this morning.

Mr. ROGERS of Texas. Mr. Henry, may I ask this question at this time, whether or not any of the other members of the Commission desire to make separate statements?

Mr. HENRY. I think, Mr. Chairman, that I have the only written prepared statement to make on it. I imagine they will want to make some comments. They can correct me if I am wrong.

Mr. BARTLEY. I have no statement. I had a dissent to the issuance of the proposed rulemaking. However, I am in agreement with the position with respect to the bill.

Mr. HENRY. I might point out, Mr. Chairman, that on the notice of proposed rulemaking which was issued some months ago, the vote was 4 to 3, with Commissioners Bartley, Hyde, and Ford dissenting. Mr. Minow was one of the majority, and of course, he has since left, so that leaves us evenly divided.

Mr. HARRIS. Mr. Chairman, since apparently there was a sharp division in the Commission, I think it would be appropriate at this point to have included in the record the decision of the Commission and the dissenting opinions, if those are available.

Mr. ROGERS of Texas. Are those available?

Mr. HENRY. They are available and we would like to insert them in the record with your permission.

Mr. ROGERS of Texas. Without objection, it is so ordered.

(The material referred to was submitted during Mr. Henry's testimony and appears on p. 22.)

Mr. FORD. I did not have a dissenting statement attached to the document. Rather, I made a speech on it and following the issuance of this, I made another one. I think the second one contains all the reasons I opposed this particular proposal. Other than that, I have no statement.

I have not joined in the Commission's statement, because I just do not know quite whether I can or cannot. I do not want, in joining in it, to indicate any favorable attitude toward the proposed rule-

making. On the other hand, I do not have any serious objection to the statement the Commission is making, so I thought perhaps I would just rely on the statement I had made on the merits and stay out of this particular statement one way or the other.

Mr. ROGERS of Texas. I think it probably would be better if the report of the Commission on the pending bill, together with the original notice of proposed rulemaking and the dissenting opinion, were to be included in the record at the beginning of the record, prior to any testimony and you will proceed from there. You may proceed, Mr. Chairman.

Mr. HENRY. Thank you, Mr. Chairman.

My name is E. William Henry and, as Chairman of the Federal Communications Commission, I appear here today to offer the Commission's views on H.R. 8316, introduced by Representative Rogers of Texas. Our comments apply equally to the identical bills introduced by Representatives Purcell, Broyhill, Langen, and Roberts of Alabama.

This bill would amend subsection 303(b) of the Communications Act to provide that the Federal Communications Commisison may not, by rule, prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of station in the broadcast service.

As you know, that subsection presently empowers the Commission to prescribe the nature of the service to be rendered by each class of licensed station and each station within any class, as the public convenience, interest, or necessity requires.

Thus, if H.R. 8316 were enacted, the Commission's authority under section 303 of the Communications Act would be circumscribed to the extent that it could not promulgate rules of general applicability to prescribe standards with respect to the length or frequency of advertisements broadcast by stations in the broadcast service.

The Commission's authority to act in this area, other than by rulemaking, would presumably be unimpaired. The Commission recognizes the importance of advertising revenue to the American system of broadcasting. Along with its predecessor, the Federal Radio Commission, it has also long recognized that the advertising practices of broadcast stations must be consistent with overall operation in the public interest. The Commission has over the years, therefore, dealt with this issue of excessive advertising on a case-by-case basis.

The line of decisions runs from *Great Lakes Broadcasting Co.* in 1929:

> Advertising must be accepted * * * as the sole means of support of broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege.

To *Palmetto Broadcasting Co.* (33 F.C.C. 250, 258), in 1962:

> * * * WDKD's programing was frequently saturated with commercial announcements. The conclusion is compelling that (the licensee) tailored his operation more to the convenience of his advertisers than to the need of the public.

On May 15, 1963, a majority of the Commission initiated a proceeding to determine whether adoption of rules might better serve the public interest in this field. Among possible advantages cited for a rule permitting an overall treatment of the problem were: definiteness, providing guidance to licensees, and applying equally to all competi-

tors in a given market. Accordingly, the Commission—Commissioners Hyde, Bartley, and Ford dissenting—adopted a notice of proposed rulemaking in docket No. 15083, requesting comments on proposed rules to limit the amount of time which could be devoted to commercial advertising in appropriate time segments. At this time, I offer a copy of that notice for the record.

(The document referred to follows:)

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D.C.

DOCKET NO. 15083

IN THE MATTER OF AMENDMENT OF PART 3 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO ADVERTISING ON STANDARD, FM, AND TELEVISION BROADCAST STATIONS

NOTICE OF PROPOSED RULEMAKING

1. Notice is hereby given of proposed rulemaking in the above-entitled matter.

2. This Commission, and its predecessor, the Federal Radio Commission, have consistently been concerned with the practices of licensees with respect to the broadcast of commercial continuity or announcements. Indeed, in one of its first pronouncements, the Federal Radio Commission stated:

"Advertising must be accepted * * * as the sole means of support of broadcasting, and regulation must be relied upon to prevent the abuse or overuse of the privilege." *Great Lakes Broadcasting Co.*, quoted in 3 F.R.C. Ann. Rep., 35.[1]

3. Thus, while it must be recognized that, as the only source of revenue for most broadcast stations, advertising is an indispensable part of the American system of broadcasting, it must be further recognized that broadcast stations cannot be operated primarily in the interest of advertisers in presenting their message to the viewing or listening public, or primarily in the interests of the station licensees in the revenues to be derived therefrom; broadcast stations must be operated in the public interest—the interest of the viewing or listening public in the nature of the program service received. Therefore, while without advertising broadcasting would not exist, with excessive advertising broadcasting is not in the public interest.[2]

4. Our case-by-case treatment of the problem, however, has not been satisfactory. Recently, we have noted a large number of applications for broadcast authorization which presented serious problems of overcommercialization, and coupled with this, our files are replete with substantial complaints from the public regarding the number of commercial announcements broadcast by some stations, the frequency and manner of program interruption for the broadcast of commercial announcements, and the length of some commercial announcements. Finally we cannot fail to note that the continuing efforts of the National Association of Broadcasters in attempting to accomplish a measure of self-regulation—which, obviously, would be preferable to any action by this Commission—have not met with success. Having promulgated commercial standards through its Codes of Good Practice, the NAB has only been able to enlist about 38 percent of all radio stations and 70 percent of television stations to subscribe to the Codes. And, with respect to those that have subscribed, the NAB, by itself, lacks effective sanctions to prevent abuses.

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[1] See also, *R. R. Jackman*, 5 F.C.C. 496 (1938), *Travelers Broadcasting Service Corporation*, 6 F.C.C. 456 (1938), (applications denied because of applicants' commercial policies); *The Walmac Co.*, 3 Pike and Fischer RR 1371 (1947), *Community Broadcasting Co.*, 3 Pike and Fischer RR 1360 (1947), *Eugene J. Roth*, 3 Pike and Fischer RR 1377 (1947), *Michigan Broadcasting Co.*, 20 Pike and Fischer RR 667 (1960), (applications designated for hearing on issues relating to number and length of commercial announcements); *Sheffield Broadcasting Co.*, 21 Pike and Fischer RR 507 (1961), *Fischer Broadcasting Co.*, 19 Pike and Fischer RR 997 (1961), (applicants given comparative demerits because of overcommercialization); and *Miss. Ark. Broadcasting Co.*, 22 Pike and Fischer RR 305 (1961), *Gordon County Broadcasting Co.*, 24 Pike and Fischer RR 315 (1962), (renewal applications granted for less than regular license period because of applicants' commercial announcement policies).

[2] Nor do we stand alone in recognizing that excessive commercialization is inimical to broadcasting in the public interest. The attempts by the National Association of Broadcasters to limit the amount of time devoted to advertising date back to 1929. See also, Sen. Res. 129, 72 Cong., 1st Sess. ("growing dissatisfaction with the present use of radio facilities for purpose of commercial advertising"); Hearings on H.R. 5589, 69th Cong., 1st Sess., pp. 81–882 (testimony of program sponsor); Hearings on S. 6, 71 Cong., 2d Sess., pp. 1752–3 (testimony of station president); p. 1801 (testimony of network president); Docket No. 12782, pp. 460, 1176, 8191 (testimony of members of public).

5. The establishment of generally applicable standards by means of rule-making procedures, on the other hand, may have a number of advantages. For, in addition to permitting an overall treatment of the problem, not available in case by case consideration, the rules adopted would have the added advantages of being definite, of providing guidance to licensees and of applying equally to all competitors in a given market. We recognize, of course, that there is a wide range within which various degrees of commercialization could be considered reasonable. However, we think the advantages of a definite rule outweigh this consideration. Moreover, the adoption of specific rules would not, necessarily, foreclose the flexibility inherent in case-by-case treatment, see Paragraph 7, *infra*, nor preclude us from amending our standards to accommodate changes in the broadcast field. In this latter connection, we recognize that the NAB has amended its Codes on numerous occasions over the years.[3]

6. Turning now to the provisions of the proposed rules, as we indicated in our Public Notice of March 28, 1963 (No. 33626), "one proposal on which comments will be sought would be the adoption of a rule requiring all AM, FM and TV broadcasting stations to observe the limitations on advertising time which are presently contained in the Radio and Television Codes of the National Association of Broadcasters." The NAB Codes, which are the culmination of many years of extensive consideration and experience, and which represent the broadcast industry's own conclusion as to the minimum broadcasting standards, obviously are particularly suited for serious consideration by us as the basis for our proposed rules. Therefore, we have incorporated the provisions of the Codes in the amendments to our rules and regulations proposed herein. Such provisions are attached hereto as an appendix.

7. We emphasize, however, that we are by no means inflexible as to the most desirable ultimate solution to this difficult and complex problem. As we also stated in our Public Notice of March 28, 1963:

"The Commission does not desire to limit its consideration of proposed policies in any way. Rather, it wishes to obtain public comment on the widest range of alternatives, so that it may have an adequate basis upon which to adopt the policies which would best serve the public interest in this area."

Further, we recognize that the provisions of the NAB Codes may not be appropriate for across-the-board application to all broadcast stations. For example, we can appreciate that there may be need for separate standards to be applied to certain special categories of stations, such as standard stations licensed to operate only during daytime hours, or stations licensed to sparsely populated communities, or stations located in communities with seasonal economy, etc. Therefore, we invite comments, and, indeed, proposals, on these specific categories, or any other categories that may warrant special treatment. For example, daytime standard broadcast stations are requested to state whether more liberal standards, i.e., more liberal maximum and average commercial limitations, should be made applicable to them during the winter months, and, if so, what these standards should be. Small market stations of all classes are requested to make a similar showing on standards which they may require in view of the advertising rates obtainable in their markets. Small market television stations are requested to comment specifically on whether they require more than 70 seconds of commercial time on station breaks. And all stations are asked to comment whether there are days of the week or times of the day when more liberal limitations are required. Stations who support more liberal standards are asked to substantiate their position by providing the Commission with specific data on advertising requirements in their community and to relate these data to income requirements needed to support an operation in the public interest. Additionally, all stations are requested to comment on the necessity or desirability of excluding time for paid political announcements in computing total commercial time under the proposed rules. Finally, we recognize that there may be circumstances that may warrant that a waiver or exemption be accorded to certain broadcast stations. Therefore, we invite comments, and, again, proposals, directed to the questions of what circumstances should be considered as warranting waiver, the type of showing we should require before granting a waiver, and the procedures that licensees should follow in

[3] Additionally, specific rules would provide us with a broad range of sanctions—any one of which could be called into play soon after discovery of an abuse. Thus, instead of the "death penalty" (i.e., revocation or denial of renewal of license), which, absent a rule are the only sanctions available to us, we could issue a cease and desist order pursuant to Section 312(b) of the Communications Act (47 U.S.C. 312(b)), or impose a forfeiture pursuant to Section 503(b) (47 U.S.C. 503(b)).

requesting a waiver (i.e., formal petition at any time during license period, specific request in connection with an application for broadcast authorization, etc.).

8. With respect to the specific provisions of the proposed rules, the NAB Codes may be summarized as follows: For radio, maximum amounts of time are specified for the broadcast of commercial continuity, in the case of sponsored programs, and commercial announcements, in the case of programs with participating spot announcements. For the former, the maximum is determined by reference to the length of the program; thus, a 5-minute sponsored program may include 1 minute and 20 seconds of commercial continuity, and a 60-minute program may include 7 minutes of commercial continuity. For programs of intermediate length, the allowable commercial continuity varies, although no fixed ratio is followed. With respect to programs with participating announcements, the maximum is computed on an hourly basis without reference to the length of the program. Thus, commercial announcements in such programs may amount to an average of 14 minutes an hour, the average computed on a weekly basis, although no single hour may include more than 18 minutes of commercial announcements and no single 15-minute segment more than 5 minutes of commercial announcements. The NAB, in computing these latter limits, counts the amount of time devoted to commercial continuity during sponsored programs as well. It should be emphasized that single sponsorship in radio is the exception and that the standards that will be applicable for the great majority of programs are those described for programs with participating spot announcements. Additionally, the Radio Code contains a separate provision for special types of programs, such as "classified," "swap shop," etc.

9. For television, no distinction is drawn between sponsored and programs with participating announcements; instead separate standards are applied to "prime time" programs (usually between 6–11 p.m.) and programs during all other hours. During prime time, the maximum amount of time that may be devoted to commercial continuity or announcements is 8 minutes per hour. In addition, 2 minutes and 20 seconds are allowed for station breaks, which may include commercial announcements. During all other hours, 12 minutes an hour, plus station break time, may be devoted to commercial continuity or announcements.

10. The distinction in the Television Code between prime time and other hours also applies to the classification of nonprogram material. During prime time, billboards (i.e., opening and closing sponsorship identifications), public service announcements and promotional announcements are counted in determining the hourly limits, although they are not so counted during other hours. Additionally, the Television Code provides that during the hours outside of prime time no more than three announcements may be broadcast consecutively. This provision does not apply to prime time.[4]

11. Finally, it is to be noted that neither the Radio nor the Television Code treats with (*a*) length of individual commercial announcements; (*b*) the number of times programs may be interrupted for the broadcast of commercial continuity or announcements (either in terms of the length or nature of the program interrupted); (*c*) the amount of program time that must elapse between interruptions for the broadcast of commercial continuity or announcements (again, either in terms of the length or nature of the program interrupted); and (*d*) the maximum amount of broadcast time that may be consumed by an interruption of a program for the broadcast of commercial continuity or announcements.

12. We emphasize that we are greatly concerned with the problem of excessive commercialization, and, therefore, parties filing adverse comments are requested, in addition, to supply a critical analysis and counterproposals directed to the merits of this Notice. Finally, in furtherance of our desire to receive as broad a cross section of comments and proposals as possible, we specifically invite the comments and suggestions of all organizations and members of the public interested in the problem. Comments from the public have been most helpful to us in the past, and we anticipate that they will be equally helpful in this proceeding.

13. Authority for the adoption of the amendments proposed herein, as set forth in the attached Appendix, is contained in Sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended.

14. Pursuant to applicable procedures set forth in Section 1.213 of the Commission's Rules and Regulations, interested persons may file comments on or

[4] It should be noted that there are no counterparts in the Radio Code to the Television Code provisions with respect to nonprogram material and consecutive announcements.

before July 1, 1963, and reply comments on or before July 15, 1963. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

15. In accordance with the provisions of Section 1.215 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,*
BEN F. WAPLE, *Acting Secretary.*

Attachment.
Adopted: May 15, 1963.
Released: May 17, 1963.

[Attachment]

RADIO

A. PROGRAMS WITH PARTICIPATING COMMERCIAL ANNOUNCEMENTS

Program time:	*Commercial time* [1]
60 minutes:	
Average [2]	14 minutes.
Maximum	18 minutes.
15 minutes: Maximum	5 minutes.

B. SPONSORED PROGRAMS

Program time:	*Commercial time* [3]
For 5-minutes programs	1 minute 30 seconds.
For 10-minute programs	2 minutes 10 seconds.
For 15-minute programs	3 minutes.
For 25-minute programs	4 minutes.
For 30-minute programs	4 minutes 15 seconds.
For 45-minute programs	5 minutes 45 seconds.
For 60-minute programs	7 minutes.

TELEVISION

A. PRIME TIME [4]

	Commercial time [5]
Program time: 30 minutes	4 minutes. [6]

B. OTHER HOURS

1. Program time:	*Commercial time*
30-minute period	6 minutes. [7]
10-minute program	2 minutes 10 seconds.
5-minute program	1 minute 15 seconds.
2. Consecutive announcements	3 maximum.

APPENDIX

It is proposed to amend part 3 of Commission rules and regulations as follows: New §§ 3.123, 3.298, and 3.669 are added, as follows:

§ 3.123. Advertising.

(*a*) No station shall broadcast advertising material by any single sponsor, regardless of the type of program, in excess of the time in the following table:

*See attached Dissenting Statements of Commissioner Hyde and Commissioner Bartley.
[1] Includes both commercial spot announcements and commercial continuity broadcast during sponsored programs.
[2] Computed on a weekly basis.
[3] Exclusive of station breaks.
[4] Defined as a continuous period of not less than 3 hours within the station's highest rate time periods.
[5] Includes public service and promotional announcements and billboards. This is not included in (B) above.
[6] Additionally, 70 seconds may be devoted to station break time, which may include commercial announcements.
[7] Plus station break time, which may include 3 commercial announcements, the maximum length of 2 of which is not specified. The third (station ID) is limited to 10 seconds.

Provided, however, That the time standards allowable to a single advertiser do not affect the established practice of allowance of station breaks between programs.

Program time	*Commercial time*
For 5-minute programs	1 minute 30 seconds.
For 10-minute programs	2 minutes 10 seconds.
For 15-minutes programs	3 minutes.
For 25-minute programs	4 minutes.
For 30-minute programs	4 minutes 15 seconds.
For 45-minute programs	5 minutes 45 seconds.
For 60-minute programs	7 minutes.

(*b*) The time to be used for advertising in announcement or participating type programs is not to exceed a maximum of an average of 14 minutes an hour computed on a weekly basis, 18 minutes in any single hour, or 5 minutes in any 15-minute segment. For the purpose of determining advertising limitations, such program types as "classified," "swap shop," "shopping guides," and "farm auction" shall be regarded as containing 1½ minutes of advertising for each 5-minute segment.

§ 3.298. Advertising.

(*a*) No station shall broadcast advertising material by any single sponsor, regardless of the type of program, in excess of the time in the following table: *Provided, however*, That the time standards allowable to a single advertiser do not affect the established practice of allowance of station breaks between programs.

Program time	*Commercial time*
For 5-minute programs	1 minute 30 seconds.
For 10-minute programs	2 minutes 10 seconds.
For 15-minutes programs	3 minutes.
For 25-minute programs	4 minutes.
For 30-minute programs	4 minutes 15 seconds.
For 45-minute programs	5 minutes 45 seconds.
For 60-minute programs	7 minutes.

(*b*) The time to be used for advertising announcement or participating-type programs is not to exceed a maximum of an average of 14 minutes an hour computed on a weekly basis, 18 minutes in any single hour, or 5 minutes in any 15-minute segment. For the purpose of determining, advertising limitations, such program types as "classified," "swap shop," "shopping guides," and "farm auction" shall be regarded as containing 1½ minutes of advertising for each 5-minute segment.

§ 3.669. Advertising.

(*a*) Within prime time, which is defined as a continuous period of not less than 3 hours of each broadcast day within the station's highest rate-time periods, commercial material for both individually sponsored and participation programs within any 30-minute period may not exceed 4 minutes, plus total station break time, in the aggregate of 70 seconds. Commercial material in prime time includes billboards, public service announcements, promotional announcements for other programs, as well as commercial copy. Station breaks in prime time shall consist of not more than two announcements plus noncommercial copy such as station identification or public service announcements. Total station break time in a 30-minute period may not exceed 1 minute 10 seconds.

(*b*) Within all hours other than prime time, commercial material for both individually sponsored and participation programs within any 30-minute time period may not exceed 6 minutes plus station break time., Commercial material for all other than prime time shall not exceed this ratio, except that individual programs of 5 minutes' duration may include commercial material not in excess of 1 minute 15 seconds, and individual programs of 10 minutes' duration may include commercial material not in excess of 2 minutes 10 seconds. Not more than three announcements shall be scheduled consecutively. Commercial material within nonprime time does not include public service announcements, promotional announcements for other programs, and opening and closing "billboards" which give program or sponsor identification. Station breaks in nonprime time shall consist of not more than two announcements plus the conventionally sponsored 10-second station identification.

(c) For the purpose of computing commercial time, reasonable and limited identification of prizes and statements of donor's name (within formats wherein the presentation of contest awards or prizes is a necessary and integral part of program content) shall not be included as commercial time. However, any aural or visual presentation concerning the product or its donor, over and beyond such identification and statement, shall be included as commercial time.

DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

In the Matter of Notice of Proposed Rulemaking To Prescribe Limitations on Commercial Material Broadcast by Standard Broadcast, FM Broadcast, and Television Brodacast Stations:

I dissent to the proposal of the majority which in essence looks toward adoption of the present Radio and Television Codes of the National Association of Broadcasters as Commission regulations.

This effort, it seems to me, is likely to place an enormous policing duty upon the Commission which could give more adverse results than benefits. I believe the proposal is inconsistent with the statutory concept of broadcasting as a competitive private enterprise service.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent to the issuance of this "proposed rulemaking." I view it as an irritating act of futility. It is inconceivable to me that, when the responses are considered, the Commission would adopt such a rule. I base this prediction on the knowledge of broadcasting which the Commission already has. We know that some stations are able to operate the year round by reason of the revenues produced mainly during certain seasons. We know that some stations operate a full week on revenues produced from Thursday to Saturday. We know that some stations can operate full time (some 24 hours) on revenues produced in peak listening hours. We should know that *some* stations with a greater number of commercials are more listenable because of their attention to the quality of production and presentation (sometimes entertaining and many times informative) where on the other hand some other stations allow screaming, irritating, and obnoxious commercials which result in headaches that the advertised product is supposed to cure, but, because the commercials are *fewer* in number, would meet the code requirements any quarter hour of the day or night or season.

Moreover, I believe that a rule incorporating the NAB Code provisions on commercial time would be an improper delegation of FCC responsibility for continuous surveillance of the public interest. Also, such a rule would have a tendency to freeze the NAB Code provisions and preclude improvement. Indeed, a general lowering of commercial-time standards could result from stations' hiding behind the skirts of recognized maximum quantity and disregarding acceptable quality. I believe that operation of AM stations is especially vulnerable to such practice.

Mr. HENRY. As we stated in that notice, our proposal is based essentially on the standards presently set forth in the television and radio codes of the National Association of Broadcasters. Since these standards are the culmination of many years of extensive consideration and experience, they appeared to be a realistic point of departure for our study. I should like to make clear that we are not proposing to blindly adopt the NAB codes. Rather, as we stated, these codes obviously warrant our serious study and are appropriate starting points of our inquiry.

Let me briefly summarize the pertinent provisions of the NAB codes. In the radio code, maximum amounts of time are specified for the broadcast of commercial continuity in the case of sponsored programs, and commercial announcements in the case of programs with participating spot announcements. For the former, the maximum is determined by reference to the length of the program; thus, a 5-minute sponsored program may include 1 minute and 30 seconds of commercial continuity, and a 60-minute program may include 7 minutes of commercial continuity.

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KANSAS STATE COLLEGE LIBRARY MANHATTAN, KANSAS

I might add at this point that our notice contained a copy of the NAB radio and television codes. I think you probably have been supplied with copies of those. If you want to turn to that page, you will find laid out a little better exactly what the NAB code limits are on advertising. For programs of intermediate length, the allowable commercial continuity varies, although no fixed ratio is followed.

With respect to programs with participating announcements, the maximum is computed on an hourly basis without reference to the length of the program. Thus, commercial announcements in such programs may amount to an average of 14 minutes an hour, the average computed on a weekly basis, although no single hour may include more than 18 minutes of commercial announcements and no single 15-minute segment more than 5 minutes of commercial announcements. The NAB, in computing these latter limits, counts the amount of time devoted to commercial continuity during sponsored programs as well. Since single sponsorship in radio is the exception today the standards that will be applicable for the great majority of programs are those described for programs with participating spot announcements. Additionally, the radio code contains a separate provision for special types of programs, such as "classified," "swap shop," etc.

For television, no distinction is drawn between sponsored programs and programs with participating announcements; instead, separate standards are applied to "prime time" programs—usually between 6 to 11 p.m.—and programs during all other hours. During prime time, the maximum amount of time that may be devoted to commercial continuity or announcements is 8 minutes per hour. In addition, 2 minutes and 20 seconds are allowed for station breaks, which may include commercial announcements, that is a minute and 10 seconds each half hour for a station break. During all other hours, 12 minutes and hour, plus 4 minutes and 20 seconds station break time, may be devoted to commercial continuity or announcements.

Neither the radio nor the television code treats specifically with (*a*) length of individual commercial announcements; (*b*) the number of times programs may be interrupted for the broadcast of commercial continuity or announcements (either in terms of the length or nature of the program interrupted); (*c*) the amount of program time that must elapse between interruptions for the broadcast of commercial continuity or announcements (again, either in terms of the length or nature of the program interrupted); or (*d*) the maximum amount of broadcast time that may be consumed by an interruption of a program for the broadcast of commercial continuity or announcements.

In our notice of proposed rulemaking, we recognized that the provisions of the NAB codes may not be appropriate for across-the-board application to all broadcast stations. For example, we indicated that there may be need for separate standards to be applied to certain special categories of stations, such as standard stations licensed to operate only during daytime hours, or stations licensed to sparsely populated communities, or stations located in communities with seasonal economies. Therefore, we invited comments and proposals on these specific categories, or any other categories that may warrant special treatment. Daytime standard broadcast stations were thus requested to state whether more liberal standards—by that I mean more liberal maximum and average commercial limitations—should be made applicable to them during the winter months, and, if so, what

these standards should be. Small market stations of all classes were requested to make a similar showing on standards which they may require in view of the advertising rates obtainable in their markets. Small market television stations were invited to comment specifically on whether they require more than 70 seconds of commercial time on station breaks. And all stations were asked to comment whether there are days of the week or times of the day when more liberal limitations are required.

Stations which support more liberal standards were asked to substantiate their position by providing the Commission with specific data on advertising requirements in their community and to relate these data to income requirements needed to support an operation in the public interest. Additionally, all stations were requested to comment on the necessity or desirability of excluding time for paid political announcements in computing total commercial time under the proposed rules. Finally, we recognized that there may be circumstances that may warrant that a waiver or exemption be accorded to certain broadcast stations. Therefore, we invited comments, and, again, proposals directed to the questions of what circumstances should be considered as warranting waiver, the type of showing we should require before granting a waiver, and the procedures that licensees should follow in requesting a waiver—by that, we meant whether by formal petition at any time during license period, or by specific request in connection with an application for broadcast authorization, or some other procedure.

Through extensions of time, interested persons had from May 15 until September 30 to file comments, with reply comments due October 14. A considerable volume of material has been received which will, of course, be thoroughly studied by the Commission.

We wish to stress that the Commission, in view of the posture of the rulemaking proceeding, has reached no conclusions in docket No. 15083. Moreover, in order to have the full benefit of the views of interested parties, the Commission has scheduled an en banc oral hearing on the matter to be held December 9. Only after the Commission considers all of the material presented in the comments, reply comments, and in the hearing, will it be in a position to determine what course will best serve the public interest.

There is, of course, at this stage a wide range of possibilities. For example, the Commission could decide not to adopt any rule but rather continue the case-by-case approach; or to issue a policy statement setting forth definite guidelines to be employed by the Commission at the time of renewal; or to promulgate a comprehensive rule dealing with various categories of stations; or to issue a rule directed only to certain categories, with the other stations treated on a case-by-case basis. The foregoing list is not exhaustive but is set out merely to point up the very large area of possible judgment involved. Indeed, in our public notice of March 28, 1963, on this subject we emphasized:

> The Commission does not desire to limit its consideration of proposed policies in any way. Rather it wishes to obtain public comment on the widest range of alternatives, so that it may have an adequate basis upon which to adopt the policies which would best serve the public interest in this area.

With this background, I would like now to discuss H.R. 8316. First, the Commission respectfully urges that legislative considera-

tion of this important area await the outcome of the proceeding in docket No. 15083. Thus, if the Commission determines, after study of the pleadings, that a rule is inappropriate, there would be no need for enactment of H.R. 8316. If, on the other hand, the Commission does determine that a rule is called for, it will, as the Administrative Procedure Act and good administration require, set forth the bases of that rule. The Commission's action will not only be subject to possible judicial review but Congress will then be in a position to review a precise rule, dealing specifically with various situations, and the factual and policy bases set forth in support of whatever rule may be adopted.

Second, we respectfully suggest that well-established and sound policy in this area favors continuation of the Commission's present broad authority, rather than its curtailment through enactment of H.R. 8316. The area of overcommercialization in the broadcasting field involving as it does changing complex economic and related factors, would appear to be the kind of problem as to which "the expert's familiarity with industry conditions" should be applied. (See *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, 310.) The Commission, in the pending rulemaking proceeding, is in the process of acquiring up-to-date data and comments in order to put it in a position to make public interest judgments, utilizing the comprehensive, expansive powers and very broad flexibility which Congress bestowed upon it in order that it might deal effectively with this dynamic industry (*N.B.C.* v. *U.S.*, 319 U.S. 190, 215–219; *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–38).

Under H.R. 8316, the Commission would be stripped of desirable authority and of a great deal of its flexibility in dealing with the ever-changing trends in this important area of overcommercialization. Of course, the Commission might still deal with such problems on a case-by-case basis, coupled with policy statements or guidelines to be applied to applications coming before it, if it thought this method was appropriate. But assuming that a compelling showing had been made that some form of a rule would best serve the public interest, the Commission would be precluded from issuing the rule. Further, such prohibition would be applicable not only to the pending proceeding (docket No. 15083), but also to the indefinite future. As the Supreme Court noted in the *Pottsville* case, *supra*, at p. 138:

> [U]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

In sum, the Commission fully appreciates and recognizes Congress' interest in this vital and sensitive area. For the reasons stated, however, we oppose enactment of H.R. 8316. We urge that this one area not be singled out for special prohibition against rulemaking—that the Commission not be deprived, in this one area, of the broad discretion which Congress gave it to meet changing problems and circumstances in the communications field. Rather, we respectfully suggest that here, as in other fields, the Commission be permitted to act as, in its judgment, the public interest standard requires, subject to congressional and judicial review.

Mr. ROGERS of Texas. Thank you, Mr. Henry, for your statement. I will ask Mr. Moss if he has any questions.

Mr. Moss. Mr. Henry, I want to compliment you on what I consider to be a most carefully reasoned and responsible statement on the part of the Commission. I know that in the course of these hearings, and I regret previous commitments will not permit my attending the next 2 days of hearings, we are going to have questions raised as to the constitutionality and involvement of censorship. It is my firm conviction that neither issue is involved here. I think the public interest is very deeply involved. I do not see how it would be possible for the Commission to undertake to regulate in the public interest if in this important area, where there is already significant complaint the Commission were unable to regulate. I have noted in broadcast publications that advertisers and agencies have been protesting the overcommercialization, the great number of interruptions, and I think anyone who views a reasonable amount of time has no difficulty in arriving at the conclusion that some stations have certainly gone well beyond the limits of intrusion which the public should have to put up with in order to enjoy this media where the total viewer and listener investment is, in my judgment, much greater than the investment of the broadcaster.

It seems strange to me that stations who for years have been loudly proclaiming their adherence to the code of the National Association of Broadcasters should be brought into point as a basis for this important discussion, and should find something onerous about it. Many of us had assumed they were operating under it. Apparently, they were not.

I want to fully subscribe to the statement you have given on behalf of a majority of the members of the Commission. I think the proposed legislation would be most unwise at this or any other time. That is all, Mr. Chairman.

Mr. ROGERS of Texas. The gentleman from California, Mr. Younger.

Mr. YOUNGER. Thank you, Mr. Chairman.

Mr. Henry, I take it from your statement that you do not have any confidence in the public being the party to discern when too much advertising is used in broadcasting.

Mr. HENRY. Well, Mr. Younger, I think that the public will put up with an awful lot before it will complain. I do not think that we can consider that that is the whole story; no.

Mr. YOUNGER. In other words, you think that the Commission is the one to determine rather than the public acceptance.

Mr. HENRY. Well, personally, I think that the Commission is the one to establish some minimum standards in this field. I do not say that the broadcasters themselves could not go further, but I do think we ought to put some limitation on it, some broad limitation.

Mr. YOUNGER. On page 2, you say the rule would be limited equally to all competitors in a given market. How can you issue a rule in rulemaking that would apply to all the various markets in this country?

Mr. HENRY. That is one of the major difficulties. We do not know that we can. That is why we solicited the comments of the industry to advise us on this point. We were not at all sure that we could. We knew, in fact, or at least thought that even if we did attempt to enact a rule that would apply across the board to all competitors, we would very probably have to grant waivers in certain cases, or that we might have to enact one rule for one class of stations and

another for another. But this is what we solicited comments on, to help us make that judgment.

Mr. YOUNGER. Would you not be setting up a process in that field that would permit the Commission to grant favors here and deny favors somewhere else wherever you wanted to?

Mr. HENRY. No, I do not think so, because we certainly could not discriminate. If a licensee thought that we had discriminated, this would be a very clear basis for appeal to courts, I think. We make judgments every day as to the application of rules or a set of rules to a given set of facts. I do not think the situation would be any different in this case.

Mr. YOUNGER. But normally, you do not make rules that affect the income of the station.

Mr. HENRY. Yes, we do. Almost every rule that we make has some economic impact. There are any number of instances of that and I think this again is no different.

Mr. YOUNGER. On page 5, you say "relate these data to income requirements needed to support the operation in the public interest." Are you going to set up a system whereby the Commission is going to go into the economics of each licensee to determine whether or not it is good management and whether or not the operation is in the public interest so far as advertising is concerned?

Mr. HENRY. I think if we were required to—let us say we had a rule and someone came in and requested a waiver on the basis that, let us say, his advertising was seasonal, that he was in Mr. Harrison's State of Wyoming and that he relied on winter tourist trade and so on to make ends meet. I think we would accept any bona fide statement to this effect. We would naturally inquire into the facts to see that there was some—that he had substantiated his claims to a reasonable degree.

Now, again, this is something that we do almost every day. We have been required to do it in some cases, as a matter of fact, by the court. The court held, for example, in the so-called *Carroll* case, where a licensee came in and said that if we granted another station in his market, his income would be so drastically reduced that he could not make ends meet and therefore the public interest would be harmed because the public would lose some of his better programs.

The court has required us, on a substantiated allegation of this kind, to set that down for a hearing and inquiry. Of course, in the case of commercials, I would assume that if we were not to grant a waiver, he could always be entitled to a full, on-the-record hearing to substantiate his claim.

Mr. YOUNGER. How in the world would you expect to take care of all of these complaints when you cannot handle the workload that you have now? You have several hundred stations with renewals that have been held up. Look at the workload that you are going to take on with this kind of a regulation. Now, how do you propose to handle it and what cost would it be?

Mr. HENRY. This would certainly be a factor that we would have to consider—both of those things: One, the amount of time and effort that would be required, and secondly, the amount of money that it would take. We have not gotten to the point yet of debating the merits of any given rule, of getting that deeply into it. But both of those factors would indeed be relevant.

Mr. YOUNGER. It would seem to me that it would be quite relevant, because with the load factor that you have now, if you placed on top of that the number of cases and appeals that you would have in the various markets for exception, and if you were going to grant full hearings to those, I just do not see how in the world it is humanly possible to handle that kind of a load.

Mr. HENRY. Well, again, I do not know exactly what the load would be. The Commission, I can assure you, has no desire to bite off additional pieces. We have a lot at the moment. We would not be so concerned about this if we did not think, though, that it was an extremely important aspect of our duty to see that they operate in the public interest. This is why we are considering it, and again, I say that those two things that you mentioned would be relevant.

Mr. YOUNGER. Do you think that the Commission has any right to set rates, advertising rates?

Mr. HENRY. No; I do not.

Mr. YOUNGER. How do you differentiate? You say that they can only have so many commercials and they have to have a certain amount of money coming in. Are you not, by virtue of that, determining the rate which they must charge?

Mr. HENRY. We do not think so. At least I personally do not, because we would not be setting the price of commercials. We would be setting the overall amount of time that is to be devoted to advertising or to commercial continuity. I would assume that if the limitation went through and a number of commercials had to be reduced in a given situation, each of those commercials might be more valuable to the advertiser and might make the station more popular and the radio station operator's income might go up.

Mr. YOUNGER. I do not know. Judging from the correspondence I have received, most of the licensees today are as nervous as can be with the present rules and regulations on where they stand. If you are going to impose on top of the present regulations, which keep them nervous all the time, such a rule as this, I think that you will not be acting, in my opinion, in the public interest.

That is all, Mr. Chairman.

Mr. HENRY. We would be a lot better off, I think, if the licensees had responded to our notice as we had asked them to. All of these questions give us concern, as they do you. Therefore, we had asked for specific instances or examples of what the economic effect of such a rule would be in a given market, in a given community, to a given station. We have had almost no comments to this effect, so we are still in the dark and we are still asking.

Mr. YOUNGER. Well, I think that the answer to that in my opinion is that you have the stations in such shape now that they are absolutely afraid to put anything in writing with their name attached to it because of punitive action that might be taken. I think that is true. In my correspondence, that would show that.

Mr. HENRY. Well, I do not know. If there is such a fear, all I can say is I personally would believe that it is unfounded.

Mr. ROGERS of Texas. That is all.

Mr. Harris?

Mr. HARRIS. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Mr. Henry, in item 4 of the FCC's notice of proposed rulemaking, you state that you have had a large number of complaints. Let me quote this, if you will:

> Recently, we have noted a large number of applications for broadcast authorization which presented serious problems for overcommercialization, and coupled with this, our files are replete with substantial complaints from the public regarding the number of commercial announcements broadcast by some stations, the frequency and manner of program interruption for the broadcast of commercial announcements, and the length of some commercial announcements.

How many complaints concerning these broadcast commercial announcements have you received?

Mr. HENRY. I asked the staff to check that for me before I made a speech in New York recently and the answer they gave me was 2,500 complaints relating to this field. I am not quite sure over what amount of time it was that those complaints came in, and I have forgotten the exact percentage of all complaints that this is, but it constitutes a goodly part of the total amount of complaints about broadcasting that we get.

Mr. BROYHILL. 2,500 complaints concerning commercial announcements?

Mr. HENRY. That is my recollection; yes.

Mr. BROYHILL. What percentage of these dealt primarily with the length and amount and frequency of advertising?

Mr. HENRY. I think the figure was about 35 percent.

Mr. BROYHILL. Thirty-five percent. Well, this would be roughly, looking at it here, about a thousand complaints a year, then?

Mr. HENRY. I think that is correct, yes; relative to the aspect of commercialization that this rulemaking pertains to.

Mr. BROYHILL. This appears to me to be a fairly small number, really, when you consider that there are over 5,000 commercial radio and television stations in the United States. Is that about the correct number of commercial broadcasters?

Mr. HENRY. That is right. There are that many radio stations, approximately.

Mr. BROYHILL. And figuring very quickly here, when you relate the 1,000 complaints per year with the 5,000 broadcasters, that would only amount to 1 complaint for every 5 stations per year.

Mr. HENRY. There are several ways of looking at that and yours, of course, is one way. Now, as far as I am concerned, I do not know what the multiplication factor is that you ought to multiply each letter by to determine how many people are really seriously concerned about this. It may be a thousand, it may be 10,000. I do not know how many people actually take the time to sit down—first of all, who know about the FCC and, second, take the time to sit down and write a letter to us. As I say, maybe it is 1,000, maybe it is 10,000. But if you multiply it by whatever factor you think is appropriate, and you consider it as a percentage of the total complaints we get, I consider it a substantial number of complaints.

Mr. BROYHILL. What you are doing is setting up yourself as a judge of what the people really think. It seems to me you go on assumption and you have to go on facts. These complaints are facts, of course.

Mr. HENRY. They are, indeed.

Mr. BROYHILL. What are the standards that you presently use in the term "at renewal time," whether or not a station has, in your opinion, and I quote, "overcommercialized"?

Mr. HENRY. I do not know what they are. They vary as Commissions vary. They vary as Chiefs of the Broadcast Bureau vary. They vary as staffs of the Broadcast Bureau vary, as public reaction varies, I suppose, as congressional reaction varies. There are no fixed criteria whatsoever.

I might say that there has been, however, a continuous laxing, or relaxing, of these standards.

In 1949, the staff had an unofficial, I suppose, delegation—it was never put into writing—to question any station that had over 600, any daytime station that had over 600 and any full-time station that had over 750 commercial announcements per week. Figured on an average of about a hundred hours per week per station, this was seven and a half commercial announcements per hour. As I say, in 1949, the staff was under such a delegation to question any licensee that had more than this number of commercial announcements. It was raised to a thousand in 1955, as I understand it, and I do not know what it is today. I do not think there is ay specific delegation to the staff now as to when to question a station with respect to its overcommercialization.

Mr. BROYHILL. The reason I bring this up is because in your statement you indicate that if this committee does nothing and if your Commission does nothing, then you will continue to deal with these matters on a case-by-case basis.

Mr. HENRY. Yes. That is the way we treat it, but as I say, I do not know—I can not answer your question as to what the key is to determine when one application will be picked out of the thousands that we get and say, "This is questionable." We have had very few, if any, cases that have actually gone through hearing on the question of overcommercialization.

Mr. BROYHILL. Then does this indicate that there is very little problem in the area, then?

Mr. HENRY. I do not think so, because I think it indicates a reluctance on the part of the Commission to grapple with this area or a feeling that you can not grapple with it.

Mr. BENNETT. Will you yield?

Mr. BROYHILL. I will be glad to.

Mr. BENNETT. How many licensees has the Commission refused to renew because of the overcommercialization, as you call it?

Mr. HENRY. As far as I know, none.

Mr. BENNETT. When did this become such a great problem, then? In other words, if it has not been serious enough for you ever to exercise the authority that you claim you have to refuse to renew a license, if the station overcommercializes and thus, in your opinion, or in the Commission's opinion, is not operating in the public interest, has not been serious enough for you ever to have refused a license renewal, it does not look to me as though it is too serious a problem. I wonder if you would tell us more about why this is so serious.

Mr. HENRY. Well, Mr. Bennett, that deserves a long and complete answer, and I will try to answer it briefly. Ever since the Radio Commission was created and then the Communications Commission, there has been a lot of concern about this and continually, the standards have gone down in the industry itself. There has been a con-

tinuous relaxing of those standards and I think to best answer your question, there has always been a continuing concern about it. Previous chairmen, previous Commissioners, the Congress, the public, have all expressed concern about it. But it is a very delicate area and I do not think any Commission has been willing to come to grips with it. The only sanction that we have had against overcommercialization is license revocation. This is the death penalty, so to speak, and there has been a natural reluctance to invoke the death penalty against stations when you had no fixed criteria by which to judge them.

So there have been a lot of cases where we have expressed our concern, but they have never gone to hearing because the remedy, in light of the Commission's lack of rules, and so on, did not seem to fit the crime. I think this is the basic answer.

The way it was usually handled—this is a case which was as late as September 1962. We granted a short-term renewal to station WCGA in Calhoun, Ga. This is a statement of public notice of the Commission as to how that was treated. In the application for renewal, WCGA had proposed to carry no more than eight spot announcements in each 14½ minutes. This would have been some 32 spot announcements per hour. We questioned that and we sent them a letter asking them how they could justify it. They changed their proposal—they said in fact, they were broadcasting only 9 commercial spot announcements per hour instead of 32 and they they proposed, for the ensuing license period, to broadcast approximately 13 spot announcements per hour, none of which would exceed a minute in length. So we granted a license. This was an expression of concern on the part of the Commission, but it washed out, which is usually the case.

That apparently established no precedent, because many, many stations—in fact, practically all of them, I would assume—do not follow the 13 commercial spot announcements per hour, certainly not as a maximum. They may on the average. But these are some of the reasons why I think there has not been more action in this field.

Mr. BROYHILL. Let me say it appears to me from your testimony that I have not been sold yet that there is a problem in this area.

Mr. HENRY. Mr. Chairman—excuse me—I did want to point out some additional facts that I think are relevant to these questions in my personal statement. I wondered if it would be appropriate for me to read it at this point, depending on what the time of the committee members is.

Mr. ROGERS of Texas. If the gentleman would yield, Mr. Broyhill, let me make this observation: Chairman Henry did indicate that he had a personal statement, separate and apart from the Commission's statement or expression of Commission's views, that he wanted to give and if the gentleman from North Carolina would yield at this time—how long is that?

Mr. HENRY. It is about as long as my first statement, however long that took.

Mr. ROGERS of Texas. Do you have any further questions, Mr. Broyhill, on any other matter?

Mr. BROYHILL. Could I defer them?

Mr. ROGERS of Texas. Yes; you will be recognized immediately after he finishes this statement. I think it would be better to proceed in the interest of time, Mr. Henry, because I think your personal

statement will clear up questions that may be asked. So proceed with your personal statement.

Mr. HENRY. Mr. Chairman, I thank you and I asked your permission to make a personal statement, because it will cover some things I think are important in the deliberations now before you.

The problem of overcommercialization is not new. Public concern with the amount and character of broadcast advertising has been with us ever since Herbert Hoover said, in 1922:

> It is inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education and for vital commercial purposes to be drowned in advertising chatter.

Since the inception of regulation, moreover, the general views of the Federal Communications Commission, and its predecessor, the Federal Radio Commission, have been the same. Both agencies have always recognized that advertising provides indispensable financial support for the program service offered by commercial broadcasting stations. In the late twenties, however, the Federal Radio Commission held that—

> broadcasting stations are not given these great privileges by the U.S. Government for the primary benefit of advertisers,

And that—

> advertising must not be of a nature such as to destroy or harm the benefit to which the public is entitled from the proper use of broadcasting channels.

Its policies were aimed, the policies of the act, at—

> limiting this advertisement in amount and in character so as to preserve the largest possible amount of service to the public.

And as late as 1960, the Federal Communications Commission in its statement on programing said that broadcast licensees have an obligation—

> to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.

Thus, for some 35 years the Government has been saying that some commercialization of broadcasting is good but that overcommercialization is bad. Yet the striking fact is that the Commission has never told the public or the industry exactly how much is too much.

The standards that have evolved from more than three decades of case-by-case treatment of the problem amount to this: In a handful of cases of the most extreme and obvious subordination of programing to advertising, the Commission has found overcommercialization to exist. Beyond this, broadcast licensees have been required to formulate their own individual standards of commercial practice, which may or may not be applied to their competitors, and which may or may not be questioned by the Commission. Members of the public, on the other hand, have been given no guidance whatever concerning the protection the Commission thinks they should have.

During the same period, industry associations have taken a different tack. The first industry code on commercials was adopted in March of 1929 and provided—interestingly enough—that there should be no commercial announcements between 7 and 11 p.m.

In 1937, the National Association of Broadcasters adopted a considerably less restrictive standard. Since that time—for almost as

long as the Commission has had a policy against overcommercialization—the NAB has had a code on the same subject. For over three decades, this major broadcasting industry association has taken the position that some specific standard, other than the judgment of each individual licensee, is desirable as a measure of voluntary self-regulation.

However, because they are voluntary, industry codes labor under certain disadvantages. Although membership in the NAB Code Authority has recently increased, about half of the country's radio stations and one-quarter of its television stations are not members. Moreover, the sanctions available to the code authority are weak. Membership in good standing in the code authority is not a condition of membership in the NAB itself. Hence, the code standards are often breached, even by members.

According to the reports of the code authority itself, some 28.5 percent of the member radio stations monitored between April 1 and September 30, 1963, violated the provision on maximum commercial time during 1 or more hours, with the average violation amounting to a minute and a half more than the 18-minute maximum prescribed for any single hour.

Our analysis at the FCC of the logs of 134 radio stations recently before the Commission for renewal—including both members and nonmembers of the NAB Code Authority—indicates that some 40 percent exceeded 18 minutes of commercial time in 1 or more hours. About half of these exceeded 18 minutes by only 2 or 3 minutes, but a few went much further, with one broadcasting an hour that contained some 30 minutes of commercial.

I would add that the stations whose hours of operation are restricted—that is, the daytime stations, and hence might be thought to be under pressure to sell the maximum amount of time in any one hour—were not the ones who most often went beyond 18 minutes. Again, I am referring to the 134 logs that we analyzed. Only 16 percent of the daytime-only stations carried at least 1 hour with more than 18 minutes, whereas some 64 percent of the full-time stations checked did so. Nor is there any real evidence that it is primarily the small, struggling station that is forced to broadcast large amounts of commercial time in order to make ends meet. We have additional examples in our files of highly profitable metropolitan stations which have broadcast 21 to 26 minutes of commercials in prime listening hours.

These figures indicate several things. In the first instance, they illustrate a basic problem of self-regulation. Every businessman knows that it is hard to maintain standards that his competitor does not observe, and that principles of minimum performance are more often destroyed by gradual erosion than by the extreme malpractices of a few. The NAB code itself has shown a long-range tendency to relax under the pressure of increasing competition. In 1948, the radio code prescribed an effective maximum of 12 minutes of commercial time in—that is a 50-percent increase since 1948—in any hour, excluding station breaks. Today, the maximum is 18 minutes.

The figures likewise confirm the fact that the problem of overall commerical time is today greater in radio than in television. However, if the erosion of industry code standards continues, and if the Gov-

ernment does not clarify its policy against overcommercialization, the radio of today may be the television of tomorrow.

These figures show, finally, that there is no definite, fixed ratio of commercial to noncommercial matter at which maximum profitability will occur. Hence, a listener cannot automatically obtain relief by switching to another station. There may be no other station in his community that broadcasts substantially fewer commercials. And if there is, that station may not be offering the programs that the listener wants. The public will take a lot of punishment in order to watch or listen to the station or program it likes. For example, in the early days of television, and even today, in outlying areas, the public has been willing to watch weak, snowy, and otherwise inadequate signals. But no one thought, or now thinks, such service is satisfactory.

So, where do we stand? We have an undefined Government policy on "overcommercialization," and an industry code of self-regulation that was described by a trade magazine last May as "window dressing designed to make broadcasting's facade look good no matter what has gone on inside the store." Neither the Government nor the NAB, moreover, has even tried to come to grips with one of the most serious problems in this field—the question of when and how often commercials should be permitted to interrupt programs.

Yet, according to the most recent studies, it is this aspect of broadcast advertising that annoys the listener or viewer most. The newscast that hurls the listener breathlessly from the awesome crises of the nuclear age to the waiting arms of the middle commercial—the late show that lures the viewer with an opening 15 minutes of uninterrupted programing, only to bedevil him once he's hooked with 5- or 8-minute chunks of movie sandwiched between generous slices of commercial—here the impact of advertising upon program service is felt most directly. But to this problem both the Government and the industry have devoted little thought and less action.

Mr. Chairman, I have taken up so much of your time with a review of the history and status of this problem for several reasons. The most important of these is my understanding that the proponents of the bill before you do not quarrel with the Commission's general policy on overcommercialization as a matter of principle. They do not argue that the overall role of advertising in our commercial broadcasting system is none of the Government's business, or that the Communications Act places this subject beyond the Commission's jurisdiction. They do not claim that this policy is inconsistent with the free enterprise system. Nor have I heard any disagreement with the proposition that advertising—however beneficial it may be to the economy—must be secondary to the program service for which the Government has allocated broadcasting frequencies.

The objection, as I understand it, is solely to the Commission's proposal that its policy be made more specific and embodied in a rule. More particularly, the objection is to our suggestion that the standards of the NAB code, or any other standard for that matter, can be equitably or practicably applied.

I would agree that a blind, unreasoned adoption of the NAB standards would not make sense. We recognized in the notice instituting our proceeding that the code does not cover all problems and may not be reasonably applicable to all stations. It may be that a clarifying policy statement will suffice. It may be that a rule setting forth stand-

ards for what the Commission would consider, prima facie, to constitute overcommercialization would be more workable—with provision for a countervailing showing on the part of the broadcaster.

The question, therefore, as I see it, is not whether the Commission should adopt a rule. It is whether we should have standards and criteria which will give the public some reasonable idea of its rights and the broadcaster some reasonable idea of his obligations.

And I am frankly perplexed by the insistence of so many broadcasters that the free enterprise system can thrive only if the broadcaster's obligations are kept vague, uncertain and subject to the differing judgments of different Commissions—that free enterprise will be destroyed if the Government states its policy in clear, understandable terms. There are, of course, areas of regulation that do not lend themselves to even relatively simple, clear criteria. But unless I drastically misread the entire history of Government regulation, one of the businessmen's primary complaints about bureaucracies is that they do not let him know where he stands.

In this instance I would agree with them. Except in the most extreme case, if the Commission took action against a licensee for overcommercialization, the licensee—while he might not have a legal argument—might nevertheless be justified in complaining that he had had no warning. He might reasonably claim that he ought to have been informed specifically of the kinds of action which might result in sanctions.

I would therefore most respectfully urge that the time has come to explore ways to translate policies that have been largely words on paper into realities in the homes of American listeners and viewers. There are dangers in the attempt, as there are dangers in every regulatory effort. It is for this reason that every action of the Commission remains subject to review by the Congress and the courts. But I do not see how we can continue to tell the industry and the public that overcommercialization is bad, but that we don't know what it is.

In closing, Mr. Chairman, I would stress that I fully recognize the contribution of radio and television advertising to our gross national product. It is a fine contribution, and the Commission can be thankful for the general economic health of the industry it regulates. On the other hand, it is clear to me, at least, that the framers of the Communications Act sought to preserve the broadcasting spectrum primarily as a medium of communication, rather than advertising. And the Commission's effort to deal with one aspect of overcommercialization—advertising time standards—is, in my judgment, entirely consistent with the spirit and letter of the Communications Act.

Mr. Chairman, I do thank you for allowing me that time for my own statement.

Mr. ROGERS of Texas. Mr. Broyhill.

Mr. BROYHILL. I will yield at this time to allow other members of the committee to ask any questions that they might have.

Mr. ROGERS of Texas. Mr. Hull, did you have any questions?

Mr. HULL. No.

Mr. ROGERS of Texas. Mr. Chairman, did you have any—Mr. Harris?

Mr. HARRIS. Yes, Mr. Chairman, but I would prefer to yield until you conclude.

Mr. ROGERS of Texas. No. You go ahead, Mr. Chairman, and then I am going to recognize Mr. Broyhill.

Mr. HARRIS. Mr. Chairman, what is the Commission's policy?

Mr. HENRY. Mr. Harris, the policy is, as stated in the 1960 programing statement—I think I have that in front of me—I am not sure I can put my finger on it. But basically, it is that the commercial continuity shall not interfere to the overall degradation of the program service. I have recorded it here in my statement—

*** * * to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.**

But that is a broad statement that, frankly, I do not know how to apply.

Mr. HARRIS. Do you know what it means?

Mr. HENRY. No, sir; not specifically. It is just that too much is bad.

Mr. HARRIS. Too much is too much. What you are saying is that the broadcaster, then, simply does not know whether the Commission has a policy that is actually enforcing.

Mr. HENRY. Well, all they know is that we have a policy against overcommercialization, and as I say, if they are careful and responsible broadcasters, I would assume that they are aware of the reported material that has been issued by prior commissions. I read one of them. That one said that 13 announcements per hour did not go beyond our policy. But I can see in many instances no relation between actual performance today and past Commission precedent.

Mr. HARRIS. I have been concerned with the very important principle of permitting the industry to police itself. That goes back to 1951, when I was designated chairman of a subcommittee to investigate programing, commercialization, and so forth, as directed by the House of Representatives.

Out of that came—and I believe I have mentioned this here before—the NAB code of March 1, 1962. At that time, I think there were 104 or 108 television stations in the country. I believe 96 of them decided they would join the NAB and cooperate with the newly adopted code of good practice. But I notice in your statement or someone's statement here today that about 38 percent of the radio industry subscribes to the code and less than 70 percent of the television industry. Is that approximately correct?

Mr. HENRY. I believe the figures have recently gone up considerably in subscribers to the radio code. I think it is now 45 percent. It was 38 percent—32 percent—and it is around 70 to 74 percent of the television stations.

Mr. HARRIS. Has that increase occurred since you announced your rulemaking proceeding?

Mr. HENRY. I think the increase in radio has been, yes. I do not know for sure, I think the television membership percentage has stayed about the same.

Mr. HARRIS. Under the provisions of the act itself and the regulations of the Commission, licensees are required to serve the public in its best interest. I would like to take the position that the licensees on their own should discharge this responsibility. That is my preference. I wish that could be done.

Mr. HENRY. It is mine, too.

Mr. HARRIS. This whole matter, it seems to me, involves more than general statements of principle on the question of overcommerciali-

zation. I think it involves the question of what kind of system of broadcasting we should have.

Now, I know that it is pretty easy for us in the Congress who are striving to serve the public to get rather persuaded by communications that we receive. For example, I know when I had decided that I would be available for public service, it did not take too many communications to persuade me that I had a call from the people. And I am sure that sometimes, when we hear from certain constituents, it might seem to us that the house is falling in on top of us and that these communications are representative of the way the general public feels about it.

I think there is involved here the question what kind of broadcasting we are going to have. We have been faced with the problem of pay TV now for a good long while. It is still with us. And I am not too sure that the way things are going with free television we might not be driven to pay television in this country.

During a visit to London a few days ago—and I know that you had been there just previous to my visit—I was interested to learn that they had two kinds of broadcasting. It is interesting that the British Broadcasting Co. has no commercials whatsoever, as you well know. They are supported by a license fee or subscription fee for every receiving set.

Now they have another procedure that involves commercial programs which are supported by advertising. Now, it is rather revealing to me that only 42 percent of the viewing public tunes to the BBC, while 57 percent tunes to the commercial programs. Now, apparently in a country where this has been tried and tested over a long period of time, what the people evidently liked was the programs with advertising.

Now, it seems to me that if we proceed with rapid changes and policy restrictions, we may very well bring about basic changes in our system of broadcasting. I am not favorable to it myself, and I frankly do not know what the answer is. I, for one, have a great deal of faith in the free enterprise system, and in business people doing what is right, and in the best public interest. I do not know whether it is best to get at those who do not operate in the public interest by penalizing everybody. That is the matter, I assume, that is giving the Commission a lot of concern. Whatever decision comes out of the rulemaking procedure, this decision cannot go beyond what has been proposed by the Commission in that proceeding. Is that correct?

Mr. HENRY. That is correct; without a further announcement of further rulemaking.

Mr. HARRIS. Now, in your rulemaking procedure, I note that a proposed rule requiring all AM, FM, and TV broadcasting stations to observe the limitation on advertising time which are presently contained in the radio and television code of the National Association of Broadcasters.

I assume that the Commission felt that the best way to approach this thing is just to adopt the industry code.

Mr. HENRY. I think there was some sentiment to that effect, but basically what we said, and I think it is primarily at my insistence—not at my insistence, but at my urging, as I remember—that we added an additional paragraph saying that we were not wedded to the code as the only solution to the problem and that we wanted additional

information about other methods that we might use to get at this problem, such as not applying it across the board, or any other rule, for that matter, that the industry could live with and live with well. But I do not believe we have had any suggestions.

Mr. HARRIS. Now, you have made a speech yourself in New York, have you not?

Mr. HENRY. Yes, sir.

Mr. HARRIS. You said at the outset that Mr. Minow, who was Chairman at the time this rulemaking proceeding was announced, voted for it. Therefore, since he has left the Commission the vote would be 3 and 3, except for your own vote.

Mr. HENRY. Other than Commissioner Loevinger.

Mr. HARRIS. Yes; that would be true. I do not know that Commissioner Loevinger has made any speeches on this subject. He made one just a few days ago, but I do not believe he covered this subject.

But I gathered from your speech and what has been said in your statement here today that you are wholeheartedly in support of this rulemaking proceeding?

Mr. HENRY. Yes. I am in support of it. I think that the criteria, that the policy and the criteria that we use must be clarified one way or the other. And I think that is the real purpose of the rulemaking.

Mr. HARRIS. Is it your position that there should be a time limitation fixed by the Commission with respect to commercials in a given period of time?

Mr. HENRY. Well, my present feeling is that there can be, and if there can be, then there should be. Now, what I wanted was some help from the broadcasters and from their associations in making that decision to see if it could be done.

As far as I am concerned, when the Commission issues a notice of proposed rulemaking, it has not made up its collective mind. I have learned that it ought to point, perhaps, to the way that it is leaning. But my mind is still open about it. But my feeling is that—I feel that the burden of proof is on the broadcasters—let's put it that way.

Mr. HARRIS. I realize I am treading on a little dangerous ground here because the Commission has a decision to make and I would not want to interfere with that at all, let me make that clear. But do I gather, then, that you do have a feeling that some positive decision should be made with reference to some standards?

Mr. HENRY. Yes.

Mr. HARRIS. And that you do that so that all broadcasters will know where they stand and will have some specific standards?

Mr. HENRY. That is correct.

Mr. HARRIS. Is that the primary motivation behind your thinking on this?

Mr. HENRY. Yes; indeed; plus the fact that I do think there is a serious problem here and that it will help the broadcasters. Not only will it help them solve the problem, but it will help the broadcasters by giving them more definite guidelines.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Bennett?

Mr. BENNETT. Mr. Henry, do you see any difference in the Commission attempting to limit, say, the number of westerns that a station may air and the number of minutes that they can use for commercials per day?

Mr. HENRY. Yes; I do.

Mr. BENNETT. What difference do you see?

Mr. HENRY. Well, one deals with program content and one does not.

Mr. BENNETT. Well, so far as the Commission's authority is concerned, do you see the difference?

Mr. HENRY. It would depend on how you stated the limitation that there would be on a fixed number of programs.

Mr. BENNETT. I am speaking about your authority to limit the programs. Do you contend that you have that authority?

Mr. HENRY. To limit programs?

Mr. BENNETT. To limit—yes; the type and amount of programing in specific categories.

Mr. HENRY. No; I do not think we can get into programing except on an overall basis and substantiate any finding that we make on an overall basis by a very heavy public interest consideration, which would stand up under review by the court.

Mr. BENNETT. It has to be related to the public interest.

Mr. HENRY. Absolutely.

Mr. BENNETT. Your right to interfere or to control in any way the programing?

Mr. HENRY. Yes, indeed.

Mr. BENNETT. Is that true with respect to advertising?

Mr. HENRY. We would have to justify any action we take with respect to limitation of advertising time by substantial public interest findings.

Mr. BENNETT. Where do you get your authority to do this rulemaking? Is that under subsection (b) of section 303 of the act?

Mr. HENRY. Well, Mr. Bennett, I will tell you. It is a matter of several different things. I think clearly we have the broad authority to do it under the public interest section of the act. I think we have the legal authority to do it under the Supreme Court decisions that have interpreted that act, which have in essence held that if you can by policy take certain actions and that you can substantiate their desirability—if you can on a case-by-case basis handle a problem, then you can do it by rules. I think the U.S. Supreme Court has made this clear and I think commercialism is one field that we are in fact handling on a case-by-case basis.

Mr. BENNETT. If that is true, then you can control programing by rule, if what you said is true.

Mr. HENRY. I have not made any judgment on it because I do not believe in it and I have not had to make a judgment on it. But there is a substantial amount of opinion that says if we wanted to say that there should be x percent of public service programing, or if there should be minimum percentages of various categories of programing, and could substantiate that with facts and figures as to its being in the public interest, this comes under our jurisdiction. But as I say, I personally have not crossed that bridge because I am not for that approach.

Mr. BENNETT. You want to cross this one first before you get to that one?

Mr. HENRY. Certainly.

Mr. BENNETT. I find it difficult to see the distinction or difference between your authority to limit programing if you have authority to limit advertising.

It is true, isn't it, that if you have authority at all to limit advertising that you can eliminate it completely, isn't it?

Mr. HENRY. No; I don't think so at all.

Mr. BENNETT. It is not?

Mr. HENRY. No.

Mr. BENNETT. Why not?

Mr. HENRY. Because again it is a matter of degree, and the public interest standard is the one——

Mr. BENNETT. Why do you say it is a matter of degree?

Mr. HENRY. Because any limitation, any action, that we take is a matter of degree. We have held that the networks, that licensees engaged in network operation, could not act as spot representatives, for example.

Mr. BENNETT. Yes; but let me ask you something that is perhaps more specifically on this point. You say you have authority to eliminate it entirely, but now if you have authority to limit advertising, you do it on the theory that it is in the public interest before you can do that, is that not true?

Mr. HENRY. That is correct.

Mr. BENNETT. All right. So you don't consider then the economics of the broadcasting?

Mr. HENRY. Well, the economics——

Mr. BENNETT. Now just a minute. So that if you come up with a decision or a policy that x number of minutes of advertising is in the public interest, therefore, that is the number that you are going to permit and no more, that may put some broadcaster out of business, would it not?

Mr. HENRY. It might; yes.

Mr. BENNETT. Now if it does, you are still acting within your authority?

Mr. HENRY. No; I wouldn't say we were. I think, as I indicated in a previous answer, that he would be entitled to a hearing to show that it would put him out of business, and if our judgment was arbitrary and said, "We don't care, if it is going to put you out of business we are going to find it anyhow," then a court would reverse us.

Mr. BENNETT. You say, of course, it could reverse you but this question hasn't been up yet, has it, before the courts?

Mr. HENRY. No; it hasn't been, but I am confident that no Commission in its right mind would put a station out of business by rulemaking.

Mr. BENNETT. You don't want to make the stations philanthropic organizations.

Mr. HENRY. No, sir.

Mr. BENNETT. Your idea of this rulemaking is not to stop the station from making a profit?

Mr. HENRY. No, indeed.

Mr. BENNETT. Is it your idea to stop them from making too much profit?

Mr. HENRY. No, indeed.

Mr. BENNETT. Is it your idea that their profit enters into the picture at all?

Mr. HENRY. It would be a factor in any station's asking for a waiver from the rule, certainly.

Mr. BENNETT. Is the station going to have to come into you and say, "Now look"—and I have mail from small stations in my district on this very point—"We can't exist if we are not permitted to have say 10 or x number of commercials per day, we would have to go out of business," are you going to require these stations to come in, in this rulemaking proceeding, and try to show to the Commission that what you are proposing to do is getting into the question of whether they can exist economically or not?

Mr. HENRY. No; I don't think they would ever have to come in. They could submit their comments or they can submit a petition in writing.

Mr. BENNETT. They would have to go bankrupt?

Mr. HENRY. They can submit a petition in writing. We had asked them to come in in the proceeding with the comments, if we enacted a rule or criteria they felt they couldn't live with, they could always petition for a waiver in writing and if we found their reasons were substantial enough then we would grant the waiver.

We asked that they give us specific information. I looked through the comments about a month ago fairly carefully and the only specific comment that I found was from a broadcaster who said that he could only charge $1 for 10-minute spots, and that he couldn't live with this.

If you take 10-second spots and multiply by 6 for the number in the minute and multiply by the average number of minutes allowed by the code, he grosses something like $200,000 a year in a small town.

So that information wasn't too helpful. We haven't had too much helpful information. Even if you cut that by a quarter, he grosses $50,000.

Mr. BENNETT. So what you are saying is that, in your proceeding, you are going to substitute your judgment as to how much profit they could make for the judgment of the station owner as to how much profit he can make from commercials?

Mr. HENRY. No, I don't think we are at all.

Mr. BENNETT. I don't see how you can keep out of the economics of this thing unless you simply disregard it and say we are going on an esthetic basis.

Mr. HENRY. We don't entirely——

Mr. BENNETT. Wait a minute.

Mr. HENRY. Excuse me.

Mr. BENNETT. And—

We have decided that as a matter of good taste there should only be five commercials per hour, and that that is in the public interest.

Now if that breaks some of the people in the industry as a matter of economics, you are not concerned with that?

Mr. HENRY. No, we would obviously be concerned about it. Economics does enter into the picture, but again as a matter of degree.

Mr. BENNETT. To my way of thinking, Mr Chairman, if the Commission has this authority, which I personally doubt they have it only as it relates to specific cases of license renewal on the question of operation in the public interest, but if you have this kind of authority under existing law, it seems to me it is a dangerous kind of authority for you to have.

If it is necessary in the public interest for the number of commercials or for the amount of advertising over radio and television stations to be limited, then it seems to me it is the function of Congress to do it, not your function, any more than it is your function to fix or decide to control programing, for example.

You just said a few minutes ago, if I understood you correctly, that there is a considerable body of expert opinion believing that you do have that right.

Up here we have always thought you did not have that right, or at least many of us up here thought that the FCC did not have the right to control programs.

I think when you refer, as you do in your statement in a half dozen instances that the public ought to know what the Government is doing, what the Government thinks and what the Government is going to allow, I assume you are talking about yourselves. The Commission is the Government.

My idea of what the Government is is what the Congress decides, and therefore I think, Mr. Chairman, that we should take an exceedingly careful look at this rulemaking authority, and if the legislation would deprive the Commission of that authority if there is any doubt about it at all, and let's get some further information about the need for doing this.

If we have to do it I think we are as well able to protect the public interest. If we are going to take a drastic step such as this across the board, the Congress and not the Commission should be the one to take it.

Mr. ROGERS of Texas. Are those all the questions you have?

Mr. Kornegay, do you have any questions?

Mr. KORNEGAY. Thank you, Mr. Chairman.

Mr. Henry, I am sorry I was unable to be here for the presentation of your statement, and I regret very much that I missed it.

As I understand it, the question has already been asked and you say that the Commission does have authority to impose this rule and that that authority is contained under the public interest provisions of the act, the Communications Act, is that correct?

Mr. HENRY. Section 4(i), subsection 4(i) of section 303.

Mr. KORNEGAY. Subsection 4(i) of 3?

Mr. HENRY. No, I will change that. Section 4(i), and sections 303 and 307(a).

Mr. ROGERS of Texas. Would the gentleman yield at that point?

Mr. KORNEGAY. Yes, indeed.

Mr. ROGERS of Texas. I think it would be a very good idea if we could get unanimous consent to include those four cited portions of the Communications Act right at this point.

Mr. KORNEGAY. I so move.

Mr. ROGERS of Texas. Without objection.

Mr. HENRY. Mr. Chairman, it is three sections of the act. We have prepared a memorandum on this subject which we would be happy to furnish the committee and make it a part of the record.

Mr. ROGERS of Texas. How long is that?

Mr. HENRY. It is pretty long. I don't know exactly. I guess it is 20 or 30 pages.

Mr. ROGERS of Texas. Would you submit it to the committee and we will make a determination whether it goes in the files or in the record.

Mr. HENRY. Yes, we will be happy to do that.

(The matter referred to follows:)

MEMORANDUM PREPARED BY THE GENERAL COUNSEL FOR THE FEDERAL COMMUNICATIONS COMMISSION ON ITS LEGAL AUTHORITY TO ADOPT A RULE PRESCRIBING MAXIMUM BROADCAST TIME TO BE DEVOTED TO COMMERCIAL ADVERTISING

INTRODUCTION

At the November 6, 1963, hearing on H.R. 8316 et al., before the Communications and Power Subcommittee of the House Interstate and Foreign Commerce Committee, the question was raised whether the Federal Communications Commission has the legal authority to adopt rules prescribing the maximum amount of broadcast time a licensee may devote to commercial advertising. This memorandum is directed solely to that question.

Thus, we do not here consider whether adoption of such a rule would be sound policy. As we made clear in our statement, the Commission has reached no conclusion on that score, and will not be in a position to do so until it has considered the materials advanced to it in Docket No. 15083, including the oral arguments to be made on December 9, 1963.

Since the Commission has thus reached no determination, we cannot discuss the question of its legal authority in terms of any specific rule. We therefore simply assume, for the purpose of the following discussion, that any rule which might be adopted in this field is (or could be) a reasonable one,[1] and turn to the question of the authority to adopt such a rule.

We shall discuss that question in terms of the statute (the Communications Act of 1934, as amended, 47 U.S.C. 151, et seq.), the administrative and judicial precedent, and the legislative history.[2]

A. THE STATUTE

1. Sections 307(a), 307(d), 309(a)

The Commission may issue or renew a radio station license only if the public interest, convenience, or necessity will be served thereby (Sections 307(a), 307(d), 308(a), 309(a) of the Communications Act, 47 U.S.C. 307(a), 307(d), 308(a), and 309(a)). In the leading case in this field, the Supreme Court stated, in construing the standard of "public interest" (*National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 216):

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. 'This criterion is not to be interpreted as setting up a standard as indefinite as to confer an unlimited power. * * * The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services. * * *' *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 280 U.S. 266, 285.

*"The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio' * * * The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. 'An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.'"* *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 475. * * * [Emphasis supplied.]

The Commission has the authority, in passing upon applications for new facilities or for renewal of license, to take into account the advertising practices of the applicant, and specifically, the time which he proposes to devote, or has devoted to advertising, and the way in which he proposes to permit, or has permitted, advertising to affect his program service. If, for example, an

[1] For example, a rule which prescribed a maximum limit of 1 percent would obviously be arbitrary while one specifying a 90-percent limitation (while of little or no utility) would clearly not be subject to attack by broadcasters as imposing an unreasonable restriction. Of course, the reasonableness of any rule which might be adopted in Docket No. 15083 would be subject to challenge by way of court review.

[2] We do not base our conclusions in the ensuing discussion in any way upon a distinction between the protection afforded under the First Amendment to advertising as against other forms of speech. It would appear, however, that advertising does enjoy somewhat less protection. See note 11, infra.

applicant proposed to devote 90 percent of its broadcast time to commercials, the Commission could consider, and indeed, would have to consider, whether this proposal was in the public interest, i.e., served "* * * the interest of the listening public in 'the larger and more effective use of radio'" (*National Broadcasting Co.* v. *U.S.*, *supra*, p. 216). Nor could the Commission, consistent with the standard of Section 307(d), renew the license of an applicant who had devoted 90 percent of his time to commercials without determining whether this practice served the public interest.[3]

It has been argued that the Commission cannot properly concern itself with the advertising aspects of the licensee's operation or proposals, and must confine its review solely to the other programing matters (i.e., whether the applicant's programing proposals or performance meet the area's needs and interests). But this argument ignores the impact the advertising proposal, in and of itself, can have upon the public interest. In a comparative case, no one would seriously argue that an applicant which proposed to devote half or more of his time to broadcasting commercial spots was not at a disadvantage with respect to a rival proposing a much more reasonable percentage of time for commercials—or that the Commission could not take into account this difference under the public interest standard. The same public interest consideration exists where only one application is before the Commission. For in a real sense—despite the recognized contributions of advertising to the public interest—an applicant who proposed to devote over 50 percent of his time to commercials would be predominantly serving his own interest and the interests of the advertiser rather than that of the listening public in the larger and more effective use of radio.

Further, in so predominantly serving the advertiser's interest, the station would be acting as an electronic handbill or service to a commercial or industrial user. As we shall show within (pp. 5–6), this might call into question whether these broadcast frequencies should be allocated to the advertisers' specialized use or whether the frequencies should be allocated to the urgent needs of other industrial users.

In short, the applicant's proposals or past record as to amount of time devoted to commercials obviously can be a relevant factor in the public interest judgment at the time of grant or renewal. And if overcommercialization is a proper consideration in individual cases, then, as the Supreme Court has stated, "there is no reason why [its policies] may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity" (*Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289–290, note 7. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203). For, as the Supreme Court has held, "47 U.S.C. Sec. 154(i) and Sec. 303(r) grant general rulemaking power not inconsistent with the Act or law" (*U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; see, also, *National Broadcasting Co.* v. *U.S.*, *supra*, at p. 217; *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, 309–10).

Thus, Section 303(r) authorizes the Commission to:

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act. * * *"

And Section 4(i) provides that:

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

To extend our prior example, if the Commission can appropriately determine in an individual case or series of cases that it is inconsistent with the public interest to grant or renew a license where the applicant would devote (or has devoted) an inordinate percentage of his broadcast time to commercials, it can also, under 4(i) and 303(r), issue a rule to the same effect (i.e., that no license will be issued or renewed to an applicant which devotes — percent or more of its time to commercials). Such a rule would "carry out the provisions of [Sections 307(a) and 307(d)]" by particularizing the public interest standard there set

[3] The 90-percent figure represents, of course, an unrealistic extreme. It is, however, a perfectly valid figure with respect to this question of authority. For, those arguing that the Commission has no authority whatsoever in this field must be prepared to assert that the Commission could not deny an application solely on the grounds of "overcommercialization" even if it specified 90 percent or 99 percent commercial time; otherwise, their argument is not with the Commission's authority but, rather, where the line should reasonably be drawn.

out with respect to the matter of overcommercialization. The rule would thus "announce the Commission's attitude on public protection against such [overcommercialization]" (*Storer*, at p. 203), and unless adequate grounds for waiver were stated, would do away with useless hearings "on applications that do not state a valid basis for hearing" (*Storer*, at p. 205).[4]

We believe that we could rest our entire case at this point.[5] There can be, we think, no doubt but that the Commission can take "overcommercialization" into account in individual cases under Section 307 (a) and (d); if that is so, there can be no doubt but that the Commission can also issue a rule defining the prohibited overcommercialization "with greater clarity" (*F.C.C.* v. *American Broadcasting Co., supra*). *In short, if those who dispute our authority are to succeed, they must establish that the Commission cannot in any manner consider overcommercialization in passing on an application at the time of grant or renewal—that, even if the applicant specified over 50% of his time to be devoted to commercials, the Commission would be powerless to deny such an application as inconsistent with the public interest because of overcommercialization.* But no such argument has been, nor could it be, made.

2. Section 303(b)

In addition, Section 303 of the Communications Act (47 U.S.C. 303), grants to the Commission broad authority to regulate the use of radio as the "public convenience, interest, or necessity requires." On the basis of this criterion, the Commission is empowered, *inter alia*, to: "Classify radio stations"; "[p]*rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class*"; "[g]enerally encourage the larger and more effective use of radio in the public interest"; "[a]ssign bands of frequencies to the various classes of stations * * *"; and "[m]ake such rules and regulations * * * not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *" Sections 303 (a), (b), (c), (g), and (r), 47 U.S.C. 303 (a), (b), (c), (g), and (r). [Emphasis supplied.]

Giving these provisions and particularly the underscored words their plain meaning, they bestow a broad grant of authority upon the Commission.[6] Under the authority of Section 303 (b), the Commission has "prescribed the nature of service" so that stations in the noncommercial educational FM broadcasts service are limited to use for the advancement of an educational program, and sponsored or commercial programs and announcements are expressly prohibited.[7] Similarly, we believe that the Commission has the *authority* to prescribe the nature of the "commercial" broadcast service so that such stations may not devote to commercials, for example, more than 50 percent of their time (to choose a very high, noncontroversial figure as an example).

There is an aspect of this matter which is often overlooked. The radio spectrum is inadequate to accommodate all who seek to use it.[8] This means that in allocating frequencies to particular users, the Commission must be assured that the public interest is being served by the amount of valuable spectrum space

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[4] The rule would be analogous to the Multiple Ownership rules sustained by the Supreme Court in *Storer*. In that individual case, the Commission had denied an application for an eighth AM station on the ground that such concentration of ownership was inconsistent with the public interest (Section 3009(a)). *In the Matter of Sherwood B. Brunton*, 3 Pike & Fischer, R.R. 291. In 1953, the Commission, after appropriate proceedings under Section 4 of the Administrative Procedure Act, embodied this policy decision in a rule (Section 3.35, 47 C.F.R. 3.35). The Supreme Court, in *Storer*, found that this rule, like those upheld in *National Broadcasting Co.* v. *U.S.*, was a valid particularization of the public interest; and that, unless an adequate basis for waiver were set out, the Commission could deny without hearing, applications inconsistent with the rule. So, also, the Commission could specify a reasonable overcommercialization limit as a particularization of the public interest standard, and could deny applications in conflict with that limit.

[5] We recognize that arguments based on legislative history, Section 326 and the First Amendment are advanced but, for reasons stated within (pp. 7–9), we believe that they have no merit in view of well-established judicial precedent.

[6] The legislative history, discussed within (pp. 16–20), confirms this broad authority.

[7] *FCC Rules*, § *3.503(c)*, *47 C.F.R. 3.503(c)*. Similarly, stations in the industrial radio services are limited, with certain exceptions, to communications related directly to the safety of life or the protection of property and those communications considered essential to the efficient conduct of the enterprise for which the licensee is eligible to hold a license. FCC Rules, § 11.151, 47 C.F.R. 11.151.

[8] See Annual Report of the Federal Communications Commission for 1959, pp. 159–160. See also *Bendix Aviation Corp.* v. *Federal Communications Commission*, 106 U.S. App. D.C. 304, 272 F. 2d 533, *cert. denied sub nom. Aeronautical Radio, Inc.* v. *United States*, 361 U.S. 965, for an example of the difficult problems still arising from an inadequacy of spectrum space. And, Cf., *In The Matter of Petition of the Land Mobile Communications Section of the Electronic Industries Association for Rule Making Looking Toward Deletion of Channels 14 and 15 from Television Broadcasting*. Petition RM–370.

so allocated. In terms of broadcast users, this obligation entails that the broadcast band fulfill the various entertainment, educational, religious, public affairs, etc., needs of the listening public—and not just those of the advertiser. In short, having allocated a large amount of frequencies to broadcasting in order to meet the public's needs, the Commission can also "prescribe the nature of the service" of these broadcast stations so as to insure that the advertising aspect (in terms of commercials) does not reach an inordinate level and thus frustrate the purpose of the allocation.[9]

3. Need for explicit statutory authority; Section 326

The argument is made that the Communications Act nowhere gives the Commission explicit authority to issue a regulation limiting the amount of time to be devoted by broadcast licensees to commercials. But the Act, in terms, bestows upon the Commission broad and expansive powers. *Storer*, at p. 203; *National Broadcasting Co.*, at p. 217. In both these cases, the Supreme Court made clear that the subject matter of the rules need not be "specifically" mentioned in the statute, and that indeed to impose such a requirement would stultify the very reason why the agency was created with broad powers. *Storer*, at pp. 202–3; *National Broadcasting Co.*, at p. 219; see, also, *American Trucking Assn.* v. *U.S.*, 344 U.S. at pp. 309–10.

Nor do we think there is merit to the contention that a regulation directed to commercials would contravene Section 326, the noncensorship provision of the Act, or the First Amendment. As stated, in determining whether the issuance or renewal of a license will serve the public interest under Sections 307(a), (d), 308(a), and 309(a) of the Act, the Commission has authority to consider proposed and past programing, as well as programing policies. Thus, in *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U.S., 285, the Court stated that in granting licenses the public interest standard required consideration of the scope, character, and quality of services to be rendered. Similarly, in *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 215–216, in upholding the chain broadcasting regulations relating to the grant of licenses, the Court declared: "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. * * * It puts upon the Commission the burden of determining the composition of that traffic." Accord, *Regents* v. *Carroll*, 338 U.S. 586, 598; *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670, 671–672 (C.A. D.C.), *certiorari denied*, 335 U.S. 846.[10] The courts have reasoned that the denial of a license upon a ground reasonably related to the public interest is neither censorship nor an abridgement of the right of free speech (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226), and that "comparative service to the listening public is the vital element, and programs are the essence of that services" (*Johnston Broadcasting Co.* v. *Federal Communiactions Commission*, 175 F. 2d 351, 359 (C.A.D.C.); see *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 171 F. 2d 826, 827 (C.A.D.C.)).

It follows, a fortiori, that the Commission may take into account, under the public interest standard, the factor of overcommercialization in granting or re-

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[9] The question has been raised whether if the Commission can prescribe the nature of the service so as to prescribe a maximum limit on commercials, it could not do so with respect to other programing categories. (House hearings on H.R. 8316 et al. November 6, 1963, TR. 54–55). This question was also raised, to a large extent, by a Senate inquiry in 1951 as to whether the Commission could require, by rule, all TV broadcast stations to devote a fixed percentage (e.g., 10 percent) of their time to educational programs (in lieu of a reservation of TV frequencies for noncommercial educational use). Chairman Coy while making clear that he did not favor such a rule as a matter of policy, submitted a memorandum of law setting forth the view that the Commission did have the legal authority to issue such a rule under Section 303(b). See Hearings on FCC Policy and Television Freeze and Other Communication Matters before the Senate Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess., pp. 48–9.

To give one more example, the Commission could hardly justify the allocation of so large an amount of spectrum space to broadcasting if broadcast stations presented only entertainment and commercials, ignoring the other needs of the listening public; therefore, the Commission could issue a rule, pursuant to Section 303(b), specifying that such stations could not devote 100 percent of their time to entertainment and commercials. Such a rule would be a further example of "prescribing the nature of the service." Whether such action will ever be deemed necessary or reasonable is, as we have indicated at the outset, another matter altogether.

[10] See also *Great Lakes Broadcasting Co.* v. *Federal Communications Commission*, 289 F. 2d 754, 755 (C.A.D.C.); *Henry* v. *Federal Communications Commission*, 302 F. 2d 191 (C.A.D.C.), *certiorari denied*, 371 U.S. 821; *Noe* v. *Federal Communications Commission*, 260 F. 2d 739, 743 (C.A.D.C.), *certiorari denied*, 359 U.S. 924; *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 60 App. D.C. 79, 47 F. 2d 670.

newing licenses, or, as we have shown, in appropriate rules.[11] A contrary view would again mean that the applicant could propose 50 percent or even 90 percent commercial continuity and yet obtain a grant as in the public interest—a patently absurd result. As the Court of Appeals stated in *Bay State Beacon, Inc.*, v. *F.C.C.*, *supra*, p. 827:[12]

"To argue that the Commission may not in the performance of its plain duty inquire into the amount of sustaining time a prospective licensee purports to reserve if granted a license, and to further argue that if it does, such inquiry is in excess of its authority, contravenes the First Amendment and constitutes censorship prohibited by Sec. 326 of the Act, is to suggest that Congress intended to create the Commission and then by the very act of its creation, stultify and immobilize it in the performance of the specific functions that called it into being. Congress obviously intended no such thing. The test laid down for the guidance of the Commission is as practical as any that could be devised for a body functioning as it does in the field of delegated authority—and 'serves as a *supple* instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.' *Federal Communications Commission* v. *Pottsville Broadcasting Company*, *Supra*, at 138. [Emphasis supplied.] While with reference to the alleged constitutional violation, certainly if a denial of a license would be violative of the First Amendment, then every unsuccessful applicant would have the right of free speech throttled and abridged, *National Broadcasting Company* v. *United States*, 319 U.S. 190, 226 (1943)—a palpably absurd conclusion."

We also wish to stress that with respect to the Section 326 contention, no distinction can be made here between Commission action on a case-by-case basis or by rule. The cases establish that a rule in this area, reasonably related to the public interest, is not censorship nor violative of the First Amendment. Cf. *National Broadcasting Co.* v. *U.S.*, *supra*, at p. 226; *F.C.C.* v. *American Broadcasting Co.*, *supra*. In the latter case, it was argued that the Commission's lottery rules, providing that no license would be granted or renewed to a party broadcasting a lottery in violation of Title 18, Section 1304, contravened Section 326 and the First Amendment (ABC Br., p. 57, NBC Br., p. 49; Case No. 117, Oct. Term, 1953). The Supreme Court, while finding that the Commission had misconstrued Section 1304, sustained the Commission's authority to act, "whether by general rule or by individual decisions", citing Sections 307(a), 309(a), 4(i), and 303(r). *American Broadcasting Co.*, *supra*, at p. 289. In short, as shown by the *American Broadcasting Co.* case, the standard for judging whether Commission action contravenes Section 326 is the same, whether that action be on an *ad hoc* or rule basis—namely, whether the Commission's action is reasonably related to the public interest standard.

4. Section 3(h)

Finally, it is argued that placing maximum limits on the amount of broadcast time devoted to advertising is a form of rate regulation, and thus contravenes that provision in Section 3(h) that "a person engaged in radio broadcasting shall not * * * be deemed a common carrier." See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470.

But the rule in question clearly would not be the fixing of charges in order to assure a relatively fixed amount of return—the normal process of rate regulation. See title II, Communications Act of 1934, as amended. A licensee would be as free as he has always been to charge what he wished for advertising time.

The thrust of this argument is, we think, that the regulation, by prescribing a limit for time devoted to commercials, might affect the revenues of broadcast stations and thus indirectly regulate rates and/or rate of return (since, it is argued, in order to maintain the present level of revenues, some stations might have to raise their rates to make up for the lesser time that can be devoted to commercials). But this argument, followed logically, means that the Com-

[11] Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Valentine* v. *Chrestensen*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Breard* v. *Alexandria*, 341 U.S. 622, 641–643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to other programming.

[12] Significantly, appellant there argued that the Commission's action in taking into account the difference between comparative rivals as to the amount of time to be devoted to sustaining programs, contravened Section 326, and was inconsistent with the legislative history of the Act (citing Sen. Doc. No. 137, 72d Cong., 1st Sess.—see p. 12, *infra*), which, appellant contended, "makes it clear that the Commission does not have the right to impose any restrictions upon the sale of time" (App. Br., pp. 7–8, Case No. 9766, C.A.D.C.).

mission could never take any action, either by rule or order, and however much in the public interest, which might affect revenues—since the station could argue that if its revenues are thus reduced, the Commission is, in effect, requiring it to raise rates in order to get back to the level of revenues it has enjoyed.

For example, the Commission has an established policy that licensees must, in good faith, seek out and serve the needs and interests of their community, including such usual needs as educational or public affairs which generally are not in the same revenue producing category as entertainment. Similarly, the Commission has promulgated rules delineating minimum operating hours (Section 3.71) and operating personnel (Section 3.93; necessity for first-class radio operator on duty). The list of actions possibly affecting revenues could be greatly multiplied. We think it clear that all such actions, if reasonably related to the public interest, are within the Commission's authority, despite any effect on the licensee's revenues or the rates he may find it necessary to charge in order to achieve what he considers a sound level of earnings. *National Bctg. Co.* v. *U.S., supra;* cf. *Carrol Bctg. Co.* v. *F.C.C.*, 258 F. 2d 440 (C.A.D.C.).

We point out again that, if this argument were correct, it would preclude any Commission consideration of the factor of overcommercialization in passing upon applications for license or renewal thereof. The applicant could propose to devote an inordinate amount of its time to advertising and resist any Commission inquiry on that score on the ground the Commission was, in effect, regulating its rates.

B. ADMINISTRATIVE AND JUDICIAL PRECEDENT

We believe that the statute is clear and unambiguous and that there is no need to resort either to precedent or legislative history to sustain the Commission's authority in this area. However, examination of such precedent and history further supports the Commission's conclusion that it has the legal authority to issue a rule prescribing a maximum limitation on the amount of broadcast time to be devoted to advertising.

1. Administrative precedent—Federal Radio Commission

The Federal Radio Commission from the beginning considered licensee advertising practices. Thus, in the Second Annual Report (1928), it stated:

"* * * It is manifest that broadcasters must resort to some form of advertising to obtain the revenue for the operation of their stations. On the other hand, it is equally manifest that the advertising must not be of a nature such as to destroy or harm the benefit to which the public is entitled from the proper use of broadcasting channels. The Commission has, of course, no power to censor programs and must proceed cautiously in its regulations on this subject."

Its application forms, also from the very beginning, requested information from applicants on programing proposals, including the sale of time. See *Statement of August 23, 1928*, quoted in Second Annual Report of the Federal Radio Commission, pp. 166–170;[13] also Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 8825, 70th Cong., 1st Sess., pp. 21–22.

The Commission implemented this policy in a series of decisions in individual licensing cases. Thus, in 1929, in its Statement of Facts and Grounds for Decision in *Great Lakes Broadcasting Co.*, the Commission said:

"* * * the amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of the station * * *. The commission must, however, recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to *preserve the largest possible amount of service for the public* * * *. Advertising must be accepted * * * as the sole means of support for broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege" (3 F.R.C. Ann. Rep. 32, 35). [Emphasis added.]

Under General Order No. 32, issued May 25, 1928, the Federal Radio Commission required 164 specified stations, with regard to which "[t]he Commission had in its files reports * * * and other records of information indicating that it was very doubtful whether any of these broadcasting stations was performing any service entitling it to a renewed license * * *" to " * * * make a showing

[13] The Statement also contains the following:
"While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. *Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.*" [Emphasis supplied.]

that their continued operation would serve public interest, convenience, or necessity" (2 F.R.C. Ann. Rep. 15 (1928)). In some cases, overcommercialization was one of the factors leading to the deletion of twenty-six of these stations. See, e.g., 2 F.R.C. Ann. Rep. 1928); cf. *WCRW*, where the Commission reduced the station's power, stating that "a large part of the program is distinctly commercial in character, consisting of advertisers' announcements and of direct advertising * * * [the] station is one which exists chiefly for the purpose of deriving an income from the sale of advertising * * *" (2 F.R.C. Ann. Rep. 156 (1928)).

There is one other pertinent matter involving the Federal Radio Commission. S. Res. 129, 72d Cong., 1st Sess., directed the Radio Commission to provide the Senate with information pertaining to the growing dissatisfaction with the use of radio facilities for purposes of commercial advertising. The Resolution contained a number of specific questions directed to the Commission. In answer to Question 4, the Commission reported:

"4. What plans might be adopted to reduce, to limit, to control, and perhaps to eliminate the use of radio facilities for commercial advertising purposes?

"Answer. This answer is based upon the premise that the present system of broadcasting will be retained. Any plan, the purpose of which is to eliminate the use of radio facilities for commercial advertising purposes will, if adopted, destroy the present system of broadcasting.

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitation or specifically authorizes the Commission to do so under a general standard prescribed by that legislation. *While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising.*

* * * * * * *

"The adoption of regulation of the sort herein described should be undertaken only when it clearly appears that a majority or at least a considerable number of the licensees have failed to operate their stations in a manner acceptable to a majority of the listening public. If, in the opinion of Congress, that time has now arrived, we conceive it to be advisable to enact such legislation as will permit the Commission to impose such regulations as the circumstances from time to time seem to warrant rather than legislation imposing specific restrictions and unflexible limitations" (S. Doc. No. 137, 72d Cong., 1st Sess.). [Emphasis supplied.]

Several things should be noted with respect to this quotation. First, a bare majority of three of the five commissioners concurred in the statement that additional legislation would be needed if control of advertising by means of direct regulation was to be assumed, the other two commissioners holding that Section 4 of the Radio Act (Section 303 of the Communications Act) provided ample authority (Sen. Doc. No. 137, *supra*, p. iii). More important, the commissioners recognized they had authority to refuse to renew or to revoke a license because "the character of program material does not comply with the statutory standard of public interest, convenience, and necessity"—in short (as shown by the phrase "* * * no other limitation upon the use of radio facilities for commercial advertising"), that they could take the character and amount of commercial advertising into account in renewing or revoking a license; indeed, as we have shown, this was precisely what the Commission was doing in individual cases. But in affirming their authority to deal with overcommercialization on a case-by-case basis, the three-man majority was, albeit unknowingly, affirming their authority to act by rule. For, as discussed earlier, the *NBC*, *ABC*, and *Storer* cases, *supra*, establish that authority which can be exercised on a case-by-case basis (i.e., in connection with renewal or revocation) can be exercised by a rule. Thus, whatever doubts may have existed in the minds of three of the commissioners in 1932 have long since been resolved by explicit judicial holdings.

2. Administrative Precedent—Federal Communications Commission

The Federal Communications Commission continued the Radio Commission's policy that overcommercialization is inconsistent with the public interest. Its application forms sought information on this score. The matter was stressed

in Commission policy pronouncements. Thus, in its 1946 document, "Public Service Responsibility of Broadcast Licensees," at page 132, the Commission noted that "some stations during some or many portions of the broadcast day have engaged in advertising excesses which are incompatible with their public responsibilities," and stated:

"As the broadcasting industry itself has insisted, the public interest clearly requires that the amount of time devoted to advertising matter shall bear a reasonable relationship to the amount of time devoted to programs. Accordingly, in its application forms the Commission will request the applicant to state how much time he proposes to devote to advertising matter in any one hour."

In the 1960 definitive policy statement, the Commission stated that "[w]ith respect to advertising material the licensee has the additional responsibility * * * to avoid abuses with respect to the total amount of time devoted to advertising continuity * * *" (*Programming Policy Statement*, 20 Pike and Fischer, Radio Regulation 1912–1913).

The Commission's actions in individual cases also reflect its concern with "overcommercialization" under the public interest standard (Cf., e.g., *Travelers Broadcasting Service Corp.*, 6 FCC 456, 465;[14] *Community Broadcasting Co.*, 3 Pike & Fischer, R.R. 1360;[15] *Re Roth*, 3 Pike & Fischer, R.R. 1377; *Re Davis*, 3 Pike & Fischer, RR. 1371).

The Commission's two most recent actions in this area were *Palmetto Broadcasting Co.*, (23 Pike & Fischer, R.R. 483), and *WCGA*, Public Notice, 24917, September 12, 1962.[16] In *Palmetto*, the Commission, after finding that programing of the licensee was frequently saturated with commercial announcements, said:

"The conclusion is compelling that Robinson tailored his operation more to the convenience of his advertisers than to the need of the public. Standing alone, this issue, on the facts of the case, might have resulted only in a short-term renewal of license. As it is, our conclusion on [this issue] bolsters the ultimate conclusion we reach that a grant of renewal would not be in the public interest."

We recognize that these administrative precedents deal with case-by-case treatment of the problem of overcommercialization. The precedents are pertinent, however, because, as we have shown, if the Commission has the authority to treat overcommercialization under the public interest standard in individual cases, it also has the authority to deal with this matter through appropriate rules.

3. Judicial Precedent

First, we point out that our prior discussion (pp. 6–9, supra) concerning Section 326 is pertinent, since it cites well-established judicial precedent that the Commission may take into account the nature and character of the applicant's programing proposals or performance in determining whether the public interest would be served by a grant of an application for construction permit or for renewal of license.[17] As stated, we do not see how it can be contended that the

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[15] The Commission there characterized the program service of the licensee as "overcommercialized," and granted the station its renewal of license on the basis of representations made to it that, among other things, the number and length of commercial spot announcements would conform to the NAB Code.

[16] The Commission there noted that the applicant's proposals as to commercial spot announcements, "* * * combined with a policy of broadcasting commercial spot announcements of substantial length, evenly distributed throughout various time segments, would raise a serious question with respect to whether the station's programing was being interrupted so frequently and in such a manner as to be detrimental to and inconsistent with the public interest."

The Commission found assurance that the licensee's performance with respect to the broadcasting of commercial spot announcements would be substantially different from the questionable proposals, and granted a short-term renewal of license.

[14] In that case, the Commission denied assignment of licenses on the ground, inter alia, that:

"The assignment of the licenses in question would involve the assumption of obligations on the part of the proposed assignee far in excess of the actual value of the property to be received. In its efforts to meet the payments on these obligations said assignee might be encouraged to overcommercialize the activities of the stations involved, leading to an ultimate detriment in the service rendered the listening public."

[17] The cases cited there by no means exhaust the list of decisions sustaining the Commission's authority to concern itself with a broadcast licensee's programing performance or proposals. (See, e.g., cases cited in the Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media, December 30, 1959, pp. 30–33.) The Report noted (pp. 30–31) that "in every case in which the question has been presented, the courts have upheld the Commission's authority to concern itself with a licensee's program policies and practices." To the same effect, see S. Rept. No. 49, pp. 12–13, submitted by a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess., and unanimously approved and adopted by the full Committee on February 9, 1949.

amount of time devoted to commercials is not a relevant consideration in that determination.

Second, the *Bay State Beacon* case, *supra*, is particularly pertinent. The Court there held that the Commission, "in the performance of its plain duty," may properly inquire "into the amount of sustaining time a prospective licensee purports to reserve if granted a license" (*Bay State Beacon, supra*, p. 827).[18] Similarly, we think it clear that the Commission, "in performance of its plain duty," may inquire into the amount of time a prospective applicant purports to reserve to actual programing for the public as distinct from advertising designed to serve the interests of sponsors.

C. LEGISLATIVE HISTORY

1. Radio Act of 1927[19]

The Supreme Court, after its study of the legislative history, has several times concluded that Congress conferred upon the Commission "broad," "expansive," and "comprehensive" powers to act in the broadcast field under the public interest standard (*Federal Communications Commission* v. *Pottsville Bctg. Co.*, 309 U.S. 134, 137; *Nattional Bctg. Co.* v. *U.S., supra*, at pp. 213–214; *U.S.* v. *Storer Bctg. Co., supra*, at p. 203). The legislative history fully supports this conclusion. (See, e.g., H. Rept. No. 1416, 67th Cong., 4th Sess., on H.R. 13773 (a predecessor bill to the Radio Act of 1927), p. 3; House Hearings on H.R. 5589, 69th Cong., 1st Sess.; 67 Cong. Rec. 12358.)

Similarly, the legislative history indicates that Sections 303 (a) and (b), directing the Commission to classify stations and prescribe the nature of their service, conveyed a broad grant of authority.

These sections had their genesis in the classification system used by the Department of Commerce in its regulation of broadcast stations. Briefly, stations were classified as Class A and Class B stations. The distinction was based, in part, on the nature of the services rendered; i.e., whether they broadcast live, original programs or mechanical reproductions. As is evidenced in subsequent hearings, Congress was aware of this classification.[20] (See Hearings Before the Committee on Interstate Commerce, United States Senate, 71st Cong., 1st Sess., on S. 6, May 24, 27, 28, 29, June 5 and 7, 1929, p. 1071.)

The provisions of Sections 4 (a) and (b) of the Radio Act (Sec. 303 (a) and (b) of the Communications Act) were specifically intended to confirm and broaden this authority. The bill which Mr. White introduced in 1922 authorized the Secretary of Commerce to "(a) classify licensed radio stations and the operators required therein; (b) prescribe the nature of the service to be rendered by each class of licensed station and assign bands of wave lengths thereto; (c) make, alter, and revoke regulations applicable to all licensed stations * * * concerning the service to be rendered by each class of stations so established" (House hearings on H.R. 11964, 67th Cong., 4th Sess., p. 1).

During the course of hearings on this bill, Mr. White explained that these provisions were "* * * broad enough to authorize the Secretary of Commerce to allocate from 6 to 10 o'clock on Sunday evenings available broadcasting wave lengths to the churches, but I am not so sure that it is broad enough to enable the Secretary to say to the church that, 'You shall broadcast a sermon instead of an organ recital.' * * * But I do think the Secretary, in this bill, undoubtedly has the power to put everybody out of the air from 5 to 10 o'clock on Sunday evenings, except the churches of the country, if he sees fit to do so" (Hearings on H.R. 11964, pp. 63–64).[21]

The bill which finally became the Radio Act contained the provisions which are Section 303 (a) and (b) of the Communications Act. Commenting on them a year after enactment of the Radio Act, Mr. White said:

"Now, I take it, under that authority, the commission has the right to say that a particular station may broadcast jazz music or that it may be used for the broadcasting of weather reports, stock reports, or market reports; that it may generally prescribe the nature and the character of the service which a class

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[18] While this statement was made in the context of a comparative hearing case, consideration of this factor is just as pertinent to the public interest judgment in the noncomparative situation and would not suddenly become improper when there is only one applicant.

[19] In view of the very great similarity between the Radio Act of 1927 and the Communications Act of 1934, as to the provisions pertinent to the legal question here being treated, a good deal of our discussion will refer to the Radio Act.

[20] This practice was discontinued upon the advice of the Fourth National Radio Conference, but not because it was felt to be improper regulation ("Fourth National Radio Conference," p. 19).

[21] See also Hearings on H.R. 5589, 69th Cong., 1st Sess., pp. 38–39. We cite the quoted material in the above text of this page to demonstrate the broad scope the draftsman intended to give Section 303 (a) and (b), and not, we emphasize, to imply that rule restrictions such as there discussed would be reasonable in the present circumstances, so markedly different from those in 1927.

of stations or which a particular station is to render. Now, I am inclined to believe, myself, that the language of present law is broad enough to permit the commission to say that on a particular station you may or may not put out advertising, direct or indirect; but * * * I recognize there is some doubt about that construction * * *"

In addition to the foregoing, the legislative history indicates congressional concern with the subject of radio advertising. During debates on the Radio Act, Representative Davis inserted in the Congressional Record portions of a letter that then Secretary of Commerce Hoover had earlier sent to Representative White. In part, that letter stated:

"During the past year there have been discoveries in the use of higher power and therefore larger areas of broadcasting, which may result in a single station being able to cover a large portion if not all of the country. This raises questions of the rights of local stations and rights of local listeners. Still another development has been the fact that it has been found possible by indirect advertising to turn broadcasting to highly profitable use. If this were misused, we would be confronted with the fact that service more advantageous to the listeners would be crowded out for advertising purposes" (68 Cong. Rec. 2573).

After inserting it in the Record, Mr. Davis observed that:

"It is interesting to note that all of the developments and dangers to which Secretary Hoover referred have resulted in a remarkable, and in some instances an alarming, extent; * * *"

Congress did not then feel justified to forbid or, itself, undertake in the Act to limit advertising over radio. (See H.R. No. 719, 68th Cong., 1st Sess., pp. 5–6.) But it is clear that Senator Pittman, who on the floor attacked the conference bill at length,[22] was incorrect in his assertion that '[N]o authority is given to the Commission or the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes * * *" For, the sponsors of the bill had stressed the bill was drafted on the principle that "* * * the right of the public to service is superior to the right of any individual to use the ether" (67 Cong. Rec. 5479), and the conference bill "* * * starts out by asserting in the first place that the right to broadcast is to be based not upon the right of the individual, not upon the selfish desire of the individual, but upon a public interest to be served by the granting of these licenses" (68 Cong. Rec. 2579).

Significantly, in floor debates on the bill, a leading sponsor, Representative White, agreed with the following statement of the then Secretary of Commerce, Mr. Hoover:

"Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust, * * *" (67 Cong. Rec. p. 5484).

Thus, the legislative history of the Radio Act indicates a clear intent to leave this matter of service to the public, including the aspect of advertising, to the Radio Commission, acting in accord with the public interest standard.

2. Communications Act of 1934

As shown (pp. 10–11), the Radio Commission did exercise that authority, and specifically with regard to advertising abuses, in a number of cases; and it repeatedly advised Congress of its policy of considering the program plans and records of applicants for broadcast licenses, including the aspect of advertising excesses.[23] See pp. 10113, supra, for specific references to the advertising aspect here in question.

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[22] In this connection, we point to the Supreme Court statement in *Schwegmann Brothers et al.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394–395: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." See, also, *U.S.* v. *United Mine Workers of America*, 330 U.S. 258; *Union Starch and Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008, 10012, certiorari denied, 342 U.S. 815.

[23] As stated (pp. 10–13, *supra*), this information had been furnished to Congress by means of the Commission's Annual Reports to Congress and in the course of various Congressional hearings. See also 1st-7th Annual Reports of the Federal Radio Commission (1927–1933); Hearings on Jurisdiction of the Radio Commission, before House Committee on Merchant Marine and Fisheries, 70th Cong., 1st Sess., pp. 26, 188; Hearings on S. 6, before Senate Committee on Interstate Commerce, 71st Cong., 1st Sess., 1929–1930, pp. 77, 88–90, 157, 230, 1615–1616.

The question of the Commission's authority to consider a licensee's commercial practices was also considered on the floor of the House when the effect of *KFKB Broadcasting Assn.* v. *Federal Radio Commission, supra*, was discussed, 75 Congressional Record 3684. In that case, the Court upheld the Commission's refusal to renew a broadcast license, because the Commission had found that the licensee's commercial broadcasting practices were "inimical to the public health and, therefore, not in the public interest."

Industry spokesmen also apprised Congress of the Radio Commission's policies. Thus, Mr. Louis G. Caldwell, the chairman of the committee on radio law of the American Bar Association, and former general counsel of the Radio Commission, informed the Senate Interstate and Foreign Commerce Committee, in its 1929 Hearings on S. 6 (71st Cong., 1st Sess., p. 90):

"I think the commission has taken a very sensible view of the proper place of advertising. It recognizes its necessity as a basis for support of the station, but has stated that that is as far as it should be permitted to go. It must be limited in character and amount so that it will not subsantially interfere with the main purpose of broadcasting, which is to bring to the public a certain amount of service composed of different kinds of programs."

It is contended that Congress, being aware of the "3–2" report of the Federal Radio Commission in 1932 as to its rulemaking powers in this area (S. Doc. 137, 72d Cong., 1st Sess.—see pp. 12–13, supra), approved this report by failing to insert a contrary provision in enacting the Communications Act of 1934. But there is not the slightest reference to this report in the debates or committee reports leading to enactment of the 1934 Act. In the circumstances, "[I]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law" (*Girouard* v. *United States*, 328 U.S. 61, 69). Here, certainly, "[T]he silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of [the principle of the Commission's report]," (*Girouard* v. *United States*, *supra*, p. 70).

In any event, the argument is undermined by the fact that Congress was informed, again and again, of the Radio Commission's policy against overcommercialization and its consideration of the problem of overcommercialization on a case-by-case basis; and, as we have repeatedly emphasized, the authority to consider these policies on a case-by-case basis also comprehends the authority to issue rules on the same score.[24]

CONCLUSION

In sum, the statute bestows upon the Commission the authority to adopt a rule prescribing the maximum amount of broadcast time a licensee may devote to commercial advertising. It does so, through its provisions in 307(a), 307(d), and 309, which give the Commission the authority, and indeed the responsibility, to insure that the advertising practices of an applicant for a license or renewal of license are consistent with the public interest; if these practices, and specifically overcommercialization, are a proper consideration in individual cases, the Act (Sections 303(r), 4(i)) and the cases establish that overcommericalization may also be the subject of appropriate rules "defining the prohibited conduct with greater clarity" (*FCC* v. *American Broadcasting Co.*, *supra*, at pp. 289–290). Further, under Section 303(b), the Commission has authority to "prescribe the nature of the service to be rendered by each class of licensed stations" and thus may consider the question of overcommercialization under its public interest responsibilities laid down in this section. While the statute is thus clear, we also point out that precedent, both administrative and judicial, and the legislative history further sustain the Commission's authority in this area.

Mr. ROGERS of Texas. Mr. Kornegay.

Mr. KORNEGAY. Mr. Henry, is it your thinking that any rule which you would promulgate limiting the commercials of the broadcasting industry, that such a rule would apply equally throughout the country?

Mr. HENRY. Well, we don't know, Mr. Kornegay, whether it would or not. We would like to get one that would, because it would be simpler of administration, and so on.

But we don't know that that could be done. We say that we may have to provide for waivers and specify the cases in which waivers would be considered, or we may have to grant exceptions in the rule, or we may have to adopt only specific criteria, and in a statement indicate instances in which that may not apply, and so on.

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[24] Reference has also been made to bills introduced in 1955 and 1957 to spell out the Commission's authority in this area (H.R. 5741, 84th Congress, and H.R. 4571, 85th Congress). But the mere introduction of such legislation clearly does not establish or even indicate a lack of authority. Cf. *Helvering* v. *Clifford*, 309 U.S. 331, 337–338; *U.S.* v. *Price*, 361 U.S. 304, 310–311.

In other words, there may be any number, and any number of different types of qualifications.

Mr. KORNEGAY. Is the Commission taking into consideration the different economic conditions that exist throughout the country, from locality to locality?

Mr. HENRY. Yes, indeed. I did indicate in my statement that our notice made that perfectly clear. We talked about stations which relied on seasonal business, stations in small towns might have to be treated differently from stations in very big metropolitan centers, and so on.

Mr. KORNEGAY. It would be very difficult to administer that sort of rule, wouldn't it, with the high degree of varying conditions in our country?

Mr. HENRY. I think it would be. It would be difficult to formulate also.

Mr. KORNEGAY. That is all I have at the present time.

Mr. ROGERS of Texas. Thank you, Mr. Kornegay.

Mr. Chairman, I notice that in your statement and also in the proposed rulemaking a great deal of attention was paid to the fact that advertising was necessary.

I think it treated it in such a manner that it could be referred to as a necessary evil, but the fact is that it is necessary, and it seems to me that a great deal of attention, much more than was necessary, is paid to the fact that advertising has been acknowledged as necessary in broadcasting.

Now let me put this question: Were it not for advertising, how would you pay for broadcasting?

Mr. HENRY. You would have a completely different system. You would have some form of Government subsidy.

Mr. ROGERS of Texas. You woud either have to have Government subsidy or you would have to have absolute Government control similar to the British Broadcasting System, or you would have to have pay television, wouldn't you, Mr. Henry?

Mr. HENRY. Yes. You would have to have Government subsidy or pay television or our present system.

Mr. ROGERS of Texas. So the economics of the people that engage in this business must be determined by the amount of advertising they can sell in the operation of that business?

Mr. HENRY. That is their principal and sometimes only source of revenue; yes.

Mr. ROGERS of Texas. Let's talk about that just a minute—their principal and only source of revenue. Now what other revenue do they have with regard to the operation of these stations except advertising?

Mr. HENRY. Sometimes they sell talent and programs, but I would say that we are not concerned about that.

Mr. ROGERS of Texas. You mean by that the type of program like a boxing match, and so forth, where the station sells that and gets a certain amount of money for it?

Mr. HENRY. Or recorded programs, or TV stations sometimes film programs and charge fees for other stations to show them. But that is so minimal in my judgment that it wouldn't be a factor in this proceeding. We are not concerned with that.

Mr. ROGERS of Texas. What percentage of the income of the average TV or radio station would that be?

Mr. HENRY. I don't know, but I would assume that it is minimal.

Mr. ROGERS of Texas. Now let's turn to another matter, Mr. Chairman. With regard to the question of basic authority, is it your opinion that the Federal Communications Act vests in the Federal Communications Commission the full and complete authority to conduct and control the communications business?

Mr. HENRY. No; it just gives us full and complete authority to regulate it.

Mr. ROGERS of Texas. You say full and complete authority to regulate it. If you have got full and complete authority to regulate it, then you would have full and complete authority to control it, would you not?

Mr. HENRY. Yes. We may be arguing about words.

Mr. ROGERS of Texas. Yes, sir.

Mr. HENRY. If you want to use the word "control," we have got full and complete authority to control it in the public interest, but we are limited by that standard, and as Congress sees fit to change the act.

Mr. ROGERS of Texas. Yes. Well, now that is the point. If the act as passed and as presently on the books grants you full control of this matter, it does so only in general terms, does it not?

Mr. HENRY. That is correct.

Mr. ROGERS of Texas. Now don't we have a rule of statutory construction that a Commission or a body created by the legislative branch of this Government gets only such powers as are affirmatively granted to it and such powers that can be employed for the carrying out of the expressly granted powers?

Mr. HENRY. Well, I would assume that there is such a rule of statutory construction. Whether there is or not though I would agree with the statement.

Mr. ROGERS of Texas. What powers is it that the Communications Commissioners feel that they do not have with regard to the communications industry?

Mr. HENRY. Mostly we do not have the authority to regulate the communications industry other than as we can substantiate a finding that such regulation is one in the public interest and within the overall ambit or intent of the act.

Mr. ROGERS of Texas. And that goes to the individual station only, does it not?

Mr. HENRY. We regulate, yes, through the individual station licensee.

Mr. ROGERS of Texas. Now the license is granted for 3 years, subject to renewal.

Now suppose you deny a man a renewal of a license. What appellate rights does he have?

Mr. HENRY. He has the right to appeal to the U.S. circuit court of appeals, and then on a petition for certiorari to the Supreme Court.

Mr. ROGERS of Texas. And, of course, the Administrative Procedures Act would apply in such an appeal, would it not?

Mr. HENRY. Yes.

Mr. ROGERS of Texas. Insofar as your findings are concerned.

Now, have you had any instances where such an appeal has been prosecuted?

Mr. HENRY. What type of appeal?

Mr. ROGERS of Texas. An appeal from denial of the renewal of a license?

Mr. HENRY. Oh, yes indeed, several are pending.

Mr. ROGERS of Texas. And what has been the decision of the courts in those most recent cases?

Mr. HENRY. Well, I will have to get the help of the General Counsel on this.

Could you comment on that?

Mr. PAGLIN. The most recent one, Mr. Chairman——

Mr. ROGERS of Texas. Will you identify yourself for the record?

Mr. PAGLIN. I am Mr. Paglin, General Counsel.

Mr. ROGERS of Texas. Yes.

Mr. PAGLIN. On the whole, and I would say generally the Commission's record in the courts with respect to the denial of renewal of licenses of broadcasting stations has been affirmed by the courts.

In our most recent cases where the Commission has denied renewal of license, in the court of appeals—KLRA is one of them—the Commission's holding was affirmed.

Mr. ROGERS of Texas. Have they upset any of those decisions?

Mr. PAGLIN. To my recollection, I know of none offhand.

Mr. ROGERS of Texas. Now on what basis did the court affirm the decision? Did they have a complete hearing or did they proceed under the substantial evidence rule?

Mr. PAGLIN. No. In each case, as you indicated, Mr. Chairman, not only our own act but the Administrative Procedures Act, and before the Administrative Procedure Act case law required that a full and complete evidentiary hearing be held before the Commission, usually before an examiner. He issues an initial decision. His findings are then subject to review by the Commission.

Mr. ROGERS of Texas. I am not talking about that. Let's not get this confused.

Let's go to the courts where a man is entitled to have his appeal completely heard on the facts.

Now the fact of the matter is insofar as these matters are concerned, they are held on the record of evidence accumulated by the Commission, are they not?

Mr. PAGLIN. That is correct, and every other review, every other review of Commission action is in the same manner.

Mr. ROGERS of Texas. I understand, but I am talking about this.

Mr. PAGLIN. The appellant court——

Mr. ROGERS of Texas. Under the substantial evidence rule if the court find that there is anything in the world in the record to support the finding of the Commission, and it really goes to the point where if there isn't something in there to contradict the findings of the Commission, the court is bound by it, isn't it?

Mr. PAGLIN. No. If you please, Mr. Chairman, it is not quite that narrow. The courts have generally reviewed Commission action as they do every matter of judicial review to determine whether the agency, and I say the agency in the broad term——

Mr. ROGERS of Texas. Yes, sir.

Mr. PAGLIN (continuing). Has made a reasonable determination based upon sufficient facts in the record. The court will not substitute its judgment in policy perhaps for the agency, but they must determine that the agency had sufficient grounds in law and in the evidence to represent the determination it did. If it did not have sufficient grounds, the court will reverse the agency and send it back for further hearing.

Mr. ROGERS of Texas. In other words, the court must find by the law as it presently exists that the agency acted in an arbitrary or capricious manner before they can upset it.

So the question of reasonableness goes to the point of whether or not the Commission was arbitrary or capricious before they could upset the decision.

That is the basic decision we are operating on right now; isn't that correct?

Mr. PAGLIN. That is correct, and also not only arbitrary and capricious in terms of the agency's interpretation of its original authority; the court will review that too.

Mr. ROGERS of Texas. That is what I am coming to. In other words, the authority that the Commission has by following this procedure is actually an authority that is made by a determination of the act as they construe it. That is correct, isn't it?

Mr. PAGLIN. As the Commission initially construes it.

Mr. ROGERS of Texas. Yes.

Mr. PAGLIN. And as the court then reviews its construction: that is correct.

Mr. ROGERS of Texas. Yes. So what has happened if we follow this policy in all independent agencies, there isn't much need for the Congress, is there?

Mr. PAGLIN. I don't mean to go into a long lecture because I believe it will suffice with the memorandum which the chairman has given us permission to submit for the record.

I think we will establish to your entire satisfaction that the Commission presently has the legal authority.

But in the overall sense——

Mr. ROGERS of Texas. You mean has the legal authority to——

Mr. PAGLIN. To adopt a rule such as being considered here today.

Mr. ROGERS of Texas. To adopt the particular rule that is under consideration?

Mr. PAGLIN. That is correct; or a rule to carry out the policy of Congress. What I meant to say quite generally and briefly is that——

Mr. ROGERS of Texas. Wait just a minute. While you are saying that, you said rule to carry out the policy of Congress.

Now what has been done is the Commission has made the determination of what the policy of Congress was and Congress hasn't made that determination, and the courts are bound by it, aren't they?

Mr. PAGLIN. No, not quite. The Congress, as it does in each of the areas of regulation of large industries let's say, the various factors of the economy of the Nation, sets out broad, general statements of congressional policy.

In our instance our touchstone as the courts have said is the public interest. It then, because as one of our former Chairmen used to say, because of the concession to the shortness of life and since Congress doesn't have the time nor probably the expertise to get into all

of these details, it then delegates this general statutory policy to the administrative agency to carry out.

The administrative agency then becoming the expert in the field will attempt to concretize, if you will, to make concrete the will of the Congress by the various administrative regulations which it issues.

It makes determinations as to what it thinks is in the public interest in this field.

These determinations are reviewable by the courts as we have discussed, and, of course, always by Congress.

If the Congress should feel that the agency is not in fact carrying out its will, of course, it can change the statute.

But the general theory in administrative law is that Congress lays down the general policy. The agency carries it out.

Mr. ROGERS of Texas. Yes, I know.

Mr. PAGLIN. And it is reviewed by the courts.

Mr. ROGERS of Texas. That is talking in generalities.

Mr. PAGLIN. It it.

Mr. ROGERS of Texas. What you are actually saying, isn't it, is that when Congress passes a law of this kind and the agency makes an initial decision as to what the policies are, if Congress does not change that, then by acquiescence they simply underwrite what the Commission has done and thereby in my opinion completely destroys the Congress of the United States as the legislative branch of the Government in dealing with these things that affect citizens' everyday lives.

Mr. HENRY. Mr. Chairman, let me add at this point that we are in no substantial disagreement with you on this point, at least I am not.

We interpret the policy of Congress as we see it.

Mr. ROGERS of Texas. Yes.

Mr. HENRY. That is why we are there, because Congress does not have the time to do it, and because it would be totally inconsistent with the administrative process to let the courts do it.

So that is why we are there, and we interpret congressional policy as we see it.

But that is good only until Congress changes our interpretation of that policy.

But we are in complete agreement that it is of continuing concern to the Congress as to how we are about to interpret its policies and how we do in fact interpret them.

Mr. ROGERS of Texas. Then by the use of the term broad and expansive authority which you have used many times, do I conclude that it is your opinion that the Federal Communications Commission has rulemaking powers in any phase of the communications business, and unless the Commission is prevented by the Congress through affirmative action from doing it the Commission has carte blanche authority to act in any area?

Mr. HENRY. No, I didn't mean to imply that we had carte blanche authority.

Mr. ROGERS of Texas. In what areas don't you have the power to promote——

Mr. HENRY. We can't fix rates. It is not a common carrier.

Mr. ROGERS of Texas. Wait, it can't fix rates because it is not a common carrier?

Mr. HENRY. That is correct.

Mr. ROGERS of Texas. What you are saying is that if the question of common carrier wasn't in there then you would be able to fix rates because Congress hasn't said you can't do it?

Mr. HENRY. No, I think it would specifically have to make it a common carrier before we could do that. I don't know but that is academic and we are in agreement that we can't fix rates.

Mr. ROGERS of Texas. Suppose the common carrier question wasn't involved insofar as the rate-fixing situation is concerned. Under the act as it presently exists, would it be your position that you would have a right to fix rates?

Mr. HENRY. I haven't considered that question, Mr. Chairman. It is clear to me that we cannot fix rates.

Mr. ROGERS of Texas. Yes.

Well, now let me ask another question on this. It is getting close to 12 o'clock, and there is so much that I think ought to be covered in this. You say that you fell like due to the complaints that have come in that you must take some action to try to determine a solution to the problem of overcommercialization, and you feel that perhaps a possible answer to this is the limiting of commercials, the frequency and the amount of commercials or the amount of time consumed by the commercials.

Now do I understand you, Mr. Henry, that your conclusion is based on the fact that you think that complying with the public service requirements is what gives you the power to do this?

Mr. HENRY. The public interest requirements; yes, sir.

Mr. ROGERS of Texas. The public interest?

Mr. HENRY. Yes, sir; but I would not, I don't want you to think that it is strictly because, and only because, of the complaints, the actual written complaints that we have received from the public.

Mr. ROGERS of Texas. Yes.

Mr. HENRY. First of all, we are simply trying, we have suggested that it may be possible to clarify an existing policy, and put it in the terms of a rule or a policy statement.

We have an existing policy against overcommercialization, and we feel that——

Mr. ROGERS of Texas. Let's look at is in reverse.

Mr. HARRIS. Will the gentleman yield there?

Mr. ROGERS of Texas. Yes, I will be happy to do so.

Mr. HARRIS. I raise the question again, Mr. Chairman, and the first question I asked you what was the policy and you said you didn't know.

Mr. HENRY. I don't know.

Mr. HARRIS. Now you say that you have got an existing policy.

Mr. HENRY. In theory we do.

Mr. ROGERS of Texas. Let me ask you this question: You say that the public interest must be served. Now as I understand you, would it be fair to say that overcommercialization is annoying to the viewer or the listener and therefore this annoyance is of such a nature that it ought to be regulated in some way to prevent too much annoyance?

Mr. HENRY. No, that is not the whole story, and I agree with you that this is a very important matter.

Mr. ROGERS of Texas. You mean the annoyance part is very important?

Mr. HENRY. No, the whole subject of overcommercialization is a very important matter.

Mr. ROGERS of Texas. Let me ask you this insofar as this part of it is concerned on overcommercialization. If you look at it from the point of these complaints, say, that come in, we think there are too many commercials and we think there are too many breaks in them, now if you could do that by the same token couldn't you say that a 30-minute commercial is obnoxious as compared with maybe a 2-minute commercial, and get into the content of these commercials as well as into the frequency and length of time?

Mr. HENRY. I don't think we have—no, I don't think we could get into the content of commercials, but it is not based on complaints alone.

Mr. ROGERS of Texas.. I know, but let's stay with that. It has an integral part. What I am trying to get at is this: Your position is that you can control the length of time and the frequency of these, but you cannot control the content of the commercial.

Mr. HENRY. That is right. We can't get into the content of commercials any more than we can get into the content of programs except as——

Mr. ROGERS of Texas. Why can't you get into content?

Mr. HENRY. Except as we are allowed to by the statute when they are fraudulent, deceptive, obnoxious, lewd.

Mr. ROGERS of Texas. I understand. Why can't you get into the content otherwise?

Mr. HENRY. Because we are prevented by section 326 of the Communications Act and the first amendment to the Constitution.

Mr. ROGERS of Texas. You mean on censorship?

Mr. HENRY. Yes, sir.

Mr. ROGERS of Texas. Do I gather from your statement that by prohibiting a thing from going on that you can also censor by that method or limit the time that you can in effect censor?

Mr. HENRY. We can't in any way censor.

Mr. ROGERS of Texas. Suppose a man has a 3-minute commercial and he didn't have time to put it on. He had to cut that commercial down to 30 seconds because that is all the time he had left on account of the limitation you put on him. Wouldn't that be a form of censorship?

Mr. HENRY. Mr. Rogers, there are all sorts of results of Commission action. When you deny the Storer broadcasting, for example, the right to own an 8th, 9th, or 10th broadcasting station, you deny his going on the air at all, but that isn't censorship.

When we make a judgment that a proposal of a licensee is not in the public interest he changes his proposal. This has an effect on the programs themselves.

Mr. ROGERS of Texas. I know. The question of censorship does not come into play until a man gets a license, so let's don't get on to the Storer case. Because you don't have any powers at all over a man that doesn't have a license, do you?

Mr. HENRY. Not until he applies, that is right.

Mr. ROGERS of Texas. I mean, suppose I didn't apply. You have got no control over me at all.

Mr. HENRY. That is correct. No, our jurisdiction doesn't extend that far.

Mr. ROGERS of Texas. Until you grant a man a license you don't have any power over him at all.

Mr. HENRY. That is correct.

Mr. ROGERS of Texas. And you can keep him from getting that license so you won't have power over him by simply refusing.

Mr. HENRY. That is right.

Mr. ROGERS of Texas. But until he gets the license and then is when the prohibition against censorship comes into play.

Mr. HENRY. That is correct.

Mr. ROGERS of Texas. Now it is your position that you can't censor by limitations of time, but that you can censor by deleting information or deleting things that come in specifically insofar as content.

Mr. HENRY. No, we can't censor in any event. We can apply, for example, the fairness doctrine, and I would assume this has some effect on programing.

Mr. ROGERS of Texas. Suppose a man has a 3-minute commercial and you said, "We are going to cut off the last 2 minutes of this because we don't like it." You say you don't have the right to do that?

Mr. HENRY. We wouldn't have the authority to cut off the last 2 minutes.

Mr. ROGERS of Texas. I know, but——

Mr. HENRY. He could go ahead and play it, and then if he thought that that violated our rule he would have to take the consequences.

Mr. ROGERS of Texas. But your position is that you would have no right to prohibit him from doing it.

Mr. HENRY. No, that is correct.

Mr. ROGERS of Texas. But you would have the right to limit him to 1 minute, so he would have to take 3 minutes and put it into 1 in some way or another.

Mr. HENRY. I am not going to deny that this will have some effect on the length of commercials.

Mr. ROGERS of Texas. Yes.

Mr. HENRY. And that a commercial that is not played because of the rule has some content to it. It does have that effect on it. But my judgment is this is neither censorship nor is it prohibited by law.

Mr. ROGERS of Texas. Mr. Henry, can you come back at 2 o'clock?

Mr. HENRY. Yes, sir.

Mr. ROGERS of Texas. I think some of the other members have some further questions and the House is in session at this time. I am going to ask for unanimous consent to sit this afternoon.

If I don't get it we won't sit. So we will notify your office just as quickly as this information is available.

Mr. HENRY. Thank you. Otherwise, we will be here at 2 o'clock.

Mr. ROGERS of Texas. Thank you very much.

The subcommittee will stand in recess until 2 p.m.

(Whereupon, at 12:05 p.m., the committee recessed to reconvene at 2 p.m., of the same day.)

AFTERNOON SESSION

Mr. ROGERS of Texas. The Subcommittee on Communications and Power will come to order for further consideration of pending business.

STATEMENTS OF HON. E. WILLIAM HENRY, FREDERICK W. FORD, ROBERT T. BARTLEY, KENNETH A. COX, LEE LOEVINGER, AND ROBERT E. LEE; ACCOMPANIED BY MAX D. PAGLIN, HENRY GELLER, GERARD M. CAHILL, JOEL ROSENBLOOM, JAMES B. SHERIDAN, HYMAN GOLDIN—Resumed

Mr. ROGERS of Texas. Mr. Henry, with relation to the powers that are being assumed by the Commission in this respect, have you had any discussion in your general Commission meetings as to whether or not you had these powers in the first instance?

Mr. HENRY. I think, if memory serves me correctly, we have had some discussion about this. I am sure it has been mentioned. I think I am safe in saying without exception, though, the individual Commissioners feel that it is presently within our jurisdiction to state by rule or specific policy statement what is really a presently existing policy against overcommercialization.

Mr. ROGERS of Texas. Well, what I am getting at is this: Has there been more or less a premise established in the Federal Communications Commission that you have very broad powers insofar as rulemaking is concerned, or do you have separate discussions when you have a meeting to decide whether or not you will enter into this rulemaking procedure whether or not the particular situation involved is within your powers, or whether you should come to Congress and discuss the matters?

Mr. HENRY. Well, yes; I think any time that we feel that there is any doubt about it, we do have a thorough discussion of it. We call not only on our own experience but on our General Counsel and our Broadcast Bureau for their considered opinion.

Mr. ROGERS of Texas. Did you want to say something about that, Mr. Bartley?

Mr. BARTLEY. I just wanted to point it up this way: We have two procedures we can follow. We have the rulemaking procedure. This can be so if we think we have the authority, or we can institute an inquiry of the legislative type if we thought we did not but needed it for the purpose of coming to Congress with a recommendation. So I would say that any time we decide on that procedure is the point at which we decide whether we have authority or not.

Mr. ROGERS of Texas. Now, in that connection, I notice that in the situation involving the imposition of license fees that the Commission cited the authority spelled out in statute, in the appropriations bill, I believe of 1951 or 1952, as your basic authority to impose those licenses. Now, do I understand from that that if it had not been for that appropriation bill, you felt you would not have had that authority?

Mr. HENRY. Well, I think—my own judgment on that is we never reached that particular point, because we all agreed that under that, under the 1952 law, we did have the power. Again, the discussion was centered on the question of whether we should exercise that power.

We did not really have a full discussion of that question.

Mr. ROGERS of Texas. But now, on this particular situation, do I understand that you did discuss this and you concluded that you did not need further legislative authority to limit the frequency and the amount or the length of commercials?

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Mr. HENRY. Yes; that is an accurate statement. Let me point out again, because it is the crux of the matter, the reason that we all felt that we did have this authority is because we are presently—we presently have a so-called policy against overcommercialization that we have implemented on a case-by-case basis. I think all of us agree that——

Mr. ROGERS of Texas. Yes; but now, Mr. Chairman, if you will permit me at that point, you are proceeding with regard to that authority on the overall basis of public interest and your power to fail to renew a license of an applicant or a licensee, are you not? You have been doing so; have you not?

Mr. HENRY. That is right. Or I would assume that if we sought to do it on a case-by-case basis, it could involve not only failure to renew, but revocation.

Mr. FORD. Mr. Chairman, I opposed this rulemaking proceeding in the proposed notice and I used every argument that I could think of. One that I did not feel that I had was that the majority did not have authority to adopt the notice of proposed rulemaking. The reason I came to that conclusion was because of the provisions of section 303(b) of the Communications Act to the effect that the Commission has the authority to classify stations. We have done that with respect to educational stations.

A broadcast station that is an educational station is noncommercial. They have no advertising at all and no one has ever challenged the Commission's authority to prohibit advertising on those stations under 303(b). Consequently, I concluded that there was no basis for me to challenge the majority in issuing the proposed notice of rulemaking on the ground that they did not have authority to do it under the provisions of the act.

Mr. ROGERS of Texas. Yes; but you are talking about the right to classify the stations. Now, the interpretation put on that as the intent of Congress was an interpretation put on there by the Commission and there is no legislative history, either in the reports of the House or the Senate, or even in the debate on the bill at the time, indicating that any power to limit advertising or commercials was intended, was there, Mr. Ford?

Mr. FORD. I have not researched that particular point and I am not able to state whether there was or was not. But it just seemed to me that basically, on the face of it here, the Commission would have that authority under the provisions of 303(b) and the other four sections. In all of our rulemaking proceedings, I think the Federal Register requires us to state our statutory authority for it. This particular notice on page 5, paragraph 13, has the authority that we rely on in the act for the adoption of this notice of proposed rulemaking. Even though I did think it ought to be done, nevertheless this is the way the system works.

Mr. ROGERS of Texas. Has it not been more or less assumed, as you went along, that you did have this authority or power?

Mr. FORD. Assumed on the basis of the statutory provisions.

Mr. ROGERS of Texas. I know, but there has been no extensive discussion of this in your meetings?

Mr. FORD. No, in this instance it did not appear to require any detailed discussion, as evidenced by the General Counsel not quite hav-

ing his memorandum ready at the present time. But generally, just on the face of it, it appeared that no discussion was necessary.

Mr. ROGERS of Texas. Well, let me add this: You simply began from the premise that authority was present and no argument was made against the authority down there?

Mr. FORD. I made none, no.

Mr. ROGERS of Texas. Okay. Now, so what you are undertaking to do by this proposed rulemaking procedure is to create a situation where you have sanctions to deal with penalizing people for violating this rule, sanctions other than the so-called death penalty or cancellation of license?

Mr. HENRY. If we put it in the form of a rule, then there would be no question that we could levy a fine up to our statutory authority for the violation of that rule as we have for any other. But we have not gotten that far, Mr. Chairman. We have not decided to enact a rule. We have not decided that if we do enact a rule, what form it will take. We are simply studying the situation and we feel——

Mr. ROGERS of Texas. Mr. Henry, that is one of the main points in this situation that I think ought to be clarified completely. Because your rulemaking notice stated that if you had these sanctions, you could do these things without having to cancel a license or revoke it, or fail to renew the license, that you could simply issue a cease-and-desist order with regard to these different violations that you were spelling out.

Now, there has been a great deal said about judicial review and congressional review. You say you have not invoked such an order and that if you do invoke such an order or such a rule, then there will be judicial review and there will be congressional review.

Mr. HENRY. Well, there can be, yes.

Mr. ROGERS of Texas. But now, the thing we have to look at in this is the practical side and there are a lot of little broadcasters, and some big ones, who by the time they got this thing judicially reviewed, would be bankrupt. The same thing is true from the standpoint of congressional review, because we are dealing with something that is operated on a day-to-day basis. We are not dealing with a situation where a man can or cannot file a lawsuit and the status quo remains more or less the same until it is decided.

Mr. HENRY. You are assuming two things that I think are incorrect. I think, first, you are assuming that we would enact a rule that would put a small station out of business. We do not think we would do that.

Secondly, you are assuming that the station could not support allegations that it would go bankrupt. If it could support such allegations to a court, they would stay such action by us or the enforcement of that rule.

Mr. ROGERS of Texas. I would prefer not to deal in assumptions, because I am not assuming that at all. I am simply saying that if you in all sincerity worked out a rule, then you say to John Doe, who owns a broadcasting station, "We are under the impression that you used 2 minutes in a commercial and our regulations said you could only use a minute and a half; therefore, we are issuing a cease-and-desist order," and you put him in a position of the reverse of the general law. You are putting the burden of proof on him to prove that he did not do that.

Mr. HENRY. We are not putting the burden of proof on him. We would give him every hearing. Under our authorities——

Mr. ROGERS of Texas. I know, but why give him the hearing if you are going to put the burden of proof on him? Why does he need a hearing if the burden of proof is not on him?

Mr. HENRY. The burden of proof is always on him to justify at renewal time that the renewal would be in the public interest. If we are going to take action such as revocation, the burden of proof would be on us for the violation of any rule. I do not think the burden of proof would change one bit by the fact that we enacted a rule. The burden of proof would remain as it is now under the case-by-case basis. There would be no change there.

Mr. ROGERS of Texas. Then it is your feeling that if you did adopt such a rule, your policy would be that you would have to have a case made out in which he would be permitted to answer any allegations that had been made against him before you would issue any cease-and-desist order?

Mr. HENRY. Yes; we would have to. I think the law, the requirements in that respect as to the burden of proof, the right to a hearing, and so on, would be exactly what they now under present Commission policy—that is, when we treat the question of overcommercialization on a case-by-case basis. I do not think that would change at all.

Mr. ROGERS of Texas. Then the difficulty would be simply this, that if he were under investigation, if he were the owner of a small station, then we would have a pretty sizable expense attached to this situation insofar as getting facts together, hiring attorneys and doing things of that sort in order to present his side of it.

Mr. HENRY. He would have the same burden as he has now if we pick him out on a case-by-case approach.

Mr. ROGERS of Texas. I understand it. Then he would have to do that or there would be the probability that he might have to do it a lot more times than he does now?

Mr. HENRY. I do not think so. It would be only once. He would either win or lose his case at that point.

Mr. ROGERS of Texas. Win or lose his case at that point? You mean on the cease and desist? If you told him, "We think you are doing a certain thing," and you decided that he was doing that thing and you issued a cease-and-desist order, then if he ceased and desisted, there would not be anything for you to file another complaint against him the next day, would there?

Mr. HENRY. No; that is true; but there would be nothing to prevent that under present Commission policy. That would not change. That is my point. If we get a complaint or it somehow comes to our attention that a station is violating our policy against overcommercialization, then all of these burdens that you speak of are immediately upon him under the present Commission policy. There would be no change there.

Mr. ROGERS of Texas. Under your powers to revoke the license?

Mr. HENRY. Under whatever powers we now have by simply treating it on a case-by-case basis. I think the cease and desist and all of the same powers would be there.

Mr. ROGERS of Texas. How many such cases have you had so far in this particular agency?

Mr. HENRY. We have had very few, relatively speaking. As I said earlier, I think it has been since the twenties perhaps, since any hearing issue has gone through the hearing and there has been a decision on this particular point. It has almost never come to a head.

Mr. ROGERS of Texas. Well, then, insofar as overcommercialization is concerned, do I understand that you have had no proceedings recently to cancel or revoke a man's license because of overcommercialization?

Mr. HENRY. Not on that ground alone. We have had several cases in which there has been a hearing and there has been an issue injected into the hearing on overcommercialization. But I do not think there has been one solely on overcommercialization in many years.

Mr. ROGERS of Texas. Is that on a revocation proceeding?

Mr. HENRY. Yes.

Mr. ROGERS of Texas. What was the basis of the revocation proceeding in the first place?

Mr. HENRY. Well, we have not had one since I have been there that I know of, but I think the latest one we have had is the so-called *Kingstree* case in South Carolina and that was a so-called renewal case, not a revocation. Overcommercialization was involved under one issue and the Examiner found there that there had been overcommercialization. I think that is quoted on page 1 of my statement.

Mr. ROGERS of Texas. Did that case involve deception or fraud?

Mr. HENRY. No; it involved obscenity.

Mr. BARTLEY. Not obscenity.

Mr. HENRY. There can be qualifications of this statement as necessary. But the principal issue in there involves the licensee's responsibility of operating in the public interest and the reason this was called into question was because of a series of programs conducted by the licensee which were deemed not to be in the public interest.

Mr. ROGERS of Texas. Well, now, Mr. Henry, have you had some complaints that the Commission has not acted upon due to the fact that revocation or the death penalty would have been the result and you did not feel that they were serious enough to go into it.

Mr. HENRY. I think this has always been in the background.

Mr. ROGERS of Texas. No. I am talking about specific cases now. I am talking about in recent years, that you know of or since you have been with the organization.

Mr. HENRY. Again, what was the question?

Mr. ROGERS of Texas. As to whether or not you have had complaints involving such matters as, we will say, obscenity, deception, fraud, overcommercialization, or anything that you felt that you had the authority under the act to cancel the fellow's license if proof could be made, but in looking into the matter, you concluded that it would not be fair to him to proceed further with it.

Mr. HENRY. If I understand your question, it is whether we have had any cases in which the Commission did not revoke a license, although it felt that it had the power, because it felt the death penalty was too severe.

Mr. ROGERS of Texas. Yes.

Mr. HENRY. There have been a lot of cases, whether or not they have gone to hearing. I know there have been a lot of cases in which that point of view has been urged. I know the *KORD* case was one in which we gave consideration to license renewal rather than continuing

with a hearing on the question of whether he should get his license. That was a case in which we said we had not been as clear in our policy as heretofore. That was based on his failure to perform in accordance with earlier promises.

Mr. ROGERS of Texas. That was on a cease and desist order, was it not, that his license would not be renewed unless he ceased and desisted?

Mr. HENRY. I think he got a short-term license and one of the reasons he got a short-term license was because the Commission felt that the failure to renew his license would be too severe in that case and this was the only remedy available and that is why he got a short-term license. I am citing this as one instance of a case in which this did occur, which I thought was your question.

Mr. ROGERS of Texas. Have there been quite a number of cases like that?

Mr. HENRY. I think there have been—not recently that I know of. I think, as I say, this has always been in the background and this was one of the main reasons why the Commission sought the power to impose the fine, that it needed some flexibility in implementing its rules and it did not have it.

Mr. ROGERS of Texas. Do I understand, then, that if you had had this flexibility——

Mr. HENRY. I beg your pardon?

Mr. ROGERS of Texas. If you had had this flexibility that you are seeking now, that you would have had a number of cases before the Commission that are not before the Commission because the only penalty would have been the death penalty? As I understand it, to clarify the situation, you said you have a lot of complaints about overcommercialization.

Mr. HENRY. That is right.

Mr. ROGERS of Texas. Now, what did you do with those complaints?

Mr. HENRY. If they were serious enough, we referred them to the station to see what the station had to say about it.

Mr. ROGERS of Texas. I know, but what did you do in the final analysis? Did you have hearings on them? Did you go into the matter for the purpose of determining whether revocation was in order?

Mr. HENRY. No. I think in many cases, the contact between the complaining member of the public and the station was sufficient to take care of it. In other cases, an inquiry as to what its policies were with respect to overcommercialization took care of it. Sometimes a lot of the complaints would relate to content and our reply would satisfy them.

Sometimes the thing went further and involved staff discussion with station personnel and on rare occasions, it came to the Commission in the form of bringing it to our attention that they had broadcast so many spot announcements per hour, so much commercial continuity per hour, and we then acted as we saw fit. But the occasions that it came to the Commission were rare.

Mr. ROGERS of Texas. Why, Mr. Henry, do you think it is necessary for you, then, to have this rulemaking power if you have followed a very successful policy to date and with all of these complaints, you have been able to handle them without having these sanctions?

Mr. HENRY. I think the policy has been singularly unsuccessful. I think that is the reason we need it.

Mr. ROGERS of Texas. Do you mean by that that it has been singularly unsuccessful because this overcommercialization in your opinion——

Mr. HENRY. Has gotten worse. Ex-Chairman Porter sent me, after my speech in New York, an essay that he had written for the St. Louis Post-Dispatch back in September 1945. I think it is interesting. It is rather long and I shall not go into it, but he talks about how many complaints they are getting about commercials being neurotic twaddle and so forth. He says:

> Such complaints are not rare. Perhaps you have heard some of them yourself. They are symptomatic of a growing body of public opinion which resents radio's commercial excesses—excesses which the wartime boom seems to have aggravated. Responsible radio executives and advertisers are themselves disturbed about it. Congress has begun to take notice of the situation.

Then he goes on to say that:

> It is painfully apparent that many of the great features and services with which broadcasting has won our favor and confidence in the past have been tossed away by commercial opportunism.

He said:

> It is clear to those who have studied the development of broadcasting that the time is approaching, if it has not already arrived, when two questions of the highest public importance must be answered. First: What kind of limitations, if any, should be placed, and by whom, on radio commercials—

and so on.

> Second, a kindred and larger question: Is broadcasting to become an almost exclusive medium for advertising and entertainment, or will it, in addition, continue to perform public service functions in increasing measure?

This was in 1945. As I pointed out earlier, the tendency of NAB codes has been to relax further and further and take in the fringe operator. In radio, the maximum is now 50 percent greater than it was in 1948. There are all kinds of evidence that we have that this is a serious problem, other than the fact that we get complaints.

It was interesting to me that Mr. Steiner's book, "The People Look at Television," has been widely quoted, and I think he is widely respected. The book says this, if I may take just a minute to quote him:

> For the first time in the study—

and he is talking about the subject of commercials—

> we have found a source of rather general annoyance with what appears on the TV screen. Programing yielded a variety of specific suggestions and complaints but nothing approaching a widespread dissatisfaction. Commercials undeniably qualify on this score. All of them don't annoy everybody all of the time, but there are probably very few viewers who are not often unhappy on one count or another.
>
> By the same token, we find the differing viewing elements in somewhat closer agreement than they have been on most issues. To be sure, the "highbrow" is still more critical of commercials, and on somewhat different grounds, but he and his less educated counterparts are in substantial agreement in the direction, if not the intensity and frequency, of their criticisms and their implicit requests.
>
> Thus we have the now surprising situation of the audience in substantial agreement on what should be changed, and on matters that could be changed, and rather easily (in principle, if not in practice). In short, viewer response gives clear direction to those who would increase viewer satisfaction. Here, unlike the case of programing, we can at least say what would please more of the people more of the time; shorter, fewer, and especially less interruptive messages; less aggressive and distasteful methods (by common, middle class

standards). And if, with regard to timing, commercials cannot be all three—shorter, fewer, and noninterruptive—the priority is probably in the reverse order.

Practically all the Commissioners, and at least most of those who voted to institute our proceeding, have had the experience, when we go out in the field to talk with people about the situation, that one of the major complaints is the subject of overcommercialization. As I say, not only that, but the trend, I think, is what is alarming here, because it has continued to increase. It started off in 1930, I think, when the president of the NBC Network testified. He said:

Our policy is to give them 1 minute of commercials and 29 minutes of solid, good entertainment.

We have seen that deteriorate. We have seen the situation in radio deteriorate, we have seen the codes deteriorate. We have seen the FCC standards deteriorate. That is why I think that the main thing we should do is clarify that policy to try to halt this trend.

Mr. ROGERS of Texas. Now, Mr. Henry, from what you have testified, I gather that you and the rest of the Commission feel that this is an issue of great importance and one that can have a very sizable impact on a major industry in this Nation?

Mr. HENRY. Well, I do not think it would have a major economic impact. I do not.

Mr. ROGERS of Texas. Do you not think that all the attention we have paid to it which you have read about over the years there would indicate that it is a pretty serious decision to be made?

Mr. HENRY. I think it is a pretty serious decision, but I think about it in this light. One is, we are treating only one aspect of it: that is, advertising time standards. There are several other complaints with respect to advertising in general.

Secondly, what we are talking about again is a minimum standard that we feel many broadcasters will go beyond and that the public perhaps would like for the broadcasters to go beyond. But it would be a minimum standard that the industry itself could live with under present conditions, but which would at least have to be changed by clearcut, affirmative, Commission action in the future if it was to get any worse. At least it would help——

Mr. ROGERS of Texas. Don't you think, though, that this is a matter of such grave importance, Mr. Henry, that the Congress is the one that ought to take the responsibility for making the decision?

Mr. HENRY. Well, as I said, I fully recognize Congress' interest in this and I think your basic assumption that it is an important question is well founded. We are not saying specifically that Congress should not be interested or that it should not act.

Mr. ROGERS of Texas. Well, I do not think, Mr. Henry, that it is your office to tell Congress whether they should or should not act. I think it is the office of Congress to make the decision in this sort of a situation.

Now, you have quoted the Supreme Court as having rendered decisions and I have noticed all through this that those decisions and the language used by the Supreme Court have been on general subjects, in which they used the word "expansive" and that sort of thing.

I noticed another trend, too, that the Supreme Court is much more jealous of its own jurisdiction than it is of the other branches of the Government's jurisdictions They do not mind infringing upon ours,

but they protect theirs pretty well. They have done a pretty good job of it.

I think we ought to get this thing spelled out very clearly so we do know just what their rights and powers are, because I do not think a commission or an independent agency would want to infringe upon an area in which they were not specifically authorized to act.

Mr. HENRY. No, we do not, and I wish, as I said in my speech, I wish the problem would go away, because we have enough to occupy us.

Mr. ROGERS of Texas. We run into those every day.

Mr. HENRY. I know you do. The Government in general does. And we are not trying to tell the Congress what it ought to do, far from it. All we are trying to do, I think, is exercise our responsibility and give our suggestions and recommendations to the Congress. That is simply not that it not consider this action, necessarily, but that it postpone its decision, at least until we have acted, if in fact we are going to act.

Mr. ROGERS of Texas. Thank you, sir. I think at this time, without objection, the record should show the presence of Commissioner Lee, who came in after the proceedings had started. I understand he had been out of town.

Also, at this time I want to call attention to the fact that the gentleman from North Carolina, Mr. Kornegay, has introduced a bill on this subject, H.R. 9042. As I understand it, he introduced it today.

Mr. KORNEGAY. That is right.

Mr. ROGERS of Texas. The chairman recognizes the gentleman from California, Mr. Younger, for additional questioning.

Mr. YOUNGER. Thank you, Mr. Chairman.

I would like, Mr. Henry, for you to clear up a statement you used about the death order or revocation being too severe, and that was the only remedy you had. Later on, we have run across several other items which you have mentioned where you could take action. Let's clear that up.

Just what do you have, other than the revocation of a license, to impose case-by-case regulations?

Mr. HENRY. Well, on a case-by-case basis, we have the power to issue cease-and-desist orders and to designate a renewal application for hearing on the question of whether or not it should be renewed. Of course, the ultimate result of a failure to renew is the same thing as a revocation, but it is a different procedure.

Mr. YOUNGER. Well, do you have the right to issue a renewal for a limited time, 30 days or 60 days or 6 months? You do not have to give a 3-year renewal, do you?

Mr. HENRY. That is right. We have the power to issue a short-term license, put the licensee, in effect, on a probationary license.

Mr. YOUNGER. Do you have the right to impose a fine of any kind?

Mr. HENRY. As I understand it, we have no power to fine unless there has been a rule violation.

Mr. YOUNGER. Only when there is a rule?

Mr. HENRY. When there is a written rule to be violated, I think there is some question about that, but that is the generally accepted view.

Mr. YOUNGER. And that is one of the reasons why you want to have rulemaking in this field, so that you could then impose fines if you wanted to?

Mr. HENRY. Well, I think that is one reason. Again, it gives us more flexibility. But it is not the basic reason. The basic reason is to clarify the policy.

Mr. YOUNGER. You mentioned that one of the reasons why you thought you ought to have rulemaking in this field was to more definitely give to the broadcasters the policy of the Commission. Is that correct?

Mr. HENRY. That is right?

Mr. YOUNGER. Well, how does this stack up with your policy statement of July 26 on the question of fairness, the doctrine of fairness?

Mr. HENRY. Well, I think it is similar in some ways and very dissimilar in others. I think our main feeling has been that on the fairness doctrine, when you are trying to obtain presentation of other points of view, if you choose to put on one point of view, not only the Commission needs a great deal of flexibility, but the broadcaster needs a great deal of flexibility. It is very, very difficult to tell a broadcaster in the area of ideas and controversial opinions—to try to give him some fixed, definite rule from which he cannot vary. We think that he has to exercise his judgment just as we do and that he should not be restricted by a rule.

We feel that perhaps there are some limited areas in the area of the fairness doctrine that could perhaps be better explained, either by a policy statement or by a rule. But in general, it should not be.

I think that is the basic difference.

Mr. YOUNGER. Well, do you think that statement which you issued on July 26 clarified or confused the understanding of the doctrine of fairness?

Mr. HENRY. Well, I think we were attempting to clarify it. What we may have underestimated is the broadcaster's understanding of the fairness doctrine. I think perhaps we did underestimate that. That just lends support to our overall feeling that it should be further clarified and we are attempting to do so.

Mr. YOUNGER. Well, do you thing that your further clarification is going to further confuse?

Mr. HENRY. I hope not. I think it will have the desired effect of clarification.

Mr. YOUNGER. That is what I am afraid of in this rulemaking, that you are going to have in this field a very confused rule, whatever you come up with.

Do you have more complaints about the backlog of applications unsatisfied and renewals than you do on the commercial program?

Mr. HENRY. I have not counted—I do not know. I have not counted the number, but I think in any area in which the broadcaster gets a feeling that his rights are being infringed, we have more complaints than when the public feels it may. Certainly, in the area that you mention, there have been many more complaints from broadcasters than there have been from the public.

Mr. YOUNGER. Well, it seems to me, looking at this and following it now for some 11 years, that it would be well for the Commission to get straightened out on its own work before you take on such a tremendous case as this would be. As you admit, it is almost impossible to write a rule to start with, and if written it is going to be terribly difficult to administer. I should think that it would be one of the functions of the Commission to get straightened out and digest the

load that it now has before it starts in with a big chunk to digest a rule of this kind.

Mr. HENRY. Well, I think your point is a good one, Mr. Younger. I think that under the present situation, and I am more aware of this as Chairman than I was as a Commissioner, that we do have an awful lot to do and we are straining to the utmost our personnel and our office space and so on. I think it is a very relevant factor for us to consider when we are talking about a new area. I think it is relevant but it is not determinative, and I do believe in this particular instance that you would be entirely correct if we enacted a rule that was difficult of implementation. If it was really difficult of administrative implementation, I would just as soon put it off a while. But I believe we can come up with a clarification, perhaps in the form of a rule, that would be just that, a clarification, so that 95 percent or a higher percentage of our licensees would immediately obey this rule and we would have very, very few complaints about violations of the rule. At least, that would be my hope.

Mr. YOUNGER. The other thing that disturbs me is this stretching of the authority under the rule of public interest. That, as you know, could be stretched almost anywhere. It is a good deal like the commerce clause of the Constitution. That has been stretched to a point now where a little one-chair barbershop finds himself in interstate commerce.

It would seem to me that the Commission ought to be very, very careful to the extent that it would go under the general rule of public interest, that it must have general public interest, not just a few complaints. Personally, I have heard as much complaint about the westerns as I have about the commercial. But I do not think you have the right nor should you have the right to go in on programing.

But I also feel, and I cannot get away from the idea, that when you step into the field of limiting commercials, you are actually setting rates. Because a station must have a certain income, and if you limit the number of commercials, they must increase their rate in order to get the same amount of money. I cannot get away from the idea that while you say you have no right to step in on rates, actually, the limitation of commercials has the same effect.

Mr. HENRY. Well, I would agree with you except for one very important thing: We are already there. We have a policy which limits commercials, supposedly.

Mr. YOUNGER. Supposedly?

Mr. HENRY. It may be in practical effect that that is so ineffective that in fact, there is no limitation on commercials. But I just do not believe that that is the position I want to take at the moment, that we should not have such a policy. I think the policy is a good one.

Mr. YOUNGER. I think that the field of leadership here is open and available to the Commission. I look to the leadership in that field rather than the rulemaking, myself.

Mr. HENRY. Let me clarify my answer. By saying we are already there, I do not mean we are in the field of rates, I mean we are already in the field of limiting the number of commercials.

Mr. YOUNGER. That is all.

Mr. ROGERS of Texas. Mr. Rostenkowski.

Mr. ROSTENKOWSKI. Mr. Henry, with respect to overcommercializing and the complaints that you have received, what is the geographi-

cal area that the Commission is receiving most of their complaints in? Is it in the Northeast, the Middle West, the Southwest?

Mr. HENRY. My understanding is that it is pretty general, but I am not sure.

Mr. ROSTENKOWSKI. Throughout the entire country?

Mr. HENRY. That is my understanding.

Mr. ROSTENKOWSKI. What is the nature of these complaints, Mr. Henry?

Mr. HENRY. They relate to several different aspects of commercials. That is the field your question is directed to, I believe.

I think the largest number of complaints—maybe it is second to largest, I am not sure—relates to the lack of taste or the undesirability of the content or the timing of the commercials.

Mr. ROSTENKOWSKI. You mean timing in length?

Mr. HENRY. No; time of day; the fact that they discuss deodorant commercials at mealtime or something to this effect. There have been a lot of comments about matters such as that.

Another one relates to the number of times that a program is interrupted. We have a lot of complaints about the daytime programs, being subjected to so many interruptions. I think they can be interrupted something like six times in a half hour for commercial copy and other times for promotional announcements, what is going to happen tomorrow and that sort of thing. That is another area. Another area is about the amount, the overall amount of time devoted to commercials, and those are the three main areas: the content, the interruptive factor, and the overall amount.

Mr. ROSTENKOWSKI. And are many complaints registered on a national broadcast rather than a local broadcast? In other words, by the networks, when the networks come out with their shows that are played all over the country at the same time, the commercial comes in and there are several commercials, several meaning six or seven within a 3-minute or 2-minute period. Are these complaints directed more toward this type of overcommercializing?

Mr. HENRY. I think some of the complaints, the complaints that relate to television, are probably as much directed at network programing as the other. I do not know what the exact breakdown would be. I think in radio, it would be the reverse. I think it would not be directed at network programing.

Mr. ROSTENKOWSKI. Do your complaints also show that the volume when the commercial is on television is raised, not by the individual watching the show but by the station that has the power to raise the volume?

Mr. HENRY. Yes; we have had a number of complaints about the loudness of commercials.

Mr. ROSTENKOWSKI. Have you made any investigation of this?

Mr. HENRY. Yes. We are presently making one. We have our engineering staff presently working on it to see if there is not some better way of controlling this. We do now have limits on the upper and lower levels of sound, the modulation, that can be effected. But the quality of loudness, again, is a subjective one. What we are trying to do is come up with some method of measuring it. But we do have an investigation underway in that area.

Mr. ROSTENKOWSKI. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Mr. Henry, you have indicated that the FCC thinks that it gets its legal authority for these proposed rules from three sections of the act. This is the legislative language as contained in section 4(i) of title I, and sections 303 and 307(a) of title III of the Communications Act of 1934 as amended; is that correct?

Mr. HENRY. That is right.

Mr. BROYHILL. Now, section 4(i) of title I provides that—

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions.

Now, I would agree that this certainly gives you authority to carry out the functions of the Commission. But how do you interpret this to indicate that these functions would include the limitation of commercial broadcast copy?

Mr. HENRY. I do not think you conclude it from that language alone. You look at the other language in the act, you look at the legislative history, you look at the judicial interpretations of the act, particularly the judicial interpretations that say that what you can do on a case-by-case basis you can do on a rulemaking basis. You take all that together and conclude that while there may be room for argument, certainly the weight of all that is that we do have the authority.

Mr. BROYHILL. I was just going by the testimony that you gave that your legal authority would be in those three basic sections of the act.

Mr. HENRY. I think that is correct, but if I implied it was that alone, I did not mean to, because any act, particularly with the history of this one, you have to look not only to its legislative history but to the way it has been interpreted.

Mr. BROYHILL. Let me go back to Mr. Rogers' argument that there has been a lot of additional authority built into this whole area by your own interpretation and by court interpretation that possibly the Congress never intended.

Mr. HENRY. There is room for argument, as I say. However, Mr. White, in commenting on the provision a year after the enactment of the Radio Act of 1927, and I am quoting now from a memorandum that I have, prepared at the Commission. Mr. White is quoted as follows:

That it may—

speaking of the law, the Commission—

that it may generally prescribe the nature and the character of the service which a class of stations or which a particular station is to render. I am inclined to believe, myself, that the language of present law is broad enough to permit the Commission to say that on a particular station, you may or may not put out advertising, direct or indirect, but I recognize there is some doubt about that construction.

We do not say that the area is free from doubt and we do not say that the Congress has no interest. We would agree with you that you have a substantial interest in it, but we just think that we have the power, separate and apart from the question of whether we should exercise it.

Mr. BROYHILL. The thing I would like to have you do is go into this legislative language of the act as written. Let's go on to section 303(r) of the act, which authorizes the FCC to—

make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.

Now, it seems to me that this section says that the FCC can make rules and regulations only insofar as they are necessary to carry out the provisions of the act. Of course, there again, I do not know what "provisions" of the act give you explicit authority to make rules in this whole area.

Mr. HENRY. Well, I think we were referring also to 303 (a) and (b), which says that we have the power from time to time, as the public interest shall require, as the public convenience, interest, and necessity, shall require, to classify stations, and define the nature of service to be rendered by each class and each station within each class.

Mr. BROYHILL. This is to prescribe the nature of service by class that you are talking about there, to say that one broadcaster may be a common carrier, another may be an educational service, or one may be for business use or another may be a commercial broadcaster. Is this not the interpretation?

Mr. HENRY. That is A. That is the classification of the station. That is 303(a). The nature of the service, I think, goes further. To be rendered by each class and each station within any class.

Mr. BROYHILL. Then you say that by prescribing the nature of the service, you can limit the number of commercial broadcasts by that station?

Mr. HENRY. Mr. Broyhill, I do not think there is any doubt about that, myself. You take any station that came on, and to take an extreme, and all of our examples have been of that nature, that came on and put on 60 minutes of commercial copy in an hour for 6 hours a day, I do not think there is any question but what we could limit that.

Mr. BROYHILL. But what we are talking about now is actually making rules where you will be looking into these situations on an actual hour-by-hour basis.

You would have to be monitoring, in some way, these broadcasts on an hour-by-hour basis, and looking at these situations on a day-to-day basis, if you are going to issue these cease-and-desist orders.

Mr. HENRY. I think that we would implement the rule the same way we do all the rest of our rules, and it is not exactly in that manner.

Commissioner Loevinger would like to comment, Mr. Chairman, on that same question, if he may.

Mr. ROGERS of Texas. All right.

Mr. LOEVINGER. Mr. Broyhill, perhaps I could elucidate this. As the silent member of this Commission, with respect to this controversy at least, I do not want what I say to be taken as a judgment on its merits. I would like to reserve my position, and say a little about that later.

As to the particular point you are discussing, I do not think there is much question that the Commission's functions under the act require it to act in a way that would be precluded by the proposed legislation. For example, the Commission classifies, as you have stated, stations as educational and as commercial. Now, if educational stations start to publish commercial announcements, advertisements, for pay, I think you would admit that is probably unfair and improper. The Commission, if it does not already, should prevent that by rule, saying educational stations on channels reserved for educational stations shall not carry commercials. That is a rule. That should be gotten at by rule, and if you do not get at it by rule, it is sort of silly to talk about getting at it on a case-by-case basis.

Nevertheless, the pending legislation would prohibit that, prohibit the Commission from passing a rule saying that educational stations cannot carry commercials.

Another example: The Commission has certain daytime-only stations. The reason there are daytime-only, I am sure this committee is familiar, is because, after dark, before sunrise, and after sunset, if they broadcast on the channels they are on, they cause substantial interference with certain nighttime stations, so we have more stations during the day than at night. However, the Commission's rules permit daytime stations to operate during emergencies, during flood, during impending hurricane, to give warning to people. They can stay on outside their authorized hours even without the permission of the Commission.

Now, the Commission has a proposed rulemaking as to what limitations to impose on these emergency operations. One of the things that will probably come up is that during emergencies, daytime-only stations can operate, but they cannot carry commercials. If they are permitted to carry commercials, then they find all kinds of emergencies and you have your daytime stations all over the map interfering with your nighttime stations. That kind of a rule would be prohibited by the proposed bill. I think that this kind of action is necessary to the Commission to be able to carry out its function, and it should not be constricted by Congress.

A third difficulty, and I do not think anyone has considered this, is the Latin maxim, the precise rendition of which I have forgotten, but which says, in substance, that "when you express one, you exclude others." If it is felt necessary for Congress, expressly to state that out of this broad general grant of power to operate in the public interest in relation to the regulation of commercials, if Congress explicitly says: "But you cannot pass a rule with respect to the limitation of commercial announcements," it may very well, by implication, be saying that every other power that anyone has thought of or heretofore suggested under this broad grant of general power is approved by Congress. This will then get you into the position where you have got to sit and legislate a code expressly negativing every conceivable action by the FCC that you think——

Mr. ROGERS of Texas. Will the gentleman yield on that point?

Mr. BROYHILL. Yes.

Mr. ROGERS of Texas. Now, Mr. Loevinger, have you not reversed the expressio unius theory?

Mr. LOEVINGER. I do not think so.

Mr. ROGERS of Texas. Yes; you have, because you start from the premise that you do not get any powers unless the legislative body gives them to you.

Mr. LOEVINGER. We start with the grant of broad general power to regulate broadcasting in the public interest. You have excluded from that the one limitation relating to commercials. And it could very well be construed that you have thereby in effect sanctioned almost everything else.

Mr. ROGERS of Texas. You and I are in complete disagreement on expressio unius theory and statutory construction. That is exactly the point I made on the floor of the House when I understood that some of the staff of this Commission said that because I introduced this bill, that was an admission that you had the power to do this now. It is

that kind of thinking in Government circles that is going to get this whole group into serious trouble. It is one reason I wanted these things brought out in these hearings. I thank you.

Mr. BROYHILL. I thank the chairman for his comments there. I have no more time, Mr. Chairman.

Mr. HARRIS. I do not believe the judge has concluded his statement. I want to hear it out.

Mr. LOEVINGER. As I say, I think you have situations such as the limitation on daytime operation during emergencies limitation on educational stations where, in effect, rulemaking has to operate. Now, as to whether or not, how far the broad general power of the Commission to act is concerned, let me say as a member of the Commission, this is a subject that I am really not terribly interested in exploring, because I think that the Commission should stay well inside the limits of its statutory and constitutional power. I probably take a more confined view of the powers of the Commission than Mr. Henry does. I think there are a good many regulations that people talk about and that they toy with intellectually that the Commission should not consider. I do not think that I could list all of these things that the Commission cannot do. This is one of the questions you asked Mr. Henry. I think that to give you a list of negatives is simply prohibitively long.

I would say, for instance, that the Commission could not pass a rule requiring broadcasting stations to broadcast religious programing. I myself, and I am not sure anybody else agrees with me, think that this is precluded from the Commission by constitutional and legal principles, but I do not think we should test it out or get anywhere near the limits of our constitutional and statutory power of what we are doing. Unless I very much mistake the temper of the other members of this Commission, I think there is very little danger that the Commission is going to do this. A good deal of this discussion has been premised upon the consideration that the power to regulate commercials is going to be abused. I think we should understand at the outset, of course it can be abused. Anything can be abused. However, I think the chances that this Commission will do anything which this committee, even sitting here very soberly and with the greatest sympathy for the broadcasters, would consider an abuse of that power, I think the chance of this is very slight, partly because of the real problems that would arise were the Commission's rulemaking powers curtailed, as this bill might do, at least in the respects I have suggested. I think it would be wiser for the committee to wait and see what the Commission does before recommending the enactment of the bill. There is no question that the committee could, if it wanted, recommend it and Congress could pass it and this would decisively settle the matter. But I think, knowing the temper of the Commission, that this Commission is very unlikely to engage in any of the abuses that have been suggested.

Mr. ROGERS of Texas. Would the gentleman yield further?

Mr. BROYHILL. Yes.

Mr. ROGERS of Texas. Mr. Loevinger, if you apply the philosophy that you outlined, then when Congress creates an independent agency with what you term broad and general powers which no one seems to be able to define, except to say that they include everything, any time that independent agency undertakes to do something which

the Congress does not feel is within the confines of those powers, then Congress is put in this position that if they introduce a bill to stop that, what they consider a false assumption of power, and pass that bill, then it is your position that they have to pass a bill stopping you from doing everything else that they can think of or that anybody else can think of. And I do not think it is that way at all.

Mr. LOEVINGER. That is much too broad a proposition, sir. I would not concede that.

Mr. ROGERS of Texas. You can follow the expressio unius theory out and say that theorizing that you cannot do it, then we have to pass another law saying that you cannot do everything else you claim you have to do as they come up.

Mr. LOEVINGER. I do not say—I say that in the context of the statute with which we are concerned and looking at the source of the authority which the Commission has asserted, I think this conclusion could be drawn. As I say, I do not think this Commission ought to test it or ought to push any of these things and I do not think there is the slightest chance that it will. But I do say that there are practical problems with such a bill as you propose which would prevent the Commission from doing things that you think it ought to do.

Mr. ROGERS of Texas. Let me ask this question about that now. There seems to be the general feeling that what you need is sanctions. Now, why did you single out overcommercialization? Why did you not just ask for sanctions insofar as the different violations that you think ought to be——

Mr. LOEVINGER. I did not single out commercialization. I did not ask for sanctions. I think the Commission can approach this through other means. I am urging it within the Commission. I am confident some other action will be taken. I do not think I am sure that overcommercialization in the sense it is being discussed is as serious a problem as the Commission thinks it is. I think there are other things the Commission could and should do.

Mr. ROGERS of Texas. Under this rulemaking, you would have to have a violation of an overcommercialization before you could invoke the sanctions. The fact is that you had a complaint about one station playing "Dixie" all day long, didn't you?

Mr. HENRY. That was before I got there, I guess.

Mr. ROGERS of Texas. Well now, the power that you would have at the present time to stop overcommercialization is in the same area as the power that you would have to stop that station from playing "Dixie" all day long, is it not?

Mr. HENRY. I do not think so. I think that the minute you talk about programs and commercial time, you are in two different categories. Now, of course, they are all within the same broad authority.

Mr. ROGERS of Texas. But in the exercise of the powers that you have at the present time.

Mr. HENRY. Well, the sanctions are roughly the same, I think, but the sanction is only one aspect of the situation, and speaking personally, it is not dominant in my thinking. It other words, the reason I want clarification of policy is not so that I can go around fining people. What I want to do is clarify the present policy so that there will be a better adherence to it.

Mr. ROGERS of Texas. But if you have the power by rulemaking to limit the time of commercials, why, by the same token, do you not

have the right to limit the amount of time that can be devoted to westerns, the amount of time that can be devoted to mystery stories and that sort of thing?

Mr. HENRY. Because that would do violence to the 1960 programing statement with which the Commission has no quarrel.

Mr. ROGERS of Texas. The 1960 programing statement?

Mr. HENRY. Yes; it points out that this is the job——

Mr. ROGERS of Texas. I am not talking about a programing statement or that sort of thing. I am talking about the basic law here.

Mr. HENRY. I thought you said why do we not enact a rule——

Mr. ROGERS of Texas. I am saying if you have the power to enact a rule to do this, by the same token, do you not have the power to enact a rule saying that in the public interest, you cannot put on but 3½ hours of westerns in 1 day?

Mr. HENRY. Well, I think that we might have such a power if we could base that on findings, but we would certainly only have it if we could reasonably substantiate it. And, as Commissioner Loevinger said, I am sure we could all think of examples where we might well have the power to do something and nobody in this room would want us to do it. But we just do not think this is one of them.

Mr. LOEVINGER. Mr. Chairman, there is a difference of opinion on this. I am much more conservative in my approach to what the FCC can properly do with respect to programing than some of the other members of the Commission. There are others on the Commission who would agree with me. I think that telling a licensee that he can or cannot have 3 or 6 hours of westerns on television—I do not personally like westerns, by the way, but I think that is completely irrelevant. Telling him how many westerns he can have on his program is quite different from telling him how much of the time can be sold for advertising. I think this is a distinction that has long been recognized by Congress and the courts.

Mr. ROGERS of Texas. What is that distinction?

Mr. LOEVINGER. That between substantive program time and that which is sold for advertising. Unless I am mistaken, this distinction is recognized with respect to newspapers under the postal regulations.

Mr. ROGERS of Texas. I am talking about programing now, and where in the law do you get the power to draw that distinction?

Mr. LOEVINGER. I have not thought it all the way through, but I have a feeling it is inherent in constitutional principles. I think that the freedom of the press is related to whether or not the FCC can tell people what to present by way of programing. I do not think that it is related to whether or not the FCC can say you are a commercial or a noncommercial station, or if you are licensed, you can sell no more than 50 percent of your time commercially. I think that is a distinction that constitutional principle will permit. But once you get into programing, it is a different matter.

Mr. ROGERS of Texas. The situation with regard to advertising in a newspaper simply says that if you devote more than so much space to advertising, then you do not get free mailing privileges under certain circumstances. You have an entirely different situation.

Mr. LOEVINGER. It is a federally granted privilege, just like broadcasting.

Mr. ROGERS of Texas. The point I am thinking about is this, that when you are talking about this air time, if you have the right to say

a man cannot use but so much of that time for advertising, I do not know of any law from the Constitution on down—of course, there is a lot of law that I do not know, but I do not know anything that I have ever run across that would indicate to me that if you have that power in the rulemaking powers, that you would not have the power to say that you cannot devote but so much time to westerns, you cannot devote but so much time to library advertisements or library promotion, or anything else. So you are actually in reverse, you are censoring.

Mr. LOEVINGER. I disagree, sir, and I think the very point you made proves it. We recongize the right to say that you cannot have the federally granted privilege of second-class mailing to a newspaper if you have more than a certain amount of advertising. Nobody doubts, however, that the Congress is still prohibited from interfering with what is expressed in the rest of the newspaper. You cannot tell them what their editorial content is. Precisely the same situation prevails with respect to broadcasting. We say, if you are going to sell more than 50 percent or 60 or 70 percentof whatever the percentage is, you cannot use the grant of a broadcasting frequency. But once we set this percentage, the substantive programing content cannot be interfered with.

Mr. ROGERS of Texas. Carrying on the point you have made what we are talking about about newspapers was written by the Congress into law, was it not?

Mr. LOEVINGER. Yes, I believe so.

Mr. ROGERS of Texas. Now, it is not written in the law, in the Federal Communications Act, about the advertising, is it?

Mr. LOEVINGER. No, sir.

Mr. ROGERS of Texas. So what is happening here is the Federal Communications Commission is taking over some legislative processes, is it not?

Mr. LOEVINGER. No; it is recognizing the basic constitutional distinction that the Congress recognized in the postal law. That is why I say you cannot say, merely because the FCC does, and I think it must for some purposes, have some rules relating to commercials, merely because it does this does not give it any power to regulate program content. I should not want to see that principle established, because I think probably this committee will recognize the necessity of the FCC continuing to say something about commercials. But I do not want to see the FCC getting into programing content.

Mr. ROGERS of Texas. We are not going to agree on this, I see.

Mr. HENRY. Let me add, if I may, Mr. Chairman, I hope when Mr. Loevinger is excluding himself from a group interested in programing, as he puts it, that he does not include me.

I might say—may I comment, Mr. Broyhill?

Mr. BROYHILL. Yes.

Mr. HENRY. You know, this is not a new theory, by any means, that we do have this power. Again, this may lose my whole argument, but again referring to Mr. Porter, he says, in one of his subheads in his newspaper article, he says, "Why Congress did not restrict commercials."

I must say I agree with him:

The prevailing belief, then, was that broadcasting stations—

Talking about enactment of law—

competing for the public ear would be forced to limit commercial announcements to modest and pleasing proportions. This belief may partly explain why Con-

gress, when it drew the laws and principles governing radio broadcasting, made no specific attempt to limit commercialism or advertising content. But Congress made it very clear that in radio, the public interest comes first and that interests which conflict with the public interest must give way. This was a Republican Congress in the days of Calvin Coolidge.

I think one reason that there has been no effort to put it into the law is because the whole climate at the time the law was enacted was that this was a public service predominantly, that advertising was necessary to support it, but it would support it as a service, and that the audience itself would not accept overcommercialism, if you will, that the audience would force, as he says, these stations to limit commercials. I think that is his explanation and I think I agree with him.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I appreciate this discussion here and appreciate the remarks by Chairman Rogers, because I, for one, was anxious to examine this basic law to see where you do get this authority, rather than the decisions that the FCC has made to interpret the law.

Now, are you familiar—I am certain you are, with section 3(h) and 3(i) of title I which says a person specifically engaged in commercial broadcasting shall not be deemed a common carrier.

Title II of the Communications Act does give the FCC power to regulate the rates of services for common carriers, such as wire services, and so forth, those engaged in interstate communications. But Congress, it seems to me, in this title II, went to great lengths to insure that FCC would regulate common carriers, but also went to great lengths to say in section 3(h), that radio broadcasters will not be considered as common carriers. It would appear to me that the statutory language here could only be interpreted to mean that radio broadcasters should be left free of any rate regulation.

Mr. HENRY. Well, as I said earlier, many of our actions have an economic effect. There is no doubt about that. We require radio stations to keep first-class operators. This costs them more than if we did not require them to keep first-class operators. We require adherence to certain technical rules and this costs them more than if we did not require them. We state in our 1960 programing statement that they must have a continuing discourse with the public and make a survey of their community. This costs them more than if they did not have to make the survey. So almost any of our action has an economic effect, and it is usually the economics of the situation, at least in part, that bring about a conflict between the public and the private interest. So this is nothing new. And again, we feel—I feel, at least—that a rule that I would vote for would not have a large economic impact.

Mr. BROYHILL. And you do not feel that this rule will have an economic impact?

Mr. HENRY. Not a large one. It may to some stations, which would be in violation of it, but it might not even to them if they could justify to us that this was necessary to their survival.

Mr. BROYHILL. Then you would agree that it would affect rates?

Mr. HENRY. No; I do not have any facts in front of me at this time that indicate that it will affect rates. We specifically asked for that information and we got none. So I do not have any in front of me that says it will affect rates.

Mr. BROYHILL. You indicated in a speech in New York in September, as I interpret it, that it could affect rates.

Mr. HENRY. If I said that, I did not mean to imply it because—I may not have said this—but I do think that the rates do not necessarily have to be affected. They may remain the same, they may go down, they may go up.

Mr. BROYHILL. The two questions you asked in that speech were these:

And more importantly, does it necessarily follow that an FCC rule in this area will automatically reduce profits? Isn't it just as probable that fewer commercials will become more attractive and attract a higher price?

Mr. HENRY. Yes. That is possible, but I do not think that the fact that rates might go up does not mean that we are fixing rates as I would mean it.

Mr. BROYHILL. That is all I have.

Mr. ROGERS of Texas. There is a vote on. I am sure it is an important one, so the subcommittee will stand in recess——

Mr. HARRIS. Mr. Chairman, I would want to make a statement before we leave. I shall not be able to come back.

I have enjoyed this discussion. It is reminiscent of some of the old discussions I have had over the last 15 or 18 years. I would like to say, for whatever it is worth—maybe nothing at all—that there have been efforts made by the Commission and by different Commissioners, I know for the last 20 years, to change things, to devise new ways to use certain authority which they have interpreted as having been given to the Commission by the statute.

On this particular issue, I think it is very interesting to note that for 20 years there has been some attention given to that by one Commissioner or another. It is rather amazing that Senator White, who was in the House at the time, I believe, was about the only one, I think in the entire debate, who mentioned this subject. You talk about the legislative history, and sometimes I wonder, and I say it in all candor, Mr. Chairman, for your information, sometimes I wonder, because the statement of Mr. White, raising it, says "I doubt if that is what was intended." Yet year after year questions have been raised in which the members of the Commission have attempted to interpret it a different way.

Sometime I want to get an answer to the question as to what the feeling is of an administrative body with reference to the intent of Congress when a general provision is contained in a statute but when there was no mention whatsoever of a particular subject matter at the time as coming within and general provision. I am inclined to think, Judge, that there is a trend which the courts, in my judgment, have followed, taking the position that where broad general authority is provided in a statute, regardless of the conditions and circumstances prevailing at that time, even though a particular matter was not thought of, 20 or 25 years later an administrator or agency feels that they may claim authority to do the specific thing under that general authority. It seems to me that it is a dangerous trend. I must state very frankly that I have felt pretty keenly about this over the years.

I would say to you gentlemen that you would have to go back a number of years to when Mr. Porter was Chairman. And you can recall back in the history, as I know Mr. Bartley can, when Mr. Fly was on the Commission and great controversy arose. The Congress

does sit here and observe these things and the Congress is not provoked to take action except under strained circumstances. But I recall that those circumstances developed and we came up with the McFarland Act. That legislation was bitterly opposed by the members of the Commission because it put some limitations on some of the authority of the Commission. In my judgment, some of those provisions went too far. I was in the middle of it at that time. But the legislation was enacted because the Congress was provoked to take some action in view of what was done by the Commission at that time which was considered as being an imposition on the industry. And it took us a good many years to amend those provisions and to straighten out the act.

I recall another occasion when the Commission—and some of you were on the Commission at that time—under some general authority with respect to new uses of radio, was going to authorize a new use called pay TV. Commissioner Lee knows precisely because he was very much interested at that time. Now, I think it will be recalled that the country got worked up over it. This committee got worked up over it. I do not think there was any intention on the part of the members of the Commission at all to do anything that would not be in the best interest. I know that the Commission had the best intentions in doing it. But the Commission proposed to authorize an experiment involving 108 markets, the biggest markets of this country, which were going to be permitted to try out pay TV.

In hearings such as we are holding today, we called attention of the members of the Commission that once you established that policy in the major markets of this country, you could not "unestablish" it, if that is a good word. The Commission did give consideration to what might happen, and following that, upon reconsideration, it did establish a much more limited experiment, which is underway now. I think that is what the law intended.

I think this hearing is a very good one today. I do not know what is meant by "nature of service." Mr. Chairman of the Commission, I think that you and your Commission have based your case on that phrase. I do not think there is anything else that you can refer to that gives you any authority at all except those words in section 303(b). And perhaps you have interpreted in such a way that the courts will uphold you. But in my judgment, I think the Commission should be exceedingly careful in trying to develop new methods of regulating the industry.

Maybe they are good. I do not say they are not good. Maybe they are good. But in my judgment, there is a way of establishing such new methods of regulation. If the Congress and the general public feel that it is a good policy and ought to be done and that the industry has been engaging in bad practices, there are ways to get these new regulatory controls established. And I just think that these matters ought to be taken into consideration before an agency starts extending its authority way out beyond what anybody ever intended at the time when power was given to the agency. This is not only directed to you, Mr. Chairman of this Commission. I have the same feeling about all the major regulatory bodies that we have. They are major agencies, and I am very zealous of them, of every one. And I want to see a strong administrative body, an agency doing its job for the best interest of all the public. If they do just that we shall not get into some

of the things that we have been into in the past as in the case of the McFarland Act.

Well, I hope you will pardon me, Mr. Chairman, for these comments, but I am just expressing some of my feelings.

Mr. ROGERS of Texas. You are talking right down my alley.

The subcommittee will stand in recess until 4 o'clock.

(Whereupon, a recess was taken.)

Mr. ROGERS of Texas. The Subcommittee on Communications and Power will come to order for further consideration of pending business.

I think the gentleman from California, Mr. Younger, has some questions.

Mr. YOUNGER. Mr. Henry, on the bottom of page 6, and then on the top of page 7, I wish you would enlarge a little on that as to the objections that you have heard of in regard to the rulemaking.

Mr. HENRY. Is this to the Commission's statement or my statement?

Mr. YOUNGER. This is your personal statement.

Mr. HENRY. You want me to comment on the bottom of page 6?

Mr. YOUNGER. And the first paragraph on 7. This rather loosely defines the specific objections that you have had and why the industry have not filed or have not given objections to the Commission on certain phases of it.

Mr. HENRY. Well, what I meant at the bottom of page 6, where I say that the objections to the Commission's notice of proposed rulemaking, where I say that they do not argue that the overall role of advertising is none of the Government's business or that the Communications Act places this subject beyond the Commission's jurisdiction—I think that the proponents of the bill do not say that we can have no, absolutely no concern with advertising. They say that what we should not do is enact a rule to make a vague policy specific, and they do not say that the policy is inconsistent with free enterprise, with the free enterprise system, because we have had the policy for 20 or 30 years.

I think it is the implementation of the policy that most of the objection has been taken to, rather than the policy itself, although I agree that there may have been some objection to the fact that we are at all interested in this field. But that is almost nil.

I think practically everyone agrees that however valuable advertising is, however necessary it is to the support of broadcasting and however helpful it is to the economy in general, it is nevertheless secondary to the program service that broadcasters are supposed to render.

Getting to the top of page 7, I say that the main objection is that the policy should not be made more specific, and particularly the reason we should not try to make it more specific is that there is no one standard that can be applied across the board.

Mr. YOUNGER. Then you have not had objections from the industry or from any other source that questioned the authority of the Commission to regulate in this field?

Mr. HENRY. Yes, we have had. In fact, the gist of the complaints has been that we are without legal authority to enact a rule. People who have filed comments have made that clear that they think we have no jurisdiction. They have taken the same position that many members of your committee have taken, that this extends the Commission's

jurisdiction beyond what Congress gave it. But what I was attempting to say there was that they have not made any specific complaint about the fact that we have a general policy against overcommercialization. Most of them, to me, imply that we have to have some general policy against it, that too much is too much, but that we should not try to make this specific.

Mr. YOUNGER. I was anxious to get a further explanation of this paragraph, because we will have a number of witnesses and I wanted to make clear as to whether any of these witnesses had expressed the same thought to the Commission that they will put into the record.

Mr. HENRY. I am going to be very interested, myself, in what the witnesses say, because as I see it, we are not enacting, we are not extending our jurisdiction in the sense that administrative agencies are usually criticized for extending or attempting to extend their jurisdiction. What we are trying to do, as I see it, is implement an existing policy, making it of some effect. Because as I see it, it is almost better to have no policy than to have a totally ineffective one. This is what I think we are trying to do, make specific a preexisting and long-existing policy.

Mr. YOUNGER. You do not think you are extending the policy at all beyond the present?

Mr. HENRY. No; I think we are attempting to make it more specific and it will be better implemented and more strictly enforced. But I do not think—the broad policy of being against overcommercialism is one of long standing.

Mr. YOUNGER. You have mentioned one other reason a while ago and I would like to have that repeated, that one of the reasons why you would like to have the rulemaking is that after a rule is adopted, then you can enforce certain sanctions that you cannot enforce without the rulemaking. Is that true?

Mr. HENRY. That would make it clear that we could find or issue cease and desist orders if it were in the form of a rule.

But again, the fact that revenues, profits, rates are involved to me is far from being the complete answer to it, because under the present policy, if, for example, we pick one renewal application out of the many that we have, and analyze the question of whether that meets our present policy against overcommercialization, the same argument applies to the present policy that would apply to this implementation of it. This is, again, not something new.

Mr. YOUNGER. But you have only given, as I recall, one example of where, because of the overcommercialization, you have shortened a renewal, made it a 30-day or 60-day renewal instead of a 3-year renewal. You only gave one example.

Mr. HENRY. I am not sure, personally, of how many cases there have been that have been designated for hearing in which this issue has been specified, nor how many short-term renewals have resulted from it.

Mr. YOUNGER. Can you furnish that information for the record?

Mr. HENRY. Yes; I would like to be permitted to do that.

Mr. YOUNGER. That is all.

(The memorandum requested follows:)

The following information was furnished by the Federal Communications Commission:

"SHORT-TERM GRANTS OF LICENSE RENEWAL APPLICATIONS INVOLVING COMMERCIAL SPOT ANNOUNCEMENTS (SEPTEMBER 1961–NOVEMBER 1963)

"1. Commission records reflect that there is only one instance where 'overcommercialization' constituted the sole reason for the short-term grant. This occurred when the Commission considered the application of Old South Broadcasting Co., Inc. (BR–2387) for renewal of license of station WNAT, Natchez, Miss., on December 12, 1962.

"2. There are, however, a few cases set forth below where short-term grants were made because the programing performance of the respective licensees deviated substantially from promised programing made in prior applications. In these particular cases, it was noted that the licensee had broadcast substantially more commercial spot anouncements than it had indicated it would broadcast in previous applications. These applications are as follows:

"KDB Broadcasting Co.: Licensee of station KDB, Santa Barbara, Calif. (BR–48), granted on September 7, 1961, primarily because of promise versus performance problems including, among other things, commercial spot announcements.

"WKKO Radio, Inc.: Licensee of statin WKKO, Cocoa, Fla., granted by the Commission on September 13, 1961, because of a promise versus performance problem including, among other things, deviation between the number of commercial spot announcements proposed to be broadcast and the number actually broadcast.

"3. The following stations received short-term license grants because of 'overcommercialization' coupled with other serious problems:

"Jose Raymon Quinones, licensee of station WAPA (BR–1494) San Juan, Puerto Rico: The applicant here had entered into contracts whereby he sold broadcast time to 'time brokers,' who, in turn, resold the time. The terms of the contracts did not limit the number of commercial spot announcements that could be resold by the brokers. The licensee received a 15-month renewal in an action by the Commission on September 16, 1961.

"Joseph S. Zuccaro, TR/AS Miss Ark Broadcasting Co., licensee of station WESY (BR–2635) Leland, Miss.: The basic problem here concerned promise versus performance, coupled with overcommercialization. On November 1, 1961, the applicant received a 1-year license renewal term.

"Gordon County Broadcasting Co., licensee of station WCGA (BR–2831), Calhoun, Ga.: The problem here involved rule violations, however, some consideration was given to the station's commercial spot announcements policy. In an action on September 12, 1962, the licensee received a 12-month license renewal term.

"United States Transdynamics Corp., licensee of station WAVA, Arlington, Va.: The principal problems in this case concerned the broadcast of spot announcements, advertising a lottery, failure to broadcast proper station identification announcements, and proper sponsorship identification announcements, and failure to comply with the Commission's logging procedures. The station also broadcast commercial spot announcements which were substantially longer and substantially greater in number than those contained in proposals made by the applicant in a previous assignment of license application. The Commission, on July 31, 1963, granted a 12-month license renewal term.

"Max M. Leon, Inc. (BR–362) and (BRH–952), licensee of stations WDAS and WDAS–FM, Philadelphia, Pa., was granted a regular grant on September 20, 1963, considered by the Commission as the equivalent of a short-term grant: The principal problems here involved 'payola' and 'plugola' along with 'overcommercialization.'"

Mr. ROGERS of Texas. Mr. Henry, one further question:

Your conclusion that you are not extending your jurisdiction is based upon the primary premise that you have very broad jurisdiction by virtue of the act, including all phases of this industry in the first instance?

Mr. HENRY. That, plus the fact that since the inception, since the creation of the Federal Communications Commission, as I understand it, it has had a policy against overcommercialization.

Mr. ROGERS of Texas. Now, one further thing. You take the position that although you have the power to limit commercials, as I understand you, you would not have the power to limit, we shall say, the

number of crime shows that were put on a station, even though it could be proven rather conclusively that these crime shows were contributing to juvenile delinquency and other things in a certain given community in which tests were made.

Mr. HENRY. Well, I think we can deal with programing in this manner. The first and foremost principle is that we can only deal with programing in the overall sense. We can only make judgments with respect to it, taking into consideration total performance.

Now, that is really the basis of it, and you go from there. If you take a situation in which crime shows overwhelmingly dominate a licensee's operation to the extent that the usually understood needs and interests of the communities are not being served, then I think that we would have the right to question that.

To take an extreme example, if every program from 6 to 11 p.m., on a given television station were a crime show, I think it would be clear that we could question whether this was in the public interest.

Mr. ROGERS of Texas. But your position is that that power does not extend to the program content itself, and if you got into a situation which, incidentally, I have witnessed several times recently and I am pretty much disturbed about the trend of some of the shows that are going on, some of the language that is being used, and some of the insinuations that are being made and some of the things that are being done which I think young children should not be allowed to see, but they are glued to the television set all the time and I think if the industry does not correct this, there is going to be some demand by some mothers in this country to correct it for them and I hope they will.

But your position is that you do not have the power at this time, under the law, to correct that?

Mr. HENRY. No; our position is—my position is that whatever those general powers are, they are the same with respect to advertising content as they are to nonadvertising content.

Now, I think the constitutional law is perhaps a little bit different. I think a Supreme Court case and some interpretations of the district courts have been that advertising continuity is in a different category. But my own point of view is that from the standpoint of statutory authority it is in the same general category.

Mr. ROGERS of Texas. One further thing I want to call attention to. We were talking about the percentage of advertising in published matter and I just want the record to show, so it will be clear for future reference, that under title 39, United States Code, section 4352, subdivision (c), the Postmaster General may not accept for mailing as second-class mail any publication having more than 75-percent advertising in more than one-half of its issues during a 12-month period and he shall revoke its rights to be entered as second-class mail. Material relating to transportation, schedules, fares, and related information is not considered as advertising under this subsection, the point being that this is expressly handled by a statute passed by Congress and not by a rule made by an agency in the executive branch of the Government, or an independent agency.

Mr. Rostenkowski had a question.

Mr. ROSTENKOWSKI. Mr. Henry, you have stated that when you do receive complaints with respect to overcommercialization, you notify the TV station and then there is some negotiation or some under-

standing that usually comes forth with respect to overcommercializing now without rulemaking?

Mr. HENRY. Well, we have to make a judgment there, Mr. Rostenkowski, on what to refer on any given subject matter to the station. Many of the complaints are simply general diatribes about something or another; they are frivolous, they are something that is so obviously none of our concern, that they are simply answered and not referred to the station. But if a complaint is something that we think the station should be concerned about, then we refer it to the station.

Mr. ROSTENKOWSKI. Well, your concern with respect to a complaint certainly would lead to some influence on the part of programing of that particular station, would it not?

Mr. HENRY. I would not deny that.

Mr. ROSTENKOWSKI. I say this, because I remember it was about a year ago that Commissioner Lee was in the Midwest holding hearings and I am sure that he would agree with me that after the testimony taken in the city of Chicago, there was a great deal of influence on the part of programing in the city of Chicago and, in my opinion, it upgraded the spirit of programing in the city.

So I should think that the Commission has a very direct influence over what the station in the community, or even the network, is going to program if the people are filing complaints with you.

Mr. HENRY. Well, sometimes I think it does and then at other times I am convinced that it does not. In any event, I think that a broadcaster should make his decisions on what he feels he can justify. If he is directly in opposition to an opinion expressed by me or by anyone else on the Commission, he should have no hesitancy in differing from us. Because he is the one with the experience, and if he can justify from his experience any decision that he may make, this is what he should do.

Mr. ROSTENKOWSKI. Thank you very much. I have nothing further, Mr. Chairman.

Mr. ROGERS of Texas. Thank you very much, Mr. Henry.

Are there any other members of the Commission present who want to make a statement? If there are, let the Chair recognize you at this time.

Mr. Lee?

Mr. LEE. Mr. Chairman, I think that I should say that I am sorry I came late and I appreciate the fact that the chairman has to carry the burden. But I think I should admit that I am the proposer of this rulemaking. I waited until late in the day so you would not have too much time to give me a lot of trouble. I thought I should admit it on the record.

Mr. ROGERS of Texas. Well, we are glad that you got here in time.

Mr. HENRY. In the Commission's decision to institute this rulemaking, we considered a lot of things other than public complaint and a lot of the testimony in some of the Commission's prior hearings on networks and on programing and so on, we thought, was entirely relevant. There was a great amount of concern expressed in this field in general.

I am sure that that is one of the things that caught Commissioner Lee's attention.

Mr. ROGERS of Texas. Commissioner Ford, did you have any further statement?

Mr. FORD. Only one other thing. The committee seems to be concerned about two things, it seemed to me as I listened. One was that this in some way would have an effect on rate regulation and the provision with respect to broadcasters not being common carriers. The second one was the question of the authority in the act for the Commission to adopt this course of action.

Neither one of these, to me, was a serious consideration in my opposition to this proposed rulemaking, because it would take a very roundabout and deliberate action on the part of the Commission to calculate precisely how much was necessary in the way of rates based on the amount of commercial continuity a station could normally have in order to calculate a reasonable rate of return on capital investment and so on.

The formulas for rate regulation are so complicated that it would take an absolute, deliberate attempt on the part of the Commission to bring that about. So that I did not consider that as a serious matter in this particular proposal.

As to the second one, it looked to me that if a station came on the air and had 100 percent of its entire broadcast day, 7 days a week, nothing but commercial continuity and another station and another one and another one followed in the same way; pretty soon, the whole country would have nothing but commercial continuity—and this is, of course, an extreme case—then would the Commission be powerless to say that in the public interest, convenience and necessity, this is not good, and that we can not find that your station is going to serve the public interest if you have 100 percent commercial continuity?

Mr. YOUNGER. Will the gentleman yield? Do you think they would have any listeners, that the station would have any listeners?

Mr. FORD. I just do not know. It depends on just how funny these commercials are. Every 5 o'clock last summer when I picked my daughter up, she would immediately turn to some station that had this silly commercial about two seeds in a watermelon—"Oh, oh, here comes the knife," he would say. I just do not know. It depends on how funny they are. This may be all right.

But I am just using this as an example: Suppose they did or did not have listeners and they had a lot of money and were just going to do this anyway?

Mr. LOEVINGER. May I interject an answer there? ITA in Britain does present just such programs. They have hour-long programs of solid commercials and they do have listeners.

Mr. YOUNGER. I would daresay that if any American station went out with that kind of program, all day long with commercials, there would be two things happen. One, they would have no listeners, and second, they would have nobody to pay for the commercials. An advertiser would be foolish to try to put an ad on that kind of station.

Mr. LOEVINGER. Competition would normally run them out of business, but it is not inconceivable that there can be long stretches of continuity with substantially all commercials, because it has been done.

Mr. ROSTENKOWSKI. Mr. Loevinger, did you say that they have an hour-long commercial?

Mr. LOEVINGER. They have what they call advertising magazines. It is precisely the opposite of what we refer to as the magazine con-

cept here. They run hour-long, and I believe some of them longer, programs with nothing but commercial copy.

Mr. ROSTENKOWSKI. But their commercials are different from ours, aren't they?

Mr. LOEVINGER. They are different commercials. I cannot give you a detailed description of them. But they do run an hour or two hour-long programs with commercials.

Mr. ROGERS of Texas. Were you through, Mr. Ford?

Mr. FORD. No, I was not through; in fact, I was just in the middle. I am not interested in what the British do, because an hour commercial is not what I am talking about. I am talking about 24 hours a day, 7 days a week of nothing about commercial continuity and a man having plenty of money and not worrying about anything but himself, and advertising his own business. I am talking about an extreme case in which the Commission would be called upon to say this is in the public interest. Would we have to do that, under the statute?

If we have no authority to do anything about it, we would have to find this formula in the public interest. If we could say, this is not in the public interest, then we must have some authority to review this kind of activity. Because to me, it would be a complete waste of a valuable government facility.

So if we can do it on a case-by-case basis and tell that man, you cannot have 100 percent commercial continuity and we shall not renew your license if you do do it, then we must have some authority to regulate this in some way.

Now, I think perhaps the way the Commission is proposing here is the wrong way to do it. Nevertheless, when it comes to the authority, it seems to me that the public interest, convenience and necessity would not require the Commission to sit idly by and find that the man was serving the public interest and renew the license to engage in this kind of activity.

If we have that authority on a case-by-case basis, we should certainly have the general authority to make a rule that you cannot do this. If we can make a general rule saying that 100 percent is bad, there is nothing to limit us to come down a little bit and say 50 percent is bad.

Consequently, that is the basis of why I find the authority in the statute for the Commission to do this. I have a different system that I think we ought to do it by, because I am not really sure there is overcommercialization. I do not know what the percentage of commercial continuity on broadcast stations in the United States is. I do know that "Amos 'n Andy" had 25 percent of their time commercial continuity. So it can vary up and down. Commissioner Lee clocked a station and I think they had 39 minutes out of an hour. But once a lot of statistics on this is gathered, maybe the Congress then would be interested in saying, well, above a certain percentage, we think, and maybe at that point, if we had those facts and figures, to present to you, you might very well say, "Well, you are right, the public interest and necessity does permit you to make this kind of regulation."

Until I see what the final rule is that the Commission proposes, I do not know just where I stand on it.

Mr. ROGERS of Texas. Now, Commissioner Ford, you dissented in the license impositions?

Mr. FORD. Fees; yes, sir.

Mr. ROGERS of Texas. Did you not base your conclusion in that on the matter that you did not have the authority to do that and that you should come back to the legislative body of the Government to get that?

Mr. FORD. No, sir, I based it on the vagueness of that authority, of the standards set up there. For instance, if we could charge $100, we could charge $10,000. It was a broad taxing authority that it seemed to me we were being given.

Then I based it on the fact that language of the appropriation act itself was quite vague. Then I further dissented on the ground that I did not think the fees we set were in accordance with the vagueness of the terms of the act itself.

Mr. ROGERS of Texas. Maybe it was some other Commissioner, but I had thought you had based it on the proposition that you did not feel the authority was vested in the Commission to do that and that the proper procedure was to come back to the Congress to get it.

Mr. FORD. No, the law was there and it was adopted and signed by the President, and it is binding. If we comply strictly with the terms of that particular statute, all right. But it seemed to me it was so vague that we should come back and get clarification before we acted.

Mr. ROGERS of Texas. Do you not think that in the event of the situation you outlined of 7 days of commercials—in the first instance, I think a moving picture would be welcome. In the second instance, do you not think that you would have the door open that has been open throughout the history of our country, that you would have uncovered the situation you felt ought to be corrected and you could come to Congress and say to the Congress, "This is a matter on which we think legislation is necessary," and make your case to the Congress?

Mr. FORD. I am a little bit inconsistent in my position on this, because I think that this is precisely the basis on which we look at the whole program. I thought it was being a little bit ridiculous when we talked about whether a broadcaster could play one record all day long. It was not long after that that our Field Engineering and Monitoring Bureau called my attention to a station that had played a record 1,235 times in succession. So there, it would seem to me, just as we could say, well, look, you just cannot bombard the receiving sets in your service area with the same record 24 hours a day, I am not going to find that is in the public interest.

Mr. ROGERS of Texas. I do not know if that is a good tune or not, but it is a good record if it played that many times.

Judge Loevinger, do you have any further comments?

Mr. LOEVINGER. Well, I might say that to a substantial extent, I agree with Commission Ford. I think that it would be unwise for the proposed bill to be enacted, because it seems to me it would unduly limit the action of the Commission in ways that this committee does not intend the action of the Commission to be limited. As I say, in such matters as differentiating between education and commercial on television or radio stations, I do not see how you could do that. Such things as limiting the broadcasting of daytime stations in nighttime in emergencies—if they did that, if you cannot have a rule preventing them from broadcasting commercials, it is going to be an awful temptation for a daytime station to find a lot of emergencies at night. There are complications, many complications in this very complex field.

Mr. ROGERS of Texas. Is a daytime station permitted to advertise at night while they are working on emergencies?

Mr. LOEVINGER. They will not be. They are not now, I guess. I know that we have a proposed revision of the rule that specifically prevents this. But this is a rule that does relate to commercials. It would be prohibited by this legislation.

Mr. ROGERS of Texas. I thought you were arguing a little bit before that if we passed this legislation, it would open up the door and give you powers that you actually did not have under the expressio unius theory.

Mr. LOEVINGER. I do not think it would give us any powers. I think it would prevent our acting in this field. This is in terms of the proposed legislation. I do not know how many other things would be affected. I suspect that there are a number of other things that the committee does not intend and that I do not have in mind now, because I do not have enough experience or depth of background in the field.

I think basically that the committee should have a little more confidence in the discretion of the Commission, because I do not think this Commission is going to come up with a result that is going to either hurt the industry or offend this committee.

Mr. ROGERS of Texas. Thank you, sir.

Commissioner Bartley, did you have anything further?

Mr. BARTLEY. No, I am here for answers to any questions.

Mr. ROGERS of Texas. Commissioner Cox?

Mr. COX. I think not, sir, thank you.

Mr. ROGERS of Texas. Gentlemen, it has been nice to have you with us and we deeply appreciate your cooperation.

Mr. HENRY. Thank you, Mr. Chairman. I think it has been a helpful discussion.

Mr. ROGERS of Texas. We have one other witness I think we ought to get to today if we can, Mr. John Coyle, president of station KVIL–AM, Dallas, Tex.

Mr. Coyle, if you are prepared to testify, we shall recognize you at this time.

STATEMENT OF JOHN COYLE, PRESIDENT, KVIL–AM–FM, DALLAS, TEX.

Mr. COYLE. Mr. Chairman, I have prepared a formal statement which I would like to submit for inclusion in the record.

Mr. ROGERS of Texas. Without objection, your statement will be included in the record, Mr. Coyle.

Mr. COYLE. I would just like to highlight this statement and cover it generally. Then I shall be available for any questions.

Mr. ROGERS of Texas. You may proceed.

Mr. COYLE. First, I feel that we should enact H.R. 8316, not only to delete the present FCC proposal, but to discourage such excursions in the future. Now, there has been some discussion here today as to who is the Government. Is Congress the Government or is the FCC? I think you should establish that. It is a shock to me to hear that there would be some discussion on the subject. I feel that enactment of this bill would be a breath of fresh air.

Now, since I have been on the NAB board, I have been very concerned aout our broadcasters and the fact that they should stay closer to their Congressmen. We have established an informal committee through the efforts of the NAB that will work with Congressmen at the local level.

This is not under-the-table stuff. This is open and aboveboard, and we want to give you all the facts, give you our position, tell you our problems so you will be completely aware of them.

We have a fine government relations staff here in Washington, but certainly, they cannot deliver to you our problems in each and every case. We feel that you are the gentlemen who are responsible to us. If there is to be anything done on this commercial problem—I personally think that the Congress should not do it, neither should the FCC. But if it is to be done, it should be done in a legal way. It should not be done by the passing of a rule. It should be done by men who will come up for reelection every 2 years and if we do not like what you do, we can do something about it then.

I would like to describe our policies so that you will know something about our operation. We have a 1,000-watt station in Dallas. We are what you call a good music station, we are daytime only. We operate in one of the major markets, as you know. We came up with a formula that we thought was the best way to service not only our listeners, but our advertisers. We run a maximum of 12 commercials an hour, plus 2 sponsored newscasts.

Now, this is well below the minimums established by the NAB code. But we do not for one minute think that everybody else in town should do the same thing. As a matter of fact, we prefer that they do not. We play the type of music we think adults prefer. While we do not play rock-and-roll, we do not think everybody else in town should stop playing rock-and-roll. We consider ourselves a quality music station.

We editorialize. Now, other stations do not editorialize. That is their prerogative. I do not think they should have to editorialize. When we editorialize, I think we must be equipped to do it. As a matter of fact, on racial equality, we took a very strong stand. We editorialized on that for 4 consecutive weeks. We do not think everybody else in town should have to do the same thing because we do it.

Now, our programing in Dallas is specialized. There are stations that are rock-and-roll stations for those who prefer that type of music, there are Western type of music stations for some who prefer that. There are others who have outstanding news, they will concentrate on that news, have maybe an hour or two hours of news. That is for those people.

But about 75 percent of the stations in this country are in small markets, they cannot specialize. They are all things to all men. They play all kinds of music. Their problems are very different from ours.

Now, if you told stations in these smaller cities that they could only advertise a certain amount, you would just kill them. It was said here today that the FTC would show consideration of these people, they could come to them and open their books. They did not say open their books, but they said, "We shall look at the profit angle." That means, of course, to open the books. I have lived in several parts

of this country. I have found the same thing to be true in New England, in the Southwest, any place. The small businessman is not going to open his books to anybody. He is a rugged individual. He is not going to open his books to you or to Austin or to the guy at the county seat asking for help. We are definitely going to put them out of business if we tell them how many commercials they can run.

You take smaller communities. I am very concerned with these smaller communities, because I represent the stations in Texas on the NAB Board. We have problems on the smaller stations, as the gentleman from Wyoming mentioned. We have vast expanses of land. These people go through January and February and have very little business. It is a little better in the spring, and not bad in the summer. But they have to do their business in the last quarter of the year. If they do not make it then, they are just not going to make it. You can just not tell them to restrict the commercials that they have.

We feel that the Commission's proposals run counter to free enterprise concepts. It is just impossible to live in Washington and know what is going on at the local level. If you are a Congressman, you must get home occasionally and know what is going on. But my observation has been that other than elected representatives, when men from our area come to Washington in appointive positions, when they come here from any other place in the country, they contract a disease. I do not know what the disease is, but it is something as a result of which Washington becomes the center of all the brains. Really, everything is known here. They know how to do it better here than any place else, and it just does not work out that way.

I think lawmaking should be left to the lawmakers who are duly elected and representative of the people.

Now, there are other ways to help this out, and I think the advertisers should do more than they are doing at the present time. At the local level, advertising agencies recognize that certain stations do a better job, certain stations run better music, certain stations have better public service. But on the national level, we do not get that. We have heads of advertising agencies criticizing, we have government people criticizing how our stations are run. We have educators, and recently, we even were subjected to actresses telling us how to run our station. You know, it is very interesting that all these people should be so interested in helping broadcasters regulate themselves.

Now, recently, we had an editorial on November 1, which I am attaching to the statement as an appendix, and it is pertinent to this condition. There is something that I think can be done by advertising agencies. That is, an advertising agency can—certainly, it is their prerogative to say, "We shall run commercials on your station if you will abide by the NAB regulations, or something comparable. You do not have to join the NAB code, but if you have a code that is better, all well and good."

A good example would be our station. If we did not belong to the NAB code, we are so far under their requirements in limiting ourselves on the number of commercials, why, we would be eligible. I think other stations, if for some reason they are not in there, that would be the main reason. A lot of these smaller fellows are not in there because they cannot afford to be. They would go broke on it.

I personally wish that the larger national advertising agencies were as well informed about the individual stations as the local people are. I think that would take care of our problem.

The proposal by the FCC, in my judgment, is symptomatic. I sit here and hear today's testimony, and it is indicative of the whole general thought. In my judgment, this is opening the door a little bit and getting a foot in the door, once they make this step. It runs counter to our free enterprise concepts. To pass a law and tell a man how to run his business in this great detail is just repugnant to me. It just seems to say that broadcasters are dishonest, the advertiser is greedy, the public is stupid, and the bureaucrat is omniscient—that he knows all. It also suggests that the Commission's judgment, sitting here in Washington, is superior to that of the individual businessman who is running his own operation.

It more or less reflects, I feel, a distrust in our judgment. If they distrust our judgment on this, where do they stop distrusting our judgment? Will it be programing? Maybe we do not know how to run our programs; maybe we charge too much. This worries broadcasting. At the TAB, the Texas Association of Broadcasters, meeting, these fellows would come up to me and talk about their problems. It is just wrong when a man in the broadcasting business gets up every morning and his first worry is, What will the next step be? What can we expect from the Government today?

They have enough problems running their business without worrying about what oppressive moves next will be forwarded from Washington. They are living in constant fear of the Government, and I imagine you found that several broadcasters hesitated to come up here. They are afraid of reprisal, afraid of this or that. I personally am not. I personally feel that the men on the FCC Commission are very honorable men, fine men. I do not know all the men on the staff, but some of the people in the broadcast industry are very worried as to what may happen. No matter how well you run your station, somebody can come in and find all kinds of things wrong. You must initial certain items in the log, and you might do it 500 times. If you miss one, that is a citation. Some of these men are not nit-picking like that, but if some of these men wanted to lay it on you, they could.

I am very happy that you and your committee recognize the urgency of this situation. Mr. Chairman, after you were down in Dallas, we ran an editorial. I included this as part of my statement here. Our conclusion was that Texas broadcasters appreciate Congressman Rogers' tribute to their fairness. Still more appreciated is his stand for the proper legislative perspective.

I think this editorail is important. We might look at it from several different viewpoints. No. 1, we welcome in broadcast opposing views of controversial issues which draw our comment on our editorializing. If someone does not like it, we like to hear about it. We like controversy on our station. We want you to come in and give your side.

Second, no one told us how we should run this editorial. Nobody told us it should be 1 minute, 3 minutes, or 15 minutes long. If I want to make it 15 minutes, I will.

Third, it was not sponsored. No advertiser came in and paid for it. But the facility over which it was broadcast and over which opposing views can be broadcast is really sponsored in the sense that it is supported by advertising. To the extent that freedom of advertising

is limited, in my judgment, there seems to be a very definite limitation upon the other freedoms attached to our public media.

I appreciate your letting me come here today and your efforts to get me on today. If you have any questions, I would sure like to answer them.

Mr. ROGERS of Texas. Thank you, Mr. Coyle, for your statement. As I have said, your entire statement will be placed in the record.

(The statement referred to follows:)

STATEMENT OF JOHN COYLE, PRESIDENT, KVIL–AM–FM, DALLAS, TEX.

My name is John Coyle. I reside at 4326 Willow Grove Road in Dallas, Tex. I am the president and owner of KVIL–AM and KVIL–FM. KVIL–AM is licensed to Highland Park, Tex., a suburb of Dallas. KVIL–FM is licensed to Dallas-Highland Park. Both serve the entire Dallas metropolitan area.

I wish to express my appreciation, Mr. Chairman, for the opportunity to appear here in support of H.R. 8316.

As a member of the board of directors of the National Association of Broadcasters, I had the pleasure a few months ago of introducing a resolution—since adopted and put in force—providing for the establishment of an informal committee of broadcasters representative of each State whose task it would be to keep Congress informed about the problems of our industry. This effort is intended to supplement the work done by our fine Government relations staff headquartered here in Washington.

I felt and my fellow board members agreed that broadcasters themselves at the community level should participate more actively in this educational process. The broadcasters of this Nation have nothing to hide and I think we might avoid some of the problems such as that implicit in these hearings if we kept in closer touch with the members of our highest legislative body.

I am the responsible party at KVIL. Although the stations are licensed to a corporation, University Advertising Co., I own the majority of stock in the corporation.

If our station license is jeopardized because of violation of clearly stated laws and regulations, I must take the ultimate responsibility. If audiences are lost through poor programing or ill-advised commercial practices, the consequences are mine. At no time and under no circumstances have I ever assumed or sought that this responsibility could or should be surrendered to the national association of which our station is a member, the Government or anyone or anything else.

KVIL became a subscriber to the NAB radio code because those of us operating the station believe the professions and businesses should promulgate and support their own rules of behavior, or standards or ethics. We believe such self-initiated action is appropriate to our way of doing things in this Nation. Had we thought that the voluntary standards to which we were subscribing would be made involuntary, as is suggested now by the Commission's proposal, we would not have subscribed to the NAB code in the first place.

To explain this, it is necessary to define our commercial policy at KVIL.

KVIL–AM broadcasts with 1,000 watts power during the daytime only. By power and hours of operation, therefore, we would be classified as an average or small radio facility. We do operate, however, in one of the Nation's major markets. We have found that we can serve our audience and our advertisers most efficiently and at the same time profitably by broadcasting 12 commercial messages an hour, none exceeding 1 minute in length, and 2 sponsored newscasts. This is well below the minimum suggested in the radio code of the National Association of Broadcasters.

The fact that we do limit ourselves to this number of commercials an hour does not mean, however, that our competition must or should do so, or that someone else might not operate satisfactorily with even fewer advertising messages. It's merely the way we have decided to handle our commercial policy because it is consistent with the kind of programing we do.

KVIL is a "quality music" station. That is, we schedule middle-of-the-road music: Good show tunes, some concert and semiclassical numbers and well-known standards. KVIL carries a full schedule of local, regional, national, and international news. We editorialize. We like to think we do a good job in supporting worthy community projects and our institutions, such as churches and schools.

There are 15 AM radio stations delivering signals in the Dallas market; that is, stations which can be heard satisfactorily in the 290,000 radio-equipped homes in the area. I don't expect all of those stations to have precisely the same kind of commercial and programming policies anymore than I expect the people occupying all of those homes to be just alike.

With that many radio stations, we tend to divide up programing responsibilities. Our programing in radio in large markets is specialized—for even a station playing only concert music in a major market can capture enough audience to render a valuable and significant service.

Our programing at KVIL, therefore, is not exactly like that of any other station in the Dallas market. We say this with no less pride than would the station which features country music, or the one which schedules heavily in news, or the one that follows some sort of formula or so-called top 40 policy.

When one is dealing, however, with the frequency and length of commercials, the problem is not limited to nor concentrated in the so-called big markets.

Of nearly 4,000 radio stations in the Nation, about two-thirds are small-market stations. Hundreds of these do not specialize; they cannot, for in many cases they are the only broadcast facilities in their communities. They have to be all things to all people. And they have seasonal survival problems, too, as do all of us. The situation is particularly aggravated in smaller communities. Business usually is great in the fall up through Christmas; depressed in January and usually February; fair in the spring and just so-so in the summer months.

If you told a lot of stations in these circumstances that they could only broadcast this limited number of commercials in the weeks before Christmas, you'd kill them—because that's when they take in enough money to live through January and February. If this doesn't seem important as a charitable thought about broadcasters themselves, then it should be considered in reference to those who are employed in broadcasting and the merchants to whom credit must sometimes be extended by broadcasters—not to mention the public itself which benefits by having its own community station, just like the big cities have theirs.

I have long thought and so expressed myself on several occasions that some special consideration should be given to this problem by our own radio code board in the National Association of Broadcasters. In some smaller communities around the Nation, it is necessary to sell advertising announcements for very little since the economy of the communities will not support higher prices. As a matter of fact, in what are sometimes referred to as "package deals," the per unit cost becomes minimal indeed. In major markets, the per announcement revenue will run anything from 20 to 200 times as much. The fact that a spot announcement must be sold for less in a very small community does not derogate in any way the value of the service of the radio facility in that community particularly if it is the only one in the market.

It seems to me that this broadcaster should have greater latitude than some of the rest of us in the code's provisions with respect to frequency of commercials. I know this is a very difficult problem but I believe it is necessary that we seek some solution to it in order that more broadcasters will be able to support the radio code in good conscience.

In Washington, unless you're a Congressman who gets home now and then, it's easy to lose sight of the fact that folks in small towns take great pride in having their own newspapers and radio stations.

It is this underlying consideration, more than any other, which disturbs me when I think about the Federal Communications Commission administering policy with respect to commercial practices in broadcasting.

Control by Government of commercial practices in broadcasting strikes at the very heart of our free enterprise system. Limitation on the frequency of commercials is indeed a form of rate fixing, a course which has been wisely and vigorously opposed by the broadcasting industry since the inception of this service in the United States.

Equally vexing is the thought that Government employees based in Washington, with little indigenous experience upon which to make judicial determinations, should be evaluating the effect of advertising on communities throughout the Nation.

I think lawmaking should be left to the lawmakers, duly elected and representative of the people.

Since the Commission's proposal with which this suggested legislation deals, some people have come out in support of it—notably some advertisers and agencies, educators and even actresses. We commented on this over KVIL in an editorial on November 1, 1963, which I am attaching to this statement as an appendix since it may be pertinent to the discussion we are having here.

There is something that I think can be done by advertising agencies and advertisers in encouraging the observance of voluntary standards of good practice in both radio and television. Many of us have espoused for some time the idea that advertising agencies—both the large national ones and the regional and local ones—can encourage observance of good standards of practice by showing preference to those stations having such standards when they buy advertising schedules in behalf of their clients. This doesn't mean that they would have to buy only those stations subscribing to the NAB code. They can buy any station that would observe reasonable standards and make these standards known to the agencies. In other words, here, too, the attainment of good commercial balance in radio broadcasting can be sought through voluntary cooperative industry action in our system of free broadcasting.

In fact, in the major markets where much of the time buying is done through local advertising agencies you will find that those agencies already do favor the stations that have sound commercial policies and are free of commercial clutter.

I only wish the large national advertising agencies were equally well informed about local conditions. Paradoxically enough, we have here in a business relationship the same problem we face with respect to Government. You can't really know what's going on locally unless you live there.

I think that broadcasters are better qualified, because of day-to-day activities running the gamut of community participation to decide such things as commercial and programing policies than are appointed Government executives—far removed, in most cases, from the affected citizens.

Had it been the policy of this Nation, as it is the policy of some others, to place broadcasting in the hands of Government, that could have been easily accomplished in the environment of this medium's developmental days. The Government wisely determined that broadcasting should be entrusted to private citizens. The dimension of broadcasting in the United States today—measured by standards of quality or quantity of service—confirms the wisdom of that original decision. This is no time to change it.

Broadcasting should be left to the broadcasters as long as they observe and respect the law which governs their stewardship.

Now some may argue that the Commission acts ingenuously and perhaps even innocently in adopting the standards already promulgated by the industry itself. I wouldn't agree.

The industry's standards are elective. One can subscribe or not subscribe, as he wishes. The industry standards are flexible. They recognize the power of decision by the broadcaster at the local level in a matter that is purely subjective. Commission application of these standards would not tolerate such recognition.

A self-promulgated code of conduct does not involve such serious sanctions, of course; and it should not, in a public medium which must be, by the Commission's own definitions, responsive to the needs and desires of the audiences it serves.

Furthermore, the law requires full participation. Industry or professional standards do not. Fewer than 50 percent of the radio stations in the Nation subscribe to the NAB Radio Code. I don't for a moment believe that this means that the nonsubscribers are not good broadcasters. Many of them don't subscribe, frankly, because they cannot meet the code's minimum commercial standards and survive.

Finally, Mr. Chairman, I find it somewhat illogical that a broadcaster should take an oath imposed by Government that he will schedule a maximum of so many commercials of a prescribed length within a defined period of the broadcast day. There's something about this which is repugnant—suggesting that the broadcaster is dishonest, the advertiser is greedy, the public is stupid, and the bureaucrat is omniscient.

It suggests also that the Commissioners' judgment, sitting in Washington, is superior to that of the broadcasters, operating daily within their own communities.

It runs directly counter to our free enterprise concepts.

However, the proposal that the Federal Communications Commission enforce through law the frequency and length of commercial advertising in broadcasting is most frightening in the sense that it is symptomatic. How far will the Government go in its distrust of the judgment of those citizens whom it licenses under a bond of trust? Would control of commercial practice lead to control of other practices, in the area of programing, for instance?

Believe me, hundreds of broadcasters throughout this Nation are seriously disturbed by the increasing tendency of the Federal Communications Commis-

sion's intrusion into matters that they think the law reserves to the discretion of the licensees. I am sure it was not the intent of the Congress that these businessmen, small and large, throughout the Nation should stand in constant fear of the Government because of the authority of license. But that is what is going on. Many, many broadcasters are spending time defending themselves against unnecessary Government intrusions when their energies should be devoted to the full-time job of serving the public interest, which is the charge that has been given to them by that very Government.

I am happy to see Mr. Rogers, that you and this committee recognize the urgency of this problem.

On October 22 our station, KVIL, broadcast an editorial commenting on the speech made by the chairman of this committee before the Texas Association of Broadcasters on October 21 in Dallas.

Here is the editorial in full text:

"It is to be hoped that Texas Representative Walter Rogers speaks for the majority of Congress. He is chairman of the important House Subcommittee on Communications and Power. Yesterday he addressed the Texas Association of Broadcasters on rulemaking by the Federal Communications Commission. FCC has moved to limit air editorializing and to fix station license fees and the length or frequency of radio station commercials.

"Congressman Rogers is alarmed that the so-called independent agencies seem to regard themselves as 'a fourth branch of the Government, completely free of any control from the executive, the judicial or the legislative.' Congress set up these agencies as its own administrative arms. Rogers stressed that they are not authorized to pass laws under the label of rules. He wants Congress to recognize and deal with the problem. If not, he wants the issue referred to the people because, he says, 'we are dealing with an attempt to change the constitutional process.'

"Texas broadcasters appreciate Congressman Rogers' tribute to their fairness. Still more appreciated is his stand for the proper legislative perspective."

In concluding, I'd like to make a couple of points about this editorial.

First, we welcome and broadcast opposing views of controversial issues which draw our comment.

Second, nobody told us how long it should be or how many times we could broadcast it.

Third, the editorial wasn't sponsored. But the facility over which it was broadcast and over which opposing views can be broadcast is sponsored in the sense that it is supported by advertising. To the extent that freedom of advertising is limited, there seems to be a very definite limitation upon the other freedoms attached to our public media.

Thank you again for your permitting me to appear here in support of H.R. 8316.

KVIL EDITORIAL NO. 79—FCC TIME LIMITATIONS, NOVEMBER 1, 1963

Throughout all of our school years we are taught one basic rule; i.e., opinions must be based on fact. Much work goes into study on a given subject before an intelligent opinion can be voiced.

Opinions are what we think and all of us have them. Too often people who desire to seem well informed will talk on anything. They forget that speech is not necessarily thought. Opinion in its true sense must be well based. How can you really think unless you know the facts? The facts may not cause two people who have studied them to reach the same conclusion. But study does give each a sound basis for his thinking. Knowledge of the facts is vital to that.

An FCC proposal would limit arbitrarily the number of permitted commercials broadcast by radio stations. Essentially, this concerns how free enterprise radio operates in serving the public. Clearly sound comment requires understanding of the business. But proponents have risen from the ranks of advertisers, agencies, educators, and even actresses—all anxious to help the Government regulate the broadcasters.

Remember the adage: "Look before you leap"?

To these self-styled experts, oblivious of the consequences, we would advise: "Think before you talk."

JOHN COYLE, *President KVIL.*

Mr. ROGERS of Texas. Mr. Rostenkowski, do you have any questions?

Mr. ROSTENKOWSKI. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Mr. Coyle, have you made your ideas known to the Commission prior to the filing of this statement in regard to the rule-making?

Mr. COYLE. I have not given any information to the FCC on this; no, sir. Now, as far as their ruling is concerned and their request, our attorneys here in Washington filed on that for others, and it is strictly legal and I am not an attorney—fortunately, I guess—and I do not get involved in all of this. This is the sort of thing I think should come before you. This is the forum for this kind of a statement, not before an agency.

One of the things that came up here today, and this is not part of my statement, but I would like to have you listen to it and decide if you would like to include this in the record. After I decided to come up here and discuss this, my idea of coming up here and meeting with you gentlemen and giving you my ideas, I thought I should be up here representing more than the broadcasters. So I ran a brief editorial. This would only take one minute to read. We ran this. We started, got the idea on Saturday morning on the way to work, ran it Saturday afternoon, Sunday afternoon, and Monday morning:

Congressman Walter Rogers, of Tampa, Tex., has introduced a bill in Congress prohibiting the FCC from passing any rules that would intrude upon the rights of free enterprise in broadcasting. He feels, as do many others both inside and outside of Congress, that any changes in the laws of the land should be brought about by congressional action and not through the passing of rules by an administrative agency.

I am scheduled to testify in favor of this bill at a hearing next Wednesday and Thursday and want to ask a favor of you. Please take a few minutes today and drop us a note at KVIL telling us your answer to the following questions:

First. Who should establish the number of commercials to be run on KVIL? A Federal agency or the management of KVIL?

Second. Who should decide on editorial policy and the side to be taken by KVIL on controversial issues? A Federal agency or the management of KVIL?

Third. Who should select the programing to be presented on KVIL? A Federal agency or the management of KVIL?

Your answer is extremely important to us as it will give us the position of the most important people in this controversy—namely, you the listener. I know that the congressional committee certainly will be impressed by whatever side you take.

We got another 40 or so letters today, I am told on the telephone. We have 40 letters here, and I do not propose to start reading all of them. But these are from, apparently, very intelligent people—the mayor of Dallas, people on the city council. For example:

Congratulations on your excellent editorial and your support of the Rogers bill. My answer to your three questions is most definitely that management of KVIL should manage KVIL. Should your proposed council resolution come officially before the city council I'll vote for the resolution. Cordially.

That is one of our city councilmen. We have a city council government in Dallas.

In answer to your broadcast for opinions, I believe all radio station managers should decide and determine the number of commercials—

and they go on to say—

the editorial policy, the hiring and firing of personnel, any other business pertaining to the operation of the radio station. It is not the place of any Federal administrative agency to make these decisions. The next step would be for the Federal Government to operate and own all TV and radio stations, which certainly would be disastrous.

There is another, signed by H. K. Herbert. All these people signed names. This is surprising to me. I thought they would come pri-

marily from businessmen on letterheads. These were written at home by most of these people, I imagine, or typed out.

This one says, to paraphrase it, I believe the management of a radio station should determine how many commercial spots it should have. I also believe that your own management should have the sole responsibility, and he goes ahead and backs up the whole thing saying:

> If I should decide I do not like your programs, all I have to do is change the radio station, and the Federal Government or any of its agencies has no business telling the radio station or newspaper business how to run their businesses.

All the way through, these people say something that seems to be ignored, that is, if they do not like what we are doing, they can just turn the dial. This is a rough business to keep them tuned to your spot on the dial. If everybody is fighting to get these listeners—

We talked about how many complaints the FCC has. You have heard that. Two of those people do not agree with those of the sixty. We have 58 people—60 write us, everyone tells us, "Yes," you should decide, and not a Federal agency should make a decision on all three of these counts, and two people do not agree with us. This is one radio station.

I have said this many times, and I finally went ahead and actually asked the public what they thought. I feel that if you want to come to Dallas, and if you want to take me on, and our radio station, and ask our listeners who should do it, they would say we should do it. If we want to go to one of the rock and roll stations and ask their listeners, we will find that they like their stations.

There is a loyalty among listeners. We are a new station. We have been on 3½ years. We find there is great loyalty. We have a dickens of a time getting some of these listeners away from stations they have listened to for 20 years.

Mr. ROGERS of Texas. Do you want to leave those letters, Mr. Coyle?

Mr. COYLE. Yes.

Mr. ROGERS of Texas. If so, they will be received for the file, and if the subcommittee decides to include any of them, that will be done.

Mr. COYLE. I would like to make copies. I want to answer them, and then I shall give them to the clerk.

(The letters referred to will be found in the files of the subcommittee.)

Mr. YOUNGER. I have one other question.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Have you read the FCC's communication of July 26 on the doctrine of fairness?

Mr. COYLE. Yes.

Mr. YOUNGER. Did that clear up the doctrine of fairness to you, or confuse you?

Mr. COYLE. Well, it is somewhat confusing. I understand it has been cleared up a little bit, but there was an implication there that if you were running for Congress and you bought a spot on our station, were we asked to we would have to give a free spot to your opponent. That has been clarified, I am told, though not by a memorandum yet. But there are all kinds of ridiculous things in that.

I think you must be fair. As one of these letters points out, we do not need the Government to tell us how to run our business if we are

all good businessmen and honest. The public is smart. If you are not honest and you do not run your business right, they will not put up with you. Many of these letters will say, "I agree with your editorial policy completely," and I value that. But the one I value more is the man who writes in and says, "I sure like your editorials. I do not agree with them all, but even when I do not agree, I like the way you state your position."

When you are fair, and you operate that way, people know and they like it. If you are going to be an underhanded businessman and get involved in being unfair, you will not last.

Mr. YOUNGER. Do you, in your editorial policy on controversial subjects, give to the other side the right to answer?

Mr. COYLE. We not only give them the right, we seek them out. We love to have controversy. But very rarely will they pick it up. We never attack individuals. I guess we do go after the administration, whichever one it might be, whether it be Democratic or Republican, but we do not like to single out an individual. The only time we did that, and I am not so sure we were right in doing it——

Mr. ROGERS of Texas. Dallas is no stranger to controversy, it is?

Mr. COYLE. No. We took a position on the one to which you are alluding, I think. We made a statement that in a situation such as that, in the case of Mr. Stevenson, people who do things like that are addlepates, not patriots. We stand upon all controversial issues, and I think the thing that will impress people in the North is that we would take that position on racial equality. People that know Dallas, when you get into controversies, the fellow on your side—there is another controversy next week and he is on the other side. But as long as they appreciate your position, even though he disagrees with you, I think that is all we can ask.

Mr. YOUNGER. That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Coyle, how do you finance your station?

Mr. COYLE. We put up our own money to finance it.

Mr. ROGERS of Texas. Where do you get your income from, your revenue?

Mr. COYLE. Through the sale of commercials.

Mr. ROGERS of Texas. Do you have any other revenue?

Mr. COYLE. No, sir.

Mr. ROGERS of Texas. In other words, if it were not for the sale of your commercials and your advertising, you would have no income?

Mr. COYLE. That is right.

Mr. ROGERS of Texas. Do you have to sell that, or do people chase you around and hunt you out to buy it from you?

Mr. COYLE. We sell awfully hard. We work very hard to sell them.

Mr. ROGERS of Texas. You work 24 hours a day, do you? The manager usually does, to try to get people to buy that advertising?

Mr. COYLE. That is right.

Mr. ROGERS of Texas. What you are trying to do is sell them a bill of goods that you have enough listeners that will listen to their ad when it is put on, and it will not offend anybody so that they will come and buy what it is you are advertising?

Mr. COYLE. Yes, sir.

Mr. ROGERS of Texas. Do you know of any of the stations where business is so good that they do not have to solicit advertising or compete very strongly with other stations?

Mr. COYLE. I shall guarantee you it is not so in Dallas. You know something that happens? If our salesman goes out and finds a new advertiser, and he is on our station with his first commercial at 9 o'clock in the morning, by 9:30 every other station in town has a salesman calling on him, and I am sure our salesmen do the same with things that might appear on another station.

Mr. ROGERS of Texas. Do you have, Mr. Coyle, a group of attorneys that represent you, free of charge, and look after your interests?

Mr. COYLE. About the only thing we get for nothing are church programs. They do not charge us. Everything else we get, we pay for.

Yes, sir; to answer your question, we pay for our attorneys.

Mr. ROGERS of Texas. These matters that are coming up all the time that you are waiting to find out whether the FCC has made some change that might involve you, that involves the economics of your station, you have to employ someone and pay them out of the revenues you get from advertisements to present your side of that case, do you not?

Mr. COYLE. We pay for attorneys in Washington, and we pay for attorneys in Dallas, to interpret what the attorneys in Washington tell us.

Mr. ROGERS of Texas. You do not keep, then, a group of attorneys on retainer to work constantly to find ways of circumventing the FCC, do you?

Mr. COYLE. No, sir.

Mr. ROGERS of Texas. Or the Federal Communications laws?

Mr. COYLE. No sir.

Mr. ROGERS of Texas. In other words, you are just a typical American businessman trying to get along and make a living out of what rights you might have associated with this particular business that you are in?

Mr. COYLE. That is right.

Mr. ROGERS of Texas. And that is true, Mr. Coyle, of all the people engaged in the communications industry, is it not?

Mr. COYLE. I have found that to be true in every case; yes, sir.

Mr. ROGERS of Texas. Do you feel that, as you said a minute ago, if you do not give the kind of programs people want, the people in Dallas will simply turn you off, and turn on some other station? I know the names of them, but I do not want to give them any free advertising.

Mr. COYLE. There are 14 other stations that come into Dallas on AM. That is AM, and I do not know how many FM there are that are going on and off every month, these FM stations that do not make it.

Mr. ROGERS of Texas. I think that is all for the present. It is 5 o'clock and we are running out of time.

Does that conclude your testimony, Mr. Coyle?

Mr. COYLE. Yes, sir.

Mr. ROGERS of Texas. Thank you very much.

The subcommittee will stand adjourned until 10 o'clock in the morning.

Thank you.

(Whereupon, at 5 p.m., the subcommittee adjourned to reconvene at 10 a.m., Thursday, November 7, 1963.)

BROADCAST ADVERTISEMENTS

THURSDAY, NOVEMBER 7, 1963

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND POWER
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m. in room 1334, Longworth House Office Building, Hon. Walter Rogers of Texas (chairman of the subcommittee) presiding.

Mr. ROGERS of Texas. The Subcommittee on Communications and Power will come to order for further consideration of pending business. We have H.R. 8316 and similar measures pending before the subcommittee. Although our first witness scheduled this morning was Mr. Peter B. Kenney, vice president of the National Broadcasting Co., the Chair is taking the liberty of letting Mr. Roberts, one of our colleagues on the committee, enter his statement and make whatever statement he wishes.

Mr. Roberts, the Chair recognizes you.

STATEMENT OF HON. KENNETH A. ROBERTS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. ROBERTS. Mr. Chairman, I am grateful to you for this privilege and I will not take very long. As you will probably remember, since we served on the full committee for many years together, I served at one time on the Communications Subcommittee and I sponsored some legislation in the communications field.

I come here today, Mr. Chairman, because I am deeply disturbed by the proposal of the Federal Communications Commission to impose strict limits on commercial time. What particularly troubles me is that the Commission believes it knows better than Congress what policies should be followed toward broadcasting. It has always been my understanding that Congress made it perfectly clear that the economic affairs of broadcasters are to be controlled by competition, not by a Government Commission. By their proposal, the Commission is seeking to turn broadcasters into public utilities with regulated income and profits. This subcommittee, whose distinguished members are among the hardest working men in Congress, should not have been put to the trouble of holding these hearings. The Commission knows very well that Congress has given it no power to impose restrictions on the amount of commercial time that can be broadcast. The Commission is reaching for the purse of the broadcaster in an undisguised attempt to make him more amenable to the Commission's dictates.

Unless the Commission is called to account now, the next step will be an outright attempt by the Commission to say what programs can and cannot be broadcast. After all, there is no difference between saying that commercials cannot be broadcast and saying that news programs with a certain viewpoint cannot be broadcast.

The Commission is constantly sending spokesmen to Congress complaining that the Commission's staff is overworked. Now the Commission proposes to regulate commercial time, a huge task that will greatly burden the Commission's staff. If the Commission would direct their efforts to exercising the power that Congress gave it, the money appropriated for the Commission's staff and operations would be more than adequate and the workload reduced.

Short of the desire to increase its power and budget, I cannot think of any reason the Commission can have for proposing to limit commercial time. Some people may think that at times, a particular station is putting on too many commercials. In Alabama, our stations are able to sense the need for changes if this happens and they react accordingly. I have no doubt, however, that the American people are happy with the service given by broadcasters.

The American people are frequently smarter than some bureaucrats in Washington give them credit for. The people know that advertising pays for the excellent programing that is presented and that a cut in advertising will harm programing. If a particular station dared present what to a large portion of the audience thinks is an excess of commercials, a station would find itself quickly without listeners and without advertisers. The FCC is a creature of Congress with the responsibility for carrying out the intent of Congress in communications matters. The intent of Congress with respect to the authority that it granted to the FCC is very clear. Any attempt by the FCC to exceed that authority and assume for itself the legislative function vested in Congress must be vigorously opposed. It is my firm conviction that FCC does not have the authority to impose limits on the commercial time that is broadcast and the proposed rulemaking to impose such limitations is substituting the Commission's desire for the intent of Congress.

I strongly oppose this FCC effort, and favor and support H.R. 6697, and I hope the committee will write a strong report and that the bill will be passed by an overwhelming vote of the House of Representatives.

Mr. ROGERS of Texas. Thank you, Mr. Roberts. The statement will be received in the record and let the Chair make this observation. One reason Mr. Roberts was not here yesterday is because he was working in connection with another committee of which he is a chairman. He has done a tremendous amount of work this year and he has to be at that committee again this morning. The committee understands that, so we are glad to have afforded you the time, Mr. Roberts.

Mr. ROBERTS. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Our next witness is Mr. Peter B. Kenney, vice president of the National Broadcasting Co., Inc., of Washington, D.C.

Mr. Kenney, it is good to have you before the subcommittee.

STATEMENT OF PETER B. KENNEY, VICE PRESIDENT, NATIONAL BROADCASTING CO., INC.

Mr. KENNEY. Mr. Chairman, members of the subcommittee——

Mr. ROGERS of Texas. Do you have a written statement, Mr. Kenney?

Mr. KENNEY. I do, sir.

Mr. ROGERS of Texas. You may proceed, Mr. Kenney.

Mr. KENNEY. Thank you.

My name is Peter B. Kenney. I am a vice president of the National Broadcasting Co.

NBC favors H.R. 8316, the bill introduced by Chairman Rogers, and its companion bills for two basic reasons:

1. We believe that the Congress, in enacting the Communications Act, did not intend to vest in the Federal Communications Commission authority to promulgate rules governing the number, frequency, and length of commercial announcements and that the Commission should not undertake regulations in this field in the absence of legislation clearly authorizing it to do so. Since the Commission considers this area within its jurisdiction and has proposed rulemaking, legislation reiterating the congressional intent is desirable.

2. On the merits and as a matter of policy, we believe that Commission regulation of commercial time standards is not necessary in the public interest and would be an unwise and unwarranted intervention in the free enterprise economy of the broadcasting industry.

I will summarize our views on each of these points.

The Federal Communications Commission's current proposals for adopting rules governing broadcast commercials represent the first such action by that agency or its predecessor, the Federal Radio Commission, in the entire history of Federal licensing and broadcasting.

The conception of broadcasting inherent in the Communications Act is that it is not a public utility or common carrier, but a competitive free enterprise in the public interest. Accordingly, it would seem that if Congress intended the Commission to assume regulation of time standards, it would have delegated that authority in clear and unmistakable terms, since such regulation directly affects the revenue of broadcasters by governing the sale of broadcast time. Not only does the Communications Act not grant such authority, but I am advised by our attorneys that the legislative background of the act indicates that the Congress intended that the Commission should not extend its regulation to this field.

In 1925 the House committee drafting what became the Radio Act of 1927 specifically stated that the committee was "not undertaking to limit advertising through this medium" (H. Rept. 719, 68th Cong., 1st sess.).

In 1932, the Senate specifically raised the question as to the advisability of controlling or eliminating broadcast advertising on radio facilities and asked the Federal Radio Commission to report on the subject. The Commission's response of June 9, 1932, stated that:

> Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitatons or specifically authorizes the Commission to do so under a general standard prescribed by that legislation ("Commercial Radio Advertising", letter from the Chairman of the Federal Radio Commission, S. Doc. 137, p. 33, 72d Cong., 1st sess.).

However, despite this opinion by the Commission that it lacked the required authority and that legislation would be necessary to provide it with such authority, the Congress in the 1934 act conferred no authority on the Commission in the area of commercial time standards. I am also advised by our attorneys that there is no indication in the House, Senate, or conference reports associated with the enactment of the Communications Act of 1934 that the Congress intended to confer on the Commission jurisdiction to regulate commercial time standards (H. Rep. 1850, 73d Cong.; S. Rep. 781, 73d Cong.; conference report, H. Rep. 1918, 73d Cong.).

This legislative history leads us to the conclusion that the Commission was not intended by Congress to have authority to adopt rules governing commercial time standards. However, since the question has now been raised by the Commission's current rulemaking proceeding, we believe that it can best be resolved by legislation confirming the congressional intent, as is proposed by H.R. 8316 and its companion bills.

NBC also favors H.R. 8316 because we believe it declares a policy which is sound in substance. Such regulation by the Commission of broadcast advertising brings the Federal Government into a field which should be left to the responsibility of broadcasters operating in response to audience choice in a free market. We have set forth the grounds for this position in our comments in the Commission's rulemaking proceeding and I believe it would be appropriate to summarize them here.

The Commission offers as a major reason for its proposed action the fact that in 1 year it received 2,500 complaints about broadcast advertising. Of these, 35 percent—some 875 letters—referred to length, number of frequency of commercials—the fields in which the Commission proposes to regulate. In view of the thousands of commercials broadcast daily over the Nation's 5,500 radio and television stations and the size of the broadcast audience constituting virtually the entire population, 875 letters in the course of a year would seem to be an indiscernibly faint public outcry.

NBC's own experience in a sense parallels the Commission's. That is, of the complaints about television commercials that come to us, roughly 35 percent relate to length, number, and frequency. But of decidedly greater substance is the fact that all complaints about television commercials amount to less than 1 percent of the total mail comment on our entire television service.

The majority of complaints we receive about commercials appear to have a subjective motivation. They are inspired principally by the moods and tastes of individual viewers, the nature of the product, the way it is presented, and the context of the program in which the commercial is placed—all matters which do not lend themselves to Government regulation. Nor do we believe that Commission regulation of commercials would eliminate or reduce such complaints as now are made by those who object to broadcast advertising.

We do not take lightly the complaints we receive about commercials, and NBC maintains a substantial staff which checks the validity of claims, obtains substantiation, rejects objectionable copy, strives to keep commercials in good taste, and is constantly reviewing the placement of commercials.

And although all commercials may not always be satisfactory to all viewers and listeners, we are confident that the public would rather have the commercials which support an enormously costly program service than restrict the scope and value of that service through governmental limitations on broadcast advertising.

In our view, the number and frequency of commercials broadcast by a radio or television station are matters that must be decided by each individual licensee in terms of his obligation to provide a total service consistent with the tastes, needs, and interests of the community he serves. Indeed, this was the view of the Commission in its policy statement of July 27, 1960, when it stated that the general guidelines it had outlined—

> * * * should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public interest * * *.
>
> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.
>
> * * * we do not intend to guide the licensee along the path of programing; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve.

In the light of this stated position, the Commission's proposed rulemaking appears to constitute a reversal of Commission policy. By setting standards for the length and frequency of commercials, the Commission would be prescribing the "rigid mold" it disclaims in its policy statement and would enforce a formula for station operation that would dictate each station's revenue-producing framework.

In our free enterprise economy, the commercial as well as the program portion of the broadcast service satisfies important public needs both by helping the advertiser to market his products and the public to learn about them. By holding the broadcaster to specified commercial time standards the Commission would be substituting its own judgment for that of the broadcaster in his effort to aline a significant element of his service with community conditions.

An unfortunate result of such a move by the Commission would be the undermining of the honest efforts at self-regulation in which responsible broadcasters have long engaged. The NAB codes, NBC's own code of broadcast standards, which was the forerunner of the NAB codes, and comparable standards established by other broadcasters are evidence of these conscientious and continuing efforts.

The Commission's proposed rules would supersede the applicable provisions of the NAB codes and displace an important part of the self-regulation to which many broadcasters adhere. Indeed, such rules would make self-regulation academic in the field of time standards for broadcast commercials. They would inhibit the continued progress and development of other commercial standards in the broadcasters' codes. The would discourage the industry in establishing and maintaining self-regulation standards in other areas for fear that voluntary efforts at flexible self-regulation would subsequently be frozen into inflexible Government fiat.

The Commission's proposal to incorporate the commercial time standards of the NAB code into Commission rules is based on the fallacy expressed by the Commission when it stated that the present NAB codes are the "culmination of many years of extensive consideration and experience." Indeed, the codes are the result of extensive consideration and experience, but they are by no means the culmination of them.

For example, since the NAB television code was adopted in 1952, it has been amended 20 times in response to changing conditions. The codes are undergoing continuing scrutiny and can be modified and refined at the tempo of a dynamic, changing industry—far more expeditiously than Commission rules might be. Yet, if the Commission were to impose commercial time standards, each licensee's response to community requirements would be handcuffed to the Commission's cumbersome rulemaking process.

Another specific and principal problem that would be created by Commission rules—which also exists with respect to industry codes—is that they must either ignore diverse, local considerations or provide for a great many variations and exceptions to meet these considerations. The Commission apparently has recognized this pitfall in inviting comments and proposals for time standards for various categories of stations, such as daytime-only standard broadcast stations, stations in communities with seasonal economies and other categories.

Not only would this seem to require the Commission to establish a number of molds and formulas but it would also thrust the Commission into the details of individual station operation. For in order to make sound judgments respecting the circumstances of individual stations, the Commission would need to consider advertiser aims and propensities, station rates and discounts, audience habits, program schedules, the quality of sales staffs and the entire gamut of factors that each broadcaster must judge in making his business decisions.

Under the present system of self-regulation, the NAB code review board are composed of experienced broadcasters, representing various types of stations. They need not consider all the economic, social, and other factors in establishing or amending codes which operate through voluntary adherence of subscribers.

The Commission, on the other hand, in promulgating and enforcing rules that would have the effect of law, must follow the requirements of due process and base its decisions on substantial evidence. Since no single set of standards could apply to all broadcasters, in all situations and for all time, the Commission would need to be conversant—through the most detailed, costly and onerous factfinding proceedings—with all current data affecting advertising rates, audience habits, economic needs and other significant factors, in every community. It would need to be able to evaluate the relationship of these data to present income requirements for supporting a broadcast operation in the public interest. And it would need to be supplied with such data continuously to evaluate requests for revision and amendment.

The total effect of this detailed involvement in station operation would, in our view, constitute a type of public utility regulation that the Commission has neither the authority nor the resources to administer soundly for every community and broadcaster in the United

States. As such, it would conflict directly with the basic and established principle that broadcasting is not a public utility but a competitive, free enterprise industry.

For these reasons we believe the Commission should not establish commercial time standards for television and radio, and we support the legislation under consideration by this committee.

Mr. ROGERS of Texas. Thank you, Mr. Kenney.

Let me ask you one question at this time. Did I understand you to say that a substantial number of the complaints you get, that the NBC receives, having to do with commercials actually has to do with the content of the commercial?

Mr. KENNEY. Many have to do with the content. Actually, the total number, Mr. Chairman, relating to commercials in general is relatively small. That portion that relates to length, frequency, or number is even smaller. I think I have—well, for example, sir, from October 1962 to September 1963, out of 245,000 comments of all types—praise of programing, requests for different types of programming—only 1,544 of those concerned commercials, which is six-tenths of 1 percent, and only 527 concerned excessive commercials, or two-tenths of 1 percent.

Mr. ROGERS of Texas. Then if we follow out those figures that you give us here, unless the Federal Communications Commission by this rule that they propose to make intend to directly or indirectly control the content of the commercial, they would not solve much of any problem with relation to the complaints coming in now, would they?

Mr. KENNEY. That is very true, sir. Complaints on commercials would continue and of course, we must also accept, I suppose, the fact that people in some cases would just dislike commercials if there were only one commercial in an hour. Other people may possibly be disinterested in a commercial. Perhaps if a person has purchased a new car, he is no longer at that moment interested in another new car. So there is some element of disinterest. But I do not think we can project this into a dislike or major objection to the idea.

Mr. ROGERS of Texas. I think that is true. I think there are variances of opinions about that. Sometimes, a loud, screaming, obnoxious, short commercial is more annoying than a long, soothing one. It depends upon who is doing the listening.

The Chair recognizes the gentleman from California, Mr. Younger.

Mr. YOUNGER. Thank you, Mr. Chairman.

We are glad to have you, Mr. Kenney.

Mr. KENNEY. Thank you.

Mr. YOUNGER. Do you understand that the Commission now has a policy in regard to commercials?

Mr. KENNEY. Has which power, Mr. Younger?

Mr. YOUNGER. Do you understand that the FCC has a policy in regard to commercials in broadcasting at the present time?

Mr. KENNEY. As to length, frequency, and number? No, sir.

Mr. YOUNGER. Were you here yesterday to hear the testimony?

Mr. KENNEY. Yes.

Mr. YOUNGER. You heard Mr. Henry say that they already have a policy in regard to commercials and the overcommercialization of broadcasting, but it is applied on a case-by-case basis and all that they are trying to do now is to make that more definite and apply the policy over the field, rather than by case administration?

Mr. KENNEDY. Well, Mr. Younger, I do not believe—and I have discussed this with some of my associates—I do not believe that the Commission has ever entered an action against a station or found, gone into a revocation proceeding, for example, or a punitive action against a station solely on the basis of excessive commercials. There have been all these other factors involved and on occasion, commercials may have been one of those factors. On a case-by-case basis—I think their case-by-case reference must be to those instances where commercials may have been a factor among many others.

Mr. YOUNGER. I think the chairman gave one example yesterday as all that they could give us. I asked him to supply the record of the cases where they had either shortened a renewal or gave a renewal on a shorttime basis due to the fact that there was commercialization in broadcasting, and he offered to do that. So I do not know, there was only one case they could give us yesterday.

Mr. KENNEY. Last evening we were speaking about the same case. We looked that one up for my own information. We found that there was a different set of circumstances there, sir. The station involved was in hearing based on a matter of performance versus promise rather than purely excessive commercials. In other words, it had exceeded in its actual performance what it said it would do in its application for license or renewal.

Mr. YOUNGER. You heard yesterday the theory that if we passed this act that we are now holding hearings on, by so doing, we would then give to the FCC the right to do all of the other things which are now prohibited. For instance, according to the theory of one of the members, Mr. Loevinger, he said that if we passed this act, then by passing this act and limiting this way, we would tacitly be giving to the Commission the right to interfere with programing, for instance, or any other thing that they might want to do. Do you subscribe to a theory of that kind?

Mr. KENNEY. I think it is more a legal opinion, Mr. Younger. I couldn't really give you an answer on that. I suppose there is justification to subscribe to that theory.

Mr. YOUNGER. For a layman, though, it seems rather farfetched, does it not?

Mr. ROGERS of Texas. Would the gentleman yield?

Mr. YOUNGER. I would be glad to.

Mr. ROGERS of Texas. I might say to a lawyer, it does, too.

Mr. YOUNGER. One other phase that we touched on yesterday that I cannot see the difference, if the FCC could limit the number and time of commercials, then they would, by that act, be determining the rates. I do not see how you can get away from that fact. Is that not true?

Mr. KENNEY. I believe that is true; yes. I believe that would be the end result, Mr. Younger; yes.

Mr. YOUNGER. And yet they admit they have no right to interfere or to have rulemaking in regard to the rates. And I cannot divorce the two ideas.

Mr. KENNEY. I think it is a pretty fine line. I personally believe that if we were to get into any reduction of numbers of commercials, this would certainly establish a rate loss for a number of stations—an income loss; excuse me.

Mr. YOUNGER. You have also covered here the subject that we went into a little yesterday, which to my mind would prohibit the FCC from getting into this field because of the tremendous staff that they would have to have in order to administer any such limitation. Because, by their own admission, they could not pass a rule that would apply to all stations. They would have to make continual exceptions. They admitted that. I thought you have covered that very well in here.

It seems to me that by their own admission, they have laid the groundwork for defeating the rulemaking in this field.

That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Kornegay?

Mr. KORNEGAY. Mr. Kenney, I also want to commend you on a very fine statement that you have made here this morning. I want to ask you two or three questions.

What sanctions, if any, does the NAB have against the stations that fail to live up to the code of good practices—that is, the members of the association?

Mr. KENNEY. Withdrawal of the membership of the station in the code, of the seal.

Mr. KORNEGAY. Well, as a broadcaster, what pride, if any, in your opinion, does an individual broadcaster have in the seal and in being able to be a member and display the seal?

Mr. KENNEY. Well, the seal itself, Mr. Kornegay, is probably relatively unimportant. It is the subscription to a broad concept of a desirable approach in this field. Those stations that have developed the code and belong to that make a continuing, conscientious effort to stay within the framework of the code.

Mr. KORNEGAY. What I am getting at, Mr. Kenney, in your opinion, has the public been so educated as to appreciate the fact that a broadcaster who is a member and subscriber to the code ranks a little higher in the community than one who is not?

Mr. KENNEY. I am not sure. I would be inclined to doubt that this is true.

Mr. KORNEGAY. Well, is the NAB making any effort to accomplish that purpose? In other words, so that the seal will mean something and it will be to the advantage of the individual broadcaster to say on his radio station, or put on his television station that he is a member of the code of good practice?

Mr. KENNEY. Well, this is done, Mr. Kornegay. There is a slide of the seal which appears during the course of the broadcast day, on occasions, on those stations which are members. But going beyond that as to whether the public really recognizes the significance of the code member, I am not sure.

Mr. KORNEGAY. And you do not know what efforts the national association is putting out?

Mr. KENNEY. I think perhaps they would be able to answer that more directly and completely than I could.

Mr. KORNEGAY. Now, to what extent, in your opinion, does competition have a bearing on commercials, the number and length of them? Competition between various stations?

Mr. KENNEY. Definitely.

Mr. KORNEGAY. In other words, there is a particular station here in Washington that appears to have a large number of commercials

to me. All I have to do is swing over to another station. Does not that in itself have a bearing on the conduct of a particular station?

Mr. KENNEY. I think this is probably the greatest regulator, Mr. Kornegay. I think it is far more effective than any attempt at regulation in this field, because we all recognize, I believe, that if the station's efforts are objectionable to the public, then the public is not going to watch or listen. If this is the case, the station does not have a salable product to its advertisers, and hence is in trouble.

Mr. KORNEGAY. Are there many areas in the country where the listener is unable to get more than one radio station or one television station?

Mr. KENNEY. I do not believe that is—certainly not in radio, sir, and I do not believe there are many of those in television. I would have to go back and do a little research on it.

Mr. KORNEGAY. In other words, there is competition, in your opinion, among stations?

Mr. KENNEY. Definitely. It is a highly competitive industry.

Mr. KORNEGAY. It is in my section. I am not familiar with other sections and I thought you would know if it were in other sections.

Mr. KENNEY. Right.

Mr. KORNEGAY. Now, of course, I understand that the Commission is not trying to eliminate all advertising but merely to limit to some extent. But I think this is an important consideration, and that is what effect does advertising by broadcasters have on the economy? It is true that if I do not have a headache, I am not interested in these medicines that they sell you for everything from heartburn to sunburn and athlete's foot. But there may be somebody who is interested in that. What impact does advertising have upon the economy?

Mr. KENNEY. I have always felt, Mr. Kornegay, that this is perhaps one of the areas where industry has properly neglected to inform the public of the importance of advertising. Certainly, in our economy of mass production—and of necessity, mass consumption—we rely on advertising in all forms to stimulate this purchasing power and in turn, stimulate production, raise the standard of living that we have now. Broadcasting, I think, is generally accepted at this moment as being, if not the leader in the field of advertising effectiveness—I would have to maintain that it is, of course. But our economy, I think, is tied very closely and directly to the commercial efforts of the broadcast industry.

Mr. KORNEGAY. I heard the expression here yesterday that advertising was a necessary evil. I do not necessarily subscribe to that, feeling that there is a lot of virtue in good advertising. As proof of that, we need only to look at what happened in the New York area during the newspaper blackout. We saw how the lack of advertising in the New York newspapers affected the economy of that city. So I think it is certainly important in broadcasting to have advertising, not only to sustain the operation under the private enterprise system, but also the effect that it has on the economy. Now, what is good for the economy, of course, is good for the country.

Mr. KENNEY. Well, there is another point that I should perhaps touch on, too, Mr. Kornegay, that some people perhaps overlooked. That is on an individual station basis, whether it be a radio station or a television station, the advertising which may be present in one

particular area or program is frequently the source of revenue which makes possible other programing, perhaps of an educational, cultural, or news level, which in itself does not produce revenue. Certainly at the network level and true again in many stations, these efforts of so-called cultural or informational programing—rarely do they recover from the advertiser, even if there is one, the total outlay to build and present that type of program.

Mr. KORNEGAY. Does the industry, the television or radio industry, contribute anything to educational programs?

Mr. KENNEY. In programing or financially, sir?

Mr. ROSTENKOWSKI. Financially.

Mr. KORNEGAY. Carrying on the educational programs.

Mr. KENNEY. On an industry level, I cannot give you specifics. There is a constant flow of assistance from numerous sources to educational operations. There is also on behalf of individuals and individual corporations very heavy and substantial contributions of—financial contributions.

I have just inquired whether we had released the fact that as of last week, National Broadcasting Co. has contributed $250,000 to the Los Angeles educational television station. Prior to that, it had contributed a like amount to the station in New York.

Mr. KORNEGAY. What other sources of income or support do educational stations have?

Mr. KENNEY. Well, they use different sources, Mr. Kornegay. In some cases, there is a local subscription effort where civic groups and individuals concerned with the growth of educational television contribute on a local basis. The Ford Foundation has contributed heavily in the past.

I would say that for the most part, these are their sources, from the local efforts.

Now, there is also the possibility that as educational stations develop and become more closely associated with school systems and colleges and universities within their areas, in-school educational programing, that the schools or colleges may in turn find some way to assist this educational effort.

Mr. KORNEGAY. I believe you state in your statement that the Commission received 2,500 complaints about broadcast advertising in 1 year.

Mr. KENNEY. Yes, sir.

Mr. KORNEGAY. And that only 35 percent of them, or about 875, related to the length, number, and frequency of commercials.

You state that is the main reason that they seek this authority to limit commercials. That is the major reason that the Commission now seeks, through the rulemaking process, to limit the number and utilization of commercials.

Mr. KENNEY. I do not say that it is their main reason, sir. It appears to be their major reason which they have presented as justification for this rulemaking effort.

Mr. KORNEGAY. Mr. Chairman, I would think that the average Congressman received more complaints than that in the course of a year.

That is all.

Mr. ROGERS of Texas. Mr. Cunningham.

Mr. CUNNINGHAM. Mr. Chairman, I want to thank Mr. Kenney for his statement and particularly the last matter referred to, as to these complaints, which certainly are of a very minor nature. I do not suppose that anyone particularly enjoys having a program broken up by commercials. But if we believe in the free enterprise system, we know that this is something which is necessary. Unless we want to go to a State-owned system, I think we must pass that off as part of the price of receiving good programing from radio and television. As a matter of fact, I am somewhat embarrassed as a Member of Congress that these good people in private enterprise have to be put to the trouble and expense of coming up here to fight for their right to make a living.

It seems to me, that in Mr. Henry we have a pretty mischievous young man. I know he went out to Omaha, where I come from, before he was chairman and he convinced the people out there that he was mischievous. With this latest proposal, he has convinced me that he is mischievous. I think that it is time that somebody's wings were clipped.

I do not know whether or not we should go into the broad problem of rewriting this act so that these people concerned do not have to come up here and fight for their life every other month on some new regulation that is proposed.

I am under the impression that if this Congress does not take action on this legislation and stop this new proposal and it takes effect, it is just going to open a Pandora's box to a lot of other comparable types of rulemaking. I just do not know where it will lead to.

I just wanted to make that general observation, that I do think we have a mischievous young man as chairman and I think we ought to take this matter in hand and try to keep him out of all this mischief.

That is all I have to say.

Mr. ROGERS of Texas. Thank you.

Mr. Hull?

Mr. HULL. I do not have any questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Thank you, Mr. Chairman.

I thank you for your statement, Mr. Kenney. I want to make sure that the record is clear that as I understand your first few pages of testimony here, you do not believe and that your legal counsel does not believe and your associates, your company do not believe that the Federal Communications Commission has the authority to issue rules concerning commercial broadcasts.

Mr. KENNEY. That is correct, sir, and you will find in your copy the citations of legislative history which brings us to this opinion.

Mr. BROYHILL. The statement was made yesterday by the Chairman, Mr. Henry, that in his opinion, the situation concerning—I do not have the exact wording, but in other words—the situation concerning commercial broadcasts had been deteriorating over the years. Would you agree or disagree to this observation?

Mr. KENNEY. I do not think I could agree with that, sir. A number of factors have changed in recent years that in turn may be reflected in change of advertising policy. But we also must consider that broadcasting a few years back in the thirties and in the forties

was on an entirely different concept. We had, for example, fully sponsored programs which would not normally be counted as commercials the way we do today. We are mixing apples and oranges, I think, when we count commercials and commercial content today as against what occurred in the past.

Mr. BROYHILL. In other words, you are saying that a good case could be made that rather than deteriorating, the situation is improving?

Mr. KENNEY. I do not know that I could say that there are fewer commercials, Mr. Broyhill. I do not think that we have a serious problem in overcommercialization.

Mr. BROYHILL. You are saying that you do not have a serious problem. Well, now, who is to say whether few commercials is a good situation or a bad situation?

Mr. KENNEY. I think initially, sir, the licensee, who has the major responsibility in his individual market, if his judgment proves wrong and the public does not straighten him out through either failure to tune in his service or failure to purchase his product, then periodically he comes up for review in a number of other areas.

Mr. BROYHILL. No other questions, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Rostenkowski.

Mr. ROSTENKOWSKI. Is there a barometer that you use, Mr. Kenney, when your station has registered an unusual amount of complaints? In other words, if your commercials last 2 minutes and you raise them in a given week to a 3-minute period, is there an influx, then, of mail where people will complain?

Mr. KENNEY. On commercials?

Mr. ROSTENKOWSKI. Yes.

Mr. KENNEY. No, sir. I had some figures here—most complaints of this type relate to programs, not commercials. I think—well, for example, on Friday, October 25, this is not in mail but in telephone calls, the "Bob Hope Special" that night was not in color and we had 147 telephone calls in New York City inquiring why it was not in color. We do not get this kind of reaction on commercials at any time.

Mr. ROSTENKOWSKI. But you do not have any barometer—is there any standard by which you now yield time for commercials?

Mr. KENNEY. Yes.

Mr. ROSTENKOWSKI. Is it 3 or 4 minutes per hour?

Mr. KENNEY. Right.

Mr. ROSTENKOWSKI. This standard is set up by whom, the National Association of Broadcasters?

Mr. KENNEY. The National Association of Broadcasters has the NAB code, which we have discussed here. The NBC has its own rules of practice which predated the code and is somewhat more rigid than the code in some respect. This governs the amount of commercials and the various categories of time.

Mr. ROSTENKOWSKI. And if the stations violate this?

Mr. KENNEY. They are not violated, sir. There is a major department which keeps track of this and clocks it. The prior program for commercial review is reviewed and clocked. So violations just do not happen that way.

Mr. ROSTENKOWSKI. Thank you.

Mr. KORNEGAY. May I ask a question?

Mr. ROGERS of Texas. Yes.

Mr. KORNEGAY. You may have just answered my question. I asked you what sanctions NAB had. You say now that NBC also has an even more rigid standard. What sanctions, if any, does your network impose upon violations?

Mr. KENNEY. I am sorry. Originally, I thought you said sanctions. Did you say standards or sanctions?

Mr. KORNEGAY. I am talking about sanctions, now, of NBC, not the NAB. Where you have a station on your network and it is not conforming to the standards you set up, what do you do about it?

Mr. KENNEY. We do not attempt to project the standards we would establish to affiliates. This is basically their responsibility. They are not necessarily subscribers of the NBC code, which applies for the most part to network production and to the NBC-owned stations. As far as I know, there has never been any effort to require the NBC affiliates to embrace the code similar to the one that NBC has for its own stations throughout the network. The affiliates' code would be the NAB code.

Mr. KORNEGAY. In other words, your standards apply only to the NBC-owned stations and not the affiliate stations?

Mr. KENNEY. The owned stations and network-originated programing, which in turn goes through the facilities of these affiliates.

Mr. KORNEGAY. You do not take any action on an affiliate when you think it has too many commercials or obnoxious commercials?

Mr. KENNEY. No.

Mr. ROGERS of Texas. Mr. Kenney, do you have many complaints about the loud commercials, about the difference in sound volume?

Mr. KENNEY. We have had complaints on it. I do not have the figure right here, Mr. Chairman, as to what percentage, but I am sure that we have had some.

Mr. ROGERS of Texas. Do you have a feeling on that? Does NBC have a feeling on that, that it should or should not be done?

Mr. KENNEY. Well, loudness is presently under study by the FCC. We have looked at it and I have participated in some of the discussions on this subject.

Technically, we cannot establish, Mr. Chairman, that there is a factor of loudness in a commercial. I assume this is what you are referring to, as against preceding or following program. I have personally seen this on meters, which are the best measuring devices available at the moment. There is no greater peak for the commercial. It follows a pattern of the preceding and following program.

The only explanation that I have heard to date that makes sense to me is that, this being a subjective area again, but it sounds—commercials may sound louder to people by reason of faster pacing and perhaps consolidating more into a shorter period than a dramatic program, which may have slow points and rapid points within the program itself.

Mr. ROGERS of Texas. Some people have complained to me that they are soothed to sleep by some of the programs and the commercial wakes them up. The sponsor feels that if a fellow is going to be rocked to sleep by his program, he ought to wake up and listen to the commercial.

Do you think that this is a proper area for the FCC to regulate?

Mr. KENNEY. Loudness? Which one, sir?

Mr. ROGERS of Texas. Yes; loudness.

Mr. KENNEY. I think the entire industry has an interest in eliminating a problem of this type if such a problem exists. I believe our efforts at this moment are to establish that the program exists. We hear people say that the commercials sound louder and I think as far as all of us are concerned, they have sounded louder, but are they really louder?

Mr. ROGERS of Texas. Do you think if enough people wrote to the advertiser and said, "If you do not stop this loud noise, I am going to buy another brand of soap," that would have more effect than the FCC regulating it?

Mr. KENNEY. Outside of that, I do not believe there is an immediate solution as to how he would change it.

Mr. ROGERS of Texas. Thank you very much, Mr. Kenney, for your statement.

Let the Chair say this: The House goes into session at 11 o'clock. I am going over to try to get unanimous consent for the committee to continue to sit. We will continue to sit and hear the witnesses this morning and this afternoon, if possible. I sincerely hope no one objects because we have a great deal of ground to cover.

Do we have a statement from CBS and one from ABC?

Mr. WILLIAMSON. Yes, sir.

Mr. ROGERS of Texas. Without objection, they will be included in the record at this point.

Mr. WILLIAMSON. And from Storer.

Mr. ROGERS of Texas. Without objection, that will be included in the record at this point.

(The material referred to follows:)

COLUMBIA BROADCASTING SYSTEM, INC.,
New York, N.Y., November 5, 1963.

Hon. WALTER E. ROGERS,
Chairman, Subcommittee on Communications and Power,
House Interstate and Foreign Commerce Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: Columbia Broadcasting System, Inc., respectfully requests that the enclosed comments and this letter be made a part of the record of the hearings of this committee on H.R. 8316, H.R. 8729, and similar bills, each of which would prohibit the Federal Communications Commission from prescribing standards concerning the length or frequency of broadcast advertisements. The attached comments were filed by CBS in the current FCC rulemaking proceeding (docket No. 15083) wherein it is proposed to adopt rules governing the maximum amount of the time which broadcast stations may devote to commercial material. These comments set forth in full the views of CBS with respect to governmental imposed limitations on the amount of time which may be devoted to commercial material. The views expressed therein are, accordingly, relevant to the bills now pending before this committee.

One of the basic positions CBS takes in the attached comments is that the Congress has not empowered the Commission to adopt rules prescribing the amount of advertising on commercial stations. Should there be doubt as to the position taken by us, we favor the enactment of H.R. 8316 or H.R. 8729 so as to settle the matter at once.

We respectfully draw the committee's attention to pages 2–10 of the attached comments wherein we demonstrate that governmental standards purporting to deal with the so-called problem of commercial announcements would be unworkable. We also show that in trying to deal with problems created by the proposed rule in the case of certain categories of stations and in the case of sta-

tions subject to certain economic conditions, the Commission would have to get into such questions as:

Is the station being operated efficiently?
Is the management experienced and is it diligent?
What are the standards of efficiency to ascertain costs?
How do the station's costs compare with those of other stations?
Can valid comparisons be made without a uniform system of accounts?
What are reasonably adequate programs and what would they cost?
What are the potential market revenues?
Are the charges for advertising too high or too low?
Could changes in staffing, rates, salaries and other categories of expense result in a satisfactory profit, without additional commercialization?
Could the station achieve a satisfactory profit by other changes, such as changes in programing or hours of operation?
What is a satisfactory profit?

These are among the reasons set forth in our attached comments which, we believe, compel the conclusion that the Commission should not inject itself into the area of prescribing the length or frequency of commercial material.

Respectfully submitted.

THOMAS K. FISHER,
Vice President and General Counsel.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the matter of Amendment of part 3 of the Commission's rules and regulations with respect to advertising on standard, FM, and television broadcast stations

COMMENTS OF COLUMBIA BROADCASTING SYSTEM, INC.

Columbia Broadcasting System, Inc., respectfully submits these comments in response to the Commission's notice of proposed rulemaking, released May 17, 1963. In this notice, the Commission has requested comments on a proposal to adopt rules governing the maximum amount of time which broadcast stations may devote to commercial material. The proposed rules incorporate the commercial time standards of the codes of the National Association of Broadcasters in effect on the date of the notice.

In seeking to limit advertising, the Commission is proposing to regulate an activity that is not only responsible for the American system of broadcasting, but that is essential to the Nation's economy. Advertising is not a necessary evil; it is a national asset. Advertising is the means whereby the people learn of the material satisfactions available for a more abundant life. "Few would deny today that advertising is indispensable to the maintenance and continued expansion of our American standard of living and our economic well-being."[1] Accordingly, in considering this problem, we think it essential that the Commission reject any notion that advertising is not in the public interest.

CBS' position with respect to the proposed rules may be summarized as follows:

I. The proposed rules—or any rules of similar import—are both unworkable and not in the public interest.

II. Congress has not empowered the Commission to adopt the proposed rules.

III. Promulgation of the proposed rules would violate constitutional and statutory safeguards.

I. THE PROPOSED RULES ARE BOTH UNWORKABLE AND NOT IN THE PUBLIC INTEREST

1. A governmental standard cannot deal with the problem

The notice recites (p. 2) that the Commission has noted "a large number of applications for broadcast authorization which presented serious problems of overcommercialization," and that the Commission has received "substantial complaints from the public" regarding commercial announcements. The Com-

[1] Statement made in 1957 by Charles A. Sweeney, Legal Adviser for Radio and Television to the Federal Trade Commission.

mission, however, had furnished no particulars regarding those applications and complaints. Complaints may stem from factors having nothing to do with "overcommercialization"; and may relate to concededly reasonable commercials.

There is no statement in the notice as to the number of complaints about advertising generally or as to the number of such complaints which relate to the length, amount, and grequency thereof. Chairman E. William Henry, in his address on September 24, 1963, before the International Radio & Television Society, stated that about 35 percent of 2,500 complaints (or 875) received by the Commission in 1962 dealt with the length, amount, and frequency of advertising. For all practical purposes, radio and television stations provide service to the entire population of the country, and only 875 complaints relating to so-called excessive commercialization from this entire population must be viewed as minuscule. For all that appears, these complaints may well have concerned commercials which would have complied with the Commission's proposed rules, had they then been in effect. It is quite possible that some or a substantial portion of the 875 complaints to which the Chairman referred were made by individuals who object to commercials of any kind.

The problem of broadcast advertising is not the simple one of the amount of time devoted to commercial messages per time segment. The problem has various aspects. The more engrossing a program, the greater the annoyance that may result from the commercial interruption. The particular point of placement of a commercial within a program also may induce audience dissatisfaction. Additional factors bearing on the problem include the quality of the commercial and its capacity to entertain or inform, the pace and method of delivery of the commercial, the attitude expressed in the commercial toward the consumer, personal convictions toward the particular product, the taste level of the commercial, the number of times a viewer may have seen a particular message, subjective attitudes toward different types of commercials, etc.

Government regulation cannot deal with the myriad factors affecting public acceptance of commercials. The multiplicity of these factors, varying from station to station, from program to program, from age group to age group, and from individual to individual, demands flexibility. The notice recognizes (p. 3) that it is not desirable to foreclose flexibility, acknowledging that separate standards may be needed for special categories of stations or for stations subject to special economic conditions. The Commission concedes that many stations will require waivers and exemptions from the proposed rules, and states that the rules themselves can, if circumstances require, be amended from time to time.

Procedures involving amendments to rules are, of necessity, time consuming, requiring public notice, and formal filings.[2] Waivers or exemptions are also cumbersome and the fact that they have been sparingly granted in the past in other areas of Commission activity cannot be ignored. The necessity for creating separate standards for special categories of stations, and of granting waivers and exemptions, will involve the Commission in endless proceedings. For example, daytime stations are one of three categories of stations specifically mentioned in the notice (p. 3) as requiring special consideration. But in that single category, the Commission would have to deal with about 2,000 stations, varying in their requirements with regard to commercials because of geographical location and other physical factors.

Furthermore, consideration by the Commission of requests for waivers and exemptions will involve the Commission in virtually every aspect of a station's operation. This is evident from the notice. In asking for comment on situations and categories of stations that "warrant special treatment," the Commission asks (notice, p. 3) that respondents supporting more liberal standards "substantiate their position by providing the Commission with specific data on advertising requirements in their community and * * * *relate these data to income requirements needed to support an operation in the public interest.*" [Emphasis added.]

The notice thus recognizes that one permissible—indeed perhaps necessary—justification for exemption will be that the station cannot operate profitably at the prescribed maxima. Determination of this issue will involve such questions as:

Is the station being operated efficiently?

Is the management experienced and is it diligent?

[2] It is noteworthy in this connection that the time standards of the NAB television code have been amended during the pendency of the instant rulemaking.

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What are the standards of efficiency to ascertain costs?
How do the station's costs compare with those of other stations?
Can valid comparisons be made without a uniform system of accounts?
What are reasonably adequate programs and what would they cost?
What are the potential market revenues?
Are the charges for advertising too high or too low?
Could changes in staffing, rates, salaries and other categories of expense result in a satisfactory profit, without additional commercialization?
Could the station achieve a satisfactory profit by other changes, such as changes in programing or hours of operation?
What is a satisfactory profit?

We cannot believe that the Commission intends to inject itself into such details of the daily business operation of stations. Apart from the lack of authority of the Commission to do so, discussed later in these comments, the task would represent a tremendous, almost impossible, work burden for the Commission and its staff.

The Commission acknowledges that the standards embodied in the proposed rules are not the only reasonable standards and that "there is a wide range within which various degrees of commercialization could be considered reasonable." The Commission concedes that the proposed rules may bar reasonable commercialization. This, it is submitted, not only is beyond the power of the Commission, but also conflicts with the legislative policy of the Communications Act which vests broadcasters with the primarry responsibility for the operation of their stations.

The Commission is willing to ban even concededly reasonable commercialization because, says the Commission (notice, p. 2): "we think the advantages of a definite rule outweigh this consideration." However, the mere fact that certainly in a rule may make administration easier does not justify arbitrary proscription of reasonable conduct.

In this area, indeed, Commission rules will tend to defeat the Commission's objectives. Such rules will, in many cases, quickly set the operational standard for all purposes and stifle individual incentive to reduce the number of commercials. This result is virtually invited by the language of the notice (p. 2) which cites definiteness as an advantage of a specific rule, "providing guidance to licensees * * *." As Commissioner Robert T. Bartley said in his dissent to the notice: "* * * such a rule would have a tendency to freeze the NAB code provisions and preclude improvement."

2. The solution to the problem lies in self-regulation

(*a*) Under self-regulation, the broadcaster assumes the responsibility for the adoption of appropriate commercial standards. This, we believe, is consistent with the statutory scheme of the Communications Act. In his dissent to the notice, Commissioner Rosel H. Hyde noted the inconsistency of the proposed rules "with the statutory concept of broadcasting as a competitive private enterprise service."

The inherent advantages of self-regulation are recognized in the notice (p. 2) which characterizes self-regulation as "obviously * * * preferable to any action by this Commission." Under self-regulation, a broadcaster has the freedom and flexibility to deal with the manifold considerations affecting public acceptance of commercials without, on the one hand, the fear that his activity—even though conceded to be reasonable—may jeopardize his license or, on the other hand, the excuse that adherence to some necessarily arbitrary standard will discharge his responsibility to operate in the public interest. Commercials are but one aspect of overall programing and as long as the licensee is responsible for programing, he must retain the responsibility for commercials in all their aspects.

Many broadcasters have chosen to use the standards of the NAB codes as their guidelines. But this choice has been voluntary and based on the licensee's own assessment of all the special circumstances with which he is confronted in determining how he should operate in the public interest.

(*b*) The fact that broadcasters themselves have attempted self-regulation concerning commercial standards is no more justification for the interposition of a Commission rule than is the broadcasters' self-regulation in respect of programing standards generally.[3] Once a Government standard is imposed in

[3] See comments of CBS, dated Oct. 2, 1961, in FCC Docket No. 13961 concerning the proposed revision of the statement of program service in broadcast application forms.

either area, voluntary action by the broadcaster slackens or ceases and the Commission's judgment is substituted for that of the broadcaster.

(c) The notice (p. 2) argues, however, that efforts at self-regulation have been unsuccessful. We disagree. The argument advanced is that subscription to the NAB codes represents only about 38 percent of all radio stations and 70 percent of all television stations.

We do not believe the present levels of subscription should be dismissed as lightly as they seem to be in the notice. These levels may approximate closely the numbers of stations that would be expected to comply with the Commission's rules as proposed, and not be accorded one of the waivers or exemptions contemplated by the notice.

Furthermore, subscription to the NAB codes has increased substantially over the past 5 years. In January 1959, less than 60 percent of all television stations and about 15 percent of all radio stations subscribed to the codes, as contrasted with the figures of 70 and 38 percent referred to in the notice.

With regard to self-regulation, the notice (p. 2) also observes that "the NAB, by itself, lacks effective sanctions to prevent abuses." However, there is no showing that sanctions available to the NAB have been ineffective or that there have been abuses by subscribers to the codes which have required sanctions. Indeed, Commissioner Lee Loevinger had occasion recently to remark upon the overall self-restraint of broadcasters in connection with advertising as compared with other communication media.[4]

We therefore urge that the Commission adopt no rules limiting the amount of broadcast advertising, and that the Commission continue to permit self-regulation to operate.

II. CONGRESS HAS NOT EMPOWERED THE COMMISSION TO ADOPT THE PROPOSED RULES

1. The legislative history

The Commission cites sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended, as the sources of its power to enact the proposed rules (notice, p. 5). None of those sections specifically grants the Commission power to deal with advertising as it now proposes. Section 307(a) provides that the Commission shall grant licenses "if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, * * *"; and the other cited sections in no way establish the Commission's power to limit advertising on commercial stations.[5]

On the contrary, the legislative history demonstrates that Congress has not granted the Commission the power which it here seeks to exercise, and that the proposed rules, if promulgated, would constitute an usurpation of power.

In January 1932, the Senate passed Senate Resolution 129 instructing the Federal Radio Commission to report to the Senate on the following question, among others:

"4. What plans might be adopted to reduce, to limit, to control, and, perhaps, to eliminate the use of radio facilities for commercial advertising purposes?"

In response to that inquiry, the Federal Radio Commission reported that it had no power under the Radio Act of 1927 to limit the amount of broadcast commercial advertising; and that if the Congress wanted the amount of advertising to be restricted, Congress should either fix the limits itself or specifically authorize the Commission to do so under a prescribed general standard.

The Federal Radio Commission stated in part (Commercial Radio Advertising, S. Doc. 137, 72d Cong., 1st sess. (1932), p. 33):

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent

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[4] In a recent address, Commissioner Loevinger said:

"We should also take cognizance of the fact that newspapers today devote well over 50 percent of their space to advertising, although this source supplies only about two-thirds of their revenue. In contrast, broadcasting derives substantially all of its revenue from advertising, but, on the average, devotes less than half as much of its 'space' to commercials as most newspapers."

[5] Sec. 4(i) permits the Commission to "make such rules and regulations * * * not inconsistent with this chapter, as may be necessary in the execution of its functions." Sec. 1 provides that the functions of the Commission are to "execute and enforce the provisions of this chapter." Likewise, sec. 303(r) states that the Commission shall make "such rules and regulations * * *, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." However, save for the requirement in sec. 317 that all matter broadcast for a valuable consideration be announced as paid for by the sponsor, nothing in the chapter, including sec. 303, gives the Commission any duty or function with respect to the regulation of advertising.

of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the Commission to do so under a general standard prescribed by that legislation."

Despite that report, Congress did not enact any statute limiting advertising or specifically granting the Commission power to do so.

This was not the first time that Congress had refused to give the Commission the power to limit advertising. In the 68th Congress, when the legislation which became the Radio Act of 1927 was under consideration, the House committee report stated with respect to its provisions (H. Rept. 719, 68th Cong., 1st sess., pp. 5–6) :

"One of the subjects of public discussion at the present time is the extent to which broadcasting stations should be utilized for advertising purposes. *Your committee has not felt justified in forbidding or in undertaking to limit advertising through this medium*, but we are unanimous in the opinion that much the same rule should apply to this form of advertising as applies in the case of newspaper advertising. It should not be hidden from the knowledge of the hearer." [Emphasis added.] [6]

As Senator Pittman of Nevada stated in 1927 on the Senate floor with respect to the legislation that became the Radio Act of 1927 (68 Congressional Record 4109 (Feb. 18, 1927)) :

"No authority is given to the Commission or to the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes."

Legislation to give the Commission power to regulate broadcast advertising was introduced in Congress but was not enacted (H.R. 8825, 70th Cong., 1st sess. (1928)).[7] When the Communications Act of 1934 was enacted, it did not enlarge the Commission's power over advertising. That legislation was not intended to effectuate significant substantive changes in the preexisting law (S. Rept. 781 ; H. Rept. 1850, p. 3 ; H. Rept. 1918, p. 47 (conference report), 73d Cong., 2d sess. (1934) ; 78 Congressional Record 10313 (1934)). Former Chairman Newton Minow has stated in this regard : [8]

"As the Supreme Court indicated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309, U.S. 134, 137, the fundamental provisions of the Radio Act of 1927 were not altered in the course of its reenactment as title III of the Communications Act of 1934."

The legislative history shows clearly that the power the Commission seeks to exercise here has been withheld by Congress.[9]

2. The absence of Commission authority over station income

Section 3(h) of the Communications Act of 1934 specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Congress has thereby expressly denied to the Commission any control over a broadcaster's return. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474–75. As the court said in *Pulitzer Pub. Co.* v. *Federal Communications Commission*, 94 F. 2d 249, 251 (Ct. App. D.C.) :

"But the power of Congress has not yet been extended to the point of fixing and regulating the rates to be charged by the licensee or the establishment of

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[6] The Congress accordingly enacted sec. 19 of the Radio Act of 1927 (now sec. 317 of the Communications Act of 1934) providing that all matter broadcast for a valuable consideration be announced as paid for by the sponsor.

[7] In the hearings on that bill, Commissioner Sykes of the Federal Radio Commission stated that "* * * we have no authority under the law to regulate direct advertising over the air." Commissioner Caldwell expressed the view that, even if such authority were granted, it would be unwise for the Commission to control advertising. (Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 70th Cong., 1st sess., on H.R. 8825 (February 1928), pp. 63, 136.)

[8] See "Authority of the Federal Communications Commission With Respect to the Programing of Radio and Television Broadcasting Stations," p. 52. Nor was the substantive authority of the Commission enlarged in 1960 when it was provided with sanctions for violations other than license revocation or suspension.

[9] In the recent case of *Head* v. *New Mexico Board*, 374 U.S. 424, the Government, appearing in the case *amicus curiae*, argued that the Commission had authority to promulgate regulations concerning advertising. The case involved the question whether the Communications Act of 1934 had so preempted the field as to exclude State regulation of optometrical price advertising. The Supreme Court held that there was no such preemption, and the opinion of the Court did not adopt the Government's conclusion as to the Commission's authority. The opinion of the Court simply held that "*Assuming* this (the Government's contention) to be a correct statement of the Commission's authority," there was no Federal preemption precluding State regulation. [Emphasis added.] 374 U.S. at 431.

rules requiring it to serve alike the entire public in the use of its facilities. Nor has Congress assumed the right to limit the profits on the basis of its investment or otherwise. The licensee of a radio station chooses its own advertisers and its own program, and generally speaking the only requirement for the renewal of its license is that it has not failed to function and will not fail to function in the public interest.'"

The Commission's proposed rules will have a direct and immediate impact upon broadcaster income. The Commission itself recognizes this, for its notice (p. 3), as we heretofore pointed out, calls upon those not supporting its advertising standards to provide "specific data on advertising requirements in their community *and to relate these data to income requirements needed to support an operation in the public interest.*" [Emphasis added.]

The Commission thereby proposes to modify a rule, and to make exceptions to general standards, depending upon a broadcaster's income. While it has been suggested that Commission requirements in other areas have an impact on gross revenues, in no prior instance has the Commission attempted to relate a rule or regulation to income requirements.

As we have noted, it is not technically feasible for the Commission to predicate rules, or exceptions to rules, upon such considerations. From the legal point of view, it is clear that the proposed rules will take the Commission into an area forbidden to it by Congress.

III. PROMULGATION OF THE PROPOSED RULES WOULD VIOLATE CONSTITUTIONAL AND STATUTORY SAFEGUARDS

Statements have been made that advertising is not protected by the first amendment.[10] We do not agree. However, even if it were assumed arguendo that advertising per se is not itself entitled to first amendment protection, the Commission's proposed rules would nevertheless violate that constitutional provision.

No one will dispute that broadcasters are engaged in activities entitled to first amendment protection, e.g., news broadcasts, public affairs programs, entertainment, etc. The first amendment protection to which broadcasters are undeniably entitled encompasses freedom from restraint on the revenues which alone make possible the protected activities. Special taxes on the advertising revenues of communication media have been held invalid under the first amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233; *City of Baltimore* v. *A. S. Abell Co.*, 145 A. 2d 111 (Ct. App. Md.). The proposed restrictions on advertising, with their direct impact on broadcaster revenues, are no different in their effect than such special taxes. Limitations on advertising time obviously will restrict broadcaster revenues and necessarily curtail those aspects of programing which are entitled to first amendment protection.

In addition, section 326 of the Communications Act of 1934 (formerly section 29 of the Radio Act of 1927) not only states that the Commission shall have no power to interfere with "the right of free speech by means of radio communication," but also provides that the Commission has no "power of censorship over the radio communications or signals transmitted by any radio station." The section on its face applies to all "radio communications and signals" regardless of their nature, and therefore includes advertising. As the Commission stated in a letter to Senator Potter on November 20, 1957: "Moreover, *the act* prohibits the Commission from exercising the power of censorship over broadcast material, which includes advertising" (16 R.R. 713, 714). [Emphasis added.]

The all-encompassing character of this statutory restraint on the Commission is shown not only by the broad scope of the statutory language but also by the legislative history of the section. As originally passed by the Senate, the section provided that the Commission could not interfere with free speech or exercise the power of censorship "except as herein specifically stated and declared" and "except as specifically stated and declared in this act." (Hearing before the Committee on Interstate Commerce, U.S. Senate, 69th Cong., 1st sess., on S. 1 and S. 1754, p. 5.) Those qualifications were eliminated by the conference committee, and the prohibitions were made absolute.

Censorship is involved whether it is the quantity of speech or the content of speech that is being controlled. Indeed, the present rulemaking proposal of the

[10] Usually citing *Valentine* v. *Chrestensen*, 316 U.S. 52, which was subsequently questioned by Mr. Justice Douglas in his opinion in *Cammarano* v. *United States*, 358 U.S. 498, 513.

Commission is simply an attempt to prescribe "priorities as to subject matter" between advertising and other programing. In connection with the enactment of the Radio Act of 1927, it was proposed in Congress to grant the Federal Radio Commission power to prescribe "the priorities as to subject matter" to be observed by stations; but the provision was dropped with the explanation that it was believed to confer a power "akin to censorship." (Hearings on H.R. 5589, 69th Cong., 1st sess., p. 39.) The proposed rules regarding advertising thus clearly fall afoul of the provisions of section 326 of the Communications Act of 1934 specifically denying the Commission any power of censorship.

For all of the foregoing reasons, the proposed rules should not be adopted.

Respectfully submitted.

COLUMBIA BROADCASTING SYSTEM, INC.,
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(s) RICHARD A. FORSLING.
(s) LEON R. BROOKS.
(s) WILLIAM D. GREENE.

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575 Madison Avenue,
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Dated New York, N.Y., September 30, 1963.

STATEMENT OF AMERICAN BROADCASTING CO.

American Broadcasting Co. (ABC) appreciates this opportunity to submit a statement in support of H.R. 8316 which would amend section 303(b) of the Communications Act of 1934 so as to provide explicitly "that the Commission may not by rule prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast service." As the committee knows, the Federal Communications Commission (FCC) on May 17, 1963, released a notice of proposed rulemaking (FCC docket No. 15083) looking toward promulgation of rules which would set specific limits on the amount of time which a broadcast station could devote to advertising messages. The subject legislation would forbid the Commission from going forward with this proposal.

ABC supports the legislation for two basic reasons. First, it believes that the FCC's proposed rules would constitute an unwarranted interference with the right of free speech guaranteed by the first amendment to the Constitution and would also be in direct violation of the no-censorship provision of section 326 of the Communications Act. Second, it believes that, leaving aside questions of free speech and censorship, regulation by the Government of the amount of advertising carried by broadcast stations, and particularly regulation in the form of hard and fast rules as proposed by the FCC, is against sound public policy.

Just as the first amendment provides that "Congress shall make no law respecting an establishment of religion," so it provides that Congress shall make no law * * * "abridging the freedom of speech, or of the press." This prohibition is binding not only on Congress but also on administrative agencies which it creates, with the result that they, also, can adopt no rule, regulation, or policy "abridging the freedom of speech, or of the press." (Cf. 47 U.S.C. sec. 326.)

Just as the power "to regulate commerce" is not confined to the modes of transportation known to the Founding Fathers, so the guarantees of the first amendment are not restricted to modes of communication in use when the Bill of Rights was adopted. The guarantees of the first amendment protect subsequent advances in means and methods of transmitting thoughts and ideas—by loudspeakers, facsimile, motion pictures, radio, and television. (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), cited with approval in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *Superior Films* v. *Department of Education*, 346 U.S. 587, 589 (1954) (concurring opinion of Douglas, J.); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Time Film Corp.* v. *Chicago*, 365 U.S. 43, 77 (1961); see also "Program Policy Statement of July 1960," 20 RR 1901, 1905–1906 (1960).) The safeguards of the first amenmdent embrace all vehicles "of information and opinion" (Cf. *Lowell* v. *Griffin*, 303 U.S. 444, 452 (1938).)

Any notion that the freedoms of the first amendment are restricted to the news or the editorial pages, and do not cover the advertising pages of a newspaper, was laid to rest in *Grossjean* v. *American Press Co.*, 297 U.S. 233 (1936). "* * * the fact that periodicals are sold does not put them beyond the protection of the first amendment" *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951). "It is of course no matter that the dissemination takes place under commercial auspices" *Smith* v. *California*, 361 U.S. 147, 150 (1959). Thus, the fact that programs broadcast by FCC licensees are sponsored or paid for by "spots" does not remove them from the aegis of the first amendment.

That "commercial continuity" and "spots," no less than news and commentaries carried by a broadcast station are protected by the first amendment is apparent from the rationale used by the Supreme Court in *Grossjean*. There the State of Louisiana levied a 2-percent license tax (measured by gross advertising receipts) on newspaper with a weekly circulation in excess of 20,000 copies, for the privilege of engaging "in the business of selling, or making any charge for, advertising or advertisements." In deciding that such a statute impinged on 1st amendment freedoms (as incorporated in the 14th), the Court, after noting (p. 241) that the "revenue derived from appellee's newspapers come almost entirely from regular subscribers and from payments received for the insertion of advertisements therein," said (p. 245) :

"[The tax in question] thus operates as a restraint in a double sense. First, its effect is to control the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation."

After reviewing the history and scope of the first amendment, the Court concluded (p. 250) :

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say [in 1936], have shed and continue to shed, more light on the public and business affairs of the Nation than other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

Without debating whether radio and television, rather than newspapers, are today the dominant medium for producing an "informed public opinion," it can scarcely be denied that broadcasting, unlike newspapers, is restricted to a single rather than a dual source of revenues—"from payments received for the insertion of advertisements." Without those revenues, no less than the printed media, radio and television could not provide the news, the information, and the discussion programs needed to produce an "informed public opinion." If the FCC today, no less than the Legislature of Louisiana, can restrict the amount of advertising carried by broadcasting stations to a given figure, it can tomorrow prescribe a lower figure.

With more than two-thirds of the AM stations and more than 90 percent of the FM stations presently operating in the red or netting less than $10,000 a year before taxes, as shown by the FCC's own published statistics, and if "overcommercialization" is as rampant as the FCC apparently believes, the rules here proposed under a general "public interest" standard will necessarily operate to reduce existing revenues, and thus affect the ability of many broadcasters to develop an "informed public opinion." With advertising revenues the sinews by which the programing provided by radio and television go out over the air, it is clear from the *Grossjean* case that "commercial continuity" and "spots" carried on the air are no less protected by the first amendment than "news," "documentaries," "discussions," and entertainment facets of such broadcasts.

It is not, of course, the ABC position that there can be no Government regulation of broadcast advertising. Because of the interference considerations inherent in electronic journalism and the mutually exclusive character of multiple demands for the same facilities a licensing system in the radio field, with attendant Government regulation, appears unavoidable. ABC submits, however, that governmental regulation of program content, including advertising, is an invasion of the right of free speech as well as contrary to the no-censorship provisions of section 326 and is not to be permitted unless the evil sought to be avoided warrants reasonable limitations upon freedom of speech.

Congress has in fact placed certain limitations upon broadcast advertising, and properly so. It has forbidden the broadcasting of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon luck or chance" (formerly 47 U.S.C.

316 now 18 U.S.C. 1304). It has specified that when a broadcaster allows his facilities to be used by a candidate for public office, he must afford "equal time" to all other candidates for the same office and has further provided that "the charges made for the use of any broadcasting station [by political candidates] shall not exceed the charges made for comparable use of such station for other purposes" (47 U.S.C. 315). Further, Congress has explicitly required broadcasters to make announcements concerning payment received for and the source of material broadcast over their facilities (47 U.S.C. 317(a) (1) and (2), 317 (b)). In each of these instances, it is clear that there was an overriding public purpose which justified the very limited restrictions on broadcasters' freedom of speech.

What, however, is the FCC's public purpose in supporting the very drastic invasion of first amendment rights which it proposes? By the Commission's own statement it amounts to no more than that there are some radio stations which have been guilty, so the Commission says, of "overcommercialization" (a word which the Commission does not attempt to define) and that the Commission has received a number of complaints from the public, apparently a rather small number in view of the immense size of the radio and television audience, expressing annoyance at certain commercial practices of particular stations.

Even if one were to assume that the Government may, consistent with first amendment guarantees, undertake to limit the amount of advertising which broadcast stations may carry, ABC submits that to do so, and particularly by hard and fast rules as the FCC proposes, would be contrary to sound public policy.

The FCC has increasingly exhibited an inclination to attempt to discharge its responsibilities under the Communications Act by the adoption of hard and fast rule rather than by the application of judgment on a case-to-case basis. While rules may be feasible and desirable in some areas, ABC submits that it is clearly impossible to formulate rules, aimed at preventing "overcommercialization," which could be uniformly applied to all broadcast stations and situations. With some 5,500 broadcast stations now on the air, with some charging 50 cents or less and others $2,000 or more for a single commercial announcement, with some stations measuring their audience in the thousands and others in the millions, with some stations operating daytime and others full time, and with not a few licensed to areas with a highly seasonal economy (fruits, tobacco, vegetables, wheat, tourists), no simple blanket rule (if it is to be fair and meaningful in eradicating "overcommercialization") could be fashioned to cover these highly divergent situations.

In fact, after suggesting as a draft for discussion purposes the present standards in the codes of good practice of the National Association of Broadcasters, the FCC itself in its rulemaking notice raises questions whether more elaborate rules may not be needed to cover particular types of situations:

"Further, we recognize that the provisions of the NAB codes may not be appropriate for across-the-board application to all broadcast stations. For example, we can appreicate that there may be need for separate standards to be applied to certain special categories of stations, such as standard stations licensed to operate only during daytime hours, or stations licensed to sparsely populated communities, or stations located in communities with seasonal economy, etc. Therefore, we invite comments, and indeed, proposals, on these specific categories, or any other categories that may warrant special treatment. For example, daytime standard broadcast stations are requested to state whether more liberal standards, i.e., more liberal maximum and average commercial limitations, should be made applicable to them during the winter months, and if so, what these standards should be. Small market stations of all classes are reqeusted to make a similar showing on standards which they may require in view of the advertising rates obtainable in their markets. Small market television stations are requested to comment specifically on whether they require more than 70 seconds of commercial time on station breaks. And all stations are asked to comment whether there are days of the week or times of the day when more liberal limitations are required. Stations who support more liberal standards are asked to substantiate their position by providing the Commission with specific data on advertising requirements in their community and to relate these data to income requirements needed to support an operation in the public interest. Additionally, all stations are requested to comment on the necessity or desirability of excluding time for paid political announcements in computing total commercial time under the

proposed rules. Finally, we recognize that there may be circumstances that may warrant that a waiver or exemption be accorded to certain broadcast stations."

And Chairman E. William Henry in a recent speech to the International Radio & Television Society echoed this same thought when he said:

"I repeat, we are aware that the same rule may not serve for a 50-kilowatt, clear-channel radio station which operates 24 hours a day in a large city, and at 250-watt station which operates from sunrise to sundown in a small town. We want facts about radio stations in seaside resorts, whose peak business may be seasonal—about radio stations in small towns, where local department stores and other businesses may want to concentrate their advertising on Thursday and Friday—and about stations in sparsely settled areas of the West, which must depend largely upon local advertisers."

Thus, the FCC apparently recognizes that the matter is not so simple as its proposal would suggest and that, if any rules at all are to be adopted, they are going to have to deal with a variety of circumstances and, to be fair and workable, they are going to have to be very, very complicated. But the moment the FCC puts a rule on the books, no matter into how many categories it subdivides broadcast stations, it will start creating policy headaches for itself. If a rule on its face says "thou shalt not" do such-and-such, in terms which are specific, and the FCC starts granting "waivers" in individual cases, as it suggests it may have to do, it is inevitably confronted, rightly or wrongly, with charges of "favoritism." And no amount of detail and complexity will solve the problem since not all situations can possibly be foreseen. Conversely, if the FCC adopts the attitude that "a rule is a rule is a rule" like those of the Medes and Persians, and refuses to consider special circumstances, flexibility will disappear, and the FCC, as an administrative agency, will be disregarding one of the basic reasons for its very being. No room would be left for "judgment or discretion." Instead of creating an FCC of seven members Congress might as well place the regulations on the statute books and employ a comptometer operator to see whether they are being obeyed.

Detailed rules making provision for "seasonal economy" and the other special factors mentioned in the notice and in Chairman Henry's speech will create policy headaches on still another front. To police effectively and check some 5,500 stations, during different periods of the day, different days of the week and seasons of the year, in small towns and in large cities, would require a substantial task force doing nothing else. With President Kennedy committed to keeping down Government expenditures in connection with his recommended tax reduction, and with the President exhorting Government agencies to keep a tight rein on the employment of additional personnel, this is not the time for the Government to impose upon itself a policing effort of this magnitude, keeping in mind that the broadcasting industry has admittedly accomplished much during almost 40 years with no such rules on the books.

If such rules are to be adopted, a sine qua non would be that they be policed and enforced. Any communications lawyer can assure the congress that, after having advised a client not to engage in certain program practices because not in line with "lifted eyebrow" views of the FCC no fully satisfactory answer can be given to the next question, which that client almost invariably poses, "Well, how come my competitor down the street does the same thing and gets away with it?" The more detailed the rules, with broadcasting generally a highly competitive business, the more certain such complaints will arise, with a licensee's pocketbook directly affected. To single out a particular broadcaster by making him an example, when scores of other broadcasters are doing the same thing, would be wholly unjust and typical of bureaucracy at its worst.

Unless scores of classifications and situations are utilized in formulating rules of the type which the FCC has proposed, the rules themselves will be grossly unfair. The more complex the rules, the more herculean the task of their enforcement. Unenforced and unfairly enforced regulations breed nothing but disrespect. Broadcaster A will not long stand by, if he sees business which he has turned down in order to comply with regulations promulgated by the FCC, start gravitating to a competitor who gambles on not getting caught.

A ceiling, unless so flexible or so high as to be no ceiling at all, cannot but curtail the operating gross of many stations. To offset such reduced income, those stations must utilize inferior program material, cut back operating staffs, reduce the percentage of nonrevenue producing features, and otherwise make economy moves which are certain to reflect on the quality of what the FCC

terms the "payoff product"—the programing provided the listening or viewing public.

From the rulemaking notice and like pronouncements, it would appear that the FCC looks upon broadcast advertising as essentially undesirable and, though unavoidable under the American system of broadcasting, something to be kept to a minimum. ABC cannot agree. Mass production under our free enterprise system has resulted in a standard of living in this country unsurpassed elsewhere. Advertising is the lifeblood of the mass production and free enterprise system. If unemployment is to be reduced and if the GNP is to be increased (aims of both our major parties), advertising of new and better products and services from coast to coast is essential. No matter how superior a new type of automobile may be, so long as it is hidden in the limestone caves of Kentucky, unknown to potential users, its inherent superiority will produce no demand for steel and create no new jobs.

Although listeners or viewers may register occasional annoyance over the number, length, frequency, loudness, or timing of radio and television commercials, one need not have De Tocqueville's observational perspicacity to know that taxpayers likewise express annoyance when income taxes come due, or that businessmen dislike the recordkeeping required by governmental agencies in Washington, or that motorists dislike stop signs on arterial highways—until they think twice (which many never do) of what the various alternatives thereto might be.

Of the 2,500 persons, out of some 125 million literate listeners, who according to Chairman Henry registered objections with the FCC during fiscal 1962 about radio commercials, how many of them realized that the rest of the programing (in which they were apparently interested enough to tune in their sets or else they would not have heard the commercials about which they complained) would not have come to them but for these commercials? And just how many of these communicants considered the alternative thereto of a tax on "listening" to support those 5,500 broadcast stations, or in lieu thereof taxes for a Government subsidized, operated, and thought-controlled broadcast system? What is equally to the point, if "commercials" are as annoying as some contend, why do untold millions tune in radio and television regularly and extensively. And even more significantly, why do hardheaded advertisers, fearful of antagonizing potential consumers, continue to buy time on radio and television, rather than divert their entire budgets to newspapers, billboards, and other advertising media?

Approaching the point affirmatively, for every listener annoyed by advertising chatter, there are scores of persons who deem the advertising messages brought to them by radio and television a vital part of the service provided by broadcast stations, particularly in smaller communities. Most housewives who have to watch pennies, and many do, are far more interested in a shopper's guide program advising them that Safeway has lettuce on sale today at 18 cents rather than 20 cents a head, or fresh asparagus at 25 cents rather than 30 cents a bunch, or that pork loin is the buy of the week, than they are in a learned discussion on relativity. While many a mother is getting her kids off to school, when told by a disc jockey that rain or sleet is in the offing and to bundle her brood up in Goodyear rubberized slickers (available at Woodies for $3.98), may feel annoyance at the weather, she is not unappreciative of the warning and advice thus received. And an expectant mother who hears on a "swap program" that Mrs. Jones has a secondhand baby crib for sale for $5 may be no less interested in that item than the fact that the Dodgers have clinched the National League pennant.

If an applegrower in the State of Washington, where high schools are closed and Mexican labor brought in at harvesttime, so as to get apples off the trees and into storage at exactly the right time, were told by a broadcaster that he had already used up his FCC quota of spots by prior commitments for that particular week and couldn't carry an urgent plea for "apple pickers at the B. & O. Orchard—$2.25 an hour," the resulting howl would be heard all the way back to Washington, D.C.—with any complaints received to date by the FCC about "number of spots" mild in comparison. A refusal to squeeze in "help wanted" spots in a community where high school kids are looking for "apple money," where inability to get the crop off the trees at the right time can mean bankruptcy, and where the economy of the entire community is tied into the apple industry, would be unthinkable. Any retired well-heeled egghead in that community who expressed annoyance at some rendition of Chopin being interrupted at an "unnatural point" in order to air such announcements would risk being ostracized.

In short, it is an erroneous premise and a gross canard to assume that listeners or viewers are not interested in the commercials carried by AM, FM, and TV stations. If the situation were otherwise, one can rest assured that the gross volume of advertising presently placed on broadcast stations would not have been put there, nor would it long remain there. When buying time on the air, it is not the intention of advertisers, at least knowingly, to make charitable donations to the broadcasting industry, nor is it their intention to offend potential users or their product or service. While not every listener will be interested in every spot, the same can be said that not every listener or viewer is interested in a particular footbal game or a particular discussion program, or a particular rendition of Beethoven.

The argument has been repeatedly made that if the rates charged for commercials were upped, the number of spots would come down; the station's revenues would thus remain about the same; and the public would thereby escape needless "interruptions." All very simple. In connection with this argument there are at least three matters which are either overlooked or not appreciated.

1. To begin with, broadcasting is only one of many advertising media. It commands, percentagewise, only a fractional part of the "advertising pie." When spot rates go up, the cost per thousand for exposure goes up. And it need not go up very far before advertisers conclude that newspapers, periodicals, billboards, tearsheets, third-class mail, bus cards, etc., may constitute a "better buy," and start diverting a larger percentage of their advertising budget to these other media. While many broadcasters may not be the best businessmen in the world, all of them cannot be so libeled. In a free enterprise system, if they thought that the traffic would bear more, new and higher rate cards would soon be forthcoming without any prodding from the Commission.

2. In determining what rates to charge for spots, the broadcaster not only has to keep in mind other media, but he must never forget that the broadcast medium is highly competitive within itself—not only AM stations versus other AM stations serving much the same area but vis-a-vis FM and television. If broadcaster A ups his rate card, the shrewd advertiser soon discovers that the spot rates of his broadcasting competitors (AM, FM, and TV) provide a better buy. ABC does not construe the FCC's rulemaking notice, and in the light of 47 U.S.C. 153(h) would be most loath to assume, that the FCC has any deliberate intention of intruding itself into the rate picture—under the act as presently written. Thus, the extent to which the number of spots can be reduced by establishing a higher card rate, without thereby reducing the revenues of a given station, is highly limited.

3. However, the point which is probably the least appreciated by those who advocate a higher rate card as a means of reducing the number and frequency of spots is one yet to be discussed. Many broadcast stations (AM, FM, and TV) serve not only the particular community to which they are licensed, but a substantial number of other towns within their service area—at least daytime. This is particularly true of AM stations licensed for daytime operation on wide-coverage class I, class II, and class III frequencies. It is especially true of station serving less populous portions of the United States. Not infrequently, in addition to serving a town of 5,000 to which such AM daytimer is licensed, he may serve a half dozen or more other towns each with a population of 2,000 or more. Merchants in each of those towns are interested in advertising by radio, but are fully aware that listeners 30 miles away, with several other small towns in between, are not going to drive that distance to take advantage of a sale on carrots at 10 cents rather than 15 cents a bunch. In short, merchants in these small towns are interested in only a small part of the service area reached by a wide-coverage station. Therefore, to be of use to these small-town merchants (who may have no station of their own, and only a weekly newspaper), the wide-coverage station must keep its rates down and not make the local merchant pay for coverage in which he is not interested. This, of course, produces a flood of spot requests toward the weekends and during certain seasons of the year. But the wide-coverage station would not be serving those merchants (and the listeners in that portion of its coverage area served by those local merchants) if it were to up its rates and price itself out of business, or if it were to refuse to carry "help wanted," "farm auction," "trading post," "shopper's guide," or like programs. Just as a local grocer does not buy space in periodicals with a national circulation (at rates providing coverage in much of which he has no interest), so he is not interested in a wide-coverage broadcast station serving thousands of homes located beyond his particular trade area—unless the station's

rates are in line with the limited area which that particular merchant is interested in, and not based on the station's overall coverage.

Thus, to argue that if rates were upped, the number of spots (and attendant "annoyance") would come down, overlooks both practical and public interest considerations which should not be ignored. The broadcaster has been told that he should serve all communities (and advertisers) within his service area, and not merely the particular community to which he is licensed. We trust that the FCC has meant what it said when it so ruled.

Finally, if the FCC's purpose is to increase the public's enjoyment of, and benefit from the broadcast services by reducing the distractions and irritations sometimes caused by the advertising messages which are essential to support those services, it will accomplish little by merely restricting the amount of advertising. Whether, and to what extent, broadcast commercial messages distract, or irritate the public is a highly subjective question. The answer depends on numerous factors, many of them not susceptible to quantitative measurement, including, in addition to the number and frequency of commercial announcements, the tastes and moods of the individual listener, the producer advertised, the content of the commercial announcements, whether the listener is interested in the product advertised, whether the listener finds the commercial entertaining (the committee may recall a local coffee advertisement featuring "Wilkins" and "Wontkins" which delighted the Washington television audience) the manner in which commercials are placed in relation to their program material, production techniques, loudness, etc.

A good disk jockey can tie in with his reference to the weather or the time of day, three or four short spots in a period of 60 seconds (all of which have to be logged under sec. 317), with the listener barely conscious that mention has been made of "Lipton's tea," "Nestlé's hot chocolate," and like items. American Airlines can put together a travelog of scenic vacation spots along its domestic and oversea routes, lasting an hour or more, with the viewer scarcely aware that he is being told to "Fly American." A station can bring a 30-minute TV show of new automobiles, which is highly informative and interesting. On the other hand, some secondhand local car dealer with a raucous voice, who insists on reading his own copy and getting his mug on the television screen, can try the patience of Job in 60 seconds or less.

Thus, in proposing to limit the amount of commercial messages, the FCC is attacking only one aspect of an exceedingly complex problem. It will not achieve its objective. On the contrary, by putting all broadcast stations in a time straitjacket, it will only hinder the efforts of those broadcasters and advertisers who are endeavoring to meet the public's objections in a broader and more comprehensive manner. The Government cannot successfully legislate taste, and, in attempting to do so, in part, it will only promote mediocrity.

In conclusion, ABC desires to raise the question whether it would not be more appropriate to amend section 326 of the Communications Act rather than section 303(b). Section 303(b), as presently worded, authorizes the Commission to: "Prescribe the nature of the services to be rendered by each class of licensed stations and each station within any class." It is ABC's belief that this section was not intended to give the Commission authority over programing of broadcast stations. The addition of a proviso to this section dealing with the Commission's authority over programing might suggest that the authority contained in section 303(b) is broader than that intended by the Congress.

Section 326—the no-censorship provision—already contains limitations on the Commission's authority over programing. The further restriction proposed in this legislation would appropriately be added to this section. In order to accomplish this, ABC submits the following suggested rewording of the legislation:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 326 of the Communications Act of 1934 (47 U.S.C. 326) is amended by inserting at the end thereof the following: 'The Commission may not, by rule, prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast service.' "

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM, and Television Broadcast Stations.

COMMENTS OF STORER BROADCASTING COMPANY

1. The proposed AM, FM, and TV rules constitute a proposal to adopt a nationwide standard as to the maximum minutes and seconds of "advertising" that may be broadcast in time periods of specific length by AM, FM, and TV broadcast stations, and to prohibit the broadcast of any quantity of advertising exceeding the specified maximum. In addition, the proposed TV rules propose to specify the maximum number of seconds that may be included in spot announcements, and the maximum number of separate spot announcements, that may be broadcast in "station breaks." Thus, these rules constitute the first proposal by the regulatory agency in the 36-year history of the Federal Radio Commission (1927–1934) and the Federal Communications Commission (1934–date) for direct regulation of the quantity of advertising that may be broadcast. In fact, on the sole occasion where the Commission studied the matter (at the direction of Congress) it reported to Congress:

"*Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the Commission to do so under a general standard prescribed by that legislation.* While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standards of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising." [Italic added.]

The foregoing conclusion was set forth in "a comprehensive report to the Senate"[1] submitted on June 9, 1932, when the legislative history of the Radio Act was clearly in mind.[2] Since that date, Supreme Court decisions on freedom of speech and of the press raise serious doubt as to whether such legislation would be constitutional. Thus, if adopted, these rules would accomplish a complete departure from the statutory scheme of broadcast regulation which has been in effect since the Radio Act of 1927.

2. In its 36-year history the regulatory Commission has exercised a wholesome restraint in adopting regulations affecting broadcast material, under a clearly expressed policy. In the 1932 report cited above, the Commission stated:

"The Radio Act of 1927 was obviously designed to permit the licensees of broadcasting stations the maximum of latitude in the matter of program material. Such licensees are in a singularly favorable position to learn what the audience wants to hear and to make the necessary changes in program material and in methods of presentation that will cause their programs to be received by a substantial majority of the listeners. *The adoption of regulation of the sort herein described should be undertaken only when it clearly appears that a majority or at least a considerable number of licensees have failed to operate their stations in a manner acceptable to a majority of the listening public.* If, in the opinion of Congress, that time has now arrived, we conceive it to be advisable to enact such legislation as will permit the Commission to impose such regulations as the circumstances from time to time seem to warrant rather than legislation imposing specific restrictions and unflexible limitations." [Italic added.]

Likewise, in promulgating the chain broadcasting regulations (which were designed to *free* broadcast licensees from restraints on competition contained in network contracts and implement the principle of licensee responsibility for selection of program and advertising material) the Commission stated:[3]

"*We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive*

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[1] See H. Rept. 281, "Television Network Program Procurement," May 8, 1963, 88th Cong., 1st sess., p. 306.

[2] S. Doc. 137, 72d Cong., 1st sess., "Commercial Radio Advertising," a letter from the Chairman of the Federal Radio Commission in response to S. Res. 129.

[3] "FCC Report on Chain Broadcasting" (1941), pp. 88–89.

market. Radio broadcasting is a competitive industry. The Congress has so declared it in the Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations. If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations to protect listeners, adverisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system."

3. Storer Broadcasting Company, as licensee of 7 AM, 5 FM and 5 TV stations unequivocably opposes the adoption of the proposed rules in the form proposed, or any variation thereof. Storer's opposition is no based on a desire to avoid compliance with the particular limitations on advertising which are contained in the proposed rules. The rules merely encorporate the current provisions of the "Time Standards for Advertising Copy" included in the NAB Radio Code of Good Practices and in the NAB Television Code, to which all Storer radio and TV stations subscribe and to which they adhere. As stated in Sec. 2.9 of "Storer Program Manual," which has been in effect since June, 1959:[4]

"*Sec. 2.9. NAB Radio and TV Program Codes.* All Storer Radio and TV stations are required to adhere to the 'NAB Standards of Good Practice for Radio Broadcasters' and to the 'NAB Television Code' * * *."

As indicated in "Storer Program Manual," Sec. 2.8, adherence to the NAB codes by all Storer stations is insured by a department of the Company, Storer Quality Control, which monitors audio tapes of all of the Company's Radio and TV stations, and which employs extra personnel to visually monitor all its TV stations. The enforced adoption by non-Storer stations of the code advertising time limitations by including them in Commission regulations would not require Storer stations to do any more than they now do voluntarily. Nevertheless, Storer firmly believes that the adoption by the Commission of the proposed numerical limitations on advertising is not supported by any factual showing of need for such drastic regulation of broadcast content and commercial practices; is unwise in principle and inexpedient in policy; is beyond the statutory power delegated to the Commission, and inconsistent with the statutory scheme of broadcast regulation; and is in all likelihood unconstitutional under the First Amendment.

4. The issuance of the Notice of Proposed Rule Making herein was authorized by Commissioners Minow (Chairman), Lee, Ford, Henry and Cox, with Commissioners Hyde and Bartley issuing dissenting statements. Since the adoption of the Notice on May 17, 1963, Chairman Minow has resigned and been replaced by Chairman Henry; and Commissioner Loevinger has been appointed a Commissioner. In addition, in a public address on June 28, 1963, Commissioner Ford has expressed his opposition to the proposal that the NAB codes "be incorporated in our regulations—thus, giving them the force and effect of law."[5] It is recognized that a majority of the Commission may well not be committed to the policies expressed in the Notice, in which the Commission states that, "we are by no means inflexible as to the most desirable ultimate solution to this difficult and complex problem." (Notice, par. 7.) Nevertheless, the drastic nature of this proposal compels Storer to firmly oppose the adoption of the proposed rules, and to respectfully urge the Commission to terminate this proceeding by simple order, recognizing that Federal rules specifying the maximum advertising content of broadcast stations are neither justified by the facts nor appropriate under the law.

5. The reasons why these rules should not be adopted are so numerous that they can be stated only briefly in these Comments. It will be noted that many of these reasons are merely expansions of the statements made by Commissioners Hyde, Bartley and Ford, as noted above.

6. Initially, it should be noted that two areas of decision are presented to the Commission before these rules, or similar rules, are finalized. *First*, the proposed rules *can be sustained* only (a) if the Commission has statutory power to

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[4] Storer stations were required by Company policy to comply with the NAB codes prior to June 1959, when a printed statement of the quoted policy was first distributed to its stations as part of "Storer Operating Manual." The Company's program were later incorporated in "Storer Program Manual" (1st edition January 1960), which has been made available to the industry without charge.

[5] Address by Commissioner Ford, June 28, 1963, before the Wisconsin Broadcasters' Association, Three Lakes, Wis., p. 3.

issue rules of this type; (b) if the rules as proposed do not constitute censorship or interference with the right of free speech by radio prohibited by Section 326 of the Act; and (c) if the proscription of certain quantities of advertising does not violate the First Amendment. *Second*, the proposed rules *should not be adopted* (a) if no substantial need has been demonstrated for rules of this type; (b) if the rules proposed cannot be administered without discrimination, or without involving the Commission in day-to-day control of broadcast material which amounts to censorship or abridgement of freedom of speech. In these Comments these issues will be discussed under the following points:

I. The proposed rules are inconsistent with the statutory concept of broadcasting as "a competitive private enterprise system."

II. The Commission does not have power under the Communications Act to issue rules of this type.

III. The proposed rules are unconstitutional as an abridgement of freedom of speech and of the electronics press.

IV. No showing of substantial need for desirablility for adoption of the proposed rules has been made, or is apparent from the available facts.

V. The proposed rules would involve day-to-day control by the Commission of broadcast material, cannot be applied without discrimination in the absence of creation of a monsterous bureaucracy, and would inevitably involve the Commission in censorship and abridgement of freedom of speech and of the press.

I. THE PROPOSED RULES ARE INCONSISTENT WITH THE STATUTORY CONCEPT OF BROADCASTING AS "A COMPETITIVE PRIVATE ENTERPRISE"

7. Commissioner Hyde has correctly stated that, "the proposal is inconsistent with the statutory concept of broadcasting as a competitive private enterprise."[6] Likewise, Commissioner Loevinger, describing elements of the British broadcasting system as "quite uncongenial to America," has pointed to the fact that, "The amount of advertising is limited, and commercial spot announcements are not permitted to exceed 10% of the day's program time."[7] The basic elements of the American system of broadcasting will be briefly noted.

8. Commercial nature of broadcasting: The competitive private enterprise broadcast system of the United States is unique in the world. Only in this country has virtually the entire broadcast system developed as a commercial, competitive enterprise with minimum government control, and with guarantees of freedom of speech. Despite the early sentiment against advertising on radio, since the Radio Act of 1927 it has been recognized that "advertising is an indispensable part of the American system of broadcasting."[8] The only limitation concerning broadcast of advertising contained in the Communications Act is the sponsorship identification provision of Section 317. In connection with the comparable provision in the Radio Act of 1927, the House report stated:

"One of the subjects of public discussion at the present time is the extent to which broadcasting stations should be utilized for advertising purposes. Your committee has not felt justified in forbidding or in undertaking to limit advertising through this medium, but we are unanimous in the opinion that much the same rule should apply to this form of advertising as applies in the case of newspaper advertising. It should not be hidden from the knowledge of the hearer."[9]

Thus enabled to compete for listener and advertising support, the broadcast industry developed with great dynamism to become what is undoubtedly the most widely diversified system in the world—in number of separate stations, ownership, listeners, programs, entertainment, and advertising. With the resources available from commercial broadcasting, American broadcast licensees and networks have pioneered the development of new services such as FM, TV, and multiplex broadcasting.

9. In addition to this recognition of advertising as an essential element of the American free enterprise system of broadcasting, the system has the following features, each of which has evolved largely through common agreement among the framers of the Radio and Communications Act, the succession of FRC and

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[6] Dissent of Commissioner Hyde to Notice herein.
[7] Address by Commissioner Loevinger, Aug. 26, 1963, Mimeo. 40060.
[8] Notice herein (par. 3).
[9] H. Rept. 719, 68th Cong., 1st sess., pp. 5–6 (1924).

FCC Commissioners, and the leaders and leading stations of the broadcast industry.[10]

10. Free enterprise: Broadcast stations are operated as free enterprises and not as common carriers. The Communications Act provides that "* * * a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Although broadcast stations must operate in the public interest,

"* * * the power of Congress as yet has not been extended to the point of fixing and regulating the rates to be charged by the licensee or the establishment of rules requiring it to serve alike the entire public in use of its facilities. *Nor has Congress assumed the right to limit the profits on the basis of its investment or otherwise.* The licensee of a radio station chooses its own advertisers and its own programs, and generally speaking the only requirement for the renewal of its license is that it has not failed to function and will not fail to function in the public interest." (*Pulitzer Publishing Co.* v. *FCC*, 94 F. 2d 249 (1937)).

As the Commission has stated:

"Broadcasting stations * * * are licensed but are not common carriers. They have specific public responsibilities, but are privately owned and managed. They cannot exist without a license from this Commission, but our power is limited as to their indvidual performance. They are a tremendous force in the field of public affairs but, in most cases, are commercial enterprises managed for profit. Upon the operations of stations much depends in implementing a free and democratic society, but the Commission is enjoined to limit its surveillance to that of a general review" (*Powel Crosley, Jr.*, 11 F.C.C. 3, 14 (1945)).

The "Television Network Program Procurement Report" of 1963 reflects this concept:

"In order to accomplish its purpose to establish and maintain free broadcasting based on private enterprise in the United States, Congress provided a social mechanism in which competitive business was 'commissioned' to build and operate our national broadcast structure in accordance with 'public interest, convenience or necessity.' The American system of broadcasting has evolved through the adaptation of that mechanism to the realities of economic and social progress" (H. Rept. 281, 88th Cong., 1st sess., May 8, 1963, p. 33).

11. Free competition: It is axiomatic that the American broadcast scheme places chief reliance on competition among stations for listeners, programs, and advertising support to insure that broadcast stations provide a program service (including advertising) that best meets the needs and desires of the communities and audiences served.

"The Communications Act 'recognizes that the field of broadcasting is one of free competition.' * * *In regulating radio, 'Congress intended to leave competion in the business of broadcasting where it found it'" ("FCC Report on Chain Broadcasting" (1941), pp. 46–47, citing *FCC* v. *Sanders Bros. Radio Station*, 309, U.S. 470, 474–475 (1940)).

Likewise,

"Radio broadcasting is a competitive industry. The Congress has so declared it in the Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations. If the industry cannot go forward on a competitive basis * * *, we recommend that the Congress should amend the Communications Act to authorize and direct regulations to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest" (ibid, p. 88–89).

The purpose of reliance on competition has been explained by the Commission as follows:

"Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs to attract and hold listeners, which necessarily results in the improvement of the quality of their broadcast system "(Spartanburg Advertising Co., FCC Docket 5451 (1940), quoted in "FCC Report on Chain Broadcasting" (1941), p. 47).

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[10] As President Roosevelt once said, "Your Government has no wish to interfere or hinder the continued development of the American system of broadcasting. Radio was born and developed in the real American way and its future must continue on that basis." "FCC Chain Broadcasting Report" (1941), additional views of Commissioners Craven and Case, p. 138.

"It is the judgment of the Commission that the competition between stations to survive furnishes the best incentive to render the best possible service" ("Voice of Cullman," 6 R.R. 164, 169 (1950)).

As discussed above, the Commission, in exercising its rule-making powers has limited its rules to those designed to encourage competition, and to remove restraints on competition, consistent with the concept that broadcasing is based on free competition (supra, pp. 2–3).

12. Reliance on listener-viewer choice (with free competition) to attain the broadcast service needed and desired: The American system is based on faith in the judgment of the great majority of listener-viewers. On them is placed strong reliance for insuring that station licensees operate their stations in the public interest. It is accepted that competition will achieve the desired result primarily for four reasons: *First*, because the prime objective is service to the listener-viewer, and it is recognized that in the receiver dial he has an effective medium for expressing his needs and desires.

"One must always be cognizant of the fact that it is the listener or viewer who is the end product—the keystone in our system of broadcasting—toward which the entire machinery of governmental administration, technical developments, investments of broacasters and expenditures of advertisers is directed. The absolute right of the listener to 'censor' any program which does not attract and hold his interest, by merely turning the dial to another station or by shutting off his receiver, is an integral part of our broadcasting system. It is in this light that American broadcasting has developed to its present state, through the stimulation of competition among stations to attract and hold listeners to their respective stations" (Address by Commissioner Bartley, August 2, 1956 (Mimeo. 35187), p. 8).[11]

"* * * the listener has a complete power of censorship by turning his dial away from a program which he does not like; this results in a keen appreciation by the broadcaster of the necessity of pleasing a large portion of his listeners if he is to hold his audience, and of not displeasing, annoying, or offending the sensibilities of any substantial portion of the public." *Great Lakes Broadcasting Co.*, quoted in 3 F.R.C. Ann. Rept. 35. (This portion of the decision was *not* quoted in the Notice herein, par. 2, which relied on the *Great Lakes* case for the proposition that "regulation must be relied upon to prevent the abuse or over use of the privilege" of advertising.)

Second, because it is recognized that it is to the self-interest of the broadcast licensee and network to furnish the listener-viewer with what he needs and desires, and to avoid broadcast material which offends him.

"Inevitably any but the most stupid applicant or licensee will design his programs to meet the reported desires of the community * * *" (address by Commissioner Loevinger, August 26, 1963, Mimeo 40060, p. 19).

Third, because what constitutes programming in the public interest is primarily a matter of what the listener-viewer needs and desires, which is primarily a matter of individual taste or personal, subjective judgment.

"Under our system of government, there is an accommodation for the widest varieties of tastes and ideals. * * * From the multitude of public offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring value" (Justice Douglas in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 148 (1946)).

Fourth, because the Commission does not have the authority to impose its personal taste as to what material should be broadcast, and in any event FCC Commissioners repeatedly have expressed their personal conviction against any such imposition.

"When it comes to questions of taste, unless it is downright profanity or obscenity, I do not think that the Commission has any part in it" (Chairman Ford, hearings before the Subcommittee of the Committee on Appropriations, U.S. Senate, 86th Cong., 2d sess., on H.R. 11776, p. 775).

"I do not know of any legal or ethical warrant for attempting to establish my taste as a standard for others. * * * Although I abhor that which you choose to read or hear or see, I shall defend to the death your right to make your own choice in these matters" (address by Commissioner Loevinger, August 26, 1963, Mimeo 40060, p. 17).

"In the field of entertainment programs, I would say that the Commission should place no bars of any kind upon the broadcaster, with the caveat, of course,

[11] See Justice Douglas, dissenting, in *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952): "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes."

concerning obscenity, lotteries, and fraud. In this field, I think that public taste is the prime arbiter. * * * The broadcaster himself must take the risk of offending the public if he goes too far or becomes too extreme in his programming practices. For here the public is, in fact, 'The absolute censor'" (address by Commissioner Bartley, August 2, 1956, Mimeo, 35187, pp. 7–8).

Likewise, the Commission:

"readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply; for example, obscenity, profanity, indecency, programs inciting to riots, programs designed to or inducing toward the commission of crime, lotteries, etc" ("FCC Report on Program Policy," 20 R.R. 1901, 1909 (1960)).

"The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision. In this connection we think the words of Justice Douglas are particularly appropriate. 'The music selected by one bureaucrat may be as offensive to some as it is soothing to others. * * * Once a man is forced to submit to one type of program, he can be forced to submit to another. * * * The strength of our system is in the dignity, resourcefulness and the intelligence of our people. That system cannot flourish if regimentation takes hold'" ("FCC Report on Program Policy," 20 R.R. 1901, 1908, quoting *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 468, dissenting opinion).

That broadcasters are responsive to public tastes is clear:

"Radio is so constituted that it is sensitive to public criticism and responds promptly to changing public tastes. For this Commission or any agency of government to attempt to substitute its judgment for that of the public involves an arrogant presumption which should be avoided at all costs. That such a policy is not contemplated by anyone on the Commission seems clear" ("FCC Chain Broadcasting Report" (1941), p. 137, additional views of Commissioners Craven and Case).

While the foregoing statements relate in terms to program material (without specifying whether advertising material is included), Commissioner Cox has dealt with the subject of advertising control in the following testimony before Congress:

"Mr. YATES. Does the Commission have any authority now to require a television station to make time available for advertising?

"Mr. Cox. No, not in a single situation certainly. That is, the act specifically provides that broadcast stations are not common carriers and, therefore, they are not, like the telephone or telegraph system of the country, required to take all traffic that is offered to them. And this would apply equally to programs or to commercial matter * * *" (testimony of Commissioner Cox in "Advertising Opportunities for Small Business in Television and Radio," hearings before Subcommitttee No. 6 of the Select Committee on Small Business, House of Representatives, 87th Cong., 1st. sess., December 6–7, 1961, p. 108 (Mr. Cox then was Chief of the FCC Broadcast Bureau)).

"Mr. YATES. Does the Commission have any control over the allocation of advertising time?

"Mr. Cox. No" (ibid., p. 110).

"Mr. Cox. * * * Section 326 of the act specifically prohibits censorship by the Commission and this has been construed to mean that it can neither prevent nor require the broadcast of any material, whether it be program material or commercial material specifically" (ibid., p. 111).

"Mr. Cox. (Refers to the) "* * * never-ending question of taste and preference in which the Commission does not inject itself * * * as to commercial presentations" (ibid., p. 130).

12. Licensee responsibility: This principle was stated by the Commission in 1941 as follows:

"The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty. * * * The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligation to operate in the public interest and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory" ("FCC Report on Chain Broadcasting" (1941), p. 66).

In 1946:

"Primary responsibility for the American system of broadcasting rests with the licensees of broadcast stations, including the network organizations. It is

to the stations and networks rather than to Federal regulation that listeners must primarily turn from improved standards of program service. The Commission, as the licensing agency established by Congress, has a responsibility to consider overall program service in its public interest determinations, but affirmative improvement of program service must be the result primarily of other forces" ("FCC Report on Public Service Responsibility of Broadcast Licensees," March 7, 1946, Mimeo. 81575, pp. 54–55).

In 1949:

"The Act imposes upon the licensee the obligation to operate in the public interest and that responsibility is his alone. It is the licensee who must determine the selection and choice of programs and it is he who must determine the specific nature of the program structure which in the light of the specific circumstances and needs of the area which he serves will constitute a well-rounded program service" (FCC Report and Order, docket 8774, reservation of time on sale of station, January 6, 1949, p. 1).

"* * * the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for selection and presentation of program material, and the congressional mandate that this licensee responsibility is to be exercised in the interests of, and as trustee for the public at large which retains ultimate control over the channels of radio and television communications" (FCC Report on Editorializing" (1949), 1 R.R. 91 : 201, 202).

"Licensee responsibility is an integral part of the statutory scheme for regulating the radio industry under which persons or groups are granted limited renewable franchises to utilize the radio spectrum for broadcasting in the public interest" (Don Lee Broadcasting System, 5 R.R. 1179, 1197 (1949)).

The Commission restated the principle of licensee responsibility in 1960 as follows:

"The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grassroots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934, and remains unaltered and undivided. The licensee is, in effect, a 'trustee' in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster. Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience is left in his hands." ("FCC Report on Program Policy," 20 R.R. 1901, 1911 (1960)).

The above Program Report then quoted the "recent testimony before a Congressional Committee" presented "by the Chairman in behalf of this Commission":

"Thus far Congress has not imposed by law an affirmative program requirement on broadcast licensees. Rather, it has heretofore given licensees a broad discretion in the selection of programs. Congress has provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. To this end the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee and that the fulfillment of such responsibility requires the free exercise of his independent judgment" (ibid., p. 1911, quoting testimony of Commissioner Ford, May 16, 1960, before the Subcommittee on Communications of the Senate Interstate Commerce Committee).

The licensee's responsibility also extends to advertising, both as to quality and as to quantity:

"The Federal Communications Commission has consistently held that the selection and presentation of program material, including advertising, is the responsibility of the broadcast licensee, subject to the statutory obligation to operate in the public interest. In fulfilling this obligation, a broadcast station is expected to exercise reasonable care and prudence with respect to advertising copy to assure that no material is broadcast which will deceive or mislead the public" ("FCC Public Notice," February 21, 1957, 14 R.R. 1262).

"[T]he responsibility for determining *the amount of radio and television time devoted to advertising* is the responsibility of the individual station licensee. However, in connection with renewing licenses the Commission examines the overall record of stations, including the amount of time devoted to advertising

to determine whether the continued operation of the station would serve the public * * *" ("FCC Comments on H.R. 5741," Mimeo. 215321, July 20, 1955).

13. Freedom of speech and of the electronics press: This Constitutional guarantee, of course, is one of the essential elements of the private enterprise system in broadcasting. Section 29 of the Radio Act and Section 326 provide:

"Nothing in this chapter (Act) shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

The Constitutional and statutory limitations on the Commission's power have been clearly set forth in its 1960 Report on Program and need not be repeated.[12] It is now beyond dispute that neither the commercial nature, nor the entertainment aspects of broadcast service remove it from the protection of the Constitution and the statute. The applicability of these provisions to the proposed regulation of the quantity of advertising time broadcast will be discussed hereafter (infra, p. —).

14. Decentralized and diversified control of program service. It is essential to recognize clearly that the objective of all of the foregoing elements of the American broadcast system is to preserve both decentralization and diversification of control of the end-product of broadcast stations, the program and advertising service heard and seen by the public. Under the American system, control of program service by an unreasonably small number of private interest or by any government agency is not permitted. The problem has usually been discussed with respect to the dangers from *private* control of broadcast stations or programs;[13] however, it has been recognized, and should not be overlooked, that:

"The United States has rejected government ownership of broadcasting stations, believing that *the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions to permit its exercise by one body, even though elected by or responsible to the whole people*" ("FCC Chain Broadcasting Report," p. 72) [Italic added.]

In supporting the Chain Broadcasting Report, Chairman Fly stated:

"So long as the more than 800 station managements all over the country are free to make their own decisions, no great harm can result if one or two or three of them make mistakes. But if power is concentrated in the hands of two or three networks, an error of judgment on the part of any one of them may seriously affect the whole nation. This makes it imperative that station licenseees have the power to choose and select programs and exercise real responsibility for their own selection. We hope that our chain broadcasting regulations * * * will, to some extent, restore a healthy balance and decentralization of power" (statement of Chairman Fly before Senate Interstate Commerce Committee, hearings on S. Res. 113 (1941), FCC Mimeo. 50718, p. 22a).

15. Program service (including advertising) in the public interest: This is the last fundamental principle of the American broadcasting system, and its ultimate objective. As the Supreme Court stated in *NBC* v. *United States*, 319 U.S. 190, 216 (1943):

"The 'public interest' to be served under the Communications Act is * * * the *interest of the listening public* in the 'larger and more effective use of radio'." [Italic added.]

And in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940):

"An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render *the best practical service to the community* reached by his broadcast." [Italic added.]

The Radio Commission stated in 1929:

"* * * the Government is interested mainly in seeing to it that the program service of broadcasting stations is good, i.e., in accordance with the standard of public interest, convenience, or necessity" ("FRC 3d Ann. Rept." (1928), p. 32).

The Commission said in 1949:

"It is the licensee * * * who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio

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[12] "FCC Report on Program Policy," 20 R.R. 1901, 1905–1909 (1960).

[13] See "Report on Network Broadcasting," H. Rept. 1297, 85th Cong., 2d sess., January 27, 1958 (the "Barrow Report"), pp. 106–124. See also, address by Commissioner Loevinger, August 26, 1963, Mimeo. 40060, pp. 4–5, 11–13.

broadcasting * * *. The practical day-to-day problem with which every licensee is faced is one of striking a balance between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of the many" ("FCC Editorializing Report" (1949), 1 R.R. 91:201, 202).

The Network Broadcasting Report stated in 1958:

"The primary public interest to be served under the Communications Act is the interest of the listening and viewing public in the larger and more effective use of broadcast facilities.

"Service to the public is the fundamental criterion employed in public-interest determinations. Therefore, the ability of a licensee to render the best practicable service to the community reached by his broadcasts if of basic importance. * * *

"The essence of service to the public is programming and the ultimate goal of the broadcast regulatory function is to make available a broadcast service filling the needs and desires of the community served by each broadcast facility" ("Network Broadcasting," H. Rept. 1297, January 27, 1958, p. 158).

"The programming responsibility of the licensee is to be discharged within the broad framework of presenting a well-rounded program service suited to the needs and desires of the community served" (ibid, p. 160).

"Intervention of the Commission into the area of specific program categories occurs only in those instances where program content is considered clearly contrary to the public interest * * *" (ibid., p. 160).

The conclusions of the 1963 Television Network Program procurement Report stated:

"Our system relies on individual initiative, operating through private enterprise, * * * for the procurement and choice of the content of broadcast service. It is operated through qualified licensees who assume the duty as an essential condition of their licenses to use and operate broadcast channels *in the interest of the public in various communities throughout the country.* These licensees bear the responsibility to choose, edit, and supervise the broadcast service they provide, in accord with the tastes, needs, and desires of the public in their communities" ("Television Network Program Procurement," H. Rept. No. 281, May 8, 1963, 88th Cong., 1st sess. p. 93).

"The Commission may not censor programs or prescribe either the source or detail of programming. Its duties with regard to broadcast service are confined to the selection of qualified licensees and to the establishment and enforcement, through its rules and regulations and the administration of its licensing process, of policies and procedures designed to require the fair use in the public interest of broadcast channels and to assure the public that licensees, individually and collectively, assume and continue to adhere to their responsibilities.

"Within the confines of their duty to serve the public interest, licensees are free to use their channels as competitive commercial ventures. The Commission may impose no restrictions on the lawful conduct of the commercial aspects of the calling of broadcasters" (ibid., p. 94).

In accordance with these principles, licenses are not issued solely to permit the holder to earn profits, nor may they be used primarily to promote the holder's private interests.

"* * * Congress intended that radio stations should not be used for private interests, whims, or caprices of the particular persons who have been granted licenses, but in a manner which will serve the community generally and the various groups which make up the community. And the courts have consistently upheld Commission action giving recognition to and fulfilling the intent of Congress. *KFAB Broadcasting Association* v. *Federal Radio Commission*, 47 F. (2d) 670; *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F (2d) 850, certiorari denied, 288 U.S. 599" ("FCC Editorializing Report" 1 R.R. 91; 201, 203 (1949)).

As Congressman White stated in the debates leading to the Radio Act:

"If enacted into law, the broadcasting privilege will not be a right to selfishness. It will rest upon an assurance of public interest to be served" (67 Congressional Record, p. 5479, Mar. 12, 1926).

Referring to the above statement by Congressman White, the Commission stated in 1949:

"And this view that the interest of the listening public rather than the private interests of particular licensees were reemphasized as recently as June 9, 1948 in a unanimous report of the Senate Committee on Interstate and Foreign Commerce on S. 1333 (80th Cong.) which would have amended the present Com-

munications Act in certain respects" (see S. Rept. 1567, 80th Cong., 2d sess., pp. 14–15. "FCC Editorializing Report," 1 R.R. 91 : 201, 204 (1949)).

16. Conclusions: Point I: The foregoing statements as to the basic elements of the American broadcasting system have been set forth at length because of their importance to the proper determination of the validity of the rules proposed herein,[14] and because they demonstrate that at this date there is no doubt as to the statutory scheme for broadcast regulation. It is submitted that the instant proposal is clearly inconsistent with this statutory scheme. It would deny the broadcaster's freedom, right, and duty to select the material to be broadcast, and to arrange his schedule in accordance with his responsible judgment as to the local needs of the community Prohibiting the broadcast of advertising material in excess of specific time limitations within specific periods would deny the freedom of enterprise and the values of competition on which the Congress and the Commission have always relied for improved service, and would substitute a common carrier approach alien to these principles. In an area dealing with subjective taste, the proposal would abandon reliance on local viewers' preferences as made known to the local licensee, in favor of centralized standards imposed by a remote agency. And it would do so despite the recognized dangers of centralized power—private or governmental—over broadcast material, and despite the knowledge the subjective taste and listener enjoyment vary from community to community and can best be evaluated by the local licensee who alone has the responsibility, local awareness, and enlightened self-interest to perform that function. Finally, the proposal loses sight of regulation's main objective. If a licensee's programming serves the overall needs of his area, that objective is met and there is no warrant for restrictions on the commercial aspects of his calling. A proposal such as this could be justified only on substantial facts demonstrating that without it broadcast stations generally cannot and will not serve the public interest through their programming operations. Absent such a demonstration, the proposal constitutes abandonment of the basic elements of reliance on listener choice and competition among stations, and is a complete departure from "the statutory concept of broadcasting as a competitive private enterprise service." [15]

II. THE COMMISSION DOES NOT HAVE POWER UNDER THE COMMUNICATIONS ACT TO ISSUE RULES OF THIS TYPE

17. The Notice herein does not contain any attempt to show that the proposed rules are within the Commission's statutory power other than a reference to Sections 4(i), 303 and 307(a) of the Act as "Authority for the adoption of the amendments proposed herein" (Notice, par 12). The citation in the Notice (par. 2) to the Great Lakes Broadcasting Co. case and its statement that "regulation (of advertising) must be relied upon to prevent the abuse or over use of the privilege" is set forth to show that the regulatory agency has "consistently been concerned" with advertising practices, as were the Commission actions listed in footnote 1, and in any event these citations do not deal with the scope of the Commission's power to regulate advertising.

18. Effect of the proposed rules: If the rules were adopted, the Commission would be authorized to revoke any station license "for willful or repeated violation of, or willful or repeated failure to observe" the rules.[16] In addition, as pointed out in the Notice (footnote 3): "specific rules would provide us with a broad range of sanctions—any one of which could be called into play soon after discovery of an abuse. Thus, instead of the 'death penalty' (i.e., revocation or denial of renewal of license), which, absent a rule are the only sanctions available to us, we could issue a cease and desist order pursuant to Section 312(b) of the Communications Act * * *, or impose a forfeiture pursuant to Section 503(b) * * *." Thus, the rules apparently are intended to provide the Commission with the power to impose a fine or forfeiture, or direct that the practice cease and desist, as well as to make it clear that "willful and repeated" violations of the proposed rules would result in revocation or denial

[14] See "Basic concepts of Federal regulation of broadcasting," as enumerated in "Television Network Program Procurement," H. Rept. 281, May 8, 1963, 88th Cong., 1st sess., pp. 33–34, an excellent summary. See also, "Network Broadcasting," H. Rept. 1297, Jan. 27, 1958, 85th Cong., 2d sess., pp. 157–160.

[15] Dissent of Commissioner Hyde to notice herein.

[16] Communications Act, sec. 312(a)(4): "The Commission may revoke any station license or construction permit—* * * (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act * * *."

of renewal of license. The specific prohibitions in the proposed rules must be considered briefly.

19. Prohibitions against AM–FM advertising: The proposed AM–FM rules provide that, "No station shall broadcast advertising material by any single sponsor, regardless of the type of program, in excess of the time in the following table: * * *." In a 5-minute program, 1:30 minutes of commercial time; in a 10-minute program, 2:10 minutes of commercial time, etc., up to in a 60-minute program, 7 minutes of commercial time. In addition, "The time to be used for advertising in announcement or participating type programs is not to exceed a maximum of an average of 14 minutes an hour computed on a weekly basis," subject to a further maximum of "18 minutes in any single hour, or 5 minutes in any 15-minute segment." Exception is made allowing "the established practice of allowance of station breaks between programs" and for "shopping guides," "farm auctions," etc. (a type of program which is not of substantial significance to most stations).

20. Prohibitions against TV advertising: The proposed TV rules provide that, "within prime time" (i.e., "a continuous period of not less than 3 hours of each broadcast day within the station's highest rate-time periods") "commercial material for both individually sponsored and participation programs within any 30-minute period may not exceed 4 minutes, plus total station break time, in agregate of 70 seconds." In "prime time," station breaks "shall consist of not more than two announcements plus non-commercial copy such as station identification or public service announcements" and such station breaks may not exceed 1:10 in a 30-minute period. Likewise, in all non-prime-time hours, "commercial material for both individually sponsored and participation programs within any 30-minute time period may not exceed 6 minutes plus station break time"; 5-minute separate programs may not include commercial material in excess of 1:15 minutes; and 10-minute separate programs may not contain commercial material in excess of 2:10 minutes. In non-prime-time, station breaks "shall consist of not more than two announcements plus the conventionally sponsored 10-second station identification."

21. Thus, the advertising limitations constitute a close and tight system of regulation specifying the minutes and seconds of advertising time that it would be permissible to broadcast. Every 5-minute, 10-minute, etc. period of every broadcast day would be subject to critical review by the Commission; in television, every station break would be subject to such review. If a licensee failed to comply with the minute prohibitions in a manner which could conceivably be considered "willful" or "repeated" violation of the proposed rules, the "death penalty" could be applied; a cease and desist order could be issued; or he could be required to "forfeit to the United States a sum not to exceed $1,000" for each day during which the violation continues "in addition to any other penalty provided by this Act." (Communications Act, sec. 503(b)). The Commission's power to issue these rules must be judged by the nature of the proposed rules, which in detail and severity are not comparable to any rules previously considered by the courts.

22. Sections 4(i), 303 and 307(a) of the Act: A brief examination of these sections of the Act is all that is necessary to establish that they contain no express, or reasonably implied, grant of power to adopt the proposed rules. If such rules are to be sustained, authority must be found in legislative history or court decisions as to the scope of the Commission's rulemaking powers. Section 4(i) merely authorizes the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 307(a) merely provides for the grant of a license to any applicant "if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act * * *." Section 303 has been described recently in the Commission's brief in Palmetto Broadcasting Co. (WDKD) as follows:

"* * * Section 303 of the Communications Act (47 U.S.C. 303) grants to the Commission broad authority to regulate the use of radio frequencies as the 'public convenience, interest, or necessity requires.' On the basis of this criterion, the Commission is empowered, inter alia, to: 'Classify radio stations'; '[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class'; '[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest'; '[m]ake general rules and regulations requiring stations to keep such records of programs, transmission of energy, communications, or signals as it may deem desirable'; and '[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *'."

(brief for appellee in the U.S. Ct. of App. for the D. of C. Cir., *Palmetto Broadcasting Co.* v. *FCC*, case No. 17,587, September 4, 1963).

It is apparent that the "Authority for the adoption of the amendments proposed herein" (Notice, par. 12) cannot be found in the sections cited, unless supported by legislative history or court decisions. As will be shown, no such extensive authority to regulate advertising practices is justified.

23. Legislative history: The legislative history of the Radio Act and the Communications Act have been combed by Commission representatives on numerous occasions, and their findings have never disclosed any intention by Congress to delegate to the agency power to specify numerical limits to either advertising or programming. A brief listing of the principal studies of the scope of the regulatory power over programming and advertising is sufficient to demonstrate that if the legislative history could have been found which justified rules of the type proposed herein, it would have been found and set forth in the studies:

(a) "Commercial Radio Advertising," a letter dated June 9, 1932, from the FRC Chairman in response to S. Res. 129, referred to in these Comments (par. 1, supra), concluded:

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation * * *. While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio faciliteies for commercial advertising." (See fn. 2 of these comments.)[17]

(b) "FCC Report on Public Service Responsibility of Broadcast Licensees," March 7, 1946 (Mimeo. 81575). The main thrust of the "Bluebook" was that the Commission had power, in licensing proceedings, to consider the overall program service of broadcast stations and applicants. "Advertising Excesses" were discussed in some detail (pp. 40–47), without any discussion of the Commission's authority to promulgate rules of the instant type. However, the "Bluebook" concluded (p. 47):

"Since it is not the intention of the Commission to concern itself with advertising excesses other than an excessive ratio of advertising time to program time, no exhaustive study has been undertaken. There is need, however, for a thorough review by the industry itself of current advertising practices, with a view toward the establishment and enforcement of sound standards by the industry itself."

And at page 56:

"*Advertising excesses.* The evidence set forth above (pp. 40–47), warrants the conclusion that *some* stations during some or many portions of the broadcast day have engaged in advertising excesses which are incompatible with their public responsibilities, and which threaten the good name of broadcasting itself.

"As the broadcasting industry itself has insisted, the public interest clearly requires that the amount of time devoted to advertising matter shall bear a reasonable relationship to the amount of time devoted to programs. Accordingly, in its application forms the Commission will request the applicant to state how much time he proposes to devote to advertising matter in any one hour.

"This by itself will not, of course, result in the elimination of some of the particular excesses described on pp. 43–46. This is a matter in which self-regulation by the industry may properly be sought and indeed expected. The Commission has no desire to concern itself with the particular length, content, or irritating qualities of particular commercial plugs."

The "Bluebook" felt that by providing the Commission with "affirmative representations of the licensee concerning the time to be devoted to sustaining programs, live programs, discussion programs, and advertising matter," the proposed renewal procedure would provide "specific data relevant to the finding of public interest required by the statute" (p. 58.) A sustaining program was defined, as it now is in the definitions attached to Section IV of the Commission's application forms, to exclude any program which contained *any* commercial continuity

[17] For the legislative and administrative history, see Warner, "Radio and Television Law," pp. 423–430, 441–442, 309–311, 351–352, 364–365, 372, 407–423. See also, legal memorandum by Mr. Joel Rosenbloom, assistant to Chairman Minow, Mimeo. 8674; "Television Network Program Procurement," H. Rept. 281, 88th Cong., 1st sess., May 8, 1963, pp. 301–311.

or a *single* spot announcement.[18] Significant to the present problem, however, is the clear fact that the "Bluebook" contains no evidence of legislative approval of rules of the type here proposed, and a clear conclusion by the Commission that matters relating to "excessive advertising" should be considered as part of the Commission's review of the overall programming service rendered by the licensee. The six "horrible examples" listed in the "Bluebook" were designated for hearing and renewals were granted. Chairman Denny testified that:

"We have docketed some six applications for renewal, for public hearing. In these cases the *overall operation* of the station did not appear to meet the minimum standards set up for public service. Where a station has been run *solely as an advertising medium* in such a way that it does not serve the community we do feel it is our duty to refuse to renew the license" (testimony of Chairman Denny, before Subcommittee on Appropriations, 80th Cong., 1st sess. (1947), p. 1281). [Italic added.]

(c) "Authority of the Federal Communications Commission with Respect to the Programming of Radio and Television Broadcasting Stations," Mimeo. 8674, an undated 76-page memorandum prepared by Mr. Joel Rosenbloom, legal assistant to Chairman Minow, which includes the following excerpts from the legislative history:

"One of the subjects of public discussion at the present time is the extent to which broadcasting stations should be utilized for advertising purposes. Your committee has not felt justified in forbidding or in undertaking to limit advertising through this medium, * * *" (H. Rept. 719, 68th Cong., 1st sess., pp. 5–6; statement by Representative White (1924) quoted by Mr. Rosenbloom, p. 35).

"No authority is given to the Commission or the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes" (Senator Pittman on the Senate floor, 68 Congressional Record, p. 4109 (1925) quoted, ibid., p. 36).

Referring to the FRC report pursuant to S. Res. No. 129 (1932):

"In an extensive report the Commission stated, *inter alia*, that, while specific power to prescribe the character and limits of advertising *by regulation* was not within its authority and would require further legislation, it could take the character of commercial advertising into account in renewing or revoking a license" (ibid., pp. 49–50).

This thorough memorandum, therefore, in no way supports the authority of the Commission to issue the rules proposed herein.

(d) "Responsibility for Broadcast Material," June 16, 1960, first interim report by the FCC Office of Network Study, traced the legislative and administrative history of broadcast regulation in detail.[19] This report contains a full study of legislative history, which enforces the conclusion that the Commission does not have the power to issue the type of rules proposed herein (pp. 301–314, see also, pp. 219–225). The references in the report to the FRC study of 1932 need not be repeated (pp. 306–311). The report also points out that recent legislative history included bills introduced in Congress—H.R. 5741 in 1955 and H.R. 4571 in 1957 "with the purpose of amending the Communications Act 'to provide for regulation of the amount of radio and television program time which may be devoted to advertising'"; and that in its comments on H.R. 4571 the Commission, in opposing the legislation, reaffirmed its position that:

"* * * the respsonsibility for determining the amount of radio and television time devoted to advertising is the responsibility of the individual station licensee. However, in connection with reviewing licenses the Commission examines the overall record of stations, including the amount of time devoted to

[18] It should be noted that in its "Report on Program Policy," 20 R.R. 1901, 1914 (1960), the Commission seriously questioned the "Bluebook" policy of assuming that "sustaining" programs were inherently superior to "commercial" programs: "Our own observations and the testimony in this inquiry have persuaded us that there is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance." Likewise, in the FCC Office of Network Study's Report on "Responsibility for Broadcast Material," H. Rept. 281, 88th Cong., 1st sess. (1963), it was stated: "In the past emphasis has been placed on 'sustaining' programs in evaluating overall program service. Testimony by responsible persons in the Commission's inquiry and a general knowledge of modern practices in broadcasting indicate that differentiation between sustaining and commercially sponsored programs, as such, may no longer assume the degree of importance which has heretofore been the case. * * * it appears likely that permitting sponsorship to become more prevalent in public affairs, and other similar programs will encourage broadcasters to greater efforts in these vital areas" (p. 215).

[19] This report is printed in "Television Network Program Procurement," H. Rept. 281, 88th Cong., 1st sess., pp. 199–494.

advertising to determine whether the continued operation of the station would serve the public interest * * *" (p. 314).

The report concluded:

"The implementation of the broadcasters' responsibility to preserve the 'incidental' and 'secondary character' of advertising in broadcast community service appears to be an area in which the best efforts of the majority of broadcasters who have assumed and acted upon their responsibilities as 'trustees' for the public, should be exerted to impress upon the less conscientious minority the necessity of proper operation and conduct" (p. 225).

(e) FCC Report on Program Policy, July 27, 1960, 20 R.R. 1901. This comprehensive statement of licensee program policy included the following:

"During our hearings there seemed to be some misunderstanding as to the nature and use of the 'statistical' data regarding programming and advertising required by our application forms. We wish to stress that *no one may be summarily judged as to the service he has performed on the basis of the information contained in his application.* "It should be emphasized that the statistical data before the Commission constitute an index only of the manner of operation of the stations and are not considered by the Commission as conclusive of the overall operation of the stations in question. Licensees will have an opportunity to show the nature of their program service and to introduce other relevant evidence which would demonstrate that in actual operation the program service of the station is, in fact, a well-rounded program service and is in conformity with the promises and representations previously made in prior applications to the Commission'" (p. 1915).

Specifically, as to responsibility for advertising, the Commission stated:

"Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community. * * *" (p. 1913).

(f) Television Network Program Procurement, November 28, 1962, Part I of the second interim report by the FCC Office of Network Study, again reviewed in summary the "history and present status of responsibility for broadcast matter." (pp. 31–45),[20] without indicating any legislative or administrative history which would justify the rules proposed herein.

24. From the foregoing, it is clear that the legislative history of the two Acts contains no justification for the adoption of rules limiting the quantity of advertising or commercial material, and that the FRC and FCC prior to this Notice have never claimed any such authority under the Act, and have consistently adhered to the contrary interpretation. Despite knowledge of the administrative interpretation, and bills proposing to extend the agency's power, Congress has enacted no legislation augmenting that power. Under accepted principles of statutory interpretation, the legislative and administrative history is controlling. *Farmers Educational Union* v. *WDAY, Inc.*, 360 U.S. 525, 561 (1959). Nor are the proposed rules within the authority of the Commission as interpreted by the courts, as will be demonstrated.

25. Court interpretation of FCC rulemaking power: While the question raised by the Notice herein is unique and has not been considered by any court, recent briefs submitted in court by the Solicitor General and by the FCC General Counsel contain all court decisions which might be relied on if the instant rules were considered by a court. The brief in the *Head* case[21] urged that "the Act

[20] This report is printed in H. Rept. 281, 88th Cong., 1st sess., pp. 1–198.

[21] See brief for the United States as amicus curiae, February 1963, in *Head* v. *New Mexico Board of Examiners* before the Supreme Court, and Brief for Appellee, September 4, 1963, in *Palmetto Broadcasting Co.* (WDKD), before the U.S. Court of Appeals for the District of Columbia Circuit. However, it should be noted that in the instant Comments no argument is made that the Commission lacks power to deny renewal of license as in the *Palmetto* case, after an overall review of the licensee's programming in an agency judicatory hearing.

gives the Commission authority to regulate programming, including advertising, to the extent compatible with 'this country's tradition of free expression,' in order to determine whether it is consistent with the public interest" (p. 22). While "excessive advertising" may have been only a subsidiary ground for the Commission's denial of license renewal to Station WDKD, in connection with this issue the brief in the *Palmetto* case[21] contains a comprehensive statement of authorities. The following discussion of authorities in these Comments will be limited primarily to the pertinent decisions in *National Broadcasting Co.* v. *U.S.*, 190 (1943) (network rules); *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) (lottery rules); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) (numerical limitation rules), in which the Supreme Court dealt specifically with the Commission's rulemaking power.

26. The *NBC* case: "composition of the traffic": Two statements in the *NBC* case are frequently relied upon as indicating the Commission's rule making powers:

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall 'generally encourage the larger and more effective use of radio in the public interest'; * * * and subsection (r) empowers it to adopt 'such rules and regulations and proscribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.'

"The provisions * * * preclude the notice that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest'" (314 U.S. 213–214).

And:

"The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communications. Yet we are asking to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. *But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.* The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the to the Commission" (314 U.S. 215–216).

In defending the chain broadcasting regulations, after the Supreme Court decision, Chairman Fly specifically denied that the quoted provisions were a Supreme Court ruling that the Commission had power to promulgate program rules. In a statement submitted to Congress,[22] the former Chairman stated:

"First, isn't it extraordinary that in a case where the question was not presented for decision, the Supreme Court should have strayed off the reservation and gone out of its way to pass on the Commission's powers with respect to programs? * * * The answer * * * is that the Court neither decided anything nor uttered any dicta with respect to the Commission's powers over programs. This will be clear in a minute when I put the phrase 'the composition of that traffic' back into the context from which the NAB tore it. * * *

"First the Court says the Commission is not simply a traffic officer, policing the air lengths to prevent stations from interfering with each other. Obviously, the traffic referred to is the stations themselves, or the radio emissions from those stations. Then the Court goes on to say that the Commission does something more than supervise 'the traffic.' Again the traffic refers to the stations. Then follows the sentence which the two big networks and their associate NAB choose to misconstrue, 'it puts upon the Commission the burden of determining the composition of that traffic.' Permit me to underscore *that traffic*, because, again it refers to the same traffic in the preceding lines and can refer to no other traffic. The composition of that traffic is again the composition of the electrical stations, that is, the stations that are on the air. *In other words, the Court is saying that far from simply policing the existing traffic, the Commission shall*

[22] Statement of Chairman Fly, March 28, 1944, before the House Select Committee To Investigate the Federal Communications Commission, hearings, 78th Cong., 2d sess., under H. Res. 21, pt. 3, pp. 2883–2902. Chairman Fly's statements are quoted from FCC Mimeo. 74078.

by licensing choose the stations which shall operate on the ether highways. To put it another way, the traffic officer simply guides and controls the traffic which comes along on the highway, but the licensing authority determines what cars shall compose the traffic, or what cars shall be permitted upon the highways" (p. 4). [Italic added.]

Again the former Chairman:

"The Court stresses that public interest involves something more than technological considerations in the process of choosing licensees, but at no point either before or after the quoted paragraph is there any reference to programs or program control" (p. 5).

And finally:

"Thus, in the network case the Supreme Court did nothing more than decide the issue before it—the validity of the anti-monopoly regulations. The law with respect to the Commission's power, or rather lack of power, over radio programs was left just where it has always been. Under Section 326 of the Act the Commission is specifically denied the power to tell a radio station what it shall or shall not broadcast. The only power which the Commission does have is the power to review the over-all service of the station to determine whether it is operating in accordance with the public interest, convenience and necessity" (p. 5). [Italic added.]

Accordingly, the NBC case must be limited to the type of regulations then under consideration, the chain broadcasting regulations. The principal regulations provided that no license would be issued to any person who entered into a network contract containing provisions which restrained the licensee from selecting or rejecting network offerings pursuant to his licensee responsibility. As the Supreme Court said:

"The basic consideration of policy underlying the Regulations is succinctly stated in its (the Commission's Chain Broadcasting) Report: 'With the number of channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest * * * .'"

The *NBC* case, as the interpretation of the FCC Chairman indicates, cannot be construed to confer on the Commission power to issue rules prohibiting licensees from broadcasting advertising material in excess of specific limits.

27. The ABC and Storer cases: Nor is there any holding or dicta in the ABC or Storer cases justifying the promulgation of Commission rules prohibiting what material may or may not be broadcast. In *ABC*, the Supreme Court held Commission lottery rules invalid, holding that while the Commission had authority to adopt interpretative regulations defining with greater clarity conduct prohibited by law, it had no power to declare that "give-away" programs were lotteries because they were contrary to the Commission's view of the public interest, and therefore make lawful program material and advertisements concerning them unlawful. The Commission's power to elect to enforce the Federal criminal lottery statute by rule was recognized, but as the Court said, "Unless the 'give-away' programs involved here are illegal under § 1304 (of the Criminal Code), the Commission cannot employ the statute to make them so by agency action." The Court concluded:

"It is apparent that the so-called 'give-away' programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery under a new guise, and they should be struck down as illegal devices appealing to cupidity and the gambling spirit. It unsuccessfully sought to have the Department of Justice take criminal action against them. Likewise, without success, it urged Congress to amend the law to specifically prohibit them. The Commission now seeks to accommodate the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy."

Sections 4(i) and 303(r) of the Act were specifically referred to by the Court, clearly indicating that the rulemaking power therein contained did not extend to otherwise lawful broadcast material.

28. In *Storer* the Supreme Court held that the numerical limitation (or multiple ownership rules were a valid exercise of the Commission's rulemaking

power. The rules there did not deal with material broadcast, but with limitations on the number of stations permissible under a common ownership. The multiple ownership rules were justified as a means of effectuating two of the "three basic supporting policy themes: Competition, diversification, and licensee responsibility" which the Commission has relied in large part on to achieve the ultimate goal of service to the public.[23] Unlike the rules proposed herein, the multiple ownership rules did not attempt to attain a desired type of broadcast operation by direct prohibition of quantities of broadcast material. The Storer case is no authority for the rules proposed.

29. In addition, the Supreme Court in the *Storer* case only sustained the rules with a clear qualification, which frequently is over-looked. The decision made it clear that where the Commission, within the scope of its power, purports to declare its "attitude" on an aspect of the public interest, and to declare the public interest considerations it applies in licensing procedures, it cannot lawfully bind itself *inflexibly* to the policy so declared. The Supreme Court stated:

"In the *National Broadcasting* case we called attention to the necessity for flexibility in the Rules there involved. The Commission provided that 'networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or here inapplicable.' Id. at 207. We said: 'The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would service the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations' (id., at 225).

"That flexibility is here under the present § 309 (a) and (b) and the FCC's regulations * * *. *We read the Act and Regulations as providing a 'full hearing,' for applicants who have reached the existing limit of stations*, upon their presentation of an application conforming to Rules 1.72 and 1.81, that sets out adequate reasons why the Rules should be waived or amended."

The prohibitions on advertising quantity proposed herein are set forth as absolute, inflexible limitations. While the Notice herein states that "the adoption of specific rules would not, necessarily, foreclose the flexibility inherent in case-by-case treatment, * * * nor preclude use from amending our standards to accommodate changes in the broadcast field" (Notice, par. 5); and states that "we recognize that there may be circumstances that may warrant that a waiver or exemption be accorded to certain broadcast stations" (Notice, par. 7), it is apparent that neither amendment nor waiver would prevent the hardships that the rules might frequently impose on numerous licensees, where rapid changes occur in competitive conditions within the licensee's service area or in general economic conditions. The procedure of amendment (while it might be considered by some as appropriate where an applicant is applying for an 8th AM or a 6th VHF station) certainly is too time-consuming and inflexible to comply with the Supreme Court's requirement of flexibility in case of proscriptions of advertising quantity. Under adverse conditions, delay of the Commission in amending its rules could result in the economic failure of numerous stations. The procedure of waiver (which is dependent on the Commission's exercising its *discretion* to grant a waiver) would be of little benefit, for example, to a licensee who inadvertently had broadcast a 13-week, 5-minute daily program which constituted a "repeated" violation of the advertising limitations on 91 separate days, and who had to justify his offense at renewal time. The Commission would have a choice of sanctions, but the choice would be theirs; the licensee would have to rely on their restraint or suffer renewal hearings, a short-term license, a fine which could amount to $91,000, or a cease and desist order.

30. Other cases. The other cases frequently cited as authority for broad scope of Commission power to regulate programming and advertising are not pertinent to the issue of the validity of the proposed rules. *Regents* v. *Carroll*, 338 U.S. 586, 598 (1950) dealt with the narrow issue of "whether in the light of the Supremacy Clause of the Constitution a state may enter a judgment that grants respondents a recovery (of damages) on the very stock purchased contract that justified the Commission's refusal of a license." *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 CAA 3d (1950); cert. denied, 340 U.S. 929, held that a

[23] "Network Broadcasting Report," H. Rept. 509, 85th Cong., 2d sess. 635.

state could not censor television film because Congress had fully occupied the field of television regulation and contains the statement that, "Congress * * * set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case." But the emphasis in this case was on the power of the Commission to control "the transmittal of obscene matter through the ether," which is not pertinent to the instant problem.

31. Below the Supreme Court level, the court cases frequently cited are *KFKB Broadcasting Ass'n.* v. *FRC*, 47 F. 2d 670; *Trinity Methodist Church* v. *FRC*, 62 F. 2d 850, cert. den., 284 U.S. 685; *Simmons* v. *FCC*, 169 F. 2d, cert. den. 335 U.S. 846; *Bay State Beacon, Inc.* v. *FCC*, 171 F. 2d 826; and *Henry* v. *FCC*, 302 F. 2d 191, cert. den., 371 U.S. 821.[24] In *KFKB*, the Radio Commission held, with court approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." In *Trinity Methodist Church* the FRC denial of renewal was based on the use of the station by a religious institution to denounce various religious denominations. As to these decisions, Chairman Fly in the statement quoted above [21] pointed out that, "The Courts * * * held that if the Commission finds that licensees have been operating their stations for private purposes only or to abuse people or various religious denominations or in any other manner inconsistent with public interest, it has the power to refuse to issue renewals of license" (citing KFKB and Trinity Methodist Church). In *Simmons* and application of a station to increase power was denied, with court approval, on the ground that the station proposed to accept and broadcast all network programs offered; the denial was affirmed on the ground that a licensee could not relinquish to the network his responsibility to select programs in accord with local need. In *Bay State Beacon* an application for construction permit was denied, and a competing application for the same facilities was granted, with court approval, on several grounds including consideration of the amount of sustaining and commercial time proposed by the unsuccessful applicant.

The court, stating that "the proportionate amount of time devoted to commercial programs was considered, but it was in no sense controlling," held that consideration of program service as an element of public interest did not infringe the First Amendment, citing the *NBC* case. Finally, in *Henry* an application for a new FM station was denied because the applicant "made no inquiry into the characteristics of Elizabeth or its particular programming need," and, therefore, could not determine whether the proposal would serve local needs. The claim of the applicant that the statutory scheme required a grant where the sole applicant is legally, financially and technically qualified, was rejected by the court, stating, "the question presented on the instant record is simply whether the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing familiarity with its particular needs and an effort to meet them."

32. Conclusions: Point II: It is clear from the foregoing that the Commission does not have power under the Communications Act to issue rules of the type here proposed. The legislative history and administrative interpretation demonstrate this conclusively. There is nothing in the court decisions interpreting the Act which extends the Commission's power with respect to broadcast material to encompass proscriptive rules against quantities of advertising broadcast in specific time segments. In view of the clear fact that the proposed rules are inconsistent with the statutory scheme and are beyond the power delegated to the Commission, this proceeding must be terminated without adoption of the proposed rules or any modification thereof. Although not necessary to a determination of the issue raised, the importance of freedom of speech and of the press requires a brief discussion of that subject as applied to broadcasting.

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[24] It should be noted that the FRC decision in *Great Lakes Broadcasting Co.* (FRC, December 17, 1928), was reserved by the court, 37 F. 2d 993, on grounds other than the regulations of advertising for which it is quoted. In that case mentioned in the Notice herein (par. 1), the FRC stated that it must confine itself to limiting advertising in amount and character so as to preserve service for the public; but in the portion not quoted in the Notice herein pointed out that the limitations on the FRC's power did not leave the public at the broadcaster's mercy, since his self-interest will cause him to please a large portion of his audience, and since the FRC has power to review the station's past performance.

III. THE PROPOSED RULES ARE UNCONSTITUTIONAL AS AN ABRIDGEMENT OF FREEDOM OF SPEECH AND OF THE ELECTRONICS PRESS

33. At the outset, it is recognized that the issue of constitutionality is one of first impression in the sense here considered. Whether rules of the instant type, if within the statutory delegation of power to the Commission, would be constitutional can only be determined by the Supreme Court. No court has rules on the issue to date.

34. Applicability of the First Amendment to broadcasting: The FCC Report on Program Policy sets at rest the notion that "because one may not engage in broadcasting without first obtaining a license, the terms thereof may be so framed as to unreasonably abridge the free speech protection of the First Amendment" (20 R.R. 1905). For the purposes of the instant proposal, the Commission's conclusions in that report may be accepted:

"The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment to the Constitution. * * * Moreover, the free speech protection of the First Amendment is not confined solely to the exposition of ideas nor is it required that the subject matter of the communication be possessed of some value to society. * * * We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. * * * Nevertheless it is essential to keep in mind that 'basic principles of freedom of speech and the press like the First Amendment's command do not vary'" (20 R.R. 1905–1906).

And paraphrasing an industry spokesman with approval:

"* * * while the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear" (20 R.R. 1907).

Pursuant to this policy or for other reasons, the Commission has stated:

"* * * the Commission has never imposed a definite program format as a prerequisite to an authorization for operation of a television or radio station" (Eastern Oklahoma Television Co., Inc., 14 R.R. 148, 149 (1956)).

Likewise, proposals of various witnesses in the public hearing that preceded the Report on Program Policy that the Commission "announce basic 'minimal' standards for station operation" were not adopted in the Report on Program Policy, which followed the recommendations of the Netwrok Study Staff:

"Each community is in a sense unique and the basic elements of broadcast service must be adapted by each licensee to the 'peculiar' requirements of his particular audience. It is true that certain of these elements have virtually universal character. But *any such minimal expressions by the Commission would, of necessity, be quantitative—percentages of time in each category. Such a course would tend toward a 'rigid mold,' or fixed formula for service in the public interest. This the Commission has consistently avoided as undue infringement on the licensee's responsibility and an unhealthy trend toward centralization of responsibility in the Government for broadcast matter*" (H. Rept. 281, 88th Cong., 1st Sess., p. 209).

As will be shown hereafter, the Commission's policy against specification of minimal public service requirements, which has included refusal to fix commercial limitations, is consistent with the First Amendment and, it is submitted, is required by the First Amendment.

35. Applicability of the First Amendment to advertising material: In the past, some statements have been made that advertising or commercial material is not protected by the First Amendment.[25] These statements apparently were based on a dictum of the Supreme Court in *Chrestensen* v. *Valentine*, 316 U.S. 52 (1942), in which a city ordinance was upheld which regulated the use of the

[25] See H. Rept. 281, 88th Cong., 1st sess., p. 95; *Pollak* v. *Public Utilities Commission* (C.A.D.C. 1951), 7 R.R. 2021, 2026; reversed *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952), 7 R.R. 2120; and Opinions of the General Counsel, Federal Radio Commission, August 1, 1928–August 1, 1929, pp. 77–82 (Opinion No. 32), quoted in legal opinion of Mr. Joel Rosenbloom, FCC Mimeo, 8674, p. 39, fn. 25. See also, Wall, Program Evaluation by the FCC: An Unconstitutional Abridgement of Free Speech, 40 Georgetown Law J. 1, 39, stating: "An interesting question of constitutional law would be presented were the Commission to either promulgate rules and regulations limiting the amount of advertising time that a licensee could permit in a broadcast day, or fail to renew a license on the ground that the applicant had permitted too much advertising. The Supreme Court has held that advertising is not within the protection of the First Amendment. Compare *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) * * *."

streets by trucks with loudspeakers broadcasting commercial material as a valid exercise of the police power. No reference to the protection of advertising was necessary to the decision, since reasonable application of the legislative police power to regulate the public streets and advertising is constitutional. Justice Douglas, concurring in *Cammarano* v. *U.S.*, 358 U.S. 498 (1959), stated that the Chrestensen dictum was "casual, almost offhand. And has not survived reflection." It seems clear that the commercial nature of the publisher or of the material published does not remove it from the protection of the First Amendment since *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), which overruled *Mutual Film Corp.* v. *Ohio.*, 236 U.S. 230 (1915), in which the Supreme Court, in sustaining state censorship of motion pictures, had said:

"* * * it cannot be put out of view that the exhibition of moving pictures is a business pure and simple, organized and conducted for profit like other spectacles, not to be regarded, nor intended to be regarded by the Ohio court, we think, as a part of the press of the country or as organs of public opinion" (236 U.S. at 244).

Apparently, advertising as such is removed from the protection of the First Amendment only where false or misleading (or similarly objectionable). See, *Drew & Co.* v. *FTC*, 235 F. 2d 735 (2d Cir. 1956); cert. den. 352 U.S. 969 (1957); *American Medicinal Products* v. *FTC*, 136 F. 2d 426 (9th Cir. 1943); *Murray Space Shoe Corp.* v. *FTC*, 304 F. 2d 270 (2d Cir. 1962); *Chamber of Commerce* v. *FTC*, 13 F. 2d 673 (8th Cir. 1926); cf. *Scientific Manufacturing Co.* v. *FTC*, 124 F. 2d 640 (3rd Cir. 1941). These cases include statements such as, "There is no constitutional right to disseminate false or misleading advertising." *Murray Space Shoe Corp.* v. *FTC*. However, in Scientific Manufacturing Co. the court refused to broadly interpret the statute where such interpretation would abridge free speech:

"Obviously a grant of power so vast is not to be accorded an administrative body except upon plain legislative direction within constitutional limits" (at p. 642).

The Brief for the United States as Amicus Curiae in *Head* v. *New Mexico Board of Examiners*, *supra*, makes the following claim:

"Since advertising, although not wholly beyond the First Amendment, enjoys less protection than other speech (see *Murdock* v. *Pennsylvania*, 319 U.S. 105, 110–111; *Valentine* v. *Chrestensen*, 316 U.S. 52, 54; *Martin* v. *Struthers*, 319 U.S. 141, 142, note 1; *Breard* v. *Alexandria*, 341 U.S. 622, 641–643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to other programming" (at p. 14, fn. 7).

This is the most that can be said; it certainly is not sufficient to authorize the type of regulation of advertising here proposed.

36. It must be noted that the First Amendment prohibits *both* "abridging the freedom of speech, or of the press." The applicability of the Amendment must be considered, therefore, as it affects radio and television as an instrument of the press (which it admittedly is. FCC Report on Program Policy, 20 R. R. 1905; "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment." *U.S.* v. *Paramount Pictures*, 334 U.S. 131, 166 (1948); and it must also be considered as it affects the broadcast medium as part of the free enterprise system, employing speech for advertising purposes.

37. It is submitted that the proposed rules are clearly an infringement of freedom of the press. The effect of the rules, as applied to many stations, undoubtedly would be to deny them revenue in the most productive segments of the broadcast day. As the Notice herein recognizes "more liberal standards" may be needed in particular communities and those making this claim in their comments are requested "to substantiate their position by providing the Commission with specific data on advertising requirements in their community *and to relate these data to income requirements* needed to support an operation in the public interest." (Notice, par. 7) If the power to tax is the power to destroy, so is the power to limit the source of revenue the power to destroy. "Advertising represents the only source of revenue for most American broadcasting stations, and is therefore an indispensable part of our broadcasting system."[26] The rules strike directly at the heart of the American system of

[26] "FCC Report on Public Service Responsibility of Broadcast Licensees," March 7, 1946, p. 40.

broadcasting. Accordingly, they seek to impose restrictions which would have the same effect on freedom of the press as tax statutes which have been stricken down as unconstitutional under the First Amendment by the courts. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *City of Baltimore* v. *A. S. Abell Co.*, 145 Atl. 2d 111 (Md. C.A. 1958). The instant rules would apply to broadcasting a limitation on revenue which is not applied to any other medium of the press. Like the newspaper tax statutes and the Baltimore tax (95 percent of the burden of which fell on radio and television) the instant rules would discriminate against radio and television as a whole, and against particular radio and television stations.

The discriminatory effect of the proposed rules, which by and large would favor large network television stations, and large radio stations which are able by virtue of their technical facilities or established public acceptance to charge high rates for individual programs or announcements, has been clearly noted in the Notice herein, as well as in Commissioner Bartley's dissent and in Commissioner Ford's address of June 28, 1963 (FCC Mimeo. 37400), and will not be repeated. Such discrimination is an unconstitutional infringement of freedom of the press as to broadcast stations generally, and as to particular stations which are less-favorably situated. For small stations which are required to reduce the quantity of their advertising, to attempt to recover lost revenues by raising their rates is not a practicable answer. Rates are limited by the audience served. Stations which cannot furnish service at a competitive cost-per-thousand price themselves out of the market. Major stations in large markets, however, might well not be prejudiced by the proposed regulations—if their rates were not high enough now, they might well justify increasing them without losing sponsor support or revenue, thus giving them an advantage over their less-favorably situated competitors. The direct effect of the proposed regulation would be to discourage small business (both the small station and the small purchaser of broadcast time).

38. As to the effect of the proposed rules as an unconstitutional abridgement of freedom of speech (apart from freedom of the press), it is difficult to see how, in a country which prides itself on its free enterprise system, approval can be given to legislative or administrative limitations on the quantity of advertising, at least of the specificity of the type here proposed. As stated in Borden, "The Economic Effects of Advertising" (1947), the result of a comprehensive study of advertising in the United States by the Harvard Business School:

"What significance can be attached to the designation of a society as 'free' if there is no freedom to exercise persuasion in the relationship between sellers and buyers? Persuasion and counterpersuasion are exercised freely from pulpit, press, nostrum, classroom, and government agencies for information. If the use of persuasion were to be forbidden in economic relations, practically all semblance of free society would vanish at the same time" (p. xxiv).

The history of freedom of speech must be examined to learn why it was possible for the Supreme Court (in the Chrestensen case) to express the dictum that advertising is not entitled to freedom of speech.

39. Freedom of advertising: "Advertising (is) the process of disseminating information for commercial purposes." [27] "Advertising—Any form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc., in the promulgation of a doctrine or idea * * *." [28] "Advertising (is) that portion of published information, whether seen or heard, the cost of which is borne by businesses that expect gain by the spread of the ideas expressed, usually commercial notices of goods and services for sale." [29] "Advertising includes those activities by which visual or oral messages are addressed to the public for the purpose of informing them and influencing them either to buy merchandise or services or to act or be inclined favorably toward ideas, institutions, or persons featured." [30] "Advertising is the paid use of any channel of communication to identify, explain or urge the use of adoption of a product, service or idea." [31] It includes the dissemination of political speeches, etc. (Notice, par. 7). Advertising, thus *is* information, ideas, communication, which would be expected to be "speech" included by the First Amendment.

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[27] Enc. Brit. 196, art. "Advertising."
[28] Ibid., 201.
[29] 1 Collier's Enc. 107.
[30] Borden, "The Economic Effects of Advertising" (1947), 17.
[31] 1 Enc. Americana 166.

40. The arguments (or assumptions) that there is no freedom of advertising are explainable by the history of the growth of advertising and the history of free speech and freedom of the press. Prejudice against advertising had an early start. In the *Tatler* of September 14, 1710 it was stated:

"It is my custom, in a dearth of News, to entertain myself with those Collections of Advertisements that appear at the end of all our Publick Prints * * *. Advertisements are of great use to the vulgar. First of all, as they are instruments of ambition. A man that is by no means big enough for the *Gazette* may easily creep into the advertisements * * *. A second use which this sort of writings have been turned to of late Years, has been the management of Controversy * * *. The inventors of *Strops for Razors* have writen against one another in this way for several years. The third and last of these writings is to inform the World where they may be furnished almost everything that is necessary for Life. If a Man has Pains in His Head, Cholic in his Bowels, or spots in his Clothes, he may here meet with proper Cures and Remedies. If a Man would recover a Wife or a Horse that is stolen or strayed; if he wants new Sermons, Electuaries, Asses' milk, or anything else, either for his Body or his Mind, this is the place to look for them in."

By the middle of the 18th century, the complaints became more numerous, and (as the "Britannica" said) "the stains which the practice of that age left upon its reputation are not yet quite obliterated." [32] In The Idler of January 20, 1758, Samuel Johnson said:

"Advertisements are now so numerous that they are very negligently perused, and it therefore become necessary to gain attention by magnificance of promises and by eloquence sometimes sublime and sometimes pathetick. Promise, large promise, is the soul of an advertisement. I remember a washball that had a quality truly wonderful—it gave *an exquisite edge to the razor!* * * * The trade of advertising is now so near to perfection that it is not easy to propose any improvement."

In the United States, the first successful newspaper, the Boston News-letter, included real estate and other advertisements in its first issue of April 1704. By 1771 thirty-one newspapers were in existence in the Colonies, all including advertising. Again, according to the "Britannica," [33] "Much of the early advertising was for patent medicines and gave advertising a bad name that persisted for many years."

41. It is believed that the basic reason for the lack of mention of freedom of advertising in the history of freedom of speech and the press, during the developmental period in the 17th and 18th centuries, is the fact that freedom of advertising existed, and was not challenged by the executive or the legislature either in England or in the United States. Likewise, the reasons given for the adoption of free speech and a free press—centering about the need for critical review of public affairs by the press and the public and the need for the citizen to be informed about governmental affairs so that he intelligently can vote—do not include the need for freedom of advertising as part of the free enterprise system, because such freedom was not under attack. The rationale of free speech is related to the specific cases in which that freedom was won. The first freedom of expression was freedom of debate in Parliament (asserted in the 14th, 15th and 16th centuries and secured in England by the Bill of Rights of 1688). Freedom of the press from prior licensing was won by 1695, the year in which the Licensing Act expired and was not renewed. A milestone in the battle for freedom from subsequent punishment of the press in seditious libel criminal prosecutions was the Peter Zenger case in the Colonies in 1733–1735, which tended to establish in America the principle that the jury must decide criminality in such cases, but left untouched the seditious libel laws. The next landmark was the arrest, imprisonment and subsequent release of John Wilkes for publication of seditious libel in the North Britain in 1763. By 1765–1769, when Blackstone's Commentaries were published, the seditious libel laws still remained untouched, and Blackstone discussing "Liberty of the Press," justified these laws by the often misapplied statement:

"Liberty of the press—In this (civil libel), and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, other with a less, degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is in-

[32] 1 Enc. Brit. 196.
[33] 1 Enc. Brit. 198.

deed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.

"Every freeman has an undoubted right to lay what sentiments he pleases before the public; forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution (of 1688), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government" (Blackstone's "Commentaries," published as Ehlich's Blackstone, Norse Pub. Co., 1959, p. 813).

Prosecutions by the British for seditious libel had continued in the Colonies after 1735, and were one of the causes of the Revolution. The adoption of the First Amendment in 1791 undoubtedly was intended to repeal the abuses of seditious libel, according to Professor Chafee.[34] Fox's Libel Act of 1792 gave the English juries power to determine criminality in seditious libel cases. All of this history involved the right to publish critical attacks on governmental activities, and, thus, the rationale of freedom of speech is expressed in terms of discussion of government affairs.

42. There was no discussion of freedom of advertising in England or the United Stats because the issue was not raised. This freedom was not under attack by the government (except for the stamp taxes on commercial documents which were a cause of the Revolution). In England, under the British Constitution, Parliament was the sovereign power, and the House of Commons included the principal representatives of such industry and manufacturing as existed. In America, there appears to have been no serious infringement of freedom to advertise. In both countries, until the middle or end of the 19th century, the doctrines of *laissez-faire* and *caveat emptor* left advertisers and advertising media as such with a free hand, except for definite warranties. Until the middle of the 19th century, advertising was primarily local in nature—the buyer might be expected to know or deal personally with his seller. There was little demand for extensive regulation of advertising.[35] Newspaper circulation in the 18th century was largely local; the canals and railroads which created widespread interstate commerce in America were established in the early 1800's. Federal legislation as to false and misleading advertising had to wait until amendment of the postal statutes in 1860, and the Federal Trade Commission Act in 1914. There is little reason to doubt that, with the growth of Federal and State regulation of advertising practices in the 20th century, the courts will find themselves faced with the necessity for protecting advertising as part of the First Amendment freedom of speech.

43. Conditioning FCC licenses: No conditions, by rule or otherwise, affixed by the Commission ito the use of a radio or television license which constitutes censorship under Section 326 or abridges the First Amendment would be valid. Under the First Amendment there is little reason to believe that even Congress can affix such a condition. The Supreme Court has stated in *Sherbert* v. *Verner*, Case no. 526, Oct. term 1962, decided June 17, 1963, 83 S. Ct. 1790:

"It is too late in the day to doubt that the liberties of religion *and expression* may be infringed by the denial or *placing of conditions* upon a benefit or privilege. American Communications Assn. v. Douds, 339 U.S. 382, 390; Wieman v. Updegraff, 344 U.S. 183, 191–192; Hannega v. Esquire, Inc., 327 U.S. 146, 155–156. * * * In Speiser v. Randall, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the free exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition even upon a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.' 357 U.S., at

[34] Chafee, "Freedom of Speech" (1920), 22–24; Perry, "Sources of Our Liberties," 426.
[35] For discussion of the inadequacy of common law remedies in the age of modern communications, see Beer, "Federal Trade Law and Practice," § 112 (1942); Fainsod & Gordon, "Government and the American Economy," 199 (1941); Geller, "Advertising at the Crossroads," 253–254 (1952).

526. 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.'" (id., at 518).

Congress, while asserting the right to affix conditions on the privilege to use a radio license, has stated that the claimed right "is within the right of the people, *acting through the Congress*" ("Freedom of Communications," S. Rept. 994, pt. 6, 87th Cong., 2d sess., April 17, 1962, p. 1).

44. Conclusion: Point III: The proposed rules would violate the First Amendment guarantee of freedom of the press. Despite the absence of an historic rationale for freedom of speech in advertising, it is likely that the courts will declare that the free enterprise system includes a measure of freedom for advertising. In view of the First Amendment problems, the rules proposed herein clearly should not be adopted by administrative action.

IV. NO SHOWING OF SUBSTANTIAL NEED OR DESIRABILITY FOR ADOPTION OF THE PROPOSED RULES HAS BEEN MADE, OR IS APPARENT FROM THE AVAILABLE FACTS

45. The showing of need or desirability in the Notice is confined to paragraphs 4 and 5 which read:

"4. Our case-by-case treatment of the problem, however, has not been satisfactory. Recently, we have noted a large number of applications for broadcast authorizations which presented serious problems, and coupled with this, our files are replete with substantial complaints from the public regarding the number of commercial announcements broadcast by some stations, the frequency and number of program interruptions for the broadcast of commercial announcements. Finally we cannot fail to note that the continuing efforts of the National Association of Broadcasters in attempting to accomplish a measure of self-regulation—which, obviously, would be preferable to any action by this Commission have not met with success. Having promulgated commercial standards through its Codes of Good Practice, the NAB has only been able to enlist about 38 percent of all radio stations and 70 percent of television stations to subscribe to the Codes. And, with respect to those that have subscribed, the NAB, by itself, lacks effective sanctions to prevent abuses.

"5. The establishment of generally applicable standards by means of rule-making procedures, on the other hand, may have a number of advantages. For, in addition to permitting an over-all treatment of the problem, not available in case by case consideration, the rules adopted woud have the added advantage of being definite, of providing guidance to licensees and of applying equally to all competitors in a given market. We recognize, of course, that there is a wide range within which various degrees of commercialization could be considered reasonable. However, we think the advantages of a definite rule would outweight this consideration. Moreover, the adoption of specific rules would, not necessarily, foreclose the fiexibility inherent in our case-by-case treatment * * * nor preclude us from amending our standards to accommodate changes in the broadcast field. In this latter connection, we recognize that the NAB has amended its Codes on numerous occasions over the years."[36]

46. The extent of overcommercialization if judged by actualy broadcasting of advertising in excess of the NAB radio and TV codes is unknown to us. Storer stations comply with the Codes, and we are aware that of our competitors, some comply and some do not. We do not know the factual extent of the problem. The only indication of the scope of the problem is certain data in Chairman Henry's address of September 24, 1963 (Mimeo. 40841) which states that the complaints as to commercials—"their number, length, frequency, loudness, timing and so forth"—totalled about 2,500 in fiscal 1962 (year ending June 30, 1962) and of these "about 35 percent—the biggest category—related to length, amount and frequency." To analyze these figures, 35 percent of the total complaints amounts to *875 complaints about commercials in a 12-month period.* This number of complaints may add up, but it is very small (if not *de minimis*) compared to the number of stations on the air duirng fiscal year 1961–62. As shown in the 1961 FCC Annual Report (p. 58), at the start of the fiscal year 3,602 AM, 553 commercial TV, and 889 commercial FM stations were operating, a total of 5,044 commercial broadcast authorizations. This is less than 1 complaint for every 5 stations on the air. Since about 64,836 hours of AM programs and 9,954

[36] "Additionally, specific rules would provide us with a broad range of sanctions—any one of which could be called into play soon after discovery of an abuse. Thus, instead of the 'death penalty' (i.e., revocation or denial of renewal of license), which, absent a rule are the only sanctions available to us, we could issue a cease and desist order pursuant to Section 312(b) of the Communications Act * * * or impose a forfeiture pursuant to Section 503(b) * * *."

hours of TV programs were *broadcast daily* (assuming 18-hour daily operation on the average), the complaints were truly infintesimal.

47. The fact that 70 percent of all TV stations and 38 percent of all AM subscribe to the Codes does not, in our opinion, indicate that the Codes "have not met with success." Attached hereto is a study of the scope of TV Code membership which shows that in the top 225 television markets containing 497 commercial TV stations, 384 subscribed to the Code, and only 81 VHF did not. The study may be summarized as follows:

Markets	Circulation	Total TV stations	NAB TV code subscribers	Nonsubscribers		Percent subscribing
				VHF	UHF	
1 to 50	38,728,800	167	138	20	9	82.6
51 to 100	11,238,100	136	109	12	15	80.1
101 to 150	5,640,400	101	80	17	4	79.2
151 to 200	2,573,300	68	41	25	2	60.3
201 to 225	414,900	25	16	7	2	64.0

In addition, all the national networks are TV Code subscribers, and their programs constitute about 50 percent of the total programing of their affiliates; and 15 film producers and distributors are Code Film Affiliates. Our experience in the 5 TV markets in which Storer stations operate, is that the Code subscribers in those markets live up to the Codes. We believe that these figures indicate that the NAB TV Code is a very substantial success, and that there is no need whatsoever for government intrusion into this field, where industry self-regulation is meeting substantial success. (It is possible that quantity of actual advertising continuity or spot announcements is not the real problem. We have noted that introductions to programing, including billboards and credits to stars, producers, etc.; and the closing of programs, listing credits required usually by union agreements and talent agreements, cause intervals between actual programs to appear excessive. This is a problem, it appears, that could be worked out by negotiation with those receiving credits. Some of this material, however, may be "fill" which is inserted to make the length of the program fit the intended 15-minute, 30-minute, or 60-minute scheduled length.)

48. The situation in AM radio presents a different problem. The fact of only 38 percent Code membership, however, is not decisive. The competitive situation in radio has been greatly increased since World War II. The number of radio stations has grown from the 2,006 on-the-air in 1949 to over 4,000 on-the-air in 1963. FM stations, which obtain some of the advertising support, have also increased slightly. This competitive situation is the apparent cause for the "overcommercialization" which some stations broadcast (judged by compliance with the NAB Code). It seems clear that, if it is true that AM stations generally do not comply with the NAB AM Code, they cannot be forced to comply by Federal regulations without forcing numerous stations into bankruptcy. We know of no way to compel thousands of marginal broadcast stations to operate their stations so that they will go bankrupt. The amount of regulation required, even if fully justified and otherwise, lawful, would require the forces of a Gestapo.

49. Based on our experience in broadcasting, we believe that the cause for the alleged "overcommercialization" of some AM stations is that there is a fundamental difference between what the listener seeks from AM and from TV. This desire of the listener affects the listenability of AM rdio as compared to the viewability of TV. The TV viewer generally tunes *to a program;* the radio listener generally tunes *to a station.* The proof of this fact, if needed, can be found in the program listings of TV stations as compared to radio program listings. With the widespread choice of radio signals in all major markets, the radio licensee must provide a "sound" which is listenable *to his audience.* If he does not do so, he will lose his audience, his ratings, and his revenue. Listener choice and licensee self-interest can be counted upon, we submit, to compel the radio licensee to provide a service acceptable to his audience regardless of the number of commercial minutes or number of announcements. We do not think it is either possible or desirable to prescribe a national standard for overcommercialization which 4,000 AM radio stations throughout the Nation can comply with and stay in business. The only alternatives are as much self-regulation as is possible, or government dictation of broadcast content. More-

over, it is impossible for any "outsider" (even a broadcaster from a different area) to judge the acceptability to the local audience of the "sound" of a particular radio station. We, in the business, continually are surprised that stations which to us seem "objectionable" win high audience acceptance in their markets. It is submitted that the Commission, in its Comments on H.R. 5741, A Bill to Amend the Communications Act of 1934 to provide for the regulation of the amount of radio and television program time which may be devoted to advertising, stated the only lawful or practicable approach to the "over-commercialization" problem:

"The Commission is not unaware of the fact that there have been, and are, abuses with respects to the amount of time devoted to advertising over particular radio and television stations and on particular programs broadcast over some stations. We do not believe, however, that the problem can be handled through the imposition of fixed rules by a government agency. The Commission's regulatory experience has indicated that any fixed rule in this area cannot hope to achieve the flexibility necessary for dealing with a multitude of differing and changing program formats. * * *

"The Commission believes, therefore, that imperfect as the existing system may be, it is clearly preferable to attempting to fix any arbitrary limitations on total advertising time per program. It is our opinion that, with the cooperation of the industry through self-regulation and self-restraint, the Commission's present procedures are best calculated to achieve the goal of operation in the public interest without involving the Federal Government in the day-to-day management of the stations in which it cannot and, in our opinion, should not, effectively or properly engage" ("FCC Comments on H.R. 5741," Mimeo. 21521, adopted July 20, 1955).

50. With regard to the desirability of providing a choice of sanctions to the Commission (stated in the Notice, footnote 3) to compel compliance with advertising limitations, we have discussed the hardships that would result to licensees above (supra. pp. 37–38, 46–47). Nor do we believe that the Commission can achieve flexibility by amendment of the rules, or by waiver of the rules. Amendment is too time-consuming a procedure. It precludes experimentation by individual licensees to determine what quantity of advertising is acceptable to its audience, and what quality of advertising is acceptable to the audience in specific quantities. The waiver procedure, in our opinion, would involve the Commission in interminable "ratemaking" preceedings, and would be no more flexible than amendment. It oversimplifies the problem to conclude that the financial success of a station is solely the function of the quantity of commercial time or number of spot announcements broadcast. Operating "know-how," the ability through experience and insight to judge and evaluate the desires and needs of the audience, and to achieve these objectives with a minimum of operating expense, are more important factors in successful operation of many stations than the mere quantity of advertising time. Aside from becoming involved in the business aspects of broadcast operation, if the proposed rules were adopted, the Commission would become involved in the same type of economic considerations and financial qualification hearings that impeded the administration of the Communications Act until the Supreme Court decision in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). See *Warner, Radio & Television Law*, § 13.a, 22.a.

51. Conclusion: Point IV: In the absence of more substantial evidence of "overcommercialization," and of resulting failure of broadcast licensees generally to furnish a program service which serves the public interest, there is no ground for adoption of the proposed rules. As with the 1941 network regulations, the Commission should be "at pains to limit (its) regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market." (supra, p. 3)

V. THE PROPOSED RULES WOULD INVOLVE DAY-TO-DAY CONTROL BY THE COMMISSION OF BROADCAST MATERIAL, CANNOT BE APPLIED WITHOUT DISCRIMINATION IN THE ABSENCE OF CREATION OF A MONSTEROUS BUREAUCRACY, AND WOULD INEVITABLY INVOLVE THE COMMISSION IN CENSORSHIP AND ABRIDGEMENT OF FREEDOM OF SPEECH AND OF THE PRESS

52. As indicated above (pp. 7–8), the proposal to adopt specific rules limiting advertising is expressly designed to provide for the use of penalties as an enforcement device. The rules would govern broadcast time segments as short as five minutes, and station breaks in TV programs, and it must be assumed

that an effort would be made to enforce them and penalize violations by about 4,000 AM stations, 500 commercial TV stations, and 900 commercial FM stations. The Notice indicates that the "broad range of sanctions * * * could be called into play soon after discovery of an abuse" (footnote 3). Thus, the rules, if adopted, would require the policing of the entire broadcast day, and minute scrutiny of the daily broadcast schedule of over 5,000 stations—amounting as stated above (p. 56) to approximately 64,836 hours of AM programming and 9,954 hours of TV programs *daily*.

53. Such policing cannot be accomplished with the Commission's present personnel allotment. The 1962 FCC Annual Report cites the Booz-Allen survey as recognizing its lack of manpower for its present "staggering" regulatory task, in which about 1,512 employees are involved (FCC Ann. Rep. 1962, pp. 16–17). It is impossible to estimate the extensive system of minute-by-minute nationwide monitoring that would be required to perform the functions the proposed rules would require the Commission to assume. If enforcement were limited to action on complaints against specific stations received from the public, the situation would be grossly discriminatory—broadcast licensees would be placed at the mercy of "cranks," "do-gooders," "grudgeholders," the misinformed and the "malevolent." The enforcement of the rules would be haphazard, and would not serve the purpose of their adoption.

54. In terms of licensee freedom, the implications of the proposed rules are even more serious. Each licensee will operate under the day-to-day surveillance of Commission monitors and investigators, studying each minute of the broadcast day to discover infractions of the detailed prohibitions. Even the sanction of forfeiture could threaten a licensee with serious financial penalties. If a 5-minute newscast contained 10 seconds of "excessive" commercial material, the maximum forfeiture for a 13-week violation (at $1,000 per day) could total $91,000. The licensee would be faced with the same penalties if he failed to cut off the air network commercials which exceeded the specified prohibitions. He would be faced with the problem of interpreting what constituted "advertising" or "commercial" material; in connection with network programs where preview is difficult or impossible, the licensee would have to rely on his own monitoring staff to make such determinations simultaneously with receipt of the network origination. On local originations, reading speed, and speed of operation of transcription devices could result in infractions of the rules.

55. Under these conditions, the licensee could have no freedom. The very persuasiveness of the rules, combined with penal threat, amounts to control by censorship of the daily, minute-by-minute operation of the station, and would place in the hands of thousands of Commission monitors and inspectors powers which could be abused and result in imposing their ideas on the station licensee. Without impugning the motives of the present Commission or staff, it is submitted that these rules invite a situation which the Commission could not wholly control to prevent abuses. As former Judge Justin Miller said in another connection:

"This we call government by intimidation. It is bad enough under any circumstances; it is vicious as applied to a medium of information, news and education. We are apt to be carried away by our displeasure at some of the things we hear over the radio. People not schooled in the background of governmental overreaching which preceded the adoption of our Constitution rush naturally to government to get the reforms which they would like to see take place." (See, H. Rept. 388, 82d Cong., 1st sess., May 1, 1951, p. 10.)

56. In *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936) the Supreme Court, invalidating a State tax as an abridgment of freedom of the press, pointed out that the advertising functions of newspapers could not be separated from their news functions for First Amendment purposes. Similarly, broadcast stations are instrumentalities of the free press, and their advertising functions cannot be separated from their news, informational, editorial, etc. functions for Constitutional purposes. A regulatory proposal which involves constant surveillance of the broadcaster's advertising function, the sole source of revenue for most stations, threatening punishment, violates broadcast freedom of the press in the same way that the Louisiana tax on newspapers violated the newspapers' freedom.

"A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves" (297 U.S. at 250).

57. It has been pointed out above (p. 60) that requests for amendment and waiver of the rules would involve the Commission in intricate consideration of

the business and financial operations of broadcast stations. It should be pointed out, also, that even if the original commercial limitations were acceptable to all broadcast stations, the inception of changed conditions would flood the Commission with requests for amendment and waiver which would require additional personnel. A temporary depression, or changes such as those that occurred in radio in the 1950's would require changes in operating, programing and advertising practices that would affect numerous broadcast stations. The scope or nature of such changes cannot be foreseen.

58. Conclusion: Point V: In view of the foregoing results, the price which must be paid for the "certainty" in the Commission policies as to "overcommercialization" which the proposed rules might achieve, would be too great. Certainty would be purchased at the price of broadcast freedom.

CONCLUSION

59. Accordingly, it is respectfully submitted that the adoption by the Commission of the proposed proscriptions on advertising is not supported by adequate showing of need or practicability; is unwise in principle and inexpedient in policy; is beyond the statutory scheme of broadcast regulation; and is in all likelihood unconstitutional under the First Amendment. It is recommended that the Commission terminate this proceeding by simple order, recognizing that Federal rules specifying the maximum advertising content of broadcast stations and programs are neither justified by the facts nor appropriate under the law.

Respectfully submitted.

STORER BROADCASTING COMPANY,
By JOHN E. MCCOY, *Vice President*,
By WARREN C. ZWICKY, *Washington Staff Counsel*.

Dated September 30, 1963.

Analysis of NAB television code membership, September 1963 (225 markets listed according to net weekly circulation)

Market	Circulation	Rank	Total TV stations	NAB TV code subscribers	Nonsubscribers	
					VHF	UHF
New York, N.Y.	5,199,800	1	6	4	2	
Los Angeles	2,615,800	2	7	5	2	
Chicago	2,220,600	3	4	4		
Philadelphia	1,957,500	4	3	3		
Boston	1,675,700	5	3	2	1	
Detroit	1,423,000	6	4	3		1
San Francisco	1,202,900	7	4	4		
Cleveland	1,130,000	8	3	3		
Pittsburgh	1,104,900	9	3	3		
Washington	810,100	10	5	3	1	1
Seattle-Tacoma	766,000	11	5	4	1	
St. Louis	752,600	12	4	3	1	
Providence	713,500	13	3	2	1	
Dallas-Fort Worth	668,700	14	4	4		
Minneapolis-St. Paul	630,800	15	4	3	1	
Cincinnati	630,700	16	3	3		
Baltimore	629,700	17	3	3		
Hartford-New Haven	627,100	18	4	3		1
Indianapolis	598,400	19	3	3		
Milwaukee	580,200	20	4	3		1
Charlotte, N.C.	574,800	21	2	2		
Buffalo	556,200	22	3	3		
Kansas City	540,000	23	3	2	1	
Atlanta	528,100	24	3	3		
Dayton	498,000	25	2	2		
Miami, Fla.	497,300	26	3	3		
Johnstown-Altoona	475,800	27	3	2		1
Houston	467,700	28	3	3		
Harrisburg-Lancaster-Lebanon-York, Pa.	460,100	29	5	3		2
Grand Rapids-Kalamazoo	432,900	30	3	2	1	
Portland, Oreg.	431,000	31	4	4		
Wheeling-Steubenville	426,300	32	2	1	1	
Memphis	423,200	33	3	2	1	
Columbus, Ohio	420,800	34	3	3		
Sacramento-Stockton	418,400	35	3	2	1	
Lansing	416,600	36	2	1	1	
Albany-Schenectady-Troy	404,800	37	3	3		
Syracuse	396,600	38	3	3		
Toledo	394,900	39	2	2		

Analysis of NAB television code membership, September 1963—Continued

Market	Circulation	Rank	Total TV stations	NAB TV code subscribers	Nonsubscribers	
					VHF	UHF
Tampa-St. Petersburg	394,300	40	3	3		
Birmingham	386,600	41	2	2		
Flint-Sagamore-Bay City	386,100	42	3	3		
Nashville	384,100	43	3	3		
Charleston-Huntington	383,600	44	3	1	2	
Louisville	369,500	45	3	2		1
New Orleans	369,000	46	3	3		
Denver	365,200	47	4	3	1	
Greenville-Ashville-Spartanburg, S.C.	343,500	48	4	3		1
Greensboro-Winston-Salem, N.C.	328,700	49	2	2		
Oklahoma City	316,700	50	3	2	1	
Subtotal	38,728,800		167	138	20	9
Wichita	312,400	51	3	3		
San Diego	305,600	52	2	2		
Salinas-Monterey	286,300	53	2	2		
Omaha	286,100	54	3	3		
Tulsa	277,500	55	3	3		
Roanoke	277,300	56	3	3		
Rock Island-Davenport-Moline	276,700	57	3	3		
Norfolk	275,500	58	3	3		
Wilkes-Barre-Scranton	274,300	59	3	2		1
San Antonio	273,800	60	3	3		
Green Bay-Marquette	272,600	61	3	2	1	
Portland, Maine	267,800	62	3	3		
Rochester	266,800	63	3	3		
Raleigh-Durham	255,200	64	2	2		
Champaign-Decatur-Springfield	253,200	65	3	1		2
Cedar Rapids-Waterloo	251,400	66	3	3		
Monroe, La.-El Dorado, Ark.	249,500	67	2	2		
Jackson, Miss.	243,900	68	2	2		
Shreveport	241,400	69	3	3		
Des Moines	240,100	70	3	3		
Phoenix	236,800	71	4	4		
Manchester, N.H.	234,000	72	1		1	
Spokane	229,800	73	3	3		
Baton Rouge	229,300	74	2	2		
Jacksonville	229,200	75	2	2		
Richmond	225,700	76	3	2	1	
Mobile, Ala.-Pensacola	223,400	77	3	2	1	
Madison	220,400	78	3	2		1
Little Rock	218,100	79	3	3		
Knoxville	216,200	80	3	2		1
Orlando-Daytona	211,600	81	3	3		
Binghampton	209,500	82	3	2		1
Sioux Falls	206,600	83	2	2		
Cape Girardeau, Mo.-Paducah-Harrisburg	203,200	84	3	2	1	
Evansville, Ind.	197,100	85	3	3		
Hastings-Kearney-Lincoln, Nebr.	190,500	86	3	3		
Salt Lake City-Ogden-Provo	189,500	87	3	3		
Fresno	188,500	88	4	3		1
Peoria	182,900	89	3	2		1
Youngstown	181,000	90	3	2		1
Greenville, N.C.	175,200	91	2	1	1	
Columbia, S.C.	173,900	92	3	1		2
Chattanooga	171,000	93	3	2	1	
Augusta, Ga.	169,400	94	2		2	
Springfield-Holyoke, Mass.	161,600	95	2			2
Erie, Pa.	161,600	96	2		1	1
Rockford, Ill.	156,900	97	2	1		1
Fort Wayne	156,500	98	3	3		
Beaufort-Port Arthur	150,800	99	3	2	1	
Burlington, Vt.-Plattsburg	150,500	100	2	1	1	
Subtotal	11,238,100		136	109	12	15
Bristol, Va.-Johnson City	149,500	101	2	1	1	
Terre Haute	148,900	102	1	1		
Duluth-Superior	148,900	103	2	2		
Columbus, Ga.	144,800	104	2	2		
Albuquerque	144,300	105	3	3		
Florence, S.C.	142,300	106	1	1		
Austin-Rochester, Minn.	138,900	107	3	3		
South Bend-Elkhart, Ind.	137,800	108	3	3		
Austin, Tex.	132,600	109	1	1		
Montgomery, Ala.	132,000	110	3	1		2
Joplin, Mo.-Pittsburg, Kans.	131,400	111	2	1	1	
Springfield, Mo.	131,100	112	2	2		
Utica	129,400	113	1	1		

Analysis of NAB television code membership, September 1963—Continued

Market	Circulation	Rank	Total TV stations	NAB TV code subscribers	Nonsubscribers	
					VHF	UHF
Bakersfield	129,100	114	3		1	2
Hawaii	129,100	115	10	5	5	
Hannibal-Quincy	128,100	116	2	2		
Wichita Falls, Tex	125,900	117	2	2		
Topeka	125,700	118	1	1		
Albany, Ga	120,900	119	1	1		
Charleston, S.C	120,400	120	3	2	1	
Sioux City, Iowa	118,600	121	2	2		
St. Joseph, Mo	117,700	122	1		1	
Tallahassee-Thomasville	117,200	123	1	1		
Columbia-Jefferson City, Mo	116,700	124	2	1	1	
Waco-Temple, Tex	115,000	125	2	1	1	
Fargo, N. Dak	107,400	126	3	3		
Chico-Redding, Calif	106,000	127	2	1	1	
Wausau, Wis	105,900	128	1	1		
Amarillo, Tex	102,900	129	3	3		
Lubbock, Tex	101,800	130	2	2		
Cadillac-Traverse City, Mich	98,800	131	2	2		
El Paso, Tex	98,600	132	3	2	1	
Corpus Christi, Tex	98,000	133	2	2		
Yakima, Wash	97,700	134	2	2		
Tyler, Tex	97,000	135	1	1		
Lafayette, La	96,600	136	2	2		
West Palm Beach, Fla	96,500	137	2	1	1	
Dothan, Ala	95,300	138	1		1	
Wilmington, N. C	92,100	139	1	1		
Macon, Ga	91,400	140	1	1		
Savannah, Ga	91,300	141	2	1	1	
Tucson, Ariz	90,300	142	3	3		
Mankato, Minn	90,000	143	1	1		
Abilene-Sweetwater, Tex	88,000	144	2	2		
La Crosse, Wis	87,600	145	1	1		
Bluefield, W. Va	86,500	146	1	1		
Bangor, Maine	86,500	147	2	2		
Ottumwa, Iowa	86,100	148	1	1		
Bismarck, N. Dak	86,100	149	2	2		
Odessa-Midland, Tex	85,700	150	2	2		
Subtotal	5,640,400		101	80	17	4
Santa Barbara, Calif	84,900	151	1	1		
Lexington, Ky	82,900	152	2	1		1
Meridian, Miss	82,000	153	1	1		
Cheyenne, Wyo	75,100	154	1	1		
Boise, Idaho	74,500	155	2	2		
Eau Claire, Wis	74,200	156	1	1		
Eugene, Oreg	74,200	157	2	2		
Eureka, Calif	73,900	158	2		2	
Alexandria, Minn	70,900	159	1	1		
Alexandria, La	70,200	160	1	1		
Lower Rio Grande, Tex	69,000	161	2	2		
Ada, Okla	67,100	162	1		1	
Colorado Springs-Pueblo, Colo	66,000	163	3	3		
Lake Charles, La	65,800	164	1	1		
Oak Hill, W. Va	64,700	165	1	1		
Columbus, Miss	60,300	166	1		1	
Watertown-Carthage, N. Y	58,900	167	1	1		
Fort Smith, Ark	57,500	168	1		1	
Marquette, Mich	[1] 57,500	169	[1] 1		[1] 1	
Billings, Mont	56,600	170	2		2	
Clarksburg-Fairmont, W. Va	55,200	171	2		2	
Jackson, Tenn	55,200	172	1		1	
Idaho Falls-Pocatello, Idaho	55,200	173	2	1	1	
Harrisonburg, Va	52,400	174	1	1		
Panama City, Fla	51,200	175	1	1		
Bellingham, Wash	49,800	176	1	1		
Hattiesburg-Laurel, Miss	49,800	177	1		1	
Roswell, N. Mex	48,100	178	1	1		
Ardmore, Okla	47,900	179	1		1	
Butte, Mont	47,600	180	1		1	
Reno, Nev	45,900	181	2	1	1	
Rapid City, S. Dak	45,600	182	2	1	1	
Akron, Ohio	44,800	183	1	1		
Las Vegas, Nev	44,400	184	3		3	
Lima, Ohio	44,300	185	1	1		
Great Falls, Mont	43,400	186	2	1	1	
Greenwood, Miss	41,700	187	1		1	
Medford, Oreg	41,200	188	2	1	1	
Lufkin, Tex	38,200	189	1	1		

[1] Not included in totals here; WLUK counted in market No. 61 above.

Analysis of NAB television code membership, September 1963—Continued

Market	Circulation	Rank	Total TV stations	NAB TV code subscribers	Nonsubscribers	
					VHF	UHF
Minot, N. Dak.	37,000	190	2	2		
Tupelo, Miss.	36,700	191	1		1	
Salisbury, Md.	34,900	192	1	1		
Casper, Wyo.	34,300	193	1	1		
Ft. Dodge, Iowa	33,300	194	1			1
Ensign, Kans.	32,000	195	1		1	
San Angelo, Tex.	28,200	196	2	2		
Huntsville, Ala.	28,100	197	1	1		
Grand Junction-Montrose, Colo.	27,300	198	2	2		
Twin Falls, Idaho	25,900	199	1	1		
Laredo, Tex.	25,000	200	1		1	
Subtotal	2,573,300		68	41	25	2
Presque Isle, Maine	22,900	201	1	1		
Zanesville, Ohio	22,600	202	1	1		
Decatur, Ala.	22,300	203	1			1
Missoula, Mont.	22,100	204	1	1		
Yuma-El Centro, Calif.	22,100	205	1	1		
Aberdeen, S. Dak.	21,500	206	1	1		
Monahans, Tex.	20,900	207	1	1		
Greenfield, Mass.	20,100	208	1			1
Florence, Ala.	19,800	209	1	1		
Parkersburg, W.Va.	19,500	210	1	1		
Mitchell, S. Dak.	19,200	211	1	1		
Roseburg, Oreg.	18,900	212	1	1		
Klamath Falls, Oreg.	18,400	213	1		1	
Big Spring, Tex.	17,200	214	1	1		
Fort Myers, Fla.	16,200	215	1	1		
Dickinson, N. Dak.	15,500	216	1	1		
Grand Forks, N. Dak.	15,000	217	1	1		
Clovis, N. Mex.	13,700	218	1		1	
Coos Bay, Oreg.	13,200	219	1		1	
Goodland, Kans.	12,100	220	1	1		
Carlsbad, N. Mex.	11,200	221	1		1	
Selma, Ala.	9,900	222	1		1	
Pembina, N. Dak.	9,000	223	1	1		
Riverton, Wyo.	7,800	224	1		1	
Glendive, Mont.	3,800	225	1		1	
Subtotal	414,900		25	16	7	2
Code subscribers included above			497	384	81	32
Code subscribers not included above				24		
Grand total	58,595,500		497	408	81	32

Mr. ROGERS of Texas. Mr. Duke of Dumas, Tex. Mr. Duke is from the area in Texas that I have the honor to represent. Mr. Duke has been there a long time and is a respected citizen of the area. I am very happy to have you here. I may have to leave to go to the floor. If so, I will turn the chair over to Mr. Rostenkowski.

STATEMENT OF KENNETH E. DUKE, DUMAS BROADCASTERS, INC., DUMAS, TEX.

Mr. DUKE. I am Kenneth E. Duke, of Dumas, Tex. With my wife, I own 80 percent of Dumas Broadcasters, Inc., operators of KDDD and KDDD-FM, at Dumas, Tex. The remaining 20 percent of the stock of Dumas Broadcasters is owned by the sales manager of KDDD, Mr. Al Tremble. I have had ownership of this radio facility since May 1, 1959. Prior to that time, I was the general manager of the same radio station under previous ownership. I have, then, been the operator of radio station KDDD for more than 14 years. I have been employed in the radio business since I was 16. I am now 41. With

the exception of a few months at a time for schooling and approximately 3½ years in the Armed Forces, I have spent my working life in the broadcasting business in one capacity or another. Radio has been good to me. It has provided me a livelihood, an opportunity to accumulate some holdings in the material world, and an opportunity to get into debt up to my ears in the purchase of the station that I operate.

This, then, briefly, is my background. It has had its rewards: it has been most pleasant. But, I'm not sure that the future holds the promise of pleasant rewards in the broadcasting business. I have come to this committee to express a favorable opinion of the legislation under study. Because this legislation is diametrically opposed to a proposed ruling that will restrain the potential of a future in the broadcasting business. This is my bread and beans. I own no other property other than a five-room house. I have no other occupation to fall back on.

My future is in the broadcasting business, good or bad. The proposal of the Communications Commission not only will limit the amount of revenue that I can provide for myself and my employees, but will, I believe, deprive me of a thing much more fundamental; my own right to choose how I can operate my station, so long as I operate in the public interest.

I am completely aware that I cannot operate in my community unless I maintain a service to my listeners from my station. We do, and have always done, everything within our power to maintain a high standard of community service broadcasting. More than that, we realize that we cannot operate in our community if we operate in bad taste. This is not to say that we don't make a mistake now and then; we do, but we do not, for instance, accept hard liquor advertising. It's not against the law nor the rules of the Commission to do so. We don't do it, because we believe that liquor advertising on the air would be in bad taste, such that our listeners, and subsequently our sponsors would not listen to us nor buy from us. This, of course, would put us out of business. The same principle applies in the manner in which we schedule commercial content on the air. If we schedule too much commercial material on the air, we know that our listeners will find another station to listen to, a TV station to watch, a newspaper to read, or just maybe go fishing. In any event, we stand a good chance to lose our listenership if we try to force feed the public. Without our listenership, again, we are dead.

Our station belongs to the National Association of Broadcasters, because we believe that within the organization there are those who can keep us informed on items of interest in the industry that will be of benefit to us. We do not participate in the code section of the NAB. We feel that we still have the prerogative to choose the number and content of our commercials. We know our town. The NAB does not. Dumas, Tex., by its lack of acceptance of our radio station can put us on the shelf. NAB code limitations would, then, have no purpose in our operation. Back of it all, there is the freedom of choice on whether we are to be a code subscriber or not.

Suppose for a moment, that the rule proposal of the Communications Commission is made a rule. Where can I expand? I don't feel that I can raise my rates to compensate for lack of numbers of commercials. I have effected only one rate increase since 1948. Since

that time, our town has seen a semiweekly newspaper grow into a daily paper, and a second newspaper, a semiweekly paper, has been established. Competition has kept down a rate increase for our station since 1956.

Our area of the Southwest is infamous for its wild weather. We have overnight weather changes that do credit to a science fiction movie. Now should we be limited to the number of announcements we can make, surely we would have as many scheduled in the early morning as possible. Suppose, for a moment, that we have one of our overnight snow-blow storms. These people call in, all wanting to advertise. One wants to advertise that he has insulated underwear; another that he has stock tank heaters; and a third wants everyone to know that he has tire chains. What will we do? Will we tell them that we can't make the announcements because of Federal regulations? Radio fills a vital need for those things that demand immediacy. Will we have to leave openings in our schedule for just such times, only to have them unsold on those days when they are not needed?

This may sound extreme to you, but it is very real to us who operate in the small markets. For instance, in many small markets, as in ours, there is a once-a-month promotion called dollar day. This is a concentrated effort of merchants in our town to get the public in for special merchandising buys.

The number of announcements we may run in regard to dollar day exceeds those of some other days by far. Retail business is not conducted on an even-scheduled day-to-day basis. I do not believe that their advertising can be either. The Tuesdays that follow the once-a-month dollar days normally find us with one of our least productive days of the month. Everyone recognizes that the month of December is one of the biggest merchandising months, while June is a much more quiet month, businesswise. So goes our advertising revenue. It is ironical that those of us who operate daylight AM radio stations have more time on the air in June, with less revenue than we do in December when our revenues are in the higher brackets of the year.

The economic factor of the proposed ruling is big. The smaller the broadcast, the bigger the problem would be. But more importantly, should the rule become effective, and x number of announcements be made a rule for each hour, is there any assurance that in a matter of time that someone will think that one-half of x number would be in better taste?

This rule would be comparable to telling a doctor, who certainly serves with a State license in the public interest, that he can see only so many patients per hour or per day. In reality the key to the problem rests with the public at large. They are the ones who can change doctors if the waiting room is too full. The people are the ones who will change stations if mine is too filled with commercial content.

Gentlemen, the proposed rule will choke off my future potential earning power. For those of us who can't compensate with additional business interests, this is a big item in our future. More than that, it will violate my right, as an individual businessman, to make a choice in my own business, when in reality the community I live in already keeps me in line with good taste radio.

I hope my thinking may be of value to you in your study of this question so very vital to people like me.

Mr. ROSTENKOWSKI (presiding). Thank you, Mr. Duke, for your very informative statement. I am sure that the committee has found more points to discuss with you. Mr. Younger?

Mr. YOUNGER. Thank you, Mr. Chairman.

Mr. Duke, you operate a daylight station?

Mr. DUKE. That is right, sir.

Mr. YOUNGER. Were you here yesterday?

Mr. DUKE. Yes, sir.

Mr. YOUNGER. Have you any comment to make on the question of daylight stations, during an emergency, operating in the evening and using that as an excuse to use commercials?

Mr. DUKE. Well, sir, I am sure that there may have been some instances where so-called emergencies have been more in the minds of the operators than they have been in fact real. But I should say, generally speaking, this is not the case, that the daylight operators, by and large, have operated within the limitations of their license and have not perpetuated this so-called emergency.

Mr. YOUNGER. You mentioned here about the sudden change in weather conditions that you have in your area. Under such conditions, you would have emergencies, or announcements.

Mr. DUKE. Yes, sir.

Mr. YOUNGER. Have you ever used that as an excuse to put on some more commercials at night during the time when you could not operate?

Mr. DUKE. Mr. Younger, we are a daylight station, such as that we sign on as early as 8 o'clock in the morning in January. We had some weather that caused us to believe we ought to be on the air with announcements regarding schoolbuses, whether school would be in session or not. And we have been on the air earlier than our assigned time without commercial content. We did not take the opportunity to present commercial material under those circumstances.

Mr. YOUNGER. In general, you would say that that is the policy followed by daylight stations?

Mr. DUKE. So far as I know, of my own knowledge, sir.

Mr. YOUNGER. That is all.

Mr. ROSTENKOWSKI. Mr. Kornegay?

Mr. KORNEGAY. Mr. Duke, I would like to commend you on your statement.

Mr. DUKE. Thank you, sir.

Mr. KORNEGAY. I think it is short and to the point and certainly very graphically points up some of the very practical situations that I am sure operators like yourself are confronted with almost daily.

That is all, Mr. Chairman.

Mr. ROSTENKOWSKI. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROSTENKOWSKI. Mr. Hull?

Mr. HULL. No questions.

Mr. ROSTENKOWSKI. Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROSTENKOWSKI. Thank you very much, Mr. Duke.

Mr. DUKE. Thank you, sir.

Mr. ROSTENKOWSKI. Our next witness will be Mr. W. M. Jones, president of the Mississippi Broadcasting Association, Brookhaven, Miss.

STATEMENT OF W. M. JONES, PRESIDENT, MISSISSIPPI BROADCASTERS ASSOCIATION, BROOKHAVEN, MISS.

Mr. JONES. Mr. Chairman and members of the subcommittee, I am W. M. Jones, president of the Mississippi Broadcasters Association and owner and operator of Radio Station WCHJ, Brookhaven, Miss. I speak my own personal views as well as the unanimous views, I am sure, of the members of the Mississippi Broadcasters Association.

We emphatically support the proposed amendment to the Communications Act of 1934, H.R. 8316.

We realize that the members of the FCC have a terrifically difficult job to do and that they are conscientious, dedicated, and honorable men. We appreciate their efforts and admire their ability. They face the problem of interpreting the law which created their position and if the Congress can make this one problem of theirs easier we are sure they will be appreciative of that. If the Congress can save them from going into a new field which will involve a tremendous amount of work not now required of them, we feel that the Commission deserves such a break. Since I am not a constitutional lawyer, I will not attempt to convince you of my belief that the proposed action of the Federal Communications Commission in promulgating rules to limit and regulate the length and frequency of advertisements clearly abridges freedom of speech as prohibited by the first amendment to the Constitution.

Nor will I, for the same reason, attempt to demonstrate to you that such action by the Commission is not only unauthorized but is specifically prohibited, by the very act which created the Commission when it forbade any censorship. The courts and the Commission itself have defined censorship as "the prohibition of publication in advance of publication" (*Farmers Education & Co-operative Union of America* v. *WDAY, Inc.*, 360 U.S. 525, 31 Ed. 2d 1407 (1959)).

These matters of legal interpretation, while I have my own definite opinion as indicated, I will leave to more capable legal minds. What I am qualified to discuss with you is some of the actual, practical effects which I, from my experience in broadcasting, anticipate would reasonably result.

Let us review the situation as it now exists in regard to the length and frequency of advertisements and compare it with what we could reasonably contemplate would result from implementation of the proposed rule by the Commission.

The broadcasting industry is not a utility. It is a free competitive business. Broadcasters, by their licenses from the FCC, are not thereby granted any sort of monopolistic privilege. Radio broadcasters face stringent competition from (1) other radio stations in the same community; (2) other radio stations in other communities; (3) television stations in the same or other communities; (4) newspapers; (5) magazines; (6) billboards; and (7) direct mail and other forms of advertising that I have mentioned.

If my station begins to carry too many commercials, listeners immediately begin to seek other radio stations to listen to, or other forms of entertainment, and, with the loss of listeners goes the loss of persons inerested in paying me to broadcast commercials. If I set my price for commercials too high, advertisers seek other means of

advertising; if I set my price too low I receive increased orders for commercials and again, with an increase in commercials there results a loss of listeners and ultimately a reduction in the frequency of commercials.

If my commercials are too long, I lose listeners and the commercials lose their effectiveness and fail to produce results and, hence, no more orders for lengthy commercials. If they are too short, they have no effect—produce no results and are not requested by the advertisers.

In my hometown there is one other radio station and this direct competition maintains a natural balance of the length and frequency of advertisements that satisfies the advertiser, the listener, and the broadcaster. The difficulty of achieving this natural balance by rules from a Washington bureau instead of by normal free enterprise and competition is obvious.

Even in communities with but one radio station a satisfactory balance is likewise maintained by the competition of newspapers, radio stations from outside the community, and the other means of advertising. These built-in automatic adjusters of the frequency and length of commercials may be slower at times and occasionally unsatisfactory, but clearly are superior to any artificial substitute. Until there is a clear need and a loud demand by the public for regulation of this normally competitive matter, I see no justification for it. My area has been completely barren of any complaints or criticism by the public of the frequency or length of commercials on the radio or television stations that cover our area.

As the situation exists today, the frequency and length of advertisements are self-regulating by the economic forces of our free enterprise system and in the absence of abuses of the privileges of free enterprise—and that is difficult to imagine—and insistent demand of the public for regulation, there is absolutely no justification for tampering with a system that works beautifully by itself.

And what would result if the Commission were allowed to assume this questionable power? First, the Commission would face an insurmountable problem of framing a set of uniform rules on the subject to fit the variegated problems of various situations of geography, competition, seasons, economic ups and downs, and the inherent differences in sections of the country and in different communities themselves.

It would be impossible to make rules that would treat all broadcasters in the many situations fairly and equally. Metropolitan area stations usually get more national advertising than stations in small communities which are heavily dependent upon local advertisers. Local advertisers do not spend equally throughout the year: strikes, weather, and seasonal sales affect them; planting time and harvest time affect advertisers; holidays have a tremendous effect on advertisers; the onset of the different seasons of the year have an effect. What the local industries are—whether tourist, fishing, agriculture, manufacturing, and so forth—have a great effect upon when the peaks of advertising occur.

Even the days of the week affect the amount of advertising—some products are primarily advertised toward the end of the week while some merchants concentrate on commercials in the early or middle of the week. Stations in communities with no newspaper face a completely different situation from stations in communities with one or

more newspapers. Likewise, stations without other competing stations in the same community have need of different standards from stations with competing stations in the same area.

It would take many years for the rules to be compiled with enough exceptions, variations, and conditions to come close to fitting the needs of the industry and then the body of rules would be so complex and involved that special courses in the Nation's law schools would have to be offered to interpret and understand what it all meant. I say that facetiously. In fact, these rules might open entire new fields of practice for lawyers. I trust that the lawyers in Congress will not seize that as a reason for opposing the proposed bill.

Such regulation would seriously hurt the broadcasting industry. It would hurt it in its competition with other advertising media; it would discourage the opening of new stations; and it would seriously hurt the revenue of every station.

If a limit were placed upon the number of commercials that I could daily broadcast, I would have to do one of two things: (1) either select and choose among applicants for commercial air time which ones I would favor with commercial time or (2) I would have to raise my prices until I lost enough customers to come within the limits set by the Commission. Under the first solution some merchants or advertisers, through no fault of their own, would be necessarily refused air time and thereby be placed in an unfavorable competitive position with their competitors. This is a responsibility I would not relish and one which would not be likely to create goodwill for my station. Furthermore, it would reduce my gross revenue proportionately and possibly change my business from a profitable one into a losing one.

The other solution of raising prices would place my station in an unfavorable competitive position with other advertising media. In fact they could very well take advantage of the situation and reduce their prices until I couldn't get enough business to stay on the air.

If limits are placed on the advertising of broadcasters it would be only fair to similarly limit the amount of ads that can appear in the newspapers, in magazines, on billboards, and that can be sent through the mails. Why not limit the number of ads that a motion picture theater owner can show? Broadcasters are but one segment of the vast advertising industry. Why limit one portion in the amount of business it can do and thereby favor the other segments?

Broadcasters, as well as other advertising media, perform a vital function and service in the Nation's economy. Without massive advertising our economy would seriously suffer. When a limit is placed on any one phase of our economy it hurts the entire economy. Limiting the amount of advertising in broadcasting to supposedly benefit the listening public is like limiting the amount of automobiles than can be produced in order to cut down on highway accidents and smog.

In conclusion I submit that the Federal Communications Commission should be informed by this legislation of what everyone else seems to realize—that it does not have the power to limit the frequency and length of commercials. There is no need for any such regulation since the matter is now properly and adequately self-regulating and to attempt to regulate the matter would open a Pandora's box of evils which would hurt not only the broadcasting industry, but the entire economy of our Nation.

Mr. ROSTENKOWSKI. Thank you, Mr. Jones, for your statement.

Mr. Younger, do you have any questions?

Mr. YOUNGER. No, I have no questions. It is a very good statement.

Mr. JONES. Mr. Chairman, could I answer—Mr. Younger had asked a question previously and I would like to extemporaneously delve into that. He had asked, Does the Commission have any rules on limitation of commercials?

Mr. YOUNGER. Do they have any policy? There is no rule. They contend that they have a policy on this now which they are applying case by case and that this proposed rulemaking only is an extension of the present policy.

Mr. JONES. Congressman Younger, they do not even have that case by case. They have it because the licensee sets that policy. If the renewal or when the licensee applies for a new station, he sets the policy of how many commercials he is going to run and how long they shall be. The Commission, I am sure, in a case by case, in a performance versus your promise, they get their rule from that. The Commission has no rule, they have no formula, they have no policy on that.

I have some renewal application forms here that I should like to direct the Congressmen's attention to section 4, where they ask you to set forth what you have actually done in a composite week and then what you propose to do in the next 3 years. That is the formula that they go by case by case on. I can assure you, they judge you on your performance against your promise.

Mr. ROGERS of Texas. Mr. Jones, do you have quite a few forms you have to fill out as a broadcaster?

Mr. JONES. Mr. Chairman, I can assure you that it almost requires a full-time employee to keep up with the forms that you have to make out for the Commission and especially when you get some letters of inquiry.

Mr. ROSTENKOWSKI. Do you have to employ people to do this work?

Mr. JONES. Mr. Chairman, I have not employed a person because I do it myself. If I did not do it myself, I would have to employ a person to do it.

Mr. ROGERS of Texas. Are they detailed and rather extensive forms?

Mr. JONES. Yes, sir; they are. I might add that they are becoming more detailed and more extensive.

Mr. ROGERS of Texas. Between that and the income tax, you do not have much time for your own business, do you?

Mr. JONES. I might add that with withholding tax and keeping social security and the other, you really do not.

Mr. ROGERS of Texas. The word has come to me that there has been some fear among some of the broadcasters insofar as these hearings are concerned. Do you have any evidence of broadcasters being fearful of retaliation by the Commission?

Mr. JONES. Mr. Chairman, I come from a unique State, the State of Mississippi, where we have no fear, period.

Mr. ROGERS of Texas. Well, let me put the question this way: You have no fear, but do you have any concern that your license might be canceled?

Mr. JONES. We have always felt that concern that our license might be questioned, but we feel that we can justify any action.

I might point out that there has been no revocation of license in Mississippi or no fines of any station in Mississippi. All but two

stations in Mississippi are members of the Mississippi Broadcasters Association. I am a member of the NAB Code and we also have a code, a Mississippi Broadcasters' Code, of which I am a member.

Mr. ROGERS of Texas. Have you had any questionable practices that created a suspension—not a suspension but a holding up by the Commission of a renewal of an application?

Mr. JONES. Yes, sir; we have. In fact, right now my own license—I had a short term renewal. I think I have satisfied the Commission.

Mr. Chairman, we could get into another field. Just recently, you know, eight stations' licenses were—well, they were sent letters inquiring on a very unfortunate incident that happened in my State. I think they can adequately and fully satisfy the Commission of their conduct. And Mr. Chairman, it goes without saying, broadcasters are not 100 percent correct in all their judgment, and I doubt seriously, and I am also a State senator, that I have always been 100 percent correct in my vote on bills.

Mr. ROGERS of Texas. Well, I think that would go for most of us. There is an old story that the fellow said that he only know of one perfect man and the other fellow said he knew of two, also his wife's first husband. I have not met the fellow yet. We are still looking for him.

Mr. JONES. Our broadcasters in Mississippi take a very vital part in community affairs. Numbers of them serve in the legislature, they serve their city in official capacities. They are very interested in down to earth, what the people want and how they can best serve them.

Mr. ROGERS of Texas. Are you required, Mr. Jones, and you folks in that area, to have to keep attorneys more or less on retainer fees in order ot kep your feet out of these traps that seem to be set?

Mr. JONES. Yes, sir.

Mr. ROGERS of Texas. Do you have local attorneys, or do you have to get Washington attorneys?

Mr. JONES. I have a local attorney and I have an attorney and I have an attorney here in Washington.

Mr. ROGERS of Texas. You said something a moment ago in your statement that you hope the possibility of many lawsuits would not prompt some of the members of this committee to oppose this legislation. Let me say to you that the members of this committee who are lawyers are country lawyers and we never got into that business very much because the Washington boys would not let us. So I do not think you need have any fear from that angle.

Mr. JONES. I hope the chairman will know that I said that facetiously.

Mr. ROGERS of Texas. Oh, yes; I understand that.

But you do have this sort of situation where you have to be on constant alert at substantial expense to you to keep up with these different things as they develop, the changes that are made.

Mr. JONES. Mr. Chairman, we learned about the fairness doctrine on Associated Press and it was several weeks before we were notified with an order from the Federal Communications Commission. That is the reason we have to retain lawyers here in Washington, because they are so close to the Commission, they can get that information to us. We can study its effect on us and be advised by them quicker. I realize the trouble the Commission has of getting information for their proposed rules when they change the rules and getting it out to the average station.

Mr. ROGERS of Texas. Have you ever hestitated, Mr. Jones, or any of the folks in your broadcast association, to write your own Congressman about matters that you might have with the Federal Communications Commission?

Mr. JONES. No, sir.

Mr. ROGERS of Texas. We shall not use the word "fear," but thinking that perhaps the Federal Communications Commission might not like it?

Mr. JONES. No, sir; we write our Congressmen and our Senators about what the Commission does and what we think they ought to do regularly. I am sure you are familiar with our Congressmen, especially Congressman Williams.

Mr. ROGERS of Texas. Yes.

Mr. JONES. We think the Commissioners are fairminded men and we do not think they will take any retaliatory action because we inquire as to their action or their conduct, any more than when they inquire into our action and our conduct. We feel they have a right to and by the same token we have a right.

Mr. ROGERS of Texas. But you have had some experiences down there in the last year that have not been very savory, have you not?

Mr. JONES. We think that right now, there is one experience going on that we do not think is being handled, and of course, this is a biased opinion, that it is being handled in a proper level and in a proper atmosphere, very definitely, and I have strong feelings on that, Mr. Chairman.

Mr. ROGERS of Texas. Of course.

Mr. JONES. I think it is all out of proportion. In one particular case, one station is not only being intimidated, it can never—it has not ever had the time—it has a complete staff of some eight or nine men and women, plus a complete staff of attorneys, who are continually answering questions that are proposed by the Commission. That is going on today. I had a number of inquiries that have been made and I do not have it with me. I would hate to say, but they are numerous.

Mr. ROGERS of Texas. But your statement represents the feeling of all the broadcasters there in Mississippi.

Mr. JONES. Yes, sir.

Mr. ROGERS of Texas. Thank you very much.

Mr. Rostenkowski, will you take over for a minute while I go over to the floor?

Mr. ROSTENKOWSKI (presiding). Do you have a staff of lawyers for your organization?

Mr. JONES. I do not have a staff of lawyers. I have an attorney that works for me, Mr. Congressman, and I have an attorney here in Washington, Mr. Held of the Spearman & Roberson firm.

Mr. ROSTENKOWSKI. How long, and I do not want to put you on the spot, but what would you say the public will tolerate in a given hour with respect to commercials on radio?

Mr. JONES. You mean how many commercials they will tolerate?

Mr. ROSTENKOWSKI. How many commercials, how much time consumption?

Mr. JONES. That would depend to a great extent on the type of commercials. They will tolerate a number of some type of commercials more than they will others. One commercial can irritate a per-

son an hour. In fact, it can irritate him all day. I would say between 15 and 25 would be probably as many, and that is taking in the fact that you have good commercials that they have no objection to and some that would be a little irritating.

Some figure between 15 and 25 would be a fair amount. Now, a music station that plays a record, I think listeners have become accustomed to hearing a commercial after the record is finished. Now, it might irritate them if after that record is through, they read four commercials before they played another one. So if you played a record that was a minute and a half long and you read a commercial and you played another one that was a minute and 40 seconds long and you read another one, you can probably get approximately 20 commercials in an hour that will not irritate anyone.

Mr. ROSTENKOWSKI. Have you received any letters at your station complaining of overcommercialization?

Mr. JONES. I have never received a letter of complaint on commercials at my station. We have a policy of fairness. When a merchant gives us a sale, we make sure that the items he is going to advertise that he has them at that price. We do not accept advertising from fortune tellers or mystics or "switch" and "bait" advertisers. We are rather proud of our commercials, because they are loyal that way.

Mr. ROSTENKOWSKI. How many radio stations are there in your area?

Mr. JONES. There are two stations in my town; 18 miles to the north, there are two stations and 18 miles in another direction there is a station. We have five stations in the area, and a daily newspaper and a weekly newspaper.

Mr. ROSTENKOWSKI. And you do not believe you should overburden the Federal Communications Commission with this job?

Mr. JONES. No, sir; I think they have a big job and we ought not to burden them.

Mr. ROSTENKOWSKI. Thank you, Mr. Jones.

Mr. JONES. Thank you, sir.

Mr. ROSTENKOWSKI. Mr. William S. Morgan, the Oklahoma Broadcasters Association.

STATEMENT OF WILLIAM S. MORGAN, ON BEHALF OF OKLAHOMA BROADCASTERS ASSOCIATION

Mr. MORGAN. Mr. Chairman, I am representing the Oklahoma Broadcasters Association. We want to express our appreciation for the opportunity to appear here today. As far as my commercial background is concerned, I am a licensee of a radio station in Norman, Okla., a full-time station. We have been the licensee of that station since 1949 and the construction permit was issued at Norman following a competitive hearing.

I have before me letters that are on record with your committee, with the Federal Communications Commission, the comments filed by the Oklahoma Broadcasters Association, and the letter sent by the Oklahoma delegation to the Federal Communications Commission. I would be glad for this hearing, if it meets with your approval, to read a letter sent to Congressman Rogers on October 31, representing the Oklahoma Broadcasters Association.

Mr. ROSTENKOWSKI. Is there objection?
(No response.)
Mr. ROSTENKOWSKI. Proceed.
Mr. MORGAN (reading):

DEAR CONGRESSMAN ROGERS: Please record the support of the Oklahoma Broadcasters Association for H.R. 8316 as introduced by you. Our association, comprised of over 40 member stations, has received the full support of the entire Oklahoma congressional delegation expressed in a letter signed by all in support of our comments filed with the FCC on this subject. We will advise our State delegation members of our opinion that the passage of H.R. 8316 will go a long way to settle the FCC's on-again off-again efforts to impose artificial and arbitrary controls on programing and advertising content. We commend you for the precise wording in the proposed legislation offered by you.

This was signed by myself, authority of our board of directors. I also have the letter, Mr. Chairman, that we sent—not that we sent, but the delegation from Oklahoma sent, signed by our two Senators and our six Congressmen, to the Federal Communications Commission. I will be glad to read that for the record if you would like me to do so.

Mr. ROSTENKOWSKI. I am sure we can enter it into the record without having you read it, Mr. Morgan. If there is no objection.

Mr. CUNNINGHAM. No objection.

Mr. MORGAN. Thank you.

I also have before me the comments that were filed by the Oklahoma Broadcasters Association at the invitation of the Federal Communications Commission, docket No. 15083, amendment of part 3 of the Commission rules and regulations with respect to advertising on standard, FM, and television broadcast stations. This is on file with the Federal Communications Commission.

Mr. ROSTENKOWSKI. That will be part of the record.
(The material referred to follows:)

SEPTEMBER 6, 1963.

Re docket No. 15083.

FEDERAL COMMUNICATIONS COMMISSION,
New Post Office Building, Washington, D.C.

GENTLEMEN: The Oklahoma congressional delegation, pursuant to your invitation to interested parties to make comments pertaining to the proposed rulemaking in this matter, advises the Commission of its interest and unanimous opposition to the proposed rulemaking.

First, we desire that the Commission be informed that no member of the delegation to this date can recall receiving any complaint pertaining to the overcommercialization of radio broadcasting in the State of Oklahoma. No information has come to the delegation's attention of the issue of overcommercialization being raised by the Commission itself in connection with license renewal proceeding affecting Oklahoma stations during the past year.

Our delegation is of the belief that there is no legal foundation upon which the Commission could base its proposed rulemaking in this field. We respectfully direct the Commission's attention to a 1940 decision of the Supreme Court of the United States in the case of *FCC* v. *Sanders Brothers* (309 U.S. 470, 475) wherein the Court stated in reference to the Federal Communications Act "the act does not essay to regulate the business of the licensee. The Commission is given supervisory control of the programs, of business management, or of policy. In short, the broadcasting field it open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel * * *. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

We are also of the unanimous opinion that the proposed rulemaking would be contrary to the intent of the Congress and would be an illegal extension of the Commission's powers from this standpoint alone.

The exercise of the power sought would fix an earning ceiling on a station's operation. No profit limits should be exercised through arbitrary control over the number of commercials a station would carry. It must carry enough to pay its way. With small broadcasters, a larger number of commercials at lower prices must be sold to meet expenses. Limitations of commercial time would lead to less income for the broadcaster, which in turn would decrease many licensees' ability to carry public service programs.

We would call the Commission's attention to the inevitable economic impact that would be brought about by the adoption of rules that would purport to put all feet in the same pair of shoes in attempting to establish an arbitrary figure as to the number or length of commercials that could be broadcast during a given period over every station in the United States. This would impose severe and undue hardship on all broadcasters, and particularly upon broadcasters in smaller communities where radio service is provided by only one station.

The delegation is impressed with the reasoning and logic set out in the dissents by the two Commissioners that were made a part of the notice to which these comments are directed.

The delegation directs the Commission's attention to the comments filed herein by the Oklahoma Broadcasters Association and advises the Commission that we subscribe to the position stated therein and join in the Oklahoma broadcasters' request that the Commission continue to rely on its existing policies and rules in this field. The delegation firmly believes that the broadcast industry of Oklahoma has established a record in the public interest which merits fullest consideration of the points set forth in the association comments.

Respectfully,

J. HOWARD EDMONDSON,
A. S. MIKE MONRONEY,
U. S. Senators.
CARL ALBERT,
PAGE BELCHER,
ED EDMONDSON,
JOHN JARMAN,
TOM STEED,
VICTOR WICKERSHAM,
Members of Congress.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

Docket No. 15083

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM, and Television Broadcast Stations

OKLAHOMA BROADCASTERS ASSOCIATION COMMENTS AND STATEMENTS OPPOSING PROPOSED RULEMAKING

Pursuant to notice of the Federal Communications Commission, hereinafter referred to as the Commission, inviting comments and statements of interested persons in this matter, the Oklahoma Broadcasters Association, hereinafter referred to as the OBA, composed of 43 member radio stations located within the State of Oklahoma, respectfully submits to the Commission its comments and statements pertaining thereto.

The OBA in advising the Commission that it should refuse to adopt the proposed rules under this docket heading, would call the Commission's attention to the universally held conclusion that all broadcasting should be in the public interest.

The fact that the Commission does not presently have any exact set of scales or measure to determine in advance whether the quantity of the advertising on a given station for a given period infringes on the public interest should not be of startling concern to anyone. It is suggested that the Commission could perhaps labor for the next 100 years and still be short as far as a clear definition of the public interest is concerned. A station is either operating under its license and in the public interest or it isn't. The determination of whether it is or is not should be determined by a fair evaluation of all the facts and circumstances in a given case before the trier of the facts that has the legal jurisdiction to make such determination.

Attention is directed to many such terms used in our society today such as a "reasonable," "fair," "beyond a reasonable doubt," "preponderance of the evidence," "freedom of speech," and many, many others. It is the lack of exactness as might be determined by an absolute rule in defining these terms that provide in this country a great amount of the freedom that we enjoy today. It is generally along these lines that the OBA believes that every licensee should operate his station in the public interest and that any more exact definition of the public interest than already exists in the decisions of the Federal Communications Commission and in the decisions of the courts of this country would be arbitrary, artificial, and would be inviting continuous amendments and modifications.

ANSWERS TO SPECIFIC INQUIRIES

The OBA suggests that the questions asked in paragraph 7 of the Commission's notice in and of themselves, negate the passage of the proposed rule and these questions are answered based on sample poll of the membership as follows:

(1) *Daytime stations.*—The daytime station, of necessity, operates in the public interest in a different way than the full-time station, and the quantity of advertising carried should vary in the same way.

(2) *Sparse population area.*—The station located in a sparsely populated area should operate in the public interest just as a station in a metropolitan area should operate. The big difference that is pointed out here is that the listening public in such an area would be more likely to be captive of the local station than of a given station in a metropolitan market. The station in the sparsely populated area has to satisfy the local service need if it is to exist at all, and it is largely on this basis that the station fulfills its service role to its community rather than upon the number of commercials that it would run in a given hour. Even in this day and age, very few tractors are equipped with radios and a station with a large farm audience must, of necessity, provide commercial time at those times when the audience is listening.

(3) *Seasonal economy.*—We are unable to comment on any specific situation whereir seasonal economy affects the operation of the station. We are advised of a few of our stations located near lake recreation areas that do have more demand for their commercial time in the peak recreation months.

(4) *Winter months.*—The OBA finds that the overhead of a daytime station is practically the same during the winter months as it is during the summer months.

(5) *Paid political.*—It is the OBA's position that the quantity of commercial broadcasts should not be excessive. We see no difference between excessive commercial announcements and excessive political announcements or a combination of both. It is mentioned here, however, that as far as the public is concerned, that during political campaigns, there is a desire to be informed as to the political matters and that the station has an obligation to meet this demand. It must be kept in mind that a station ofttimes has continuing commercial contract commitments and then during a campaign, it has political contract commitments, and on top of these, candidates in several races commence to clamor for equal time so that in a given short period, almost any station, through no fault of its own, could exceed any maximum standard and still be operating in the public interest.

(6) *Waiver.*—The OBA certainly feels that in the unlikely event that the Commission adopted these proposed rules, that a waiver procedure should be established. The circumstances that should be considered in warranting a waiver should be those that commonsense and good judgement would indicate. It would appear that specific circumstances that should be considered would be financial, community needs and problems, economy of the area, hours of the station's operation, number of stations in the market, labor and talent, and others.

(7) *Waiver procedure.*—The procedure to obtain such a waiver should be as simple as possible. A letter request at any time during the license period that the circumstances warranted should be grounds for the Commission considering a waiver. It would appear that the Commission would certainly reserve the right to request additional information all to the end that the Commission have adequate background upon which to base its judgement as to the issuance of a waiver.

PROPOSITION NO. 1

Case-by-case treatment of alleged violations of the public interest is the only fair way to handle such.

The notice of the proposed rulemaking concludes under paragraph 4 as follows: "Our case-by-case treatment of the problem, however, has not been satisfactory."

The OBA respectfully challenges this conclusion. We believe that the notice itself indicates that perhaps the Commission's branding the case-by-case treatment of the problem as unsatisfactory should first be explored from the standpoint of whether or not the Commission has handled the "problem" in a satisfactory manner. The notice states that the Commission's "files are replete with substantial complaints from the public regarding the number of commercial announcements broadcast by some stations, the frequency and manner of program interruption for the broadcast of commercial announcements and the length of some commercial announcements." We believe that the Commission is not without remedies, if in fact it believes that the "substantial complaints" have merit. The Commission has so acted in the past. More than one hearing on renewal applications has been held because the Commission believed the licensee was not providing a "balanced" program structure. See *Walmac Company*, 127 FCC 91, 3 RR 1371 (1947), *Eugene J. Roth*, 12 FCC 102, 3 RR 1377 (1947), and *Hearst Radio Inc.*, 6 RR 994 (1951).

PROPOSITION NO. 2

The OBA does not believe that because the NAB has a code of good practice, that the FCC should adopt this code as a Commission rule.

The self-regulation that the broadcasting industry is seeking to impose upon its membership should certainly be that which the industry, in good faith, believes to be a goal of a high standard of achievement. The industry, itself, recognizes that the location, operation, economic conditions, and many other factors will perhaps delay or prohibit the adoption of the code standards in many stations in the country.

The OBA would ask what the Commission's reaction would be if the NAB should change its code? If the NAB's code of good practice is worthy of the blanket adoption by the FCC, should the Commission not make a complete study of the NAB's recommendations and proposals with an eye to further rules based thereon?

It would seem that for the Commission to say to the industry, you have adopted these high standards, we therefore will make those standards Government regulations, would be the same proposition as a legislature passing laws for the conduct of husbands, simply because most wives were always trying to straighten them out.

PROPOSITION NO 3

The regulation of competition between stations in a given market is a field into which the FCC should not wander too far.

The Commission's notice concerns itself in paragraph 5 with the equality of competitors in a given market. The OBA would ask, Is this a proper concern of the FCC? The listening public in the United States is, generally speaking, not restricted to just hearing one radio station. The listening public also is equipped with radios that can be turned off and on, if in fact a station in a given market is overcommercialized. Is it conceivable that the public or for that matter, the advertisers, will not take care of this competitive situation and if the public and the advertisers do not, upon what conceivable basis can the FCC establish a conclusion that overcommercialization exists?

CONCLUSION

In conclusion, the OBA encourages the Commission to maintain its regulation of broadcast advertising as it has been done in the past. The review of a station's entire past conduct at the time of the renewal of the license should give the Commission adequate leverage to see that the continued operation of the station is in the public interest.

The OBA is not disturbed that the Commission's interpretation of the public interest might vary from year to year or decade to decade any more than the Commission should be surprised at the variations of what the public is interested in. The use of commonsense and experience to arrive at a sound judgment

as to what is in the public interest by those charged with making that determination is a far superior criterion than by detailing in advance every factor that must exist before operation in the public interest can be satisfied.

By action of the board of directors of the Oklahoma Broadcasters Association.

Respectfully submitted.

FITZGERALD & HOUSTON,
By CLEE FITZGERALD.
OBA Counscl.

Mr. ROSTENKOWSKI. Is that all you have, Mr. Morgan?

Mr. MORGAN. Yes, sir.

Mr. ROSTENKOWSKI. Is there any other statement you would like to make?

Mr. MORGAN. The statements that are contained in the comments before the Commission, the statements that are contained in the letter that our delegation has filed with the Federal Communications Commission, are the statements for our association.

Mr. ROSTENKOWSKI. Thank you.

Mr. Cunningham, do you have any questions?

Mr. CUNNINGHAM. Mr. Morgan, relative to the communication which your Oklahoma delegation has sent to the FCC, do you have any knowledge of any acknowledgment?

Mr. MORGAN. No, sir; nothing except an official statement that they did receive it, but we have had no reply as to the content.

Mr. CUNNINGHAM. I was wondering if you had, because I wonder how much influence we have, sometimes, and I would like to know if we have any with some of these regulatory bodies.

Thank you, sir.

Mr. MORGAN. Thank you, sir.

Mr. ROSTENKOWSKI. Mr. Hall, president of Meredith Broadcasting Co.

STATEMENT OF PAYSON HALL, PRESIDENT, MEREDITH BROADCASTING CO.

Mr. CUNNINGHAM. Mr. Chairman, I would like to, if I may, welcome Mr. Hall to these hearings. He has been a friend of mine for quite a long time. The Meredith Broadcasting Co. has a television and radio station in my district and they do an excellent job. I just wanted to say I am pleased to have Mr. Hall here and I welcome his testimony.

Mr. ROSTENKOWSKI. Mr. Hall, it it a pleasure for the committee to hear you. It is always a pleasure to have friends of Mr. Cunningham's here to testify before this committee.

Proceed, sir.

Mr. HALL. My name is Payson Hall, I am president of Meredith Broadcasting Co., a wholly owned subsidiary of the Meredith Publishing Co. Meredith Broadcasting Co. and its subsidiaries are licensees of stations WHEN–AM and WHEN–TV, Syracuse, N.Y.; WOW–AM, WOW–FM, and WOW–TV, Omaha, Nebr.; KCMO–AM, KCMO–FM, and KCMO–TV, Kansas City, Mo.; and KPHO–AM and KPHO–TV, Phoenix, Ariz. I am appearing today on behalf of our stations to express opposition to the rules proposed by the Federal Communications Commission to restrict the number, frequency, and length of commercial broadcast by radio AM, FM, and TV stations.

The "statutory silence" cannot be attributed to an oversight by Congress. The record is clear that Congress was aware of proposals to have the Government control commercial time. Congress deliberately rejected them.

The Radio Act of 1927 resulted in large measure from the Fourth Annual Radio Conference in 1925. The report of committee No. 2 of that conference stated in part:

> *Resolved*, That the conference concurs in the suggestion of the Secretary of Commerce that the problems of radio publicity and advertising should be solved by the industry itself, and not by Government compulsion or by legislation.

Many Senators and Representatives attended the conference. Others became aware of the issue in the debates that culminated in the passage of the Radio Act of 1927. Despite all the pressure to authorize governmental control of broadcast commercials, that act contained only one reference to advertising. That was the requirement that sponsored programs be identified as such.

In 1928, a bill was introduced into Congress proposing to give the Federal Radio Commission the authority to prohibit commercial advertising in broacasting. The bill was not reported out of committee. Thus, Congress refused to take even the first step toward regulating advertising time.

In 1932, the Senate passed a resolution directing the then Radio Commission to provide information on the subject of commercials in broadcasting. The Commission replied as follows:

> Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the Commission to do so under a general standard prescribed by that legislation. While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising.

Thus, the Commission again recognized that existing legislation granted no authority to control commercial time.

Congress was aware, before the Communications Act of 1934 was passed, that the Radio Act of 1927 left the amount of commercial time to be determined by the forces of competition and industry self-regulation. In passing the Communications Act of 1934, Congress was apparently satisfied with that treatment of the matter. The Radio Act of 1927 was incorporated substantially without change, and no provision was made to enlarge the authority of the Commission to regulate the number of commercials or the time devoted to them.

Indeed, Congress explicitly forbade the Commission to interfere in that area. The new act provided that broadcasters were not to be treated as common carriers, nor as enterprises protected from competition, nor as businesses subject to regulated rates and profits. Surely Congress did not intend to confer upon the Commission indirectly, powers which were explicitly denied to it.

In interpreting the new act, the Supreme Court said:

> The act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of programs, of business management, or of policy. Congress intended to leave competition in the business of broad-

casting where it found it (*Federal Communications Commission* v. *Sanders Bros.*, 309 U.S. 470, 475 (1940)).

Until the present attempt to control advertising time, the Commission adhered to the law as thus carefully defined and redefined by the Congress and as authoritatively interpreted by the Supreme Court. As the Commission correctly and ably stated some years ago:

> The whole scheme of regulation embodied in the Communications Act of 1934 is based upon the proposition that the governmental policies appropriate to the areas of free competition rather than those applicable in the public utility and common carrier fields will achieve the most satisfactory utilization of our available broadcast spectrum.

Obviously a Commission that claims the power to control the number of commercials on a station can regulate that station as effectively as if it directly set the rate for those commercials.

Twice in recent years bills (H.R. 5741 in 1955 and H.R. 4571 in 1957) have been introduced to require the Commission to take steps to insure that the amount of broadcast advertising is not excessive. Congress declined to pass these bills, in effect reaffirming the position it took in 1927 and 1934. In fact, the Commission's formal comment on the 1957 bill reflected its own clear understanding of its limited powers. The Commission said:

> The responsibility for determining the amount of radio and television time devoted to advertising is the responsibility of the individual station licensee.

Thus, in claiming the power to regulate the commercial standards of broadcasters, the Commission flies in the face of 40 years of history, the studied and repeated withholding of power by Congress, the interpretation of the Supreme Court and, in fact, the past pronouncements of the Commission itself. In proposing the new rulemaking, the Commission is in fact legislating and not merely exercising its clearly delegated powers.

The trend of thought at the Commission is all the more disturbing because of one of the recommendations made in the report on the FCC inquiry into local live television programing in Omaha, Nebr. The recommendation made by the hearing commissioner, now the Chairman of the Commission, was to the effect that stations shall be required to open their financial records to public inspection. This suggests that broadcasters should be treated as public utilities and regulated as common carriers.

It is calculated to interfere with the exercise of the responsibility which Congress imposed on the licensee, to select programs; it is designed to force a licensee to broadcast programs that in his judgment ought not be presented. Like the attempt to regulate commercials, it is an attack on profits, a penalty placed on success, and an attempt by Government to influence competition.

A further illustration of the proclivity of the Commission to grasp for power is its action in establishing, as of January 1, 1964, a schedule of fees for its services, without the sanction or authority of this committee or of the Congress.

For the sake of exploring some of the issues, however, let us assume that the Commission has clearly defined power to regulate and control commercials. We are compelled to ask why it is asserting the power without significant reason for doing so. FCC Chairman Henry in a speech of September 24, 1963, stated that in fiscal year 1962 the

Commission received about 875 complaints related to the length, amount, and frequency of commercials. Even if each complaint came from a different source, the complaints came from only a minute fraction of the homes with radio, television, or both.

Thus, the Commission proposes to set in motion the ponderous wheels of a bureaucracy to cure an alleged evil that led to fewer than a thousand complaints in an entire year from an infinitesimally small segment of the entire population.

Consider the nature and complexity of the task that the Commission proposes to assume. It will have to do one of two things, it seems to us. It will have to adopt blanket rules that will be unjust to many broadcasters, and then make numerous exceptions that will result in chaos. Or it will have to follow a case by case approach. In either event it will have to consider many complex factors, such as these—I have listed 14 of them:

1. Size and nature of the broadcasting market;
2. Competition from other broadcasters;
3. Competition from other media, such as national and regional editions of magazines, newspapers, direct mail, and billboards;
4. Power of each broadcast station;
5. Frequency of each broadcast station;
6. Coverage (determined by station facilities as well as interference received from other stations) of each broadcast station;
7. Hours of operation of each broadcast station;
8. Programing by each station for a particular audience, for example, by broadcasting programs in a foreign language or to a minority group;
9. Network affiliation or lack thereof;
10. Special competitive disadvantages of certain types of stations, for example, FM compared with AM, UHF compared with VHF–TV;
11. Demand for advertising as affected by the time of day, the day of the week, the season of the year, and special factors such as an area's selection as a test market for a new product;
12. Sources of demand for commercial time, whether from institutional advertisers, national manufacturers, local small businessmen, regional retail chains, and so forth;
13. Whether the station is owned by a sole proprietorship, a small group, or a relatively large segment of the public;
14. The financial condition of the station.

Many stations serve more than one market. In such cases the relevant factors in establishing commercial standards are multiplied.

The Commission itself recognizes that circumstances alter cases. In its May 23, 1963, notice of rulemaking, it invited stations to submit their recommendations for waivers and exceptions. The circumstances that affect each station vary so much, however, that no system of waivers and exceptions can introduce adequate flexibility into the Commission's proposed rules.

In thus proposing to assume a new function, the Commisison is proposing to add enormously to its caseload and to its field enforcement problems at a time when its budget and its energies are consumed by other and far more pressing duties. Indeed, if the Commission is to function efficiently in this field, it will have to set up an army of inspectors, examiners, and other functionaries at considerable additional cost to the taxpayer—all this to take care of a problem which

Chairman Henry says was limited to less than a thousand complaints by our population of 180 million people in fiscal year 1962.

We could raise many other questions. For instance, the Commission is proposing to adopt as rules the voluntary code of the National Association of Broadcasters. Will the association in the future be permitted to change and amend this code to meet changing conditions? If so, will the changes be automatically adopted by the Commission?

Many factors determine the public's reaction to commercials. At this point, the Commission proposes to assume jurisdiction over the length, frequency, and total number of commercials. But suppose there are complaints based on intangibles, such as the content of a commercial, or its placement in relation to programing. Does the Commission claim jurisdiction over the content and placement of advertising? Commercials that are annoying to some people may be extremely interesting or diverting to others. Who is to decide in matters of taste?

Some of the factors, such as content, that may have produced complaints about commercials are placed largely beyond Commission control by the first amendment to the Constitution and by section 326 of the Communications Act of 1934. Other factors, such as placement of commercial messages, are governed by all of the myriad exigencies of station operation and cannot practicably be controlled. The most important factor, individual taste, is intrinsically beyond control.

In summary, the Commission is attempting in our judgment to seize power that has been expressly denied it by Congress. It is proposing to treat broadcasters as common carriers or public utilities. It is approaching dangerously close to areas protected by the first amendment. It is undertaking a task of appalling complexity which will inevitably involve the Commission in the day-to-day business decisions of more than 5,000 licensees.

By the way, I do have our Washington attorney, Mr. Andrew G. Haley, who has served us for a number of years, as well as the broadcasting industry generally, here with me, in back of me.

Thank you very much.

Mr. ROGERS of Texas (presiding). Thank you, Mr. Hall, for a most informative statement.

Let me say this at this time that I am quite impressed with the amount of information and background which has been done on these statements, all of them, including yours. I think they will be most helpful, not only to the committee but to the country as a whole in his problem.

Mr. Rostenkowski?

Mr. ROSTENKOWSKI. I have nothing to say, Mr. Chairman, except that I would like to associate myself with the remarks of the chairman on the depth of these statements. There certainly has been a great deal of research and it is complimentary to those who testify.

Mr. HALL. We are all very much concerned.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. Thank you, Mr. Chairman. I want to commend the witness on the statement which he has made, particularly the legal background which is presented in Mr. Hall's statement, which clearly indicates that the Commission has no authority to do this, but evidently, they want to go ahead and try to do it anyway.

Getting back to Nebraska, one of the recommendations you mentioned in Mr. Henry's report was to the effect that stations shall be required to open their financial records to public inspection. It seems to me that that would be an attempt to get into the profit that a station may make in its operations. I am wondering what, in your judgment, would cause Mr. Henry to feel that he should be able to delve into your financial records?

Mr. HALL. I cannot speak for Commissioner Henry.

Mr. CUNNINGHAM. I understand.

Mr. HALL. At the time of the questioning at the Omaha hearings, I judge that he felt that the complete capacities of the station, including its profits, should be devoted to whatever the Commission determines is programing in the public interest and therefore, our profits were an acceptable measure of whether we were doing an all-out job in his concept and if we had any profits, perhaps we ought to do even some more in the way of programing.

That is not a very good answer, Congressman Cunningham, but it is the best I can give. I cannot see that is serving any worthwhile interest in the public interest. I can see it is of some curiosity to our competition and some curiosity to people who receive salaries and compensation for programing from us. Otherwise, I think it is of no value whatsoever. It would only be a bother and a trouble and an invasion of our private business rights.

Mr. CUNNINGHAM. If I recall correctly, Commissioner Henry said that he did not receive too many replies from the stations commenting on this proposal that we are discussing today. I notice on page 11, your remarks that the stations were invited to submit their recommendations for waivers and exceptions. You say:

> The circumstances that affect each station vary so much, however, that no system of waivers and exceptions can introduce adequate flexibility into the Commission's proposed rules.

Would you think that if it is true that there was not too great a response to the Commission's request, it might be because of what you say here on page 11, which I have just read?

Mr. HALL. I think, Congressman Cunningham, two answers to that. First, it is a little astounding to us as broadcasters to be invited to provide suggestions as to how to perform a regulation which we preponderantly and emphatically think is illegal and against the wishes of the Congress to begin with, and certainly preponderantly feel is not in the interest of the public or better broadcasting. It is a little hard for us to respond to such an invitation.

Second, as we pointed out in this testimony, the complexities of trying to lay down rules of conduct which the NAB code and all of us at stations have been working on for a long time, the complexities of trying to standardize those into simple rules simply defy our capacities to come up with suggestions which will make it possible for the Commission to regulate in a wise and fair manner.

My response is first, I do not think it reasonable to expect us to help to do something which we do not think is lawful and in the public interest, and second, we do not know how.

Mr. CUNNINGHAM. Did you, in spite of those handicaps, respond to them?

Mr. HALL. In this particular instance? No, we did not.

Mr. CUNNINGHAM. That is all Mr. Chairman.

Mr. ROGERS of Texas. Do you feel that that is like asking you whether you want to be hung with a short rope or a long rope, Mr. Hall?

Mr. HALL. I was tempted to make that comment, Mr. Chairman. I am glad that you did, yes, sir.

Mr. ROGERS of Texas. Some of the reaction this bill has caused would indicate to me that had there been a great response from the broadcasters. It is entirely possible that somebody down at that Commission would have taken the position that the broadcasters wanted this, because they did respond and that by their response, they wrote their own law and had no right to complain about it in the future; because, as I pointed out yesterday, word came to me that some of the Commission staff took the position that because I introduced this bill, it was an acknowledgment on the part of the Congress that they had the power and the right to exercise it. Now, with that sort of philosophy at the FCC, I would say the Supreme Court had better watch out.

Mr. HALL. I agree.

Mr. ROGERS of Texas. Thank you very much.

Mr. HALL. Thank you, I was glad to have this opportunity.

Mr. ROGERS of Texas. Mr. Jack Harris, vice president of stations KPRC and KPRC–TV, Houston, Tex.

STATEMENT OF JACK HARRIS, GENERAL MANAGER, STATIONS KPRC AND KPRC–TV, HOUSTON, TEX.

Mr. HARRIS. Thank you, Mr. Chairman.

My name is Jack Harris. I am general manager of stations KPRC and KPRC–TV in Houston, Tex. My broadcast experience dates back to 1935, when I started on the staff of WSM, Nashville, Tenn. I subsequently became associate manager of their station; spent more than 5 years in the Army during World War II as deputy chief of radio public relations of the War Department and later as radio and press communications chief on General MacArthur's staff, AFPAC.

Since 1947, I have been general manager of KPRC and since 1950, general manager of KPRC–TV. I have just completed 5 years as chairman of the NBC Affiliates Committee and for the past 7 years have been president of the Association of Maximum Service Telecasters. With the permission of the committee, I would like to file the written remarks that I have prepared, together with the comments that we filed with the FCC. And I have a few comments to make.

Mr. ROGERS of Texas. Without objection, your entire statement will be included in the record and as a part thereof, following immediately thereafter, will be the remarks and the comments that you made before the Federal Communications Commission in docket 15083.

(The material referred to follows:)

My name is Jack Harris. I am general manager of stations KPRC and KPRC–TV in Houston, Tex. My broadcast experience dates back to 1935, when I started on the staff of WSM, Nashville, Tenn. I subsequently became associate manager of that station; spent more than 5 years in the Army during World War II as deputy chief of radio public relations of the War Department and later as radio and press communications chief on General MacArthur's staff, AFPAC. Since 1947, I have been general manager of KPRC and since 1950, general manager of KPRC–TV. I have just completed 5 years as chairman of the NBC Affiliates Committee and for the past 7 years have been president of the Association of Maximum Service Telecasters.

I have no pretentions to being a lawyer; however, it has been my understanding that it was intended by Congress in its passage of the Communications Act and subsequent amendments thereto that broadcasting in the United States was to be based on free competition and was not to be regulated as a public utility. Additionally, it is my understanding that the proposals before the Commission in docket 15083 amount to censorship, in violation of specific provisions of the Communications Act and the first amendment to the Constitution. I think it should also be pointed out that broadcasters are in competition with a variety of unregulated advertising media, and to impose restrictions on broadcasters of the nature contemplated by the Commission would not only be unfair, but could eventually strangle the broadcast industry. As I have indicated, the subject matter of this bill is under consideration by the Commission in docket 15083. Our company filed comments in this proceeding and for the record I wish to supply copies of these comments.

Having said this, let me point out that KPRC and KPRC–TV are subscribers to the NAB codes and comply with these codes. We have every intention to continue our compliance on a voluntary basis. Thus the imposition of these present codes on a mandatory basis by the Commission would not adversely affect our own operations at this time. However, there are many broadcasters who would be adversely affected, and, indeed, I suspect some might have to suspend their service if compliance became a Federal regulation. I am sure such stations have or will appear before this committee to advise the possible effects upon their own operations. But those stations, such as ours, who are now fully complying with the radio and television codes, certainly object to their becoming a matter of Federal regulation. As I have indicated before, we operate in a highly competitive business, competing with a variety of unregulated media who could well take advantage of a radio or television station's inflexibility to meet changing conditions.

To answer that changing conditions could be met by a corresponding change on the part of the Commission is to ignore the great amount of time required for the Commission to act. By the time the Commission might react to changing conditions there might only be time to attend the burial of some of the patients.

Aside from the foregoing arguments, and there are many more, there are some practical aspects of this problem which must be considered. If the Commission were to adopt its pending proposal on this subject, every licensee, including ourselves, would be under daily, yes hourly, pressure to make sure that one too many spot announcements was not incorrectly scheduled by a traffic clerk or to guard against some other human error which would subject us to penalties and fines by the Commission. The regulatory thicket which would be engendered by the Commission's proposed action is beyond comprehension. Monitoring and extended recordkeeping would not only cause the Commission to hire hundreds of airwave sleuths, but also would require licensees to set up additional procedures and probably have more employees.

Television is still a teenager and has been going through the process of upgrading and improvement over these past 15 years of its operation.

The service we are rendering the people of our area is immeasurably superior to that accorded 13 years ago, or even 3 years ago. Through the competitive processes of the American system, the public has been the principal beneficiary. And, I might add that we do maintain close liaison with our public, and believe we are in the best possible position to judge their likes and dislikes and their wants and needs.

It would be absurd to maintain that commercial practices in American broadcasting are perfect—or that anything else in our society is perfect. But our system of broadcasting, including its commercial practices which has developed along traditional American lines of free enterprise, has given our people the best television programs in the world. If anyone would doubt this, may I suggest that he examine the schedules of foreign television systems and make particular note of the number of American programs which he finds there. We may expect this process of evolution to continue to produce improvement in commercial practices side by side with improvement of the overall product of American broadcasting.

It appears strange, indeed, to me that the Commission has initiated this proposed regulation on commercials. Over the past 3 years, we have received less than one complaint a year on commercials on KPRC and KPRC–TV from listeners and viewers in our area. And, these two complaints have not been on the length or number, which the Commission proposes to regulate, but rather on the aspects of specific commercials. One of the commercials was subsequently

changed by code persuasion. The other complaint, we felt was completely unjustified. The Commission itself appears to justify its proposed rulemaking on the basis of some 2,500 letters, of which only 35 percent related to length, amount, or frequency of commercials. Thus, according to Chairman Henry's speech on September 24 in New York, the size of the FCC sample for basing their action is 875 letters, some 17½ letters per State or approximately 1 letter for each 6 licensed broadcast stations. Stated another way, it is 1 complaint for each 270,000 broadcast receivers in the hands of the public. We, in our business, sometimes quarrel with sample sizes of professional broadcast researchers, but these samples are infinitesimal by comparison. I think one of the most sage comments on the proposal on this subject now under consideration by the Commission was made by a member of the Commission, Robert T. Bartley, when he dissented to the Commission's action in issuing its notice of proposed rulemaking. He said, in part:

"I dissent to the issuance of this 'proposed rulemaking.' I view it as an irritating act of futility. It is inconceivable to me that, when the responses are considered, the Commission would adopt such a rule. I base this prediction on the knowledge of broadcasting which the Commission already has. We know that some stations are able to operate the year around by reason of the revenues produced mainly during certain seasons. We know that some stations operate a full week on revenues produced from Thursday to Saturday. We know that some stations can operate full time (some 24 hours) on revenues produced in peak listening hours. We should know that some stations with a greater number of commercials are more listenable because of their attention to the quality of production and presentation (sometimes entertaining and many times informative) where, on the other hand, some other stations allow screaming, irritating, and obnoxious commercials which result in headaches that the advertised product is supposed to cure, but, because the commercials are fewer in number, would meet the code requirements any quarter hour of the day or night or season."

So even if the Commission should adopt the proposed rule, some people would still complain about the noise and nature of commercials, if not the frequency. The next step would be to attempt to set standards of quality, and who would be the judge of this? I rather doubt that the Commission could or would undertake this monumental task, nor is there any agency, public or private, which could practically and fairly assume this responsibility. This is indeed an irritating act of futility, as Commissioner Bartley stated. In order to insure that the Commission does not engage in this fruitless exercise, I urge the adoption of H.R. 8316, or a bill of like nature. I have only one question regarding H.R. 8316: Does the language "by rule" permit the Commission, by policy declaration, or some other method, to obtain the same result as it now proposes by docket 15083? If so, the language should be rewritten so that this possible loophole is closed.

Thank you for your time and attention.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

Docket No. 15083

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations with respect to advertising on Standard, FM, and Television Broadcast Stations

COMMENTS OF THE HOUSTON POST CO.

Comes now the Houston Post Co., by its attorneys, and files its comments with regard to the notice of proposed rulemaking in the above-captioned proceeding released May 17, 1963 (FCC 63–467).

I. STATEMENT OF FACTS

. The Houston Post Co. is the licensee of standard broadcast station KPRC operating on 950 kilocycles, unlimited time, in Houston, Tex., and television station KPRC–TV operating on channel 2 in Houston, Tex.

II. ARGUMENT

The Commission's proposal to restrict the amount of time devoted to commercial continuity is both unlawful and impractical

A. Unlawfulness of the proposal:

2. The Commission's proposal to incorporate in its regulations certain provisions of the radio and television codes of the NAB with regard to commercial

time limitations is directly contrary to both the spirit and the letter of the Communications Act.

3. It is clear that Congress intended to leave broadcasting in the realm of free competition in the marketplace and to have broadcasting operate as a private enterprise. The whole scheme of the Communications Act of 1934, as amended, demonstrates this fact. Title II, concerning common carriers in an area where the public pays directly for the service provided, includes provisions giving the Commission control of competition, and, as a concomitant, control of the rates to be charged for common carrier services. Title III, which on the other hand contains the provisions regarding broadcasting, delegates to the Commission no similar authority to control rates or competition, and makes it clear that it is the intent of Congress that broadcasting enterprises sink or swim on the support or lack of support of advertising revenue and that the services of broadcast stations are available to the public at no direct cost other than the cost of a receiver, as distinguished from direct payment by the public for common carrier services such as telephone and telegraph.

4. If there were ever any doubts that Congress intended in the Communications Act to leave broadcasting subject to the forces of competition, such doubt was laid to rest long since by a landmark decision of the Supreme Court which unequivocally recognizes that broadcasting was left in the area of free competition, and that the Congress has no control over programing, *F.C.C.* v. *Sanders Brothers Radio Station* (309 U.S. 470 (1940)).

5. The Commission's proposals in this proceeding are nothing more than an attempt by the Commission to regulate the amount of advertising which a station broadcasts, and this can only eventually lead to control of rates, charges, and the business of licensees, contrary to the whole scheme of the Communications Act.

6. Furthermore, such control of what is broadcast is clearly contrary to the no censorship provision of section 326 of the Communications Act of 1934, as amended. Though the Commission has the authority to review a station's overall performance at renewal time to determine whether such performance has served the public interest, convenience, and necessity, this does not mean that the Commission has the power arbitrarily and unreasonably to restrict each individual broadcaster's access to advertising revenues to sustain his operation as a free enterprise as he is permitted to do by the Congress of the United States.

7. Because the proposal is contrary to the Communications Act and unequivocal decisions of the Supreme Court, it must be rejected without further consideration.

8. Furthermore, the proposal is arbitrary and capricious on its face because it cannot fairly be applied across the board even if it assumed, arguendo, that the Commission may regulate competition. The Houston Post Co., furthermore, cannot imagine what language could be adopted which could differentiate between stations in different markets with different facilities, or in the same market with different facilities, or in different markets with the same or similar facilities. The very numerous different factual situations suggest that a rule of general applicability just cannot be formulated, even if otherwise legal, because of the complexity of differing fact situations and the need for administrative flexibility. That such a situation can arise is clear from two decisions of the Supreme Court. *F.C.C.* v. *Pottsville Broadcasting Co.* (309 U.S. 134, 137–8 (1940)), recognizes the responsibility of administrative agents to retain the flexibility necessary in order to deal with the numerous and varying fact situations, simple and complex, with which it is faced. Adopting rigid time standards, assuming arguendo that the Commission has the authority to do so, is clearly inconsistent with the holding in the *Pottsville* case. One of the most venerable and oft cited decisions in the entire field of administrative law is also applicable here, the landmark case of *S.E.C.* v. *Chenery Corporation* (332 U.S. 194 (1947)), concerning the general question of the propriety of rulemaking. The Supreme Court therein recognized that certain regulatory problems "* * * may be so specialized or varying in nature as to be impossible to capture within the boundaries of a general rule." The Court further went on to recognize that in such situations, rather than adopt rules of general applicability, agencies must deal with problems on a case-to-case basis. The *Chenery* doctrine is no less applicable here, again assuming arguendo that the Commission has the power to adopt the proposed rules.

9. The fact that the Commission's proposed rules adopting NAB commercial time standards recognizes a distinction between television and radio does not cure the fatal defects which arise with the many and varying types of markets in which either or both operate.

10. Thus, the proposal must be rejected on two separate grounds, first because the Commission is prohibited by law from regulating the business of individual stations, and secondly because any rule of the type proposed would be arbitrary and capricious in application, even if legally adopted, because of the innumerable factual situations which make it clear that rules of general applicability cannot be adopted in this area consistent with the *Pottsville* and *Chenery* cases.

B. The Commission's proposal is unworkable from a practical standpoint:

11. The proposal to restrict commercial time in accordance with the NAB code provisions presents enormous practical difficulties, both for the broadcaster and for the Commission, which likewise demonstrate the arbitrariness and capriciousness of the proposal.

12. From the Commission's standpoint, the enforcement problem is almost incomprehensible in order that all stations may be tested equally. It would necessitate large numbers of additional personnel, and an additional budget request from the Congress, and there is no indication that such funds would be made available. A rule that cannot be justly and fairly administered should not be adopted, and it is simply a delusion to think that this rule can be properly and fairly administered.

13. It is also difficult to imagine what steps will have to be taken by individual broadcast stations to assure compliance with these rigid requirements for commercial time. Obviously a running record for each hour of the broadcast week would have to be kept and this would be subject to error. The licensee's responsibility cannot be delegated to traffic clerks and employees, and it is conceivable that the Commission will levy forfeitures or propose revocation for minor infractions of these proposed requirements. Broadcast licensees have enough affirmative duties making continuing surveys of their areas' needs and attempting to meet the needs without being saddled with the detailed task of keeping a running record of the amount of commercial minutes in order to avoid the possibility of a forfeiture.

14. Practical difficulties also arise because the day-to-day cycle of economic activity in various communities also varies greatly throughout the country, but, generally speaking, retail merchants and those that are most likely to utilize broadcast time do their principal business on Friday and Saturday. This is, in turn, related to the general American tradition of Friday payday, and consequently, the demand for radio time is greater toward the end of the week than the beginning.[1] This problem is further complicated for the broadcaster by the fact that advertisers desire to place their continuity in heavy traffic hours and thus have more commercial activity at certain times than others.

15. Independent of the legality or illegality of the proposal, many stations provide public service at very little profit, and if their commercial activity were reduced, they would have only a limited number of choices. Those choices would be to increase rates, curtail the staff and the public service, or go off the air. Each one of these possibilities is undesirable and contrary to the public interest.

16. If stations are forced to raise rates, many small advertisers who have exceedingly limited advertising budgets would be forced to abandon radio advertising. If this happened on a broad national basis it would work unimaginable hardships on small businessmen and would be contrary to the President's policy of increasing and encouraging economic activity on all levels in order to spur economic growth.

17. If stations, particularly marginal ones, elect to curtail their staffs and their public service, then the public is obviously the loser. It must be remembered that the advertising revenues that a station can attract supports their entire operation, both commercial and sustaining, and curtailment of the staff is contrary to the President's policy of full employment.

18. The simple fact of the matter is that the number and length of spot announcements or commercial continuity and the number of program interruptions is not the determinative factor of whether or not a broadcast station is sufficiently listenable or viewable to be accepted by the public, a necessary requirement to serving the public interest. Any listener or viewer knows that it is the manner of presentation and organization of the material which governs the listenability of a station, including both commercial continuity and programs, and any listener or viewer also knows that if he finds the particular station objectionable, all he needs to do is turn it off. Eventually this will be reflected in the

[1] This factor is also recognized by weekly newspapers, the great bulk of which are published on Thursday, and nearly all of which are published on Wednesday, Thursday, or Friday, see 1963 Editor and Publisher International Year Book, pp. 313–359.

station's commercial success and the station will operate successfully or unsuccessfully in accordance with the economic forces of free competition, as intended by Congress.

19. The Commission's proposals could reduce licensees, particularly in small markets with limited staff, to the roll of record keepers, and defeat many of the creative efforts that are being made or could be made both by adding to the administrative burdens of station operation and by forcing reductions in revenues or curtailment of staff, or both, to the detriment of the public interest.

Contrary to the Commission's concern the public is well served and not dissatisfied with commercial content of broadcast stations

20. In addition to the fact that the Commission lacks the legal power to adopt the proposed rules, it would be unwise for it to do so for the practical reasons set forth above. In addition, it now appears that the alleged problem exists not in the minds of the American public, but in the imagination of the Commission.

21. The broadcast industry learned last week, in an address by the Chairman of the Commission to the International Radio & Television Society on September 24 the extent to which the Commission has received complaints on commercial content. The Chairman stated that, in fiscal 1962, a total of approximately 2,500 complaints were received about advertising, of which about 35 percent related to length, amount, and frequency. These figures, by themselves, are utterly de minimis and have no statistical significance whatsoever. This is a mighty poor outpouring of public sentiment considering the fact that public notice is given of all significant applications in the community to be served and the fact that there were as of January 1962, approximately 180 million radio sets and 60 million television sets in use in the United States. Thirty-five percent of the approximate number of complaints amounts to 875, an average of approximately 17½ per State, and approximately 1 complaint for each 6 licensed broadcast stations. If all of these 875 complaints were about radio, it would be 1 for approximately each 200,000 radio sets in use, and if all concerned television, it would be 1 for approximately each 70,000 sets in use. Taking a combination of the two, it would be 1 complaint for each approximately 270,000 receivers in the hands of the public.[2]

22. Obviously the listeners are far from as dissatisfied as the Commission would believe, and the problem is so infinitesimal that the Commission's concern with it is completely out of proportion to the magnitude of the problem. The Commission itself has held that interference to 4,799 persons was de minimis, Fredericksburg Broadcasting Corporation, 20 R.R. 1117 (1960), a fortiori, 875 complaints about the number and length of spot announcements from the whole country during 1 year are also de minimis.

23. The Chairman also suggested in this speech that the Commission's concern arises from "* * * every detailed study of public attitudes toward broadcasting." Certainly no one should be surprised that these studies, which, in effect, seek comparisons between audience reaction to program time vis-a-vis commercial time, would result in a preference for program time. As long as broadcasting remains a free-enterprise industry supported by advertising revenues, there will have to be commercial time, and this time, like program time, will contain, through the workings of the marketplace, continuity acceptable to the public. Obviously this is so because the advertiser desires to sell his product to the public, and he cannot expect satisfactory results if he only antagonizes it. Apparently the advertisers do not antagonize the public in general from an analysis of the de minimis statistics made available last week.

24. It is clear, from the foregoing, that the public is overwhelmingly satisfied with its broadcast fare, recognizing the fact that commercials are a part of broadcasting and its economic foundation. In fact, the public, based on its de minimis number of complaints to the Commission, is 100-percent satisfied, since the few complaints, in relation to the number of sets in use, do not have any statistical significance whatsoever. Even if the Commission had the legal power to adopt the proposed rules, which it lacks, it would be unwise to do so since there is clearly no need or practical justification for their adoption.

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[2] TV Factbook No. 33, pp. 32a–33a, lists estimated receiving sets in 1962 as follows:

Radio	183, 800, 000
Television	60, 200, 000

III. CONCLUSION

25. The proposed rules to limit commercial time must be rejected, and this proceeding terminated because the Commission lacks the legal power to adopt them. Even if it had such power, practical considerations on the part of the Commission and licensees require that the rules not be adopted, and there is no public need for them.

Respectfully submitted.

THE HOUSTON POST CO.
By MILLER & SCHROEDER,
Its attorneys.
NEVILLE MILLER,
JOHN P. BANKSON, Jr.

WASHINGTON, D.C., *September 30, 1963.*

Mr. HARRIS. I would like to make a few comments, in order not to be repetitious, and say that we are a member of the NAB Code. We subscribe in both radio and television.

The proposed rules of the FCC, that this committee is now having hearings upon, would not affect us adversely at this time, since we are adhering to those regulations, and, in some instances, more stringently than the NAB Code requires. However, I would like to point out that we do feel that there are many stations, a number of whom have appeared here, who would be adversely affected and we think it is wrong for them. We also think it is wrong for us, because the code is a flexible instrument that has been modified almost two dozen times since its inception, and it can be modified by the NAB in relatively short time. But if the FCC adopted this code, the time required for the FCC to come out with a ruling requires so much time that by the time relief is accorded to the affected stations, it would only be in time, perhaps, to attend the burial of these stations. And this could be a very serious thing, and it might well be our station, also, because we are in a very volatile industry, that does not stand still, fortunately.

The Commission's proposal of this rule, originated by Mr. Henry's speech in New York and from no great demand on the part of the public—these figures have been given before, but I would merely like to say that in the case of our radio and television station, over the past 3 years, we have had a total of two letters complaining about commercials. Neither of these letters was on the number or frequency or length of commercials. One was a commercial that was later changed, by persuasion of the NAB Code, to the advertiser, and the other one, we felt that the viewer in this case had no legitimate right for complaint. There was a complaint about bra commercials which we felt were in perfectly good taste, since they were not on live models and we felt that the fault lay with the viewer and not with the commercials.

The FCC, yesterday, appeared to make a good deal out of the fact that the broadcasters—as I understood their comment, it was not that they had not heard comments from enough broadcasters, but the broadcasters had failed to come up with creative suggestions, alternate suggestions to the proposal that the FCC came up with. I would like to explain why I think this is so, because the broadcasters felt that there was no merit in the FCC proposal and that the present system was right and should be continued, and it was not incumbent upon broadcasters to try to make tolerable an intolerable proposal that the FCC had suggested.

Their claim that this is not ratemaking, in the sense of a public utility—I am not a lawyer, and I would not like to give a legal opinion on this, but as one who has operated radio and television stations for many years, I would like to submit that the effect of this rule would be one of ratemaking. They indicated that they would make exceptions for those stations that could not survive under the broad rule that they might put down. In that event, the station would have to come to the Commission to make its case. The Commission would then decide how many commercials, based on the rate that the station was able to get in the economic atmosphere and climate of that community, and so many stations at such rate, the Commission would then decide was proper for them and give them a waiver on that. If that is not setting the rates that the station could survive on, I do not know what it would be. I think that the net result must be, in those cases where exceptions are made, clearly a result and an effect of ratemaking on the part of the Commission.

I was disappointed that one of the Commissioners did not testify yesterday, while I was here, and I would like to read a part of my testimony, because I very seldom find myself quoting members of the FCC, but, in this case, I would like to quote part of Commissioner Bartley's dissent, to be certain that it is in the record. He said:

> I dissent to the issuance of this "proposed rulemaking." I view it as an irritating act of futility. It is inconceivable to me that, when the responses are considered, the Commission would adopt such a rule. I base this prediction on the knowledge of broadcasting which the Commission already has. We know that some stations are able to operate the year 'round by reason of the revenues produced mainly during certain seasons. We know that some stations operate a full week on revenues produced from Thursday to Saturday. We know that some stations can operate full time (some 24 hours) on revenues produced in peak listening hours. We should know that some stations, with a greater number of commercials, are most listenable because of their attention to the quality of production and presentation (sometimes entertaining and many times informative) where, on the other hand, some other stations allow screaming, irritating, and obnoxious commercials which result in headaches that the advertised product is supposed to cure, but, because the commercials are fewer in number, would meet the code requirements any quarter hour of the day or night or season.

Finally, just one other comment. I have one question regarding H.R. 8316. Does the language "by rule" permit the Commission by policy declaration or some other method, as I believe was suggested by Commissioner Henry yesterday, to obtain the same result as it now proposes by Docket 15083? If so, the language should be written so that this possible loophole is closed.

Mr. ROGERS of Texas. I do not understand that question. Would you state that again?

Mr. HARRIS. As I read the very brief proposed rule that you have introduced, it says that by rule, that the Commission cannot by rule do this. My question is, Can the Commission, by some other method, or declaration, do the same thing and would it not be well for the committee to consider broad enough language that would preclude the Commission from obtaining this same result by some other means than rulemaking?

Mr. ROGERS of Texas. I think this, Mr. Harris, in answer to your question. This particular bill is drawn to fit into that portion of the act where their powers find their source, and therefore, this would be a specification that they did not have the power by rulemaking to do this and they have not other power in the act to do it otherwise.

Now, I grant you that it is a very pertinent observation, and if any of your lawyers know anything, any other way they can do it, I wish you would tell them to let us know, and we will add it on. It is our intention—it was my intention and I hope the record is pretty clear on it, that when I introduced this bill, I introduced this bill because I feel that this is a flagrant abuse and violation of the legislative processes of the people of this country. Now, if this country is going to be run as a representative form of government by duly elected Members of Congress, it ought to be run that way. If we reached the point that we do not want to operate that way and turn it over to independent agencies that are not answerable directly to the electorate, I think that is something the people of this country ought to decide by amending the Constitution. I introduced this bill for the purpose of bringing this thing into focus and find out just exactly what the Congress wants to do.

If there is any other method that they have in mind to work this out, I would consider that information very welcome, from you or anybody else. I can personally not speak for the members of this committee, but I shall do what I can to clear it up.

In the information that you are now required to furnish to the FCC, Mr. Harris, is it not possible for the Commission to pretty well know in pretty short order and pretty quickly what your operations are?

Mr. HARRIS. Yes; I would think so. I would think they would know a great deal about it. They know our programing, they know our finances; our expenditures for salaries, for programs.

Mr. ROGERS of Texas. You say they know your programing——

Mr. HARRIS. Our costs, and the programing.

Mr. ROGERS of Texas. In the programing, do you have to submit a report as to the number of hours each day you devote to certain things, certain types of programs?

Mr. HARRIS. Yes, sir; we do this at renewal time in the composite week. Then we make an additional composite week in which we try to look 3 years ahead and tell them what we are going to do.

Mr. ROGERS of Texas. Are you monitored, secretly or otherwise, during the time that your license is in effect?

Mr. HARRIS. I do not think it is secretly, but the FCC does have offices, employees who monitor the station. I do not know how regularly. And, of course, inspect the station for technical facilities. Their field people do this.

Mr. ROGERS of Texas. I guess that would be a conflicting statement. If it is secret, you would not know about it, would you?

Mr. HARRIS. We do not know where they are and I do not think they monitor it very often. They do not monitor it at anything like the degree they would have to if this rule were passed. They would have to have a great deal more employees, I would think, both to monitor and to study the reports of the monitor.

Mr. ROGERS of Texas. That is the practice that some of the Federal departments have not hesitated to pursue, trying to get more employees, from past experience.

Mr. Rostenkowski?

Mr. ROSTENKOWSKI. I have no questions, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I have no questions.

Mr. ROGERS of Texas. Mr. Kornegay?

Mr. KORNEGAY. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Thank you very much, Mr. Harris, for your statement and your comments made to the Federal Communications Commission.

Mr. Morton H. Henkin, president of the South Dakota Broadcasters Association. Mr. Henkin?

STATEMENT OF MORTON H. HENKIN, PRESIDENT, SOUTH DAKOTA BROADCASTERS ASSOCIATION

Mr. HENKIN. Mr. Chairman, the South Dakota Broadcasters Association, representing 24 radio stations and 8 television stations, appreciates the opportunity to give testimony. We are of the opinion that the stations in South Dakota operate under some conditions that perhaps may add factual information for consideration by this committee.

South Dakota broadcast stations, both radio and television, have unusual opportunities for service because of (1) the State's large geographical service areas, (2) the sparse population in many of the areas served by these stations, and (3) the rigorous variations in climate with their effect on the safety and care of both human beings and livestock, and, finally, (4) because of the unique opportunities available to broadcast stations in the area of agricultural service, which economic activity is the principal source of income to South Dakotans, the majority of whom are either directly engaged in agricultural and related activities or indirectly derive their income from those engaged in these activities.

South Dakota broadcast stations, and we recognize this is true of stations generally serving smaller communities in other parts of the United States, are an important factor in practically all facets of the daily lives of the public they serve. It is necessary for most of our stations to derive their supporting revenues from many small advertisers who, if they are to be permitted economically feasible utilization of broadcast facilities, must be afforded broadcast time at relatively low per unit cost.

The ability of South Dakota stations to provide the broadest service possible to areas such as we serve of necessity is in part dependent on the flexibility of our operations and our freedom to meet seasonal situations without the necessity of conformity to rigid regulations that might limit the very versatility that is an important ingredient of our service in the public interest. Our support of the proposed bill as based principally on these considerations which we shall outline for you.

We have no desire to intrude into the functions of the Commission and, for our part, merely seek to present for your consideration our views, based on an analysis of our opportunities for service—as we see them—with the hope that we may thereby make a useful contribution to the overall consideration of the proposed bill.

First, we would like to discuss the opportunities of South Dakota stations in the area of agricultural service and the necessity for flexibility in our accommodation of the agricultural needs of those we serve.

The advertising of farm machinery, feeds, seed, agricultural chemicals, chickens, remedies, and all of the myraid items necessary to the

agriculture economy is principally a seasonal matter. It is simply a fact of agricultural economic life that certain items are advertised, for example, starting in the late winter for purchase in the spring with the advertising emphasis of necessity concentrated during that period of the year. There are some agricultural items necessitating concentrated advertising during other periods of the years such as corn-pickers for fall and other obvious applications of this seasonal principle. A considerable portion of the commercial programing of South Dakota stations reflects these seasonal situations with sustaining time commensurately larger during the off season. The stations perform an inestimable service to both the agricultural advertisers and those engaging in agricultural pursuits in their resourceful ability to maintain flexibility of program schedules so that American agriculture, one of the great forces for world peace and in the perpetuation of the American image, can properly maintain the stability and growth necessary to its vitality.

Certainly it is vital that we remain able to schedule agricultural advertising, without regard to limiting regulation, if we are to properly perform this important function of a typical South Dakota broadcast station.

The variations in our climate present a unique opportunity for service and the maintenance of our freedom to serve the needs arising for this circumstance is, in our opinion, an important consideration.

Generally regarded as the healthiest State in the Union, South Dakotans attribute this fact to the rigorous changes in climate. From the bitter blizzards of a typical February to the hot crop parching winds of August, South Dakotans live in a most invigorating and demanding limate.

The variations in climate are perhaps the principal factor in the advertising requirements of South Dakota retail merchants who, again, are the principal source of revenue for most South Dakota broadcast stations. Much as stations in some areas find the holiday season perhaps their most important period of commercial programing in South Dakota, South Dakotans do their staple buying and merchants their heavy advertising during a few months of the spring, the fall, and certain periods of the winter. Overshoes and snow tires, items little known in many parts of the United States, are staples in South Dakota.

The agricultural economy—the growing season itself—has a unique effect on seasonal buying. In South Dakota we say the farmer thinks about buying when he can hear a crop and finally goes into the store and lays out hard cash when he sees it. Any limitations on broadcast stations ability to be immediately sensitive to these needs of both South Dakota advertisers and the public they serve would adversely affect the seasonal commercial service our stations must deliver in the public interest.

In South Dakota, public service concepts of broadcasting, again as in other areas of service, present unique opportunities for public interest minded broadcasters. For example, South Dakota weather broadcasts are essential to the safety of human life, livestock, and property. Changes in the weather, both anticipated and unscheduled, present one of the most important challenges of any area of service to which South Dakota stations can dedicate their efforts. This is a vital service of broadcasting and one to which much time, effort, and out-of-

pocket expense is devoted. Agricultural service is, of course, inherent to our way of broadcasting life. Cooperation with all public service agencies, including charitable fund-raising campaigns, is an important service of our broadcasters. All of these services cost money. The typical South Dakota station is operated on a very small margin and has already demonstrated unusual resourcefulnes in its discharge of public service responsibility.

The dynamic, ever-changing seasonal commercial needs of South Dakota advertisers and the public they serve generates revenue from these seasonal situations that assists South Dakota stations in the maintenance of high standards of public service programing. Artificial and arbitrary standards inflexible throughout the year cannot be made to fit the special situation in our State's broadcasting economy. Any attempt to do so could have a limiting effect on the public service delivered by South Dakota stations.

Although some of the considerations we have outlined are of special significance in South Dakota we recognize that many of these same opportunities and consequent situations are applicable to broadcast licensees in other States, and that we share the same problems and opportunities with other stations similarly situated.

There are a few other specific situations in South Dakota. In addition to agriculture, tourism, particularly in the western part of South Dakota, has now become a major source of revenue. Rushmore Memorial and the other wonders of the Black Hills of South Dakota attract increasing thousands of visitors to our State each year. Several of our stations, particularly those located in and near the Black Hills of South Dakota, dedicate an important part of their broadcasting effort, including commercial messages, to the tourist for the joint benefit of both the visiting public and the large percentage of the commercial activities during the summer months that serve these tourists and tourism generally.

Quite naturally these stations carry more advertising during the summer months than during the winter. In fact, a large number of the very commerical institutions they serve literally close their doors for the winter and in many ways substantial portions of the entire economy of the Black Hills area is seasonal in character—open for a few months during the summer—closed during the long fall, winter, and early spring months.

There are other ways in which our stations, and this is applicable to other States also, serve the public by the acceptance of flexible advertising schedules. Stations in smaller cities and towns very often carry many weekend specials for grocery stores and similar outlets with their Monday, Tuesday, and Wednesday schedules very light—again reflecting the economy—the buying and selling habits of the area they serve.

Another serious problem for broadcasters in our State—and this we know is true of other States—is the problem of the daytime broadcaster who, in order that there may be proper protection afforded to all stations operating on a particular frequency, is licensed to operate only from sunrise to sunset (with some modification of this principle under consideration by the FCC). These stations must either cancel out advertisers or crowd them a little during months when their sign-off may be as early as 4:45 p.m.

The daytime station, with its limited opportunities for revenue must do its best to maintain this regular continuity of advertising if it is to maintain its staff and its customary standards of service during what would otherwise be inadequate income months. From a purely competitive standpoint, it is somewhat unfair to require the daytime station to give up its regular accounts perhaps to its competitive unlimited time station in the same city, and in all likelihood lose such accounts for the long haul.

For these and all related reasons we in South Dakota are of the opinion that H.R. 8316 should be favorably considered.

We do not regard ourselves as competent to testify in depth regarding the legal considerations that are applicable to the entire matter. We respect the Federal Communications Commission and its integrity in its interpretation of the Communications Act as it now exists. The Commission has amply demonstrated in the past and has always evidenced concern that none of its rules or decisions should intrude into the area of program control and censorship. Broadcasters generally have accepted the role of the Commission in its periodic broad review of licensees' program proposals in terms of the overall needs of the areas served, with due regard for differences in the size of stations, the characteristics of the areas in which they are located and other similar considerations. The Commission has carefully refrained from censorship of specific programs or program material all in conformity with the meaning of section 326 of the Communications Act.

The South Dakota Broadcasters Association appreciates the fact that the Commission itself, in the consideration of proposed rulemaking regarding the subject of commercial time limitations, has indeed invited the comments of broadcasters and has in all ways evidenced an open mind in seeking all of the applicable facts that might bear on the establishment of any such proposed rules.

In closing, we would like to say something about quality and quantity and its relationship to good broadcasting. It is a well-established fact that the overall quality of the commercial content of some stations is superior to that of others and it is equally apparent that quantity alone is not the determining factor. Some stations sound good or look good and in fact may well have more commerical material incorporated within their broadcast schedules than other stations that simply do not look as good or sound as good. Good taste, clean copy, high standards for the acceptability of commercial material generally—these are the concepts to which broadcasters should dedicate their efforts.

The American public, with very few exceptions, has a multiple choice of both radio and television programs. Poor or tasteless programing, including both commercial copy and other broadcast material, is inevitably subjected to the critical judgement of listeners and viewers. Public opinion and the twisting of dials are the most effective means of assuring licensee responsibility.

The performance of irresponsible broadcasters, of which there may still be some, should not be the yardstick or the basic test by which American broadcasting is judged. Better the imperfect character of the American democratic way of life as typified by its free system of broadcasting, than a system that would in any way deprive the American public of the inestimable benefits, demonstrated throughout a long and rich broadcast history in the United States, of our American

way of broadcasting, a competitive and constantly developing art of service in the public interest.

Mr. ROGERS of Texas. Thank you very much, Mr. Henkin. Do you have any questions, Mr. Cunningham?

Mr. CUNNINGHAM. I want to compliment Mr. Henkin on a very fine statement.

Mr. ROGERS of Texas. How many broadcasters are members of your association? All of them?

Mr. HENKIN. Not all of them, sir. There are in our State 28 radio stations and 10 television stations; 24 of our radio stations belong to our State association and 8 of our television stations. There is one ownership, of four radio and television stations that, for reasons that I am sure are valid to them, aren't members of our association and there may be another two or three.

Mr. ROGERS of Texas. But your statement represents the views of all the members of your association?

Mr. HENKIN. Yes, by authority of the board of directors of our association, who have requested and authorized the presentation; yes, sir.

Mr. ROGERS of Texas. Have you heard the comments of those who are not members?

Mr. HENKIN. Not in any substantial detail. Generally speaking, I would say that I am aware of some of their problems regardless of the fact that some few are not members and that they share some of the same problems that the membership does.

Mr. ROGERS of Texas. Thank you very much.

Now, the Chair understands that Mr. Joseph P. Dougherty, president of the Rhode Island Broadcasters Association, is present and will not be able to be present this afternoon.

Mr. Dougherty, if you would like to make a short presentation at this time—your statement can be included—we will certainly permit you to do so. I know you heard the bells ring and we have to go over to the House.

Let me say this, first, that your own very able Congressman, Mr. John Fogarty, has talked to me about the manner in which these radio and television stations have been operated in Rhode Island and he tells me it is very fair and that you have done a very fine job over there and we are glad to have you before this subcommittee.

STATEMENT OF JOSEPH F. DOUGHERTY, PRESIDENT, RHODE ISLAND BROADCASTERS ASSOCIATION, PROVIDENCE, R.I.

Mr. DOUGHTERY. Thank you very much, Chairman Rogers and Congressman Cunningham. I certainly get the message, Mr. Chairman, and I will make it brief.

I know you have heard a lot of the aspects of the problem discussed. I would only want to comment on a few. My presence here this morning is as president of the Rhode Island Broadcasters Association. This is my second year in that office and as a day-to-day broadcaster I am general manager of WPRO–TV and have been for the last 4 years. I recognize that over the period of these hearings you will hear many aspects on the problem of commercial limitations for radio and television stations. I will confine my remarks to a few of these in particular.

The Rhode Island Broadcasters Association is made up of 16 members and 5 associate members—14 radio and 2 television stations and 5 advertising agencies. Most of these stations subscribe to the NAB code, a few do not. I feel all of these station operators, regardless of whether they subscribe to the code or not, are good broadcasters serving their communities in the public interest as best they know how. In 1950, according to FCC figures, there were 19 radio stations in the Providence metropolitan area whose average profit before taxes was $43,000.

In 1961, according to FCC's figures, there were 13 radio stations in the Providence metropolitan area whose average loss before taxes per station was $17,000. This means that some of these broadcasters made money, and some lost substantially more than $17,000. These broadcasters find it is an economic necessity because of—

(*a*) too much competition due to overpopulation of AM stations;

(*b*) seasonal changes in audience levels;

(*c*) restrictions related to daytime only operations that there are times of the year when they may go over a given set of commercial standards.

The following is a quote from a letter of one of the smaller radio station members who speaks to this point:

> Throughout the year our station makes every effort to adhere to a schedule which spreads commercials well within the suggested and desired limits of the FCC. But when Christmas, Easter, and other shopping seasons roll around, there are times when we run more announcements in the morning traffic areas and between 5 and 6 in the evening than such limitations would allow. To impose these restrictions as proposed would put our station in the position of having to be a lawbreaker in order to survive.
>
> We have more commercials than the competition, but we have more interesting, more varied, more educational, more beneficial, more costly programing, too. Only the fact that we do have the commercials permits us to do so extensive a public service job. We take editorial stands, we air thoughts of guests representing many views, we promote campaigns, we broadcast city council meetings, we have remotes. All this takes extra time, extra money, extra personnel. The only way to stay out of the red if the proposed limitations were imposed would be to cut expenses by eliminating many of our public services. This we would hate to do.

The due process of the "marketplace" tends to handle a part of this problem. A station attracts audience through its programing and promotion—it sells time to advertisers on the basis of the quantity of this audience, that is, its circulation, or on the basis of quality, the type of audience—experience shows that when a radio station interrupts is regular progaming too often with commercials and/or promotion spots, it tends to drive listeners away from it—thus, when circulation drops so does advertisers' interest in buying the station's time decrease.

Thus, action of the marketplace which is an integral part of the process of our free enterprise system is sometimes slow and painful. However, the marketplace often brings an effective solution based on the facts of a given situation that no agency or association in all its wisdom and desire can do.

In both radio and television, experience has taught us that often it is not the amount of commercials in a given period of time but the quality of these commercials. For example, in TV, according to the NAB code in an evening half hour program—7:30 to 10:30

p.m.—you may run three 60-second commercials—one poor commercial in that half hour is one too many and may bother the viewer, three as allowed, or four, five, or six well done commercials carefully placed in and around the program content may have no adverse effect on the viewer. In fact, a very respected professional radio-TV critic in our market told me recently that with the increased serious dramatic fare on TV this season, commercials tend to bring a relief from the suspense built up in these programs.

Many of the RIBA members have filed, through counsel, briefs with the FCC which question whether the FCC has the legal right to establish such regulations. Our membership is vitally concerned with this aspect but, as important, we seriously question that the adoption of these commercial limitations is a practical or effective solution—in fact, this cure may be worse than the disease. We are broadcasters charged with the responsibility of serving the public interest. To do so effectively, we must produce income from our broadcasting operations to pay the cost of meaningful programing.

Allow us the freedom to make judgments both to commercial content and program content. If we fail our responsibilities, the FCC already has the authority necessary to handle such situations on an individual station basis at license renewal time. Also, it is at the time of license renewal that the conscientious broadcasters has the opportunity to present his commercial policy based on the actual conditions under which he operates in his competitive situation. It would seem not only unfair, but impractical, to impose a rigid formula on all markets, regardless of size, makeup and other dissimilarities. We contend it is better to allow the broadcaster, guided by the condition of the marketplace, to serve the public interest.

The very fact that we are sitting here with you and this committee today, Congressman Rogers, working for a clearer understanding of all phases of the problem of commercial content in broadcasting, is evidence that the FCC and the broadcasters can find practical answers to ways in which the public interest can best be served.

The Rhode Island Broadcasters recognize we have a many-sided problem. We must do more than just talk about it, but we must be allowed to do it ourselves.

Thank you.

Mr. ROGERS of Texas. Thank you, Mr. Dougherty. Do you have any questions, Mr. Cunningham?

Mr. CUNNINGHAM. No; I have no questions.

Mr. ROGERS of Texas. Thank you very much, Mr. Dougherty. We are happy to have your statement.

I want to repeat that I think these statements are evidence of some good research and some good presentation of the problems involved of all the broadcasters who have appeared.

The subcommittee will stand in recess until 2 p.m.

(Whereupon, at 12:40 p.m., the committee recessed, to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

Mr. ROGERS of Texas. The Subcommitteee on Communications and Power will come to order for further consideration of pending business. I believe our first witness is Mr. Leo Hackney, president of radio station KGVL in Greenville, Tex. Mr. Hackney.

STATEMENT OF LEO HACKNEY, PRESIDENT, RADIO STATION KGVL

Mr. HACKNEY. Thank you, Mr. Chairman and Mr. Younger. My name is Leo Hackney, and I am president and general manager of radio station KGVL in Greenville, Tex. The population of Greenville is 19,085, according to the 1960 census. The area we serve is a rural section depending heavily on the seasonal income of cotton. I have been continuously associated with KGVL since 1947, almost 17 years.

Since I am not a lawyer, I will not attempt to touch on the aspect of this proposed rulemaking by the Commission. Instead, since I operate a small market radio station, I will present only the economics of this proposed ruling by the Commission as it will affect us—and, in turn, the more than 1,600 radio stations in the United States in markets of 25,000 population and less.

First, let me say that I'm familiar with the Government's efforts to help the people in another field—and I think this other field, it's the cottonfield, is a good parallel. In the early thirties I was assisting my father as a cotton producer. The Government decided to help the cotton farmer to get better prices by telling him to plow under some of his crop, limit his production. Chairman Henry said in New York in September that by restricting or limiting the number of commercials it might mean we—in the radio and television business—will be able to increase our rates. Back to the cottonfields—the farmers plowed under their crops; the price did go up. We know the rest of the story on cotton. Now and since the early thirties the farmer has been told how many acres of cotton he can plant. True, the price has stayed up, but in the meantime, with the higher prices, cotton lost much of its market and the small cotton farmers were unable to survive. Will this happen to us in the radio and television business? I hesitate to mention—price support for commercials, and storage bins for the excess spot announcements.

However, let's get back to the case for small market operators. I'm a code subscriber and have been for over 2 years. I can live with the present code, but there are times when we need to forget it in small markets. Take as an example last Saturday. I sent our sports announcer on a 1,100-mile trip to cover a football game. I don't have to tell the people in the radio business, we lost money on that sponsored public service endeavor. By running more than 5 announcements in 15 minutes during the half-time, we were able to salvage some of the costs. We could have accomplished the same end and lived with the Commission's proposed ruling by running 5 commercials each 15 minutes for the game and not just when time outs are called. We, and I'm sure no broadcaster, would so chop up his sports coverage because our listeners would be on our necks—and they'd have a right to be.

Here at this point let me say we do not need further guidelines from the FCC. Our management and listeners, the people, provide those guidelines. When we do something our listeners don't like, they tell us. We either correct it, or we lose listeners, it's that simple. The people regulate us. They will turn us off or shift their loyalty to another station if they don't like our programs and informative messages. I might add that in my 17 years at KGVL, I can't recall

ever having received a complaint regarding our commercial announcements.

As for the seasonal aspect of our economy, let me comment on that briefly. Most of the merchants in our area make the big majority of their sales and profits in the fall months after the cotton is harvested. If we have to tell him we're sold out in October and November and can't sell him advertising, we'd have a hard time selling him in January and February when business is poor. Our station does almost as much advertising for firms in October as we do in January and February combined, and almost as much advertising on Thursday and Friday as the rest of the week combined. Let's say this rule is put into effect—some stations will go up on their rates to keep their income stable—who is hurt most by this situation? The small businessman. If a station leaves its rate structure the same, and its income drops, then they have to cut their staff. Therefore we're working against two of our President's programs—encouragement of economic activities on all levels and his policy of full employment.

Another concern—if the Commission adopts the proposed commercial limitation, what will prevent a future Commission from deciding that 5 commercials in a quarter hour and 18 in 1 hour is not in the public interest and decide to protect the people even more by cutting it to 2 commercials in 15 minutes and 7 in an hour; then later to 1 in 15 minutes and 3 in an hour. The results of such possible action are obvious. Even with the present proposed limitations the death rate of small stations would be considerable.

One other point in concluding: We at radio station KGVL do not subscribe to the theory that commercials are objectionable. We and most of our listeners agree that they are informative messages and many times they are entertaining as well.

Thank you for your time and interest.

Mr. ROGERS of Texas. Thank you, sir, for that statement. Mr. Rostenkowski, do you have any questions?

Mr. ROSTENKOWSKI. No questions.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Thank you, Mr. Chairman. I just want to compliment you for this very brief and down-to-the-point statement.

Mr. HACKNEY. Thank you, sir.

Mr. ROGERS of Texas. There is one question I had in mind with regard to your coverage of football games.

Mr. HACKNEY. Yes, sir.

Mr. ROGERS of Texas. As I understand you, when they had a timeout you make your commercial announcement in that timeout, so that it doesn't interfere with the continuity of the game insofar as the viewer is concerned.

Mr. HACKNEY. That is correct, sir.

Mr. ROGERS of Texas. Now under this new proposed rule, you would be put in the position of jeopardy in several different ways, wouldn't you, insofar as making those announcements?

Mr. HACKNEY. Yes, sir, because as you know in the half time there is very little activity that we will say the football fan is interested in, especially on a radio broadcast, so we put in a good percentage of our commercials during the half-time activity so we will not interrupt the continuity of the football game. So it would be hard for us to

say, limit ourselves to five annoucements in a 15-minute period in such an event as a sporting game like football.

Mr. ROGERS of Texas. You could continue that under any new rule or what could be done under the new rule, you could use up your whole week's allowance in one afternoon, couldn't you?

Mr. HACKNEY. Yes, sir, that would be possible.

Mr. ROGERS of Texas. In other words, it just points up the impracticability to me of the situation, and of the different things that would happen, that the Commission would have to try to police.

Mr. HACKNEY. Yes, sir, I certainly agree with that.

Mr. ROGERS of Texas. It would be most difficult to police. How far does your station go out?

Mr. HACKNEY. We go about 50 miles in each direction out of Greenville.

Mr. ROGERS of Texas. 50 miles?

Mr. HACKNEY. Yes, sir. To elaborate a little bit on this 1,100-mile trip, East Texas State College is 15 miles from Greenville, and they ask us to carry their football games, and they play each year out in Alpine, Tex., which is 550 miles from Greenville, so I have to send our sportsman out there every year by automobile to originate that broadcast.

Mr. ROGERS of Texas. That is the college at Commerce?

Mr. HACKNEY. Yes, sir.

Mr. ROGERS of Texas. Off the record.

(Discussion off the record.)

Mr. ROGERS of Texas. Thank you very much for your statement.

Mr. HACKNEY. Thank you, sir.

Mr. ROGERS of Texas. Mr. Raymond E. Carow, president of the Georgia Association of Broadcasters, general manager of station WALB, Albany, Ga.

STATEMENT OF RAYMOND E. CAROW, PRESIDENT, GEORGIA ASSOCIATION OF BROADCASTERS, GENERAL MANAGER, STATION WALB-TV, ALBANY, GA.

Mr. CAROW. I have a prepared statement, Chairman Rogers, which I would like to read.

Chairman Rogers and members of the subcommittee, I am Raymond E. Carow, general manager of television stations WALB-TV Albany, Ga., and WJHG-TV, Panama City, Fla. I appear before you today on behalf of these two stations and in my capacity as president of the Georgia Association of Broadcasters.

I sincerely appreciate this opportunity to testify in support of H.R. 8316 introduced August 30, 1963, by Chairman Rogers.

In July of 1963, I and other members of the Georgia Association of Broadcasters came to Washington to express our concern to our Georgia congressional delegation over recent proposals of the FCC. We were particularly concerned over the FCC Docket 15083 proposal of May 17, 1963, to adopt rules which would impose time limitations on advertising messages carried by broadcast stations.

Our support of H.R. 8316 is based on the following four propositions:

First, the Communications Act of 1934 does not grant authority to the FCC to adopt rules of the type proposed by the Commission. As Commissioner Hyde correctly stated in his dissent:

> * * * the proposal of the majority * * * is inconsistent with the statutory concept of broadcasting as a competitive private enterprise service.

Second, the rules proposed by the Commission would violate the freedom of speech guarantees set forth in section 326 of the act and the first amendment of the Constitution.

Third, any attempt by the Commission to regulate the length and frequency of commercials would constitute, as aptly stated in Commissioner Bartley's dissent, "an irritating act of futility." The highly complex and multiple problems which are inherent in the operation of the over 5,000 existing broadcast stations make it impossible, in our opinion, to devise any set of standards which would guarantee equal protection under the law, and which would be fair, equitable, and in the public interest. Congress wisely decided that the business practices of broadcast stations, with exceptions which do not apply to the matter under consideration, should be regulated by the marketplace and not by the Federal Government. We strongly endorse the NAB Code; believing that self-regulation is the only road to follow. We do not feel that the failure of some to adhere to self-regulation should result in a substitution of Government controls for the free enterprise system.

Fourth, there has been no demonstrated need for the proposed FCC rules. Broadcast stations are, of necessity, sensitive and responsive to public attitudes. The vast majority of broadcasters have acted and will continue to act in the best interests of their communities. It would indeed be an unusual community which would economically support a broadcast station which its people, as listeners or viewers, did not like.

For these reasons, we oppose the FCC proposals and support H.R. 8316. We heartily commend the action of Chairman Rogers and this subcommittee in seeking out the facts relating to this matter through these hearings. We particularly advocate that policy questions of the type under consideration be resolved by the Congress. We strongly feel that the FCC proposals are an attempt to rely on powers not delegated to the FCC by Congress.

In conclusion, we have faith in the representative form of Government and are therefore content to leave our case in the hands of Congress and this subcommittee.

Thank you.

Mr. ROGERS of Texas. Thank you. Mr. Rostenkowski?

Mr. ROSTENKOWSKI. No questions.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Do you consider that the FCC has a policy now in regard to overcommercializing?

Mr. CAROW. No, sir, I do not. At least if they do have a clearcut policy I have not been able to apprehend it.

Mr. YOUNGER. Therefore you wouldn't consent to the statement that this rulemaking that they propose is merely an extension of an existing policy?

Mr. CAROW. No, sir; I would not. I do not believe it to be an extension.

Mr. YOUNGER. That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. I want to ask one or two. Mr. Carow, the Georgia Association of Broadcasters has not been what you would call backward in asserting their position on these matters, has it?

Mr. CAROW. No, sir, we have not.

Mr. ROGERS of Texas. I know we ran into some situations at the time of the editorializing hearings, and it was all well and good. I felt at that time that they probably misunderstood what this committee was trying to do.

Mr. CAROW. Yes, sir.

Mr. ROGERS of Texas. But I think we got it all straightened out. And you did have a rather informative meeting in Georgia on that subject, did you not, Mr. Carow?

Mr. CAROW. On editorializing?

Mr. ROGERS of Texas. On the editorializing.

Mr. CAROW. Yes, sir, we certainly did.

Mr. ROGERS of Texas. And took some very firm positions, if I recall correctly.

Mr. CAROW. Yes, we did.

Mr. ROGERS of Texas. Now at that time did you discuss this problem, or the licensing problem?

Mr. CAROW. Oh, yes. We have had this matter under discussion for some time. When the FCC first notified the stations of their intent, the discussion began immediately, and it is still going on, I might add.

Mr. ROGERS of Texas. Yes. Mr. Carow, in those discussions with regard to, let's say, the rulemaking power, with regard to commercials, was there any discussion among your broadcasters as to possible retaliation by the FCC against those who took a firm position in operation to the FCC?

Mr. CAROW. This is something I think every broadcaster always lives with, Mr. Chairman. It is not an unknown factor to us.

I would not care to say that I know of any concrete examples of this, though I have heard rumors that various licensees were afraid that if they took a positive stand, it might result in action by the FCC.

Mr. ROGERS of Texas. You are somewhat in the same position of a private in the Army who is tempted to write his Congressman, who fears that he might end up on KP, and he doesn't know how he got there.

Mr. CAROW. Yes, sir.

Mr. ROGERS of Texas. But he knows he is washing the dishes.

Mr. CAROW. That is correct.

Mr. ROGERS of Texas. Well, I would hope that this would not be the case, and that there would not be retaliation in this sort of thing, although I have had the matter presented to me privately, and I can understand why it was presented privately a number of times.

I would hope that if any broadcaster ever had even a semblance of an idea that he was being mistreated because of the position he took in the exercise of the freedom that he is supposed to have in this country, that he would not only report it to his own Members of Congress but would report it to other people——

Mr. CAROW. Yes.

Mr. ROGERS of Texas. Other people associated with and having jurisdiction.

Mr. YOUNGER. Will the gentleman yield there?

Mr. ROGERS of Texas. Yes, sir; I will be happy to.

Mr. YOUNGER. This question was brought up yesterday, Mr. Carow. Do you not feel that such a rulemaking as they propose, will be unenforcible when it is admitted that no rule would reach broadcasting across the country, and that all kinds of exceptions are going to have to be made? When you have those exceptions, you do place in the hands of the FCC the opportunity to play favorites?

Mr. CAROW. Yes, sir; I would agree with that 100 percent. As a matter of fact, I think the FCC's proposal to even attempt to adopt such a rule demonstrates to me personally an inadequate knowledge of the day-to-day broadcaster's operation.

Mr. YOUNGER. That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I would just like to commend the gentleman for his statement and thank him for his appearance before the committee. I have no questions.

Mr. ROGERS of Texas. Thank you.

Mr. CAROW. Thank you.

Mr. ROGERS of Texas. Our next witness is Mr. John Hopkins, president and general manager of station KCOP–TV of Hollywood, Calif. Mr. Hopkins, I might say, at one time was manager of station KFDA in Amarillo, Tex., in my district. We hate to see you move off to Los Angeles.

STATEMENT OF JOHN HOPKINS, PRESIDENT AND GENERAL MANAGER, KCOP–TV, HOLLYWOOD, CALIF.

Mr. HOPKINS. It is just one of those things. We haven't forgotten Texas by any means, and get back there quite often, sir.

Thank you very much, sir, for giving me an opportunity to testify. I suppose I should apologize for repeating a few things that have already been said. However, I typed this during the half-time of the football game on Friday, Saturday, and Sunday, and couldn't know in advance what other people would say.

My name is John Hopkins, president and general manager of KCOP–TV, Los Angeles, Calif.

My experience in radio and television spans a period of 27 years, with 5 years out for Army service. I left radio for television 10 years ago.

In addition to serving as president and general manager of KCOP, I am on the board of directors of KPTV, Portland, Oreg. Past experience in chronological order:

Vice president and general manager—KFDA AM & TV, Amarillo, Tex.

Vice president and general manager—KTOK radio, Oklahoma City, Okla.

President and general manager—KTVT, Dallas-Fort Worth, Tex.

I have managed three television stations (two nonnetwork, one network) and two radio stations, ranging in market size from small (Amarillo, Tex.) to large (Los Angeles, Calif.). With experience in depth, I feel fully qualified to discuss the matters at hand with regard to

proposed rulemaking which, if adopted, would limit by law the amount of broadcast time allotted to commerical continuity or announcements.

To avoid repetition I do not wish to comment on the legal and/or constitutional aspects of the subject nor to measure the impact of continuing and expanding governmental control of private enterprise. These subjects have been covered and will continue to be covered by other segments of the broadcast fraternity. Rather, I wish to discuss the practical implications if broadcasters are faced with commerical time limitations by law.

THE PUBLIC INTEREST

In the opinion of the speaker there is no lack of communications between listeners/viewers and management of the broadcast industry. Commercial density should be and is a judgment matter for station management. Obviously viewer complaints on a wide variety of subjects—including excessive commercialization—are received and evaluated. Every station manager is acutely aware that viewer abuse by overcommercialization will surely result in a "flip of the dial." Incidentally, Los Angeles has eight commercial television channels (seven VHF, one UHF). How to attain one's share of audience is no small problem. Viewers are the integral part of broadcasting and broadcasters are constantly searching for more and better ways to serve the people of the community. However, commercial density is not a common complaint of the television viewer. The subject of listener abuse caused by overcommercialization has been dramatized all out of proportion to its true consideration. I have discussed this subject in detail with Gary Waller, director of programing for KCOP, and can state with authority that the station has received no more than four viewer complaints in the last year dealing with overcommercialization. KCOP receives an average of 2,700 letters weekly or about 147,000 annually. I notice from the testimony of Mr. Henry we get more letters in a week than he apparently has gotten in a year. Those dealing with commercial density are infinitesimal, to say the least. Virtually all listener comments by mail are seen by both Waller and me (see attached affidavit). Actually I put four in it. We could only remember two.

(The affidavit referred to follows:)

KCOP TELEVISION, INC.,
Hollywood, Calif.

AFFIDAVIT

To the best of our knowledge KCOP Television, Inc., has not received over four letters in the past year regarding overcommercialization.

JOHN HOPKINS,
President.

GARY WALLER,
Director of Programing.

Subscribed and sworn to before me on this 4th day of November 1963 as a true and correct statement.

[Seal]

MARY M. MCMILLAN,
Notary Public.

My commission expires May 6, 1967.

Mr. HOPKINS. American television audiences are knowledgeable and sophisticated enough to realize that the quality and diversity of television is possible only because of generous advertiser support.

Curbing commercials—other than through the voluntary television code—would surely lower the quality of television programing.

SELF-REGULATION

The "Television Code of the National Association of Broadcasters" is now in its eighth edition. Many changes have been made since its beginning, and certainly it will be revised from time to time when research indicates necessity. With each edition the public interest has been enhanced.

The code is voluntary and represents self-regulation in the true spirit of our free enterprise system. All stations do not subscribe to the code. This does not necessarily imply overcommercialization by the nonsubscriber. There are a variety of reasons. (1) Some companies maintain that their system of commercial control is as good as or better than the code. (2) Many stations simply can't afford the cost of membership. This, I understand. I can remember many times when a $6-a-year trade publication subscription had to be considered a luxury. Not all television stations have financial statements with black ink on the bottom line.

CORRELATION BETWEEN COMMERCIAL DENSITY AND AUDIENCE SIZE

The following statement is based on the experience of the writer and cannot be substantiated by research on short notice. My opinion is that there is absolutely no correlation between the amount of commercials within a program and the size of the viewing audience. Logic dictates that prime audiences or peak periods of audience size are also times of heaviest commercialism.

Going back a few years, the periods of 7 to 8 o'clock in the morning, 12 noon to 1 o'clock in the afternoon, and 6 to 7 o'clock in the evening were radio's prime time. These hours were the most commercially dense (easiest to sell at highest rates). Presently, radio's prime audience is during driving times. Too, this period is the heaviest commercially. As far as television is concerned, KCOP's commercial density is in an area of highest audience reach.

The point I wish to make is that listeners/viewers don't tune out because of the amount of commercials.

CHARACTER OF PROGRAMS

The character of the program itself often will determine the amount of commercial time that can logically be placed within the period. For example, the typical children's program with live host and cartoons is less likely to be hurt by heavy commercial density because advertisers have deliberately designed their commercial messages to integrate easily into this type of program. The entertainment value of many commercials is greater than or equal to that of the program content itself. Commercial density is still a matter of judgment and should not be fixed by law.

ECONOMICS OF TELEVISION

Fixed commercial limitations by law would upset the financial structure of American television to a degree that would approach disaster. Knowledgeable advocates of commercial control are well

aware that: (1) certain stations operate year 'round only because of profitable seasons; (2) other stations can only survive because of revenues produced on 2 or 3 days per week; (3) full-time stations operate profitably because of revenues produced during peak hours; (4) many stations can program qualitatively most of the time because certain peak hours earn revenues that subsidize low set-in-use hours.

The adoption of the NAB code into law might be the first step in limiting the revenues now produced by stations. Please remember, all stations are not "fat," only those with healthy bottom line figures are publicized. If the Congress gives the FCC the power to control the financial health of the industry by adopting the present NAB code, the FCC could also go on to further restrictive measures. Further economic strangulation under the guise of "the public interest" would certainly follow.

The facts are simple and irrefutable. The quality of American television depends solely on revenues from advertisers. If commercial positions are reduced in number, the results of such a move are crystal clear. Every network, every station, and every producer of programing would be forced to readjust programing expenses to fit loss of revenues. The public interest would be damaged, to say the least. The median between television with no commercials (Government subsidized) and the present healthy free enterprise television would be closed. And—at this point—mediocrity would thrive.

Using the market with which I am most familiar at the moment—Los Angeles, Calif.—the total market revenues for 1962 is 6,845,247 from networks; 20,988,614 from local advertisers and 36,163,611 from national spot advertisers; a total of 56,622,760 annually. If the number of commercial positions in the total market is reduced, two actions might result: (1) programing costs would have to be reduced to fit the new economy or (2) the price per commercial spot would have to be raised. Either one or both actions might result—depending upon the extent of commercial limitations. A substantial increase in advertising rates would eliminate to a great degree the small local TV advertiser. An obvious answer might be that the profit picture in Los Angeles TV could stand to absorb some of the profit cutback. The facts are that certain stations, network owned, and operated, for example, gain the major share of the market profits. Let me state with conviction that the remaining stations (four non-network VHF's, one UHF) scramble for what's left of the market's profits. Obviously, the network stations would be handed a further competitive advantage if total market revenues are reduced due to a limitation of available commercial positions.

If stations are forced to raise rates to compensate for a reduction of commercial positions—advertisers would be penalized by higher cost-per-thousand homes. Advertisers support televison because of its ability to move merchandise, but there is a point beyond which television would not be a good advertising buy. Advertising now supporting high quality American televison would be shifted to other media with more realistic pricing. In this regard the link between advertising revenues and the public interest is real and well defined.

EXAMINATION OF PRESENT COMMERCIAL LIMITATIONS

Commercial limitations by law are now in effect. Although the formula for commercial density varies from station to station, the FCC

nevertheless exercises control over the amount of commercial continuity any station can broadcast. When applying for license renewal, each station must specify the amount of time to be devoted to commercial and noncommercial announcements. The procedure for determining the effectiveness of this current limitation is as follows: A stational applying for renewal must supply the FCC with commercial and noncommercial performance during a composite station week. The days for the composite week are selected by the FCC without advance knowledge of the station. After the composite week has been forwarded as part of the renewal request to the FCC a determination is made as to whether the station's promise versus performance is in line. Flagrant overcommercialization evidenced by the composite week would certainly influence the request for renewal. What further commercial control could be needed?

Mr. ROGERS of Texas. Mr. Hopkins, what method is used to determine that composite week?

Mr. HOPKINS. What method is used by the FCC, sir?

Mr. ROGERS of Texas. Yes.

Mr. HOPKINS. I don't really know how they go about it.

Mr. ROGERS of Texas. How do they notify you about it?

Mr. HOPKINS. We are notified by them to comply with the forms for the composite week, and it is time that has already gone by, so we can't preselect the weeks that we would like to show.

Mr. ROGERS of Texas. What I mean is this. They call upon you to furnish them certain records on certain dates that they give you that are already passed, records that you keep, and then they put these together as the composite week.

Mr. HOPKINS. No, sir. They don't put them together. We put them together for them.

Mr. ROGERS of Texas. That is what I mean.

Mr. HOPKINS. Yes, sir.

Mr. ROGERS of Texas. They give you the dates?

Mr. HOPKINS. That is correct, sir.

Mr. ROGERS of Texas. And you put them together. I misworded that. And you furnish them the information. But you have to keep records of everything that goes on at your station.

Mr. HOPKINS. Yes, sir.

Mr. ROGERS of Texas. All the time, so that when they do call upon you for this composite week, you have the figures there and you can get them.

Mr. HOPKINS. That is correct, sir.

Mr. ROGERS of Texas. Just like the income tax collector.

Mr. HOPKINS. That is right, sir.

Mr. ROGERS of Texas. Mr. Rostenkowski.

Mr. ROSTENKOWSKI. When making your application for renewal, is this composite week taken in past performance of the last year, let's say?

Mr. HOPKINS. Yes.

Mr. ROSTENKOWSKI. Or is it any week as long as you have been broadcasting?

Mr. HOPKINS. It can be any week that they specify. It normally is a day out of several weeks to make up the composite week.

Mr. ROSTENKOWSKI. Do you know, Mr. Hopkins, of any station that was refused renewal of their license because of overcommercialization in the Los Angeles area or anywhere?

Mr. HOPKINS. I have no personal knowledge of that. I would like to say that in this regard, to what I would have to call control now on commercials, that I have a rather large station, and I have a lot of people. I say this because of comparing it with a small-market station of a few people and not enough time, I can afford to be very detailed.

I do for my own information what I call a program content summary 1 week out of every month. This is not asked for by anyone. This is just for our information. And I very carefully look at the amount of commercials that we have had on the air and what we have promised, and if I find that I am out of line, why I do something about it.

So I take this composite week thing very seriously from my personal standpoint. I would hate to face the Commission if I had flagrant overcommercialization or too many spots, as opposed to my promise.

Mr. ROSTENKOWSKI. But you don't know of any request that was denied on the part of the FCC with respect to overcommercializing?

Mr. HOPKINS. No, sir, I do not.

Mr. ROSTENKOWSKI. That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Mr. Hopkins, were you here yesterday?

Mr. HOPKINS. Yes, sir.

Mr. YOUNGER. Did you hear the hypothetical case of broadcasting all day long 7 days a week just commercials?

Mr. HOPKINS. Yes, sir. I thought that was hardly worth our time, it was so ridiculous, but I do recall it, sir.

Mr. YOUNGER. I was just wondering, I don't know how the matter crept in, but I think it would take the stretch of a very imaginative person.

Mr. HOPKINS. Yes, sir.

Mr. YOUNGER. To even imagine a station existing, either getting advertising or getting listeners.

Mr. HOPKINS. That is right, sir.

Mr. YOUNGER. With that kind of a program. Are you familiar with the statement of the FCC on July 26 on the doctrine of fairness?

Mr. HOPKINS. Yes, sir; I am very familiar with it.

Mr. YOUNGER. Does that confuse you or clear your thinking on the subject?

Mr. HOPKINS. I would have to say it confuses me somewhat, and it is a matter of very great concern. I happen to be in a particular area where there is much controversy, and almost on a day-by-day basis, and trying to apply the fairness doctrine is no small consideration to me personally.

Mr. YOUNGER. Could you possibly run a station on the basis of where a person could come in and buy time and use that time for editorializing for some purpose and then have to give equal and free time to somebody to answer it?

Mr. HOPKINS. I got the last part of your statement, not the first two or three words, sir.

Mr. YOUNGER. I said could you operate successfully a station where you sold time to somebody that might editorialize on some controversial subject on paid time, and yet you would have to give equal and free time to somebody to answer it?

Mr. HOPKINS. It would be most difficult to do, sir, if that were the case.

Mr. YOUNGER. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Mr. Chairman, I just want to commend Mr. Hopkins for his statement, and thank him for appearing before the committee, and state that on the last page of his statement there appears the most clear discussion of the FCC's present policy on overcommercialization that I have heard so far.

I know that this question was asked yesterday of the members of the FCC, and I did not get a clear indication from them as to what their present policies are. I certainly am glad to see this cleared up in my own mind. Thank you very much.

Mr. ROGERS of Texas. Mr. Hopkins, in keeping with Mr. Younger's question, you appreciate the fact of course that there is a public interest facet to this broadcasting business.

Mr. HOPKINS. Yes, sir; very definitely.

Mr. ROGERS of Texas. But you have never been told or led to believe that the broadcasting business is an eleemosynary institution?

Mr. HOPKINS. No, sir.

Mr. ROGERS of Texas. You have to get out and sell advertising to keep it going, don't you?

Mr. HOPKINS. Yes, sir.

Mr. ROGERS of Texas. To make ends meet. Now in the magazine business I know they put in what they call a short, short story, and it has been going through my mind, and I have been wondering what would happen in this field, speaking of the difference between limiting frequency of commercials and not having the power to get into the programing content.

If you had a 2-minute commercial and you devoted 15 seconds of that to just repeating the name of the product, then you had a minute and a half short, for instance, the Lone Ranger or something else, and then you had 15 more seconds repeating the name of the product, that would probably be considered 2 minutes of commercial.

Mr. HOPKINS. Yes, sir; I believe it would.

Mr. ROGERS of Texas. But if you had a 15-minute program in which you devoted 1 minute at the beginning to a commercial announcement and then had 13 minutes of crime or cowboy or mystery or whatever you wanted, and then a minute closing up, then that would only be 2 minutes of commercial, wouldn't it?

Mr. HOPKINS. That is right, sir.

Mr. ROGERS of Texas. Of course, I have a little difficulty in my mind in making the difference between length, but wouldn't it be possible for these nimble-minded—and I say that with affection—advertising people to get up a show to go in between these 2-minute things at the end, and every picture they show, it would contain the name of the product involved or someone would repeat the name of the product in ordinary conversation? That would be advertising, wouldn't it?

Mr. HOPKINS. Yes, sir.

Mr. ROGERS of Texas. What do you think the FCC would do in that sort of a situation, have another rulemaking?

Mr. HOPKINS. I suppose they would, sir. That is a little far out for me to visualize at the moment. I just haven't given much thought to that.

Mr. ROGERS of Texas. Thank you very much, Mr. Hopkins, for your testimony.

Mr. HOPKINS. Thank you, sir.

Mr. ROGERS of Texas. Our next witness is another man who is taking the place occupied by Mr. Dougherty, Mr. Marshall Pengra of KLTV, Tyler, Tex. Mr. Pengra.

STATEMENT OF MARSHALL H. PENGRA, VICE PRESIDENT AND GENERAL MANAGER, KLTV, TYLER, TEX.

Mr. PENGRA. Mr. Chairman and members of the committee, I will try to summarize material, since a great deal of what has been said by previous people testifying is going to now be rehashed the rest of the way.

My name is Marshall H. Pengra. I am a 20-percent owner and serve as vice president and general manager. This is a television station in a small market. I will pass over legal ramifications and any documentation reference to court cases and so on.

Mr. ROGERS of Texas. Let me make this observation, Mr. Pengra. Without objection your statement will be included in the record in total as it appears here the same as if you had read it. You may make such comments as you may wish to in connection with it.

Mr. PENGRA. This licensee does not intend to argue the legal ramifications of the Commission's proposal, nor to attempt to review such court cases and decisions which bear on this matter as may be referred to by others testifying in this hearing.

I am deeply concerned with the possible consequences of the Federal Communications Commission's proposal to determine and regulate the amount and frequency of advertising on television and radio stations. I certainly favor H.R. 8316.

Speaking as a general manager, part owner, and executive vice president of our corporation, my experience is largely limited by size of the market in which we operate the only television station, and so I want to identify myself with that. Tyler is a city of approximately 65,000. We utilize the only VHF frequency assigned to the east Texas area. Tyler is midway between Dallas and Shreveport, approximately 100 miles away from each of those cities. We are a way point, and there is just one frequency that has been used in there. I, incidentally, did have an experience in St. Louis with UHF television in 1953. I lost my shirt and my money and my share of the license, and briefly my enthusiasm for the whole business, but I got it back, but that is another story, but I do know what can happen to you under certain circumstances that are not too favorable. As I say, I think most of the things have been said.

Some people refer to a market situation like ours where you have the only television station, and the next ones are 100 miles away, as a kind of bird's nest on the ground thing, but there are probably 30 or 40 markets in this particular classification as to being a single station

serving an area in the United States. So that you can get a little idea of the particular problem that I have in Tyler and the east Texas area we compete for audience attention and for advertising revenue with 14 radio stations, 10 daily newspapers, approximately 35 weekly newspapers, 7 community antenna systems, including 1 in Tyler proper which brings in 3 networks and 1 independent television station from the Dallas-Fort Worth area. This is a rather painful subject with me, the community antennas, and unless you ask me about it, however, I will skip over that for you.

Mr. ROGERS of Texas. I have understood the problem. I know what the problem is. We have been over it.

Mr. PENGRA. I further compete with billboards, direct mail, national magazines, theaters, local sports events, and eggheads above the plebeian delights of a local television station. So if you think you are in a market all alone, somehow or other circumstances seem to creep in and still make it a little difficult now and then to keep enough money on hand to do all the things you want to.

We operate a television station in a secondary market. We pay the same prices for the telecast equipment as any major market, and we pay our employees almost as much, but there the similarity ceases. Our rates for advertising are substantially lower than the major markets, the number of local merchants and potential advertising firms are fewer, and our problems in securing advertising revenue from the national advertisers is far more difficult because of our size and total coverage.

According to published summaries and statistics which have been accepted by national advertisers and networks in the so-called secondary market statistics and then on down to the smaller markets, there are about 150 of us, and I took this from Tyler as sort of a medium secondary market, and went down from there while checking it out.

So while many of these so-called secondary markets where two stations are operating in a comparatively small or secondary market and in some cases one, but we will all have relatively the same setup problems as they come along. There are approximately 150 secondary market stations operating in the United States today, which range from Tyler, Tex., a medium-sized secondary market, downward to the smaller markets. I need hardly explain that the smaller the market the greater the problem securing the necessary advertising revenue to keep the operation solvent and operating enough hours of the day with adequate staff to really operate in the public interest rather than simply as a satellite type of operation releasing network programs to the service area.

The advertising rates which such stations are able to sustain are considerably lower than the larger market stations, and despite the fact that considerable question has been raised as to the validity of circulation measurements by certain measuring groups, the advertiser still largely selects and buys his time based on stated cost per thousand rates basis, and he wants to set measurement in your market and he wants you to show him how many homes you are going to supposedly give him at this particular time and how much do you charge for it.

Because his formula as to what his cost per thousand is must be met, he can eliminate a great many of these secondary market stations from his list of stations that he will buy by taking the statistical cover-

age material that would be represented by maybe the top 50 markets which will get him x percent of all the viewers in the United States, and he may feel that is as much of his budget as he wants to put in television, and a great many of the rest of us can thus be eliminated by that simple factor alone. Or we can be elimintaed by not having the number of homes necessary in this delivery to meet his cost per thousand rate that he is willing to pay.

This is a little thing that comes into ours as a problem. The situation then leads to a heavy demand for our highest rated time period, more advertisers want those, and so we find ourselves often in a cramped position of attempting to operate as closely as possible to the established NAB commercial codes, and yet facing the realistic problem of getting an advertising position for him that will meet his cost efficiency policy. So far we have been able to cope with this situation reasonably well.

Each new season as new programs come along, we will make a selection from the two network affiliations that we have and hope we are right, but if we hit a disastrous area of low-rated programs, then our whole structure is off, and we face the problem all over again. It is not uniform.

My advance filing with the FCC in this matter made no attempt to spell out any terms that I thought I could live with. I think I must admit that my filing in essence said "Mother, please, I'd rather do it my self," and I couldn't feel there was much to add to that at that level.

We subscribe to the NAB code. We have objected to many of its provisions on the grounds that we did not feel they were realistic, and we felt they were largely influenced by opinions of operators in the major markets whose rates for a spot were high enough to permit them frankly to operate in a rather rarified commercial exposure atmosphere.

But I am not critical of the code and its goals and its restrictions in the sense that I don't believe it should be there. My statement is intended to point out that the varying conditions which exist in our type market underline the need for a realistic approach on the part of the code committees of the NAB or members of the Commission.

It simply varies so much from market to market and station to station that the things that have been referred to previously, the almost impossible situation of attempting to administer it, would really be ridiculous.

If I had a rate of $10,000 for a class A hour, prime time hour, as does WCBS in New York City, as against $325 per hour rate that I have, I might be inclined not to worry very much about who might want to enforce code restrictions of any kind.

On the other hand, to be realistic about it and in complete candor, I must say that I oppose the exercise of this power or the possibility of the exercise of this power over television or radio in specified time segments or unspecified time segments totally. I feel it is an invasion from which, if once started, we might never recover.

My competitors in terms of open market competition, the newspapers, the billboards, the magazines, and direct mail—and I separate these from others in the broacast media because they must live under similar restrictions that I do, but these others are not subject to reg-

ulation as to the amount of advertising per page or the number of pages or the boards or what goes on the board or whether a section of it over there promotes cancer drive or what, or how many insertions in the direct mail can go into the same envelope.

None of these things exist that I know of. Nor are these people that I compete with in the open market charged with the responsibility of the fairness doctrine, or the obligation to serve significant minority groups in prime time, or with the anxiety of a 3-year license period, or the life and death problem of a network rate, or a possible cancellation, all of which could result in a real quick distress merchandise sale, my antenna, my transmitter, my building, my shirt, my $30,000 radar unit which I won't need any more to let me know that I was hit by a tornado.

Now, one other thing I would like to call to your attention. At the peak viewing periods in Tyler, based on what information we have again from these research people who tell us how many people are in viewing and so on, at a peak period in prime nighttime it was indicated that from 60 to 82 percent of the total television homes within our area were tuned in.

Now, as I say, there has been some question about these measurement groups, and I would not want to advance this as being an absolute fact. We have been reminded to restrict ourselves in utilizing this material. But they range from 60 to 82 percent of all television homes tuned in, which would lead me to cautiously conclude that somebody out there loves us, or if they don't love us, they are tolerating us, and toleration in many cases is about 90 percent love, if I know what marriage means, and in a way we are married to these folks, or they to us.

I just would like to close by saying to you members of the committee and you, Mr. Chairman, that your approach to this problem which the proposed rulemaking has brought and raised to our industry makes me feel kind of like Sam McGee, the legendary Yukon gold miner. You remember him in the poem by Robert Service.

They though he was frozen to death, and the ground was so hard that they couldn't bury him, so they stuck him in a big oven to cremate him, and when they though he was done and they were ready to get the ashes, they went in to get him and here sat Sam happy as a code subscriber with a 3-year new license renewal saying, "This is the first time since I left the farm that I have been warm, from sunny Tennessee."

Thank you.

(The statement of Mr. Pengra follows:)

STATEMENT OF MARSHALL H. PENGRA, VICE PRESIDENT AND GENERAL MANAGER OF CHANNEL SEVEN, INC., TYLER, TEX.

The instant comments are filed on behalf of Channel Seven, Inc., doing business as KLT-TV, Tyler, Tex. My name is Marshall H. Pengra. I am a 20 percent owner and serve as vice president and general manager.

This licensee does not intend to argue the legal ramifications of the Commission's proposal, nor to attempt to review such court cases and decisions which bear on this matter as may be referred to by others testifying in this hearing.

I am deeply concerned with the possible consequences of the Federal Communications Commission's proposal to determine and regulate the amount and frequency of advertising on television and radio stations.

Speaking as a general manager, part owner, and executive vice president of our corporation, my experience is largely limited by size of the market in which we operate the only television station. Tyler is a city of approximately 65,000.

We utilize the only VHF frequency assigned to the east Texas area. Tyler is midway between Dallas and Shreveport, approximately 100 miles away from each of those cities.

In Tyler and the east Texas area we compete for audience attention and for advertising revenue with 14 radio stations, 10 daily newspapers, approximately 35 weekly newspapers, 7 community antenna systems, including one in Tyler proper which brings in three networks and one independent television station from the Dallas-Fort Worth area, the billboards, direct mail, national magazines, theaters, local sports events and eggheads above the plebeian delights of a local television station.

We operate a television station in a secondary market. We pay the same prices for the telecast equipment as any major market, and we pay our employees almost as much, but there the similarity ceases. Our rates for advertising are substantially lower than the major markets, the number of local merchants, and potential advertising firms are fewer, and our problems in securing advertising revenue from the national advertisers is far more difficult because of our size and total coverage.

According to published summaries and statistics which have been accepted by national advertisers and networks, there are approximately 150 secondary market stations operating in the United States today, which range from Tyler, Tex., a medium-sized secondary market, downward to the smaller markets. I need hardly explain that the smaller the market the greater the problem securing the necessary advertising revenue to keep the operation solvent and operating enough hours of the day with adequate staff to really operate in the public interest rather than simply as a satellite type of operation releasing network programs to the service area.

The advertising rates which such stations are able to sustain are considerably lower than the larger market stations, and despite the fact that considerable question has been raised as to the validity of circulation measurements, the advertiser still largely selects and buys time based on stated cost per thousand rates as evidenced by the total homes showing for individual programs. This means that a station operator in a market such as Tyler, Tex., will often find specific program periods and station break times which fall below the limits of cost per thousand as observed by the national advertising agency. This inevitably leads to a heavy demand for his highest rated time periods and leaves the station in the cramped position of attempting to operate as closely as possible to the established NAB commercial codes, yet facing the realistic problem of getting advertising position for an advertiser at a cost efficiency he will authorize for purchase.

As each new fall season with its new programs comes along, different time segments which the station has for sale change in value with program popularity. A disastrous season of low-rated network programs could cause a single station market or secondary market station to sustain a severe loss if the proposed commercial limitations were to be strictly enforced.

Despite the fact that this station subscribes to the NAB code, we have objected to many of its provisions on the grounds that they have been unrealistic and that for the most part they were drawn up and designed by operators of metropolitan market stations whose rates for spot and network advertisers are high enough to permit them to operate in a rarefied atmosphere of minimum commercial exposure.

This statement is in no wise to be construed as a criticism per se of the goals and restrictions provided by the NAB code. It is intended to point out that the varying conditions which exist in our type markets underline the need for a realistic approach on the part of the NAB code committee members and the Federal Communications Commission. Single station and secondary market stations would face real problems of economic survival if commercial regulation became a matter of enforcible law and should prove too severe.

At present and up to now we have managed to operate substantially within the limits of the NAB code. We have slipped occasionally in certain time periods. If I could command a rate of $10,000 for a prime hour in evening time as WCBS does in New York City, rather than the $325 per hour which we charge in Tyler, I might be inclined to worry less about surviving code regulations regardless of who might be enforcing them, but in complete candor, I must earnestly oppose the exercise of power by the Federal Communications Commission which would attempt to regulate the length and number of commercial advertising announcements permitted on any television or radio station in specified or unspecified time segments.

I compete in the open market for advertising revenue with newspapers, billboards, magazines, and direct mail. They are not subject to regulation as to the amount of advertising per page or the number of pages or boards or enclosures which they may utilize. Nor are they subject to the limitation of hours during the day which they can operate.

If a change in the policy of national advertisers should result in lowered revenue to our station, or the operation of the CATV system in Tyler causes me to lose a network affiliation or result in a lower network rate, or if a low-powered UHF station enters my market with low rates to compete with me for the advertising dollar, or if other unfavorable market conditions or business depressions should ensue, I will most certainly find it necessary to look for ways and means to run more commercials for less money than I do presently. I hardly think I could be expected to do otherwise. Under such circumstances as these, unless we could recoup lost revenue, our television station would start cutting expenses, staff, operating hours, and public service programing. We would be forced to meet our income problem. Any existing restrictions as to the number of commercials and their length which would be enforced under those circumstances could cripple our operation possibly permanently before we could even get on the FCC docket for a hearing to plead our case.

I object further on the grounds that existing requirements by advertisers and networks are severe enough, in my judgement, with respect to the number of commercials and the time allowed for them within the program structure to prevent really serious overcommercialization. Beyond that it is certainly to be expected that today's viewing audience will stop watching and thus stop responding to television advertising if its commercials become too long and too numerous. I can think of no more effective restraint on overcommercialization than that life-and-death force, the home viewer, with his hand on the on-and-off switch of his TV dial.

We are an industry, licensed and regulated by the Government, with respect to the channels and frequencies we are authorized to use, the operational standards of equipment we use, and the required annual reports of our revenues, types of programing, and ownership. Certainly the Federal Communications Commission must operate in this area of authority to maintain order in the broadcast spectrum and to determine the qualifications of those individuals and corporations which are entrusted with the responsibility of operating television and radio stations in the public interest, convenience, and necessity.

However, in the area of station programing, establishing rates, length, and number of commercial announcements and the character and quality of those announcements, station owners must be free to meet their specific individual problems as they vary from market to market and station to station, free without constant fear of investigation, and free from the implication that all broadcasters are suspect and that the broadcast advertising medium is tainted in all aspects of its operation.

The responsibility of keeping the viewers' attention, satisfying advertisers' demands, complying with network policies and meeting the payroll will, in most cases, constitute a reasonably close observance of most of the present NAB code authority regulations. Any station operator who consistently fails in any of these areas runs the risk of finding his business in a precarious position which will dictate the necessity for a change in a far more graphic and urgent manner than set of prescribed rules enforcible by the Federal Communications Commission or any other Government authority covering his advertising practices.

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Thank you very much, Mr. Pengra.

Our next witness is Mr. H. Selph Holder, president of station WGAU, Athens, Ga.

Mr. Holder?

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STATEMENT OF H. RANDOLPH HOLDER, PRESIDENT, STATION WGAU, ATHENS, GA.

Mr. HOLDER. Mr. Chairman, my name is H. Randolph Holder, but they call me J. Randolph, and they call me Randolph in Broadcasting magazine, and sometimes they put me with WBAL–TV, so I feel right at home.

Mr. ROGERS of Texas. It is H. Randolph?

Mr. HOLDER. That is right. It is easily mixed up.

Mr. ROGERS of Texas. The clerk advises me that this is the name that came in on the Western Union information. They spelled Randolph S-e-l-p-h.

Mr. HOLDER. That is right.

Mr. Chairman and members of the committee, I am appearing for my partner and myself in behalf of our own full-time radio station, WGAU and WGAU–FM in Athens, Ga. This is a college town about whom you have heard a good deal, and now they don't even ask where Atlanta is. They just say it is close to Athens very often.

This station has competition, our station, to other radio stations with another FM grant. We have an educational TV station, a daily newspaper, and we have, of course, three or four or five TV signals in the town also. We belong to NAB, GAB, RAB, we are affiliated with the CBS network, and myself, personally, I have been in broadcasting since 1939 at a variety of stations.

We subscribe to the NAB code of good practices, and we were renewed just last month. So it is true no personal difficulty that I appear here.

I have been a past president of the Georgia Association of Broadcasters a couple of years ago when we started this real active phase that we are now in, and which is being carried out so well by Mr. Kurault. I hasten to add we like the NAB code because it is voluntary. We can either subscribe—we can either join it or not as we so desire.

We use it in our promotion. We think it is good business, and from the results that we have been having lately, we believe that it is very good. It helps us with our image as far as sponsors are concerned.

Now my appearance before your committee comes because we are deeply alarmed at what we believe is a threatened encroachment on broadcasters' rights. Encroachments, I believe, were never envisioned by those who fashioned the original Communications Act.

I believe that the FCC's proposed control of commercial time will inevitably be followed by other program control attempts that will eventually or could eventually destroy the freedom of the broadcaster and deny him from becoming an active and important catalyst in the development of his community.

There has been a good deal of talk at different times about why we don't come up here before these committees, or why we don't appear before the FCC, and in some of the newspaper accounts I have read, it has been called a fear of reprisal and that sort of thing.

I frankly believe it is far more practical than that. The cost of this to myself this time will run about $150. Now this is just beginning to come here to Washington for 2 or 3 days, besides saying up there for an hour and a half last night in that plane wondering whether we were going to come down and if we would get down.

You see in small stations, and mine is sort of middle sized by standards, I have 15 employees, I do the news, the public relations, the promotion, sell some and I also manage it. My day starts at 5:30 in the morning, and I leave and get home at about 8:30 at night 6 days a week. Then on Sundays, my day off, I only work from 5 to 9 in the evening. So when I leave it costs me more money, or my station more than the committee could possibly recognize.

The fact, too, that I am gone from the community, and when they miss my voice on the air, or the fact that my presence is not there, this costs me in image, too. This is, of course, difficult because this is the personality image and it isn't good.

We are, of course, moving in the direction of building this station image completely.

Now I believe another thing, too, that the FCC encroachment is as great upon your congressional authority as it is on our freedom in programing selection, and by this I include a selection of commercials, because properly done and programed I think the commercials don't intrude at all, but they suggest and sell at the same time.

I believe, too, that the FCC is moving into areas not expressly denied it by the act, and instead of working to carry it out as Congress perhaps intended. This is the fault of many of the regulatory or regulating agencies.

This encroachment isn't necessarily predetermined or thought out in advance, I believe, because I think that sometimes the permanent personnel in any one of these agencies, well, they are the masters of all this technical detail, and sometimes they get a little overenthusiastic and move into these areas, and suddenly it is there before the top men in the group, and they take the ball and run with it.

The system is about as much to blame as anything I think, but it is one that we ought to watch very carefully and try to control.

Now, I want to mention just one personal thing here. I recently received some public service announcements from the Public Housing Authority. I tried to read most of this stuff when it comes in, but this read in part, this is paraphrased: "If you are having difficulty getting a mortgage loan because you live in an undesirable neighborhood or because you are a member of the minority race, come see us and we will take care of you."

Now, of course, this is just one evidence of what I think could be possible for control. As far as this is concerned, we editorialize for open schools at a time when it was distinctly unpopular in my hometown, and we have editorialized on that situation very much. But this did not go on my station. I sent it to Senator Russell who took care of it from his office. But it is the idea of the kind of thing I think we could be forced to put on the air if the FCC goes ahead with, first, this commercial control, then they can inch into this other thing, too. I fear that it would soon result in full control of the broadcasting media.

And I think too that the FCC underestimates the intelligence of the people who listen to us. I think that it is a suggestion we don't have sense enough to turn off that radio or turn to another station, if we don't like what we hear. There is scarcely any place in the United States you know that you can't hear at least four radio station signals anytime during the day.

I see Mr. Rogers looking around. If I may, I would like to show you gentlemen three things here from the FCC, or rather the NAB overpopulation study that was made just recently. It was presented to the FCC.

The first one is a 1940 map showing the Southern United States which has mountains, it has also the coastline, it has some areas, agricultural areas and everything, and it was thought to be very indicative of the Nation, from Birmingham, Ala., to Durham, N.C., to Jacksonville, Fla. That shows the number of stations in there, Mr. Chairman, as of 1940. Now there are a lot of areas in there where you couldn't hear radio.

The next map shows 1950, and I think this is quite an addition. In my own town instead of one signal there are three. This shows that there has been a considerable amount of improvement, but of course since the 1947 area there, station assignments have really jumped, and so I am going to show you the 1960 map now, which looks almost black, and shows you that you can see, you can really see that there are at least four signals everywhere, some places a good many more.

I found, in looking around and thinking about this situation, that overcommercialism is not very well defined actually. It is sort of a nebulous term, and many people in my community never took the time to think about where the money comes from to operate a radio station.

I was sitting by a new lieutenant from Fort Benning on the plane coming up here last night, and I was showing him some things in a scrapbook that I am going to present to the committee here in a moment. He said to me he thought we were subsidized by the Government. He did not know we got our money from advertising at all. This is an interesting thing. This fellow is 22 years old, and above the average in intelligence.

Many of my friends have asked me—not in business but say at the University of Georgia—where we get our money to operate. So, apparently, they are not especially aware of any commercials. I mean they know they are there, but they never have thought of them in this regard.

We have a system where we ask students to come in, the kids in the grade schools around there to come in and see our radio station. We had a thousand of them through there last year. We had our first class this year.

I asked them where do we get our money to operate? You know one little kid held up his hand and said, "From the Governor?" I said, "Heavens, no."

A little girl raised her hand and I said, "Where do you think we get it from?"

She said, "From the President."

I said, "No, no, that is what we are trying to stop," referring to this sort of thing. This is what upsets us just a little bit.

When they finally got through I think that we had convinced them that through the commercials their parents could find the things they needed to buy to make living more worthwhile, and this is the idea that we are trying to put out. Perhaps this upcoming generation will not be quite as ignorant of broadcasting affairs.

Now, I believe that not very many people violate any conception of overcommercialism on Sundays, Mondays, Tuesdays, and Wednesdays, but now Thursdays, Fridays, and Saturdays, in my area are a

different thing. Businessmen unfortunately follow the same old tactics followed in the newspaper, advertise on Thursday, Friday, and Saturday so when they come into town you see on Saturdays to buy, from the country, which, of course, is not true any more, then they go ahead and put all their advertising on the last 3 days of the week.

Also as far as most broadcasters are concerned, I think you can have January, February, and August. In some areas where they sell tobacco this is a little bit different, but in some areas I think this is just not up to it. You couldn't sell 18 spots if you had it.

Speaking of what station operators are going to do, every businessman wants his commercial where you can hear them. This is an unfortunate fact in sales. He likes to hear his own stuff but this isn't necessarily where he ought to have them if he is going to sell the most stuff.

Most of them like the hours between 7 and 8 in the morning and 6:30 and 9, because that is when you can hear them. But you have already heard testimony that mighty fine time is the driving time in the afternoon. This means that all stations are usually jammed from 6:30 to 9 in the morning, but I think that a lot of station operators are doing the same thing that I did.

Just the other day, and this is a concrete product here, the Chick Piano Co. came and they wanted a spot a day between 7 and 8 in the morning. I turned them down. My commercial manager turned them down before he came to me because of the fact we think we are commercial enough in that area already. He couldn't conceive of this.

He said, "You can always squeeze in one more." They think it is elastic. When we told him no, he finally decided that he just wouldn't take it. Now, when you don't sell somebody like that, the money goes into another station, it goes into the newspaper or something else. You never get it back.

I am not saying that you should because we didn't at that time, but now I can see in some cases where that account might make the difference that they would go ahead and take it.

Now, I turned down another shorter run of spots within the same period of time for the same reason, because we just won't do that at this time.

Now, I am sure that I am not unique in this, that plenty of other broadcasters are having to do the same thing, just for good broadcasting so that people will continue to listen to the station.

I was asked to say this by several small station operators in the State who heard that I was coming up here, and that is that if you do knock off this advertising business from them in the areas when they can sell, that it will mean the difference between making or breaking the station, whether or not it is going to continue to make any money, and it will result in loss of business.

Another thing they brought out was that many of the small advertisers in their area cannot afford higher prices than this would cause if the commercials were limited.

I wanted to say also that I thought I saw something the other day where we were told that we did not know what our audience was thinking, and I wanted to say that broadcasters are extremely thin-skinned where the audience is concerned. The loss of just one listener to us is of vast importance.

Now, if somebody tells me, like the man did at the musicale about the Schola Cantorum the other night, in our city there was too much violence to the newscast just reporting in our area, I listen and think how can I present this so it doesn't give him an unfortunate distaste for that part of the programing. I think how I can write it differently in a different mood, but still say the same thing.

We tried at one time to move a public service program called "Strength for the Day." We had just taken over this station, a 15-minute program, a very nice, quiet religious service. It was at 6 o'clock in the morning. We figured we would move this public service program and sell the 6 o'clock news or something on this order here.

We moved it to 5 o'clock. About a dozen calls came in the first day. We thought we will weather this one because that isn't too many complaints. The next day it was double. By the third day they offered to sue us, so we moved it to 5:30 by way of a compromise. By the end of the week we had a thing in there with 200 names on it—a petition. So we moved it back to 6 o'clock where it belonged.

If you don't think that the listeners can't program your station one way or the other, you are mistaken as this just shows. This isn't the only thing that you would change if a listener says so.

Public service is the thing that I wanted to concentrate on today. People think of public service as something that just comes out, but it takes money, gentlemen, to do public service in the broadcasting industry, particularly I would say in television, but even in radio also, because if you take the time of your program director or yourself to work up a public service program of any type, you have spent a good deal of money in hourly wages alone, not to speak of the air time that you give them, the time taken from other areas of your broadcasting day.

So I wanted to bring out just a little bit of a program, and if I may present these 2 sheets here without going into detail, they show about 100 different areas here in which our station alone; and once again I am not holding it up as an example, all broadcasters do this, gentlemen, all broadcasters, it shows what we have entered into.

For instance, a series of 35 program in cooperation with the League of Women Voters on legislative questions, capital matters, voting procedures, and so on. In another instance we ran a series of 12 programs on the 12 different agencies in the Community Chest.

Now, if you don't think it takes a lot of time and effort to get these people together and bring them into your station and record the program, and then give them the time plus the promotion efforts involved, then this is something, a very difficult field, but this is what will be eliminated if we start losing money. If you would present these to them, you could just check these as I talk, please.

Now, one other thing. We have a considerable pride of ownership in this 3-year license and in our concern. A lot of people ask where does all this money go from, from this overcommercialism that we are getting so rich on. I will tell you that most of it goes back into making better sound and better programing for the people in the area.

It goes back into equipment, No. 1. If you really don't believe this, you could ask my wife. I told her I was going to say this, and she

was unhappy, but she has asked me about new furniture for the living room. She says every time she starts looking or shopping we buy a new transmitter, a new board, or something at the station. I know these gentlemen behind me here have the same difficulties.

For instance, we put in over $45,000 back in new equipment in our little station in 7 years. These people back here with us and broadcasters all over the United States do the same thing. They try to operate better and better in the public interest.

I know a station in Paris, Tex., where an out-of-State owner has not taken out a cent of profit in 5 years, while he is building that station back up to what it should be. We have heard some remarks from larger areas and medium areas and I think that perhaps it may be more difficult to be personal in a community in a larger area.

But even in a larger area, a medium area, or a small area, if you are doing something that your listeners don't like, you hear about it very soon, or a sponsor would tell you if they don't tell you themselves, because they are going to talk, and they will get to a sponsor or to you sooner or later.

The small area is cognizant of that feeling immediately. And we keep very close contact with the people in our towns to know what they are feeling.

I think that on our staff of 15 I could say, without extending it a bit, that we are in over 100 organizations. We belong to over 100 organizations in town on the board of directors, or are quite closely connected with chambers of commerce, boards of health, all these different boards, civic clubs of all sorts.

One thing from AP, just by way of closing. I had a couple of things here, but on this AP release about a question of when and how often commercials should be permitted to interrupt programs, Mr. Henry has said the other day I think though I wasn't here, but the question came up as to what is a program in modern-day radio.

This is difficult. Is it uninterrupted music? This makes a very interesting subject to get into, and whether or not this is in the public interest to have nothing in such a program.

Chairman Rogers, you brought up, just a moment ago, I thought this was interesting because you brought this up about the statement on the commercials and the fact that a commercial could be the whole 15 minutes. I was riding on the plane a part of the way up here with Edwin Gerchevski, the head of the school of music at the University of Georgia. He put to music one of those articles or a news item in Time magazine, because it was really sort of poetry in motion as far as he was concerned.

He suggested that many of the singing commericals today would soon be able, through serious music, to take a company like the Ford Motor Co. or something like this, put the whole story of the Ford car in a serious piece of music, a really serious classical piece of music, and have the whole program completely commercial, and he asked, "Well, is this all commercial programing, or is it really entertainment?" On that thonght, I would like to leave it with you and say that we are very much in favor of your bill.

Mr. ROGERS of Texas. Thank you very much, sir. Mr. Rostenkowski?

Mr. ROSTENKOWSKI. No questions.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. You say you received your renewal a month ago?

Mr. HOLDER. No, sir. I don't know what I said. My renewal is up right now. I have to renew within the next few months, sir.

Mr. YOUNGER. I thought you said when you started in——

Mr. HOLDER. Oh, my renewal of my NAB good code. In other words, I was accepted again for the code as a result of their perusal of my logs.

But my renewal for the FCC is up again, and I also have a contract ended by a radio station in another town in Rome, Ga., which is up for FCC approval right now.

Mr. YOUNGER. How long has it been awaiting approval?

Mr. HOLDER. The transfer of the station has been in about 6 weeks now, and we expect it still in December. I understood there are 500 behind in that category. I don't know, that is what I have heard.

Mr. YOUNGER. If they take on this rulemaking and supervise that, how long do you think then to get a transfer of the station?

Mr. HOLDER. Sir, I don't think it will make any difference in that respect. I think they have a certain section to take care of that, and they have four attorneys working on it.

Recently they put four more with it, as I understand it, to attempt to speed this up. But so far as I know, there hasn't been any new surge of renewals as yet. But I don't think it will hurt that section. It is sort of divided up sectionwise.

Mr. YOUNGER. To try to do it with the same staff, they will have lots of problems.

Mr. HOLDER. They could if they move anybody around; yes, sir.

Mr. YOUNGER. That is all, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Kornegay?

Mr. KORNEGAY. I am sorry I was not here to hear all of your statement, sir, but I would like to ask you this: How often do you come up for renewal, insofar as the code of good practices is concerned?

Mr. HOLDER. You have me there. I don't know. Paul, how often do we come up for renewal—once a year? I am informed every year. That is checked every year on that code.

Mr. KORNEGAY. And in making application for renewal, do you have to submit the log to the NAB?

Mr. HOLDER. Yes, sir; that is right. They pick the days, and you give them the logs. In other words, you don't get to pick the logs yourself. They pull them from whenever they want to.

Mr. KORNEGAY. They pull them?

Mr. HOLDER. Yes, sir.

Mr. KORNEGAY. And that log indicates how many commercials, the length of commercials during the course of that day?

Mr. HOLDER. Yes, sir; that is right. I know there has been some talk here about too many commercials, and I don't understand.

Mr. KORNEGAY. You don't have too many commercials on radio; do you?

Mr. HOLDER. I don't; no. The fact of the matter is, I could stand some more if we knew any good sponsors. You mentioned 2 minutes; there has been some talk about 2-minute commercials, and I don't understand it because most of the commercials are just a minute long.

Mr. KORNEGAY. We have heard all sorts of things here.

Mr. ROGERS of Texas. Will the gentleman yield?

Mr. KORNEGAY. Yes.

Mr. ROGERS of Texas. That would make for a short, short, short story, wouldn't it?

Mr. KORNEGAY. You are situated in Athens, Ga.?

Mr. HOLDER. Yes, sir.

Mr. KORNEGAY. That is the home of the University of Georgia.

Mr. HOLDER. 10,500 students.

Mr. KORNEGAY. Do you carry any public service programs?

Mr. HOLDER. With the university?

Mr. KORNEGAY. As far as the university is concerned?

Mr. HOLDER. Yes; they have a weekly program that they put out. Also we are in very close connection with the people there in the Science Center, and we don't run those on a regular basis, but anything that goes on on the campus we usually tape or else play back live, and I was going to say also in that regard we have internships with our station, with the local people there, and in their school, that our staff is available and does go to the university to talk to the journalism and radio—TV students, and that we also give the university 2 hours every day on our FM stereo separate programing, a 2-hour show, and they set up their own station staffs there of a general manager, and a program director, and a news director, and so forth.

They program that 2 hours according to our policy, and our station takes the time to send over our top people with them and confer on this, so that when they get out of school they have had some practice experience in radio and TV broadcasting.

This, of course, is another expense that we don't write off. We just do it because it is good for the industry.

Mr. KORNEGAY. Thank you very much.

Mr. HOLDER. You are quite welcome.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. Mr. Holder, if a bill came before the Congress granting wide powers such as the FCC is undertaking to presume here, do you feel that the industry generally would oppose such a bill?

Mr. HOLDER. Yes, sir. I think that there is already a move afoot with the FCC hearings here for every broadcaster in the State of Georgia to come up in protest at the FCC hearing next week.

Mr. ROGERS of Texas. Then it would follow, Mr. Holder, that had you or any of your associates anticipated, at the time of the passage of the Communications Act, that any commission ever intended to assume such authority as this, then you would have opposed that at the time or asked that language be written in specifically saying that no such wild things could take place.

Mr. HOLDER. That is correct, sir. We don't believe that the act, in the beginning, meant this at all.

Mr. ROGERS of Texas. Thank you very much, Mr. Holder.

Mr. HOLDER. Thank you.

Mr. ROGERS of Texas. Our next witness is Mr. Wayne Kearl, of TV station KENS, San Antonio, Tex.

STATEMENT OF WAYNE KEARL, GENERAL MANAGER, KENS–TV, SAN ANTONIO, TEX.

Mr. KEARL. Mr. Chairman and gentlemen, my name is Wayne Kearl. I am general manager of KENS–TV in San Antonio, a market of about 350,000 television homes.

I have been 23 years in the broadcast business, and just on Halloween celebrated the completion of 9 years as a resident of Mr. Rogers' fine State.

Many of the points that I thought might be of interest to present have been ably covered by other witnesses. If it is permissible, I would submit my statement and address my remarks to but one point.

Mr. ROGERS of Texas. Do you have other copies of your statement, Mr. Kearl?

Mr. KEARL. Yes, sir; 50 were delivered.

Mr. ROGERS of Texas. Your statement will be included in the record in full the same as if you had read it all.

Mr. KEARL. Yes; 50 copies were sent to Washington. If they have been misplaced, we will hunt them down.

Mr. ROGERS of Texas. Fine. You may proceed to comment on it as you please.

Mr. KEARL. Thank you, sir.

I wish to comment in favor of Mr. Roberts' amendment.

Our station recognizes that improvements are possible and desirable in the commercial procedures of television. To that end we subscribe to and support the National Association of Broadcasters Code.

Television is a young industry which has grown with dazzling speed. As our experience grows in this fascinating and complex field we are searching for better forms, sounder procedures, broader service to the public. The NAB Code is one instrument in this search. Its essence is, that it is a voluntary, continuing process through which a wide variety of views and needs and problems are brought together. It would be a serious mistake in my judgment to change this continuing process into a frozen design, as the FCC in effect proposes.

Let me illustrate. Our station broadcasts a certain hour-long kiddies program daily. We became aware that we were running two commercials a day too many according to the NAB Code. So we reduced the number of commercials to conform. But most of these commercials are entertaining. They use cartoon characters, songs, illustrations, and so forth to appeal to the youngsters.

And the kids like them. In consequence, I do not agree with the code limitations on this particular program. Economically we are placed in hardship. The advertising orders available for kiddies programing is seasonal. The program "travels light" from, say, December 15 to March 1, and from May 15 to September 15. Yet it costs as much to produce during the lean months as during the fat ones. And certainly the kiddies want this program service year round. We need commercial leeway in the good months to pay for the bad months. Now here's a heartening thing. I can talk to the code people, explain our problem, and I've a fighting chance sooner or later of winning their approval.

In contrast, our station thinks the code is too lenient in the number of commercial interruptions it allows in certain programs. We would

favor more commercials at the beginning and end of a program and fewer interruptions within the body of the program. But many other stations and many other advertisers don't agree with us. The code authority hears our views, it hears their views and there is hammered out a generally improving instrument to serve all. Thus, through the voluntary code a lively, constructive dialogue is going on. Let us not, through regulation, turn this into a cautious, sterile monologue.

May I comment briefly on another point. Spokesmen for the Commission have publicly recognized that stations must sell a certain minimum of commercials in order to be economically healthy so as to be able to perform their public service obligations. The attitude seems to be that commercials are a necessary evil. If this is what is being implied, I think it would express a narrow conception of the public interest. The public watching television is made up of individuals who, however diverse their spiritual, emotional, political, and cultural needs, all have one common need and that is economic. They want to make a living and as good a living as they can. When a television commercial moves merchandise for a manufacturer or a retailer, thereby helping to provide a livelihood for his 10 or 20 or 3,000 employees as the case may be, surely this is no small thing. There is not a single public interest, there are many public interests.

Television commercials serve the public economic interest just as television programs serve the public cultural, educational, entertainment, and other interests. Parenthetically I have no shadow of a doubt that the FCC proposal if adopted would have the long-range effect of regulating broadcast commercial rates. In our town we are already exploring how to continue to offer service to the smaller merchant and the medium smaller merchant who finds himself hard pressed in economic competition with the commercial rates which can be paid by national advertisers. Further increases brought about in this way would make it more difficult for the local merchant to use television.

Additionally, one set of standards in a small market, another set of standards in a large market, is apparently being proposed by the FCC. While it may have practical reasons it seems to me to be a flagrant double standard.

Many of us would have a great time selling that idea to our wives.

Increasingly mature and sophisticated commercial procedures in television can best be brought about by continuing free dialogue among stations, the public, and advertisers focused voluntarily through the NAB code authority.

I appreciate Congressman Rogers' interest in our problems and I appreciate the time you gentlemen have given me here today. Thank you.

Mr. ROGERS of Texas. Thank you. Mr. Rostenkowski, do you have any questions?

Mr. ROSTENKOWSKI. No questions.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I would just like to say that I appreciate Mr. Kearl's bringing out this point. It is very well stated, and I think you stated very clearly the economic purposes that commercials of television and radio stations serve.

Thank you very much.

Mr. KEARL. Thank you very much.

Mr. ROGERS of Texas. Mr. E. L. Byrd, president of the Michigan Association of Broadcasters.

STATEMENT OF E. L. BYRD, PRESIDENT, MICHIGAN ASSOCIATION OF BROADCASTERS

Mr. BYRD. Mr. Chairman, my name is E. L. Byrd. I am the president of the Michigan Association of Broadcasters. I am also the vice president and general manager of WILS radio in Lansing, Mich. I have a prepared statement I would like to read.

Mr. ROGERS of Texas. You may proceed, Mr. Byrd.

Mr. BYRD. The Michigan Association of Broadcasters is an organization comprised of and representing 108 broadcast stations in the State of Michigan. A number of noncommercial, educational broadcast stations in Michigan are affiliated with the association. The association and its members work closely with many civic, educational, and cultural organizations in the station and Nation.

The Michigan Association of Broadcasters states that the proposed rulemaking by the Federal Communications Commission—FCC docket No. 15083—designed to place a limit on the number of commercial minutes presented within a specified time period is unrealistic and impractical. It would be virtually impossible to establish an objective standard for such limitations which would provide equality under the law. The proposal would cause all classes of broadcast facilities, regardless of the varying conditions under which they operate, to submit to prescribed limits on the amount of commercial continuity that may be broadcast within the specified time period.

Even if separate standards were applied to the various classes of stations, the proposal is still unrealistic. The allocation practice has allowed low-power stations to be located in large cities and, in other cases, high-power stations in small communities; what might be reasonable and appropriate commercialization for a station operating during daylight hours only in one community certainly would not be reasonable and appropriate for a station operating without such sunrise-to-sunset limitations in a community of a greatly differing size. Such factors as competitive positions with other stations in the area, competitive situations with other advertising media, seasonal and cyclical changes in a market, market changes due to strikes, local recessions, defense contract changes, all would have to be considered for each individual broadcasting station. Each case would have to be considered and evaluated separately.

Each evaluation and possible subsequent rule of limitation in station commercialization would be subject to appeal. It is questionable whether an objective agreement between the broadcast industry, unit by unit, and the FCC could be reached. The consequences are frightening. Certainly, the present staff of the FCC could never administer and adjudicate such a tangled mass of subjective judgment. Much more money, many more staff people, would have to be allocated.

The proposed rule reaches its most impractical point when it, in effect, would cause extreme hardship to many of the small stations in the small communities of Michigan, and in the end deprive many communities of the only daily source of news, information, entertain-

ment, and public service that the informed public has learned to expect and receive from the broadcast licenses. If faced with the necessity of reducing the amount of commercial time it may sell to advertisers, the station would have to either raise rates or lose income. Rates in most markets are at their competitive upper limits now. If you will investigate the amount of profit made by stations in small markets you will quickly realize that they cannot reduce income to any great extent and remain in business.

We are all concerned with the palatability of commercials. Such palatability may vary greatly, depending upon design, placement and content. To set an arbitrary maximum on commercials ignores the fact that one hard-sell announcement in a given time period on one station can be far more offensive than two announcements in the same time period on a station that presents commercial messages with dignity and restraint.

Many stations have reached a commercially successful position in their markets as a result of good and appealing programing and the production of pleasant and even entertaining commercials that do a job of selling products and services, and do not offend the public, even though the number programed exceeds the proposed limits now being considered by the FCC.

The amount of commercial continuity on a station is not necessarily a yardstick in measuring public acceptance of the station. Most broadcasters, in fact, believe that a full commercial schedule enhances the sound of their station and attracts audience. The public recognizes that a station that is worth buying by advertisers is worth listening to. Attractive programing and commercialization go hand in hand.

Many advertisers refuse, or are reluctant, to purchase time during diminished listening and/or viewing hours. To limit the sale of commercial time in prime time periods is to place many stations in financial difficulty. Generally, broadcasters have no desire to overload these prime periods with commercials. Stations must, however, have freedom from restraint in this matter so that they may group commercials in terms of the realities of the specific market situation. To restrain trade as the FCC rule proposal would most certainly do, would reduce the revenue of broadcast stations and also reduce their ability to provide public service programing as well as other services to the community.

Beyond the impractical and unrealistic aspect of the FCC rule proposal, the Michigan Association of Broadcasters considers such proposals to be without legal basis. The Commission does have the authority to consider public interest, convenience, and necessity in granting broadcast licenses. However, in view of the first amendment to the Constitution, which guarantees free speech, and also section 326 of the Communications Act, which implements it, and in view of the certainly ambiguous and uncertain nature of the extent of the Commission's power over programing, as a legal matter, the Michigan Association of Broadcasters believes that the Commission should place the principal responsibility for programing on the broadcaster, particularly in the matter of commercial limitation now under consideration.

The Congress, in enacting the Communications Act, never intended that the Commission have authority to limit commercial continuity. If a limit were to be placed on the amount of time allocated to com-

mercial continuity the alternative for most station operators would be to increase rates. Thus the Commission would be able to regulate the amount a broadcaster could charge an advertiser, or to do indirectly what it cannot do directly. Under the law broadcasting is not a public utility and therefore is not subject to rate regulation. The Supreme Court stated that:

> The Communications Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy * * * Congress intended to leave competition in the business of broadcasting where it found it * * * (*F.C.C.* v. *Sanders Brothers*, 309 U.S. 470, 475 (1940).)

More basic in the matter of the legal considerations involved is the fact that, according to the settled aspects of constitutional law, the power conferred upon the legislature to make law cannot be delegated by that department to any other body or authority. Congress can exercise the legislative function and only Congress can exercise the legislative function.

In conclusion, the Michigan Association of Broadcasters denies the legal right of the Federal Communications Commission to limit commercial time; asserts that such limitation is completely impractical, unrealistic, and unsuitable; states that, if such limitations are to be forthcoming, they must, a priori, come from the Congress; and therefore enthusiastically supports H.R. 8316 which specifically forbids the Commission to attempt such a ruling on the limitation of commercial time.

The FCC has no authority to limit broadcast commercials, and its arbitrary intrusion would destroy free enterprise with tragic consequences to the public interest.

Mr. ROGERS of Texas. Thank you, Mr. Byrd.

Mr. Rostenkowski?

Mr. ROSTENKOWSKI. I would just like to thank Mr. Byrd on a very informative statement and to congratulate him on it.

I have no questions.

Mr. BYRD. Mr. Chairman, we have the statements that were submitted before the FCC in docket No. 15083. They were mailed to you and Mr. Harris. However, I have extra copies if other members of the committee would like these.

Mr. ROGERS of Texas. Yes; I think it would be very helpful. How long is that?

Mr. BYRD. I do not care to read it. If you would like to put it in the record——

Mr. ROGERS of Texas. How long is it?

Mr. BYRD. It is 16 or 18 pages.

Mr. ROGERS of Texas. The committee will receive it either for the file or the record, and make a determination later.

Mr. BYRD. Thank you.

Mr. ROGERS of Texas. Thank you very much.

Mr. BYRD. I have one more thing.

Mr. ROGERS of Texas. Mr. Byrd?

Mr. BYRD. After hearing yesterday's testimony, I am in complete accord with the FCC in that they are asking for clarification of this commercial time limitation, and I think that this bill that you have introduced is a very appropriate way to do it.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Mr. Byrd, on the testimony we have received in opposition to the Commission on the rulemaking, do you know of any segment in the industry that would support the contention of the Commission in this field?

Mr. BYRD. I would imagine that if you asked your competitor who was not getting much business and you were getting it all, he might oppose it, but otherwise I would say there is no company or person engaged in broadcasting who would be against this proposal that Chairman Rogers introduced.

Mr. YOUNGER. I am trying to find out if there is any segment in the industry that is in favor of the position taken by the FCC.

Mr. BYRD. I would say not.

Mr. ROGERS of Texas. Would the gentleman yield at that point?

Mr. YOUNGER. Yes.

Mr. ROGERS of Texas. In keeping with that, I think it is a very important point that really has not been treated very much. Do you know of any other industry or segment of the economy of this country that would be in opposition to this bill and in support of the rulemaking power sought to be exercised by the Commission?

What I have in mind, Mr. Byrd, is this: Do you have any people who use your services or use the broadcasting medium, in trying to sell their merchandise, who feel like there ought to be this power to limit the time of commercializing so that you won't offend their possible buyers?

Mr. BYRD. I do not think there would be any.

Mr. ROGERS of Texas. You do not think of any. You have had no complaints from your advertisers on your stations, have you, saying that "you folks are commercializing too much and we won't advertise with you any more"?

Mr. BYRD. No, sir; we have not had.

Mr. ROGERS of Texas. Thank you, Mr. Younger.

Are you through?

Mr. Kornegay?

Mr. KORNEGAY. Mr. Byrd, I would like to join my colleague in commending you on your statement. I direct your attention to page 3, I believe it is. You state that attractive programing and commercialization go hand in hand. Would you explain that just a little bit more.

Mr. BYRD. Well, I think that, first of all, you have got to have revenue to provide good program services. You have to have good equipment; you have got to have good personnel; you have got to have good talent in writing.

Mr. KORNEGAY. In other words, what you mean by that is without being able to sell advertising you cannot provide first-quality programing?

Mr. BYRD. That is precisely correct.

Mr. KORNEGAY. Not programing commercials, but music and educational, public service, and other programs, is that right?

Mr. BYRD. Yes, sir; precisely.

Mr. KORNEGAY. Do you at your station make a real effort to present catchy or dignified commercials?

Mr. BYRD. Yes. We have in our particular radio station a staff of around 32 employees. One person is employed whose sole respon-

sibilty is in the production of commercials. We have two continuity writers, and their total effort is to be different.

Mr. KORNEGAY. In the production of commercials?

Mr. BYRD. In the production of commercials that are appealing, and also have the ability to sell a product or a service.

Mr. KORNEGAY. Do you from time to time receive complaints on your commercials?

Mr. BYRD. Yes, sir. I think I could name several of them offhand.

Mr. KORNEGAY. Well, to get to the point of the matter, I am not one who believes that all advertising is boresome or troublesome or bad, and from time to time I hear commercials on both television and radio that I think are extremely attractive and probably add greatly to the show. I think the industry does put an emphasis on making commercials as attractive as possible and, of course, I know that would suit the sponsors. If they did that this problem probably would not exist. It is a problem.

Mr. BYRD. It takes a great deal more revenue to operate a station that does produce good programs than one that is willing to accept all the public service type stuff we get in the mail and just run it. Some of the stuff is not particularly attractive to the listener nor is it beneficial. But stations that are not able to afford the library services for making commercials and other programing efforts attractive have to resort to this.

Mr. KORNEGAY. In other words, you mean the canned commercials, canned programs?

Mr. BYRD. That, in effect, would be what the person with reduced income would have to resort to.

Mr. KORNEGAY. Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Do you have any direct contact with advertising agencies?

Mr. BYRD. Do I? Yes.

Mr. BROYHILL. Have you ever heard any of the agencies with whom you deal express any comment on this overall subject?

Mr. BYRD. No, I have not.

Mr. BROYHILL. No further questions.

Mr. ROGERS of Texas. Thank you.

Thank you very much, Mr. Byrd. It is nice to have you before us.

Mr. BYRD. Thank you, sir. It is nice for you to allow us to appear.

Mr. ROGERS of Texas. We have one more witness, Mr. Richard Smiley of Bozeman, Mont.

STATEMENT OF RICHARD D. SMILEY, PRESIDENT, MONTANA BROADCASTERS ASSOCIATION

Mr. SMILEY. Chairman Rogers, members of the committee, I am Richard D. Smiley of Bozeman, Mont. I own and operate radio station KXXL in that city. I am president of the Montana Broadcasters Association. I am a member of the legislature, house of representatives of the State of Montana, elected by the people of Gallatin County. I am vice president of the Bozeman Chamber of Commerce and hold other offices in organizations in our area. It is because of the statements I have already made that I am here to testify for and give support to H.R. 8316.

It is becoming increasingly evident to many persons in our area that the legislature powers given to Congress in our Constitution are being usurped by the bureaus, agencies, and commissions created for various reasons by the Congress. Instead of being an arm of the legislative branch of our Government with sepcific administrative duties, they are now doing the legislating. It is my thinking that this usurpation of power is not by accident but by design.

Some of the present Federal Communications Commissioners seem to be enamored by the idea of controlling the mass broadcast medium. When I say control, I mean absolute control. They seem to think that the public has no knowledge of and should have no voice in what it sees and hears as judged by response directly to a radio or television station.

They seem to believe the only way a broadcaster can be responsive to the great American public is to accept a list of 14 program categories which a bureau in Washington legislated and says the public should see and hear. They also now seem to think that they should set the standards for how much advertising a broadcast station can sell. We are being told by the Commission Chairman that he doesn't like the so-called clutter at station break time, that he has warned us about this matter and that he now believes he is going to have to take legislative action in order to make stations cease and desist cluttering regardless of what the advertiser who makes the program possible has to say, or for that matter, what the viewer or listener has to say.

This cluttering seems to be a whim of the Chairman. In recent months the Commission has tried to make clear its "fairness doctrine," a piece of legislation that has been in effect for some time. However, the new legislation seems to try to circumvent the judgment of the licensee in matters of fairness. Certain specific rules seem to be required regardless of the licensee's view on whether the test of fairness has been met. If followed by licensees to the letter, the situation at any radio or television station would be chaotic.

Members of the committee, I submit to you that these pieces of legislation are being promulgated on the broadcast industry by some members of the Commission who have no history of even being in close touch with the industry much less being in the industry. I attended a meeting of broadcasters in Great Falls, Mont., with a member of the Commission present. Clearly, before the broadcasters assembled, this Commissioner asserted that he did not know the difference between a cycle and a watt. I cannot have respect for the decisions a man such as this makes when he knows so little about our industry.

Originally, the Federal Communications Commission was set up to control the allocation of frequencies in the electronic spectrum. However, now, using that catchall phrase, public interest, convenience and necessity, they are clearly way beyond the intent and purpose of the Congress. For a moment think about this: Just how qualified is the Commissioner I spoke of earlier to have jurisdiction over the electronic spectrum?

We in the broadcast medium are responsive to our citizenry. Just yesterday my fellow broadcasters and I met with our local ministerial association and discussed the intolerable position taken recently by the National Council of Churches, with respect to the broadcasting industry.

Generally we accept our public responsibility very well. On the average, each broadcaster in Montana last year donated over $31,000 to public service time. These are definite answers to public appeals for broadcaster cooperation. But alas, the Federal Communications Commission says we have a problem. We are not conducting our business as they feel we should. Competition and free speech can't possibly be the answers to all the problems and failures of the broadcasting industry. We must heed a bureaucratic line of legislation and reasoning emanating from people who don't even know our problems nor have they experienced them.

Members of the committee, we in the broadcasting industry have problems enough just keeping alive with the laws that are passed by the Congress without legislation passed by a bureau which seems to not be responsive to anyone and is in addition the prosecution, judge, and jury.

Yes, I support H.R. 8316. Bills such as this which clearly halt the assumption of legislative powers by bureaus, agencies, and commissions seem to be the only way to stop the assimilation and consumption of our electorate regardless of our Constitution. With the ever-increasing numbers of bureaus, agencies, and commissions being brought about by this Nation's trend toward socialism, the all-protective state, you the elected representatives of the people of the United States are going to have to be increasingly vigilant to keep the legislative powers delegated you and only you by the electorate.

Chairman Rogers, committee members, thank you for the privilege of presenting my views and the views of those I represent. I certainly hope H.R. 8316 gets your approval.

Mr. ROGERS of Texas. Thank you, Mr. Smiley.

Mr. Rostenkowski, do you have any questions?

Mr. ROSTENKOWSKI. Do you broadcast 24 hours a day?

Mr. SMILEY. We have a license to broadcast 24 hours a day. We broadcast 18 hours and 35 minutes a day, 7 days a week.

Mr. ROSTENKOWSKI. Have you in your station received any complaint about overcommercializing?

Mr. SMILEY. Never.

Mr. ROSTENKOWSKI. Do you know of any other radio station in Montana that has received such a complaint?

Mr. SMILEY. Not in Montana.

Mr. ROSTENKOWSKI. Do you know of any station?

Mr. SMILEY. Yes, sir.

Mr. ROSTENKOWSKI. Where are these located?

Mr. SMILEY. I think probably the most historic case of this nature, and I call it overcommercialization, I may term this case a little differently than some other broadcasters, occurred in Pasco, Wash., with a station whose call letters were KORD.

You see, I also feel that the intention or my intentions, as I submit them on my license renewal form, are not promises. They are what I think I will do. They are estimates.

Now, as you all know, KORD in Pasco, Wash., was given a short-term renewal because they did not live up to their intentions or estimates. So I would say this fell into the realm of a penalty because of not complying with the number of commercials they wanted to broadcast or maybe the amount of public service they thought they could give. There is restriction in this area right now.

Mr. ROSTENKOWSKI. How many radio stations are you competing with now?

Mr. SMILEY. I am competing with——

Mr. ROSTENKOWSKI. In your area.

Mr. SMILEY. We have two directly in the same city as mine, and one within 10 miles, and then I have another one within 26 miles.

Mr. ROSTENKOWSKI. How much power do you have on your station?

Mr. SMILEY. 1,000 watts daytime, 250 watts night.

Mr. ROSTENKOWSKI. How far does that reach?

Mr. SMILEY. Well, it will run in the daytime about 50 miles in three directions, and about 35 in one, the reason being mountains.

Mr. ROSTENKOWSKI. You do not think there is any need for this legislation?

Mr. SMILEY. I do not believe you understood me correctly, sir.

Mr. ROSTENKOWSKI. You do not think there is any need for the FCC to accept this responsibility?

Mr. SMILEY. You certainly are correct.

Mr. ROSTENKOWSKI. Thank you.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Mr. Smiley, when is your station up for renewal?

Mr. SMILEY. My station, sir, will be up for renewal, if I am correct I will be preparing it, next year, and I believe it will be, the license will fall due, on the 31st of December 1964. I will be starting to prepare it next year.

Mr. YOUNGER. You are not going to file this with your application?

Mr. SMILEY. Mr. Younger, I am not inhibited, and I may file it with it.

Mr. YOUNGER. That is good.

The average life of the Chairman of the FCC is only 2 years.

Mr. SMILEY. May I say something in that respect, sir? I wish it were longer so he could learn the broadcasting business.

Mr. YOUNGER. That is correct. I think that is one of the shortcomings.

Mr. SMILEY. That is right.

Mr. YOUNGER. That is all.

Mr. ROGERS of Texas. Mr. Kornegay?

Mr. KORNEGAY. Mr. Smiley, you state in your statement that the Chairman does not like the so-called clutter at station break time. I am afraid I do not understand exactly what that term means.

Mr. SMILEY. Mr. Henry made a statement at a meeting in New York just recently—I have a copy of this in my brief case—and at which time he said it is high time that we brought this matter of overcommercialization down out of the clouds and put it in the living room of the listener and the viewer, and coupled with this statement he also said that this is a matter for the Federal Communications Commission to take hold of, to get control of, and to make some definite rules about.

Mr. KORNEGAY. Well, is that the clutter that goes on on the station-break time?

Mr. SMILEY. This is what he called it and, if I interpret his remarks correctly, this means whether you broadcast 1 commercial or 75.

Mr. KORNEGAY. I thought that was the time you had commercials, at station-break time.

Mr. SMILEY. Well, sir, that is, generally—we always plan on having one there if we possibly can.

Mr. KORNEGAY. That is usually on the hour, quarter hour, half hour, is it not?

Mr. SMILEY. That is right.

Mr. KORNEGAY. The ideal period of time in which to put a commercial?

Mr. SMILEY. That is right. It has been, historically, for a long time.

Mr. KORNEGAY. You go on to say that he has "warned us about this matter"; that he "now believes he is going to have to take legislative action." Is that term "legislative action" his words or are they yours?

Mr. SMILEY. That is my word, sir.

Mr. KORNEGAY. In other words, you interpreted his remark that he was going to take action to mean that he was going to legislate?

Mr. SMILEY. Well, the premise of—to explain that—the premise of my testimony is that many of the things that the Federal Communications Commission is now doing are properly legislative actions that should be taken by the Congress and do not fall within the jurisdiction of the Federal Communications Commission.

Mr. KORNEGAY. Yes, sir. I am personally inclined to the same view. The thing I am trying to find out is whether or not the Chairman said he was going to take legislative action.

Mr. SMILEY. He did not define the word "action"; I mean he did not use an adjective. I used that adjective.

Mr. KORNEGAY. But you would interpret promulgation of this proposed rule as legislative action by the administrative agency?

Mr. SMILEY. Yes, sir.

Mr. KORNEGAY. Thank you very much, Mr. Smiley.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I would like to congratulate Mr. Smiley on his very forthright statement. I have no questions.

Mr. ROGERS of Texas. Thank you very much, Mr. Smiley, for your presentation. You have been most helpful.

Mr. SMILEY. Thank you.

Mr. ROGERS of Texas. The subcommittee will stand adjourned until 10 o'clock in the morning.

(Whereupon, at 3:55 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Friday, November 8, 1963.)

BROADCAST ADVERTISEMENTS

FRIDAY, NOVEMBER 8, 1963

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
SUBCOMMITTEE ON COMMUNICATIONS AND POWER,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m. in room 1334, Longworth House Office Building, Hon. Walter Rogers, of Texas (chairman of the subcommittee) presiding.

Mr. ROGERS of Texas. The Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce will come to order for further consideration of pending business.

Our first witness this morning is the Honorable Leroy Collins, president of the National Association of Broadcasters.

STATEMENT OF LEROY COLLINS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. ROGERS of Texas. Governor, it is nice to see you and to have you before the subcommittee this morning.

Mr. COLLINS. Thank you, Mr. Chairman. It is a real privilege to be here.

I have a statement that I do not think will take more than 10 minutes, sir, that I would like to present first, and then if I can answer any questions which may be in your minds I will be very happy to try to do so.

Mr. ROGERS of Texas. You may proceed.

Mr. COLLINS. Thank you.

Mr. Chairman and distinguished members of the subcommittee, my name is Leroy Collins, and I am president of the National Association of Broadcasters. Our principal offices are here in Washington, and our membership consists of 1,933 AM radio, 674 FM radio, and 422 television stations in addition to the 4 national radio networks and the 3 national television networks. This is a substantial majority of all broadcasters in the United States.

I am appearing in support of H.R. 8316, introduced by Chairman Walter Rogers, of Texas, which would amend the Communications Act of 1934 and prohibit the Federal Communications Commission from making rules prescribing standards with respect to the length or frequency of broadcast advertisements.

NAB also supports identical bills which have been introduced by Representative Roberts, of Alabama, Representative Langen, of Minnesota, Representative Purcell, of Texas, and Representative Broyhill, of North Carolina.

And I have also been informed that a similar measure was introduced just yesterday by Representative Kornegay.

These pending proposals stem from the action of the FCC last May, proposing a rule which would impose limitations on the amount of time broadcasters would be permitted to use for commercial messages.

The broadcasters of the Nation—and I feel sure that I speak the sentiments of almost all of them in this behalf—are uncompromisingly opposed to this action by the FCC, and, inasmuch as the bills under consideration reflect strong congressional opposition to such, we join in hearty approval of these measures.

I would also like to make it clear that we agree with the conclusion expressed by Chairman Rogers in remarks before the House of Representatives on September 26, emphasizing that in the introduction of H.R. 8316 no implication should be drawn that the FCC now possesses the authority to adopt and put into effect any such limitations. In fact, we think it quite clear that the FCC has no such authority We have prepared a legal memorandum supporting this position, and I respectfully ask that it be regarded as a part of this statement and included in the record.

The passage of H.R. 8316, however, or any of the other like bills, would clarify and make certain the matter of authority which otherwise might continue in some state of doubt and conjecture.

The broadcasting industry stands firmly on the proposition that it is not the proper business of the FCC to fix commercial time limitations in broadcasting. The American system of broadcasting, unlike any other major system of broadcasting in the world, is one in which stations are privately owned, commercial, and competitive both for the attention of listeners and viewers as well as for the support of advertisers.

Revenue from advertising is the sole support of this system. It is the only means by which the broadcaster can provide the programs of information, education, and entertainment essential in meeting his obligations to serve the public interest.

Advertising is an ingredient so essential to the functioning of competitive enterprise that our American system could not exist without it.

Whatever may be the faults of advertising—and they do exist—it has been indispensable to the achievement of the highest standard of living ever enjoyed by any people, anywhere, at any time. It has sparked the continued phenomenal growth of our gross national product.

Here in the United States, to a far greater degree than anywhere else in the world, the broadcaster devotes much attention to matters of local interest and concern. American stations give their listeners news about local happenings; they provide discussions of purely local issues as well as of national issues; they present programs in cooperation with local civic and community groups. There is a very full and free discussion of all major controversial issues from local PTA problems to those in Vietnam.

It is only through the sale of time that such a wide diversity of programing is possible.

I submit, therefore, that at the crux of the issue we have with the FCC is really the question of whether we will continue our present system of free broadcasting or (1) go into a broadcasting system with

a utility complex of rate fixing to complement the time limitations, or (2) go into a Government-operated system like those in most other areas of the world.

Should the FCC adopt its proposal to apply commercial time limitations, this action would portend a complete change in the present structure of broadcasting and a conversion to something out of harmony with competitive enterprise which has been the taproot of American economic progress.

No other conclusion can be reached when one contemplates that the Government would be saying to a broadcaster: "You have only x minutes of time to sell—you must make your profit from this time; and, of course, all of your present obligations will remain."

For those licensees who simply could not make the equation work, the next step for the Government would be to examine the licensee's books to determine whether his management judgments equate with the Government's concepts of efficiency. Would not this be a necessary prerequisite to the grant of any waiver?

And then who would really be in control? How free would broadcasting be?

I submit that if the Government should move in and control the amount of commercial time available to the broadcaster, it will thereby control his means of self-support. This could well mean control of the broadcaster himself, and hence of what he broadcasts.

We in broadcasting recognize that there is a need for advertising improvements. I hope that we can and will do more than we have been able to do up to now, though much has been done.

However, if the FCC should adopt a stopwatch approach to broadcasting, I am confident that much of the incentive within the industry to control its own destiny will become lost, and irretrievably so. From that day forward, a station's contribution to its community would be judged in large measure by the numerical clocking by the Government of the minutes and seconds of advertising which appear on its program schedule. Fearing the Government clock more than failure in community service, responsive creative effort would become supplanted by rote and rule.

If there is to be continuing progress in broadcasting, and broadcasting is to remain free, advertising improvements should spring from the industry itself. Government cannot effectively legislate in this field. It is the broadcaster, individually and collectively, who, under our competitive system, constantly must seek ways to improve the quality of service he renders to the American people. This, of course, includes advertising as well as other programing.

Collectively, these efforts of broadcasters in self-discipline and self-determination are reflected in the radio and television codes of the NAB.

The obligations, express and implied, under these codes stem from the acknowledgement that radio and television broadcasts enter virtually every American home—homes that include children and adults of all ages, embrace all races and all varieties of religious faith, and encompass every educational background. Under the codes, it is recognized that all who utilize radio and television to convey their advertising messages to the home have responsibilities which are not merely limited to the sale of goods and services and the creation of favorable attitudes toward the sponsor.

Because of the special dynamics of advertising, the codes provide standards for the protection of the public relating to the integrity of the advertiser, truth of the advertising message, compliance with the letter and spirit of the law, and respect for the customs and attitudes of the community.

In his testimony on Wednesday, Chairman Henry of the FCC stated that the codes have been progressively relaxed. We take issue with this statement. The truth of the matter is that over the past decade the codes have been materially strengthened in all respects. This includes limitations on commercial time, enforcement, and scope.

For example, in furtherance of the efforts of the television code to encompass all aspects of television broadcasting, NAB in 1960 opened a separate code office in New York City.

Initially providing consultative advice to advertising agencies and code subscribers, mainly in the area of good taste in advertising copy, the New York code office now directs much of its activities to analyses in depth of advertising claims. Activity of this nature involves the code authority in more than 1,000 investigations a year.

Similarly, in an effort to deal more directly with television programming material, an office was established in Hollywood, Calif., in 1959 to work with producers of film designed specifically for television presentation. This effort encompasses the careful review of scripts, story boards, and final editing.

Our NAB codes actually go far beyond any provision that the Congress could constitutionally enact into law, and certainly beyond any rule that the FCC or the Federal Trade Commission could practically or lawfully administer.

But I would not seek to give you the impression that either our codes or their enforcement is perfect. While a substantial majority of television broadcasters subscribe to the television code, unfortunately we do not yet have a majority of the Nation's radio broadcasters as subscribers to the radio code.

But, I would make these points:

(1) The support of the codes is growing—radio subscriptions increased 14 percent in the past year;

(2) Our monitoring for compliance recently has been substantially improved—840 radio subscribers and 387 television subscribers have been checked since April of this year; and

(3) At their present level of efficiency, these codes are the strongest voluntary self-regulatory effort being made in the whole of American private business.

Our experience over the years with the commercial time limitations contained in the codes indicates that time as the sole measure of control is not satisfactory. More and more it is indicated that there is an impelling need for the development and adoption of supplemental qualitative standards if there is to be a more effective gage of whether broadcasters are handling radio and television advertising in a manner which is satisfying the needs and desires of the public.

This opinion is supported by Dr. Gary Steiner's findings in his book, "The People Look at Television," a recent study made at the Bureau of Applied Research at Columbia University and supported by a grant for that purpose made by the Columbia Broadcasting System.

The substance of a commercial message and the way it is produced and introduced into the program schedule are far more significant factors in the determination of pubilc acceptance than the length and number of commercial announcements which appear in a station's program schedule.

The NAB code authority is now seeking practical, effective ways to develop new standards which may be applied in voluntary commercial controls. Very substantial research and study will be required if meaningful standards can be developed and incorporated into the codes. Some of this work we have already underway.

The codes and all their provisions are in fact under constant review, because these are living documents designed to reflect and represent the needs of a dynamic and ever-changing society.

As I have stated, the industry and its codes have made remarkable progress over the years—progress marked by initiative in the constant quest for new ideas, new techniques, and new approaches. But we are not satisfied with past efforts and past deeds, and we will not seek to hide our failures.

We know that we must constantly find ways to do a better job in all our efforts, including self-regulation. We know that our codes must be ever stronger instruments of self-discipline, and that the American people have a very important stake and involvement in them. The codes belong to them as much as to us. We want them to feel this more and more, and if this is to happen we must have the codes serve their interests more and more.

We earnestly ask, Mr. Chairman, that the Government in no way impede or halt the course which we as broadcasters have charted toward professionalism within our own ranks and toward improved performance for the benefit of the people of this land.

Broadcasters cannot, and do not, accept the principle that the Government should prescribe limitations on commercial time.

The Chairman of the FCC, in his testimony and otherwise, has expressed unhappiness over what he regards as a failure of broadcasters to project for FCC consideration commercial limitation standards they would regard as more acceptable than those included in the NAB codes.

He seems to overlook the fact that broadcasters oppose the principle of the Government moving into this area under any plan. If they refuse to accept the principle, surely it is unfair to charge them with failure to supply alternative courses to an end regarded as both unwise and illegal.

Over the years, the Congress has remained a steadfast and firm supporter of free broadcasting. You have provided the framework which has made possible the development of the finest system of communications known to mankind. We well realize that we must ever move forward with our own initiative and our own resources better to serve if we are to deserve your continued faith.

This is the challenge we have from you, and I hope we will fully meet it.

Thank you very much.

Mr. ROGERS of Texas. Thank you, Governor Collins, and without objection, the memorandum of law that you furnished to the subcommittee will be included in the record immediately following your statement.

(The memorandum referred to follows:)

MEMORANDUM OF LAW, RE LACK OF AUTHORITY IN COMMUNICATIONS ACT FOR THE FEDERAL COMMUNICATIONS COMMISSION TO ADOPT RULES RELATING TO LENGTH OR FREQUENCY OF BROADCAST ADVERTISEMENTS

The Constitution of the United States proclaims that "all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."[1] One of the settled maxims in constitutional law is that the power conferred upon the legislature to make law cannot be delegated by that department to any other body or authority. In other words, only the Congress can exercise the legislative function.

It is also elementary that an agency of the Congress, such as the Federal Communications Commission, derives all of its powers from the act that created it. It has no implied powers. Thus, the delegation of quasi-legislative rulemaking powers to an administrative agency does not encompass the power to make law. The application of this principle to the instant proposal was demonstrated clearly in the so-called lottery rule case.[2]

"* * * the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of section 1304 does not provide the remedy."[3]

Perhaps this principle has nowhere been better expressed than in *WOKO, Inc* v. *F.C.C.* (153 F. 2d 623), at 628, where the court stated:

"The broad scope of authority, or standard of action, established by the Communications Act is that public interest, convenience, and necessity must be served. Within that framework the administrative agent is free to exercise its expert judgement; *it cannot act unconstitutionally, for neither could its principal, the Congress, and the stream cannot rise higher than the source;* it must proceed within the scope of the authority granted to it, that is to say, it must observe the standard established; and it cannot act arbitrarily or capriciously." [Emphasis supplied.]

In suport of its authority to adopt limitations on the amount of time stations may devote to commercial announcements, the Commission relies solely upon the general powers conferred upon it by sections 4(i), 303 and 307(a) of the Communications Act.

Section 4(i) is simply a general empowering clause that authorizes the Commission to perform such acts as may be necessary in the execution of its functions; section 303 enumerates certain specific acts relating to the regulation of radio, which may be performed as public convenience, interest, or necessity requires; and section 307(a) authorizes the grant of a license if the public convenience, interest, or necessity will be served thereby.

It is interesting to compare these sections with section 308(b) which also speaks of the licensing powers of the Commission but in more specific terms. This section delineates certain areas with respect to which the Commission may promulgate specific a priori regulations, such as citizenship, character, hours of operation, etc. Nowhere can be found any language or reference that would lend color of authority to prescribe regulations limiting the amount of time a station may devote to commercial advertising.

Yet, a limitation of commercial time is subject to the same definiteness as citizenship, character, hours, etc. Had the Congress intended to give the Commission authority to prescribe specific standards in this field, to be conformed to by all stations across the board, it is reasonable to assume that it would have included in section 10 of the Radio Act, which was the forerunner to section 308 (b) of the Communications Act, clear, express provisions to accomplish this.

That the Congress was well aware of the problems concerning advertising in broadcasting at the time it passed the Radio and the Communications Acts will be evident from the legislative history set forth below. The fact that it declined to legislate in this area is highly significant and, in our opinion, can

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[1] Art. I, sec. I.

[2] *American Broadcasting Company* v. *United States* (110 F. Supp. 374 (1953 aff'd.), *Federal Communications Commission* v. *American Broadcasting Company* (347 U.S. 284 (1954)).

[3] Ibid.

only mean that the Congress did not intend for the Commission to determine by regulation advertising policies of stations.

Apart from any question of legal authority, however, it would appear that sound public administration would require that before an action so inconsistent to the philosophy of free enterprise in broadcasting would be proposed, specific approval of Congress would be sought. This is especially true in the light of the lack of specificity in the act in this regard, and the fact that for years previous commissions have been of the opinion that any plan to control the amount of time a station might devote to commercial advertising, by regulation, would be required to have its inception in new legislation.

It was quite apparent by the midtwenties that if broadcasting was to flourish as a communications medium, Federal regulation was necessary. To this end, a series of conferences was called, the last of which, the Fourth Annual Radio Conference, convened in Washington in 1925 and resulted in the consideration of legislation by the Congress which led to the Radio Act of 1927.

At the first session of the conference, then Secretary of Commerce Hoover, in his opening remarks, spoke on the subject of advertising.[4]

"Another problem for solution by the industry itself, and which now rests prominently on the public mind, is that of advertising. There lies within it the possibility of grave harm and ever-vital danger to the entire broadcasting structure. The desire for publicity is the basic motive and the financial support for almost all the broadcasting in the country today. Publicity largely provided the cost of broadcasting which might otherwise fall upon the listener, who now pays nothing, much as the advertiser does in the case of newspaper or magazine. Whether an individual accomplishes his purpose through the building and operating of his own station or by hiring time on one already built by somebody else makes little difference.

"But the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set. It has been pointed out over and over again in previous conferences, and it might well be reiterated by this one, that advertising in the intrusive sense will dull the interest of the listener and will thus defeat the industry. Furthermore, it can bring disaster to the very purpose of advertising, if it creates resentment to the advertiser. If we can distinguish, on the one hand, between unobtrusive publicity that is accompanied by a direct service and engaging entertainment to the listener and obstructive advertising, on the other, we may find the solution. I believe the conference could well consider a definition of the distinction all along the line."

As a result of the deliberations of this conference, a report[5] was made by committee No. 2 on the question of advertising, as follows:

ADVERTISING AND PUBLICITY

"1. The committee divided advertising or publicity into three classes: (1) direct advertising; (2) mixed advertising; (3) indirect advertising.

"2. It was the consensus of opinion that both direct and mixed advertising were objectionable to the listening public. In fact, indirect advertising could be made detrimental to the interests of both the public and the broadcasting station.

"3. Advertising to achieve its best results must create the good will of those to whom it is addressed. Hence, the first requisite in the successful operation of any broadcasting station in which the excellence of programs depends largely upon the support of the advertiser is the presentation of the material transmitted in such a manner that it may appeal to the majority of the listening public.

"4. The following resolution has been unanimously adopted by this committee for the guidance of all broadcasting stations:

"Whereas the excellence and public service value of radio programs is increased by the support of those seeking appropriate publicity; and

"Whereas the use of inappropriate publicity methods meets with the hearty disfavor of the listening public; and

"Whereas this public disfavor is fatal to the purpose of those seeking publicity and good will, as well as detrimental to the interest of the broadcaster and all branches of the radio industry: Therefore be it

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[4] The report is contained in hearings before Committee on Interstate Commerce, U.S. Senate, 69th Cong., 1st sess., on S. 1 and S. 1754, Jan. 8 and 9, 1926.

[5] Ibid., p. 67 of the hearings.

"*Resolved*, That it is the sense of this conference that the best interests of the listening public, of the radio industry, and of the broadcaster is served by that form of broadcasting which provides a meritorious program of entertainment and educational nature and which limits itself to the building of good will for the sponsor of the program, whether he be the owner of the station or a subscriber utilizing its facilities.

"*Resolved*, That the conference deprecates the use of radio broadcasting for direct sales effort, and any form of special pleading for the broadcaster or his products, which forms are entirely appropriate when printed or through direct advertising mediums.

"*Resolved, That the conference concurs in the suggestion of the Secretary of Commerce that the problems of radio publicity (advertising) should be solved by the industry itself, and not by Government compulsion or by legislation;* and be it further

"*Resolved*, That the conference urges upon all owners of broadcasting stations the importance of safeguarding their programs against the intrusion of that publicity which is objectionable to the listener, and consequently detrimental to others in the industry, as well as to the reputation of the individual broadcasting station." [Emphasis supplied.]

This radio conference was attended by representatives of the radio industry, Members of both Houses of Congress, and personnel from various governmental agencies interested in communications. From the above quotation, it is apparent that those in attendance anticipated many problems inherent in the use of broadcasting for commercial advertising purposes but felt that these should be resolved in the caldron of free competitive enterprise and not through bureaucratic management.

The deliberations and recommendations of the conference, attended as it was by the principal sponsors of radio legislation in the Congress, played an important part in the framing of the Radio Act of 1927. Thus, Congressman White of Maine who introduced H.R. 9971, the forerunner of the act, in his opening statement to the House on March 12, 1926, said:

"Mr. Chairman, the necessity for radio legislation has in recent years often been called to the attention of your committee by the Department of Commerce; consideration of the problem and action with respect to it have been urged on the Congress by two Chief Executives * * *. The most recent and authoritative utterance by the radio world was given by the Fourth National Radio Conference, held in Washington, November, 1925 * * *. It formally expressed the opinion that existing Federal statutes are inadequate to permit proper administration of existing radio activities and that the public interest required that legislation be enacted. It followed these general recommendations with detailed suggestions. The pending bill is your committee's response to these requests; it is our contribution to the solution of the difficulties which are so generally recognized." [6]

It is also noteworthy that the matter of advertising had been discussed by the Congress earlier in its considerations of a bill that was a forerunner of H.R. 9971. In 1924, a representative of the American Telephone & Telegraph Co. advised a House committee, which was considering broadcast legislation of the problems and practices of radio advertising.[7] His testimony prompted the requirement for sponsorship identification which, with variations in phraseology, was carried forward in all subsequent bills concerning broadcasting and culminated in section 19 of the Radio Act of 1927.[8]

Additionally, during the debates, consideration was actually given to the possibility of completely eliminating all advertising.[9] For example, Senator Pittman complained about the amended conference version of H.R. 9971 because:

"No authority is given to the Commission or the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes."

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[6] 67 Congressional Record 5478.
[7] Testimony of Mr. Harkness in hearings on H.R. 7357 (68th Cong., 1st sess., 1924).
[8] Warner, Harry P., "Radio and Television Law," p. 310.
[9] Freidrich and Sayre, "The Development of the Control of Advertising on the Air 6–7" (Harvard University radio broadcasting research project, "Studies in the Control of Radio, No. 1," 1940).

They [the House and Senate conferees] did not even retain in this so-called regulatory body any power of limitation of the character of stuff that they will use the broadcasting facilities for." [10]

Senator Pitteman asked [11] the Senate to send the conference report [12] back to the House of Representatives for further conference with that body. This was not done, and the bill without further amendment was agreed to by the Senate,[13] having previously been passed by the House.[14] It was signed into law by the President on February 23, 1927.[15]

Despite this concern over the place advertising would occupy in the broadcasting medium, the only statutory restriction embodied in the Radio Act of 1927 related to the requirement that sponsored programs be identified (sec. 19).

Discussion concerning advertising has continued long after the creation of the Federal Radio Commission, as is evident from the proposal currently under consideration.

In its second annual report to the Congress in 1928, the Radio Commission expressed concern over the extent and charcater of advertising over broadcasting stations and the use of broadcast facilities for "direct" advertising purposes. It concluded:

"The Commission has, of course, no power to censor programs and must proceed cautiously in its regulations on this subject." [16]

In January 1928, a bill [17] was introduced which proposed, among other things, to give the Commission authority to adopt rules on chain broadcasting, the time it may be carried, and to prohibit commercial advertising through such broadcasting. However, in the hearings on it before the Committee on Merchant Marine and Fisheries, which was chaired by Mr. White, the principal author of the Radio Act of 1927, Commissioner Caldwell of the Radio Commission and Congressman White had a discussion on the question of the Commission and advertising over broadcasting. Mr. White, in summarizing Commissioner Caldwell's position said:

"Mr. WHITE. So it is your personal judgment that it would be unwise for the Commission to undertake any control over advertising and therefore it would be unwise to confer that authority by law upon the Commission."

"Mr. CALDWELL. I think it would be most unwise to censor in any way the programs. I feel that should be left in the hands of the stations to determine whether it is of public interest and the people would manifest that by whether they want to listen or not, and they can always tune it out, if they do not want to listen to it." [18]

On the other hand, Congressman White had a somewhat different opinion, as is indicated from the following quotation:

"* * * Now I am inclined to believe, myself, that the language of the present law is broad enough to permit the Commission to say on a particular station you may or may not put out advertising, direct or indirect; but, because I recognize there is some doubt about that construction in what I have proposed here, the question is raised for your consideration whether this is in the law, and in the second place, whether it ought to be in the law." [19]

We believe that Congressman White's statement is especially significant because he raised doubts as to the authority of the Commission to control advertising on even a case-by-case basis. We submit that if there are doubts as to a case-by-case approach, the authority to make a blanket rule covering all stations is even more doubtful.

The bill was never reported out of committee. Thus, Congress, aware of the opinions of the Commissioners that the Radio Act of 1927 did not confer authority to regulate advertising, and afforded the opportunity by Congressman White to correct this interpretation if it so desired, declined.

Later, in December 1931, the Commission issued a formal statement calling attention of the industry to the code of ethics which had been adopted by this association on March 25, 1929:

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[10] 68 Congressional Record 4109.
[11] 68 Congressional Record 4113.
[12] S. Doc. 200.
[13] 68 Congressional Record 4155.
[14] 68 Congressional Record 2580.
[15] 68 Congressional Record 4938.
[16] Federal Radio Commission Second Annual Report, June 30, 1928, pp. 19 and 20.
[17] H.R. 8825.
[18] Hearings before the Committee on Merchant Marine and Fisheries on H.R. 8825, January 1928, p. 202.
[19] Ibid., at p. 244.

The principal objection to programs under our system arises out of the kind of advertising that is allowed to be made a part of them.

"* * * There is not a single station that can escape responsibility. A heavy responsibility rests upon all chain companies * * *. If their [the American people] share of this form of entertainment can be received only at the expense of advertising statements or claims which are false, deceptive, or exaggerated, at the expense of programs which contain matter which would be commonly regarded as offensive to persons or recognized types of political, social, and religious beliefs, then *they are justified in demanding a change in the system.*

"The good will of the listener is the station's only asset, and, therefore, this should rest with the licensees of the station. This problem should not be taken out of their hands until they have full opportunity to make the necessary corrections. *If they decline the opportunity or seizing it fail, the matter should be treated with proper legislation.*" [Emphasis supplied.]

Again, we find the Radio Commission expressing the belief that legislation would be needed if it were to control advertising. Also significant is the fact that the Commission seemed to recognize that if this authority were granted, it could change the basis of our system of broadcasting.

The concern of Congress over the "commercial" use of radio came to a head in 1932 with the adoption of a resolution [20] by the Senate calling on the Radio Commission to provide it with information pertaining to the "growing dissatisfaction with the present use of radio facilities for purposes of commercial advertising." Because of the tremendous significance of this resolution, and the response thereto on the question of whether the Communications Commission has authority to adopt the instant proposal, we quote from it extensively.

Senate Resolution 129 directed the Federal Radio Commission to provide Congress with a review of broadcasting as it had developed in the United States under the Radio Act. Included were specific questions directed to advertising.

On June 9, 1932, the Chairman of the Commission, C. McK. Saltzman, transmitted a comprehensive report to the Senate in response.[21] The Commission advised Congress that "there are many possible broadcasting systems that could be operated in the United States under Government control." [22] It pointed out that "there are many other plans that could be conceived, each of which would serve a certain purpose and fulfill a particular policy," but that the "competitive operation of broadcasting stations has grown up under the policy laid down by Congress in the Radio Act of 1927," and if this policy were to be changed, there should be "a thorough investigation of all the various possible methods of serving the people of the United States" with a view to determining a policy "which would be satisfactory." The Commission observed that under the "competitive" system "all the people of the United States get some form of radiobroadcast service," but the Commission was ready "to prepare detailed plans for a technical arrangement to meet the needs of any policy which may be determined if it should be decided that Government ownership and operation of broadcasting is desirable for the United States." Specifically, with regard to advertising, the Commission concluded that to eliminate advertising would "destroy the present system of broadcasting." [23]

Since the Commission's answer to questions 4 and 6 of the resolution deal with the problems involved in eliminating or restricting "advertising," we quote them in full. In answer to question 4, the Commission reported: [24]

"4. What plans might be adopted to reduce, to limit, to control, and perhaps to eliminate, the use of radio facilities for commercial advertising purposes?

"Answer. This answer is based upon the premise that the present system of broadcasting will be retained. Any plan, the purpose of which is to eliminate the use of radio facilities for commercial advertising purposes will, if adopted, destroy the present system of broadcasting.

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station *must have its inception in new and additional legislation which either fixes and prescribes such limitations*

[20] S. Res. 129, 72d Cong., 1st sess. (1932); 75 C.R. 1412–13, pt. II.
[21] S. Doc. 137, 72d Cong., 1st sess., "Commercial Radio Advertising," a letter from the Chairman of the Federal Radio Commission in response to S. Rept. 129.
[22] Ibid., p. 2.
[23] Ibid., p. 33.
[24] Ibid., p. 33.

or specifically authorizes the Commission to do so under a general standard prescribed by that legislation. While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, *there is at present no other limitation upon the use of radio facilities for commercial advertising.*

"Such regulation, whether specifically undertaken by Congress or delegated by it to the Commission, could extend both to the quality and the quantity of commercial advertising. While the quality of advertising might and probably would be difficult of adequate regulation, the quantity of such advertising could be limited to certain hours in the day or night and to a certain number of such hours; also, provision could be made limiting the advertising matter to a certain percent of the time devoted to total programs or commercial programs.

"Any such system of regulation should, however, recognize and apply the differences in the needs and requirements of stations of the several classes; i.e., clear, regional, and local. Also, a basis for classification may exist in the fact that certain programs are originated locally for local consumption, whereas other are originated by chain companies for the edification and entertainment of the country as an entirety or at least for very large sections thereof.

"Thus, it will be observed from the matter collected in this report that while sales talks, etc., consumed 6.55 percent of the total hours used during the sample week by the 582 stations of all classes and that such matters consumed 18.11 percent of the total commercial hours of such stations, sales talks and related matters consumed only 11.27 percent of the commercial programs of chain stations as compared to 20.03 percent of the commercial programs of local stations. A flat restriction placed upon the amount of time used for sales talks without regard to the location, power, and activities of stations would, in all probability, work inequitable results. Moreover, and in any case or class, limitations upon the use of time for commercial advertising, if too severe, would result in a loss of revenue to stations which, in all probability would be reflected in a reduction in the quantity and quality of programs available to the public.

"The Radio Act of 1927 was obviously designed to permit the licensees of broadcasting stations the maximum of latitude in the matter of program material. Such licensees are in a singularly favorable position to learn what the audience wants to hear and to make the necessary changes in program material and in methods of presentation that will cause their programs to be favorably received by a substantial majority of the listeners. The adoption of regulation of the sort herein described should be undertaken only when it clearly appears that a majority or at least a considerable number of the licensees have failed to operate their stations in a manner acceptable to a majority of the listening public. *If, in the opinion of Congress, that time has now arrived, we conceive it to be advisable to enact such legislation as will permit the Commission to impose such regulations as the circumstances from time to time seem to warrant rather than legislation imposing specific restrictions and unflexible limitations.*" [Emphasis supplied.]

In response to question No. 6, the Commission replied in part: [25]

"6. Whether it would be practicable and satisfactory to permit only the announcements of sponsorship of programs by persons or corporations?

"Answer. 'The American system of broadcasting is predicated upon the use of radio facilities as a medium for local and national advertising. Upon this use depends the quantity and quality of commercial and sustaining programs. The competition between advertisers insures the employment of the best talent available and a variety in kind of commercial programs. The commercial programs furnish the principal source of revenue to stations. The quality and character of sustaining programs are dependent upon the revenue received from the sale of time for commercial advertising purposes. The daily newspaper furnishes a parallel: A newspaper can be sold to the subscriber at a cost greatly under the cost of production because it is used as a medium for advertising, and what it contains of a news, educational, literary, and entertaining value depends almost entirely upon the revenue received from the sale of space for advertising purposes. Similarly, a radio broadcast station can present sustaining programs that are of great educational value and rich in entertainment only in a degree measured by the revenue derived from the sale of time for purposes of commercial advertising.' "

[25] Ibid., pp. 36–37.

Further, in responding to this question, the Commission was of the opinion that any problem concerned with advertising had the cure within itself:

"By the use of these facilities, the advertiser is permitted by the licensee of a radio station to visit in the homes of the listening audience. The value of his contact is dependent upon the amount of sales talk and the kind of entertainment he offers as well as the manner in which he chooses to express himself. Those whom he offends can promptly eject him and deny his further admission. The broadcaster and advertiser who fail to recognize such fundamental principles and to make the adjustments in the content and method of presentation of programs desired by a great number of the listening public must suffer the natural consequences resulting from the operation of the law of economics."

Finally, the Commission concluded:

"There, as in our answer to the fourth question, if it is the opinion of Congress that the situation justifies further and additional legislation, the proper solution would seem to lie in legislation authorizing the Commission to enact certain regulations designed to govern the situation rather than specific legislation on the subject by Congress."

We have dwelt at length on the response of the Federal Radio Commission because, as we already indicated, we feel it is of special significance in this discussion. Its importance rests not only with the opinions contained therein, that the Commission did not have authority to control or limit the use of radio facilities for commercial purposes, but the fact that this opinion was formally conveyed to the Congress prior to its consideration[26] and adoption[27] of the legislation creating the present Commission. Yet, the Congress, having this information, *took no action to enlarge the authority of the Communications Commission over that of the Radio Commission.*[28]

Further, there is a thought that seems to permeate the response of the Radio Commission—a sort of sense of proportion, an insight, really, into the proposition which is so basic to this discussion: That the system of broadcasting, as we now know it, would be drastically altered if Congress were to delegate to the Commission authority to place limits on advertising.

The Radio Commission cautioned against any such alteration in the absence of a failure of a majority of licensees "to operate their stations in a manner acceptable to a majority of the listening public." We respectfully suggest to this Commission that the considerations that impelled the Radio Commission to reach these conclusions 32 years ago should be given consideration today.

The Commission in its notice refers to the policies of its predecessor, the Federal Radio Commission, to support the instant proposal. We note, however, that no reference is made to the reply of the Radio Commission to Senate Resolution 129 which raised the same questions as those contained in the current rulemaking proceeding. An examination of this response indicates clearly that the Federal Radio Commission not only was of the opinion that it lacked authority to promulgate rules limiting commercial time, but expressed grave doubts as to the wisdom of legislation enabling it to act in this regard. We suggest, therefore, that not only does reliance on the actions of the Radio Commission fail to support the current proposal, but actually those actions are philosophically opposed to it.

Thus, in 1932, the Congress was well aware of the fact that the Radio Commission did not believe it had the authority to adopt regulations limiting the amount of time broadcasting stations could devote to commercial advertising. Two years later witnessed the adoption of the Communications Act of 1934 which, as we have indicated, was passed not to give the Commission any additional authority, but rather to consolidate the various agencies regulating communications under one body.

The true fact of the matter is that Congress has always been aware of the relationship of commercial advertising to our system of broadcasting and has had ample opportunity to act had it desired administrative control over it.

Through its affirmative action in reenacting the Radio Act of 1927 as title III of the Communications Act of 1934, without including authority to regulate the

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[26] S. 3285, 73d Cong., to provide for the regulation of interstate and foreign commerce by wire or radio and for other purposes was introduced by Mr. Dill on Apr. 4, 1934 (78 C.R. 5952).

[27] 78 C.R. 10,968–10,995, June 9, 1934.

[28] See Warner, "Radio and Television law," p. 788, "The Communications Act of 1934 reenacts the Radio Act of 1927 in title III of the act * * *." Any provisions that were changed were minor and were dealt with by specific language (Conference Report on Communications Act of 1934, H. Rept. No. 1918, 73d Cong.).

time a station could devote to commercial advertising, despite knowledge of the fact that the Radio Commission did not believe it possessed such authority, demonstrates acquiescense with the opinion of that Commission. If Congress had considered the Radio Commission's interpretation erroneous, it would have amended the act of 1927 accordingly or included necessary changes in the act of 1934. Its failure to do so requires the conclusion that the Radio Commission's interpretation was consistent with the intent of the statute, and that Congress was satisfied with this interpretation.

We believe that *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269; *National Lead Co.* v. *United States*, 252 U.S. 140; *Poe* v. *Seaborn*, 282 U.S. 101; *McCaughn* v. *Hershey Chocolate Company*, 283 U.S. 488; *Costanzo* v. *Tillinghast*, 287 U.S. 341; *Skidmore* v. *Swift Co.*, 323 U.S. 134; and *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172; support our view. *Norwegian* tells us (p. 313) that "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."

Finally, it is interesting to note that in more recent times, identical bills have been introduced in Congress—H.R. 5741 in 1955, and H.R. 4571 in 1957 by Representative Heselton—with the purpose of amending the Communications Act to provide for regulation of the amount of radio and television program time which may be devoted to advertising. Specifically, the bills sought to add a provision entitled:

"Program time devoted to advertising.

"Section 330. The Commission shall prescribe appropriate regulation, applicable to licensees, program sponsors, and others, to insure that of the total amount of time available for any radio or television program, the proportion of such time which is devoted to advertising shall not be excessive."

It belabors the obvious to point out that Congressman Heselton was proposing to give the Commission the exact authority which it now proposes to use, but does not possess. Apparently, as recent as 1957, Congress did not believe that the Commission possessed the authority under question, otherwise there would be no need for passage of additional legislation to confer the authority. Again, we see Congress possessed with the opportunity to bestow the authority in question upon the Commission and failing to do so. We do not believe that any ther conclusion can be drawn but that Congress placed full responsibility on the broadcast licensee to select and control the advertising material which is broadcast over his facilities. This philosophy was echoed by the FCC, in 1955, in its formal comment on the above-mentioned proposals:

"The Commission is not unaware of the fact that there have been, and are, abuses with respect to the amount of time devoted to advertising over particular radio and television stations and on particular programs broadcast over some stations * * *, the responsibility for determining the amount of radio and television time devoted to advertising is the responsibility of the individual station licensee. * * *"[29]

Furthermore, it should be noted that the Commission was not given powers of rate regulation over broadcasters as it was over common carriers. In this connection, the Supreme Court in the case of *F.C.C.* v. *Sanders Bros.*, 309 U.S. 470, 474 (1940) stated:

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus, the act recognizes that the field of broadcasting is one of free competition."

We submit that the present proposal amounts, in the final analysis, to a form of rate regulation. By limiting through Government stricture the amount of time a broadcaster may devote to commercials, and at the same time requiring service in the public interest, the Commission indirectly also determine the minimum rate that can be charged for advertising time which will produce an overall yield adequate to finance such a service.

In summary, Congress has always been aware of the question under consideration and has had ample opportunity to act. We have seen, for example, that the matter was squarely brought to the attention of the Congress in 1932 in connection with Senate Resolution 129. When asked to comment on what plan

[29] See "Comments of FCC on H.R. 5741," mimeo No. 21521, adopted July 20, 1955.

could be adopted to limit and control commercial advertising, the then Commission, after considerable research, replied that under the existing statute, it did not have the authority to do so and would require new legislation.

Thereupon, and within 2 years, Congress passed the Communications Act of 1934; adopted essentially without change the act of 1927 as title III.

As we have seen in 1955 and 1957, specific proposals were presented to Congress to grant to the Commission authority to control advertising. Again no action was taken.

We recognize, of course, that a month ago, on August 30, Congressman Walter Rogers introduced a bill to prohibit the Commission from adopting any rules relating to length or frequency of broadcast advertisements. Some may interpret this as meaning that the Commission must have authority to adopt commercial time limitations under the present law, otherwise an amendment to prohibt such action would not be necessary. We would suggest, however, that there is a logical basis for the introduction of this bill at this time.

The Commission has raised the question of jurisdiction by issuing the instant notice. Obviously it is of the opinion that it possesses statutory authority to adopt the proposed limitations. As we view it, Congressman Rogers' bill is a countermeasure designed to resolve the matter of jurisdiction through legislative means rather than through lengthy and expensive court proceedings. When a Federal agency that is a creature of Congress proposes to adopt measures which are of questionable statutory authority, the quickest and surest method of resolving the matter is through corrective legislative action. This is what the Rogers bill is designed to accomplish.[20]

We submit that the legislative history of the Radio Act of 1927 and the Communications Act of 1934 indicates clearly that the adoption of regulations placing a limit on the amount of time broadcasting stations may devote to commercial advertising would be the assertion of power never expressly conferred or even intended through inference by the Congress.

Respectfully submitted.

NATIONAL ASSOCIATION OF BROADCASTERS,
DOUGLAS A. ANELLO, *General Counsel.*

NOVEMBER 8, 1963.

Mr. ROGERS of Texas. I want to express my thanks for the memorandum. I think it is very important. I have not had too much of an opportunity to glance at it so far, but it seems to me that there has been a great deal of work done on it, and we appreciate it.

Mr. COLLINS. Thank you very much and, Mr. Chairman, our general counsel, Mr. Anello, who prepared the memorandum, is here and if there are any questions regarding the legal aspects, he would be happy to respond.

I would try, but I am quite sure that he would do a better job than I would in that area.

Mr. ROGERS of Texas. Mr. Hull, do you have any questions?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Thanks, Mr. Chairman.

That was a very fine statement, Mr. Collins, and we appreciate it very much.

Mr. COLLINS. Thank you, Mr. Younger.

Mr. YOUNGER. I do not know whether you are familiar with a talk that Commissioner Cox made in Seattle in October of this year, but I want to read a statement that he made:

After all, the broadcast media are the only forms of communication which are subject to direct regulation in all of their aspects by an agency of the Federal Government.

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[20] See remarks of Congressman Rogers, chairman of Subcommittee on Communications and Power, made to the House of Representatives Sept. 26, 1963, atached hereto as app. A.

Now, I am not taking this out of context at all because that is all inclusive, but apparently he feels that the Commission does have the right to regulate the industry in all of their aspects.

Certainly, that would include programing and commercial time and everything else.

Mr. COLLINS. I would strongly dissent to that.

Mr. YOUNGER. I know, but that seems to be the trend of the Commission in connection with this whole matter, and that is what disturbs most of us.

It is almost a completely new concept that has come into being by this Commission as to their legal rights and the acts which they want to perform.

I have no questions.

Mr. ROGERS of Texas. Mr. Harris?

Mr. HARRIS. I am sorry I was not here at the outset of Governor Collins' remarks, but I have gone over them with interest.

I would say, Mr. Chairman, that the Governor's reference to his ability in the legal field is interesting, and I would not want him, as a classmate of long ago in law school, to downgrade himself in that field.

It might reflect on others of us who had the same kind of training.

Mr. COLLINS. I am happy to stand corrected, sir.

Mr. HARRIS. I would be interested in having your counsel, as well as yourself, study the memorandum supplied by the Federal Communications Commission. It is rather lengthy. I deal with the Commission's authority under the law to take certain actions in the field of broadcasting.

I made a little statement during the hearing the other day when all of the Commissioners were here. In my judgment there is not anything new here as might have been implied by Mr. Younger's comment a moment ago. We have had these controversies and difficulties to my knowledge for more than 20 years.

I do not believe that even though the broadcast industry is greatly concerned today, I do not believe that they are nearly as worked up as they were in the 1940's, when there was quite different personnel on the Commission. It is quite obvious, however, that this is a continuing problem.

The challenge may be greater today than ever before because of the growth of the industry. The industry is so much greater today than when it was an infant industry.

I think that perhaps you are going to have greater challenges as we go along and as these problems develop. That is the reason that I would like, as I indicated in my statement the other day, to see this authority clarified and see if we could not come to some resolution as to just what the extent of the authority of the Commission might be.

These general terms that the Congress provided in the 1934 act, some of which stem from the old Radio Act of 1927, are subject to controversy. And I would like to have your legal staff take that legal memorandum that the Commission filed and go over it and then see if we might not compare some notes.

In the meantime, I think I would like to be in a position to ask the staff of the Federal Communications Commission about your legal memorandum and see if we might not get some good ideas out of that.

Now, you have gone very strongly on the question of the industry——

Mr. COLLINS. May I respond at this point, Mr. Chairman?

Mr. HARRIS. Yes.

Mr. COLLINS. We will be glad to have our legal staff take the FCC memorandum and prepare a rebuttal or its own analysis of the strength and weaknesses of that and forward it to you.

Mr. HARRIS. The Commission's legal memorandum, Mr. Chairman, was referred to and included in the record, was it not?

Mr. ROGERS of Texas. Yes, the notes were filed and also the statement of the Commission with regard to this measure and their position as far as——

Mr. HARRIS. I had reference to the legal memorandum, which is rather extensive, that they put in the record the other day and on which they rely as to their authority.

I think there are some copies here, and the clerk will make a copy available to you.

Mr. COLLINS. Mr. Anello advises me that at the hearing Wednesday the FCC stated that they were working on a legal memorandum but that it had not been prepared, but when it was prepared they would like to file it, and we would be glad to take a copy of that, when it is made available, and file something in response to it.

Mr. HARRIS. I was under the impression that they had it with them and referred to it, and the chairman did, too, on two or three occasions.

Mr. COLLINS. Well, he may be mistaken.

Mr. ROGERS of Texas. Well, if the gentleman will yield, I think what the chairman was referring to at the time was the order in which they undertook to spell out——

Mr. HARRIS. No, he had the order, but he also had a legal memorandum that he wanted to put into the record, and it was about 30 pages long——

Mr. ROGERS of Texas. Oh.

Mr. HARRIS (continuing). I thought it was a pretty long legal discussion but I do think that this hearing, in bringing out this point, might throw a lot of light on the authority of the Commission.

They rely on section 303 and, of course, the other two provisions are complementary to it, but that was their major authority that they claimed.

And I might say that I am inclined to think that the Commission, with the very efficient and able staff that they have, can no doubt make a record on almost any given case, using that authority and it would probably be sustained by the courts.

I will be very candid and frank about it, and say that in all probability that that can be done. But, anyway, I would like for both you and the Commission's legal staff, as well as our own staff, to study this matter in more detail.

Mr. COLLINS. We will be glad to do that, sir.

Mr. HARRIS. The only other thing that I wanted to comment on or mention was your statement about the improvements.

We all know that improvements are desired. We have not reached the perfection stage. You made a pretty strong statement that such improvements should come from the industry itself.

In my judgment, the members of this committee, going way back, have felt strongly about that and we have, in my judgment, leaned over backward to let the industry take the initiative.

I must say to you, in all candor, Governor, that I am not altogether satisfied that the industry has assumed the full responsibility in that regard during the whole time. You know, patience could run out I do not see that it is going to but, after all, we are all human beings and it has been contended all of these years that self-regulation is the best policy.

I believe pretty strongly in it myself, but if we are going to pursue that policy and it is going to be an established procedure, then I cannot too strongly suggest that the industry ought to assume full responsibility.

Now, we have taken the field of ratings as an example, and I do not want to drag out that one here today and get involved in a long-drawn discussion of it, but I think you have to recognize yourself that the industry has not done its full share, even though you are working on it and trying.

I think that if the industry is going to assume full responsibility, it had better get down to concrete facts and come up with something and I am still waiting for a report on it.

It is not only in that field but it is in these various fields dealing with commercials and programing. I agree with you as to the principle but I also want to suggest strongly that if the industry is going to do certain things we had better try to do the best possible job and do it promptly.

Thank you, Mr. Chairman.

Mr. COLLINS. Can I just say a word or two in response to the statement by the chairman?

Mr. ROGERS of Texas. Yes.

Mr. COLLINS. Mr. Harris, I fully recognize that this industry has needed prodding by the Congress and that much prodding has resulted in much good over the years, and that well may be true in the future.

I was speaking of the basic obligations of the industry to do this with its own initiative and its own resources, and I think I could, of course, enumerate in great detail many, many ways in which the industry has proceeded without that prodding, but you are so right and no Congressman has contributed more to the industry in that respect than yourself.

Now, in response to the ratings problem, the industry has had every reason to know that this problem existed long before your investigation was started, and many in the industry sought to bring it to the industry's attention and to get something moving, but it was not until after your committee made its investigation that the industry was prodded into doing an effective job in that area.

But I do think, sir, that an effective job is being done, and I would be very happy to respond. You said something about wanting a report. I thought you were getting reports and although of course, I could speak on that, it probably would not be proper to take the time of this committee at this time, dealing with another matter. I could speak at substantial length in relating to you what I think is extraordinarily fine progress that is being made in that area at the present time.

Mr. HARRIS. Well, we will try to make some time available at another date.

Mr. COLLINS. All right, sir.

Mr. HARRIS. We will try to make some time available at a later date when you will have that chance and opportunity.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I have no questions, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I have no questions, except I would like to say that I have listened with a great deal of interest to this discussion today, and I think it has been very worthwhile.

Mr. ROGERS of Texas. Governor, just one observation: Thank you for the legal memorandum and your statement.

In your discussions in the NAB has the matter come up as to the possible retaliation by the Federal Communications Commission if your organization takes a position contrary to what they want to do?

Mr. COLLINS. No, sir. I have seen nothing in the actions of the FCC to indicate any retaliatory attitude when we have opposed them.

We have established, I think, a very frank basis of discussion and argument with the FCC about what they do and what they do not do.

We had that with Mr. Minow, and I have yet to see any specific act that they have taken that I would regard as retaliatory or the result of any petty disposition.

Mr. ROGERS of Texas. Yes. Well, of course, as far as the NAB is concerned, I would expect that answer and I would think in my own mind that that is what is occurring.

But what I have reference to is this, is there any evidence in your organization among some of the members that they have fear of retaliation by the FCC if they, as individuals, participate in these matters?

Mr. COLLINS. If they do what?

Mr. ROGERS of Texas. Participate in opposing the FCC.

Mr. COLLINS. I would certainly say there is fear among some of our members, Mr. Chairman.

Take into account that the rollcall of broadcasters in this Nation is a very broad one and it includes people of all kinds of thinking and attitudes and dispositions and there is no doubt but that with many there is substantial fear of the FCC.

There is substantial fear that unless they respond to the suggestion in a letter or to a "lifted eyebrow" it will result in an unhappy or an antagonistic act on the part of the FCC.

But I think, sir that most of that fear is an unreal thing. I do not think that the FCC has really overtly demonstrated that type of disposition.

Mr. ROGERS of Texas. Governor, in keeping with Mr. Younger's observations with regard to the speech by Mr. Cox, do the members of your organization, not as an organization but as individual broadcasters, indicate any feeling that the FCC, by letters and memoranda sent to broadcasters, indicate to those broadcasters that they do have full and complete power to regulate this industry in any manner that they see fit and include some veiled threats with regard to how those broadcasters conduct themselves?

Mr. COLLINS. There was a time, a few months back or maybe a year back, when the nature of the letters that the FCC staff were

sending to the licensees, inquiring about their program practices and what they expected in the future, would justify or give reasonable ground for an interpretation that implicit in them was a threat.

But I am frank to say that in more recent times they have consciously, and to some effect, sought to take out the type of language that they were using, that the letters that they write now are not as much in that vein as they were some time back.

Mr. ROGERS of Texas. Well, that is encouraging.

Thank you very much, Governor Collins, for your statement.

Mr. COLLINS. Yes, sir. Thank you.

Mr. ROGERS of Texas. Our next witness is the Honorable John C. Doerfer, a former member of the Federal Communications Commission.

Mr. Doerfer was also a former Chairman of the Federal Communications Commission.

STATEMENT OF JOHN C. DOERFER, ON BEHALF OF MARYLAND-DISTRICT OF COLUMBIA-DELAWARE BROADCASTERS' ASSOCIATION, INC.

Mr. ROGERS of Texas. Mr. Doerfer, it is nice to have you before this committee.

Mr. DOERFER. Thank you, Mr. Chairman, and I appreciate the opportunity of being here.

Mr. HARRIS. Mr. Chairman, I would like to join you and the other members of the committee in extending a welcome to Mr. Doerfer back to this committee.

It has been some time since we have had the benefit of his experience and knowledge in matters respecting broadcasting.

Mr. DOERFER. Thank you, Chairman Harris. The pleasure is all mine.

Mr. Chairman, and members of the committee, my name is John C. Doerfer. I am the general counsel for the Maryland-District of Columbia-Delaware Broadcasters' Association, Inc., which is an association of about 40 broadcasters in the States of Maryland and Delaware as well as the District of Columbia.

My experience includes 4 years as a commissioner on the Public Service Commission of Wisconsin, 7 years as a Commissioner on the Federal Communications Commission (2½ years as its Chairman).

The Maryland-District of Columbia-Delaware Broadcasters' Association, Inc., is in favor of H.R. 8316 because the Communications Act of 1934 as interpreted by the Commission needs clarification.

The Federal Communications Commission proposes to assume jurisdiction over the length, frequency, and placements of commercial announcements by broadcasters.

This is a common carrier or utility type of regulation never contemplated by Congress. In fact, Congress specifically provided against such forays into the field of free enterprise.

VIOLATES FIRST AMENDMENT AND COMMUNICATIONS ACT

The legislative history of the act indicates that Congress had debated a choice. The spectrum could be developed and utilized through Gov-

ernment ownership and operation, or it could be developed by private industry under governmental regulation. If by regulation, then there was a further choice. The industry could be regulated in accordance with established public utility and common carrier concepts or by a more aloof application of regulatory powers—such as those which did not cast upon the Government the obligation of providing reasonable rates of return upon the investments of private capital.

The latter obligation, obligatory in the field of common carrier type of regulation, was not assumed by the legislative branches of Government. It was imposed by the courts, or else common carrier regulation in this country would be unconstitutional.

Congress deliberately chose the private industry method of developing broadcasting. Placing no ceiling on profits, it assumed no responsibilities for losses. Hence, Congress provides specifically in the adoption of the Communications Act a section defining common carriers and later assigned to common carriers a portion of the spectrum.

The act then proceeds to exclude broadcasters.

Section 3(h):

> * * * but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The import of this section has been construed by the Supreme Court of the United States. In *FCC* v. *Sander Bros.* 309 U.S. 470, (1940) the Court said:

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

Apparently the Commission's proposed rule would circumvent this decision.

Incidentally, it is not mentioned in support of their statements on this subject to this subcommittee of their assorted powers.

Advertising revenues in the American system are the sine qua non of the broadcasters' financial ability to operate their stations.

The *Sander's* opinion has never been overruled or modified. Yet there is a school of thought composed of a few members of the broadcasting industry, and some in academic circles who feel that there must be some power to limit the number, frequency, and interspersing of commercial content in a broadcasting program.

There may be. But in the face of the history, language and interpretation of the act, the limit is not reached until it can reasonably be said that the broadcaster has abandoned program broadcasting for the general public and has converted his assigned frequency into a sort of private instrument tantamount to point-to-point broadcasting. There is another part of the spectrum for that—but it has not been allocated to broadcasting.

Up to this limit it is the public which will decide who "shall succumb or survive."

And that is a quotation from the *Sander Brothers* case.

A broadcaster waltzing up to the brink of commercial saturation places both his investment and genius, or lack of it, in the marketplace of ideas—not in the Commission. Both Congress and the American people have not subscribed to permitting seven men regardless of wellsprings of good intentions to dictate the length, number, or placements of commercial announcements in a broadcast program.

VIOLATES THE DUE PROCESS CLAUSE

The Commission's proposed rule would circumvent not only section 3(h) but the constitutional guarantees against taking property without due process of law. It does this by placing its own interpretations on those provisions of the Communications Act which provides for the issuance of broadcast licenses "in the public interest, convenience, and necessity."

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this act, shall grant * * * a station license * * *.

That is one of the sections containing the phrase "in the public interest, convenience, and necessity."

This latter phrase has been seized upon by the Commission (aided and abetted to some extent by the courts) as a talismanic touchstone opening the door to unlimited powers.

In *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943) the Supreme Court of the United States, in deciding that the Commission had power to adopt rules regulating broadcast stations affiliated in a chain broadcasting system, said:

> But the act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.
>
> * * * The touchstone provided by Congress was the "public interest, convenience, or necessity" a criterion which "is as concrete as the complicated factors for judgment in such field of delegated authority permit" (citing *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)).

What the Commission has overlooked in the *NBC* case is the equally important caveat that:

> The Commission was, however, not left at large in performing this duty.

May I divert for a moment to apprise the members of this committee of what the *National Broadcasting* case was and the *Pottsville* case was about.

The *NBC* case was really an effort on the part of the Commission to divert and to restrict forces which were tending toward a monopolistic situation. It felt, and the Supreme Court sustained it, that the act provided for competition and that unless the Commission could regulate the practices of affiliation with a network they would probably thwart the congressional intent to keep it in the competitive field, and that is where they got the power to provide for the public interest.

It was on the periphery of an expressed delegation, because in the law itself there are expressed laws against monopolistic tendencies or against the accumulation of power which may create a monopoly as well as lotteries.

All that this Commission was doing, in fact, in that particular case was carrying out congressional intent.

In the *Pottsville* case, actually that was a procedural case.

The case came back from the court of appeals and the Commission decided that what they would do now would be to have a comparative hearing. The person or the litigant, who won in the court of appeals, finally objected to that and brought it to the Supreme Court of the United States and said the Commission did not have the right to order a comparative hearing, and the Supreme Court of the United States said, yes, it did and quoted this language which has been seized upon by the Commission as giving it unbounded power to provide for the public interest, convenience, and necessity.

The evil that the Commission tried to curb in the *NBC* case was to prevent a licensee from entering—

into a contract with a network organization which limits his ability to make the best use of the radio facility assigned to him. * * * the net effect (of affiliation practices) has been maintained at a level below that possible under a system of free competition.

Congress moved (via regualtion by licensing in the Communications Act of 1934) under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.

Now, this is a quote from the *NBC* case.

DISCRIMINATES AGAINST THE SMALL BUSINESSMEN

Under the proposed rule, the Commission is moving in the opposite direction. By limiting the time a broadcaster can give to advertisers, the Commission is cutting out the little advertiser. He cannot compete with the big business interest who can afford to purchase the higher priced time segments due to shortages caused by governmental intervention in the natural forces of competition.

Although a credible argument can be made that the language relied on in the above-cited cases is taken out of context by the Commission and is not the rationale upon which they were decided, enough confusion has been generated as to warrant a clarification.

H.R. 8316 would eliminate the risk of possible adverse judicial interpretation extending undelegated powers to the Commission under the vague "public interest, convenience, and necessity" clauses.

If the courts should interpret these clauses so as to grant the Commission unbounded power to regulate the amount of time a broadcaster may sell, and, dictate the various time segments of the day within which varying limitations will apply, then the Commission will have wedged the broadcasters into the domain of common carrier regulations.

For what is left? Nothing but to set rates. Time is all a broadcaster has to sell.

As a matter of fact it is horn-book law that our common carrier and public utility regulatory laws would be unconstitutional if they did not compel the regulatory agencies to permit the carriers to earn a reasonable rate of return. It would be the taking of property without due process of law—not that the broadcasters want rate regulation but it would become inevitable.

In the proposed rulemaking the Commission does not assume the concomitant duty of allowing, where necessary, sufficient sale of time to sustain a broadcaster—especially the small daytimers who can only operate between sunup and sundown. In some parts of this country, that means many broadcasters must get off the air at 7:21 p.m. in the wintertime, and cannot get back on until 7:35 a.m. the next day.

The Commission mentions this disparity in passing and hence is aware of it. Yet, if the rule as proposed is adopted it will be of small comfort to the little broadcasters that somebody on the Commission will get around to making equitable rules—if possible, for him. By that time he may be out of business. The Commission is many months behind in its present statutory duties now.

In the broadcasting field approximately 14,500 applications were filed during fiscal 1963. About 5,400, or well over one-third, were pending at the end of the year. Of this number about 3,500, or 65 percent, were more than 3 months old. About 1,500, or 28 percent, were more than 1 year old, and about 700, or 13 percent, were more than 2 years old. Whatever the cause, it is clear that applications in the broadcast field are not handled as expeditiously as those in other fields that the principal backlog is in this field.

Address by Commissioner Lee Loevinger, Portland, Oreg., November 1, 1963.

Just why the Commission wants to assume more duties is unclear.

It is respectfully submitted that unless Congress wishes to permit the gradual transition of broadcasting from the field of competition into the common carrier regulatory field, it should adopt H.R. 8316. This amendment would be clear and unmistakable reiteration of the original intent of Congress. It is a reassertion of the people's faith in the American way of developing broadcasting. It tacitly recognizes that advertising, like taxes, may be odious to some people. But until common carrier type of regulation is lawfully determined by Congress, all efforts to slip into its side door should be specifically barred.

Thank you for this opportunity.

Mr. ROGERS of Texas. Thank you, Mr. Doerfer.

Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Harris?

Mr. HARRIS. Well, I want to thank Mr. Doerfer for his statement, Mr. Chairman. I think it was a very talented statement and it deserves a lot of attention.

When the Commission was here Wednesday it was called to our attention, Mr. Doerfer, that if the language as proposed here were to be adopted, it would provide a much greater limitation than was intended.

Now, you represent the industry area association. Now, it appears from the Commission's statement, and I was interested in Judge Loevinger's brief comment on it, that they would not have authority to make rules with respect to advertising on educational television stations.

Do you have any comment on that?

Mr. DOERFER. Well, yes; I do.

I would say that in view of the action or the proposed action of the Commission and in view of the proposed bill, which is in response to that action, there has been sufficient legislative history developed to point out just exactly what the Congress was trying to reach.

But rather than to get into an extensive argument, that could be resolved; and I would suggest that the eighth line of the bill be amended by striking the words "all or any class" and insert therein "commercial", so that it would read "which may be broadcast by commercial stations in the broadcast service."

Mr. HARRIS. Well, I had that thought myself, that something like that might be considered.

Now, from your services on the Commission and as Chairman of the Commission, I am interested in your comment with reference to the daytime broadcasters.

I believe during the years that you were there and before and since, the daytime broadcasters have been asking for more time.

As you well know, they have been limited to from sunup to sundown, and they still are. They had various proposals and finally we came up with a, I suppose, a compromise proposal.

As Chairman and a member of the Commission, you along with the other Commissioners, have been ardently opposed to any legislative policy in that field. Your being solicitous of the daytime broadcasters now, I assume, has not changed your policy as to the technical problems involved with giving them more time to advertise their programs during the day?

Mr. DOERFER. Chairman Harris, I think that there are two problems involved really.

I am certainly not opposed, nor was I ever opposed, to giving the daytimers more time. My problem was trying to reconcile the laws of science.

Would I, as a Commission, create more chaos, more interference, and destroy more service by permitting the broadcasting of electronic signals at a time of the day when they are likely, as engineers have told us, to collapse a good deal more service than they would create?

That was my real problem. Now, I would say this, that after sunrise, when the phenomenon disappears which creates the interference, certainly no Commission should infringe or impinge more and more upon the time that these daytimers have.

Mr. HARRIS. I appreciate that. You made your point very well in that regard.

But I have been one of those even when you were on the Commission you will recall, who urged the Commission to conduct a test; to select some place in the country and run a trial test there. I know your experience in the field of electronics had something to do with your decision, as it has been with all the other members.

I still would like to see a trial test of it though, because I cannot help but believe that there could be some relief given in that field. I thought so then and I have thought so since, but I guess the phenomenon that you mentioned is the prevailing judge in this case and we cannot do anything about it.

And I want you to know that I did not bring this up to try to imply that you were taking a position now that was different from the one taken by you when you were on the Commission. I was merely bringing up an old, old problem that we have had over the years. We are still searching for a solution to it, and I know you did when you were there and I know the other members of the Commission do.

Mr. DOERFER. May I add one comment?

I was always aware of budgetary limitations and resented very much assuming any more duties than the law absolutely required.

I always felt—perhaps I never showed it before this committee and the Congress—that the solution to the daytimers would really be a substantial research problem. It would involve not only the phenomenon of electrical interference but to what extent does it really impinge upon a service area that needs it, or has a plentiful service, or does not have a community of interest with the service with which it is interfering?

That to me is a substantial undertaking and it probably should be studied primarily for the purpose of ascertaining it, because I feel this way about it, that a station 150 miles away loses a certain amount of community of interest in those communities.

So that if local daytimers could service their communities without collapsing what I would call the legitimate community of interest of the other distant broadcasters, why, certainly some accommodation should be worked out.

But that is such a complex, difficult thing that I do not think anybody could possibly solve it without an adequate engineering study and, you might almost say, a survey of what particular services these communities need which they may either gain or lose.

Mr. HARRIS. I think there is a lot to what you say.

Mr. DOERFER. I would say this, that I would much rather see Congress appropriate money to try to solve a problem like that than to give the Commission money to police the programing, the advertising practices, and the business practices of the broadcasters.

Mr. HARRIS. One other thing, since you are experienced in this field and quite knowledgeable, and we respect your experience and knowledge: The Commission has made a plea for the Congress not to proceed on this legislation at this time until the Commission has had an opportunity to complete the rulemaking proceedings before them and reach a decision.

In view of your background and experience, what would you think about that request?

Mr. DOERFER. Well, I would be opposed to any delay, and the reason for it is that I think I could make quite a case that this is the pattern, extending 'way back even to my time.

There has always been, and I wil grant it, a reasonable difference of opinion.

But I have constantly seen an encroachment in fields which I do not think Congress really intended and which I think is un-American. I think the broadcasters have just as much right to make as many mistakes as any other industry, for instance, say, a teacher or a minister or Congressman——

Mr. HARRIS. Or any newspaper?

Mr. DOERFER. Or any newspaper, in trying to solve our social problems and supply our needs. Why the broadcasting industry should be singled out and held to a standard beyond or up to human perfection, I have never been able to understand.

I, too, have had the opportunity of viewing broadcasting in foreign countries and I would say this, that the people who were complaining about the advertising and the programs, if they knew what the alternative was they would not be quite so vociferous.

I do not remember that I have ever turned on a television set or a radio set to listen to a commercial. I know that that is the price that I have got to pay.

And I would say that in some of the foreign programing that I saw during prime time, and this was in 1959 or in the fall of 1958, I listened to the British broadcasting television programing during prime time, and I saw Burns and Allen, Jack Benny, Wyatt Earp, and all that I did see there during prime time were American-produced programing.

It seems to me that a system that has produced as much good programing as our system has, if we paid full attention to some of the good things that we have, I think some of the people would appreciate that there is a price to pay.

In England, at the time I was there, you had to pay, I think it was, $8.40 a year for a license to have a television set for 1 year. Now, in addition——

Mr. HARRIS. You may want to check that. I was over there just last week. It is 4 pounds a year now and that——

Mr. DOERFER. Well, I may be wrong about the exact figure, Congressman Harris, but there was a combination of television and radio at one time, and the thing that amazed me about it was that I thought it was a substantial portion of the Englishman's budget.

But another thing that people do not realize is that when the British Broadcasting Corp. broadcast its governmentally operated facility the government loses all of the income which it could recover in income taxes. I think that it amounts to—well, it must amount to almost $75 to $100 million in the country alone.

If you are going to have government-operated stations which includes entertainment programs you certainly can do away with all commercials, but I do not think the American public, if they were informed and understood what was at stake, I do not believe that they would accept it.

Mr. HARRIS. Well, I am glad that this came up, Mr. Chairman. I believe we should emphasize it to the American people. Since I have recently had the privilege of going into their facilities, I found that they take about $150 million a year from the viewing public in licenses from the viewer at home.

They have no commercials. They are supported, as you have indicated, by this license method. The television authority, which is a competitor of the BBC, on the other hand is supported by advertising. They say that 57 percent of the viewing people view the programs supported by the advertisers.

This, to me, is a very interesting thing in view of the fact that they have to pay the license fee anyway on their sets. But, even so, by far the far majority of the people like the kind of program broadcast by the advertising procedure. They like it better than the programs without commercials. I thought that was a most interesting thing, Mr. Chairman.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions. I just want to compliment Mr. Doerfer on his statement and thank him for his appearance before the committee.

Mr. ROGERS of Texas. Mr. Doerfer, you served as a public utilities Commissioner, and there is one thing that I want to talk just a minute

about, and I think you have had quite a bit of experience, and that is the extent of rulemaking power in an agency; that is, how far it goes into the legislating field. Would you comment on that?

Mr. DOERFER. Yes. I think that you have to start with fundamentals.

In the first place, the history of the creation of a regulatory agency is replete with court decisions which would deny their creation because it was an attempt to create a branch of government which was not authorized by the Constitution. We had the tribranch system.

Finally, however, under the theory that a state which could create a corporation it could also create some controls. Now, when that theory was finally recognized by the courts as being constitutional it did throw one protective barrier around it, and that to this day has never, to my knowledge, been repealed, and that is that the agency which is established by the Legislature must be reasonable.

It must allow a reasonable rate of return.

Now, I was quite amazed, I might say, when Chairman Henry indicated, in response to a question, "Obviously," he said, "we admit that the adoption of this rule would create some economic impact upon broadcasters but all of our rules create some economic impact."

And then he added a phrase, and I am not quoting him directly, but something to the effect that, "We will be reasonable."

Well, that is no bargain for the broadcasters. That is a constitutional requirement of the public utility regulator.

And then I might say that one of the things that you have to consider, when you are trying to determine whether or not a proposal like this is, in fact, a public utility regulation—you should not confuse the power of the Government to regulate a number of industries.

Bankers, brokers, bakers, barbershop people—they are all regulated but no power is given to a regulatory agency there to put their finger on the jugular vein, which are the revenues. They are required to stay off of that.

On the other hand, a public utility, regulatory agency, the first thing that they try to do—let me back up for just a moment.

Because certain endeavors and business enterprises in this country lend themselves better to a sort of a monopolistic operation than the competitive, the Government has created what has been commonly recognized as a counterbalance and that is a regulatory agency.

That regulatory agency supplants or takes the place of competition; no more, no less.

Now, when it does that and when it is required to find a formula for a reasonable rate of return the formula which the public utilities use is rather simple in terms and sometimes hard to devise specifically. But the first question, the public utilities commissioners ask the staff, when there is a question of regulating the rates, is "What are the income requirements?"

That is fundamental. A professor in public utilities in a university will say the first thing that the regulatory agency has got to do is to find out what are the income requirements, and then they say the income requirements are, first of all, to find—after you have established the rate base—what is the rate of return sufficient to attract capital. You have got to have that. You have to give your utility all of its expenses.

Then, of course, you have to add generally a little bit more for surplus in order to handle some contingencies in future expansions.

Now, that formula or the expression is just common parlance with public utilities, "What are the income requirements?"

Well, let me call the attention of this committee to the language in the proposed rulemaking which was issued by the Commission, and I call your attention to the 11th line from the bottom on page 3.

> Stations who support more liberal standards—

that is within the time limits proposed—

> are asked to substantiate their position by providing the Commission with specific data on advertising requirements in their community and to relate these data to income requirements either to support an operation in the public interest.

Well, that to me is an absolute confession that they have invaded and crossed the line, and they are going into the public utilities field.

And then I was amazed that in support of their parlance they cited on page 3 of their comments of the Federal Communications Commission—they cited the *American Trucking Association* vs. *The United States* as authority:

> The expert's familiarity with industry conditions.

That is the root of their authority.

Well, may I point out to the subcommittee that this is a common carrier case. The Supreme Court of the United States decided the case of the powers of the Interstate Commerce Commission with respect to trucks, common carriers. Now, whether or not the Commission has done it unwittingly, or whether or not they have a predilection, the fact remains that there is no place in the Federal Communications Act they can point to a specific authority granting them this power. They get that only by interpretation, by statutory construction, and the record of the Commission is replete with excerpts of "legislative history," going way back to 1922, 12 years before the 1934 act was passed.

May I add this: I concur a good deal with the judge in the U.S. circuit court of appeals who, in the *Greenwood* case, finally, after being somewhat exasperated by arguments about the legislative history, said "I think when the legislative history is a little bit confusing, the thing to do is let's turn to the statute."

That is all I think this bill is trying to do. It is trying to tell the Commission there is a provision against converting the broadcaster to a common carrier. There is a provision that says all you have to do is determine the character, the financial ability, the technical ability. When you have done that, then you can implement it in the public interest. But those are the bounds. That is the line of demarcation. When you cross that, you are going further. Now, if you can find some courts' support, then I can say, as a Congressman, you should enact H.R. 8316: that will put an end to all the legislative history interpretations that have been going on for the last 35 years.

Mr. ROGERS of Texas. Now, Mr. Doerfer, in keeping with that, and I appreciate your background—I think the record is much the better for it—I may have misconstrued or misunderstood Judge Loevinger's testimony. But as I understood his statements, he took opposite positions at different times. Word came to me by the grapevine that the staff of the FCC was taking a position in the first instance that my

introduction of this bill was an admission by the Congress that the FCC had this power all the time.

Then another story came to me that if this bill was passed, it would, by the application of the expressio unius theory in statutory construction, create a situation where, by singling out commercial advertisements, say that the Federal Communications Commission had omnipotent powers in all regards insofar as the broadcasting industry was concerned, more in keeping with Mr. Cox's statement that Mr. Younger read.

Now then, of course I do not agree with that at all and I think that any lawyer who would go into the matter with regard to an independent agency would agree, and I was wondering if Judge Loevinger's statement at that time was probably a repetition of something one of the staff had said to him down there in reaching around for something to probably scare the Congress into not passing this bill. But then, we will find that out later.

Now, with regard to your remarks as to the possible amendment of the bill which Judge Loevinger later treated and on which he took an inconsistent position, in my mind, by saying that the passage of this bill would so shackle the FCC that it would not carry out its job, although he had previously said that it was absolutely unshackled—now, with regard to the language, you say—would you repeat that again, your suggested amendment?

Mr. DOERFER. Yes. While we are on that, Mr. Chairman, I propose the insertion of the words "or policies."

Mr. ROGERS of Texas. I want to go into that in just a minute.

Mr. DOERFER. Then I shall read what I would consider a suggestion for amending the bill.

In the title, in the third line, between the words "rules" and "relating," there should be inserted the phrase, "or policies," so that the title of the bill would read as follows:

To amend the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules or policies relating to the length or frequency of broadcast advertisements.

Then with respect to line 6 between the words "rule" and "prescribed," I would insert the phrase "or policy." Then in line 7, between the words "length" and "or," insert the word "placements."

Then in line 8——

Mr. HARRIS. Wait just a minute. You would say "to the length, placements"?

Mr. DOERFER. "Length, placements, or frequency."

Then in line 8 I would strike the words "or of any class" and insert the word "commercial."

So the bill would then read, starting from line 6:

Except that the Commission may not by rule or policy prescribe standards with respect to the length, placements, or frequency of advertisements which may be broadcast by commercial stations in the broadcast service.

Now, the reason I suggest the word "commercial" is because the Commission in its rulemaking has established a class of stations which it has designated as "noncommercial educational stations."

Mr. ROGERS of Texas. Now, in regard to that, and that is the area in which I wanted some enlightenment; this, then, would permit the

Federal Communications Commission to fix any time of commercials on the noncommercial station?

Mr. DOERFER. I think the Commission would have the power today to remove the classification or the restriction on noncommercial and rule out a certain amount of advertising.

Mr. ROGERS of Texas. That is the point, Mr. Doerfer. Now, the Commission at the present time has the authority, as I understand you, to permit advertising on a noncommercial station?

Mr. DOERFER. The Commission has the authority to do that.

Mr. ROGERS of Texas. Then it would cease to be a noncommercial station.

Mr. DOERFER. Yes; or a limited one. I do not know——

Mr. ROGERS of Texas. Let me say this: The reason I put this in here "by all or any class of station in the broadcast service," was in order to nail down the fact that the basic intention of the Congress was that they were not to have the power in the first instance to determine the length and frequency. Now, the fear I have is that if we limit this to a commercial station, then we would be moving ourselves into the area of the trap that the staff apparently is trying to set in saying "Well, you have only limited us in commercial stations: therefore, we had the power all the time before to do it. That is an admission that we did, because you are saying that we still have it in these other stations."

Mr. DOERFER. I do not agree with the staff. I think that—if the staff is responsible for that statement. I think that the Commission has the power to take that portion of the spectrum which has been delegated to their jurisdiction and they can cut it up into what we call safety and special services, which includes the police, the ships, the airplanes, and the taxicabs. Now, certainly, when it makes that classification, the Commission can say "We are not going to allow any commercials on these things. This is to be used for communications."

There should not be any restriction on that. I think the Commission has that power when it classifies a certain portion of the spectrum for safety and special services.

For illustration, some of the shipowners or where there are shared frequencies. There is a rule over there that actually, no one person who is on a shared frequency shall appropriate it entirely to himself. I think that that is a reasonable rule. I think that is where they have power. But when they move over and take a portion of the spectrum and say "This shall be for broadcasting," and then in the act itself, Congress enacts something that says broadcasting shall not be deemed a common carrier, I do not think there is any misunderstanding. I do not think the fact that you make an amendment to elucidate the original content and cut out all of the confusion with respect to legislative history, that that is a limitation upon all of their powers to classify stations.

Mr. HARRIS. Will you yield on that?

Mr. ROGERS of Texas. Yes; I will be happy to.

Mr. HARRIS. I am inclined to agree that there is a great deal in what you say, a lot of merit to it, Mr. Doerfer. But presently, there is no definition of commercial station.

Mr. DOERFER. There is a definition of noncommercial.

Mr. HARRIS. I know there is a definition of noncommercial, but there is no definition of commercial station, is there, by rule or regulation?

Mr. DOERFER. I do not think there is.

Mr. HARRIS. If we followed your suggestion, would that not require a definition of what a commercial station is?

Mr. DOERFER. No: I think that in view of the——

Mr. HARRIS. Well, we would set up another provision here for a commission, whether it is this one or some other commission, unless we define what it means, the commission may interpret that to mean whatever they want it to mean, it seems to me.

Mr. DOERFER. Well, we are talking now about the broadcasting spectrum. We are not talking about point-to-point communications.

Mr. HARRIS. I know it.

Mr. DOERFER. I never considered that a shipowner who is trying to contact another ship was in the broadcasting field in the sense that he was broadcasting to the public. Now, certainly, the public can hear anything, but it is not intended for the general public. So that in section 303, you are dealing with broadcasting to the general public. I think that there is just a—it is the type of thing that you divide into noncommercial and into commercial.

Mr. HARRIS. There are two definitions in the act. I do not want to utilize your time.

Mr. ROGERS of Texas. Go ahead.

Mr. HARRIS. There are two definitions in the act that have been there throughout. One is the definition of radio communication, or communication by radio. Now, it does not separate, as you do here, broadcasting from point-to-point communication. Then there is another definition that would seem to me would come into play. That is transmission of energy by radio, or radio transmission of energy. The statute gives a definition on those two terms.

Well, anyway, I think we should consider it.

Mr. DOERFER. Congressman, may I call your attention to section 3(o):

> Broadcasting means the dissemination of radio communications intended to be received by the public, directly or by an intermediary of relay stations.

So that a microwave——

Mr. HARRIS. That would include educational TV.

Mr. DOERFER. Yes. That is why I say if you designate—the Commission could designate between commercial and noncommercial. The fact that you adopt an amendment to 303(b) and say that it shall not apply to commercial clearly indicates that they are free to restrict advertising on noncommercial.

Mr. HARRIS. Well, I think that there are a lot of technicalities that go to this whole thing, but I suspect whatever is done about it, when we get through, everybody is going to understand what we mean.

Mr. DOERFER. I think so.

Mr. ROGERS of Texas. I think this discussion is very good, but your point is this, Mr. Doerfer: If you make that last amendment that you are talking about by using the word "commercial" then if the Commission permitted an educational channel to do some advertising, they would then fall into this commercial definition and the FCC would not have the power to control the length and frequency of those

advertisements. Or is it your intention that they should have the power to control the length and frequency on educational or noncommercial channels if they decided to let them advertise?

Mr. DOERFER. May I preface my remarks by saying, I think it is academic, because the attempt to preserve a portion of the spectrum for noncommercial is precisely to afford the educators an opportunity, assuming that the educational institutions prevail upon the Commission to allow, say, just a little bit of advertising.

Certainly, the Commission could do that. Now, that might, of course, set off a substantial amount of repercussion because of the—you see, those are generally Government-operated stations and that is putting the Government into the business of broadcasting.

Now, as I indicated at the outset, Congress really debated whether or not we were going to have a governmentally operated system. It certainly can. The United States owns the airwaves and, if it wants to, it can eliminate commercial broadcasting within its powers. But it has decided not to do that. However, it did not say to the Commission that all of the spectrum must be commercial. You are allowed to divide it up for the public interest.

Mr. ROGERS of Texas. I thank you very much, and I might say this, that it is my hope that when a report is written on this bill, if it is written in view of some of the strange goings-on downtown, I think we will spell it out very clearly and dot every "i," so we won't have this thing up again in the future. I think if this thing had been done, if there had been any anticipation when the 1934 act was passed as to some of the powers that would be undertaken to be assumed by that group, there would have been a great deal more in the legislative history than there was.

Mr. DOERFER. May I add just one little note? Herbert Hoover has been quoted so frequently, and I had occasion to have a private luncheon with Herbert Hoover in 1959. And I asked him specifically with respect to some of these statements. And he turned to me and said: "There are an awful lot of statements that I made back in 1926 and 1922 that, well, I cannot say that they have proved to be the right view of the matter."

Mr. ROGERS of Texas. You know, there is an old saying that a fellow gives an "Oklahoma guarantee." If you do not like what he says, he will take it back.

Thank you very much, Mr. Doerfer.

Our next witness is James R. Terrell, manager of station KTVT–TV in Fort Worth, Tex.

STATEMENT OF JAMES R. TERRELL, STATION MANAGER, TELEVISION STATION KTVT, FORT WORTH, TEX.

Mr. TERRELL. My name is Jim Terrell. I am manager of television station KTVT in Fort Worth, Tex. I am very grateful for this opportunity to tell you some of the reasons I oppose the establishment of time limits on broadcast advertising.

I know you have heard and will hear many arguments about the constitutionality and legality of the step now being contemplated by the Federal Communications Commission. Others have told you of the discriminatory aspects inherent in placing restrictions on only

one advertising medium. I would like to take part of the time generously allotted to me to tell you how the proposals might affect the station I manage in Fort Worth.

KTVT is an independent television station. Of the Nation's more than 500 commercial television stations, only 35 fall into this category. An independent station has no network affiliation. It is entirely dependent upon its own resources to produce and purchase the program it offers its viewers from sign-on in the morning until sign-off late at night. We operate from 7 a.m. until after midnight. This requires, I can assure you, a rather frightening outlay of money. Almost all of the independent stations are located in the large markets, where at least four or more television stations are operating. This is the principal reason for the existence of an independent station. Three stations in the same market each have an affiliation with one of the television networks, while the others must compete on their own. It is not easy, I can tell you.

The only source of revenue available to an independent station is the sale of advertising within the programs it produces or purchases and schedules. For us, it is a matter of necessity to produce revenue from every possible program, and to produce as much of it as possible. In connection with this, if I might digress for a moment, during the assignment of the license when we were purchasing KTVT, our proposed commercial percentages prompted several letters of inquiry from FCC and we had quite an exchange back and forth.

KTVT is a member of the National Association of Broadcasters, and subscribes to and operates within its code. Our company is one of the charter members. Therefore, if the commercial time limitations of the NAB code were adopted as legally enforcible limits, there would be no immediate effects on the revenue potential of my station. However, I strongly oppose any such action on what I believe to be two very solid grounds: One, our membership in the code is voluntary. While we believe in it and the principles behind it, we do have the freedom of choice to abandon it if we find that we cannot continue to operate our particular station within the code's guidelines.

And two, and I think this very important, once the code or any other set of commercial time standards is established by decree or by law, the door is open for the regulatory body to change the standards any time it desires. Next year it may decide that the code itself permits too many commercials, and so reduce the number to a much lower total. In short, the very establishment of commercial time limitations by regulation is tantamount to giving someone a stranglehold and hoping he won't squeeze the life out of you.

This leads to what I think is the strong probability that the Commission's proposals, far from being in and serving the public interest, would instead work strongly against that very goal. Commercial television as we have it in the United States is a privately owned business. If it cannot operate profitably, it cannot operate at all for long. Each time a station is forced off the air because of inability to meet its expenses, the public loses another choice of programing.

In the same manner, if absolute limits are prescribed wherein only so many commercials are permitted per program, or per half hour, or hour, most broadcasters, I believe, will be forced to select programing for the entire day which is likely to attract the largest

audience and thus the greatest advertising potential. This necessarily will reduce the number of fine programs which appeal only to a minority of the public and of which only a few have ever succeeded is gaining sponsorship. In other words, the broadcaster will be forced to look upon his entire broadcast day in the light of its revenue potential, instead of being able, as he is at present, to schedule a number of programs which he knows will not attract sponsorship but which he is willing and able to carry in order to achieve variety and balance in his schedule, knowing that he is free to bring in the necessary revenues elsewhere.

For example, we recently originated—I say recently; last January—the first telecast, statewide telecast, of the inauguration of the Governor of Texas. We lost some $5,000 on that program, which to an independent is quite a bit of money.

The Congress, and the Commission have acted in recent years to encourage a broader use of the television spectrum. Enactment of the so-called all-channel set law was designed to promote the development of UHF television stations by assuring them at least of the possibility of being seen on all home receivers within the next few years. However, a considerable amount of risk capital is required to put any television station, UHF or VHF, on the air. It may very well be that many holders of such capital will prefer not to take the risk if regulations have been adopted which restrict profit opportunity, if not, indeed, profit possibility. This, again, will limit the public's choices of program sources and opportunities to be served.

On another point, I doubt very seriously whether a limitation on the amount of time devoted to commercials could even hope to accomplish the goal under which it is proposed, namely, to abolish so-called overcommercialism. Time limitations will do nothing to control commercials. Each of these elements certainly can be much more objectionable if improperly handled than the amount of time per se devoted to the commercial message. Put another way, which is more objectionable, a tastefully executed, imaginative, interesting commercial which runs 2 minutes or a loud, shouting, repetitive, and inane advertising message which may run only 30 seconds?

Another reason I believe the adoption of any commercial time limitations is unnecessary is the very nature of the relationship among the advertiser, the station, and the viewer. The advertiser pays large sums of money to sell his product to the Nation. The last thing in in the world he wants to do is to waste that money.

He wants his advertising message to be effective, he wants that to sell, and therefore he must do everything possible to see that first, his message is received and second, that it leaves a favorable impression and a desire to buy on the part of the person who receives it.

Only a very foolish advertiser would deliberately set out to offend or displease his audience, or take any action which would lessen the effectiveness of his message. The same is true of a station. To be successful, we must have audiences. We do not want to drive them away. Any station which consistently, or even frequently, engages in offensive practices will soon find its audience greatly diminished. And this, after all, is the most effective and proper method of control.

Finally, competition in broadcasting is by no means limited to one station's efforts against others in the same market. Television is com-

peting with other media for its share of the total advertising dollar. These other media, newspapers, magazines, etc., are not regulated, and properly not so. But broadcasting will certainly have one hand, if not both, tied behind its back, if it is forced to compete with nonregulated media while under severe restrictions itself.

Broadcasters are quite willing to meet other competing media in free and fair competition for advertising dollars. However, we must have the essential means of competing successfully, and fundamental among those is the right to exercise independent managerial judgment in a flexible manner as dictated by constantly changing competitive conditions.

We cannot compete successfully if the Commission artificially restricts either the scope, the quality, or the quantity of service we are able to offer potential advertisers, or if it otherwise tampers with any of the economic factors which control our only source of revenue.

I believe the television industry is making good strides toward effective self-regulation. Membership in the NAB Code is at an all-time high. Most broadcasters are well aware of the wisdom of sensible self-regulation, and I believe few will knowingly indulge in practices which place the entire industry on the carpet of adverse public opinion. It is essential that we are permitted to meet whatever problems of overcommercialization which may exist in a free and voluntary manner, so that we may cure the disease without inflicting greater and sometimes fatal injury elsewhere to the patient.

The public most properly is the final arbiter of what it will and will not watch on television. No more effective control can be placed upon this industry than the two knobs on every television set. One enables the viewers to change to another channel; the other enables him to turn the set off. I respectfully ask that this committee and this Congress act to prevent any threat of interference with this natural relationship between broadcaster and viewer.

Thank you.

Mr. ROGERS of Texas. Thank you very much, Mr. Terrell.

Let me repeat my comment that I think these statements are excellent. I think yours is good, Mr. Terrell, and I want to compliment all of the broadcasters on the conciseness of the statements and the documentation. So many times we Members of Congress see these great long, extended statements with everything in them except the meat of the coconut we are looking for. But in these statements, and I think it is pretty well true across the board, I have been well pleased with the type of statements and I want to thank you for yours.

Mr. TERRELL. Thank you.

Mr. ROGERS of Texas. Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I would just like to join with the chairman in his remarks and particularly to thank Mr. Terrell and all these other gentlemen for coming here personally, because I know they come here at great personal sacrifice and personal expense. It means a great deal to me, I know, to know that these people have come here and their presence just adds that much more to the statement.

Mr. TERRELL. Thank you, sir.

Mr. ROGERS of Texas. Thank you very much, Mr. Terrell.

Mr. A. James Ebel, president of the Nebraska Broadcasters Association, Lincoln, Nebr.

Mr. Ebel?

Mr. CUNNINGHAM. Mr. Chairman, with your permission, I first want to thank you for allowing Mr. Ebel to come here and present his statement. I thank him for taking his time and effort to do so. Mr. Ebel has been an acquaintance of mine of long standing and I know him to be an able and hardworking and conscientious executive. He certainly is held in high esteem by the broadcasting industry in the State of Nebraska.

I welcome you here, Jim, and we appreciate your statement.

Mr. EBEL. Thank you.

STATEMENT OF A. JAMES EBEL, PRESIDENT OF NEBRASKA BROADCASTERS ASSOCIATION

Mr. EBEL. Chairman Rogers and distinguished members of the subcommittee, my name is A. James Ebel. I am president of the Nebraska Broadcasters Association and I appear here on behalf of the Nebraska Broadcasters Association.

Initially, I would like to note for the record that the Nebraska Broadcasters Association is composed of some 39 radio stations and 12 television stations located in the State of Nebraska. There are a total of 13 television stations in Nebraska, 1 of which is educational, and some 41 existing standard broadcast stations. Consequently, the membership of our association represents every television station, except one, and every standard broadcast station, except two, in Nebraska.

As the committee knows, the Federal Communications Commission in May of this year initiated a proceeding (docket No. 15083) which looks toward controlling, by rules and regulations, the extent of advertising over standard, frequency modulation, and television broadcast stations in the United States, possibly in accordance with standards set forth in the codes of the National Association of Broadcasters, or in accordance with some other set of standards which might be developed by the Commission. The Nebraska Broadcasters Association has opposed these proposals and a copy of our comments, as submitted to the Commission, is attached for the information of this committee.

The proposals of the Federal Communications Commission in its docket No. 15083 were also considered by the Nebraska Broadcasters Association on October 7 and 8, 1963, at our annual State convention in Scottsbluff, Nebr. The implications of the Commission's plans were carefully considered and the association unanimously adopted a resolution in opposition to those proposals. A copy of this resolution is also attached for the information of this committee.

Many of the broadcasters in Nebraska are pioneers in the field of radio and television broadcasting and believe strongly in the American free enterprise system of broadcasting. I personally have made my livelihood continuously in the field of radio and television broadcasting for some 35 years, or since 1928. I, like all responsible broadcasters, am proud of the business we are in. We are most conscious, of,

and feel the effects of every effort to impose additional controls upon the operation of broadcast stations, and we attempt to guard carefully the freedom given to our business by Congress against any erosions in the form of administrative rulemakings.

The Nebraska Broadcasters Association unanimously supports H.R. 8316 because we believe it is unthinkable that any broadcaster in the United States, under our free enterprise system of broadcasting, should have to spend the time, effort, and money, urging the Federal Communications Commission that it is proceeding under an assumption of power not granted to it by the Congress of the United States. We believe that the Commission's proposed rules if adopted, are another step toward placing the broadcasting business in the category of a utility, despite the fact that the Congress has expressly stated that this is not to be.

We believe that the forces of public response and of competition between broadcasters provide the best possible controls against alleged overcommercialization. There are very few radio listeners and very few television viewers that do not have available to them a multiple selection of program sources—and the ability of the listeners or viewers to turn their dials to other stations, or to turn their sets off entirely, is the most potent force that affects our industry. The great majority of broadcasters are responsible, respected and trusted businessmen and citizens in their respective communities and have a deepseated desire to serve the people of those communities to the fullest.

We are convinced that, in the long run and on an overall basis, the combined judgments of these broadcasters, responsive as they are and must be to the likes and dislikes of people they serve, will provide for the American public a much better response to any alleged problems in the commercial area of broadcast operations than will an administrative agency in Washington, D.C.

In conclusion, it is the earnest hope of the Nebraska Broadcasters Association that action on H.R. 8316 may be taken with the greatest possible dispatch so that this attack upon the American system of broadcasting may be put to rest once and for all.

Thank you very much for your time and attention and for giving me an opportunity to present this statement to you in behalf of the Nebraska broadcasters.

Mr. ROGERS of Texas. Thank you, Mr. Ebel.

Without objection, the documents attached to your statement will be included in the record immediately following it and as a part of it.

It is a very fine statement and we appreciate it.

(The documents referred to follow:)

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D.C.

DOCKET NO. 15083

IN THE MATTER OF AMENDMENT OF PART 3 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO ADVERTISING ON STANDARD, FM, AND TELEVISION BROADCAST STATIONS

COMMENTS OF THE NEBRASKA BROADCASTERS ASSOCIATION

These comments are being filed pursuant to notice of the Federal Communications Commission inviting comments concerning the above-captioned docket. The

Nebraska Broadcasters Association (NBA) composed of 39 radio stations and 12 TV stations in the State of Nebraska, in opposition to this proposed rulemaking, urges as follows:

The proposed rule would limit the quantity of commercial time, but it would not necessarily improve the quality of commercial time or programing in general. In fact, NBA feels that since it would limit income, it undoubtedly would have exactly the opposite effect.

Nebraska broadcasters are at a complete loss as to how the Federal Communications Commission would effectively enforce this proposed rule. It is obvious to the industry that once the FCC stepped in this area, self regulation by the industry would stop. The net result would be a serious minus.

The practical, experienced broadcaster knows well that every station faces different market problems and opportunities. NBA fails to see how it is possible to spell out adequately in the implementation of this proposed rule conditions that would fairly take into account the differences in operational problems of its members. It is only too obvious to us that any type of rigid conformity of docket 15083 would be grossly unrealistic and unfair in application.

The Nebraska Broadcasters Association is fundamentally concerned and disturbed by the anti-American free enterprise facets of this proposed rule. In Nebraska, this economic control by the FCC would unquestionably hit hardest some stations in our small communities. We know well that in many smaller markets, there is an essential need for low-cost advertising. This is all the traffic will bear in many, many instances. Arbitrary limits upon broadcast time would in many of these communities deprive advertisers of a service essential to the town's economic prosperity. This is in the public interest? We say not.

The Nebraska Broadcasters Association for a number of years has actively concerned itself with the real problem of a reasonable balance of program and commercial material. Again, hard experience and study has dramatized to us that it is not how much time, but how the time is used that nearly always determines the degree of public acceptance. To the experienced, successful broadcasters, it is fundamental that the amount of time allocated to commercials is far from being the sole or even the most important factor in determining the overall effectiveness of a station's commercial presentation and community service. A qualitative measure is vital. A quantitative measure by itself is worthless. Time limitation alone is certainly not responsive to the problem; docket 15083 is not the answer. We agree with NAB that "code efforts should be further encouraged and supported, not suffocated as the hand of Government will surely do."

The Nebraska broadcasters feel that the adoption of docket 15083 is actually a very definite form of ratesetting. This is bad. This is bad, indeed. This, it is urged, is outside and beyond the authority granted to the FCC by Congress. Should this proposal be permitted to be placed in effect, it would actually determine station rates, and, in many instances, these rates would be so high that advertisers would be forced to cease to patronize the station involved. The thought that broadcasting is in the public utility class should be thrown in the wastebasket once and for all.

The Nebraska broadcasters agree wholeheartedly with Commissioner Robert T. Bartley that docket 15083 is "an irritating act of futility." Commercial time limitations should continue to be a matter of industry self regulation, and the public self regulation, if you please. Let's, for a refreshing and overdue change, place a premium on the free and reasonable judgment of good broadcasters and the time tested public's freedom of choice. These proposed Commission rules will most certainly endanger, not aid, the public interest.

Respectfully submitted,

NEBRASKA BROADCASTERS ASSOCIATION,
By BOB THOMAS, *President.*

Dated this 12th day of September 1963.

RESOLUTION OF THE NEBRASKA BROADCASTERS ASSOCIATION, 1963 STATE CONVENTION, OCTOBER 7–8, SCOTTSBLUFF, NEBR.

Whereas the Federal Communications Commission on May 15, 1963, initiated a proceeding (docket No. 15083) which looks toward Federal regulation of the extent of advertising over standard, frequency modulation, and television broadcast stations in the United States; and

Whereas the proposals of the Federal Communications Commission if adopted, would increase Federal control over all broadcast stations and would have a substantial and adverse impact upon the private capital risk-free enterprise system of broadcasting which has heretofore existed in the United States; and

Whereas the Congress of the United States has not granted, and has instead specifically refused to grant, the Federal Communications Commission statutory authority to adopt and enforce a comprehensive scheme for Federal control of advertising and broadcasting as now proposed; and

Whereas the Congress of the United States and the courts of the United States have declared and recognized that broadcasting is not a public utility subject to, among other things, rate regulation, but instead have declared and recognized that the field of broadcasting is one of free competition and private enterprise; and

Whereas we strongly believe that proposals for Federal control of advertising over broadcast stations, or in any other media, would be inimical to the interests of the United States and to the citizens thereof: Now, therefore, be it

Resolved, That the Nebraska Broadcasters Association go on record as strongly opposing the proposals of the Federal Communications Commission for Federal control over advertising on broadcast stations in the United States and that we sincerely urge the Federal Communications Commission to terminate forthwith its proceeding looking toward the adoption of such controls, rules, and regulations; and be it further

Resolved, That the secretary of the Nebraska Broadcasters Association be and is hereby directed to promptly forward a copy of this resolution to the President of the United States, to the Secretary, Federal Communications Commission, Washington, D.C., and to each individual Commissioner thereof, and to each Senator and Representative from Nebraska in the Congress of the United States.

Mr. ROGERS of Texas. Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I appreciate the statement, Mr. Ebel. It falls in the category of the others, well prepared and to the point. I mentioned Mr. Henry's sojourn in Nebraska. That upset not only the industry but the people generally as being unwarranted and unnecessary. Is that true?

Mr. EBEL. I think that is a correct statement, Congressman.

Mr. CUNNINGHAM. Was the broadcasting industry put to great expense, and on needles and pins, worrying about what might come of this?

Mr. EBEL. Well, I can only speak from secondhand knowledge, because the Lincoln station was not involved. The Omaha stations were involved. I do know that they went to great expense. I do not think that there was a great deal of worry, because I think they felt that their record was of such stature that they had no reason to worry.

Mr. CUNNINGHAM. Well, it was a pretty high price to educate the then Commissioner and now Chairman of the Federal Communications Commission. I think he could have gotten the information that he sought by just writing a few letters. That is my opinion.

Thank you.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. Thank you very much, Mr. Ebel, for your contribution.

Mr. EBEL. Thank you.

Mr. ROGERS of Texas. I suspect we had better recess now until 1:30, at which time, Mr. Ronald Hickman will be the first witness. We will try to proceed as quickly as possible this afternoon.

The subcommittee will stand in recess.

(Whereupon, at 12:07 p.m., the subcommittee recessed, to reconvene at 1:30 p.m. of the same day.)

AFTERNOON SESSION

Mr. ROGERS of Texas. The Subcommittee on Communications and Power will come to order for further consideration of pending business.

Our first witness this afternoon is Mr. Ronald L. Hickman, president of the New Jersey Broadcasters Association.

STATEMENT OF RONALD L. HICKMAN, PRESIDENT, NEW JERSEY BROADCASTERS ASSOCIATION

Mr. ROGERS of Texas. Mr. Hickman, we are glad to have you.

Mr. HICKMAN. Thank you very much, Mr. Chairman and Congressmen.

To avoid duplication this afternoon I will exercise brevity in delivering my prepared remarks to you and the Congressmen.

Mr. ROGERS of Texas. Mr. Hickman, did you want to read the statement because, if not, we can insert it in the record, if you like, and you can comment on it.

Mr. HICKMAN. Well, it would only take about 2 or 3 minutes, if you wish——

Mr. ROGERS of Texas. You mean to read it?

Mr. HICKMAN. Yes.

Mr. ROGERS of Texas. Why do you not just go ahead and do it then. It is short, I notice.

Mr. HICKMAN. Fine.

The competitive system of American broadcasting is threatened by proposed rules to regulated advertising. Therefore, my purpose for appearing before this committee today, is to illustrate the inequities in the Federal Communications Commission proposal as they apply to New Jersey.

As president of the New Jersey Broadcasters Association, I represent a total of 53 AM and FM radio stations in our State. New Jersey is unique in the sense that we do not have a commercial television station. Our broadcasting stations are truly community stations operating purely in the local community interest. New Jersey radio depends for its economic existence upon its ability to sell advetrising.

Radio, like all other modern media of mass communication, plays a triple role today. It is a craft, a business, and a social force particularly on the community level. Radio is supported by advertising revenue. It is up to the industry to decide how much advertising is needed to maintain good programing standards.

In our association's opinion, the proposal to limit the advertising time is impractical because broadcasting, as practiced under our system of free enterprise, is flexible from market to market, station to station, and community to community.

In New Jersey, we have a number of stations which operate in the resort areas of the State. To stay in business and make a profit and thereby enable to operate in the public interest, convenience, and necessity, these resort stations must make the bulk of their profit during

summer months, so as to compensate for operating at a loss during the off season months. Therefore, it would be unreasonable for the Commission to expect these stations to limit their commercial announcements to adhere strictly to the NAB code during the peak operating months.

Why does broadcasting differ from station to station? A daytime station is usually the local community station operating from sunrise to sunset. The daytime local station, in addition to a shorter operating time, has peak listening hours. People awake to the station, drive to work with the station, go to their place of business for 8 hours, and again rejoin the station on their way home from work.

These peak listening hours are the time which are most salable due to increased listenership during these hours. Hence, it is incumbent upon these station to utilize these few hours in the broadcasting day to derive its income.

Now let us compare community to community. Most of these stations, being local, know their community's needs and program accordingly. In advertising or frequency or commercials, being a local station they hear immediately and forefully from fellow citizens when programing is unacceptable or indeed when commercials are too frequent, too loud, and too long.

This immediate feedback to a local community broadcaster enables him to program in the community's interest. The number of commercials alone do not necessarily determine or assure that a radio station is going to be good. Content, type of commercials, programming, and many other areas go into the presentation of a good station.

The New Jersey Broadcasters Association is in sympathy with the aims of the Federal Communcations Commission in eliminating the overcommercialization indulged in by a small number of broadcasters.

However, the FCC proposal on regulating and limiting commercials, we feel, would tend to impose economic hardships on responsible and dedicated broadcasters.

We go on record today as being in favor of your proposed bill.

Mr. ROGERS of Texas. Thank you, Mr. Hickman.

Mr. Hull, do you have any questions?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions, sir.

Mr. ROGERS of Texas. Mr. Hickman, I noticed here that you say that New Jersey is unique in the sense that "we do not have a commercial television station."

Do I understand that there is not a television station in New Jersey except the educational?

Mr. HICKMAN. That is correct, speaking of VHF. There is an application for a UHF channel in Wildwood, but there are no commercial VHF television stations in New Jersey.

Mr. ROGERS of Texas. Why is that?

Mr. HICKMAN. Well, I believe it was the Commission's decision to convert channel 13, which was at that time a commercial channel, to grant them an educational license.

This has been secured, perhaps, within the last 13 months.

Mr. ROGERS of Texas. Where do you get your television? From New York?

Mr. HICKMAN. Primarily New York. There are a few Philadelphia channels which come into our area.

Mr. ROGERS of Texas. Do you get those by community antenna systems?

Mr. HICKMAN. No, sir; direct transmission.

Mr. ROGERS of Texas. Yes. Yes; of course, that is right. Well, that is very unusual.

I did not think there was any State in the Union that did not have any commercial television stations. Here is one right in the heart of the most populous area.

Thank you very much, Mr. Hickman, for your statement.

Mr. HICKMAN. Thank you.

Mr. ROGERS of Texas. Our next witness is Mr. Jack Brown, of the North Carolina Association of Broadcasters.

Mr. Broyhill will be recognized to introduce Mr. Brown.

Mr. BROYHILL. I want to say that Mr. Brown is with Station WLON, in Lincolnton, which is located in a district adjoining the one I represent.

His city is just a few miles from my hometown. I know that he has been in broadcasting in North Carolina for a very long time, and is greatly interested in the whole subject, and I would like to say that we welcome Mr. Brown to the committee.

STATEMENT OF W. JACK BROWN, ON BEHALF OF THE NORTH CAROLINA ASSOCIATION OF BROADCASTERS

Mr. BROWN. Thank you, Congressman Broyhill.

Mr. ROGERS of Texas. Let me say this, Mr. Brown. In that regard, North Carolina is well represented on this subcommittee by Mr. Kornegay and Mr. Broyhill.

So you fellows have some good champions down there.

Mr. BROWN. Thank you, sir.

I am representing the North Carolina Association of Broadcasters, representing 223 stations. They have asked me to convey to you that they are going on record as in favor of Mr. Rogers' bill, H.R. 8316, and Mr. Broyhill's bill, H.R. 8729, and taking just a few minutes of your time, I would like to point out six reasons why the North Carolina Association of Broadcasters opposes the proposed FCC rule on limiting commercials:

(1) It would be contrary to the intent of Congress. The proposed rule is beyond the powers which the Congress has delegated to the Federal Communications Commission. The Congress, in enacting the communications law, did not intend that the Commission have the authority to impose limitations on the amount of time which broadcasters may use for commercial messages. The inevitable result of any such rule would be governmental regulation of the amount a broadcaster could charge advertisers. Thus the Commission would seek to do, indirectly, that which it cannot do directly. Under the law, broadcasting is not a public utility and therefore is not subject to rate regulation.

(2) The rule would be unequal and unfair. There are unique problems—recognized even by the Commission itself—in each of numerous diverse communities in the United States. These relate to

such factors as the type of station, its location, its competitive position with other stations and other media, seasonal and cyclical changes in the market, sudden dislocations due to strikes, local economic recessions, defense contract relocation, and many others. Therefore, it would be impossible for the Government to establish an objective standard which would provide equality under the law. The frightening consequences would be a vast exercise of subjective judgment on a case-by-case basis by the staff of the Commission.

(3) It would destroy free enterprise in broadcasting. Economic control would fall most heavily upon stations in small communities. A rule across the board would destroy many of them.

The sale of time at rates competitive with all media provides the sole support for broadcasting stations. Faced with a reduction in the amount of commercial time it may offer to advertisers, the station must either raise its rates or suffer a loss of income. Even if the broadcaster could survive, local advertisers would be denied an important outlet. In many smaller markets there is an essential need for low-cost advertising with definite limitations on what local advertisers are able to pay. Arbitrary limits upon broadcast time would deprive the community of a service which contributes to its economic prosperity.

(4) The industry's codes of good practice would be underminded. The codes of good practice of the National Association of Broadcasters are widely accepted by radio and television broadcasters on a voluntary basis. Under these codes, broadcasters recognize their obligation to the American public for the special needs of children, for community responsibility, for the advancement of education and culture, for the acceptability of the program materials chosen, for decency and decorum in production, and for propriety in advertising.

The codes are addressed to many sensitive aspects of programing and advertising to foster the highest possible standards. The commercial time limitations represent only one section of these voluntary codes, but by singling it out for incorporation into its rules, the FCC would make it appear all-important. It would destroy the broadcaster's incentive to subscribe to the other provisions of the codes, and would spell the doom of self-regulation in broadcasting.

(5) Other factors are as important as quantity. Overcommercialism has never been satisfactorily defined, and probably never will be. The industry has been convinced that there should be a reasonable balance of program and commercial material. It is not how much time but how the time is used that often determines the degree of public acceptance. The amount of time allocated to commercials is far from being the sole or even the most important factor in determining the overall effectiveness of a station's commercial presentation and community service. No quantitative measure of commercials without due regard to their content, quality, and techniques of production can possibly provide a sound basis for judging a station's performance in the public interest. Mere time limitation is not responsive to the problem.

(6) A stranglehold over private business. The Commission asks stations to provide it with—

> specific data on advertising requirements of their community, and to relate these data to income requirements needed to support an operation in the public interest.

Clearly, this would give the Commission arbitrary powers over business judgment. It is equally clear that such restrictive regulation

of broadcasters would subject many other business operations, including those of a purely intrastate character, to more Federal control. If an agency of the Government is given the power to determine the advertising requirements of local communities, it would stifle free enterprise.

Thank you, sir.

Mr. ROGERS of Texas. Thank you, Mr. Brown.

Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. Mr. Brown, I notice you are representing the North Carolina Broadcasting Association.

Are you president of that association?

Mr. BROWN. I am not; no, sir.

Mr. ROGERS of Texas. But you do speak for all of the members of it?

Mr. BROWN. Yes, sir.

Mr. ROGERS of Texas. Thank you.

Next is Mr. Eugene Wilkin, vice president of the Guy Gannett Broadcasting Services, of Portland, Maine.

STATEMENT OF EUGENE W. WILKIN, VICE PRESIDENT, GUY GANNETT BROADCASTING SERVICES, PORTLAND, MAINE

Mr. WILKIN. Mr. Chairman and Members of the Congress present, good afternoon. My name is Gene Wilkin and I might say, Mr. Chairman, that my dad was born and raised in Dallas, Tex. So now we have representation from Maine to Texas here.

I am vice president of the Guy Gannett Broadcasting Services, WGAN radio and television, Portland, Maine. My remarks this morning will also reflect the direct comments of Maine broadcasters and the Maine Association of Broadcasters, for whom I will do my best to speak with some understanding, dignity, and purpose.

I would also like to say, Mr. Chairman, that I have here with me today, Mr. Donald S. Moeller, general manager of WGAN–TV; Mr. Henry L. Van Amburgh, chief engineer of WGAN–AM–TV; Mr. George D. Illy, assistant manager of WGAN–TV, and Mr. Thomas H. Wall of Dow, Lohnes & Albertson.

These are busy times, as always, and I would hope that you may quickly walk away from questions of "regulation" and move on to other challenges more worthy of your time than the charge that the broadcaster lacks integrity and needs further hand holding on the part of the Federal Government in the name of the public interest.

It would be hoped that I might add a little light, as well as heat, to the matter of regulation of commercial time and standards in broadcasting and your consideration of the Rogers amendment which would apply an effective brake to the sad direction in which those who regulate broadcasting are moving.

When I was born, radio had just started and television was a word of little interest to the American people. My early training at home in North Attleboro, Mass., Joe Martin's hometown, formally at the

New York Military Academy and finally to graduate from Dartmouth after 4 years of service in World War II all add up to a fine set of tools with which to work in the fertile field of broadcasting.

So while you may now be asking in your mind, "Who is this bumpkin from Maine?" I would also hope that alongside the question you place a possible answer. "Here is a man who comes from the place where the original Radio Act of 1927 was born, for it was in Maine that Wallace White, Jr., drafted its content."

For broadcasters, the Communications Act of 1934 is becoming a veritable springboard from which noisy interpretation leaps into the void. It has been used, in our opinion, far beyond reason as a weapon of strangulation and needs to be rewritten to reflect today's challenge and today's broadcaster.

Lacking the fruitfulness of a new act, the very least we can do is support an amendment that purports to contain its interpretation, specifically in the area of commercial time standards.

It is difficult to understand what all the fuss is about. There has been no clear mandate on the part of the American people to authorize the Federal Communications Commission to emasculate the broadcast industry by setting up artificial limitations to their lifeblood—commercial material.

It is a curious side issue that while some individuals cry out in newspapers and magazines against "commercial interruptions," this same group could watch 30 minutes of commercial material strung together and find it highly entertaining.

It was the mighty Roman, Seneca, who said, "A kingdom founded on injustice never lasts." And we need look no further than today's news to find this true.

And I am not going to make a pun on the word "news" in that instance.

In my opinion, it is unwarranted, unreasonable, and, in sum, unjust to make laws or give the force of law to interpretations of the Communications Act of 1934 by the Federal Communications Commission and more importantly, to allow the Commission to give the force of law to setting up commercial time restrictions, simply because they feel it is in the public interest to do so.

May I naively ask, "What section of the public wants to destroy commercial television?" It seems to me that the links of the chain that will restrict the entire advertising industry are being forged daily by the Federal Communications Commission with the Chairman himself, E. William Henry, wielding the iron hammer.

I submit that hammering broadcasters into submission can only lead to an appalling silence on part of that body and in the case of a few, including me, to cry out in the wilderness that this entire concept of tying the broadcasters' minds, hearts, and hands, and now financial ability, is against the tide of history in this great country and will ultimately be repudiated by Congress and the people, once all fully understand the import of such intended action as commercial time regulation.

Since I speak today on behalf of the Maine Broadcasters Association, I would be well to add the honest words of several outstanding broadcasters in that very great State.

I ask you to bear with me. I cannot go back to Maine and look them squarely in the eye if I do not repeat their words. I promised to do this.

From Ted Coffin, vice president and general manager, WEGP, Presque Isle:

The greatest mass communications media in the world has been built by the free enterprise system. The commercial content of radio and television can best be controlled by the listening public, not by Government regulation.

From Melvin L. Stone, general manager, the Lobster Network of Maine (WLOB–AM–FM, WGUY, WCOU–AM–FM, WFST–AM–FM, WGHM, WFAU–AM–FM, WSME, WRUM):

* * * The intent of the Communications Act establishing Federal controls over the broadcast spectrum was to provide merely for an orderly means of assigning and policing the various frequencies.

With the great expansion in the number of all types of broadcast outlets providing wide choice of program services, the checks and balances inherent in competitive business itself provide the best possible controls on broadcast stations.

Listeners and viewers will turn away from the station broadcasting too large a proportion of commercial messages, providing the cure within itself. For the sponsors of these messages will move their patronage to other stations when audiences dwindle, and they surely do.

Therefore, we strongly advocate the view that the Federal Communications Commission be expressly denied the power to prescribe standards on the number and length of commercial messages for radio and television.

From F. Parker Hoy, general manager, WLAM, Lewiston:

If the Federal Government through the Communications Commission ever limits arbitrarily the commercial time on radio and TV stations, the broadcast industry will be one short step away from becoming a completely regulated public utility. Such action would, in my opinion, strike at the heart of what is left of free broadcasting in this country, and as a byproduct, limit a station's financial capability to produce and broadcast quality programs in the public interest.

From Winslow T. Porter, owner-manager, WJTO, Bath:

In the last analysis, it is really a question of how many radio or TV stations a market will support that determines the number of stations that will operate, and not the number of frequencies available. This is particularly true now that all receivers are to be equipped with UHF.

A broadcast station owner is not subsidized by the Government. He has no guarantee that his business will be a success. He is engaged in free competitive enterprise. There is no more reason that a broadcasters should be subject to program control in any way, shape, or manner, than there is for the Government to interfere with the content or makeup of any newspaper.

Indeed, if the broadcasting industry could be freed of every possible Government control, except those of a technical nature, it would be in the interest of our free society. Broadcast stations are subject to all the laws applicable to newspapers; libel, et cetera. There is a measure of decency among broadcasters and they are answerable directly to the public.

From Donald E. Knowles, vice president and general manager, WDEA, Ellsworth:

The management of WDEA feels a limitation of commercials is predetermination of his income akin to price fixing and, therefore, not in the public interest.

From Carleton D. Brown, WTVL, Waterville:

The Federal Communications Commission now threatens to arrogate to itself the vast power of advertising censorship—at present by limiting the same. It is my understanding that no such jurisdiction is by law conferred. If so, this serious encroachment should not spring from mere inference. It is respectfully suggested that the Congress should maintain its rightful privilege of establish-

ing the Commission's authority and the bounds thereof. The Commission's endeavor to take over the advertising field will not only constitute an inordinate invasion of broadcasters' right to fix policy but will also undermine well-recognized rights of freedom to disseminate information, at the same time adding immeasurably to the bureaucratic redtape which, if continued, will strangle the valued tradition of keeping the Government's hands off of the press, radio, and television. May I take this opportunity to endorse the Rogers bill.

From Raymond B. Durgin, general manager, WJAB, Portland:

* * * It is the feeling of this station that the Federal Communications Commission be specifically denied any authority whatsoever to establish any rules limiting the number or length of commercial announcements by standard broadcast stations.

We feel that any steps by the Commission in this respect would be contrary to the principles of free enterprise and that the general public, through their habits of listenership, will and should be the final judge as to commercial practices of radio stations.

From John W. Guider, president, WMTW-TV, WMTW-FM, Poland Spring:

Mount Washington TV, Inc., heartily supports both the letter and the spirit of the bill. Legislation of this sort is long overdue. Students of the history of radio and TV regulation know that since the enactment of the original Radio Act of 1927 there has been a steady enlargement of the scope of the regulatory power, but that this proliferation of activity on the part of the Commission has often been far in excess of anything Congress ever authorized or even considered in committee hearings.

The Federal Communications Commission, as a matter of every day routine is following regulatory practices that go far beyond anything Congress ever directed or in the opinion of Mount Washington TV, Inc., anything that Congress ever intended.

The proposal of the Federal Communications Commission to regulate the commercial content or programs represents the most striking example to date of the extreme lengths to which the Commission is willing and anxious to go despite the lack of any legal sanction, for its proposed action.

From William N. McKeen, general manager, WCME, Brunswick:

I want to go on record as being vehemently opposed to the FCC's prescribing standards regarding advertising on radio and television.

If this is allowed, the FCC would in effect be putting the small owner out of business, since he could not possibly compete due to his low rate structure.

It would probably take 10 spots on a small station at the local rate to make up for 1 on a station in a large metropolitan area.

From Norman G. Gallant, general manager, WFAU-AM-FM, Augusta:

As an independent broadcaster, in the State of Maine, I strongly urge the adoption of the proposed bill (H.R. 8316). This bill is necessary to spell FCC limitations in the matter of rules applicable to commercial broadcast time.

From Elby Stevens, vice president and general manager, WFST, West Caribou:

In trying to operate in the public interest, it has been quite interesting to watch an enlarging Government crowd private enterprise by competing with it. Now, we face the loss of freedom of the electronic press, if the FCC gets control limiting commercial announcements on American radio.

Since we have more and more regulation, it would seem rather superfluous to control income as well as having added more expense for operation. We, at WFST, therefore, urge the passage of H.R. 8316.

From Gerald T. Higgins, president, WKTQ, South Paris:

The situation of the smalltown radio station is already most complicated and difficult with the necessary compliance regulations set forth by the Federal Communications Commission.

H.R. 8316 will stop another attempt by the Federal Communications Commission to get a further vice-hold on all radio and TV stations that will eventually strangle their continuing efforts to serve the public honestly and effectively.

In regard to specific control of commercial time on radio and TV programs, I believe that the listening and viewing public will take care of the rare violations.

From Walter L. Dickson, executive vice president, the Hildreth stations (WABI–AM–TV, WAGM–AM–TV, WPOR, WTYL, WRKD):

The Hildreth stations of Maine are opposed to the proposal of the majority of the FCC which in essence looks toward adoption of the present radio and television codes of the National Association of Broadcasters as Commission regulations or any FCC rule limiting commercials. We believe it would be contrary to the intent of Congress. The rule would be unequal and unfair. We believe any adoption of a rule limiting commercials by the FCC would destroy free enterprise in broadcasting. Economic controls would fall most heavily in small markets such as Bangor and Presque Isle, Maine, where we are presently operating radio and television stations. Therefore, we strongly recommend the enactment of Rogers amendment, H.R. 8316. We are not unmindful of our obligations as broadcasters, however, and realize we must operate in the best interests of the people in the communities we serve.

From Faust Couture, president, WCOU, Lewiston:

After 25 years as an independent broadcaster, in the State of Maine, and having lived precariously with digression and uncertainty it is respectfully requested that the proposed H.R. 8316 be adoped.

From J. Alan Jasper, president, WIDE, Biddeford:

Does any Member of Congress feel that one small group of theorists in Washington can tell him how many hours he should spend at his office, how many hours he should spend campaigning, how many at banquets how many in talking with his constituents? Obviously it varies with each man and he will survive the next election on the strength of his own competency in judging this division of time himself. Each radio and TV station must survive a daily "election" by the listening audience, and can survive only if it is allowed to judge and adjust its own division of time.

In our opinion this latest move by the FCC is one more in a steady progression of moves by which this agency apparently seeks to gain full programing control over the entire medium. It is a direct attempt at censorship by telling stations "when" they may or may not say something commercial. Is the next step to be an attempt to tell us "what" we may or may not say?

By law the Federal Communications Commission is empowered to grant broadcast licenses only to those individuals whom it judges to be competent, reliable, and responsible. We strongly feel that the record of the industry as a whole, over the years has proven us to be all of these, and to be adults as well.

From Jack S. Atwood, executive vice president, Maine Broadcasting System (WCSH–AM–TV, WLBZ–AM–TV, WRDO):

We join our fellow broadcasters of Maine in endorsing H.R. 8316.

With the threat of censorship hanging over our heads and the fear of control of radio and television programs by the Federal Communications Commission, it is gratifying to see the introduction of this bill which would check the unwarranted assumption of power by the Commission.

We feel that the passage of this amendment to the Communications Act by the Congress would truly be in the public interest.

From Donald S. Moeller, general manager, WGAN–TV, Portland:

A man who is told when to sleep, when to eat, when to work, and when to march is either sick or a criminal in prison.

In our democracy, a man with ability, clothed in decency, is allowed, as an individual or corporation, to succeed or fail solely on the merit or acceptance by the public of his products or services.

We believe broadcasters should operate under no less a philosphy.

To this end, we strongly support H.R. 8316.

The following statement is a resolution adopted by the Maine Association of Broadcasters, at their annual meeting in Portland, November 6, 1963.

This resolution represents 6 television stations and 29 radio stations, plus 2 associate educational television station members, or 100 percent of the broadcasters in Maine.

I repeat, this resolution represents 100 percent of the broadcasters in Maine:

RESOLUTION—MAINE ASSOCIATION OF BROADCASTERS

Whereas the Federal Communications Commission proposes to amend its rules and regulations by placing limitations on advertising time,

Whereas we believe that this proposed rule is beyond the power delegated by Congress to the Federal Communications Commission, and

Whereas the Congress in enacting the communications law did not intend that the Commission have the authority to impose limitations on the amount of time which broadcasters may use for commercial messages: Now, therefore, be it

Resolved, That the Maine Broadcasters Association, in convention assembled, heartily endorses H.R. 8316 which bill would amend the Communications Act of 1934 to prohibit the Federal Communications Commission from prescribing commercial time standards; be it further

Resolved, That the Maine Broadcasters Association commends the Honorable Walter Rogers, Member of Congress, for his devoted efforts on behalf of the Broadcasters of America.

Unanimously adopted by the Maine Broadcasters Association in annual convention, November 6, 1963, Portland, Maine.

It is one thing for the Federal Communications Commission to nibble away at parts of the broadcast body politic in an earnest attempt to fulfill the function for which they were created.

It is an entirely different set of circumstances when you now address yourselves to the heart of broadcasting's ability to serve, its commercial revenue.

Radio today is horribly difficult to manage on an economically sound basis for the simple fact that Uncle Sam spawned too many of them in the misguided feeling that proliferation automatically creates good competition.

The revenue that provides the wellspring of insight into the local community, its desires, its wishes, its problems—the insight which has been served in great measure by broadcasters from Bangor to Bakersfield—to restrict this flow of advertising revenue is to invite eventual Federal subsidy. The host of unspeakable problems that arise in my mind over that point is enough to fill another 50 pages.

It has been said that some broadcasters have a license to steal by virtue of reported profits at the end of the year. These same profits go to improvement of product, extension of programing in the community interest, and just plain investment in the American economy.

To put restrictive clauses in the commercial standards of a large broadcast operation because of large profit is to restrict all of us.

Our operation is in a highly competitive three-station television and five-station radio market. They are all good broadcasters but often reflect, in word and deed, the pressures of competitive practice.

Unless the Rogers amendment (H.R. 8316) is given swift and honest consideration, the door will be wide open for unsound and unenforceable commercial restrictions.

Somewhere along the tideline of Federal Communications Commission domination of the broadcast business, a bulwark must be erected upon which the legend appears: "You can go no further."

I know of no more traditionally great place to do this than in Washington, D.C.

If you, by demurring, allow this ugly weed of commercial regulation to fester and grow in the broadcast garden, it will corrupt and destroy a far wider area than that of the communications industry.

The billboard industry is already deep in the morass of hand and idea-binding regulation. Containment could spread to the entire advertising group.

It is conceivable that commercial restrictions can and will lead to an Herculean task on the part of the Federal Communications Commission to keep everybody in line, involving a much larger staff, and thus leading to additional regulatory bodies in order to keep the supposed public interest served.

Gentlemen, broadcasting is an art. It is also show business and I accentuate the word "business."

To overregulate the business is to constrict and strangle the art.

To suggest that limiting those "obnoxious commercials" is grounded on anything but emotional diatribe is to allow an infinitesimal minority the power to destroy local broadcasters in radio and television who live from day to day in one of the most competitive businesses in this country.

There are many in the broadcast business who are motivated by just as many reasons for being in it. Broadcasters often disagree heatedly among themselves. But, on one subject, you will find them concerned and confused. It is the area on which you seek comment today. For, it is an area in which the Federal Communications Commission seeks to extend its growing power—that of commercial regulation.

In sum, at the heart and core of the matter might be these words, they appeared in a comment published in Television Age on September 2, 1963, above my signature:

The future of American broadcasting depends on "responsible individualism" on the part of the broadcast manager and what U.S. Supreme Court Justice Douglas once called the dignity, resourcefulness, and intelligence of the people.

Thank you very much.

Mr. ROGERS of Texas. Thank you, Mr. Wilkin, and without objection, the addendum to your remarks will be included in the record at the end of your statement.

(The addendum referred to follows:)

ADDENDUM

FROM WINSLOW T. PORTER, OWNER-MANAGER, WJTO, BATH

"For the past 3 years the Federal Communications Commission has been making forays into the field of broadcast program control. This is decidedly unhealthy in a free society.

"Congress recognizing the dangers of such action expressly withheld this power from the Federal Communications Commission when it wrote the Communications Act.

"Until now most of these excursions into the field of program control by the FCC have reached the broadcasters in the form of suggestions opinions or the threat of overly careful scrutiny of license renewal applications. In the broadcasting industry this might be called the employment of 'the lifted eyebrow technique.'

"My support of H.R. 8316 does not stem from selfish personal economic motives. Rather I believe that if the FCC is permitted to adopt as a ruling the

proposal of its Docket No. 15083 and to enforce the same it will mean that the Federal Communications Commission has the power to dictate programing. It will be doing exactly that.

"Such a wedge will undoubtedly bring forth a plethora of future rulings that will give a politically appointed Commission life and death power over programing and the Broadcasting Industry.

"Broadcasting can be far more potent in the moulding of pubic opinion than print media. There is much talk about freedom of the press. Yet I doubt if a truly free press could operate under the conditions broadcasters are forced to contend with at the present time let alone under a situation that might very well develop if the FCC is permitted to adopt rules regulating programing.

"Broadcasters do not operate public utilities they are engaged in competitive free enterprise . Stations are licensed to prevent interference. If the possibiilty of bedlam on the airwaves did not exist then there would be no excuse for licensing stations at all in a free society.

"A rather weak argument is made that because the number of channels available for broadcasting is limited that stations should be subject to Government control in every phase of their operation.

"It is significant that there are vastly more radio stations than newspapers and there are many more television stations in metropolitan markets than there are newspapers.

"No one has yet dared to attempt to dictate how newspapers should be run, for this would be interference with a free press quaranteed by our constitution. The only limitations placed on newspapers are economic. To survive they must have readers and adequate advertising income to pay expenses.

"Radio stations and television stations must please their listeners or viewers and have adequate advertising revenue to survive.

"In the last analysis, it is really a question of how many radio or TV stations a market will support that determines the number of stations that will operate, and not the number of frequencies available. This is particularly true now that all receivers are to be equipped with UHF.

"A broadcast station owner is not subsidized by the Government. He has no guarantee that his business will be a success. He is engaged in free competitive enterprise. There is no more reason that a broadcaster should be subject to program control in any way shape or manner, than there is for the Government to interfere with the content or makeup of any newspaper.

"Indeed, if the broadcasting industry could be freed of every possible Government control, except those of a technical nature, it would be in the interest of our free society. Broadcast stations are subject to all of the laws applicable to newspapers—libel, etc. There is a measure of decency among broadcasters and they are answerable directly to the public.

"Is it not reasonable to believe that if broadcasters were freed from fear of the Government that there would be more stimulating editorializing than there is today?

"Broadcasting is the most powerful medium of opinion molding on earth. If it can be controlled by the Government it can be used to destroy our freedom. I believe it dangerous to permit the FCC or any Government agency control over our programing—more dangerous than tampering with a free press.

"I oppose the Commission adopting docket No. 15083 as a rule because I see it as another decided step in the direction of program control, and even though the current members of the FCC are undoubtedly intelligent well-meaning men, there is no guarantee that their successors will be."

FROM J. ALAN DESPER, PRESIDENT, WIDE, BIDDEFORD

"You've asked for comments on the Rogers bill, and we're delighted to send ours for you to use any way you see fit before the committee hearing.

"We feel strongly that the relentless forward move of nonbroadcasting theorists at the Federal Communications Commission must be stopped. Broadcasters' protests are blithely flattened as the juggernaut rolls on. Someone must say "Halt!" Congress can, and we hope will with the Rogers bill.

"The Commissions' errors in judgment and demonstrations of apparent complete lack of knowledge of practical broadcasting have been many. Their continued state of confusion after years of trying to draft an up-to-date license renewal form, to name one.

"Their recent attempts to 'take over' the industry, however, are far more frightening than mere errors and confusion. The recent arbitrarily imposed schedule of license fees amounts to a form of 'taxation without representation.'

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It implies that the FCC is an entity separate from the rest of the Federal Government, and ignores the fact that the entire industry already spends millions of dollars in presenting Government-prepared educational and informational programs and announcements to the public.

"Now we have these theorists about to tell experienced, practical broadcasters exactly how many commercials will be allowed at any given period of the day. No one can possibly know this for all stations equitably. The number of commercials which can be carried consistant with good programs varies with each station, being different from hour to hour at any given one. Moreover, the whole question regulates itself. Each broadcasting station depends on reaching the largest possible audience for survival. Any station which exceeds the limit of acceptability in number of commercials will obviously lose its audience and thus put itself out of business. Is the Commission more qualified to judge the limit of acceptability on an arbitrary wholesale basis than the individual broadcaster who must please his audience or die?

"Does any Member of Congress feel that one small group of theorists in Washington can tell him how many hours he should spend at his office, how many hours he should spend campaigning, how many at banquets, how many in talking with his constituents? Obviously it varies with each man and he will survive the next election on the strength of his own competency in judging this division of time himself. Each radio and TV station must survive a daily 'election' by the listening audience, and can survive only if it is allowed to judge and adjust its own division of time.

"In our opinion this latest move by the FCC is one more in a steady progression of moves by which this agency apparently seeks to gain full programing control over the entire medium. It is a direct attempt at censorship by telling stations 'when' they may or may not say something commercial. Is the next step to be an attempt to tell us 'what' we may or may not say?

"By law the Federal Communications Commission is empowered to grant broadcast licenses only to those individuals whom it judges to be competent, reliable, and responsible. We strongly feel that the record of the industry as a whole, over the years has proven us to be all of these, and to be adults as well. We protest at being treated like ignorant, naughty, children, to be surrounded by a set of schoolboy rules.

"Those are some of our sentiments, Gene. We hope they will be of assistance. Our blessings and good wishes go with you."

Mr. WILKIN. Yes, sir.

Mr. ROGERS. of Texas. Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I want to thank you for an excellent statement. It was a very interesting statement, and I know you mean every word of it.

Mr. WILKIN. Thank you.

Mr. ROGERS. of Texas. Thank you Mr. Wilkin, and let me make this observation that you can carry back to those members whom you quoted.

The committee did hear with great interest your remarks, and we appreciate it very much.

Mr. WILKIN. Thank you.

Mr. ROGERS of Texas. Let the Chair make this remark at this time. We have about eight more witnesses. There have been some requests to be taken out of order. In view of the fact that these people have set up their schedules and have expected to appear in the order that was arranged, if anyone desires to insert their statement in the record at this point the record will reflect it just as though it had been read, and the Chair will receive requests at this time to do that; otherwise, we will just have to proceed in the regular order so that everyone can be accommodated as quickly as possible.

Our next witness is Mr. John P. Carr, president of the West Virginia Broadcasters Association, Inc.

STATEMENT OF JOHN P. CARR, PRESIDENT, WEST VIRGINIA BROADCASTERS ASSOCIATION

Mr. CARR. My name is John P. Carr and as president of West Virginia Broadcasters Association, I am here today to testify on behalf of the association in support of H.R. 8316. I am also the president of Marja Broadcasting Corp., licensee of station WDNE, Elkins, W. Va.

West Virginia Broadcasters Association is a nonprofit association whose members operate more than 50 standard, FM, and television stations in the State of West Virginia.

Insofar as the merits of the proposed rulemaking adopted by the Federal Communications Commission is concerned, our association filed detailed comments in docket No. 15083. We challenged both the legality and the wisdom of the proposed rules. For the convenience of the subcommittee, I have attached to this statement a copy of our comments and respectfully request that, if appropriate, they be made a part of the record in this proceeding.

With respect to the proposed legislation, H.R. 8316, West Virginia Broadcasters Association strongly urges that the bill become law.

As we understand the position of the Federal Communications Commission, that agency opposes the legislation for two reasons:

First, according to Chairman Henry's statement, H.R. 8316 would strip the Commission of "desirable authority" and a "great deal of its ability" in dealing with the ever-changing trends in the area of so-called overcommercialization.

Second, it is argued that legislative consideration should await the outcome of the proceeding presently before the Commission in docket No. 15083. The Commission begs this committee not to single out this one area for special prohibition against rulemaking.

We respectfully submit that now is the time for Congress to act. It seems odd indeed that the Federal Communications Commission should ask Congress to keep hands off a specific area of possible regulation when that "specific area" is exactly what the Federal Communication proposes to regulate without any apparent regard whatsoever for the other areas of operation or functions broadcast stations perform.

In other words, why should the Federal Communications Commission promulgate rules on commercializing without, at the same time, considering time devoted to kinds and types of programs, public service contributions and the like?

Why is it permissible for the Federal Communications Commission to regulate specifically in this field and yet ask Congress to lay off?

The overall public interest requirements that stations must satisfy to continue operation provide adequate safeguards against misuse of a license.

We strongly urge passage of the bill now. Even if the Commission does not act on the proposed rules, the threat will hover like Damocles sword over the broadcasters. It is said, however, that even if the rules are adopted, they will be subject to "possible judicial review."

The difficulty with that argument is that the only way that a broadcaster may be able to challenge the validity of these rules is by placing his license in jeopardy. We submit that the Commission does not have the authority to adopt this rule and that it would be

extremely unwise for it to do so because of the possibility that it would unduly stifle business judgments that have to be made day by day at the station and cannot, and should not, be made in Washington.

The next argument, that the Commission's discretion should not be fettered, is equally fallacious. As Chairman Henry pointed out in his own statement, the Commission has a considerable amount of authority now to deal with the broadcasters where the Commission feels that the broadcaster has acted contrary to the public interest or has violated a statute, a rule, a regulation, or even some stated policy of the Commission.

The Commission has never hesitated to revoke a station's license in appropriate cases. It now has written into the law, certain added sanctions such as the power to fine and the power to issue cease and desist orders, in appropriate cases.

A rule that places all broadcasters in a mold dictated by the Federal Government is contrary to the basic tenets of the free enterprise system which the framers of the Constitution and this Congress have always sought to preserve. Further, we feel that adoption of the proposed rule by the Commission in this area will set a dangerous precedent.

This may be the first step as this subcommittee is aware. There are other provisions of the NAB code which relate to the content of programing. If the Commission adopts a rule with respect to the length and number of the commercial announcements, the next step may be to adopt a rule regulating the content of religious discussion, or even entertainment programing. The implementation of its policy on editorializing is already dictating program content.

The Commission states that the comments filed by broadcasters in the proposed rulemaking proceeding do not form a basis from which any worthwhile evidence can be obtained that is helpful to the Commission in promulgating rules in this area. The Commission, it seems, has extended naivety to the point of absurdity. Why should any thoughtful licensee assist the Commission in fashioning a noose by which he can hang himself?

In effect, the Commission, in instituting the proposed rulemaking and in testifying before you, has stated that only it has the expertise to make a reasoned judgment as to the number and length of commercial spot announcements that can and should be carried over broadcast station in the United States. As a matter of philosophy, we submit that this approach is absolutely wrong. This type of unbridled power in the hands of an administrative agency is contrary to the basic tenets of our form of government.

It is contrary to the best interest of the American public and the basic philosophy of the Communications Act from which the Commission derives its power. This committee, and indeed Congress, should make very clear to the Commission that its function is not to superimpose its judgment upon the licensee in this area.

We submit that passage of your proposed legislation, at the present time, will have a very salutary effect.

Thank you very much.

Mr. ROGERS of Texas. Thank you, Mr. Carr.

Now, how long is the statement that you have of your comments to the Commission? Is it just a few pages?

Mr. CARR. Nine pages.

Mr. ROGERS of Texas. Without objection that will be included as a part of your statement and will immediately follow the statement that you just gave.

Mr. CARR. Thank you, sir.

(The document referred to follows:)

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON D.C.

DOCKET NO. 15083

IN THE MATTER OF AMENDMENT OF PART 3 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO ADVERTISING ON STANDARD, FM, AND TELEVISION BROADCAST STATIONS

WEST VIRGINIA BROADCASTERS ASSOCIATION COMMENTS AND STATEMENTS OPPOSING PROPOSED RULEMAKING

West Virginia Broadcasters Association, hereinafter sometimes referred to as West Virginia, by its attorneys, herewith files its opposition to the Commission's proposed Rules in the above-captioned proceeding. West Virginia desires to go on record as being unequivocally opposed to the instant proposal and respectfully requests that the Commission reconsider the results of the proposed Rules and dismiss the proceeding forthwith.

PRELIMINARY STATEMENT

1. West Virginia Broadcasters Association is a nonprofit trade association whose members operate more than fifty (50) standard, FM, and television stations in the State of West Virginia. The Directors of the association have authorized the filing of Comments opposing adoption of the proposed Rules discussed below.

2. On May 15, 1963, the Commission adopted a Notice of Proposed Rulemaking [1] which, in essence, looks toward incorporating into the body of Commission law, the Radio and Television codes of the National Association of Broadcasters. In its Notice, the Commission invited Comments of interested organizations and members of the public [2] and in doing so, requested that those parties filing adverse Comments submit counterproposals therewith. West Virginia requests the Commission to reexamine the unavoidable, harmful results of regulating advertising in the general manner proposed.

LACK OF STATUTORY AUTHORITY

3. The Federal Communications Commission is an administrative agency set up by Congress to protect, under statutory direction [3] the interests of the people of the United States, in order that they might enjoy the best possible radio [4] and television service.

4. The Communications Act delegates to the Commissioners who administer its provisions the following powers and duties, among others not in question here: (*a*) to license radio stations; (*b*) to prescribe the nature of service of each class of station; (*c*) to assign bands of frequencies for each station; (*d*) to make regulations to prevent interferences between stations; (*e*) to prescribe qualifications for station operators; (*f*) to license operators; and (*g*) to make general Rules and Regulations.[5]

5. Section 3(h) of the Communications Act excludes broadcasters from the definition of common carriers. This provision was not in the Radio Act of 1927 and appeared in final form in both the Senate and House Bills which were to be-

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[1] B FCC 63–467 35001.
[2] Ibid, para. 12.
[3] The Communications Act of 1934, 48 Stat. 1064, as amended, 50 Stat. 189 (1937), 47 U.S.C. 151 (1946).
[4] Cf. *Black River Valley Broadcasters* v. *McWinch*, 69 App. D.C. 311, 101 F. 2d 225 (1938), Cert. denied, 307 U.S. 623 (1938).
[5] § 303 of the Communications Act of 1934, 48 Stat. 1082 (1934), as amended, 50 Stat. 190 (1937), 47 U.S.C. § 303 (1946).

come the Communications Act of 1934.[6] The provision received no comment in any of the Committee reports or on the floor of either House. However, extensive discussion had taken place in 1927, 1929, and 1934 on the matter of discrimination in service or charges by stations against political candidates, speakers on public issues, and even religious, charitable and educational organizations.[7] The nondiscrimination provisions which were imposed on the telephone and telegraph common carriers by Title II of the Communications Act were excluded from the broadcast portion of the Act. Therefore, it is evident that broadcast stations were not intended to be common carriers or public utilities subject to rate regulation. The Supreme Court itself, has given full recognition to this intent in the *Sanders* case.[8]

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted. * * *

"But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. * * *"

6. One of the major reasons[9] the Senate passed the White-Wolverton Bill,[10] dividing the Commission into a common carrier division and a broadcast division, was to negate the administrative tendency of confusing broadcast communications with private or public utility communications and applying the same concepts and philosophies in both fields. Following this, in 1959, the Supreme Court once again stressed that broadcasting was not to be regulated, ratemakingwise.[11]

WISDOM OF THE PROPOSED RULES

7. The instant proposal would, for the first time, in one bold step, introduce raw and unabashed public utility regulation into the house of free broadcasting. It is submitted that if the Commission "tells the broadcaster how his advertising efforts are to be limited, is not the next logical step an effort to tell him what his charges (rates) must be to enable him to finance his business on this limited base." [12] Indeed, would it not be necessary for many stations operating on this reduced base, to increase their rates just to remain in business? If so, would not an already existing pressure on the Commission to reduce broadcast rates for local small businesses be intensified [13] compelling the Commission to take the short step to rate fixing and thus, to dive head first into the forbidden waters? In view of these considerations, the proposed rule becomes an administrative Frankenstein playing havoc with its creator, the Commission, as well as with the broadcaster.[14]

EQUITY AND FAIRNESS DICTATE THAT ADVERTISING BE RESTRAINED ONLY FOR THE MOST COMPELLING REASONS, NONE OF WHICH ARE PRESENT HERE

8. It must be thoroughly understood that the American system of broadcasting, contemplated by the Communications Act of 1934, as amended, specifically provides for a free enterprise private risk capital system in the public interest. An American businessman entering into the field of broadcasting must risk

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[6] 48 Stat. 1064 as amended 47 U.S.C. 151 (1946).
[7] See Hearings on H.R. 9971, S. 1, and S. 1754 in the 1926–1927 period, S. 6 in 1929 and H.R. 7986 in 1934.
[8] *FCC* v. *Sanders Bros.* 309 U.S. 470, 642, 60 S. Ct. 693 (1940).
[9] See, *Warner*, Radio & Television Law, Sec. 104c.
[10] S. 1333 (1947).
[11] *U.S.* v. *Radio Corporation of America*, 79 S. Ct. 457, 466, 358 U.S. 334, 348 (1959).
[12] Statement by LeRoy Collins, President, National Association of Broadcasters.
[13] See, for example, Final Report, Committee on Small Business, 87th Congress, 2d Session, House Report No. 2569, p. 124.
[14] It should also be noted here that the Commission has already taken steps looking toward limiting the number of stations in a particular area (Notice of Proposed Rulemaking, Docket 15084).

capital, his own capital, in meeting the costs of obtaining a construction permit, license, and related authorizations as well as the costs of constructing and operating the station. Neither the public nor the Commission contributes to that risk nor does the public or the Commission enter into the expenses and the difficult considerations which are relevant and necessary in deciding whether to engage in broadcasting as a business. It is well recognized that advertising is the only means by which the broadcaster may recoup his costs [15] and thus, reason and equity demand that limitations on his right to advertise should arise only from the most compelling reasons. It is submitted that no such compelling reasons are here present.

LACK OF NEED FOR THE PROPOSED RULE

9. It is submitted that no compelling need requires the adoption of the proposed rules. The National Association of Broadcasters (NAB) Codes of Good Practices assists subscribers by setting guidelines as to limiting commercials. The rest of the broadcast industry, as well as the Code Subscribers, is ever working to govern itself and to improve service in every category. Avenues to intervene by the Commission and the public are already available, should self-government fail in any one area. Through its established processes, the Commission may, and has in the past, held up renewal of license applications and indeed, set them for hearing. A very realistic remedy is available to listeners by complaining to the station. As businessmen, good broadcasters are highly sensitive to complaints such as this and moreover, are in a position to do something about it without jeopardizing the station's existence, contrary to what is shown below. This is especially true today when the listener knows that a complaint to the Commission receives attention never before offered.

10. Taking, for example, a daytime only standard station, in a small market, on a seasonal economy competing with other stations as well as newspapers and magazines, the effect of the proposed rules on this station's existence may well be fatal. The records of the Commission contain ample evidence of stations that failed or of stations that are operating at a loss or at a de minimus profit. The effect of the instant proposals may well mean death to many of these marginal stations. In addition, the myriad of stations and the uniquely individual problems of each and every one of them deems it administratively impossible for the Commission to establish an objective standard which would be equal and fair to all.

11. In discussing his opposition to the proposal, Commissioner Ford stated : [16]

"Briefly, the objections that I expressed were that since self-regulation is one of the cornerstones of a successful regulatory process, it is important that the industry itself engage in a rather extensive voluntary program of self-regulation. When, however, industry with the encouragement of the Government develops satisfactory codes for self-regulation, it appears to me to be wrong for the Government to appropriate them and to propose incorporating the codes in our rules in order to give them the force and effect of law. Such a course of action must necessarily undermine and destroy the incentive of the industry to a large extent to engage in self-regulation."

12. In the Public Notice (supra), the Commission requests that those parties submitting adverse comments include counter proposals therewith. A review of the docket in this case so far shows that almost all, if indeed not all, of the Comments filed are adverse to the proposal. Among these, there are some commentators who attempt to offer counter proposals as requested by the Commission. However, by and large, interested parties have urged the Commission to drop the proposal carte blanche. Again, this would be a case of adopting rigid rules to corral an entire industry in order to weed out a few bad apples. The Commission has other more appropriate methods.

CONCLUSION

West Virginia desires to go on record as being unequivocally opposed to the instant proposal. West Virginia respectfully requests the Commission to re-

[15] See Address by E. William Henry, Chairman, FCC, Before the International Radio and Television Society, September 24, 1963, (FCC Release of that date, 40841, p. 4).
[16] Address before the Wisconsin Broadcasters' Association, Three Lakes, Wisconsin, June 28, 1963.

consider the results of the proposed Rules and dismiss this proceeding forthwith.

Repectfully submitted.

WEST VIRGINIA BROADCASTERS' ASSOCIATION,
By THOMAS H. WALL,
By JOHN B. JACOB,
By ALFRED C. CORDON, Jr.,
Its Attorneys.

SEPTEMBER 30, 1963.

Mr. ROGERS of Texas. Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Thank you very much, Mr. Carr, for your contribution.

STATEMENT OF MARK EVANS, VICE PRESIDENT, PUBLIC AFFAIRS, METROMEDIA, INC.; ACCOMPANIED BY THOMAS J. DOUGHERTY, ASSISTANT GENERAL COUNSEL

Mr. ROGERS of Texas. Mr. Mark Evans, vice president of public affairs, Metromedia, Inc., is the next witness, and I believe you are accompanied by Mr. Thomas J. Dougherty, assistant general counsel.

Mr. EVANS. Yes, sir.

Mr. ROGERS of Texas. Mr. Evans, you may proceed.

Mr. EVANS. Mr. Chairman, members of the subcommittee, my name is Mark Evans, I am vice president of Metromedia, Inc., for public affairs. Appearing with me is Thomas J. Dougherty, assistant general counsel for Metromedia.

In order to place our views in proper perspective, I want to briefly explain what Metromedia is. Metromedia is a publicly held diversified communications company, which is owned by in excess of 7,000 stockholders. Through operating divisions or wholly owned subsidiaries, it is engaged in several areas of endeavor in the communications, advertising, and entertainment fields.

Metromedia owns and operates broadcasting stations in the States of California, Illinois, Missouri, New York, Ohio, Pennsylvania, and the District of Columbia. Naturally, these stations serve portions of adjacent States. Our radio stations are all independently operated—that is, they are not affiliated with any network. Likewise, three of our television stations are independents. Two of our television stations are UHF stations.

As we understand its position, the Federal Communications Commission opposes the measures on which these hearings are being held upon the ground that enactment of this legislation would deprive the Commission of the flexibility it believes required to enact rules prescribing standards of general applicability relative to the length of frequency of advertisements carried by broadcast stations.

We take the position here, as we did in the Commission's rulemaking on this subject—docket No. 15083—that the Congress has not delegated authority to the Commission to act in this area in the first instance. Consequently, the enactment of H.R. 8316 would not, in our judgment, deprive the Commission of an area of authority which it already possesses.

We do not propose to engage in a lengthy discussion of what authority we believe the Commission possesses in this area. Rather, we would like to present the practical reasons why we support the enactment of this legislation.

We would, however, like permission to submit for purposes of this record the comments that we filed in the Commission's docket No. 15083. We believe that these comments will demonstrate our position on the legal questions involved in the FCC rulemaking on commercial limitations. Our comments in docket No. 15083 are attached to this statement.

The Federal Communications Commission is faced daily with policy decisions whose impact can be felt in every home across the land. Having such an important function to perform, we became interested in the magnitude of the so-called problem of overcommercialization which would require this agency to turn its attention to this matter at the expense of the weighty policy decisions facing it.

Although the statistics are not set forth in comparable fashion, we found that in fiscal year 1961 the Commission reported to the Congress that it had received nearly 250 complaints objecting to the excessive length and nature of commercials. At the close of fiscal 1961, there were 5,499 commercial AM, FM, and TV stations authorized by the Commission, of which 5,044 were actually on the air.

At the end of fiscal 1962, there were 5,328 operating commercial AM, FM, and TV stations. During fiscal 1962, the Commission received a total of 674 complaints relating to—

station commercial practices, including overcommercialization, loud commercials, false and misleading advertising, and the advertising of liquor, tobacco, and other controversial products.

The Commission's report to Congress, from which these figures were taken, does not tell us whether these complaints related to a few or many broadcasters or a few or many products. Whatever the case might be, we think that this matter has been blown all out of proportion when one considers the number of hours of entertainment and information that are provided each day by this vital industry.

One of our radio stations alone will provide in excess of 8,700 hours a year of entertainment and information.

I am possibly unique among those who have appeared before you. I have spent 20 years of my broadcasting life authoring and delivering sales messages—sometimes deprecatingly called commercials. Having been on that firing line may I hasten to point out I have no particular love for commercials. My idea of purgatory would be to be forced to listen unendingly to some of those I have had to deliver through the years.

However I feel about them, I am aware as are you gentlemen of the Congress that they are the aorta or bloodstream near the backbone of not only the broadcasting industry but also free enterprise generally. It is like old age—no one really likes old age but don't know it; the alternative is very final. Nor do people like taxes, but it is the price we must pay for this very imperfect form of democratic government which we cherish.

Who can question advertising as being an integral part of our way of life? My early duty in the Armed Forces of World War II was

in radio. National programs, decommercialized, were sent overseas but were rejected by the men—they missed the commercials.

Armed Forces Radio then had to make up fictitious commercials to make the boys feel at home with their radio entertainment. Recently a guest on my TV show, a high official of the BBC, admitted that commercial TV in England was capturing most of the staid English audience.

In several of our markets we are independent radio-TV operators. In such operations the challenge for listeners is all the greater. In each instance we have captured substantially higher ratings by building better programing. Each broadcaster is fighting first for listeners and then for the chance to keep solvent by selling time. An operator who abuses those listeners may for a while reap reward, but inevitably the good judgment of the American people will cast their votes by the proverbial twist of the wrist.

Quite frequently of late we broadcasters have sat down to exchange ideas to try to figure out just where we are going. We are exhorted to "upgrade" our programing and make more searching our audience analysis. Occasionally, one of us will get a letter which contains a gentle hint relative to the amount of our local live programing in prime time. These "hints" do not go unnoticed by the rest of the industry. It takes money to do these things and under the American system of broadcasting, the advertising dollar must pay the freight.

Now we are faced with proposals to limit the amount of our income. The quandary we are being placed in is evident. How do you improve the product with the same or less money? The immutable laws of economics play a role in broadcasting, too. We can't just keep raising the rates. Further, it seems to us that these various proposals run headlong into one another. You cannot have programing improvements and innovations unless the necessary income is present.

Reasons for our militant objection to time and frequency limitations are many. Principal among them are:

1. The belief that such a move is a politically dangerous foot in the door for further inroads in broadcasting freedom. Only recently the Commission proposed to limit the number of stations that could be assigned to a city based upon its population. It recently put out a proposal that would require all FM stations to be independently programed 50 percent of the time. The Commission now proposes to limit a broadcaster's income. It seems to us that it is just a short step to common carrier regulation.

2. The proposal is discriminatory and impracticable. No two stations—even stations serving the same market—are alike. The problems of the independent television station, which must either produce or purchase anywhere from 130 to 168 hours of programing a week, are far different from the network affiliated stations.

The problems of the UHF station are different from the VHF station. The problems faced by the daytime-only radio station are different from the unlimited-time station. In short, each station is different and to avoid discriminatory treatment each would have to have its own federally approved commercial code. Who would enforce these codes and what would the cost of enforcement be? We cannot even hazard a guess. We can only assume that it would be many times the approximately $15 million which you gentlemen now appropriate to operate the Federal Communications Commission.

3. If the amount of time available for advertisers is limited, the inevitable result will be increasing rates until such times as the laws of supply and demand turn the advertiser to another medium. In the interim, however, the local advertiser would of necessity yield time to more powerful national advertisers. Congress has already expressed its concern that there are now insufficient opportunities for access to the medium by small businessmen and hearings were held on this very subject before the Select Committee on Small Business during 1961. Can anyone seriously question the proposition that a limitation on commercial time will further restrict the opportunity for access to the medium?

4. There is another area which bears examination. The Commission proposes to adopt the NAB television code into its rules. The code states that—

commercial material in prime time includes * * * public service announcements * * * as well as commercial copy.

Can anyone seriously question what would be eliminated from his schedule when the broadcaster is faced with limitations which affect his economic survival?

As we indicated earlier, the complaints relative to broadcast advertising are not as many as some would like you to believe. Much of the smoke being generated is fanned by competitive media which would in most cases be happy to see broadcast commercials not limited but eliminated. Their reasons are understandable.

Churchill once said democracy is the poorest form of government there is—except for all the rest. Mr. Chairman, members of this important committee, American broadcasting, like democracy, has soft spots—but it is far superior to any other type yet devised.

The decision you are making exceeds by far the immediate question at hand. The very life of the industry is in jeopardy—certainly not in the foreseeable future but gradually, ever so slowly, by such steps as the one before you. Abrasive forces could wear down the mountain of broadcasting freedoms, which far more often than not distinguishes itself in keeping the land aware of the land's problems and achievements.

Mr. ROGERS of Texas. Thank you, Mr. Evans, and without objection, the comments of the Metromedia, Inc., before the Federal Communications Commission, in docket No. 15083, will be included as a part of your statement immediately following your statement.

Mr. EVANS. Thank you, Mr. Chairman.

(The document referred to follows:)

[Attachment]

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D.C.

DOCKET NO. 15083

IN THE MATTER OF AMENDMENT OF PART 3 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO ADVERTISING ON STANDARD, FM, AND TELEVISION BROADCAST STATIONS

COMMENTS OF METROMEDIA, INC., IN OPPOSITION TO THE PROPOSED RULES

Metromedia, Inc. ("Metromedia") herewith submits its comments in response to the Notice of Proposed Rulemaking in the above entitled proceeding released May 17, 1963.

STATEMENT OF INTEREST

Metromedia is a publicly held corporation licensed to own and operate four VHF television, two UHF television, five standard, and five FM broadcast stations.[1] Its interests are a matter of record and require no elaboration here.

As a licensee of the Commission, Metromedia has a direct interest in any rules which would through a prior restraint impose a limitation on the amount of advertising time that could be broadcast by commercial AM, FM, or TV stations, contrary to the public policy of the United States as expressed in its constitutional, statutory, decisional, and administrative law. As a communications entity devoted to the free exchange of ideas and information, Metromedia has a direct concern in any attempt to abridge cherished constitutional liberties by any means whatsoever, whether by prior restraint or subsequent reprisal.

PRELIMINARY STATEMENT

On May 17, 1963, the Commission issued a Notice of Proposed Rulemaking which proposed the adoption of rules limiting the amount of advertising time that could be broadcast by commercial AM, FM, and TV stations. The proposed rules appended to the Notice embody the time standards of the Radio and Television Codes of the National Association of Broadcasters. The Notice also suggested that there might be special situations that could be suggested that would warrant the adoption of variants to the standards embodied in the NAB's Codes. Additionally, comments were requested as to whether paid political announcements should be excluded in computing the total commercial time under the rules and whether, and in what circumstances, a waiver of the rules might the appropriate.

The impetus for the Notice is based upon the Commission's concern arising from applications for broadcast authorizations which are alleged to have presented serious problems of "overcommercialization" to the regulators and the fact that the Commission's files are alleged to be replete with complaints from the public on this score. "Replete" is not defined by number or percentage reference to the volume of mail received by the Commission.[2]

Authority for adoption of the proposed rules is stated to be bottomed on Sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended.

I. THE PROPOSED RULES ARE ABHORRENT TO CONSTITUTIONAL GUARANTEES

This is the second attempt in a very short span of time where the Commission has proposed rules which impinge on constitutional rights through the blatant prior restraint of broadcast matter. This is the second time within the span of six months that the Federal Government has proposed to censor what United States citizens can hear and see.[3]

The rules proposed here are another attempt to impose a prior restraint on the content of broadcast matter. The question presented, therefore, is whether such a prior restraint offends consstitutional and statutory guarantees. In short, is commercial matter separable from other matter transmitted by broadcast stations (including nonpaid "advertising" for public service organizations and governmental agencies) and any less entitled to basic constitutional and statutory protection? In the paragraphs which follow we shall demonstrate that it is equally entitled to such protection.

The Commission has long recognized that broadcasting is inherently entitled to First Amendment protection. The proposition was well stated by the Commission in its petition to the United States Court of Appeals for the Second Circuit for leave to file a memorandum *Amicus Curiae* in *Grove Press, Inc.* v. *Christenberry*,[4] as follows:

"It is settled, of course, that the protection of the First Amendment extends to broadcasting. *United States* v. *Paramount Pictures*, 334 U.S. 131, 166; *Superior Films, Inc.* v. *Department of Education of State of Ohio*, 346 U.S. 587, 589. 'We

[1] Through a subsidiary, it operates an additional VHF television station.

[2] As indicated by Chairman Henry in his address before the International Radio & Television Society on September 24, 1963 during fiscal 1962 the Commission received approximately 2,500 complaints about advertising of which about 35 percent related to length, amount and frequency. We must assume that these are the figures which the Commission had in mind when it referred to replete. But see p. 18, *infra*.

[3] Final comments were submitted in Docket No. 15040 during the latter part of August. The rules proposed in that docket would censor information relative to horseracing.

[4] Case reported at 175 F. Supp. 448 (D.C.S.D.N.Y. 1959), aff'd., 276 F. 2d 433.

have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment' (*Paramount Pictures, supra*, 334 U.S. at 166). Moreover, the Communications Act itself, in Section 326, prohibits censorship by the Commission or interference with the right of free speech by radio or television. [footnote omitted]"

The Commission's Notice does not cite any authority for excluding commercial continuity from the protection of the First Amendment. Nor can there by any warrant for a belief that the commercial portion of a broadcast station's output is somehow separable from the entertainment, educational and other matter broadcast of which it is a part and any less entitled to protection from prior government restraint.

To place this proposal in proper context requires a return to fundamentals. Broadcast advertising can be many things. It may be the voice of a product, advising listeners of a new development or idea. It may suggest the value of a particular service. It may urge the qualities of a candidate for office. It may suggest a governmental service that is available to the people. It may urge voters to support a particular position on a proposition before them. It can be good. It may be bad. Subjectively, we may like the ideas it presents to us. We may dislike them. It may provide the broadcaster with money for its presentation. He may present it as a public service. To some the idea may have educational value. To others it may not. It may be entertaining, it may not. Whatever its reception by the subjective mind, it is an intimate part of broadcast programing and equally entitled to the same protection from government interference. It cannot be distinguished from other matter broadcast simply because the entrepeneur receives a monetary return for one and not for others.

Constitutional protection is not restricted to the exposition of ideas simply because "[t]he line between informing and entertaining is too elusive for the protection of that basic right." *Winters* v. *New York*, 333 U.S. 507, 510 (1948). First Amendment rights are not confined to certain selected fields of human interest and it is simply not sound to even contend that these safeguards are inapplicable to business or economic activity. *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). The mere fact that the idea communicated is commercial in nature does not withdraw the mantle of protection afforded by the First Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951). *Smith* v. *California*, 361 U.S. 147, 150 (1959). As an unanimous Court said in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157–8 (1946):

"Under our system of government, there is an accommodation for the widest varieties of tastes and ideas. [Footnote omitted.] What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. * * * From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

See also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952); and *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 527 (1959). The Federal Act was not intended to establish a mode of supervising the income of broadcasters or of protecting or limiting their profits. (*WDAY* at 544; dissenting opinion.)

We are not unaware of the Court's opinion in *Valentine* v. *Christensen*, 316 U.S. 52 (1942), a case involving the regulation of handbill advertising. Even if this is good law today in other cases (a proposition which is in considerable doubt in light of the cases cited above and in the margin[5]), it most assuredly does not apply to broadcast advertising. *Valentine* was a police power case, which places it on an entirely different footing from the outset. See *Head* v. *New Mexico Board*, 374 U.S. 424 (1963). There is no question of the public

[5] *Cf.*, Justice Douglas' concurring opinion in *Cammarano* v. *United States*, 358 U.S. 498, 513 (1958), where he is sharply critical of *Valentine* and indicates that it is not the law. He stated (at 514): "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy is not hitched to a profit motive." See Justice Black's dissent in *Kovacs* v. *Cooper*, 336 U.S. 77, 102 (1949), (in which Justices Douglas and Rutledge concurred) where he stated that "* * * the results of today's opinion in upholding this statutory prohibition of amplifiers [on sound trucks] would surely not be reached by this Court if such channels of communications as the press, radio, or moving pictures were similarly attached." See also *Martin* v. *Struthers*, 319 U.S. 141 (1943); and *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); and *Saia* v. *New York*, 334 U.S. 558 (1948). As noted by Justice Frankfurter in his concurrence in *Dennis* v. *United States*, 494, 529, n. 7 (1951), the Court treated the regulation in *Valentine* "as though it imposed no real restraint on speech or on the press."

health, safety, or morals here, nor is there any interference with the rights of others. *Cf., Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 463 (1952).

The fundamental right to listen or see may not be abridged merely because someone may have profited from the idea communicated. There is simply no legitimate basis for distinguishing the paid from the nonpaid advertising message. Each is equally entitled to protection from prior government fiat.

Even if it could be argued that advertising per se is somewhat less entitled to First Amendment protection in other areas, this would not in and of itself remove the mantle of protection here in view of the specific prohibition of governmental interference with the right of free speech contained in the Communications Act. See Section 326, 47 U.S.C. 326.

Section 326[6] specifically prohibits the Commission from promulgating any regulation which would interfere with the right of free speech. It is to be noted that this prohibition is all encompassing and that broadcast advertising is in no way excluded. Moreover, an examination of Sections 4(i), 303 and 307(a) of the Act (relied upon by the Commission for authority) clearly discloses that there is no grant of authority to adopt the type of limitations proposed here. In fact, advertising matter is nowhere mentioned in these actions.

It is settled law that an administrative agency can exercise only those powers conferred upon it by the legislature. *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961). And the Congress has demonstrated repeatedly that it knows how to make an express delegation of authority. *Trans-Pacific Freight Conference* v. *Federal Maritime Board*, 302 F. 2d 875, 880 (D.C. Cir. 1962). The Communications Act is no exception.

In view of the clear and unambiguous language of these sections, resort to the legislative history should be unnecessary and we should be able to rest the matter here. *Caminetti* v. *United States*, 242 U.S. 470 (1916). However, since the Notice of rulemaking asserts that the agency has the authority to impose prior restraining limitations on commercial broadcast matter, resort to legislative intent appears required.

Although advertising by radio was well known at the time of enactment of the Radio Act of 1927 and the present Act, neither statute contains a specific provision granting the agency authority to regulate advertising. The only statutory restrictions are that sponsored programs be identified as such and the bans against broadcasting lottery information, obscene and indecent language, and schemes to defraud.[7] These facts are set forth succinctly in "The Regulation of Advertising," 56 Columbia Law Review 1045, n. 159 (1946):

"* * * [A]lthough a movement developed early in the history of radio for the complete elimination of direct advertising, see Freidrich & Sayre, The Development Of The Control Of Advertising On The Air 6–7 (Harvard Univ. Radio Broadcasting Research Project, Studies In The Control Of Radio, No. 1, 1940), the statutory restrictions concerning advertising as embodied in the Radio Act of 1927, 44 Stat. 1162, were limited to the licensing power of the Commission, § 5, 44 Stat. 1164 (1927), now 48 Stat. 1082 (1934), 47 U.S.C. § 307 (1952) and the requirement that sponsored programs be identified as such. See § 19, 44 Stat. 1170 (1927), now 48 Stat. 1089 (1934), 47 U.S.C. § 317 (1952). This Act, however, was supplemented by subsequent legislation which declared illegal the broadcasting of lottery schemes, 48 Stat. 1088 (1934), as amended, 18 U.S.C. § 1464 (1952), and the transmission of indecent language, 48 Stat. 1100 (1934), as amended, 18 U.S.C. § 1464 (1952)."

Equally pertinent to this point is the legal memorandum prepared by Joel Rosenbloom, Esquire, entitled "Authority Of The Federal Communications Commission With Respect To The Programming Of Radio And Television Broadcast Stations" (Mimeo No. 8764).[8] In his analysis of the legislative history of what

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[6] Section 326 provides: "Nothing this this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."

[7] The sponsorship restrictions are contained in Section 317. The ban against advertising lotteries was formerly contained in Section 316 of the Communications Act. In 1948, this provision was codified as a part of the Criminal Code, 18 U.S.C. § 1304. The obscene, indecent, and profane language provision appeared in Section 326 of the Communications Act. In 1948, this language was removed from the Communications Act and codified in 18 U.S.C. § 1464. The fraud by radio provision was added to the Criminal Code in 1962. 18 U.S.C. § 1343.

[8] This memorandum was prepared for use by former Chairman Minow at a symposium held at Northwestern University on August 3, 1961.

evolved as Section 29 of the Radio Act of 1927 (44 Stat. 1172; predecessor to Section 326 of the present Act), the author stated (p. 35, n. 18):

"One should also list here the history of provisions dealing with advertising. The White bill which was reported out in the 68th Congress in 1924, contained the original of what was to be section 19 of the Radio Act of 1927 (see Communications Act, section 317), requiring that all matter broadcast for a valuable consideration be announced as paid for by the sponsor. The House committee report stated: 'One of the subjects of public discussion at the present time is the extent to which broadcasting stations should be utilized for advertising purposes. *Your committee has not felt justified in forbidding or in undertaking to limit advertising through this medium*, but we are unanimous in the opinion that much the same rule should apply to this form of advertising as applies in the case of newspaper advertising. It should not be hidden from the knowledge of the hearer. Section 6 accordingly requires that all matter broadcast for which any money * * * is paid shall be announced as advertising at the time the same is broadcasted. The section contains a provision that when the advertising or publicity consists solely of the announcement of the name and business of the person paying for the feature broadcasted, it shall be sufficient to announce that the feature is "paid for" or is "furnished by" such person.' [Emphasis added.] H.R. Rep. No. 719, 68th Cong., 1st Sess., pp. 5–6. The same provision was carried by Mr. White's bill in the 69th Congress (Hearings on H.R. 5589, p. 5), but the requirement that material broadcast for a valuable consideration be announced as "advertising" was dropped by the committee. See H.R. Rep. No. 404, 69th Cong., 1st Sess., p. 3; Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4.

"On the floor of the Senate, Senator Pittman attacked the conference bill at length, setting out its alleged inadequacies. Among them were the claim that 'No authority is given to the Commission or the Secretary of Commerce to limit the extent to which broadcasting stations may be utilized for purely advertising purposes. The owners of the 15,000,000 purchased radio receiving sets in the United States are interested in the character of matter that is broadcast. This subject becomes particularly material when it is understood that there are only 89 effective broadcasting channels.' 68 Cong. Rec. 4109. [Author's query omitted.]"

It should be noted that the author included the above summary in that portion of his treatment of the anticensorship provision of the legislation. See also pp. 29–34 of the memorandum which demonstrates without a shadow of a doubt that the Commission was given no power of censorship or limitation over what might be broadcast.

Not only does the legislative history of the 1927 Act clearly indicate that the Commission was granted no power to anyway limit advertising, but the Commission itself recognized this limitation and forcefully reminded the Congress that it had no such authority. This is patently evident from the report submitted to the Senate by the Commission on June 9, 1932, in response to Senate Resolution 129.[9] Questions 4 and 6 of the Senate Resolution and the Commission's replies thereto are particularly pertinent to the matter under consideration. Consequently, they are quoted extensively below:

Question

"4. What plans might be adopted to reduce, to limit, to control and perhaps to eliminate the use of radio facilities for commercial advertising purposes.

Answer

* * * * * * *

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the commission to do so under a general standard prescribed by that legislation. While the commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising.

[9] As amended and adopted (75 Cong. Rec. 1760 (1932)), this resolution propounded 15 questions to the Commission concerning radio advertising and the educational use of radio. The Commission's reply to these questions is contained in Senate Document No. 137, 72d Cong., 1st Sess. (ordered printed, 75 Cong. Rec. 14981 (1932)).

"Such regulation, whether specifically undertaken by Congress or delegated by it to the commission, could extend both to the quality and quantity of commercial advertising * * *.

* * * * * * *

"The Radio Act of 1927 was obviously designed to permit the licensees of broadcasting stations the maximum of latitude in the matter of program material. Such licensees are in a singularly favorable position to learn what the audience wants to hear and to make the necessary changes in program material and in methods of presentation that will cause their programs to be favorably received by a substantial majority of the listeners. The adoption of regulation of the sort herein described should be undertaken only when it clearly appears that a majority or at least a considerable number of the licensees have failed to operate their stations in a manner acceptable to a majority of the listening public. If, in the opinion of Congress, that time has now arrived, we conceive it to be advisable to enact such legislation as will permit the commission to impose such regulations as the circumstances from time to time seem to warrant rather than legislation imposing specific restrictions and unflexible limitations." [Emphasis supplied.]

Question

"6. Whether it would be practicable and satisfactory to permit only the announcement or sponsorship of programs by persons or corporations.

Answer

* * * * * * *

"Here, as in our answer to the fourth question, if it is the opinion of Congress that the situation justifies further and additional legislation, the proper solution would seem to lie in the legislation authorizing the Commission to enact certain regulations designed to govern the situation rather than specific legislation on the subject by Congress."

Despite this self-admitted limitation on the Commission's authority in this area, there were no changes in the Radio Act and the Communications Act carried forward unchanged in the section prohibiting the Commission from promulgating any regulation which would "interfere with the right of free speech by means of radio communication."

As indicated by the Commission's Office of Network Study in its Interim Report in Docket No. 12782,[10] "[t]he policies with regard to advertising developed by the Federal Radio Commission have undergone no essential change during recent years." Nor have there been any changes in the enabling statute which would grant the Commission authority to impose a limitation (which is simply another manner of saying a prior restraint) on either the amount or type of advertising a station may broadcast.[11] As a matter of fact, Section 326 of the Communications Act prohibits censorship by this Commission in the identical language set forth in Section 29 of the Radio Act. See "Regulation of Broadcasting," a study prepared for the House Committee on Interstate and Foreign Commerce pursuant to H. Res. 99 (85th Cong., 1st Sess.), p. 47.

From time to time, legislation has been introduced to give the Commission authority to limit advertising in general or to ban certain types of advertising altogether. (See Interim Report by the Office of Network Study, p. 74). It is significant that the Commission did not state in its comments on this legislation (as it could have if such were the case), that such authority was not required because it already possessed the authority. *Rather, the Commission stated that the responsibility for determining the amount of time devoted to advertising was the responsibility of the licensee.*[12] Because of its significance to the instant proceeding, we have set forth below an extensive quotation from the Commission's comments on H.R. 5741, FCC Mimeo No. 21521 (July 1955) :

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[10] "Responsibility for Broadcast Matter," Interim Report in Docket No. 12782, FCC Mimeo No. 92567 (1960), p. 71.

[11] We recognize, of course, the ban on advertising lotteries, gift enterprises and similar schemes. But even here the Commission's authority is narrowly circumscribed. *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954) ; *The Caples Company* v. *United States*, 243 F. 2d 232 (1957). This limitation does not detract from the above statement in the context in which it is made. Nor do the limitations contained in 18 U.S.C. § 1464.

[12] See also the public notice relating to the liaison between the FCC and the FTC (FCC 57–172, Mimeo No. 41503, February 21, 1957) and the Commission's Report and Statement of Policy re Commission En Banc Programing Inquiry dated July 29, 1960.

"H.R. 5741 would amend the Communications Act of 1934, as amended, by adding a new Section 330 to Part 1 of Title III of the Act. This new section would require the Commission to prescribe appropriate regulations, applicable to licensees, program sponsors and others, to insure that, of the total amount of time available for any radio or television program, the proportion of such time devoted to advertising not be excessive.

"* * * We do not believe, however, that the problem can be handled through the imposition of fixed rules by a government agency. The Commission's regulatory experience has indicated that any fixed rule in this area cannot hope to achieve the flexibility necessary for dealing with a multitude of differing and changing program formats.

"At the present time, the primary responsibility for determining the amount of radio and television time devoted to advertising is primarily the responsibility of the individual station licensee. However, in connection with renewing licenses the Commission examines the overall record of stations, including the amount of time devoted to advertising, to determine whether the continued operation of the station would serve the public interest. In reviewing the overall record of stations on renewal, the Commission has employed criteria, as a guidepost, rather than as a fixed standard, to determine whether there has been overcommercialization. The Commission has found, however, that even these flexible guideposts have had to be adjusted in light of changing advertising practices in the broadcasting industry. Thus, the change in sponsorship techniques in recent years from a program sponsorship concept to one in which time is sold for commercial announcements incorporated into programs produced directly by the stations themselves or by the networks has required a reevaluation by the Commission of the role of spot announcements in the operation of broadcast stations.

"The Commission believes, therefore, that imperfect as the existing system may be, it is clearly preferable to attempting to fix any arbitrary limitations on total advertising time per program. It is our opinion that, with the cooperation of the industry through self-regulation and self-restraint, the Commission's present procedures are best calculated to achieve the goal of operation in the public interest without involving the Federal Government in the day-to-day management of stations in which it cannot and, in our opinion, should not, effectively or properly engage. * * *"

A list of the bills introduced in Congress during a one year period is collected in "Regulation of Broadcasting" at pp. 67–68. This listing, too, includes several measures designed to give the Commission authority to limit or ban certain types of advertising. None, however, were enacted.

Other legislative pronouncements make clear that the Commission has no authority to in any way dictate the contents or character of programing. The following statement is contained in the Final Report of the Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res. 691 (H. Rep. 2479, 80th Cong., 2d Sess. (1949), p. 8):

"When the Commission undertakes to dictate the contents and character of radio programs, it assumes an authority which has absolutely no basis in law."

Finally, this limitation on the Commission's authority has been recognized by individual Commissioners, who have indicated that advertising by a broadcast station must be treated in the same way as other program material and it is subject to the protection afforded by Section 326 of the Act. See address of Commissioner Ford before the Advertising Association of the West (Mimeo No. 6968, June 28, 1961, at p. 4).[13] Commissioner Cox has expressed a similar view of the law.[14]

The Commission can exercise only those powers granted it in the enabling statute (*Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 333 (1945)) and, as the foregoing demonstrates, it has been granted no such power as it has attempted to arrogate to itself here. "* * * the Board [Commission] is entirely a creature of Congress and the determinative question is not what the Board [Commission] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961). The Commission is prohibited from censoring (or limiting) program material, except in certain

[13] Commissioner Ford reiterated his opposition to this interjection of government in the purely business affairs of a licensee in a speech delivered before the Wisconsin Broadcasters Association on June 28, 1963.

[14] See Hearings before Subcommittee No. 6, Select Committee on Small Business, pursuant to H. Res. 46, 87th Cong., 1st Sess. (1961), pp. 108–111. Commissioner Cox was then Chief of the Commission's Broadcast Bureau.

limited areas not germane here. "Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communications [footnote omitted]." *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 529–30 (1959). See also *Allen B. DuMont Laboratories, Inc.* v. *Carroll*, 184 F. 2d 153 (3 Cir. 1950). There is simply no basis in law for denying the commercial portion of a station's output this same protection. The program selection process has been reposed in the broadcaster (*McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600 (1945)), and this includes the power to select the amount and type of advertising matter to be broadcast.

In sum, the proposed rules tread in an area forbidden to the Commission by both the Constitution and Section 326 of the Communications Act of 1934, as amended.

II. ASSUMING THE NECESSARY AUTHORITY THERE ARE NO STANDARDS FOR ITS EXERCISE

Assuming *arguendo* the necessary authority in the Commission to limit in advance the amount of time that may be devoted to advertising by a broadcaster, there are no standards for its exercise. Certainly the grants of authority in the sections of the Act relied upon by the Commission here are too vague to support the limitations proposed in the Notice. See *Schechter Corp.* v. *United States*, 295 U.S. 495, 530 (1935). The public interest standard is far too uncertain a guide for the imposition of a prior restraint by a regulatory agency of what the people may see and hear. *Joseph Burstyn, Inc.* v. *Wilson, supra; Schneider* v. *State*, 308 U.S. 147, 161 (1939). There must be a sufficiently precise definition of the regulator's authority. *Saia* v. *New York*, 334 U.S. 558 (1948). Compare dissenting opinion of Justice Douglas in *United States* . *International Union*, 352 U.S. 567, 596 (1957), where he stated:

"When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because *some evil* may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control." [Emphasis supplied.]

Sections 4(i), 303 and 307(a) of the Communications Act of 1934, as amended, do not contain any authority for what the Commission proposes here. Even if such authority could be assumed, there are no standards for its exercise. In and area such as this, where fundamental concepts are involved, precise legislative standards are required for guidance of the administrator. *Saia* v. *New York, supra*. There are none in the Act.

III. THE COMMISSION'S PRIOR ACTIONS RELATIVE TO ADVERTISING CANNOT SUPPORT THIS PROPOSAL

In the Notice in this proceeding, the Commission cites a number of cases where it had considered applicant's commercial practices. This prior consideration, however, lends no support to the Commission's proposal here. The unchallenged exercise of power does not vest it with color of authority. *Cf., Jones* v. *Liberty Glass Co.*, 332 U.S. 524 (1947). Suffice it to say, that we need not reach the question of what authority the Commission has to consider commercial practices in another context. It is sufficient to note that it lacks authority to impose prior limitations (which is vastly different from the actions taken in the cases cited by the Commission in the Notice) on the amount of advertising that may be broadcast.

IV. THERE ARE PRACTICAL REASONS WHICH MILITATE AGAINST THE COMMISSION'S INTERJECTION INTO THIS AREA

Even were the law otherwise and the Commission had authority to set itself up as a national arbiter of taste, there are many practical reasons which militate against the Commission's entry into the role of censor. Prior to this discussion, it would appear appropriate, however, to place this proposal in proper prospective by considering the order of magnitude of the "problem" which caused the Commission to even consider such a drastic departure from its traditional role.

As indicated by Chairman Henry in his address before IRTS (see n. 2, supra), the Commission received approximately 2,500 complaints about advertising during fiscal 1962. About 35 percent, or less than 900 of these complaints, related

to the length, amount, and frequency of commercials. In our judgment, the total number of complaints can only be characterized as de minimis, especially when it is considered that this number amounts to less than one-half of a complaint per operating station. In fact, a good station gets more letters of commendation for its programing during a year than the total number of complaints concerning the whole industry.[15] When the more realistic figure of 900 is considered in relation to this proposal, it is evident that someone has made a mountain out of the proverbial molehill.

A. The Commission's Proposal Is At Cross Purposes With Its Other Activities

The Commission, through the speeches of its members, public policy announcements, and other means, constantly exhorts the industry to carry more public affairs programing, experiment with new program types such as editorializing, makes more searching its audience analysis, et cetera ad infinitum. Occasionally a staff letter will leave the broadcaster with the distinct impression that if he carried more local live programing during so-called prime time, his renewal application would fare better. But whatever the means of "persuasion," the fact remains that it takes money to do these things under the American system of broadcasting and the advertising dollar must pay the freight.[16]

It is a simple answer to say, "well raise the rates"—and what communications attorney has not said it over and over again. But he, like the Commission, is not on the local scene. In addition to the other problems discussed infra, this approach in time runs headlong into the law of supply and demand and the advertiser abandons broadcasting for another "buy" which can be bought more economically and efficiently. Nor is it any answer to broach the "conscious parallelism" approach to state that "if you all do it, you will at least be on the same footing." The short answer to this parallelism approach is that broadcast advertising is purchased, like other media, on the basis of circulation translated into cost per thousand and no two stations (even in the same market) have the same circulation. Some are 250 watt stations, some have 50 Kw/s, some are wide area VHF stations, some are struggling UHFs, some are independently operated FMs where the advertiser has not recognized what a good buy they make, some are independently operated TV stations in a seven station market, some are locked-in (due to engineering considerations) into what is a highly favorable monopoly situation. Some are in depressed markets—some are in markets where the consumer spendable income is high. In short, each station is different and faces different problems. There are as many variables as there are stations and the Commission would be well advised to let each station find its own way in the traditional pattern. Stated another way, there would have to be a separate code for each station (with a separate Government monitor to enforce it or advise when it is being violated) in order for this proposal to achieve some semblance of workability.

B. The Proposal Runs Headlong Into Conflict With Administration Policy

In the final analysis, the proposal contained in the Commission's Notice is inherently antibusiness and antigrowth. Further, it is completely at odds with administration policy.

Since 1960, all of us have heard the recurrent slogan, "We've got to get this country moving again. We've got to increase the gross national product." The speaker, of course, was our President. As he stated on another occasion:

"If we are to prevail in the long run, we must expand the long-run strength of our economy. We must move along the path to a higher rate of growth and full employment." [17]

Again, he said:

"When business does well in this country, we have full employment, and this country is moving ahead, then it strengthens our image as a prosperous and vital country in this great fight in which we are engaged. When you do well, the United States does well, and our policies abroad do well." [18]

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[15] Our calculation, based upon the 28th Annual Report to Congress for Fiscal 1962, would place the total number of complaints relative to all commercial practices in the neighborhood of 1,900. At any rate the figure is miniscule when compared to the commendatory mail which the average broadcaster receives. One of our stations estimates that it receives on the average of ten letters a day commendatory of its programing.

[16] "Advertising is the lifeblood of newspapers, radio, and television * * *" *Pottstown Daily News Pub. Co.* v. *Pottstown Broadcasting Co.*, 25 Pike & Fischer R.R. 2131, 2134 (Pa. S. Ct. 1963).

[17] State of the Union Message (1963).

[18] Address before the National Association of Manufacturers on December 6, 1961, in New York City.

Broadcasting advertising moves goods and services. There can be no question about this proposition. Members of the print media will readily, if not a little grudgingly, attest to it. If advertising is to be limited in amount with a deprivation of access to some, profits will suffer and the economy will suffer correspondingly.

Especially in television, Congress has already expressed its concern that there are now insufficient opportunities for access to the medium by the small businessman. See "Advertising and Growth Opportunities for Small Business in Television and Radio," H. Rept. 2571, 87th Cong., 2d Sess.[19] The Report states that the problem relative to access to the television medium was summed up by Mr. George J. Burger, vice president in charge of legislative activities of the National Federation of Independent Business. One of Mr. Burger's more forceful conclusions was:

"There seems but little question that as it is now operated, TV has been, and continues to be, a most powerful force to centralize business in a monopolistic pattern." Report, p. 46.

The Committee selected the following testimony given by Mr. Norman E. Cash, president of the Television Bureau of Advertising, to indicate the "vital importance of television advertising to the economic survival of the businessman":

"The Television Bureau of Advertising, Inc., agrees that the magnitude of importance of the utilization of television for advertising purposes becomes not only apparent, but a necessity in the economic growth of this country. The choice is that of the businessman—to use television or not. By not using this powerful medium and allowing his competitors to do so he may well cause his own economic collapse." Report, p. 12.

Can anyone seriously question that this proposal will further restrict access to this vital medium? Can anyone seriously question that a limitation of access will cause a broadcaster to increase his rates, because he is already caught in the proverbial rising price spiral?[20] As a consequence, access to the medium will be further constricted with a consequent adverse impact on the small businessman and America's economy in general.

This would raise additional problems with which we do not intend to dwell upon at great length. Who acts as the traffic cop? Who is to decide who gets access to the medium. Are we now to become common carriers who must see that access is afforded on a nondiscriminatory basis with a guaranteed rate of return? The Act makes clear that broadcasting is not a common carrier activity (see Section 3(h), 47 U.S.C. 3 (h)), but this would appear to be one of the inevitable consequences of the Commission's approach in this docket.[21]

In sum, this proposal is monopolistic in tendency and completely at odds with long established legal precepts and governmental philosophy.

C. The Proposal (Or Any Substitute) Would Be Impossible Of Administration

In order to administer this proposal properly and to avoid discriminatory application, the Commission would have to place a monitor in every station's continuity department. As the Commission is well aware, the NAB Codes are not so clear that they are not subject to varying interpretations. Many problems of interpretation have arisen and more will arise in the future. Should a broadcaster be subjected to a monetary forfeiture simply because he makes a wrong interpretation?

As it is now, the majority of the broadcasters are required to retain Washington counsel to keep abreast of the latest "word from Washington" and to avoid the many pitfalls of the voluminous rules to which the industry is already subject. If counsel is not retained, the station manager must devote the majority of his time to this task and the programing operation of his station must necessarily suffer.

It would appear that the time has arrived for a flicker of recognition that broadcasting is not an infantile industry. It has served, grown, and prospered without heavy-handed intervention of government and it will continue to do so if left alone.

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[19] A report of the Select Committee on Small Business pursuant to H. Res. 46.

[20] It must be remembered that in some instances the broadcasters is committed to spend in excess of $100,000 for fixed costs in that week when the keys goes in the lock Monday morning.

[21] It is clear that this, too, would require additional legislation. Cf., testimony of Commissioner Cox (n. 13, supra).

D. The Proposal Is Discriminatory

As the Commission noted, only about 70 percent of the television stations and 38 percent of the radio stations subscribe to the Codes. *Naturally, there are no figures on the numbers which adhere strictly to their provisions.* These figures standing alone are mute testimony that at least a large number of industry members believe that they cannot exist with the present provisions of the Codes.

The Notice itself recognizes this frailty by requesting comments on whether other standards are more appropriate; whether variants should be adopted; and whether and what circumstances waivers from their provisions should be considered. When such frailities are admitted, it is axiomatic that no rule should issue.

The discriminatory nature of the Codes in their present form may be emphasized by one example. As the Commission knows, the Television Code allows a certain number of announcements in daytime participating programs. Yet during the hours when an independent station must receive its high monetary yield in order to achieve a return that will allow it to procure programing to compete with the popular network features, it is faced with a constricted amount of saleable time, *despite the fact that it must still sell participations during these hours.* It must earn enough to be able to provide service for 130 hours a week. Yet it must cut back on its availabilities during its highest yield time periods while its competitors are enjoying the benefit (and the income) from programs which they neither need to produce nor sell.[22]

Another area bears examination. In computing the total time allowed for commercial material during prime time, the Television Code (Eighth Edition—September 1963) states that "[c]ommercial material in prime time includes billboards, public service announcements, promotional announcements for other programs as well as commercial copy." When faced with decreasing availability of saleable time, it will only be natural for the broadcaster to either eliminate or drastically curtail the amount of his time that he unselfishly devotes to the various public service causes and activities that have come to rely upon his assistance and help. We are certain that the Commission does not wish this to happen.

The following breakdown was taken from the monthly programing report for one of our stations. The listing includes only public service announcements. It does not include public service sustaining programs.

During the period from June 1 to June 30, WNEW–TV telecast a total of 1,191 public service announcements. A breakdown follows:

929	60 second announcements
16	30 second announcements
14	20 second announcements
230	10 second announcements
1	08 second announcement
1	05 second announcement

In addition, we presented approximately 67 promos for sustaining programs, 55 Morning and Evening Prayers, and 60 anthems.

Two 12-minute spot announcements for the Greater New York Fund, with Paul Newman, were telecast in June.

One minute spot announcements for the benefit of the International Rescue Committee were used in June. These public service announcements describe the plight of Cuban refugees.

Special campaigns were directed especially at the children in the station's audience, and were featured during the programs Just for Fun, the Sandy Becker Show, Sandy's Hour, Deputy Dawg, and Felix and the Wizard.

WNEW–TV's star children's talent, Fred Hall, Sandy Becker, and Sonny Fox, joined together for an all-out, all-summer promotion of neighborhood Muscular Dystrophy "Carnivals," on the above-mentioned programs. The talent distributed "Carnival" kits to children throughout the city. The kits included tips on carnival games, suggestions for the formation of a "Carnival Club," and advertisements to call attention to the local get-togethers. Children, upon receipt of the kits ran their own "Carnival," with the resultant cash raised, going directly into the Muscular Dystrophy coffers.

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[22] The Television Code would appear to grant recognition to the old adage of the superiority, or at least the tolerance, of the female of the species. Advertising in daytime programing is allowed more leeway than the so-called prime time hours, when the tired businessman is more likely to be before his set. If a certain number of commercials is all right for daytime hours, why isn't it all right for nighttime? What sets the latter time period apart? To state the query demonstrates the lack of logic in this area.

We do not claim to be unique in this regard. All give. Some give more—some less—but the total industry contributes and the contributions in time set forth above for this one station would run into thousands of dollars if priced out at the regular commercial rate.

Other examples could be given but they would only highlight the discriminatory nature of the Codes, not only to the broadcaster but also to the public.

V. SUGGESTED COURSE OF ACTION

The Commission's Notice requested comments as to alternative proposals that could be considered. In view of the state of the law and the complete lack of Commission authority to adopt any prior restraining proposal, no alternatives would be acceptable.

VI. CONCLUSION

"The Commission cannot substitute its taste for that of the broadcaster or his public [and] * * * it cannot set itself up as a national arbiter of taste. Such wholly improper action by the Commission would be disastrous to our system of broadcasting and would not be tolerated by the courts or by the Congress." [23] It is submitted that this quotation points to the inevitable result here.

Wherefore, the premises considered, the Commission should dismiss this proceeding forthwith.

METROMEDIA, INC.
By ROBERT A. DREYER,
By THOMAS J. DOUGHERTY,
Its Attorneys.

SEPTEMBER 30, 1963.

Mr. ROGERS of Texas. Mr. Hull?

Mr. HULL. I just have one question to ask Mr. Evans.

What was it the Commission had? 674 complaints?

Mr. EVANS. Yes, sir.

Mr. HULL. That was on station commercial practices? What percentage of that dealt with all of the commercials put out over the air?

Mr. EVANS. There is room for some question about that, Mr. Hull. I took this from the Federal Communications Commission's 28th Annual Report for 1962. It says 16 percent in one place or 35 percent. And we think it is ambiguous as to whether it is 16 percent or 35 percent.

Mr. HULL. It is rather miniscule overall.

Mr. EVANS. That is correct.

Mr. HULL. Well, how many complaints have you received through your operations in the various States?

Mr. EVANS. The number for one station or for the entire chain?

Mr. HULL. For the entire chain.

Mr. EVANS. Oh, if we average one a month we are very stirred up.

Mr. HULL. Do people tend more to take it up with the local broadcast people than to send it into the FCC?

Mr. EVANS. It depends on the individual and his knowledge of the industry, but I remember a comment that was made by a leading advertising executive in this country one time, and he said "If we get one complaint that is written to us and a carbon copy to the sponsor, there is trouble; if we get two there is real trouble, and if we get three, there is real chaos."

Some complaints are very carefully adhered to by our company and I would think by all.

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[23] Commission decision in the so-called Kingstree case, quoted in the Commission's brief in *E. G. Robinson, Jr. v. Federal Communications Commission*, U.S. App. D.C. Case No. 17,587 (at p. 57).

Mr. HULL. Thank you very much.

Mr. EVANS. We are very concerned about them whenever we get them.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I enjoyed your statement, but I have no questions.

Mr. ROGERS of Texas. Off the record.

(Discussion off the record.)

Mr. ROGERS of Texas. Back on the record.

Mr. Evans, your comments there about the possibility of some people in competitive lines generating some of this heat, on that let the Chair say this, that if they are doing it they are doing it secretively.

As a matter of fact, I was very much surprised that we did not have more requests or I might say even more requests from some groups asking to appear here in opposition to this legislation and, so far as I know, at the present time we have had no requests, have we, Mr. Clerk?

Mr. WILLIAMSON. That is correct, Mr. Chairman.

Mr. ROGERS of Texas. We have had none to appear in opposition, and the only opposition that has apparently come forward so far has been the Federal Communications Commission.

Mr. EVANS. I have reference, Mr. Chairman, to many newspaper articles, one of which appeared only last week in just a suburban paper here, that had a front page story that covered about half of the front page, and it was the kind of question that said: "Have you stopped beating your wife?"

It was very leading and only one answer could be given.

We acknowledge the weaknesses sometimes on television and in radio, but we frequently think that many of the things are headlined that are not necessarily in the best interests of our industry, which is understandable.

I think the report of this hearing the first day was a little bit underplayed in some instances and overplayed in others. I do not believe them, but I think it is part of the reason.

Mr. ROGERS of Texas. Surely; but the thing I am wondering about is why those people, instead of doing that, do not come here and make their feelings known if they feel like they have a justifiable cause.

There has been quite a bit of publicity given to these hearings and people from all over the country have written me about them, and I have had no letters at all in opposition to this proposed legislation, which indicates to me that the very few complaints, relatively speaking, which Mr. Hull was talking about is undoubtedly true, because the people generally, who might complain to a local radio or TV station about a matter of this kind would complain to them, and in some instances the people do not know that they can write to the Federal Communications Commission.

They do not know there is an FCC. I have had letters like that, but they do know that there is a Congress and usually he writes his Congressman about this sort of thing, and with all of this publicity it would seem to me that if this situation was one thousandth as serious as has been represented that there would be a lot more complaints.

Mr. EVANS. I think it is very serious, Mr. Chairman, because I have made quite a study of this thing and I think this media cannibalism is a pretty serious thing in our country, for the simple reason that if the newspapers attack television and the billboards they are eventually going to be attacked themselves.

And it is not very farsighted of any medium to attack any other medium because advertising is pretty basic to our way of life.

Mr. ROGERS of Texas. Thank you very much.

Mr. HULL. Mr. Chairman, I have been up here nearly 9 years and I do not think I have had one letter of complaint about commercials on TV in our area.

Mr. EVANS. We are happy to hear it. We hope you do not have any.

Mr. HULL. Sometimes I think the commercials are better than the shows.

Mr. ROGERS of Texas. If the gentleman will yield at that point, I have had quite a few letters in which people in certain groups have criticized the television ads on beer and on tobacco and also some complaints about the use of whisky in these pictures, whether it be a cocktail party or a western show in a bar, and things of that nature, but I do not think I have received any with regard to commercials; that is, as being too loud or overcommercialization.

Mr. EVANS. We never get perfect. We can strive for it, but I am sure we are not even close to being perfect.

But I think the one thing that we can sell to the American people is that 99.9 percent of the American broadcasters are dedicated people.

Mr. ROGERS of Texas. When you cease to be dedicated to what you are trying to do, you will not be in business very long.

Mr. EVANS. I agree with you, sir.

Mr. ROGERS of Texas. Thank you very much.

Mr. EVANS. Thank you.

Mr. ROGERS of Texas. Our next witness is Cecil Woodland, from the Pennsylvania Association of Broadcasters.

STATEMENT OF CECIL WOODLAND, ON BEHALF OF THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS

Mr. ROGERS of Texas. Mr. Woodland, it is nice to have you.

Mr. WOODLAND. Thank you, Mr. Chairman. I will be very brief, but I do represent a large bloc of broadcasters.

My name is Cecil Woodland, general manager of WEJL, a daytime radio station located in Scranton, Pa. As national affairs chairman and past president of the Pennsylvania Association of Broadcasters, I am representing that association, which comprises 175 radio and television stations licensed to operate in Pennsylvania. Because of our strong opposition to the proposed FCC rulemaking in respect to limitation of commercials, we strongly support and endorse H.R. 8316.

The Pennsylvania Association of Broadcasters has made known its opposition to this proposed rulemaking in extensive comments filed with the FCC early in September of this year. Not only are Pennsylvania broadcasters almost unanimous in their opposition, but a great many prominent newspapers have editorialized against the proposed commercial limitations. The fact that a competitive medium comes

to the support of broadcasting points clearly to the fact that the newspaper industry recognizes that such controls over broadcasting could threaten its own industry.

We feel that such a fear is valid, and we also feel that the proposed rulemaking goes far beyond what can properly be termed "rulemaking." We cannot believe that it was ever the intent of Congress to grant such powers to an administrative body, and H.R. 8316 would serve to make crystal clear that such controls should not be exercised by the FCC. Opponents of this bill have been vocal in attempts to persuade that the purpose of the rulemaking is to eliminate irritating commercials, although no one, to our knowledge, has defined what represents an irritating commercial. These opponents have also claimed that the rulemaking will eliminate overcommercialization, and no one has yet defined exactly what represents overcommercialization.

We believe the American public can well control the commercial activities of all broadcasters by simply tuning away from any stations, which, in their opinion, broadcasts irritating commercials, or, in their opinion, too many commercials. Without audience, no station can survive and the size of the station's audience determines, in great part, the amount of revenue that station will have.

To drive away audience is to drive away revenue. As responsible broadcasters, we recognize our duties to operate in the public interest, and every 3 years we are required to justify the fact that we do operate in that fashion, and if we do not so operate, we risk the loss of our license. The Pennsylvania Association of Broadcasters is on record as endorsing the voluntary codes of the National Association of Broadcasters, and it believes that such voluntary codes, backed by the requirement of applying for and justifying license renewal, is more than sufficient guarantee that broadcasting serves the public interest. The passage of H.R. 8316 will be of value to the radio listener and the television viewer, not simply the station operator. Listeners and viewers will gain because broadcasters recognize that such listeners and viewers are the final judges: they must be pleased; they must not be irritated or they will tune to another station; and finally, with lessened fear of FCC rulemaking of this nature, the broadcaster can focus more attention on his own community and its broadcasting needs.

Thank you very much.

Mr. ROGERS of Texas. Thank you, Mr. Woodland.

Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Thank you, Mr. Woodland.

Let me ask you this: How many of the broadcasters are members of your association?

Mr. WOODLAND. We have close to 90 percent.

Mr. ROGERS of Texas. Close to 90 percent?

Mr. WOODLAND. Yes.

Mr. ROGERS. Thank you very much, sir.

Mr. WOODLAND. Thank you.

Mr. ROGERS of Texas. Thank you for your fine contribution.

Our next witness is the Honorable John J. Ryan, general counsel of the Advertising Federation of America.

STATEMENT OF JOHN J. RYAN, GENERAL COUNSEL, ADVERTISING FEDERATION OF AMERICA

Mr. ROGERS of Texas. Mr. Ryan?

Mr. RYAN. Mr. Chairman and gentlemen, my name is John J. Ryan and I am general counsel for the Advertising Federation of America. My purpose in coming here is to tell you why the Advertising Federation of America strongly believes that the bills which are before this honorable committee for consideration and which would prohibit the Federal Communications Commission from regulating the length or frequency of advertisements which may be broadcast, should be enacted into law.

And on the subject that was mentioned by the two previous speakers, the question as to what is the feeling of the other departments of advertising in this country, I think maybe we are as well equipped to speak about this as anybody.

By way of introduction may I explain to you just who it is that I represent here today. The membership of the AFA centers around 141 advertising clubs located in our leading cities from the Atlantic seaboard as far west as Denver.

It has nearly 1,000 individual corporate members, many of which are large national advertisers, some of which are great advertising agencies and some of which are publishers of newspapers and magazines and radio and television broadcasters. Also represented on the board of directors of AFA there are 20 national associations of people involved in the various specialized fields of advertising.

Thus, we combine under one roof all facets and phases of advertising: the advertiser, the agency, and media. In addition to all this, AFA maintains close liaison with the Advertising Association of the West, an association of 44 advertising clubs operating in the area between the west coast and Denver, and I am authorized to inform you that this association has endorsed the position which AFA is taking in this statement today.

Many years ago the Advertising Federation of America embarked on a crusade for truth in advertising, and it still continues this crusade more than a half century later .

We were the ones who formulated the better business bureau, which most of you gentlemen are aware of, and I am sure you are aware of the good work that they have done over the years.

To advance this crusade the AFA, back in 1911, conceived the idea of organizing vigilante committees in each of its member clubs throughout the United States. The purpose of these committees was to insure that those engaged in the business of advertising would maintain the highest ethical standards and would adhere to the code of advertising practice promulgated by the AFA in those days.

These committees later became known as better business bureaus and then to give them unfettered freedom of action, AFA finally cut them loose from the local advertising clubs to become completely autonomous, as they are today. I am sure that all of you know of the fine job that the better business bureaus of America have done for the American consumer public over the years. And it was the AFA which recommended to President Wilson the establishment of the Federal Trade Commission back in 1913.

So you will see, gentlemen, that while we feel that our organization has always been a good friend of advertising, we have always, in its own best interest, been its severest critic and have been the first to propose measures to protect the public from those who do not live up to the high standards of advertising practice to which we are dedicated.

It is in our capacity as the friend and critic of advertising that we are here today.

That there is some overcommercialization in broadcasting no one can deny any more than anyone can deny that some of the programs themselves could stand a great deal of improvement. But isn't that something that should be left to those whose responsibility it is to their employers to present to their customers and their potential customers a maximum of enjoyment and a minimum of annoyance?

There is no charge made here by the Federal Communications Commission that the broadcasting industry has shirked its responsibility or is lacking in good will or good faith in its continuing effort to regulate its own business. The very fact that it has voluntarily produced a code which the Government thinks so highly of is the best possible evidence of that. The Commission's complaint is that the National Association of Broadcasters doesn't have the power to enforce its code by penalties and legal sanctions because the antitrust laws of the country forbid it to do so. The FCC says in effect: "You are cooperating splendidly. Your code is so fine that we want to enact it into law but we can do the job of deciding what people shall see and hear on television and radio better than you because we have the power to impose heavy fines upon broadcasters or take away their property if they do more advertising than we think they should."

Do we want this police-state approach in an area which has nothing whatsoever to do with the health, safety, morals, or welfare of our people? I think not.

Our remedy for whatever abuses exist is self-regulation by an industry which has already shown a disposition to clean its own house. The reason self-regulation is bound to work in this field is a very simple but a most persuasive one—self-interest. It will be effective because the advertiser and the broadcaster are conscious of the fact that the most potent regulator of all responses within the control of those most affected—the viewing public. Small children have this magic power as well as grown men. It require merely a certain dexterity of the human wrist.

Under our American system, competition and the knowledge that in the long run the public has the good sense to know when it is being abused will effectively restrain even the most avaricious time grabber.

In my own home my wife and I, and even our young children, have learned to shun some of the broadcasts which are overcommercialized. If a program we are watching becomes boring because it is carrying too many commercials, we don't feel deprived of life, liberty, or the pursuit of happiness. We feel annoyed and we react accordingly by imposing upon the offending broadcaster and advertiser the deadliest sanction within the power of men or governments—we flip the switch.

On some shows there are perhaps more commercials than we would care to listen to, but if the programs are worth while we feel that this is a small price to pay for top-grade entertainment.

We know that a beneficent Government might intercede and end all these bothersome commercials but we also know that if it does,

someone else besides the advertiser will have to pay the cost thereafter and we have an uneasy feeling that that someone just might be us.

But the overriding objection that AFA has to the proposed regulation—and this is why we are here today—is that it amounts to censorship and is violative of the first amendment to the Constitution of the United States.

If the FCC has the power to decide that three commercials are too many in an hour's program, it also has the power to decide that two are too many and if this is so, what in fact is there to prevent it from deciding that one is too many?

Unless the FCC has been given somewhere a grant of power that has been denied to every other branch of Government and to the Government itself by the first amendment—that is, the power to abrogate freedom of speech—then it has no right to the power it claims by this proposed regulation.

Advertising by the printed and spoken word is protected by this amendment. Mr. Justice Douglas in the famous *Cammarano* case of 3 years ago clearly enunciated that principle when he said:

> That freedom of speech or of the press directly guaranteed against encroachment by the Federal Government and safeguarded against State action by the due process clause of the 14th amendment is not in any terms or by implication confined to discourse of a particular kind or nature. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise.

In that same year Congressman Overton Brooks, chairman of one of the most important congressional committees, stated this in layman's language when he said:

> The power to sit in judgment over advertising is in fact the power to destroy a business. One of our cherished freedoms is freedom of speech and press. This in my opinion definitely includes paid advertising.

And let us remember that the first amendment does not guarantee that a citizen shall have the right to say only some part of what is on his mind. Freedom of speech is an absolute guarantee of the Constitution. There are no degrees of freedom of speech spoken of in that document. Under the Constitution you either have the right to say all of what you want to say and as often as you want to say it or you haven't the right at all.

In my estimate the proposed regulation would definitely be an abrogation of the first amendment to the Constitution and it would clearly be a departure from the time-honored FCC position that it has no power to regulate advertising on radio or television broadcasts.

But the FCC by this proposal has thrown down the gauntlet. It says, in effect: "We have had this power all along. Now we are going to use it."

Those who oppose this assumption of power have two alternatives:

(1) The passing of legislation which will write into the law in clear, unambiguous language a specific prohibition against it; or

(2) A long, expensive fight in the courts which may result in the restriction or abrogation of this regulation and which also may wind up, after every other forum has been exhausted, in an appeal to the Congress for the relief that could have been afforded by the Congress in the first place.

It is evident that legislation is the only sensible alternative to pursue in order to put an end to this threat which it is now evident we will always have with us until this question is resolved.

In the interest of all of advertising and principally for the reason that the fundamental right of freedom of expression is threatened by the proposed regulation, the Advertising Federation of America wishes to record its strong support for the legislation which is before this committee.

It may well be that all that this legislation is doing is repeating a guarantee implicit in the first amendment of our Constitution. But so long as the issue has been raised, let us settle the matter in a straightforward and simple manner, at a minimum of cost in time and money to those affected and without the serious damage which even a temporary imposition of this regulation would cause to many.

Mr. Chairman, in conclusion, I would like to say that this morning I heard you state that the FCC had indicated that maybe this proposed legislation should be put off for another year.

In respect to that let me say this: If there was one thing that I learned in 17 years in the service of my own New York State Legislature it was this, that one of the finest gambits that there is in knocking down legislation that you are not very keen about, the most effective, and the most sophisticated probably, is the device of laying it over next year and, for that reason, Mr. Chairman, I would most certainly urge the passage of this legislation this year if it is at all possible.

Mr. ROGERS of Texas. Thank you, Mr. Ryan, for your statement and your concluding statement.

The FCC has taken the position that until they have had an opportunity to act, to make a determination as to whether or not this power ought to be exercised by them, that the Congress should not pass any legislation on this subject.

Needless to say, I am in direct conflict with that type of thinking.

Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. Thank you very much, Mr. Ryan.

Mr. Ryan, let me ask you one question with regard to the other advertising media. Has there been any indication to you by any of them that they feel like or they feel that it would be helpful to them—say the newspapers or magazines—that it would be helpful to them if the FCC would invoke this rule?

Mr. RYAN. No, quite the contrary, Mr. Chairman. I think their feeling is that this is a precedent which affects everyone of them in their own particular fields, and they are fearful of it—this regulation.

Mr. ROGERS of Texas. Yes, that would be what I would think.

Thank you very much.

Our next witness is Mr. Howard B. Hayes, chairman of the Government Liaison Committee of the Virginia Association of Broadcasters.

STATEMENT OF HOWARD B. HAYES, CHAIRMAN, GOVERNMENT LIAISON COMMITTEE, VIRGINIA ASSOCIATION OF BROADCASTERS

Mr. ROGERS of Texas. Mr. Hayes, will you come forward, please?

Mr. HAYES. Mr. Chairman, and members of the subcommittee, I and those whom I represent are very appreciative of the privilege accorded me in being present before you today.

My name is Howard B. Hayes. I am vice president and general manager of Potomac Broadcasting Corp., licensee of radio station WPIK, Alexandria, Va., vice president and general manager of WOKO, Inc., licensee of radio station WOKO, Albany, N.Y., and president and general manager of WBVA, Inc., licensee of radio station WXRA, Woodbridge, Va. I have been actively engaged in broadcasting for more than 30 years.

I appear before this committee, however, in my capacity as chairman of the Government Liaison Committee of the Virginia Association of Broadcasters, representing the association which comprises, through membership, the majority of all radio and television broadcasting stations operating in the Commonwealth of Virginia.

The Virginia Association of Broadcasters strongly supports H.R. 8316 and urges its enactment by the Congress of the United States. In order that this committee may know the reasoning behind the posture of the Virginia Association of Broadcasters in this matter, the following comments are set forth for consideration by the committee and all parties at interest in this proceeding.

The opposition of the association to any controls, express or implied, on the length and/or frequency of advertising matter carried by any and all stations comprising the broadcast media is not predicated upon any desire to oppose for the mere sake of opposition. Rather, the opposition of the association is based upon salient factors concerning the economy of our industry, the general economy of the Commonwealth of Virginia and the United States and the public interest in terms of free expression.

The Congress enacted the Communications Act of 1934, which, among other things, established the Federal Communications Commission as an instrument of Congress to administer the act. Careful scrutiny of the Communications Act of 1934 reveals nothing, express or implied, to indicate, in any form whatever, the intent of Congress to confer any authority upon the Federal Communications Commission permitting that commission to exercise control of the traffic in the broadcasting medium.

Conversely, the Communications Act of 1934 contains specific prohibitions against such control of the traffic and clearly expresses the intent of Congress to insure that no element of censorship might derive from the administrative actions of the Federal Communications Commission.

To permit the Federal Communications Commission, in any sense, to exercise control, by any means whatever, over the commercial content of broadcast programing would provide the means to exercise total censorship and open the door to a Government-controlled broadcasting system in the United States.

With a steady decline in the number of newspapers, over the past few years, the broadcasting industry has become one of the most important, if not the most important news media serving the people of this country.

Operating as a free enterprise system, broadcasting has grown from a meager beginning to substantial stature, nurtured by the investment of private capital and tremendous personal effort exerted by solid citizens bent on providing programing that will capture and hold audiences.

Generally speaking, broadcast station policy is determined by professionals in the field who are fully cognizant of their responsibilities to the public. These policy determining individuals are also fully aware that if the commercial content of their programing is excessive or offensive the stations they direct will soon lost favor with the listeners or viewers which immediately reduces their commercial value to advertisers or potential advertisers.

They are not likely, therefore, to run headlong into a commercially unprofitable situation by indulging in killing the goose that lays the golden egg. The presence of a simple tuning mechanism embodied in virtually every radio and television receiver places in the hands of the listener and viewer the absolute control of the effectiveness of all broadcasting, whether it be commercial or noncommercial in nature.

It is self-evident, I believe, that certain standards relating to advertising, with respect to truthfulness, good taste, and the like, must be maintained. To a large degree the broadcasters themselves perform this function. Regulation, at Government level, if and when required, is properly the business of the Federal Trade Commission.

It is rather incongruous that the Federal Communications Commission should, on the one hand, consider placing limitations on the handling of commercial content in broadcasting by rule and regulation while, on the other hand, under existing rules and regulations, the Commission imposes upon each licensee of a radio and television station the sole responsibility for determining what shall and what shall not be broadcast and measures his performance under this mandate at license renewal time in terms of his fulfillment of poorly defined "public service" responsibilities, or operation in the public interest.

Somewhere along the line the false notion has arisen that broadcasting is totally different from printed communications. Most of those who expound this theory base their contention on the fact that broadcasting operates in the so-called public domain because broadcast stations occupy specific parts of the radio spectrum and there exists an opportunity for only a limited number of such stations without incurring impossible interference between stations which would reduce the effectiveness of all. The "public domain" exponents class the radio spectrum with its limitations as a public resource.

I submit, however, that unlike our forests, our minerals, our petroleum, our tillable lands, et cetera, the radio spectrum is not something which is consumed. So far as science can determine, it has been with us always, will continue to be with us in the future, and in no way is being used up.

It is not, therefore, necessary to husband this invisible spectrum against untoward destruction or unwise and rapid use to the detri-

ment of future generations as may be the case in those areas we normally consider natural resources. Inasmuch as broadcasting is not "using up" the spectrum or depleting it in any way, it appears unusual, to say the least, that there should be any distinction placed on broadcasting as opposed to print media of communication, which media, incidentally, is under no control, present or anticipated, which limits the amount or quality of its advertising content.

If Government control of advertising content is good for broadcasting, is it not equally good for print media? The Virginia Association of Broadcasters wants no controls of this nature placed on any medium.

The Federal Communications Commission has, for some time, urged the upgrading of broadcast programing in both the visual and aural branches of the broadcast medium and there are few in the industry, I am sure, who would argue against the medit of such urging. There is one thing quite certain, however: it costs money and lots of it to do any programing. Broadening the base of a station's program structure is expensive.

It may be a good investment but, there must be reasonable assurance that a fair return on the investment will be realized. Limitations on the amount of advertising a station may carry could and most surely would provide a quick answer as to how far a station might proceed in its efforts to provide an improved program service. It appears logical that the imposition of limits on the length and frequency of advertising material would force the rates charged by stations upward.

At the extreme of this situation complete saturation would be reached in which no more dollars would be derived regardless of the program content because the station would simply price itself out of the market. At the same time, the small business, unable to afford high rates, would be excluded from using the broadcast medium.

The net result of controls on advertising content would, in the opinion of the Virginia Association of Broadcasters, result in severe degradation of the broadcast service to the public and deny, totally or in part, an important advertising medium to many businesses with the real possibility that the general economy would suffer in the end, as well.

Thank you very much.

Mr. ROGERS of Texas. Thank you very much, Mr. Hayes, for your statement.

Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Thank you very much, Mr. Hayes.

Mr. HAYES. You are quite welcome, sir.

Thank you, Mr. Chairman.

Mr. ROGERS of Texas. Our next witness is Mr. Don C. Dailey, president of the Missouri Broadcasters Association of Springfield, Mo. Mr. Dailey, you are recognized.

STATEMENT OF DON C. DAILEY, GENERAL MANAGER OF RADIO STATION KGBX, SPRINGFIELD, MO.

Mr. DAILEY. Thank you very much, Congressman Rogers.

I am Don C. Dailey, general manager of radio station KBGX in Springfield, Mo. I am immediate past president of the Missouri Broadcasters Association. The association is composed of 76 radio and television stations broadcasting in Missouri. The comments I make today are in behalf of these stations, made after due deliberation with those stations, and the board of directors of the Missouri Broadcasters Association.

We feel that the Communications Act of 1934 under which stations are licensed outlines the powers which the Congress has delegated to the Federal Communications Commission but that House bill 8316 must be enacted to clearly define the authority of the FCC.

At this point, Congressman Rogers, with your permission and the permission of the committee, in order not to appear as a hostile witness, I would like to jump to the first paragraph of page 5 in the interests of brevity and hope that all of these comments could be included.

Mr. ROGERS of Texas. Your prepared statement will be included in the record the same as if read in full, Mr. Dailey, and you may comment on it as you please.

Mr. DAILEY. Thank you, sir.

The main ingredient of the free enterprise system of American broadcasting is the fact that the licensee, having been carefully selected by the Commission's processes, is presumed to be capable of exercising proper discretion as to what should be broadcast over the facilities which have been entrusted to him. Except for a very small group, we believe licensees have exercised their discretion in a most commendable manner. As in every group, some have abused their privilege; but these represent a very small percentage of the whole. Certainly this group is no greater percentagewise than the number of lawyers who are disbarred or doctors who are deprived of their licenses to practice. Even with these facts present, there is a constant agitation to continue to further regulate the broadcaster because a very few do not exercise good judgment in operating their stations. The Missouri Broadcasters Association contends that the FCC already has sufficient authority to impose sanctions on this group that does not exercise good judgment, without the necessity of shackling every broadcaster with additional regulations. Again, it must be emphasized that the public's acceptance or rejection of a station is the most powerful deterrent to advertising excess that can be devised.

Certainly you gentlemen will concede that honest advertising is not bad. Advertising has not only fostered the growth of our industry but has been, and still is, the motivating force that keeps American factories going at a rate which provides a standard of living never known before. Advertising is the oxygen of America's industrial life blood. Without advertising the will to buy would languish. Most new products and improved products would never come to the public's attention. Without adequate advertising it is safe to say the proverbial mousetrap maker would have no great demand for his product, no matter how much better or more effective it might be. Admittedly, there are those listeners who honestly believe advertising on the air

should be prohibited entirely. To satisfy this segment of the population, some new system would have to be instituted similar to pay TV. However, there seems to be no great rush of subscribers to the pay TV experiments now being conducted. There is no great public ground swell to abandon the system whereby stations are supported by the sale of advertising. The Missouri Broadcasters Association is convinced that advertising may be judiciously placed and tastefully written so as to accomplish the advertiser's goal, and yet not be offensive to the listener. If this course is followed, the great majority of the public will welcome the advertising messages broadcast. But it must be up to the advertiser and the broadcaster to continue to select the time and the frequency that announcements are to be made. One spot announcement inartfully prepared and injudiciously placed can be more objectionable than six spots which blend into a program and which congeal it into a single entity rather than shatter it into many parts.

On July 29, 1960, the FCC released a statement of policy on programing. In that statement the Commission wisely said:

> There is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance.

Now the Commission would make a 180° turn and rule to control the degree of sponsorship on the grounds of public interest. We should hasten to point out that a bare majority of 4 to 3 of the Commissioners voted to even consider this proposal. But in doing so they have caused thousands of words to be written about an issue that should never have been proposed. They have taken the time of literally hundreds of Congressmen away from the great issues of our day by causing broadcasters to seek out their Congressmen to explain what the proposal would do to broadcasting. Our Missouri Congressmen were amazed when told of this proposal. Every Congressman from Missouri agreed such a rule is beyond the powers which the Congress has delegated to the Federal Communications Commission. With your permission, I would like to quote from the letter sent by the Missouri congressional delegation to the FCC in September:

> If the FCC presumes to curtail the number of commercials which can be carried by radio and television stations—

our Congressmen said—

> then it may also have to presume to subsidize those stations to make up for any loss in revenue or failure to operate at a profit. Almost without exception, we have never received a complaint about either the number or length of commercial announcement on radio or television.

Our Congressmen went on to say:

> We believe the American public recognizes tthat such commercials make it possible for them to listen to radio and watch television without charge. To our knowledge there is no evidence that any station in Missouri is failing to carry out its public service function because of an excessive number of commercial announcements, and that, we believe, is the only pretext on which such a proposal could even be considered.

Missouri Governor John M. Dalton joined the Missouri congressional delegation in asking the FCC to drop this proposal.

In summary, Missouri's broadcasters believe this proposal to limit advertising would not only sign the death warant for many stations but would kill freedom of enterprise in the broadcasting industry. Under the proposed rule the stations would be asked to provide the

FCC with specific data on advertising requirements of their community and relate these data to income requirements needed to support an operation in the public interest. Clearly, this would give the Commission arbitrary powers over business judgment—powers never intended by Congress.

No one has ever satisfactorily defined overcommercialism—and no one probably ever will. Our industry has been convinced that there should be a reasonable balance of program and commercial material. It is not how much time but how the time is used that often determines the degree of public acceptance and, gentlemen, every station is striving for 100 percent public acceptance.

Our industry will never be able to gain wide acceptance for codes of good practice if the FCC passes such a ruling. The broadcaster's incentive to subscribe to the other provisions of the codes would be destroyed.

Economic control such as that proposed would fall most heavily upon stations in small communities. A rule across the board would destroy many of them. The sale of time at rates competitive with all other media provides the sole support for broadcasting stations. Faced with a reduction in the amount of commercial time it may offer to advertisers, that station must either raise its rates or suffer a loss of income. Even if the small station survived, local advertisers would be denied an important outlet. In many small towns there is a definite need for low cost advertising and local merchants have definite limitations on what they are able to pay. Limits set by a Commission hundreds and even thousands of miles away would deprive the small town of a service which contributes directly to its economic prosperity. Thus it would destroy free enterprise in broadcasting.

If such a rule were adopted, it could never be administered fairly. The Commission itself has already recognized that there are unique problems in such a proposal including the type of station daytime or full-time, directional or nondirectional, its location, its competitive position with other stations and with other advertising media, seasonal and cyclical changes in the market, sudden dislocations due to strikes, local economic recessions, weather, defense contract relocation, and many others. The frightening consequences would be a vast exercise of subjective judgment on a case-by-case basis by the staff of the Commission. Undoubtedly the Commission would require more money from Congress to hire more people. There could never be equality under the law in such a proposal. And last—and most important of all the Congress of the United States never intended for such a rule to be. This proposed rule is not a rule at all we contend, but it is an attempt at legislation by an administrative commission that was never given the power to legislate. For nearly half-a-century Congress has left the amount of broadcast advertising to the free play of the marketplace, to the reasonable judgment of the broadcaster and to the public. The inevitable result of any such rule would be governmental regulation of the amount a broadcaster could charge advertisers. Under the law wisely set up by Congress, broadcasting is not a public utility and therefore is not subject to rate regulation.

The Missouri Broadcasters Association believes this is such a serious issue that Congress should prohibit, for all time to come, any attempt to establish advertising limitations by passage of House bill 8316.

In our annual meeting October 3, in Jefferson City, Mo., the following resolution was unanimously passed:

Whereas House bill 8316, introduced in the U.S. House of Representatives by the Honorable Walter Rogers of Texas, chairman of the House Subcommittee on Communications and Power, will prohibit the Federal Communications Commission from adopting any rule limiting the commercial time of radio and television; and

Whereas the Missouri Broadcasters Association acting by and for its members in the broadcasting industry in Missouri, believes that House bill 8316 represents fully the intent and principles of our free American enterprise system; and

Whereas the Missouri Broadcasters Association wishes to lend its support and enthusiasm toward maintenance of the free enterprise system: Now, therefore, be it

Resolved, That the Missouri Broadcasters Association express by this resolution its wholehearted support of House bill 8316; and be it further

Resolved, That this feeling on the part of the Missouri Broadcasters Association be conveyed to Representative Rogers, members of the Missouri delegation in the Congress of the United States, and to the members of the Federal Communications Commission.

This 3d day of October 1963.

Gentlemen, we believe this is the greatest threat to the future of broadcasting as we know it today, that the FCC has ever proposed. Lincoln's Gettysburg address contained 268 words. House bill 8316 is even shorter, but in its brevity there is strength and very definitely purpose.

The broadcast industry desperately needs this bill enacted into law and we earnestly solicit your favorable support and action to that end.

Thank you.

Mr. ROGERS of Texas. Thank you very much.

Mr. Hull?

Mr. HULL. Mr. Chairman, I would just like to say that Mr. Dailey is one of our outstanding and dedicated broadcasters in the State of Missouri. He comes from down in southwest Missouri, a beautiful part of our country, the Ozark region. Don has been an outstanding citizen for many, many years. We are certainly glad to have you.

Mr. DAILEY. Thank you very much, Congressman Hull.

Mr. HULL. We appreciate your excellent statement.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. I would just like to say I appreciate your statement, and most of all, appreciate your personal presence here to deliver it.

Mr. DAILEY. Thank you very much.

Mr. ROGERS of Texas. Thank you, Mr. Dailey. I go through your section of Missouri.

Mr. DAILEY. We wish you would stop in. That is God's country.

Mr. ROGERS of Texas. It is very green. I don't know whether it is because it is close to Texas.

Thank you very much, Mr. Dailey.

Mr. DAILEY. Thank you.

(The prepared statement of Mr. Dailey follows:)

STATEMENT OF DON C. DAILEY, GENERAL MANAGER, RADIO STATION KGBX, SPRINGFIELD, MO.

I am Don C. Dailey, general manager of radio station KGBX in Springfield, Mo. I am immediate past president of the Missouri Broadcasters Association. The

association is composed of 76 radio and television stations broadcasting in Missouri. The comments I make today are in behalf of these stations, made after due deliberation with those stations, and the board of directors of the Missouri Broadcasters Association.

We feel the Communications Act of 1934, under which stations are licensed, outlines the powers which the Congress has delegated to the Federal Communications Commission but that House bill 8316 must be enacted to clearly define the authority of the FCC. The Congress, in enacting the communications law, did not intend that the Commission have the authority to impose limitations on the amount of time which broadcasters may use for commercial messages. For nearly a half century Congress has left the amount of broadcast advertising to the free play of the marketplace, the responsible judgment of the broadcaster, and the public's freedom of choice. Gentlemen, commercial limitation is illegal in our opinion. The proposed rules are inconsistent with section 326 which prohibits censorship. The Supreme Court has said the term "censorship" connotes any examination of thought or expression in order to prevent publication of objectionable material. As authority for the proposed limitation, the Federal Communications Commission has cited sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended. None of these sections give the Commission power to limit commercials. For example: Even if it could be established that any commercial time in excess of 7 minutes on a 1-hour radio or television program constitutes objectionable material, the Commission has no blanket authority to outlaw such additional advertising as might be broadcast.

Admittedly broadcast stations cannot be operated primarily in the interest of advertisers or primarily in the interest of the licensee. Most stations agree that they must be operated in the interest of the public. Clearly there are proper areas where the Commission can find that a particular program or type of advertising is not in the public interest. However, "the public interest" is not a blanket to cover every action the Commission might decide to take. Everyone is aware that radio and television attracts more attention than most any other given activity today. The number of home radio sets exceeds 127 million. There are over 49 million automobile sets and 59 million television sets in use today. What the real intention of the Federal Communications Commission is, we do not know; but the result of such proposals as this one, to limit the amount of advertising, strikes at the very heart of freedom of broadcasting and freedom of speech. Let us assume for a moment that the proposed rule were enacted. The Commission has stated that due to the fact that there are many different economic factors involved in various areas of the country that it would be necessary to allow some stations to air more commercials than others. Radio and television stations in some States serve large geographical areas; but the population is sparse in many of these areas, the rigorous variations in climate with their effect on the safety and care of both human beings and livestock make it mandatory that these stations be ready to broadcast weather warnings, etc., on a moment's notice. Some stations are fortunate enough to operate in cities of substantial economic stature so that, with the exception of certain periods of the year, such as Christmas and other holidays where gifts are exchanged, the advertising demands of the merchants are comparatively steady.

As you know, there are many stations located in seasonal markets such as small resort towns where some periods of the year are practically devoid of advertising business, but during other periods the demand for advertising could not be accommodated if restrictions such as those proposed were adopted. Of course, one way this problem could be handled would be to waive the rules regarding such stations during the busy portions of the year. Yet, this solution, while perhaps keeping the stations open and operating as media of public service, will certainly not meet the FCC objective of cutting down on the number of commercial announcements, which is allegedly the basis for the Commission's proposed rule. Moreover, any rules that require a built-in waiver would be the beginning of industrywide problems, and rules that would be designed to sooth the public's alleged irritation could not accomplish this purpose if they have built-in exceptions designed to accommodate selected broadcasters in selected areas. It stands to reason that the public listening to a station in a small town is no less tolerant of advertising excess than those of large cities. Gentlemen, in order to survive, the small stations especially, must accept their business when it is available. I am sure you can see how impractical such a rule would be when put into actual practice. This is an attempt to regulate the busi-

ness practices of an industry that is not a public utility. Congress specifically stated in the Communications Act of 1934 that broadcasting was excluded from classification as a public utility.

As you know, many stations are licensed to operate daylight hours only. The daylight hours are quite short during the months of November through February. As a consequence, the time available for sale to advertisers over daytime only stations is greatly reduced particularly in the early morning and late afternoon. This is prime time on a broadcast station. The advertisers want to reach the public. If the station can't accommodate them, they will go to other media. Therefore, the daytime only licensee must do the best he can to make sure his advertisers are treated fairly and are satisfied as far as possible under the circumstances. Waiving the amount of advertising for such stations is not the answer, for if a waiver is to be granted, the question arises as to what number of spots is too many and again, are the listeners to a daytime only station any more tolerant of advertising than listeners to unlimited time stations? Just how much advertising makes the listener angry? Does the Federal Communications Commission know? How many commercials cause the listener to shut off a set? Does the Federal Communications Commission know? The broadcaster will always be in a better position to know the answer to these questions because the public and his advertisers will let him know in a most effective manner.

For many years the broadcasting industry has been operated and has flourished on the basic American tenant of free enterprise. If a station did not serve the public adequately, the public refused to listen to it. If the public would not listen, the advertiser would not use its facilities. Therefore, the station had to primarily please the public and serve the public in order to continue to exist. This condition still exists. It has not changed. The public is the judge, and it should continue in this role. Our American system of broadcasting has under these conditions developed into the world's greatest system of broadcasting. Naturally an industry reaching into every home in this country will have critics. Some criticism is good and well merited, therefore it is constructive. Yet, there are those who criticize simply because they enjoy criticizing; and what is a better target than a regulated industry which has to please all conditions of men with tastes as varied as there are stars in the sky! Nevertheless, as we pointed out, if a large segment of the general public is critical of a station's operation, its dissatisfied reaction is much more effective than any rule could possibly be.

The main ingredient of the free enterprise system of American broadcasting is the fact that the licensee, having been carefully selected by the Commission's processes, is presumed to be capable of exercising proper discretion as to what should be broadcast over the facilities which have been entrusted to him. Except for a very small group, we believe licensees have exercised their discretion in a most commendable manner. As in every group, some have abused their privilege; but these represent a very small percentage of the whole. Certainly this group is no greater percentagewise than the number of lawyers who are disbarred or doctors who are deprived of their licenses to practice. Even with these facts present, there is a constant agitation to continue to further regulate the broadcaster because a very few do not exercise good judgment in operating their stations. The Missouri Broadcasters Association contends that the FCC already has sufficient authority to impose sanctions on this group that does not exercise good judgment, without the necessity of shackling every broadcaster with additional regulations. Again, it must be emphasized that the public's acceptance or rejection of a station is the most powerful deterrent to advertising excess that can be devised.

Certainly you gentlemen will concede that honest advertising is not bad. Advertising has not only fostered the growth of our industry but has been, and still is, the motivating force that keeps American factories going at a rate which provides a standard of living never known before. Advertising is the oxygen of America's industrial lifeblood. Without advertising the will to buy would languish. Most new products and improved products would never come to the public's attention. Without adequate advertising it is safe to say the proverbial mousetrap maker would have no great demand for his product, no matter how much better or more effective it might be. Admittedly, there are those listeners who honestly believe advertising on the air should be prohibited entirely. To satisfy this segment of the population, some new system similar to pay TV would have to be instituted. However, there seems to be no great rush of subscribers to the pay TV experiments now being conducted. There is no great

public ground swell to abandon the system whereby stations are supported by the sale of advertising. The Missouri Broadcasters Association is convinced that advertising may be judiciously placed and tastefully written so as to accomplish the advertiser's goal, and yet not be offensive to the listener. If this course is followed, the great majority of the public will welcome the advertising messages broadcast. But it must be up to the broadcaster and the advertiser to continue to select the time and the frequency that announcements are to be made. One spot announcement inartfully prepared and injudiciously placed can be more objectionable than six spots which blend into a program and which congeal it into a single entity rather than shatter it into many parts.

On July 29, 1960, the FCC released a statement of policy on programing. In that statement the Commission wisely said: "There is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance." Now the Commission would make a 180° turn and rule to control the degree of sponsorship on the grounds of public interest. We should hasten to point out that a bare majority of 4 to 3 of the Commissioners voted to even consider this proposal. But in doing so they have caused thousands of words to be written about an issue that should never have been proposed. They have taken the time of literally hundreds of Congressmen away from the great issues of our day by causing broadcasters to seek out their Congressmen to explain what the proposal would do to broadcasting. Our Missouri Congressmen were amazed when told of this proposal. Every Congressman from Missouri agreed such a rule is beyond the powers which the Congress has delegated to the Federal Communications Commission. With your permission, I would like to quote from the letter sent by the Missouri congressional delegation to the FCC in September: "If the FCC presumes to curtail the number of commercials which can be carried by radio and television stations, then it may also have to presume to subsidize those stations to make up for any loss in revenue or failure to operate at a profit. Almost without exception, we have never received a complaint about either the number or length of commercial announcements on radio or television. We believe the American public recognizes that such commercials make it possible for them to listen to radio and watch television without charge. To our knowledge there is no evidence that any station in Missouri is failing to carry out its public service function because of an excessive number of commercial announcements, and that, we believe, is the only pretext on whch such a proposal could even be considered." Missouri Governor John M. Dalton joined the Missouri congressional delegation in asking the FCC to drop this proposal.

SUMMARY

Missouri's broadcasters believe this proposal to limit advertising would not only sign the death warrant for many stations but would kill freedom of enterprise in the broadcasting industry. Under the proposed rule the stations would be asked to provide the FCC with specific data on advertising requirements of their community and to relate these data to income requirements needed to support an operation in the public interest. Clearly, this would give the Commission arbitrary powers over business judgment, powers never intended by Congress.

No one has ever satisfactorily defined overcommercialism, and no one probably ever will. Our industry has been convinced that there should be a reasonable balance of program and commercial material. It is not how much time but how the time is used that often determines the degree of public acceptance and every station is striving for 100 percent public acceptance.

Our industry will never be able to gain wide acceptance for codes of good practice if the FCC passes such a ruling. The broadcaster's incentive to subscribe to the other provisions of the codes would be destroyed.

Economic control such as that proposed would fall most heavily upon stations in small communities. A rule across the board would destroy many of them. The sale of time at rates competitive with all media provides the sole support for broadcasting stations. Faced with a reduction in the amount of commercial time it may offer to advertisers, that station must either raise its rates or suffer loss of income. Even if the small station survived, local advertisers would be denied an important outlet. In many small towns there is a definite need for low-cost advertising and local merchants have definite limitations on what they are able to pay. Limits set by a commisison hundreds and even thousands of miles away would deprive the small town of a service which contributes directly to its economic prosperity. Thus it would destroy free enterprise in broadcasting.

If such a rule were adopted, it could never be administered fairly. The Commission itself has already recognized that there are unique problems in such a proposal including the type of station (daytime or full time, directional or nondirectional), its location, its competitive position with other stations and with other advertising media, seasonal and cyclical changes in the market, sudden dislocations due to strikes, local economic recessions, weather, defense contract relocation, and many others. The frightening consequences would be a vast exercise of subjective judgment on a case-by-case basis by the staff of the Commission. Undoubtedly the Commission would require more money from Congress to hire more people. There could never be equality under the law in such a proposal. And last, and most important of all, the Congress of the United States never intended for such a rule to be. This proposed rule is not a rule at all, but an attempt at legislation by an administrative commission that was never given the power to legislate. For nearly half a century Congress has left the amount of broadcast advertising to the freeplay of the marketplace, to the reasonable judgment of the broadcaster, and to the public. The inevitable result of any such rule would be governmental regulation of the amount a broadcaster could charge advertisers. Under the law wisely set up by Congress, broadcasting is not a public utility and therefore is not subject to rate regulation.

The Missouri Broadcasters Association believes this is such a serious issue that Congress should prohibit, for all time to come, any attempt to establish advertising limitations by passage of House bill 8316. In our annual meeting October 3 in Jefferson City, Mo., the following resolution was unanimously passed:

(Read resolution.)

We believe this is the gravest threat to the future of broadcasting, as we know it today, that has ever been proposed by the FCC. Lincoln's Gettysburg Address contained 268 words. House bill 8316 is even shorter, but in its brevity there is strength and purpose.

Gentlemen, the broadcast industry desperately needs this bill enacted into law. We earnestly solicit your favorable support and action to that end.

Thank you.

Mr. ROGERS of Texas. Our next witness is Mr. Thad M. Sandstrom, station WIBW–TV, Topeka, Kans.

STATEMENT OF THAD M. SANDSTROM, VICE PRESIDENT AND GENERAL MANAGER, WIBW RADIO, TELEVISION & FM, TOPEKA, KANS.

Mr. SANDSTROM. Thank you very much, Mr. Chairman and members of the subcommittee. My name is Thad M. Sandstrom. I am vice president and general manager of WIBW Radio, Television & FM in Topeka. I am appearing today as a spokesman for the Kansas Association of Radio Broadcasters, comprising 52 of the 56 AM radio stations in Kansas. I have served two terms, from 1960 to 1962, as president of this organization. And I would like to add that, being from Topeka, I am very well represented here in Washington by Congressman William H. Avery who, as you know, served for 8 years as a member of this committee and has a great interest in broadcasting.

One of my primary aims while president of this outstanding group of broadcasters was to upgrade the number of stations participating in the NAB code. Today, Kansas has a higher percentage of radio stations subscribing to the NAB codes then any other State in the Nation.

Forty-seven of the sixty-eight AM–FM stations in Kansas—69 percent—just about double the national average, subscribe to and follow this voluntary code. While TV stations do not belong to our association, I'd like to mention that 10 of the 11 TV stations in Kansas subscribe to the television code.

The broadcasters of Kansas strongly support H.R. 8316. Over the past few years we, in broadcasting, have witnessed the gradual slide toward more Government regulation of this industry. Our country has the greatest system of broadcasting in the world today, and we've done it without the aid of Government control of the number of commercials on our stations. We don't need this control today, but I'm afraid unless Congress takes the action outlined in this bill, the industry will be forever shackled by needless controls.

As you know, the Federal Communications Commission will soon begin hearings on its proposal to place limitations on commercial advertising. The FCC is a child of Congress. These proposed rules go far beyond the intent of Congress. The proposed Commission rules, for all practical purposes, incorporate the present provisions of the NAB codes. As we pointed out a moment ago, Kansas is the leading State in the Nation in the percentage of radio stations subscribing to the NAB radio code. We believe that virtually all stations in Kansas, code and noncode, currently adhere to standards as strict or stricter than the proposed Commission rules. There is, in fact, no need for such rules as far as the broadcasters of Kansas are concerned.

Adoption of FCC rules on commercials, we believe, would establish as primary criteria the stopwatch rather than the public need as the measure of broadcasting service. We believe that the people of Kansas like what the broadcasting industry of this State provides. We believe there is no better broadcasting anywhere in the world than in Kansas. We have learned to serve in times of tornadoes and droughts, snowstorms and floods. Kansas broadcasters serve in countless ways with which you gentlemen are generally familiar from your knowledge of the radio and television stations in your home States. We believe the citizens we serve are much more interested in the services we provide than in the precision accuracy of the clock in complying with a Federal edict. The real measure of broadcasting is the service it provides. Kansas broadcasters now provide that service, and do it within the framework of the NAB codes.

Advertising revenue is fundamental to the American system of broadcasting. Profits are fundamental to the American way of life. Advertising and profits go hand in hand in the economy of this Nation. We do not believe the public interest would be served by a Commission rule which precisely limits the amount of commercial time when, in fact, commercials are vital stimulators of the economy and a fundamental ingredient in the overall pattern of economic growth in the United States.

Since most Kansas broadcasters already voluntarily subscribe to standards such as suggested by the Commission rules, no useful purpose would be served in adopting additional regulations. Further, the incentive for self-regulation would be destroyed. The Kansas Association of Radio Broadcasters believes the adoption of the proposed rules by the Commission would bring an end to the era of self-regulation in broadcasting. The most important consideration by the Commission would be not how well a station serves, but whether, by stopwatch, it meets the Commission's precise definitions of commercial limitations.

In conclusion, the Kansas Association of Radio Broadcasters believe that the proposed Commission rules will endanger, not aid, the public

interest. The day these rules are adopted, the broadcaster will spend more time watching the clock and less time seeking ways to serve the community interest. In order to stop forever this threat of needless Government control, the broadcasters of Kansas urge favorable adoption of H.R. 8316. Thank you very much.

Mr. ROGERS of Texas. Thank you, Mr. Sandstrom.

Mr. Hull?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions, Mr. Chairman.

Mr. ROGERS of Texas. Thank you very much, Mr. Sandstrom, for a very interesting statement and one that adds to the hearings immeasurably.

Our next witness is Mr. James Caldwell, Kentucky Broadcasters Association, Radio Station WAVE, Louisville, Ky.

STATEMENT OF JAMES M. CALDWELL, KENTUCKY BROADCASTERS ASSOCIATION, RADIO STATION WAVE

Mr. CALDWELL. Mr. Chairman, gentlemen, my name is James Caldwell. Since 1946 I have been associated with WAVE in Louisville. I am past president and a retiring director of the Kentucky Broadcasters Association, and incidentally a member of the Kentucky House of Representatives. I am appearing to speak on behalf of the Kentucky Broadcasters Association in support of H.R. 8316 on the subject of the proposed amendment of part III of the Federal Communications Commission's rules and regulations with respect to advertising on standard, FM, and television broadcast stations.

My appearance has been authorized by the KBA board of directors at a special called meeting on November 6, 1963, at which time I was instructed to present the attached resolution, and the following statement.

In the interests of brevity, gentlemen, I will omit reading the resolution and request that it be placed in the record. It is the resolution adopted by the directors of the KBA in the form of a letter addressed to the Federal Communications Commission objecting to their proposed imposition of regulation of advertising on the basis that this is another step in the direction of censorship.

Mr. ROGERS of Texas. Without objection, Mr. Caldwell, the resolution will be included as part of your statement and with proper reference made to it.

Mr. CALDWELL. Thank you, sir.

Mr. ROGERS of Texas. You may proceed.

Mr. CALDWELL. The Kentucky Broadcasters Association is made up of 71 AM, 7 TV, 14 FM, and 22 associate members. The membership constitutes all the TV stations, all except 26 of the AM stations, and virtually all the FM stations in Kentucky. In short, the Kentucky Broadcasters Association can speak for 79 percent of all Kentucky stations. I might add at its October 4 semiannual meeting the membership unanimously passed another resolution opposing the FCC proposal to regulate commercials. That is not contained here but they did so.

Kentucky is a large State, measuring nearly 400 miles from east to west, with the eastern third made up of mountains, and much of the central and western portion consisting of small towns and farmlands. Of the 120 counties 74 have been declared by the Federal Government areas of substantial unemployment. Up until today it had been 80 percent, but as of today 6 counties, I am happy to say, went off this list. It is now down to 74. So I changed that in the record. Because of these distances and terrain, and other factors, radio and television are the primary means of communication for many Kentuckians. Some counties have no newspaper, or only weekly papers. The 1960 official U.S. census showed that less than 60 percent of all households in Kentucky have telephones, and in Martin County, for example, which has 2,200 households, there are only 318 telephones available. In many cases, for example, radio is the only means of advising friends and relatives of deaths and funerals. We have radio stations operating in towns numbering as few as 2,200 persons, and yet they serve wide areas.

Likewise, it's worthy to note that more than one-half of these stations gross less than $100,000 a year in revenue, averaging income of not more than $8,000 to $10,0000 before Federal and State income taxes. In 1961, according to FCC figures, Kentucky's 91 radio stations had an average of only $15,000 income before taxes. One station, in a remote mountain area, has done as little as $22,000 worth of business in a year.

Much has been said, in recent congressional hearings on another subject, about "Mrs. Murphy's boardinghouse." Kentucky in the eyes of the KBA, has many "Mrs. Murphy's broadcasting stations," whose continuance on the air is vital to the interests of the areas they serve.

In addition to the many individual public service projects which Kentucky's stations perform for their communities, the KBA itself undertakes many joint efforts, among them, promoting State traffic safety, State travel, civil defense, underwriting the State industry advisory committee on the emergency broadcast system, promotion of the State fair, promotion of good music through a Louisville orchestra series, promotion of the State commission on public education, and promotion of the educational TV network, among many others. If these stations cannot derive enough revenue, they cannot continue to support these and other public service functions, and their communities will be the losers.

On top of this, many of these stations must cope with additional factors which restrict their revenue-producing operations * * * for example, some are daytime only stations (in December, for instance, sunrise is at 8 a.m. and sunset is at 5:30 p.m., making for a short broadcast day) * * * also, many sponsors will buy only on the so-called "shopping days" of Thursday, Friday, and Saturday * * * and many sponsors are seasonal, running accounts only briefly in the spring, or summer, or fall, or for Christmas. Then again, many Kentucky stations carry network service at a loss in order to supply world news service to their listeners, and yet they must include these profitless network commercials in any commercial count.

These things add up to the fact that many stations, to stay alive and serve the public, must run commercials where and when they can get

them. This requires flexibility of commercial limitations to survive, so it goes almost without saying that the Federal restriction of the number of commercials could mean the difference between life and death for many small Kentucky stations. Should the Federal Government get into the business of limiting the number of commercials, there is always the possibility that the rules could be changed, further limiting commercials.

In view of these factors, the Governor of Kentucky has gone on record as opposing any proposal which would limit the amount of advertising a station could carry. His statement is attached, and with your indulgence I would like to read it. It is brief but I think it is very timely.

This is a statement of Gov. Bert Combs of Kentucky:

"It has been called to my attention by the Kentucky Broadcasters Association that proposals have been made to limit broadcasters in the selling of their commercial time. As Governor of the State of Kentucky, I want to express my opinion in regard to this proposal. It's my opinion that Washington has no right to take away the freedom of free operation, free enterprise, from the broadcasting system. And I want to go on record in favor of the Kentucky Broadcaster's position * * * the petition against the limiting of freedom of operations of broadcasters. And I want to oppose any effort to limit their commercials and, also, any effort to limit their right to freedom of expression in the form of editorializing * * * editorializing for the good of their Nation, their State, or their communities. I've always found that the members of the broadcasting fraternity are more than willing to make sufficient sacrifice to do a job for the communities. I've found they are willing to give of their good time and of their services in order that we can make progress in Kentucky and throughout the Nation. And I've found that the broadcasters are not only willing but able to govern themselves and to impose upon their own members such rules and regulations as are desirable or necessary in the public interest. And so I make this statement giving my wholehearted support to the Kentucky Broadcasters Association in their effort to operate as they see fit in the public interest, convenience, and necessity."

That ends the statement of Gov. Bert Combs of Kentucky.

Now, in the metropolitan areas of Kentucky, such as Lexington and Louisville, the cause of the problem is somewhat different, but the end result is almost the same. In Louisville, which is at present, if you will partdon the chamber of commerce type phrase, a booming metropolitan area, the problem is overpopulation of radio stations, with 12 commercial AM stations selling in the market. In 1961, according to figures published by the FCC, all the radio stations in Louisville operated at a combined net loss of $195,984. We asked the FCC, incidentally, on July 10 for the 1962 figures on Louisville radio profits or losses, but to date have not yet heard from them, even a reply to our letter.

In our free enterprise competitive system, the thing which limits the number of commercials a station can carry is how many commercials, within a given time, it can run without adversely affecting its listening audience. The limit may vary in degree in different situations, but in the NAB code—and incidentally, 52 percent of Ken-

tucky's radio stations subscribe to the NAB code—stations have attempted to effect a compromise yardstick for limiting commercials. However, many Kentuckians have a mountaineers' code of honor, and if they know they cannot survive under a code limitation, they are not going to join and that is what they tell us. And as has been demonstrated, many of these stations are just barely surviving. If a code, a self-regulating code, would put them out of business, it also follows that a law based on the code would assuredly do likewise, because it would cost them their licenses and their communities their services.

But mere time limits are not the whole story in commercials. Quality of the commercials, making for the least obvious interruption, is a major item.

Following are some figures from the book Governor Collins mentioned this morning, "The People Look at Television," and it shows some of the results of some surveys which I will not go into in the interests of time, but I would appreciate this being put into the record, too, because it shows that, for example, as "What, if anything, do you dislike about commercials?" 48 percent said "Content," 19 percent said "Too many," and only 18 percent said "They were too long."

I thank you for the opportunity of appearing and for stating the position of the Kentucky Broadcasters Association on the proposal of the FCC to amend the rules with respect to advertising limitations for radio and TV stations, and we heartily support the passage of H.R. 8316.

Thank you very much.

Mr. ROGERS of Texas. Mr. Caldwell, without objection, your entire statement, including the statistics, will be included in the record.

(Mr. Caldwell's prepared statement and attachments thereto follow:)

STATEMENT OF JAMES M. CALDWELL, LOUISVILLE, KY.

My name is James M. Caldwell, and I live at 213 Alcott Road, Louisville, Ky. Since 1946 I have been associated with WAVE, Louisville. I am past president and a retiring director of the Kentucky Broadcaster's Association, and am appearing to speak in behalf of the association on the subject of a proposed amendment of part 3 of the Federal Communications Commission's rules and regulations with respect to advertising on standard, FM, and television broadcast stations. My appearance has been authorized by the KBA board of directors at a special called meeting on November 6, 1963, at which time I was instructed to present the attached resolution, and the following statement.

The Kentucky Broadcaster's Association is made up of 71 AM, 7 TV, 14 FM, and 22 associate members. The membership constitutes all the TV stations, all except 26 of the AM stations, and virtually all the FM stations in Kentucky. In short, the Kentucky Broadcaster's Association can speak for 79 percent of all Kentucky stations.

Kentucky is a large State, measuring nearly 400 miles from east to west, with the eastern third made up of mountains, and much of the central and eastern portion consisting of small towns and farmlands; 74 of the 120 counties have been declared depressed areas by the Federal Government. Because of these distances and terrain, and other factors, radio and television are the primary means of comunication for many Kentuckians. Some counties have no newspaper, or only weekly papers. The 1960 official U.S. census showed that less than 60 percent of all households in Kentucky have telephones, and in Martin County, which has 2,200 households, there are only 318 telephones available.

In many cases, for example, radio is the only means of advising friends and relatives of deaths and funerals. We have radio stations operating in towns numbering as few as 2,200 persons, and yet they serve wide areas.

Likewise, it's worthy to note that more than one-half of these stations gross less than $100,000 a year in revenue, averaging income of not more than $8,000 to $10,000 before Federal and State income taxes. In 1961, according to FCC figures, Kentucky's 89 radio stations had an average of only $15,000 before taxes. One station, in a remote mountain area, has done as little as $22,000 worth of business in a year.

Much has been said in recent congressional hearings on another subject, about "Mrs. Murphy's boarding house." Kentucky, in the eyes of the KBA, has many "Mrs. Murphy's broadcasting stations," whose continuance on the air is vital to the interests of the areas they serve.

In addition to the many individual public service projects which Kentucky's stations perform for their communities, the KBA itself undertakes many joint efforts * * * among them, promoting State traffic safety, State travel, civil defense, underwriting the State industry advisory committee on the emergency broadcast system, promotion of the State fair, promotion of good music through a Louisville orchestra series, promotion of the State commission on public education, and the educational TV network, and many others. If these stations cannot derive enough revenue, they cannot continue to support these and other public service functions, and their communities will be the losers.

On top of this, many of these stations must cope with additional factors which restrict their revenue producing operations * * * for example, some are daytime-only stations (in December, for instance, sunrise is at 8 a.m. and sunset is at 5:30 p.m., making for a short broadcast day) * * * also, many sponsors will buy only on the so-called shopping days of Thursday, Friday, and Saturday * * * and many sponsors are seasonal, running accounts only briefly in the spring, or summer, or fall, or for Christmas. Then again, many Kentucky stations carry network service at a loss in order to supply world news service to their listeners, and yet they must include the profitless network commercials in any commercial count.

These things add up to the fact that many stations, to stay alive to serve the public, must run commercials where and when they can get them. This requires flexibility of commercial limitations to survive, so it goes almost without saying that the Federal restriction of the number of commercials could mean the difference between life and death for many small Kentucky stations. There is the further possibility that, should the Federal Government get into the business of limiting the number of commercials, there is always the possibility that the rules could be changed, further limiting commercials.

In view of these factors, the Governor of Kentucky has gone on record as opposing any proposal which would limit the amount of advertising a station could carry. His statement is attached.

In the metropolitan areas of Kentucky, such as Lexington and Louisville, the cause of the problem is somewhat different, but the end result is almost the same. In Louisville, which is at present a booming metropolitan area, the problem is overpopulation of radio stations, with 12 commercial AM stations selling in the market. In 1961, according to figures published by the FCC, all the radio stations in Louisville operated at a combined net loss of $195,984. We asked the FCC on July 10 for the 1962 figures on Louisville radio profits or losses, but have not yet heard from them.

In our free enterprise competitive system, the thing which limits the number of commercials a station can carry is how many commercials, within a given time, it can run without adversely affecting its listening audience. The limit may vary in degree in different situations, but in the NAB code, stations have attempted to effect a compromise yardstick for limiting commercials. However, many Kentuckians have a mountaineers' code of honor, and if they know they cannot survive under a code limitation, they are not going to join. And as has been demonstrated, many of these stations are just barely surviving. If a code would put them out of business, it also follows that a law based on the code would assuredly do likewise, becaues it might cost them their licenses and their communities their services.

But mere time limits are not the whole story in commercials. Quality of the commercials, making for the least obvious interruption, is a major item. In this field, for example, in the book "The People Look at Television," by Gary A. Steiner (Alfred A. Knopf, 1963), chapter 7, a broad sample of viewers were

asked: "What, if anything, do you like most about commercials?" The answers are somewhat lengthy but I do not want to quote them out of context, so I list them here in full for your information:

	Percent
Found them entertaining	38
Informative	22
Said they pay for TV	18
Said they provide a break for food and chores	3
Liked a particular commercial	13
Had a negative response	28

To the question, "What, if anything, do you dislike most about commercials:"

	Percent
Said content (17 percent found them dull, 16 percent misleading, 11 percent stupid)	48
Said the timing (21 percent said interruptions, 19 percent too many, 18 percent too long)	48
Too loud	4
Too effective on children	2
Disliked nothing about them	11
Pay no attention	2

Other varied opinions regarding TV commercials (not based on 100 percent):

	Percent
Thought commercials a fair price to pay for the entertainment you get	75
Thought most are too long	63
Thought some are helpful in keeping one informed	58
Thought them more entertaining than the program	43
Would prefer TV without commercials	43
Thought them ordinarily in poor taste and very annoying	40
Said "Frequently I find myself welcoming a commercial break"	36
Said "I dislike long movies"	27
Said they would rather pay a small amount yearly if "I could have TV without commercials"	24

I thank you for the opportunity of appearing and for stating the position of the Kentucky Broadcasters Association on the proposal of the FCC to amend the rules with respect to advertising limitations for radio and TV stations.

Statement of Gov. Bert Combs of Kentucky on Broadcasting Freedom

It has been called to my attention by the Kentucky Broadcasters Association that proposals have been made to limit broadcasters in selling of their commercial time. As Governor of the State of Kentucky, I want to express my opinion in regard to this proposal. It's my opinion that Washington has no right to take away the freedom of free operation, free enterprise, from the broadcasting system. And I want to go on record in favor of the Kentucky broadcasters' petition * * * the petition against the limting of freedom of operations of broadcasters. And I want to oppose any effort to limit their commercials and, also, any effort to limit their right to freedom of expression in the form of editorializing * * * editorializing for the good of their Nation, their State, or their communities. I've always found that the members of the broadcasting fraternity are more than willing to make sufficient sacrifice to do a job for their communities. I've found they are willing to give of their time and of their services in order that we can make progress in Kentucky and throughout the Nation. And I've found that the broadcasters are not only willing but able to govern themselves and to impose upon their own members such rules and regulations as are desirable or necessary in the public

interest. And so I make this statement giving my wholehearted support to the Kentucky Broadcasters Association in their effort to operate as they see fit in the public interest, convenience and necessity.

Mr. ROGERS of Texas. Did you want this letter to the Secretary of the Federal Communications Commission under date of August 5 included as part of your statement?

Mr. CALDWELL. I would like to, sir.

Mr. ROGERS of Texas. Without objection, it will be so included.

(The letter referred to follows:)

The following is a copy of the letter sent at the direction of the board of directors of the Kentucky Broadcasters Association to the Federal Communications Commission.

AUGUST 5, 1963.

Subject: Opposition to proposed FCC commercial time standards.

SECRETARY, FEDERAL COMMUNICATIONS COMMISSION,

Washington, D.C.

DEAR SIR: The Kentucky Broadcasters Association, representing a majority of the radio and television broadcasters of this Commonwealth, through action of its board of directors, respectfully petitions the Federal Communications Commission to withdraw from further consideration proposed ironclad rules governing the amount of commercial time used in any given hour, day or week by AM, FM, and TV stations.

Accordingly, this letter is presented for inclusion into the official hearing record.

The Kentucky Broadcasters Association recognizes that overcommercialization is not in keeping with good broadcaster practices in the public interest. But to set an inflexible maximum for any 1 hour or day would impose financial hardships upon stations with varying commercial demands as well as unnecessary clerical work that in itself is burdensome and costly. It is believed that such a program would be difficult and costly to administer and supervise, and would bring no desirable results.

It is our belief that under existing rules and practices, the Commission licensing renewal policies allow for review of commercials carried by any station and enable the Federal Communications Commission to exercise judgment concerning an excessive amount of commercial matter presented by broadcast stations.

The present National Association of Broadcasters Code time limitations, which the Commission proposes to incorporate into its rules, are not satisfactory in application to stations in all categories, urban and rural, small and large, stations with seasonal business increases and decreases, and it is the sentiment of the Kentucky Broadcasters Association that there should be more elasticity in the application of the National Association of Broadcasters Code regulations.

Then, too, it is the consensus of the board of directors of the Kentucky Broadcasters Association that strict supervision of the amount of commercial time allowed in any one period is a move toward censorship and would mean curbing of incentive in programing at individual stations thus detracting from the attractiveness of programing and thus failing to operate completely in the public interest.

The board of directors of Kentucky Broadcasters Association is unalterably opposed to such regulations and asks for complete consideration of the subject before any action is taken.

It is further stated that copies of this statement are to be mailed to all members of the Kentucky congressional delegation.

Respectfully submitted.

ALVIS H. TEMPLE,

Secretary, Kentucky Broadcasters Association.

Mr. ROGERS of Texas. Mr. Hull, do you have any questions?

Mr. HULL. No questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. No questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. Mr. Chairman, I was very interested in the statement that Mr. Caldwell made that most Kentucky stations carry network service at a loss. I am certain the general public would feel the network service was carried at a very high profit.

Would you say that this is a general situation, or is this only happening in isolated circumstances?

Mr. CALDWELL. I would say the general situation in radio is that network service by a large station is carried at just a very minimum profit, if any. Many smaller stations carry it, paying the line charges and not being paid for the commercials, simply to provide the news service for their listeners.

In this case, in the accounting every 3 years when you file for license renewal you have to give a commercial count, how many commercials you have carried within a quarter-hour segment. These network commercials have to be counted as commercials.

Mr. BROYHILL. And as a net result, you get no profit from them?

Mr. CALDWELL. No profit from them, and in some cases, I suppose it would be said that they are preempting time that you could sell locally.

Mr. BROYHILL. Very interesting; thank you.

Mr. ROGERS of Texas. Thank you very much, Mr. Caldwell.

Mr. CALDWELL. Thank you.

Mr. ROGERS of Texas. The Chair has been advised that Dr. Carl McIntire, director of the 20th Century Reformation Hour, is present and would like to testify. In view of the fact that we do have a little bit of time left, Dr. McIntire, we are happy to have you. If you will come forward, you will be recognized.

STATEMENT OF REV. CARL McINTIRE, DIRECTOR, 20TH CENTURY REFORMATION HOUR

Mr. MCINTIRE. Thank you very much. My name is Carl McIntire. I am a clergyman. I am the pastor of the Bible Presbyterian Church in Collingswood, N.J., where I have been for 30 years.

I am the director of the 20th Century Reformation Hour broadcast, which originates from our church facilities. It is now being heard in 46 States of the Union and on 530 radio stations, AM and FM.

I feel an interest in this from several standpoints. The first is I have already begun to feel the effect of it in stations as it relates to our broadcasts. I do not have a prepared document to present and I apologize for that, but may I express just several thoughts to you.

My approach to this whole question is an entirely different one from what we have been listening to. I am operating in the religious field. I am dealing with moral and spiritual principles. I accept the Biblical principle that righteousness exalts a nation, and my program deals with these questions in various ways expressing opinion and promoting a cause.

The Constitution of the United States in its first amendment says Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech. And before the guarantees concerning freedom of speech are in the amendment we have the references to the free exercise of religion. And certainly the requirements that the FCC operate in the public interest should require among the first that it protect the

freedom of speech and it protect the free exercise of religion. And anything which would directly or indirectly impinge upon these liberties and developments in our country should be primarily the concern of this body, the Congress.

Now, already we have had several stations in this country decline to take on our program, even when a local committee went with a thousand dollars collected to pay for the time. The reason given has been that we will wait and see what the Federal Communications Commission does.

If there are restrictions to be placed on commercial time, there could very easily be reflections against a program such as mine. I am buying commercial time, paying commercial rates, and occupy a segment of the commercial time which a program or a station may sell. Regulations of this kind could easily result in squeezing such programs as mine off of local stations.

The broader question, of course, of the whole concept of freedom is the area in which I am thinking and in which we are considering this problem. Frankly, it appears to us that the Federal Communications Commission is getting bigger than the Congress. The tail is wagging the dog. And we must have some Federal action by this Congress to put the Federal Communications Commission back where it originally was when it was first started.

These actions of the Federal Communications Commission as they have developed amount to a usurpation of power, just a gathering of power by an agency which has been set up by this Government. This is dangerous, not just to radio. It is dangerous to all of us. And particularly it is dangerous to me though at the present time I am speaking freely, as a freeman freely in this country on radio.

I might compare it to the church, if I may. We do not have a Federal commission on religion in our country. We do not have any Government direction or control in the field of religious thought or religious activity whatsoever because of the first amendment. But if we did have a Federal commission on religion which set up for itself the task of providing a code which would limit the length of ministers' sermons or in the public interest decided that only so many illustrations could be used in that sermon, you would have the type of interference and direction of our life in the religious field that I see developing in this field of radio.

We do not have a Federal commission on the press whereby the Federal Government sets up certain regulations through its commission limiting the pages or the columns of advertising which may be secured or bought by advertisers. Nothing like that has developed in our national life because of the first amendment. And it is our position that the same identical concept of liberty pertains to the Federal Communications Commission.

The public should not even look to the Federal Communications Commission for relief in this particular field. We do not look to a Federal commission on the press for relief when we have troubles with our local editors. We go about it in some other way to get our story in or our story told.

When we have difficulty with our churches, and problems, we do not look to a Federal commission on religion for some relief. We proceed to handle these things among ourselves on the local level as

protected in the 9th and 10th amendments of the Constitution which have reserved these rights and freedoms to us.

The area here where the Federal Communications Commission is now seeking to transgress is the broad field of reserved rights under which, of course, we have free enterprise and these other freedoms which have been discussed and presented here today. We therefore maintain, or I maintain, that this activity on the part of the Federal Communications Commission is completely outside of its scope of interest and responsibility.

Also that the American people should be instruced and taught to understand that they shouldn't seek relief for problems of this kind from Washington or from a Federal agency. These are matters which we can relieve ourselves of in our own activities on our local levels as we deal with our stations, and we deal with these problems.

I might say in addition to this, if the Federal Communications Commission proceeds as it is, the creature is getting ready to devour its creator, and the Federal Communications Commission would be in a position someday to determine who would be the Congressmen.

I think it is absolutely essential that the Congress of the United States review this entire question and place the Federal Communications Commission in its proper relationship to the Congress and to the people.

There is still another aspect as I see the problem. Radio stations, some of them, like to use the FCC as an excuse for their local action. It is a hook on which some of them can hang their hats when they want to have some answer to a local individual or to a local group that goes to them for some request. And the station can blame the FCC and dismiss the local man and that is a convenient out for some stations.

We do not think that stations should use the FCC in this manner in dealing with our local people or with our local interests.

I am also a member of the executive committee of the American Council of Christian Churches. This council is composed of 15 Protestant denominations, and last week it had its 22d annual convention in Indianapolis. Now, this council of churches does not presume or pretend to speak for its members but as a council of churches it does take actions on the basis of the men who represent the churches on certain questions, and one of the questions raised before the council and considered and discussed at great length was the difficulty that our churches and our preachers are having with radio stations because of the Federal Communications Commission.

Several pastors arose and testified concerning these problems and difficulties, all of which they alleged revert to the policies and the actions of the Federal Communications Commission, centering around the uncertainty and confusion which has developed on the part of radio station operators in this particular field.

As a result of this, the American Council of Christian Churches unanimously adopted a rather lengthy resolution which it authorized to be sent to the Members of the Congress calling upon Congress to make a thorough investigation of the Federal Communications Commission, not merely on this particular question but on other related questions in this field.

I also have had some experience—perhaps this is not the place to speak of it—but I am broadcasting daily by shortwave around the

world on WINB, one of the three shortwave stations in this country that is privately operated.

An investigation was undertaken—at least, that is what it was called—a good many months ago as a result of my broadcast and the local station itself has not to this date even been consulted or any questions asked about it. Letters have been sent to the Congressmen reflecting against that station's operation.

We have heard that reports were going to be issued by the Commission but no such report has been issued, and in all these months I hang in some kind of a state of uncertainty as a result of it, and I would like to know where I do stand with the Federal Communications Commission.

But it is in all of these areas that we feel that the Federal Communications Commission is going too far. It is getting too big. It is becoming too bureaucratic, and if it would reserve or retain to itself the right of simply licensing the station, preserving order so far as wavelengths are concerned, and leave all these other questions of the free exercise of religion, the freedom of speech, advertising, and everything else to the give and flow of a free society, they would be honoring the principles of our Founding Fathers who believed individuals should be free and that individuals could take care of themselves better on a local level than by some centralized authority from headquarters in Washington, D.C.

Thank you very much.

Mr. ROGERS of Texas. Thank you very much, Dr. McIntire.

Mr. Hull, do you have any questions?

Mr. HULL. I have no questions.

Mr. ROGERS of Texas. Mr. Cunningham?

Mr. CUNNINGHAM. I have no questions.

Mr. ROGERS of Texas. Mr. Broyhill?

Mr. BROYHILL. No questions.

Mr. ROGERS of Texas. Thank you very much, Doctor, for your contribution.

This concludes the witnesses.

There are several letters that have been handed to the Chair, letters and questionnaires that have been sent out by the Federal Communications Commission left with me by Mr. Younger of California. Without objection, I think these letters ought to be included in the record for reference purposes anyway, and they will be so included unless there is some objection.

Also, the Chair has in his office a number of items requesting that they be included in the record and, unless there is an objection, these will be submitted to the ranking minority member, Mr. Younger, for his approval, and they will be delivered to you, Mr. Williamson, and any member of the committee may look at them before they are included in the record.

If there is no objection, before the record is closed to any of them, they will be included, that is, the ones that are decided upon by the Chair and the ranking minority member.

Let the Chair say this, too, that without objection all Members of Congress will be allowed to extend their remarks in the record if they are forthcoming before the record is closed.

At the present time the Chair would like very much to move forward with this matter as quickly as possible, and it is impossible now to say what day we can have an executive session on it, but I will talk to the chairman of the full committee, Mr. Harris, and try to arrange that at the earliest possible date so that we can take whatever action is to be taken on this measure.

Mr. HULL. This concludes these hearings?

Mr. ROGERS of Texas. This concludes the public hearings, and we will try to proceed with the executive hearings at the earliest possible date.

Is there any further business to come before the subcommittee? If not, we will stand adjourned subject to the call of the chair.

(The material mentioned above follows:)

MAY 11, 1962.

WKY TELEVISION SYSTEM, INC.,
Radio Station WKY,
Oklahoma City, Okla.

GENTLEMEN: This is with reference to your application for renewal of license of station WKY, Oklahoma City, Okla. (file No. BR-468).

In connection with a review of the program log analysis, section IV, paragraph 2(a) shows that no time was devoted to discussion programs during the 165 hours that comprise the composite week. No changes are proposed for the future in this program category. Therefore you are requested to inform the Commission of the reasons why you believe it is in the public interest not to broadcast discussion programs (i.e., forum, panel, and roundtable programs) over your facilities.

With respect to the discussion of public issues, you state in exhibit No. 8 that, "WKY will continue its policy of providing time for discussion of public issues and presenting information of public and community interest." You state further that, "under the rules, time is given to explain, for example, bond issues, annexation proposals, special legislation, special elections, financing public schools, income tax regulations, etc. On subjects of controversial nature, WKY will seek out both sides of an issue and give equal coverage * * *. The method of handling issues as outlined in this exhibit is essentially one of listener interest and maintaining listener interest. Subjects selected for airing are analyzed for the proper method of handling. In most cases, listener interest can best be maintained if the discussions or questions, and answers are covered within the realm of 60 seconds and inserted into a program essentially in the entertainment or news category. Several such 60-second insertions over a period of an hour maintain listener interest and result in a more widespread coverage of the issue." You are requested to advise the Commission as to whether these 60-second inserts constitute forum, panel, or roundtable programs. Such programs by definition involve more than one speaker. You are also requested to submit illustrations of programs relating to the discussion of public issues which may have been broadcast over your facilities during the past license period.

It is noted in paragraph 2(a) that 5.47 percent of the composite week was devoted to agricultural programs. No changes are proposed for the future in this program category. A review of the program logs and proposed program schedule shows that the program "Farm Information Time" which is broadcast Monday through Friday from 5:30 to 7 a.m. is classified as agricultural and consists of recorded music interspersed with short newscasts, market reports, weather and livestock auction reports. Whereas the total broadcast time devoted to this program is classified as agricultural, it appears that the time devoted to the broadcast of agricultural program material represents only a portion of the total time. Accordingly, the allocation of 5.47 percent of time to agricultural programing in paragraph 2(a) appears to be overstated. Thus, it may be necessary that your responses to paragraphs 2 (a) and (b) with respect to the above matter be amended.

In addition to the above, paragraph 2(a) shows that 0.28 percent of time was devoted to educational programs and 0.36 percent of time was devoted to talk programs during the composite week. No changes are proposed for the future in these categories. A review of the application and associated exhibits shows that your station's programing consists almost entirely of recorded music inter-

KANSAS STATE COLLEGE LIBRARY MANHATTAN KANSAS

spersed with short newscasts and commercial and noncommercial announcements. With the exception of religious programs early each morning and on Sunday, all programing material consists of capsule announcements presented in what you call diskjockey shows throughout the day. You state in exhibit 10 that, "In searching out the needs and desires of this community, the licensee has found this program matter to be much appreciated and widely accepted." You are requested to inform the Commission as to how you determined the needs and interests of the community, the persons and/or organizations contacted for the purpose of presenting programs on their behalf, the offers which may have been made and the responses received from such offers. It cannot be determined from the material submitted that invitations were extended to interested groups or persons to use the station's facilities or that the station's personnel would be made available for the purpose of assisting in the production of programs. Full opportunity is afforded you to explain how your station's programing is in the public interest.

Paragraph 4(a) shows that 16.66 percent of your programs were local live presentations. The program logs show that your live programing consists of short newscasts, weather reports, agricultural material included in the "Farm Information Time" program, and the religious program on Sunday. Although the logs do not so show, you may have included in live programing the announcements you intersperse in your so-called diskjockey shows. It does not appear that local live programing constituted 16.66 percent of the station's operating hours or that future programing will constitute the same percentage of your operation. You are requested to review your responses to paragraphs 4(a) and 4(b) to determine the accuracy thereof.

A review of the technical portion of the application discloses that only two of the transmitter logs for the composite week show base current readings. Your attention is directed to the terms of the license which provide, among other matters, that when phase monitor sample currents are read and logged in lieu of base currents, the base currents should be read and logged at least once daily. It is requested, therefore, that you explain this discrepancy and that you duly signed by an officer of the corporation. You are requested to submit your indicate the corrective action taken.

Any information submitted in response to this letter should be filed in triplicate, response within 20 days of the date of this letter.

Very truly yours,

BEN F. WAPLE,
Acting Secretary.

JULY 27, 1962.

WKY TELEVISION SYSTEM, INC.,
Television Station WKY–TV,
Oklahoma City, Okla.

GENTLEMEN: This is with further reference to the application for renewal of license of station WKY–TV (BRCT–34) and to the application for assignment of license of station KTVT, Fort Worth, Tex., to WKY Television System, Inc. (BAPLCT–44). Also, receipt is acknowledged of your response to the Commission's letter of May 11, 1962, wherein you were requested to furnish additional information with respect to the operation of those stations in the public interest.

In your response, you state that it is your policy to preempt regularly scheduled entertainment programs between the hours of 6 p.m. and 11 p.m. for programs in the public interest and thus retain sufficient flexibility in your programing operation to permit opportunities for programs designed to serve the needs of significant minority groups in the community. In your letter, you list programs which you state preempted regularly scheduled network and other programs. It does not appear from your letter whether these are the only instances of preemption during the 6 p.m. to 11 p.m. period during 1961. If the list is not complete for this time period, you are requested to furnish a complete list thereof for the year 1961.

It appears from the programs listed for 1961 that they are classified for the most part as talk and news. It appears, further, that a number of the programs were documentaries dealing with the heritage of the State of Oklahoma and its citizens. It does not appear that any of the substituted programs were discussion programs (i.e., forum, panel, or roundtable), programs relating to the discussion of public issues, or interviews. In two instances, scheduled discussion programs were preempted. A question is raised as to the manner in which you

are serving the needs and interests of your community when you do not provide time for regularly scheduled local discussion programs and programs relating to the discussion of controversial issues of public importance during prime evening hours; and particularly when your policy of preempting programs does not result in the broadcast of such discussion programs.

With respect to our inquiry concerning the commercial policy of stations WKY–TV and KTVT, your response is limited almost entirely to the quotation in the Commission's policy statement on programing which states that "* * * there is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance." The Commission's policy statement acknowledges the truism that given a good program, the value of the program is not changed by its being sustaining or commercially sponsored. This statement does not stand for the proposition that all commercially sponsored programs necessarily are in the public interest. The Commission specifically points out that the licensee must retain flexibility necessary in programing to accommodate the public needs and anticipate that it may be necessary to present programs on a sustaining basis in order to achieve that end. In consequence, we would appreciate a further response to the questions raised with respect to 94.23 percent of commercial time on station WKY–TV and the proposal for 100 percent of commercial time on KTVT during the 6 p.m. to 11 p.m. period.

Accordingly, you are again requested to furnish information as to how you will provide opportunities for programs designed to serve the communities in which the stations are located.

Very truly yours,

BEN F. WAPLE,
Acting Secretary.

[Attachment A]

MAY 11, 1962.

WKY TELEVISION SYSTEM, INC.,
Television Station WKY–TV,
Oklahoma City, Okla.

GENTLEMEN: This is with reference to the application for renewal of license of station WKY–TV (BRCT–34) and to the application for assignment of license of station KTVT, Fort Worth, Tex., to WKY Television System, Inc. (BAPLCT–44).

In connection with a review of the program log analysis of the WKY–TV renewal application, section IV, paragraph 4(a) shows that during the composite week the station devoted 94.28 percent of the 6 to 11 p.m. time period and 87.14 percent of the 8 a.m. to 6 p.m. period to commercial programs. Under your proposals for future operation you show that 100 percent of the evening hours (6 to 11) and 92.01 percent of total broadcast hours will be devoted to commercial programs.

A review of the program logs submitted with the application shows that on Monday through Friday during the 6 p.m. to midnight hours your programing consisted of a half hour of news at 6 o'clock and a half hour of news, weather, and sports at 10 o'clock with the rest of the time devoted to network and recorded entertainment programs.

The above raise questions as to whether the station has retained sufficient flexibility in its programing operation to permit opportunities for programs designed to meet the needs and interests of significant minority groups in the community. Therefore, you are requested to explain how your station's programing is designed to serve the particular needs and interests of the Oklahoma City community.

Additionally, the Commission has received several complaints alleging that with respect to a "right-to-work" bill, apparently now pending before the Oklahoma legislature, stations WKY and WKY–TV have broadcast only those views in support of said bill. The Commission has no independent information concerning the subject matter of the above complaint and it has reached no determination in the matter. In light of the Commission's "fairness docrine" relating to the treatment of controversial issues of public importance and in accordance with its practice of associating complaints with the files of the station involved and affording said station the opportunity to comment on the complaints, his matter is being brought to your attention.

In connection with the application for assignment of license of station KTVT, Fort Worth, Tex., it appears that during a proposed typical week of operation the station will devote 100 percent of its time to commercial programs during the 6 to 11 p.m. period and during the daytime hours (8 a.m. to 6 p.m.) almost 95 percent of the programs will be classified as commercial.

A review of the proposed program schedule shows that between the hours of 8 a.m. and 6 p.m. on the weekdays, except for news and weather and a daily 15-minute program you classify as agricultural, all of your programs will be entertainment and will be commercially sponsored. During the evening hours between 6 p.m. and signoff at 12:10 a.m., except for a half hour of news, weather, and sports at 10 o'clock all programing has been classified as entertainment, recorded commercial.

As in the case of the renewal application of WKY–TV, there is the question as to whether the assignee will retain sufficient flexibility in its programing operation to permit opportunities for programs designed to meet the needs and interests of significant minority groups in the Fort Worth community. Accordingly, your response to this letter should set forth in detail how your station's programing will serve the particular needs and interests of the community.

In exhibit 13 you explain certain of your proposed programing in the categories covered by section IV, paragraph 2(b), of the application. Further information is requested so that the Commission will have a clearer understanding of certain of the programs. (*a*) You state that you are serving the needs of the diversified agricultural interests by scheduling a 15-minute farm program each morning, Monday through Friday. From the description of the program, it appears that the program will consist entirely of weather information. Additional details as to the format of the program are requested so that it can be determined whether the program comes within the Commission's definition of an agricultural program. (*b*) With respect to educational programing, you indicate that you have discussed programing possibilities with educational leaders in the area and promised them full cooperation. You are requested to furnish additional information relating to the manner in which you have ascertained the needs and desires of your community with respect to educational programing. The additional information requested should include, but is not limited to, the identification of the educational organizations and the names of the individuals contacted for the purpose of formulating educational programing; the amount of time (i.e., 5 minutes, 10 minutes, 15 minutes, 30 minutes) proposed for each program and whether the station offered its facilities to effectuate such programing; and the response you received from your offers.

Any information submitted in response to this letter should be filed in triplicate, duly signed by an officer of the corporation. You are requested to submit your response within 20 days of the date of this letter.

Very truly yours,

BEN F. WAPLE,
Acting Secretary.

FEDERAL COMMUNICATIONS COMMISSION,
Date:——.

GENTLEMEN: This is with reference to your application for renewal of license of ----------.

The Commission recognizes that it is the licensee's responsibility to determine the program needs and interests of the community which he serves. On the other hand, in order to fulfill its duty to see that each licensee's overall service is in the public interest, the Commission must assure itself that the licensee has adequately discharged this responsibility.

The Commission's *Report and Statement of Policy Re:* Commission *En Banc Programing Inquiry* (20 Pike & Fishcer RR 1901 (1960)) notes that among the major elements usually necessary to meet the public interest, needs and desires of the community in which a station is located are the provision of an opportunity for local self-expression and the development and use of local talent. The Commission's Report notes further that in light of the Communications Act's requirement of a "fair, efficient, and equitable distribution of radio service" among the several States and communities and in light of the licensing policies which the Commission has followed in carrying out this mandate, "appropriate attention to local live programing is required."

Your application indicates that your station devotes approximately—percent of its overall broadcast time to local live programing on the basis of the composite week. In the time segment of 6 and 11 p.m., your application indicates

that your station presents certain local live programs. Beyond this, you state generally that you have a policy of preempting time allocated to network or film programing in order to present local live programs, when and as the need arises.

In this connection, so that the Commission will have a fuller understanding of the operation of your policy with regard to local live programing, including your policy of preempting time for such programs, you are requested to submit the following information:

(1) A narrative description of the steps you have taken to determine the needs and interest of your community for local live programing.

(2) The conclusions you have reached on how such needs and interests should be fulfilled in each segment of the broadcast day (8 a.m. to 6 p.m.; 6 p.m. to 11 p.m., and other).

(3) A description of the local live programs carried by your station within the past 12 months in each segment of the broadcast day. Where such a program was regularly scheduled, specify if it was carried once a week, once a month, etc.; where it was a special program preempting another type of offering specify the time, date, and length thereof.

(4) A statement of your plans, based on your evaluation of the needs and interests of the area served, for fulfilling those needs and interests for local live programing during the coming renewal period in each segment of the broadcast day.

Any information submitted in response to this letter should be filed in triplicate, duly signed by an officer of the corporation. You are urged to provide this information as soon as possible so that we may complete the processing of your renewal application without any unnecessary delay.

Very truly yours,

BEN F. WAPLE, *Secretary.*

STILLWATER, OKLA., *October 31, 1963.*

Re support of H.R. 8316.

Congressman WALTER ROGERS,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN ROGERS: Please record the support of the Oklahoma Broadcasters Association for H.R. 8316 as introduced by you.

Our association, comprised of over 40 member stations, has received the full support of the entire Oklahoma congressional delegation (expressed in a letter signed by all) in support of our comments filed with the FCC on this subject. And we will advise our State delegation members of our opinion that passage of H.R. 8316 will go a long way to settle the FCC's on-again, off-again efforts to impose artificial and arbitrary controls on program and advertising content.

We commend you for the effective and concise wording of the proposed legislation offered by you.

As directed by the board of directors, Oklahoma Broadcasters Association, October 30, 1963.

CLEE FITZGERALD,
Counsel for Oklahoma Broadcasters Association.

[Telegram]

WASHINGTON, D.C., *November 6, 1963.*

Hon. WALTER ROGERS,
Chairman, House Subcommittee on Communications and Power,
House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: We respectively request that the following comments of the California Broadcasters Association be made a part of the record in your committee's hearing regarding H.R. 8316.

California Broadcasters Association represents a substantial number of the approximate 242 radio and television stations licensed to operate in California. California Broadcasters Association supports H.R. 8316 for the following reasons:

1. Federal Communications Commission has proposed the adoption of rules that would require all AM, FM, and TV stations to observe the limitations on advertising time which are presently contained in the radio and television codes of the National Association of Broadcasters. H.R. 8316 would prohibit the

Commission prescribing any rules with respect to the length or frequency of advertisements which may be broadcast. The rules proposed by the Commission raise several serious legal questions among them being—

(*a*) Whether the Commission has authority to adopt commercial time limitations under present laws.

(*b*) Whether the proposed rules amount to censorship and therefore violate section 326 of the Communications Act of 1934.

(*c*) Whether constitutional rights guaranteed by the first amendment would be violated by the proposed rules. In view of the doubt as to the legality of the rules proposed by the Commission, lengthy and expensive court proceedings would follow their adoption. The most expeditious method of resolving the dispute is the enactment of H.R. 8316.

2. Advertising is indispensable to the maintenance and the growth of our economy. Advertising alone makes it possible for stations to serve the public interest. Because of the vast number of stations and the myriad of factors affecting each of them it is impossible for the Commission to envolve workable rules with regard to the number and length of commercials. The injection of the Commission into this area would necessarily involve it in questions such as: Can the amount of advertising on the station be reduced without financially jeopardizing the station? Does the station operate at a satisfactory profit? What is a satisfactory profit? Is the station operating efficiently? What changes could be made in station operations to permit it to operate profitably with less advertising? Clearly questions such as these can best be answered by the stations themselves.

3. The solution to the problem lies in self-regulation. Every station assumes the responsibility of operating in the public interest. It is the station's obligation to adopt appropriate commercial standards which are in the public interest. Only such self-regulation is consistent with the statutory scheme of the Communications Act. Commercials are but one aspect of overall programing; so long as a station is responsible for programing it must retain the responsibility for commercials in all their aspects. Many broadcasters have found that the standards of the NAB codes are consonant with their operations and serve the public interest. This choice however has been voluntary and based on the station's assessment of all the circumstances with which it is confronted in determining how to operate in the public interest. It is contrary to the scheme of the Communications Act and not in the public interest for the Commission to adopt standards with regard to commercials.

Respectfully submitted.

CALIFORNIA BROADCASTERS ASSOCIATION,
ROBERT D. WOOD, *Hollywood, Calif.*

[Telegram]

BOSTON, MASS., *November 5, 1963.*

Hon. WALTER ROGERS,
Chairman, Subcommittee on Communications and Power,
House Office Building, Washington, D.C.:

The Massachusetts Broadcasters Association wholeheartedly endorses H.R. 8316. The association has filed comments with the Federal Communications Commission expressing in detail the association's opposition to the Commission's proposed changes in its rules and regulations with respect to advertising (docket No. 15083). Should you so desire, you have our full permission to incorporate our associations views as expressed in said comments into your proceedings.

Respectfully yours,

GEORGE W. STEFFY,
President, Massachusetts Broadcasters Association.

[Telegram]

TUCSON, ARIZ., *November 2, 1963.*

Representative WALTER ROGERS,
House of Representatives,
Washington, D.C.:

On behalf of the Tucson Broadcasting Association, who have given their unanimous consent to this communication, we strongly urge your committee to

expedite the passage of H.R. 8316. We are giving our personal and editorial support to this proposed addition to the Communication Act. We believe this bill to be a simple and effective method for the Congress to indicate specific intent to the FCC regarding its authority to control broadcast stations. Copies of this wire are being sent to Congressman Morris Udall, Senator Carl Hayden, and Senator Barry Goldwater.

THOMAS J. WALLACE, Jr.,
President, Tucson Broadcasters Association.

STATEMENT OF THE ARKANSAS BROADCASTERS ASSOCIATION BY W. H. MAYO, PRESIDENT, AND DON WHITNEY, SECRETARY

It is the desire of the Arkansas directors to present a highly significant viewpoint which may not have been expressed in statements previously filed, to wit:

When stations are operated by responsible licensees, the amount of community and public service increases as station revenue increases. Therefore, proposed limitations on commercial time would not serve the public interest.

Among those stations which have described the impracticality of operating under the proposed commercial limitations are daytime stations, stations in markets where advertising is customarily concentrated in the closing days of the week, and stations with seasonal advertising surges. Many such stations acknowledge that in certain periods advertising exceeds the limitations proposed. Among these are stations which subscribe to the NAB Code of Good Practices because the code establishes high standards of operation in regard to programing and advertising content.

Loss of present revenues derived from advertising which is in excess of proposed limits will inevitably require adjustments in operating cost. Since payroll is the largest item, loss of revenue must mean reduction of personnel, and adequate personnel is the key to effective community service.

When staff members can devote a portion of the normal workweek to community service projects or to program preparation, the underlying purposes of the proposed rules are well served. On the other hand, when a minimal staff must handle all details of a station's operation, economic survival dictates against energetic, imaginative community service programing. This fact is evident in the operation of marginal stations.

The supposition that increased commercial activity by a station limits public service performance is poorly founded. Generally speaking, the best public service work is being done by the more affluent stations. Therefore, what appears to be aesthetic improvement in programing through the limitation of commercial time would actually result in the loss of public service functions performed with vitality and the substitution of noncommercial spot announcements which are abundantly available and easy to schedule and perform.

The board of directors of the Arkansas Broadcasters Association opposes limitations on commercial time not only by rulemaking by the Federal Communications Commission but also as a requirement of the Code of Good Practices of the National Association of Broadcasters. It is our belief that good programing in good taste can be combined with effective public service without the imposition of limits on commercial time, and that public service tends to increase as net revenues increase.

We therefore conclude that the proposed rules are based on the faulty premise that public service broadcasting decreases as commercial broadcasting increases, whereas the opposite reaction is more typical throughout the broadcasting industry.

(Approved by the board of directors, Arkansas Broadcasters Association, at North Little Rock, Ark., July 12, 1963.)

STATEMENT OF HORACE FITZPATRICK, PRESIDENT, VIRGINIA ASSOCIATION OF BROADCASTERS

The Virginia Association of Broadcasters opposes limitation on the length and frequency of broadcast advertisements. No single set of generalized rules can fairly regulate the manner in which the Nation's broadcasters present commer-

cials, for radio and television stations operate under a wide variety of conditions and face many different types of problems. Further, regulation of one segment of the broadcasters' programing would open the way to Government control of other aspects of programing, including news and public affairs.

STATEMENT OF GENE CLAUSSEN, PRESIDENT, IOWA BROADCASTERS ASSOCIATION

On behalf of the Iowa Broadcasters Association I express our support of the bill (H.R. 8316) introduced by Representative Walter Rogers of Texas relative to the proposed FCC rule limiting commercial time of broadcasting stations.

Of the many dangers inherent in any such limitation there is the obvious hardship any such measure would place on daytime broadcasters during roughly one-fourth of the year.

We feel too that the broadcast industry (and the individual stations within it) should prosper or fail according to the listener's or viewer's response which is usually quite vividly apparent to broadcaster and advertiser at all times.

We feel Congressman Rogers' bill is important to the industry and strongly urge its passage.

STATEMENT OF N. L. BENTSON, PRESIDENT, MINNESOTA BROADCASTERS ASSOCIATION, REGULATION OF ADVERTISING

On July 29, 1960, the Commission released a statement of policy on programing. In that statement, the Commission wisely said, "* * * There is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance." The Commission now, however, proposed to controvert its own axiom, and control the degree of sponsorship on the grounds of public interest.

Any broadcaster who made a 180-degree turn in program direction would be questioned by the FCC as to what change of conditions warranted such a change in programing.

Here the roles are cast oppositely in the proposed rulemaking. The Commission has submitted a plan. Now comes the broadcaster to ask why. Why a 180-degree turn? Did the public, through Congress, tell the Commission that public interest should be changed?

Returning to the 1960 statement, after encouraging the broadcaster to continue his survey of his community, the Commission goes on to state that such community views "clearly cannot be accepted without attention to the business judgment of the licensee if his station is to be an operating success." This is, indeed, clear, and so patently true that the Commission's motivation in the present proceeding is extremely cloudy.

"We," states the Commission in 1960, regarding broadcast codes, "consider the efforts of the industry to maintain high standards of conduct to be highly commendable, and urge that the industry persevere in these efforts." We, the broadcasters, find the compliment turning to gall when, after 3 more years of fruitful efforts, such efforts are rewarded by another 180-degree turn.

The question of the Commission's legal right to propose the instant rulemaking will undoubtedly be discussed in the statements of others. We question here only the Commission's promise versus performance * * * and find the answer wanting.

STATEMENT OF EUGENE B. DODSON, PRESIDENT, THE FLORIDA ASSOCIATION OF BROADCASTERS

The Florida Association of Broadcasters is in full accord with and vigorously urges adoption of H.R. 8316, a bill to prohibit the Federal Communications Commission from establishing, by rule, limitations upon the length or frequency of broadcast advertising.

The Florida Association opposes the FCC's proposed limitations rule for these reasons:

1. The Commission's attempt to regulate commercials is illegal, in that it is not authorized by the Communications Act of 1934, and, therefore, is an attempt to legislate by rule. In 1955, the Commission, in commenting on H.R. 5741 (a bill to provide regulation of the amount of radio and television advertising)

stated: "It is our opinion that, with the cooperation of the industry through self-regulation and self-restraint, the Commission's present procedures are best calculated to achieve the goal of operation in the public interest without involving the Federal Government in day-to-day management of stations in which it cannot, and, in our opinion should not, effectively or properly engage."

2. The Commission's proposal is another step toward program control and censorship, in that the Commission would dictate program composition in violation of the Communications Act.

3. The Commission's proposal would result in economic strangulation of small stations through inflexible rules being applied in areas where flexibility is essential to the financial health necessary for stations to continue serving in the public interest. The proposed rule also would place stations at a distinct disadvantage in competing with uncontrolled media for advertising revenue.

4. Sufficient means of commercial control already are in use through the Commission license-renewal policies, the self-restraint and judgment of broadcasters, and the ultimate power of the public to refuse to listen to or view improperly operated stations.

Therefore, the Florida Association of Broadcasters respectfully and urgently requests adoption of H.R. 8316 to specifically prohibit the FCC from instituting, by rule, any limitations on length, frequency, or placement of broadcast advertising.

STATEMENT OF CARLTON S. DARGUSCH, JR., SECRETARY-TREASURER AND COUNSEL, THE OHIO ASSOCIATION OF BROADCASTERS

It is the sincere belief of the Ohio Association of Broadcasters, which represents 80 of Ohio's radio stations and 19 of its television stations, that H.R. 8316 should be enacted into law at the earliest possible moment for the following 2 very important reasons:

(1) It appears quite clear that the proposals of the Federal Communications Commission to regulate advertising are contrary to the intent and spirit of the previous laws which the Congress has passed in the field of communications. Although it should be unnecessary, it does appear that the Federal Communications Commission needs to have this past intention of the Congress spelled out in clear and convincing terms.

(2) If H.R. 8316 does not pass, and the Federal Communications Commission adopts its proposed rule, a long period of confusion would exist during the time required for the litigation which would most certainly follow adoption of such a rule.

For the above-stated reasons, the Ohio Association of Broadcasters urges prompt passage of H.R. 8316.

LESHER, SCHMIDT & VAN CISE,
ATTORNEYS AT LAW,
Denver, Colo., November 4, 1963.

Hon. WALTER ROGERS,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN ROGERS: I am informed as attorney for the Colorado Broadcasters Association that your Subcommittee on Communications and Power is holding hearings on November 6, 1963, concerning H.R. 8316, a bill to make it clear that the FCC may not adopt a rule limiting commercial time.

The Colorado Broadacsters Association representing the radio and television stations in Colorado wholeheartedly support H.R. 8316 and urge the favorable consideration of this bill by your committee.

We enclose herewith a copy of the petition filed by the Colorado Broadcasters Association before the Federal Communications Commission in docket No. 15083. This petition sets forth the position of the Colorado broadcasters concerning proposed commercial time limitations and we respectfully request that this be submitted to your subcommittee as setting forth the views of our organization concerning the proposed procedure by the FCC.

It is our sincere hope that each Member of Congress from Colorado will support H.R. 8316.

Sincerely,

RICHARD M. SCHMIDT, JR.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations with Respect to Advertising on Standard, FM, and Television Broadcast Stations

The Colorado Broadcasters Association, an organization composed of licensees of radio and television stations in the State of Colorado respectfully presents to the Federal Communications Commission the following petition, pursuant to resolution adopted at the annual convention of said association in Durango, Colorado, on June 21, 1963.

1. The Colorado Broadcasters submits that the proposed rulemaking is not only impractical but is unwarranted. While fully recognizing the responsibilities vested in broadcasters by virtue of the license granted pursuant to the Communications Act of 1934, the Colorado Broadcasters Association submits there is nothing in the Communications Act which grants the Commission authority to impose limitations on the amount of time which broadcasters may use for commercial messages.

The broadcaster, while subject to regulation of the Commission pursuant to the Communications Act, has and is in a competitive free enterprise position as far as the amount of his advertising sold and the rates charged therefor. He therefore operates under the basic tenents of capitalism in having the opportunity to make a profit but also facing the necessary corollary thereto—the right to go broke.

The broadcaster's ultimate consumer, the listening public, constitutes the greatest regulatory body of all and no broadcaster will long survive who offends the listening public with commercial policies abhorrent to them.

We cannot help but comment on the fact that the Commission has engaged in a favored administrative practice of citing itself as authority (footnotes 1, 2, and 3, docket No. 15083). Nowhere in the said docket No. 15083 do we find any judicial decisions sustaining the Commission's theory.

In fact, the Commission's own citation shows the Commission has neither a reason nor the authority to adopt the proposed rules. The Federal Radio Commission in its reply to Senate Resolution 129 (72 Cong., 1st sess. (footnote 2, p. 2, docket 15083)), stated:

"Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the Commission to do so under a general standard prescribed by that legislation. While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising.

* * * * * * *

"A flat restriction placed upon the amount of time used for sales talks without regard to the location, power, and activities of stations would, in all probability, work inequitable results. Moreover, and in any case or class, limitations upon the use of time for commercial advertising, if too severe, would result in a loss of revenue to stations which, in all probability, would be reflected in a reduction in the quantity and quality of programs available to the public.

"The radio act of 1927 was obviously designed to permit the licensees of broadcasting stations the maximum of latitude in the matter of program material. Such licensees are in a singularly favorable position to learn what the audience wants to hear and to make the necessary changes in program material and in the methods of presentation that will cause their programs to be favorably received by a substantial majority of listeners. The adoption of regulation of the sort herein described should be undertaken only when it clearly appears that a majority or at least a considerable number of the licensees have failed to operate their stations in a manner acceptable to a majority of the listening public. If, in the opinion of Congress, that time has arrived, we conceive it to be advisable to enact such legislation as will permit the Commission to impose such regulations as the circumstances from time to time seem to warrant rather than legislation imposing specific restrictions and unflexible limitations."

The above statement is just an applicable to the FCC as it was to the FRC.

2. The inequality of the proposed rule by the Commission could be no more dramatically illustrated than by its probable effects on the broadcasters of the State of Colorado.

Ours is a State of dramatic geographic and population extremes. The Commission has granted licenses to Colorado broadcasters in cities ranging from a population low of 1,101 people to a high of 493,887. The population density in the counties where the stations are licensed ranges from a low of 1.5 persons per square mile to a high of 7,483.1 persons per square mile.[1]

The geography ranges from the eastern plains area where the principal factor in the economy is the multiacreage, dryland wheat farms, through the largely urbanized metropolitan areas along the eastern face of the Rocky Mountains where the largest factor in the economy is manufacturing and mercantile activity, to the mountain communities where the dominant factor in the economy is seasonal tourist activity governed by climatic conditions.

The utter futility of attempting to write into regulatory form rules of conduct to cover these varied situations is readily apparent.

The 1963 wheat crop in Colorado is one of the smallest in recent years due to drouth and late frost. The broadcaster in the wheat area, like the wheat farmer, must face "fat" and "lean" years. Unlike the wheat farmer, who has a price support in exchange for acreage limitation, the broadcaster has no guaranteed income. What the Commission now proposes is "limitation" without "support." It has been estimated that this year's low-yield wheat crop means a loss of $40,000,000 in income in Colorado. The broadcaster in this area will suffer his proportionate share of this loss. If he is limited in his opportunity to recoup his loss in the years of good crop, he will not survive to serve his community.

One of our mountain communities with a standard broadcast station has a permanent population of 3,612 persons. Largely dependent upon tourism to sustain its economy, this town doubles and even trebles in size during the prime tourist season from June 15 through Labor Day. Like the Alaskan truck farmer, this broadcaster has a rather short growing season. And, yet, is it to be said that his commercial sales in the summer are to be limited? The inevitable result would be that during the relatively barren months of the remainder of the year he would be without financial resources to carry on the public service activities so desired by the community's year-round residents. It would undoubtedly cause him to forgo the remote broadcasts that he now carries of the town's high school athletic teams, cause him to reduce his personnel so as to be unable to gather all the items of community interest which are regularly broadcast for the information of the local citizenry.

This broadcaster states:

"Our population may fluctuate from a base figure of 3,612 permanent residents in the winter to 7,500 to 10,000 when summer visitors pour in.

"As a result, many businesses (drive-in theaters, motels, restaurants, etc.) operate only in summer and advertise only in the summer months.

"Thus, we usually carry twice the commercial load in June, July, and August that we do in January, February, and March.

"As a result, we make money in summer, lose in winter, and must balance to survive economically.

"Generally speaking, our advertising revenue drops 33 to 50 percent with the advent of 'off-season' months."

Unlike the motels, restaurants, and other business operations, this broadcaster cannot shut down during slack months and eliminate overhead.

Another concrete example of the impracticality of the proposed rule is illustrated by the following comment from a radio station operator in a suburban metropolitan area:

"This spring our high school team was in the State AAA baseball finals at Greeley, Colo. We followed the team and broadcast both of its games. The Friday afternoon game started late and ran later. It backed up into traffic time and we were forced to stuff in several spots in several minutes after the game was over. We definitely violated the limit on the number of commercial minutes in a quarter hour. (Referring to the NAB code.) We were all right on the succeeding full hour. We feel we performed a public service by carrying the game; but we violated the proposed rule in also taking care of our regular sponsors. This can happen any time in a sports event because of extra innings, overtimes, and the like."

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[1] Figures from 1960 United States Census of Population.

Another example of community participation which would be barred by the proposed rule is illustrated by the following comment from a Colorado broadcaster:

"In past years we have allowed the Lions Club to sell time for a few hours one day near Christmas. They sell the time, keep the proceeds, and make some money for their scholarship fund. We do not, by the way, let them run the station, but they do appear on the program and sell a lot more than 18 minutes of time in each hour. This has become a big day in the community."

Another broadcaster in our largest metropolitan area states:

"We subscribe to the NAB radio code and religiously observe all of its provisions. The proposed FCC rule would, therefore, have absolutely no effect on our station.

"Nonetheless, after spending 20 years in the radio business, I am quite aware of the enormous burden which would be placed on some stations. Markets vary considerably across the country and the amount of money an operator may charge for his time vary sharply from market to market.

"In Denver there are 10 full-time stations, and in addition there are several day-time only stations. Thus, the Denver market is sharply more competitive than large eastern markets with far fewer stations. The Federal Communications Commission has granted licenses to these stations for operation in Denver, and, because of the vast number of stations in Denver, it is necessary for many of the stations to exceed the proposed limitations at certain times. Because they are often unable to obtain satisfactory rates in this highly competitive market, it is necessary for them to compensate by running more announcements than would be necessary in a market not so overpopulated with radio stations.

"It seems grossly unfair for the FCC to grant a license to a small businessman for the operation of a station in Denver and then to place restrictions on the number of announcements which he must run in order to show a profit and serve the public interest by using a portion of his income to develop new features of interest and service to his audience.

"It should be apparent to everyone that a station which truly overcommercializes and exceeds the number of commercial broadcasts acceptable to an audience will soon find the practice self-defeating. His audience will go elsewhere and advertisers will have little incentive to buy the station and, consequently, the number of commercials broadcast will decline. In Denver, I believe a certain stability has been achieved by most stations so that the cycle of having too many commercials, losing audience, then having too few commercials, regaining audience, running too many commercials again, etc., has been virtually eliminated. If radio stations are allowed to follow their natural commercial development, the cyclic overcommercialization, followed by a period of loss for the station, will naturally and normally be eliminated. An unprofitable radio station cannot and does not serve the public interest, convenience and necessity."

Another comment of a broadcaster states, in referring to a particular area in Colorado:

"There are two daily newspapers, three local television stations and six radio stations and the situation is extremely competitive. I can state unequivocally that the competition from other media is a primary factor in the low rate structure found in the market, and consequently to run many announcements on the part of some stations. These stations do not perform a disservice to the public, for there is nothing to my knowledge inherently bad about commericals in the first place. In the Commission's apparent attitude, that commercials are, per se, evil and subject to regulation, is contradicted by the fact that many commercial announcements render a distinct service to listeners in advising them where to obtain products and services that they desire."

Another comment follows:

"Our country was founded on the ideal of free enterprise with the many subsequent provisions that such free enterprise may remain free so long as it does not abuse its rights and privileges by harming other businesses or individuals. If a radio station elected to run commercials 24 hours a day and provide no entertainment, news or other public services, the station would soon find itself without listeners and, subsequently without advertisers. On the other hand, if a station elected to run 24 hours a day with no commercials and attempted to provide many services of varying kinds to the public, it would soon find itself without funds to continue operation. Somewhere between these two extremes, for each station, an individual operating policy must be determined.

The station running the most commercials and receiving the most money from advertisers each month may very well also be the station which is able financially to provide the greatest service for its listeners."

Another broadcaster comments as follows:

"It is impossible for the FCC or any other Government agency to establish rules in an area where so many variable individual conditions prevail and to enforce these rules successfully. Let the people make the choice. In the final analysis to determine a station's success or failure, if overcommercialism is abhorrent to most people as the FCC seems to believe, then the loss of listeners will effectively take care of the problem."

Commissioner Frederick W. Ford in his speech before the Wisconsin Broadcasters Association on June 28, 1963, set forth the problems that would squarely face the broadcasting industry of Colorado, where he stated:

"There are some situations that are not provided for in the radio code. A daytime station in the northern latitudes in the United States is on the air a comparatively short period of time during the day in winter months, and in the summertime, it has much longer hours. A daytime-only station, and there are about 1,300 of them in the United States, in the southern latitudes has a much more even broadcast day, summer and winter. If a station is to operate successfully, it would seem to me that it must make enough money to stay on the air the year around. It must have an effective organization both summer and winter. To enforce the National Association of Broadcasters' code in winter months against a northern daytime station as a matter of law could cause the elimination of a number of stations furnishing a valuable service to their communities.

"In addition, there are rural markets, in which little advertising is sold the first five days of the week, but on Friday and Saturday their stations are full of advertising. They make enough money those two days to pay for the service the other five days. A broadcaster talked to me in Seattle. He said, 'I would like to adhere to the NAB Code on advertising, but if I did, I would have to go off the air. I am the only station in a small town so that my people would lose their only broadcast service.'

"Resort-area radio stations furnish a broadcast service to those people who live as permanent residents in the area the year around, but it is only in the summertime that business is good enough that people can afford to advertise to any great extent on some of those stations. The stations in some cases must make enough money in three months to support it the other nine. Consequently, on the basis of these considerations, it would seem to be impracticable to include the self-regulatory code developed by broadcasters for the general government of broadcasters into rules having the force of law."

In addition to those problems as illustrated above, we have some communities in Colorado where the economy is centered largely around a single industry. These industries are cyclical in nature and the pattern of market supply and demand means seasonal layoffs, together with recurring unemployment during periods of labor strife. To severely limit these stations in their commercial activity when the economy is on the upswing after periods of economic depression means their eventual elimination as operators in the particular market.

You have stated you recognize there may be a need for separate standards to be applied to "certain special categories of stations" and you invite "comments, and, indeed, proposals. * * *"

We submit that we have in our comments shown the absurdity of attempting proposals to cover the variant seasonal, geographic, economic, and population situations in our state. Can such a proposal anticipate crop failure? labor strife? lack of tourists?

For example, last winter Colorado's ski season was both late and short due to late snowfall. Many ski areas advertised intensively when snow did arrive. Are these advertisers, many of them small business ventures, to be deprived of an advertising outlet during their short business season because they cannot obtain a relatively inexpensive media or because the media is limited in its availabilities due to blanket regulation?

In conclusion, the Colorado Broadcasters Association respectfully submits that neither the Commission nor anyone else has shown a need for the proposed rule. The proposed rule would be impossible of equitable administration and goes beyond the intent of Congress in its delegation of powers to the Federal Communications Commission. The adoption of the same would be

destructive of the interests of the listening public and would destroy available advertising outlets for thousands of small adveritsers.

Respectfully submitted.

COLORADO BROADCASTERS ASSOCIATION,
RICHARD M. SCHMIDT, Jr.,
Legal Counsel.

DENVER, COLO.

WISCONSIN BROADCASTERS' ASSOCIATION,
Milwaukee, Wis., November 4, 1963.

Congressman WALTER ROGERS,
Chairman, the Subcommittee on Communications and Power,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN ROGERS: We are writing to you in your capacity of chairman of the House Subcommittee on Communications and Power.

It is our understanding that your subcommittee will begin hearings on November 6, 1963, on a bill amending the Communications Act of 1934 to prohibit the Federal Communications Commission from making certain rules relating to the length or frequency of broadcast advertisements.

The Wisconsin Broadcasters' Association, which represents more than 87 percent of the broadcasters in the State of Wisconsin, wishes to be recorded with the subcommittee at this hearing as being emphatically in favor of the passage of this bill (H.R. 8316).

On September 13, 1963, we wrote the Secretary of the Federal Communications Commission outlining the opposition of the Wisconsin Broadcasters' Association to the proposed commercial time limitation rule now being considered by the Commission.

We quote from a part of that letter:

"If the Commission approves this commercial time limitation rule or adopts any other rule having to do with direct control of broadcast station programing, it enters a field which is not included in the Communications Act, the field of program content and composition. If the Commission adheres to the spirit and intent of the Communications Act, the Wisconsin Broadcasters' Association believes that this proposed invasion of the field of broadcast programing should never even be considered by the Commission. In other words, we feel that the proposed rule is contrary to the intent of the U.S. Congress as expressed in the Communications Act delegation of powers to the Commission, and would be an improper use of such powers."

We feel that the amendment to the Communications Act of 1934, as contained in H.R. 8316, will be an additional safeguard against any action which the Commission may take in connection with program content, length, or composition.

We strongly urge the adoption of the bill.

Sincerely,

BRUCE WALLACE, *President,*
Wisconsin Broadcasters' Association.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations with respect to advertising on standard, FM, and Television Broadcast Stations

COMMENTS OF THE MICHIGAN ASSOCIATION OF BROADCASTERS

1. The Michigan Association of Broadcasters is an organization representing 108 broadcast stations in the state, whose main purposes are to serve the needs of the industry and promote generally high standards of programing in the public interest. We provide an information service to members and promote exchanges of opinion among them, to the end that high business standards will be maintained and maximum public service rendered.

2. In carrying out these objectives, the Association and its members work closely with many civic, educational, and cultural organizations in the state and nation. A number of noncommercial educational broadcast stations in

Michigan are affiliated with the Association, and the commercial broadcasters and educational institutions engage in cooperative programs designed to improve the quality of broadcast service throughout the state. For example, in a joint effort with colleges and universities the Association recently initiated an internship program whose purpose is to give on-the-job training to capable college students and to aid in the recruitment of improved personnel for station management and operation.

Also, at our annual conventions and at other meetings, we give consideration to means by which we can more fully serve the commercial, educational, and cultural needs of the state and nation. In these ways, and by other self-regulatory processes, the Association, its members, and the public-service agencies are working to improve the quality of broadcasting in Michigan. Accordingly, we have a vital concern in the matter which is the subject of the instant proceeding.

THE PROPOSED REGULATIONS ARE ARBITRARY AND UNREALISTIC

3. While we do not question the good motives of the Commission, we believe the adoption of this proposal would be an unreasonable and unlawful exercise of power by the Commission. First, we would like to discuss its unrealistic and impracticable aspects. Later, we will deal with its illegality.

4. This proposal would freeze into a regulation a requirement that all stations, regardless of kind (clear channel, regional, local, AM, FM, and TV), and regardless of varying conditions under which they operate, submit to prescribed limits on the amount of commercial continuity that may be broadcast during the specified periods of time. While the Commission does state in its Public Notice that "there may be need for separate standards to be applied to certain special categories of stations," it does not take cognizance of the fact that the problems of hundreds of stations in a single category and the conditions under which they operate may differ widely. What may be reasonable and appropriate commercialization for a daytimer in one community may not be reasonable and appropriate in another. The same can be said of other station categories.

5. In attempting to evaluate commercial continuity in broadcasting, quantity is only one factor to be taken into account. And the true weight to be attached to any advertising percentage cannot be determined without reference to other factors, such as the particular social milieu of the coverage area in which the station operates—the cultural characteristics of the community, the values, attitudes, and behavior patterns of its people, their feelings toward business enterprise in general, and more particularly the prevailing climate of receptivity for advertising messages in the community served. Obviously, these conditions vary so much in different communities that it would be unrealistic to attempt to specify an arbitrary minimum standard applicable to all situations.

6. Another important consideration overlooked, is that the palatibility of commercials may vary greatly, depending upon design, placement on the program schedule, and the nature of their content. To set an arbitrary minimum is to ignore the fact that, on one station, three minutes of crudely constructed, hard-sell blatant spots can be far more offensive to the listener than twice that number of spots carried by another station, when they are artfully presented, with dignity and restraint, and with informational or entertainment values for the listeners. As Commissioner Bartley has pointed out in his Dissenting Statement, some stations with a greater number of commercials are more listenable because of their attention to the quality of production and presentation (sometimes entertaining and many times informative) where on the other hand other stations allow screaming, irritating, and obnoxious commercials which result in headaches that the advertised product is supposed to cure, but, because the commercials are *fewer* in number, would meet the code requirements any quarter hour of the day or night or season."

7. It also should be pointed out that an arbitrary and inflexible limit on commercials during certain time segments of the day would work a serious hardship on many stations, especially in those markets where advertising dollars are comparatively scarce. In a report dated December 6, 1962, the Commission stated that, of 3,469 AM and AM–FM stations then in operation, almost 40 percent lost money the preceding year. This was the highest proportion of stations reporting a loss in any year since the collection by the Federal Communications Commission of the broadcast annual financial data was begun in 1937.[1]

[1] "Broadcast Revenues, Expenses, and Income of the Radio Broadcast Service, 1961; report of FCC, dated Dec. 6, 1962.

8. Broadcasting increasingly is becoming an expensive business. As we pointed out in Docket No. 14507 (in the matter of Establishment of Fees for the Commission's Licensing and Regulatory Activities), the cost of materials, service and labor, accounting, taxes and many other expenses continue to mount. Added to all this is the expense of maintaining relationships with the community, and of meeting our growing responsibilities to government at local, State, and Federal levels.

9. And now, on top of recent action to charge service fees, to aggravate the financial plight of many stations, the Commission proposes to reduce further the amount of their income by imposing limits on the sale of commercial time during the prime periods of broadcasts. Many advertisers refuse, or are reluctant to purchase time during other segments of the broadcast day and insist that their advertising messages be presented when the larger numbers of people are listening. While, generally, broadcasters have no desire to overload these prime periods with commercials, more flexibility and freedom than the instant proposal would allow are necessary, if the financial security of many stations is not to be seriously jeopardized. Naturally, the 1,372 broadcast stations that lost money in 1961 and the 636 that made less than $5,000 that same year are vitally concerned.[2]

10. It goes without saying that cutting the revenue of stations must necessarily affect their ability to provide public service programming. To keep stations operating during the whole broadcast day (some periods from which little or no advertising revenue is derived); and to provide time for civic, educational, religious, and other cultural organizations in the community, stations must have leeway to distribute and group commercials in terms of the realities of the market situation. Otherwise, income suffers, and programming to meet varied community interests and needs must be neglected.

THE PROPOSAL WOULD UNDULY ENCROACH UPON THE FREEDOM OF BROADCASTERS

11. From the standpoint of public policy, we believe there is a more fundamental objection to the proposed regulation that should be considered. The proposal represents another attempt to encroach upon and restrict the freedom of broadcasters, and strikes another blow at one of the keystones of the democratic way of life. In a free society, as we have conceived it in the Western world, the protection of the individual and his enterprise have been considered crucially important. The rationale for this has been that where there is *free* exercise of personal powers, *free* speech, and *free* enterprise, individual citizens and institutions, which they create, can attain a higher level of growth in all important dimensions, that in the competition of the open market truth will prevail over falsehood, virtue will triumph over evil, and that the good society will be more readily attained. We think that long-range experience and history prove the validity of this concept, and we are opposed to the instant proposal which does violence to it. It is in our opinion, another move toward statism in the field of communications. Before giving sanction to a regulation that would further subordinate the interests of freedom in broadcasting, the Commission might well heed the words of John Stuart Mill: "A state that dwarfs its men, in order that they may be more docile instruments in its hands, even for beneficial purposes, will find that with small men no great thing can really be accomplished."[3]

12. While not perfect by any means (what human endeavor is?), we believe that broadcasting in this country, both quantitatively and qualitatively, deserves a superior rating. In our opinion, the freedom that the industry has enjoyed in the United States has been a large factor in the accomplishments of the industry. The broadcaster, under the American system, has been free to carry the kind of programs which, in his best judgment, will serve the interests of the people, and give him reasonable returns on his investment as well. He has been free to use his imagination, to use his creative powers, to experiment with new types of programs in the interest of providing more service to the community while, at the same time, having the opportunity to achieve greater financial security to meet his human needs.

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[2] Ibid., table 7.
[3] Mill, John Stuart, "On Liberty" (New York: Galeway Editions, Inc., distributed by Henry Renery Co., 1956), p. 161.

13. No governmental official can restrain him in the exercise of this freedom. Those who framed the Magna Charta for broadcasting in this country specifically prohibited censorship. Section 326 of the Communications Act reads:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station and *no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.*" [Italic supplied.] [4]

With a multiplicity and diversity of individual broadcasters free from governmental restraint, and with the forces of healthy competition at work, the people have been able to receive, overall, high quality programing, with a wide range of information, opinion discussion and entertainment.

THE PROPOSED REGULATIONS ARE LEGALLY INDEFENSIBLE

14. We recognize that individual freedom cannot be absolute. And certainly broadcasters do not expect it. As Judge Learned Hand has suggested, a society in which men recognize no check upon their freedom soon becomes a kind of human stockade, where freedom is limited to the evil few who inflict their savagery upon a servile and sorrowful population.[5] We acknowledge that broadcasters have the privilege of making use of publicly owned resources and are subject to some social restraints and must assume public responsibilities. For example, there are certain types of programs prohibited by statute such as lotteries, indecent and vulgar programs, and others that are not entitled to protection under the umbrella of the First Amendment which guarantees free speech and Section 326 of the Communications Act which forbids censorship. We are willing to agree to the validity of a statutory mandate which says, as a general principle, that stations, operating on publicly owned channels, should provide programs in the public interest, but we draw the line on proposed regulations that would prescribe detailed program categories applicable to all stations (see our comments in the Matter of Amendment of Section IV of Broadcast Application Forms, Docket 13961), and what now goes even farther, proposed requirements that would limit, in an arbitrary manner, commercial announcements and time during specific periods of the broadcast day. We do not believe such regulations will serve the public interest and are convinced that they are legally indefensible.

EXPERT OPINIONS DIFFER AS TO COMMISSION'S AUTHORITY

15. As the Commission well knows, there are widely differing opinions as to its authority in the program field. While experts generally agree that the Commission may concern itself with violation of specific laws such as those forbidding lotteries and indecent and vulgar utterance, beyond this, there is no unanimity of opinion. Some hold that the Commission has limited authority to review overall performance of stations when they come up for renewal of their licenses.[6] Others seriously question this.[7]

16. It should be pointed out that there has been a tremendous amount of speaking and writing in and out of Congress for more than twenty-five years to the effect that Congress never really intended to give the Commission the power of "overall review of programs. For example, the adoption of the Blue Book (Public Service Responsibility of Broadcast Licensees) in 1946, while supported by some Congressmen, was violently opposed by others. Shortly after it was issued by the Commission, Congressman Wigglesworth made a derogatory reference to it, saying that some people construed the document as "indicating an interest on the part of the FCC to assume unlawful control over what the people shall hear over the air." [8] At the same time, the late Senator Tobey dropped a resolution in the Senatorial hopper to determine how much the FCC has censored and controlled programs of broadcasting stations, and the extent it had restricted or might restrict freedom of speech as guaranteed by the Constitution of the United States.[9] Not to be outdone, Congressman Wolverton of New Jersey subsequently

[4] 48 Stat. at Large 1086, June 19, 1934.
[5] Hand, Learned, "The Spirit of Liberty, Papers and Addresses of Learned Hand" (New York: Alfred A. Knopf, 1952).
[6] See Emery, Walter B., "Government's Role in the American System of Broadcasting," Television Quarterly, February 1962, p. 7, for a discussion of authorities supporting this point of view.
[7] See Pierson, W. Theodore, "The Active Eyebrow—A Changing Style for Censorship," ibid., p. 14, for discussion of opposing point of view.
[8] 92 Congressional Record, p. 2217, Mar. 13, 1946.
[9] S. Res. 307, 92 Congressional Record, pp. 9803–9804.

gave the House notice that he was introducing a resolution to authorize an inquiry and complete study of the FCC.[10] Likewise, recent statements by Congressmen have raised questions as to the Commission's authority.[11]

13. Argument over the extent of the Commissioner's powers regarding programing has continued down through the years. Congress has never seen fit to define clearly in the statute what these powers are, and only in a few cases, have courts been called upon to say whether the Commission has fairly exercised its discretion within "the vaguish, penumbral bounds" expressed by the statutory standard of the public interest.[12]

THE PREVAILING ATTITUDE OF THE COMMISSION

14. In 1947, the late Senator White stated "the Commission does not have the authority to tell a licensee, directly or indirectly, what he can broadcast or cannot broadcast, or how he should run his day-to-day business. While it is clear that the Commission has the authority to make findings as to whether stations have operated in the public interest, there should be no elastic stretching of the words of the statute into tortured construction that go beyond Congressional intent." [13] While some Commissioners have not been willing to go even this far," [14] down through the years, with some variation, this has appeared to be the prevailing attitude of the Commission.

16. As early as the late thirties, a committee of the Commission made a study of the proposal to establish standards for program service and made the following statement:

"It is very difficult to prescribe 'standards of public service' uniformly for all broadcasting stations because initiative and reasonable freedom of action are essential to the American system of broadcasting. The problem is also complicated by the fact that the requirements of broadcast service differ in the various sections of the nation, and within these sections each community presents its individual similarities. Also the economic factor is different for each class operating in different communities. While it is the primary duty of each station licensee to offer programs which will fully satisfy the public needs in the particular area served, it is obvious that some general principles might apply to the industry as a whole * * *. However, it is needless to state that such standards should be minimum standards and they should be utilized solely as guides and subject to variation in accordance with changed conditions and even then should not be requirements of the Commission." [15]

17. In its Blue Book, mentioned above, the Commission stated that the primary responsibility for determining program service vests in the licensee of a station. While the Commission did state that it would give consideration to certain program factors in its overall review of station performance, it carefully avoided prescribing any particular percentages of time for the different program categories, or imposing any numeral limits on program types.[16]

18. In its 1960 "Report and Statement of Policy" in connection with its *en banc* programming inquiry, the Commission said:

"During our hearings there seemed to be some misunderstanding as to the nature and use of the '*statistical*' data regarding programming and advertising required by our application forms. We wish to stress that no one may be summarily judged as to the service he has performed on the basis of the information in his application." [17]

The Commission then referred to an earlier public notice (1946) in which the Commission emphasized "that the statistical data before the Commission constitute an index only of the manner of operation of the stations and are not considered by the Commission as conclusive of the overall operation of the stations in question." [18]

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[10] 93 Congressional Record, p. 2899, Mar. 31, 1947.
[11] See statement of Congressman Walter Rogers, reported in Broadcasting magazine, Sept. 2, 1963, p. 58, and statement of Congressman Orin Harris in letter to FCC Chairman Henry, reported in Broadcasting, Sept. 9, 1963, p. 77.
[12] See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 89–91, June 8, 1953.
[13] 93 Congressional Record, p. 5709, May 23, 1947.
[14] See dissenting opinions of former FCC Commissioners Norman Case and T. A. M. Craven, FCC "Report on Chain Broadcasting," May 1941, p. 117. Also see Commissioner Craven's dissent *In the Matter of Amendment of FCC Application Forms*, FCC Docket 12673, IRR 98:21.
[15] FCC Docket No. 5072–A, Apr. 1, 1939, p. 30.
[16] Report by FCC, "Public Service Responsibility of Broadcast Licensees" (Mar. 7, 1946), p. 10.
[17] 25 F.R. 7291, Aug. 3, 1960.
[18] Ibid.

19. In the 1960 report, the Commission further stated that "broadcasting licensees must assume responsibility for all material which is broadcast through their facilities, and that this includes programs and advertising material which they present to the public." Then, after discussing the responsibility of broadcast licensees to avoid abuses with respect to overcommercialization, and enumerating categories which have been developed by the broadcast industry and recognized by the Commission, the report said:

"The elements set out above are neither all-embracing nor constant. We reemphasize that they do not serve and have not been intended as a rigid mold of fixed formula for station operation. The ascertainment of the needed elements of the broadcast matter to be provided by the particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee." [19]

PROPOSED REGULATIONS VIOLATE TRADITIONAL FCC POLICY

20. Accordingly, despite the fact that, time after time, in case after case, and in public statements galore, the Commission has reiterated that it has no intention of prescribing, on a numerical basis or otherwise, inflexible standards applicable to every station and "that it seeks to avoid any possible invasion of the discretion vested in the licensee to determine the program material to be presented and to make decisions involved in day-to-day operations," [20] it now proposes to set specific limits on commercials, and to prescribe these in advance for all stations to follow. This representes, in our opinion, a serious, extreme, and unlawful departure from past policy.

THE REGULATION WOULD CONSTITUTE CENSORSHIP

21. Some legal experts have accepted the legality of the Commission's past practice of administrative review of program service, as previously pointed out. But we believe there will be few, if any, who will claim legal validity for the subject proposal. It unquestionably will have the effect of invading the discretion of licensees, and will, in a very direct and positive way, affect and control their daily broadcast operations.

22. A few early court cases did sanction administrative review of station performance.[21] It should not be overlooked, however, that these cases were decided thirty years ago, before the FCC was created. It has been about twenty years since the Supreme Court, in the network regulations case, upheld the FCC's power and responsibility in the program field. Since these court opinions, the Commission has issued statements of policy specifying program service criteria to be applied in deciding whether to authorize new broadcast stations or renew licenses. Application forms have been modified requiring the submission of detailed information in terms of program categories set forth by the Commission. In a proceeding now pending, to which reference has already been made, and in which proceeding we have submitted adversary comments, the Commission proposes to extend further these forms and require additional information along this line. We have contended that the recent weight of expert opinion tends to hold that the adoption of such regulations will constitute censorship in violation of the First Amendment to the Constitution and Section 326 of the Communications Act. The present proposal to impose specific limits on one aspect of programming, to prescribe in advance, by means of regulation, restrictions on commercials, goes considerably further. It would clearly exceed constitutional and statutory limits and, we believe, if made the subject of court review would be declared invalid.

23. The Commission itself recently stated that the manner and the extent to which it exercises programming powers can raise serious legal questions.[22] The

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[19] Ibid.

[20] *Captain James E. Hamilton*, 16 RR 170 (1957). Other cases in point: *Appalachian Broadcasting Co.*, 11 RR 1327 (1956); *Travelers Broadcasting Service Corporation*, 12 RR 689 (1956); *WKAT, Inc.*, 22 FCC 117, 12 RR 1 (1957). Also see discussions of FCC in "Public Service Responsibility of Broadcast Licensees," op. cit., and "En Banc Programming Inquiry," op. cit.

[21] See *Trinity Methodist Church South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F (2d) 850 (1932), and *KFKB Broadcasting Assn, Inc.* v. *FRC*, 60 App. D.C., 47 Fed. (2d) 670, pp. 670, 672.

[22] Commission "En Banc Programming Inquiry," op. cit.

adoption of the present proposal would overstep the border line of legal validity and clearly invade the area of discretion reserved by law for the licensee—an invasion which the Commission says it has consistently sought to avoid.

24. One final point should be mentioned. Section 3(h) of the Communications Act provides that broadcasters are not common carriers. Traditionally and legislatively, broadcasting has been recognized as a competitive industry, with a wide range of discretion in the conduct of the business reserved to management. Recent regulatory trends represent an insidious undermining of these principles. The privilege of free choice and independent judgment enjoyed generally by entrepreneurs in competitive enterprise, more and more, is being restricted in the broadcast industry. This latest proposal of the Commission, if adopted, will accelerate the pace. It will mean more standardization of business and programming practices, will have a restrictive effect on station income and, in many cases, will compel readjustment in rate structures to comply with governmental decrees. This will mean a big leap in the direction of public utility control, in clear violation of longstanding national policy, as expressed in the Communications Act of 1934.

SUMMARY AND CONCLUSIONS

In conclusion, we recognize the Commission's authority and responsibility to consider program service as a factor in determining whether stations have operated in the public interest. However, in view of the First Amendment to the Constitution which guarantees free speech and Section 326 of the Communications Act which implements it, and in view of the ambiguity and uncertainty of the law as to the extent of the Commissions' powers over programming, as a legal matter, we believe the Commission should place the principle responsibility for programming on the broadcaster, and avoid regulations which are prescriptive in character.

While we are aware of the good intentions of the Commission in seeking to establish helpful "guidelines," we believe the instant proposal goes much too far. Heretofore, the Commission has concerned itself with the problem of overcommercialization in connection with the overall review of a station's performance and in terms of the particular interests, tastes and needs of the community. Never has it attempted to prescribe program percentages applicable to all classes of stations or all members of a particular class. While there are differences of opinions among the experts as to the legality of the Commission's past practice, we think there are few, if any, who will uphold the legality of the proposed regulation which uniformly would prescribe program limits for broadcasting, in violation of Section 326 of the Act, and would open the door wide for common carrier controls, specifically prohibited by Section 3(h) of the same law.

Not only would the regulation be an unlawful exercise of governmental power, it would be unreasonable and unrealistic. For in determining whether a station is overcommercialized, the Commission would be unduly influenced by rigid statistical measures, and would fail to take cognizance of other important factors related to the problem which vary from station to station and community to community. And, in the application of these arbitrary and unfair formulae, it would work a serious financial hardship on many stations and result in a net loss in the public programing service to the listeners.

The Commission has asked for alternative suggestions. In view of the foregoing comments, we believe the Commission has no alternative but to continue its present policies and practices, putting the major responsibility on the broadcaster to determine the amount of commercial time on his station in terms of local conditions. In those instances where overcommercialization may become a serious problem (we think that self-regulation and competition for audience will tend to keep these at a minimum) the Commission, we believe, should deal with them on a case-to-case basis, basing its judgment upon the particular needs of the broadcaster and the realistic conditions under which his station must operate, as well as the particular needs, tastes, and interests of the community he serves.

We think the words of Commissioner Frederick W. Ford are noteworthy:

"Thus far Congress has not imposed by law an affirmative programing requirement on broadcast licensees. Rather, it has heretofore given licensees a broad discretion in the selection of programs. In recognition of this principle, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. To this end the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of

broadcast material ultimately devolves upon the individual station licensee and that the fulfillment of such responsibility requires the free exercise of his independent judgment." [23]

And we close by asking the Commission to reflect upon the truth and wisdom of the following words of the United States Supreme Court (and to which the Commission made favorable reference in its 1960 "Report and Statement of Policy" based upon its programing inquiry):

"The Communications Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy * * * Congress intended to leave competition in the business of broadcasting where it found it * * *." [24]

Respectfully submitted.

MICHIGAN ASSOCIATION OF BROADCASTERS,
By WILLARD SCHROEDER, *Its President.*
By WALTER B. EMERY, *Its Attorney.*

SEPTEMBER 12, 1963.

WGN, INC.,
Chicago, Ill., October 31, 1963.

Hon. WALTER ROGERS,
Chairman, Subcommittee on Communications and Power, House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: On October 1, 1963, WGN, Inc., licensee of WGN Radio and WGN Television, Chicago, filed comments with the Federal Communications Commission opposing the plans of that agency to restrict the number of commercials which radio and television stations may broadcast. The comments of WGN, Inc., pursue the proposals of the Federal Communications Commission in Docket No. 15083.

It has been noted that your committee will conduct public hearings November 6–8, 1963, on bills that would preclude the Federal Communications Commission from making rules relating to the length or frequency of broadcast advertisements. While licensee does not desire to participate in person, it is respectfully requested that the statement of WGN, Inc., as filed with the Federal Communications Commission on October 1, 1963, be introduced into, and made a part of, the record of the proceedings in the subject hearing of your committee.

Enclosed herewith are three copies of the subject statement as filed by WGN, Inc., and respectfully submitted.

Respectfully yours,

WARD L. QUAAL,
Executive Vice President and General Manager.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the Matter of Amendments of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM, and Television Broadcast Stations

COMMENTS OF WGN, INC.

WGN, Inc., licensee of television station WGN–TV and radio station WGN, Chicago, Illinois, by its attorneys, herewith submits its comments in opposition to the Notice of Proposed Rulemaking promulgated herein on May 17, 1963.

INTRODUCTION

In this proceeding, the Federal Communications Commission (hereinafter referred to as "the Commission") proposes to adopt rules regulating the amount of time which a broadcast licensee may devote to a particular type of programming: commercial continuity and announcements. The adoption of the rules proposed would not only mark a significant departure from previous Commission policies, but would result in an unauthorized and unconstitutional infringement of the rights of broadcasters.

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[23] Testimony before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, United States Senate, May 16, 1960.
[24] *FCC* v. *Sanders Brothers*, 309 U.S. 470, 475 (1940).

There are three reasons why adoption of the proposed rules would be illegal:

(1) The Commission has not been authorized by the Communications Act of 1934, as amended, to adopt rules limiting the broadcast of commercial continuity and announcements;

(2) Section 326 of the Communications Act of 1934, as amended, flatly prohibits the Commission from adopting such rules; and

(3) The First Amendment to the Constitution prohibits the Commission from adopting such rules.

Limitations on programming time devoted to commercial continuity and announcements such as those proposed in the instant proceeding would not have a direct adverse effect on WGN, Inc. This is true because stations WGN and WGN–TV are, and have been for many years, subscribers to the Radio and Television Codes of the National Association of Broadcasters. However, we oppose adoption of the proposed rules not only because of their patent illegality but also because of the following considerations which affect the entire broadcasting industry:

(1) Uniform commercial time standards cannot be applied to all broadcast licensees in the fifty states without creating serious inequities;

(2) The suggested economic test for waivers and exemptions from the proposed rules would destroy economic freedom in broadcasting and lead to regulation such as that imposed on public utilities; and

(3) The procedures involved in setting up categories of exemptions and granting waivers from the proposed rules would result in an intolerable burden not only on the Commission but on licensees as well.

The Commission's stated purpose in promulgating the proposed rules is to eliminate "overcommercialization." Even if we assume that the term is capable of meaningful definition, we believe that the listeners and viewers are the proper parties to determine whether "overcommercialization" occurs on any radio or television station. Our system of broadcasting is based on the freedom of the American citizen to choose among the various stations and the program fare they broadcast. The remedy for "overcommercialization" is not the adoption of additional rules by the Commission, but the exercise by the listener of his freedom to turn off any station which does not offer programming to his liking.

DISCUSSION

I. *The Communications Act of 1934, as amended, does not empower the Commission to adopt the proposed rules.*

The following statement of authority appears in the Notice of Proposed Rulemaking:

"13. Authority for the adoption of the amendments proposed herein, as set forth in the attached Appendix, is contained in Sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended."

These Sections of the Communications Act of 1934, as amended (hereinafter referred to as the "Act") do not make programming of commercial continuity and announcements a subject of the Commission's regulatory powers. In fact, nothing in those Sections refers to programming of commercial continuity and announcements at all. The only portions of these Sections of the Act which could even possibly be relevant to this subject are those provisions granting the Commission the powers to "make such rules * * * not inconsistent with this Act, as may be necessary in the execution of its functions" (sec. 4(i)), to "make such rules * * * not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *" (sec. 303(r)), and "* * * if public convenience, interest, or necessity will be served thereby, [to] * * * a station license provided for by this Act" (sec. 307(a)).

The grant of power to the Commission to make such rules as are "necessary" to the execution of its functions and to carry out the provisions of the Act is not a grant of authority to adopt a rule limiting the broadcast of program material. Nor does the "public interest" standard of Section 307(a) grant such authority to the Commission.

This lack of authority is apparent first of all from an examination of the Commission's present Rules concerning programs. The only types of programming now regulated by rules are station identification announcements, announcements concerning mechanical reproductions and sponsorship, broadcasts by candidates for political office, and broadcasts of lottery information. None of these rules rely solely on the broad grant of powers set forth in Sections 4(i), 303(r),

and 307(a) of the Act. Each is based upon a specific grant of statutory authority. Thus:

(1) The rules relating to station identification carry out the Commission's statutory power to allocate frequencies and designate operating powers (sec. 303(f)).

(2) The rules relating to identification of mechanical reproductions, which impose no restraint on the use of such reproductions, and merely require a truthful labeling of the character of this particular type of programming, are an implementation of the Commission's statutory power to suspend the license of an operator who transmits "false or deceptive signals or communications" (sec. 303(m)).

(3) The rules requiring announcement of sponsorship are based upon Section 317 of the Act.

(4) The rules concerning broadcasts by candidates for political office are based upon Section 315 of the Act.

(5) The rules concerning broadcasts of lottery information are based upon a Federal criminal statute (18 U.S.C., 1304).

It can be seen, therefore, that every rule now in effect which regulates material broadcast is referable to a specific power of the Commission, or to a Federal Statute. In view of this, we do not believe that the Commission may properly rely on its general rulemaking powers or on the "public interest" standard as a "carte blanche" to impose controls over programming such as here proposed. We should not lightly impute such an intention to Congress. If the Commission can exercise its rulemaking powers so as to prohibit any type of programming which it deems to be "not in the public interest," the First Amendment to the Constitution would be rendered inapplicable to broadcasting. Censorship such as this is a "power so abhorrent to our tradition that a purpose to grant it should not easily be inferred." [1]

Further analysis of the Act reinforces the conclusion that the power granted to the Commission to adopt "necessary" rules does not carry with it the power to adopt rules restricting the amount of commercial programming. While Sections 1 and 201 of the Act grant the Commission the power to regulate common carriers engaged in interstate or foreign communication, Section 3(h) of the Act states that broadcasters are not to be considered common carriers.[2] Thus, Congress has made it clear that the Commission may not regulate broadcasters in the use of facilities in the same manner that the Commission regulates interstate telephone communication, or in the same manner that the Interstate Commerce Commission regulates railroads, buses, and trucks. The proposed rules, however, completely ignore this fact, and would have the same effect on broadcasters as outright rate regulation. This is apparent for two reasons:

(1) A broadcaster's main source of income is the sale of commercial time. If the Commission limits the amount of commercial time which a broadcaster may sell, the Commission thereby limits the income of the broadcaster. By adjusting the amount of time available for sale, the Commission is in effect setting rates.

(2) In the Notice of Proposed Rulemaking, it is requested that stations which desire more liberal time limitations produce data relevant to their income. Nothing is said concerning standards which the Commission might apply in evaluating income requirements. If the Commission on its own motion can determine what income is "required" to maintain certain types of commercial broadcasting stations, and can adjust advertising time limitations accordingly, it is in the field of rate regulation.

No provision of the Act, directly or inferentially, gives to the Commission the power to determine what income is "required" to maintain a broadcasting station, and if Congress had intended to grant the Commission the power to adopt rules limiting commercial programming, it would not have excluded broadcasters from the common carrier classification.

The Supreme Court on several occasions has confirmed the fact that the Commission is totally without the power to regulate the programming or business affairs of licensees. For example, in *Federal Communications Commission* v.

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[1] *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 151 (1946).

[2] Sec. 3(h) states as follows: "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication, by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940), the Court stressed that the Act expressly prohibits any "supervisory control of the programs, of business management, or of policy" by the Commission. The Court said, at pp. 474 and 475:

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * * * * * *

"But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy * * *.

"* * * Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interferring electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public" [footnotes omitted].

Finally, the legislative history of the Act also shows clearly that Congress has never given to the Commission the power to regulate the amount of time devoted to commercial continuity and announcements. This very question was the subject of discussion in the Senate just before the Radio Act of 1927, the predecessor of the Communications Act of 1934, was adopted.[3] A Senator asked that the bill be sent back for admendment to include a limitation on broadcast of advertising material.[4] This was not done, and the bill was adopted without any such amendment.[5] In 1928, a bill was introduced to amend the Radio Act so as to limit advertising.[6] The bill was not adopted. In 1932, the Federal Radio Commission submitted a report to the Senate in response to a resolution inquiring what could be done about broadcast advertising.[7] The Commission's Report stated that "new and additional legislation" would be required either to "reduce, limit, or control" the amount of time devoted to advertising.[8] In 1934, the Radio Act of 1927 was reenacted as Title III of the Communications Act, with only minor changes, none of which have any relevance to the Commission's power to regulate commercial continuity and announcements.[9] The conclusion is inescapable: Congress never gave the Commission this power, never intended to give the Commission this power and, when presented with the opportunity, declined to amend the laws relating to broadcasting so as to give the Commission this power.

II. *Section 326 of the Communication Act of 1934, as amended, directly prohibits the adoption by the Commission of the proposed Rules.*

Time limitations upon radio and television commercial announcements, commercial information, and advertising through the vehicle of rulemaking is censorship and constitutes a violation of Section 326 of the Act. Section 326 clearly and unequivocally forbids the Commission from exercising "the power of censorship" and from interfering with freedom of speech over the air:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

The proposed rules fall squarely within the proscription of Section 326. *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953), *aff'd.*, 347 U.S. 284 (1954). This decision makes it clear that the Commission

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[3] 68 C.R. 4109.
[4] 68 C.R. 4113.
[5] 68 C.R. 4938.
[6] H.R. 8825, 70th Cong., (1928).
[7] S. Res. 129, 72d Cong., 1st sess. (1932); 75 C.R. 1412–13, pt. II.
[8] S. Doc. 137, 72d Cong., 1st sess., "Commercial Radio Advertising"; a letter from the Chairman of the Federal Radio Commission in response to S.R. 129, p. 33.
[9] Conference report on Communications Act of 1934, H. Rept. 1918, 73d Cong.

may not by rule limit the amount of broadcast time allotted to a particular type of program solely on the basis of its determination that the time would be better filled by other programs.

In that well known case, the Commission undertook to adopt rules interpreting Section 1304 of the Federal Criminal Code[10] which prohibits the broadcasting of lottery information. The Court concluded that those portions of the Commission's rules which went beyond interpretation of the criminal offense and into the realm of adjudication of the social value of "give-away" programs were invalid.

The Court stressed that the general public, not the Commission, would make the final decision whether "give-away" programs would be continued:

"* * * when the radio or television audiences tire of ["give-away" programs], they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the "give-away" programs as lotteries, if as a matter of law they are not" (p. 389 of 110 F. Supp.).

It is perfectly clear that the prohibition against censorship contained in the Act is total. *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). In this case, the Court construed and applied Section 315 of the Act, and in so doing investigated and commented upon the legislative history of Section 326, because both sections prohibit "censorship." It was held that "censorship" as used in Section 315 of the Act encompassed *any* cloture of expression over the air by qualified candidates for any public office. Broadcasting stations were therefore held to be exempt from the operation of the laws of defamation in broadcasts pursuant to Section 315. The Court said, at 527:

"* * * The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of "objectionable" material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give "censorship" as narrower meaning in Section 315."

It regarded the legislative history of Section 326 of the Act as compelling authority for such a broad, comprehensive interpretation:

"* * * the legislative history of the measure both prior to its first enactment in 1927, and subsequently, shows a deep hostility to censorship either by the Commission or by a licensee."[6]

[6] * * * "Section 326 of the present act, which deals with the question of censorship of radio communications by the Commission * * * makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio" (S. Rept. 1567, 80th Cong., 2d sess., 13–14 (1948)) (p. 528 of 360 U.S.).

and further, at 529 and 530:

"Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication."

If a broadcasting station is compelled, by Section 315 of the Act, to make available its facilities for the airing of libelous utterances by political candidates because of a comprehensive interpretation of the word "censorship," then program and commercial continuity must also be immune from "censorship" as that word is used in Section 326 of the Act. The legislative history of Section 326 of the Act, the opinion of the Supreme Court in the *WDAY* case and sound public policy require this result. If Congress *had* intended a different result, Section 326 would certainly not have placed a total ban on censorship.[11]

III. *The First Amendment to the Constitution of the United States prohibits the adoption by the Commission of the proposed Rules.*

"Congress shall make no law * * * abridging the freedom of speech, or of the press * * *" (U.S. Const. amend. I).

Radio and television programming, like books, newspapers, handbills, and motion pictures, is protected by the First Amendment. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *American Broadcasting Co.* v. *United States*,

[10] 18 U.S.C., sec. 1304.

[11] It should also be noted that rules imposing limitations upon the amount of commercial broadcast time violate not only sec. 326 of the act, but also sec. 4(i) and 303(r) of the act as well. While the Commission is authorized by sec. 303(r) to make such rules "as may be necessary to carry out the provisions of this act," that section also provides that such rules must be "not inconsistent with law." Additionally, sec. 4(i) provides that such rules must be "not inconsistent with this act." Rules which violate sec. 326 of the act cannot be consistent with law or with the act. The reliance by the Commission on secs. 4(i) and 303(r) as authority in the instant rule making proceeding is accordingly misplaced.

110 F. Supp. 374 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954). This protection is afforded to all aspects of programming, including commercial announcements and continuity. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *City of Baltimore* v. *A. S. Abell Co.*, 145 A. 2d 111 (Md. 1958).

It has long been recognized that the commercial character of the expression sought to be protected is of no significance in determining whether it is within the protection granted by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), wherein the Court said, at pp. 501–502:

"It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."

Additionally, *Winters* v. *New York*, 333 U.S. 507 (1948), makes it clear that the subject matter of a communication is irrelevant in determining whether it is to receive the protection of the First Amendment:

"We do not accede to appelee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right * * *. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature" (p. 510).

Squarely in point and demonstrative that the Commission may not adopt the proposed rules without creating an unconstitutional abrigment of freedom of expression is *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374 (S.D.N.Y. 1953), *aff'd* 347 U.S. 284 (1954), discussed above. In that case, the Commission's rules governing the broadcasting of "giveaway" programs were held violative of the First Amendment to the extent that they went beyond interpretation of Section 1304 of the Criminal Code governing lotteries and into the area of program control. The three-judge court specifically held that the content of the radio program was not determinative of whether the First Amendment protects the licensee's right to program without censorship imposed by Commission rulemaking. The Court said, at 389:

"The merits of the "giveaway" programs are not an issue in this case. They appear to be a source of amusement for many thousands of people. Even if it could be said that "we can see nothing of any possible value to society" in these programs, "they are as much entitled to the protection of free speech as the best of literature" or music (*Winters* v. *New York*, 333 U.S. 507 (1948)). Thus however strongly a majority of the Commission may feel that certain types of commercial announcements possess, little or no value to the listening or viewing public, it may not limit their duration by rule.

The rules proposed by the Commission in the instant proceeding take the invidious form of a prior restraint upon freedom of expression, and, as such, run afoul of the strongest and most solidly entrenched protections of the First Amendment. Only for exceptional or grave reason will a prior restraint upon freedom of expresssion be permitted. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

In *Near* v. *Minnesota*, 283 U.S. 697 (1931), the Court held unconstitutional a State law providing for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine, or other periodical." The Court, after holding that the chief purpose of the guarantee of the First Amendment is to prevent previous restraints on freedom of expression, declared that only in the most exceptional circumstances would they be upheld:

"The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:

"No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

* * * * * * *

"The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship" (pp. 715–716 of 283 U.S.; footnotes omitted).

The Court also dismissed the attempted justification of the law on the grounds that the publication was in the "business of publishing defamation." Since the protection of the First Amendment against prior restraint encompasses all publication, with exception recognized only for suppression of grave evil, the commercial character of the enterprise was deemed to be of no significance.

"In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint" (p. 720 of 283 U.S.).

"Overcommercialization" which is alleged by the Commission to attend certain types of television and radio advertising certainly is not the type of compelling and grave evil which may be used to validate a prior restraint. It does not even approach the outer limits of this stringent standard. In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), the Court said, at pp. 95–96:

"Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations" (*Schneider* v. *State*, 308 U.S. 147, 161, 162 (1939)).

Involved there was an Alabama statute prohibiting loitering and picketing "* * * about the premises or place of business of any other person * * * with intent of influencing * * * other persons not to trade with, buy from, sell to, [or] have business dealings with [him] * * *." Breaches of the peace and violence, which Alabama's legislature felt would accompany the picketing, were found not to be sufficiently imminent dangers to justify a prior restraint. The Court held that "no clear and present danger" to life, property, or person necessarily accompanied publicizing the facts of a labor dispute through picketing:

"The State urges that the purpose of the challenged statute is the protection of the peace can be thought to be inherent in the activities of every person who are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the later" (p. 105 of 310 U.S.).

It cannot seriously be maintained that the number or length of commercial announcements and continuity broadcast by radio and television stations are in any sense a clear and present danger to life, liberty, and property or an exceptionally grave danger to public welfare. Absent such a finding, the proposed rules are unconstitutional in view of the *Thornhill* and *Near* cases. Even if there are some who feel that it would be wise in some way to limit or restrict the commercial content of radio and television programs, let us remember that the vice here is not in the wisdom of a particular restraint, it is in recognizing that the Commission has the power to impose such restraints.

"The power of the licensor against which John Milton directed his assault by his *Appeal for the Liberty of Unlicensed Printing* is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that

constitutes the danger to freedom of discussion." (*Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940)).

The *Near* case shows that the protection granted by the First Amendment against prior governmental restraint extends not only to matters of obvious public importance and to matters of indifferent social utility, but even to defamatory utterances. The protection must, therefore, extend to the broadcast of commercial continuity and commercial announcements, whether such commercials be considered separately as a form of expression or as an integral part of overall programing. For this reason, the Commission's proposed rules, as a prior restraint on this form of expression, are invalid.

Commercial broadcast material is not only a form of expression, but it is an integral part of broadcasting in a free enterprise system. America's radio and television stations, like newspapers, cannot exist without the financial support of advertising. In *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), the United States Supreme Court held that the First Amendment rendered invalid a Louisiana state tax which was levied on the gross receipts from the sale of advertising by newspapers. The State of Louisiana argued that the tax was valid because it did not affect the business of publishing a newspaper but only affected the business of selling advertisements. The state also contended that the constitutional protection of the First Amendment should not extend to the sale of advertising. The Court rejected these arguments, and held the tax to be an unconstitutional infringement of freedom of the press because it was a previous restraint which the national and state governments are precluded from adopting by the first and fourteenth amendments to the United States Constitution. The Court went on to say, at page 245:

"* * * if [the statute] were increased to a high degree, as it could be if valid * * * it well might result in destroying both advertising and circulation."

City of Baltimore v. *A. S. Abell Co.*, 145 A. 2d 111 (Md. 1958), makes it clear that radio and television stations may not be subjected to a rule limiting the amount of advertising they may broadcast. In that case, the Maryland Court of Appeals held invalid a municipal ordinance which imposed a tax upon "the sale of time on, or in connection within, any intrastate radio and television broadcast * * *." The Court applied the *Grosjean* opinion to these facts and held that these taxes constituted an unconstitutional restraint upon freedom of expression.

The rules proposed by the Commission in this proceeding stand in no better position than the taxes which the State of Louisiana and the City of Baltimore attempted to impose on advertising. So long as advertising revenues are the financial means by which a broadcaster supports his programing, a limitation (other than ordinary forms of taxation) on the source of those revenues will be barred by the first amendment.

In an environment of free speech, free press, and free broadcasting, the public is given the right to choose among programing policies and content offered by the many radio and television stations. The first amendment contemplates and indeed requires that the public's power to turn the dial, not governmental dictation of commercial policy and programing, will be the natural regulator of program content. This is the answer to claims that the Commission must take steps to stop "overcommercialization."

IV. *Even if the Commission possessed the power, it would be unwise to adopt the proposed rules.*

For the reasons hereinabove set forth, we believe that the adoption of the proposed rules would result in an unauthorized and unconstitutional infringement of the rights of broadcasters. Without more, this is sufficient to require their rejection. However, there are additional practical reasons which make the adoption of the proposed rules unwise and contrary to the public interest.

Broadcasting in the United States has developed into a medium which delivers to its audience a selection of program material as diverse as that furnished by the book, magazine, newspaper, and movie industries. There are stations which direct their programs at audiences in the millions and others which direct their programs at audiences which may never exceed a few thousand. Commercial limitations which purport to be applicable to each and every broadcasting station in every state of the union therefore cannot possibly be equitable in their operation.

Under our system of broadcasting, which has reached a pinnacle of service unequaled anywhere in the world, the individual broadcaster has been relied upon to determine that proportion of broadcast time which should be devoted to commercial announcements and commercial continuity. In making this determination, each broadcaster has the flexibility to take many factors into account,

including the mixture of commercial and other programing elements best suited for his listeners, the economic necessities involved in operating his station, and the needs of the community for a commercial forum. In making this determination, many, including WGN, Inc., subscribe to and abide by the Radio and Television Codes of the National Association of Broadcasters. WGN believes in these Codes; and WGN abides by them. However, WGN also believes that an attempt to supplant individual determination by each station as to the appropriate amount of commercial continuity with Commission rules which purport to be uniform in their application would be an unfair and an unwarranted departure from the principles that have made our system of broadcasting great.

The Commission's Notice itself recognizes the diversity of commercial broadcast operations. It mentions six different categories of stations which might require separate treatment. But this list can hardly be considered exhaustive, and the possible number of categories which could appropriately be formed is certainly far in excess of the six referred to.

The establishment of separate regulations to cover each separate category as it is created would create intolerable administrative complexities, and in all likelihood would require an inordinate amount of the Commission's time for the next several years. Similar complexities would result from attempts to establish exemptions and waivers in particular applications by individual broadcasters. Such proceedings would indeed amount to an "irritating act of futility,"[12] for their only purpose would be to achieve an approximation of the flexibility which broadcasters now have to fashion their programing to the needs of the communities they serve. And even though the results of such administrative proceedings cannot accurately be foreseen, we doubt whether they could result in an improvement of broadcasting service to the people of America.

Conclusion

For the foregoing reasons, it is respectfully submitted that the proposed rules should not be adopted and that the Commission should dismiss the above entitled proceeding.

Respectfully submitted.

WGN, Inc.,
By Keith Masters,
Edwin T. Sujack,
David W. Maher,
Of Kirkland, Ellis, Hodson, Chaffetz & Masters, Its Attorneys.

September 30, 1963.

Utah Broadcasters Association,
Salt Lake City, Utah, November 1, 1963.

Representative Walter Rogers,
House of Representatives, Washington, D.C.

Dear Representative Rogers: The Utah Broadcasters Association, comprised of 28 of Utah's 30 radio stations and the 4 television stations, take this opportunity to thank you for introducing H.R. 8316.

Utah's population is concentrated in 4 of 29 counties. Twenty-five counties make up less than 15 percent of the population. The outlying areas would be particularly hard hit by any time limitations and could easily force the curtailment or shutdown of stations that offer isolated areas the only local or regional daily contact with State, National, and world events.

This is but one of many reasons that the proposed action by the FCC must be stemmed by H.R. 8316. We cite the following factors as important in urging passage of this bill:

1. The proposal is beyond the powers which the Congress has delegated the FCC. It was not the intent of Congress, when they enacted the communications law, that the Commission would have authority to impose such limitations.
2. The restriction would tend to destroy the free enterprise system.
3. The rule would be unequal and unfair, particularly to small stations.
4. It would undermine the effective NAB code.

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[12] See dissenting statement of Commissioner Bartley in the Notice of Proposed Rule Making initiating this proceeding.

You are to be congratulated for taking this step in behalf of all radio listeners and broadcasters. If we can assist your efforts in this matter please contact us.

Sincerely,

DES BARKER, *Executive Secretary.*

WASHINGTON STATE ASSOCIATION OF BROADCASTERS,
Seattle, Wash., October 30, 1963.

Re H.R. 8316.

Hon. WALTER ROGERS,
Chairman of the House Subcommittee on Communications and Power, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN ROGERS: It has come to our attention that the Subcommittee on Communications and Power will hold hearings on H.R. 8316 regarding the prohibition of the Federal Communications Commission from prescribing standards on length or frequency of broadcast advertising.

The Washington State Association of Broadcasters has formally opposed the FCC's proposed rulemaking on this subject matter, FCC Docket No. 15083. In doing so, we filed written comments with the FCC, and sent copies to our Congressmen and Senators.

Just as we opposed the FCC's proposal to enter the field of commercial time limitations, we support H.R. 8316, and for the same reasons. Consequently, we are enclosing three copies of our comments to the FCC and request that they be submitted in favor of your bill, H.R. 8316, at the hearing to be held on the bill, commencing November 6, 1963.

Yours very truly,

JAMES A. MURPHY, *President.*

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 15083)

In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations With Respect to Advertising on Standard, FM, and Television Broadcast Stations

COMMENTS OF THE WASHINGTON STATE ASSOCIATION OF BROADCASTERS

PREFACE

"*Any* plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station *must* have its inception in *new and additional legislation* which either fixes and prescribes such limitations or specifically authorizes the commission to do so under a general standard prescribed by that legislation.

* * * * * * *

"A flat restriction placed upon the amount of time used for sales talks without regard to the location, power, and activities of stations would, in all probability, work inequitable results. Moreover, and in any case or class, limitations upon the use of time for commercial advertising, if too severe, would result in a loss of revenue to stations which, *in all probability*, would be reflected in a *reduction in the quantity and quality of programs available to the public*." [Emphasis added.] (Report of the Federal Radio Commission in reply to S. Res. 129, 72d Cong., 1st sess., S. Doc. 137, 1932.)

I. INTRODUCTION

The respondent, hereinafter referred to as WSAB, is a corporate association organized and existing under and by virtue of the laws of the State of Washington. It was chartered in 1935 and has been in existence ever since. Its membership consists of broadcasters holding 85 FCC broadcast licenses, being a mixture of Standard, FM, and Television licenses, whose combined signals blanket the State of Washington.

In view of the substantial and serious nature of the Commission's proposed rulemaking regarding commercial advertising, we consider it our responsibility to the public, the Commission, and ourselves to comment.

II. NOTICE OF PROPOSED RULEMAKING, DOCKET NO. 15083, FLAGRANT INCONSISTENCIES

After the opening sentence in notice of Docket No. 15083, the Commission stated that it and its *predecessor*, the Federal Radio Commission, have consistently been concerned with respect to commercial continuity or announcements. Conspicuously absent from the decisions cited in support of this statement are any court decisions or legislative enactments. In citing its own decisions, Docket No. 15083 still provides no authority for commercial time limitations similar to those now proposed.

In fact, just looking at the first two cited decisions demonstrates they have practically nothing to do with commercials whatsoever. (See app. A.)

Apparently recognizing that the Commission has cited only its own essentially irrelevant decisions, the notice of Docket No. 15083 tells us in the next paragraph "Nor do we stand alone in recognizing that excessive commercialization is inimical to broadcasting in the public interest." Although we have no quarrel with that abstract statement, we are frankly startled at the sources from which the Commission seeks comfort for authoritative statements relative to modern commercial broadcasting. Except for Docket No. 12782, which we will deal with later, the Commission does not cite one statement by anyone that occurred subsequent to the year *1932*. We are sincerely concerned that a branch of the government of the United States of America which is charged with such immense responsibilities would propose rule making affecting the greatest communications industry in history generally citing nothing more substantial than nebulous statements made in 1926, in 1930, and again in 1932. How these statements could even remotely be a catalyst in the modern thinking of a responsible arm of our government is incomprehensible.

Nevertheless, since the Commission deems these authorities as standing beside the Commission "in recognizing that excessive commercialization is inimical to broadcasting in the public interest," we felt it was our responsibility to seek out these authorities and understand them. The first, Sen. Res. 129, 72nd Cong., 1st Sess., was a Senate Resolution passed in 1932. It was not so much a resolution of Senate dissatisfaction as it was of curiosity, and directed the Federal Radio Commission to survey and report on matters dealing with the feasibility of government ownership and operation of broadcast facilities; various considerations relative to commercial advertising, including what was being done in other countries in 1932; and matters relating to educational institutions and broadcasting. The notice of Docket No. 15083 fails to note that the Commission undertook an extensive survey and replied to the Senate in an exhaustive reply, report of the Federal Radio Commission in reply to Senate Resolution 129, 72d Congress, 1st session, Senate Docket 137.

Nearly every aspect of that report is inconsistent with the presently proposed rulemaking. Before proceeding further, it should be noted that in the second sentence of the notice in the present proposed rulemaking, Docket No. 15083, the Commission referred to the policies of the Commission *and* its *predecessor*, the Federal Radio Commission. The docket notice later referred to the Senate Resolution which was directed to the Commission's predecessor. Presumably this was done because the FCC and the FRC both operate and operated under essentially the same statutes. In paragraph 13 of the notice of Docket No. 15083, it is stated that the authority for the now proposed regulations are Sections 4(i), 303, and 307(a) of the Communications Act of 1934, as amended. These sections were also generally contained in the Radio Act of 1927 under which the FRC operated, being sections 4 and 9. The Communications Act of 1934 was not passed to give the Commission more power, but to consolidate the various federal agencies regulating communications under one Commission. Emery, W. B., *Broadcasting & Government Responsibilities and Regulations* (Michigan State University Press, 1961), page 24. Therefore, and rightly so, the FCC refers to the FRC as authority and guidance.

Let us then examine Senate Resolution 129 (1932) as referred to by the present notice of proposed rulemaking. Among other things, the Senate directed the FRC to report on the feasibility of government ownership and operation of broadcasting facilities. The FRC in its reply to the Senate indicated that in Europe or smaller countries this was perhaps more feasible, however noting

that "The United States is made up to 48 political subdivisions having varying areas, populations, and interests." We submit that the same is even more true today and that the FCC should recognize what its predecessor recognized nearly three decades ago. The Commission was not and is not in a position to know the needs of, let alone dictate, local programming or commercial standards for the whole nation.

The United States Senate in Sen. Res. 129 also directed the FRC to reply to exactly the same thing the FCC now proposes by directing response to the following question: "What plans might be adopted to reduce, to limit, to control, and perhaps to eliminate the use of radio facilities for commercial advertising purposes?" The Commission answered in part as follows:

"*Any plan* to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time utilized by the station *must* have its inception in *new and additional legislation* which either fixes and prescribes such limitations *or specifically authorizes the commission to do so* under a general standard prescribed by that legislation. While the commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present *no other limitation* upon the use of radio facilities for commercial advertising."

* * * * * * *

"A flat restriction placed upon the amount of time used for sales talks without regard to the location, power, and activities of stations would, in all probability, work inequitable results. Moreover, and in any case or class, limitations upon the use of time for commercial advertising, if too severe, would result in a loss of revenue to stations which, in all probability, *would be reflected in a reduction in the quantity and quality of programs* available to the public.

"The radio act of 1927 was *obviously* designed to permit the *licensees* of broadcasting stations the *maximum* of latitude in the matter of program material. Such *licensees* are in a singularly favorable position to learn what the audience wants to hear and to make the necessary changes in program material and in the methods of presentation that will cause their programs to be favorably received by a substantial majority of listeners. The adoption of regulation of the sort herein described should be undertaken *only* when it *clearly* appears that a majority or at least a considerable number of the licensees have failed to operate their stations in a manner acceptable to a majority of the *listening public.* If, in the opinion of Congress, that time has arrived, we conceive it to be advisable to enact such *legislation* as will *permit* the Commission to impose such regulations as the circumstances from time to time seem to warrant *rather than legislation imposing specific restrictions and unflexible limitations.*" [Emphasis supplied.]

The Senate in 1932 also asked the FRC to survey other countries in the world as to commercial practices and government ownership of broadcasting facilities. Inasmuch as the FCC deemed the Senate Resolution important in the first place, it is interesting to see what the status of broadcasting was in those countries in 1932 in light of what history now tells us occurred in those countries just subsequent to 1932 and even now. For convenience we have prepared a chart summarizing the FRC's report, which chart is attached hereto as Appendix B.

The next authority cited in the notice of Docket No. 15083 is Hearings on H.R. 5589, 69th Cong., 1st Sess. When we located this testimony we found that the Commission singled out just two pages from a hearing reported in 216 pages. The hearing was before the House Committee on The Merchant Marine and Fisheries, and related to a statute that was never adopted. Just how the Commission takes solace from this isolated testimony by one sponsor's representative in the year 1926 is difficult for us to understand, but the testimony is in part as follows:

"We are anxious, however, that the wording of the section shall not make obligatory upon program announcers any set type of announcement which will compel us, or any other company furnishing a similar program, to indulge in more advertising than we do now.

* * * * * * *

"We should feel embarrassed, possibly, if we were required to use a compulsory type of set phraseology that the announcer would have to give."

The proposed statute referred to dealt with sponsor identification and would have required sponsor identification to include the word "advertising."

The next citation referred to by the notice of Docket No. 15083 is Hearings on S. 6, 71st Cong., 2nd Sess. This brief testimony is part of two pages taken out of 2,375 pages of a Senate hearing. The testimony itself is set forth in Appendix C, and in substance said that this particular broadcaster in 1930 limited commercial content to two minutes an hour. All that this does, it seems to us, is demonstrate why the Federal Radio Commission was right two years later when it said there should *not* be fixed commercial time limitations. At least in the State of Washington, there is not one commerical radio or television station that could economically survive if the testimony referred to were adopted, even though it was advocated by the then *president of the National Association of Broadcasters*. (Docket No. 15083 refers to him as a "station president," but he was identified in the hearing, and testified, as president of NAB.) Surely he was sincere. Surely he was a good broadcaster. But then, as now, because the efforts of some seem to them to be in the best interests does not mean it should be usurped as a governmental fiat.

Furthermore, the testimony of Mr. Hedges, as set forth in Appendix C, makes it clear that in 1930 the public at large was the best regulator. If too much time was directed to commercials out of a given program, he said, the station would lose its audience. It was clear then; it is clear now. Government intervention wasn't needed then; it isn't needed now. It was made clear to Congress then; it has been ever since.

Finally, the notice of Docket No. 15083 refers to one more page from the 2,375 pages in the same Senate hearing. The Docket refers to a 12-point code of commercial practices used by CBS in 1930. One of these points does in fact deal with commercial time limitations. For some strange reason, the Docket does not refer to the response of the Senators conducting the hearing to this very point:

"Senator SMITH. These advertisers now pay for the programs of the time that has been allotted to them?

"Mr. PALEY. Yes, they do.

"Senator SMITH. And you restrict them to a minimum of advertisement. I just do not exactly see the equity in that."

The foregoing is the sum total authority that the Commission cites (save Docket No. 12782 referred to, infra) for reference to others in the community who "stand" with the Commission in "recognizing that excessive commercialization is inimical to broadcasting in the public interest." We quite agree with the statement made, as an abstract statement. But we are at a complete loss to know how the cited authorities do anything but cry out from the past that the Commission *should not* and *does not* have the authority to adopt the NAB commercial time limitations.

III. PROPOSED RULEMAKING EXCEEDS THE POWER DELEGATED TO THE FCC

Although we have already touched on this matter in the preceding section, we feel it is important enough to deserve special mention and additional comment. We do not see how it could have been made more clear than by the authorities cited by the FCC itself in the notice of Docket No. 15083 that the Commission does not have the power to prescribe commercial time limitations.

As previously seen, and pointed out by the Commission, in 1932, the United States Senate directed the FRC to survey and report to the Senate what plans could be adopted to limit and control commercial advertising. The then Commission, after considerable research, replied that under the existing statutes it did not have the authority to do so and would require new legislation.

Thereupon, and within two years, Congress passed the Communications Act of 1934. For the matters now under consideration, the statutes were adopted essentially without change. If there ever were any doubt about whether or not the Commission had authority to enter into programing or commercial time standards, the Commission's legislative history puts the doubts to rest. At the request of Congress, the Commission replied it had no such rulemaking authority; it did not want the authority; when Congress met, it did not give the Commission such authority; and no one has given the Commission authority since.

Congress *did* give the Commission authority regarding programing in certain limited areas such as obscenity, Section 303(m)(D); false or deceptive communications, Section 303(m)(D)(1); regarding political candidates, Section 315; lotteries, Section 312(a)(6); etc. But nowhere can we, nor could the Commission's predecessor, find anything regarding commercial time limitations. And

the Commission is directly prohibited from censorship by Section 326. There would seem no room to argue that the Commission has implied rights to censor, when it is strictly forbidden by the Act that created the Commission.

The Commission was not given powers of rate regulation for broadcasters as it was for common carriers in the Act of 1934. If Congress wanted the Commission to enter into station economics, it would have so provided. The Supreme Court made this very clear:

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition" (*F.C.C.* v. *Sanders Bros.*, 309 U.S. 470, 474 (1940). Accord, *United States* v. *R.C.A.*, 358 U.S. 334, 348 (1959)).

The present proposal by the Commission would be another form of rate regulation. In fact, in the notice of proposed rulemaking, the Commission specifically requests stations to comment on "advertising rates obtainable in their markets." By limiting the amount of commercial time, the Commission in effect determines also what minimum rates a broadcaster can charge advertisers for time. It is well to recall that advertisers do constitute members of the public. We could extensively review the Communications Act, but knowing that others, such as the National Association of Broadcasters, will do so, we shall refrain.

However, in passing, we would remind the Commission that it has run afoul of the United States Supreme Court when the Commission has attempted power grabs in business judgment on other occasions. For example, in the case of *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954), the Supreme Court did not mince words when the Commission similarly overstepped its bounds:

"It is apparent that these so-called 'giveaway' programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. It unsuccessfully sought to have the Department of Justice take criminal action against them. Likewise, without success, it urged Congress to amend the law to specifically prohibit them. The Commission now seeks to accomplish the same result through agency resolutions. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power. Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of section 1304 does not provide the remedy."

IV. THE PROPOSED RULES ARE UNCONSTITUTIONAL

"They can't do that; it's unconstitutional." Those, or similar, words are so often heard regarding legislative or regulatory matters that the words soon fall on ears attuned to ignoring the words. But governmental ears should never be unhearing of those important words, particularly where matters of free speech and press are concerned. We do not intend to make a long legal presentation on this point because we recognize our efforts would be duplicated and no doubt exceeded by the National Association of Broadcasters and others. However, because of our sincerity and concern in this regard, we make this a separate topic.

Before the government even considers stepping into an area as vital to our constitutional precepts as freedom of speech and press, there should be real fundamental reasons at hand. Except perhaps in time of war, we can conceive of none on the horizon. And certainly none are set forth in the notice of Docket No. 15083. (We have already reviewed those authorities cited in Section II of this comment.) As near as we can tell, much of this furor was created by the immediate past chairman of the FCC who created a great deal of controversy where little was justified, offered no practical solutions, and then resigned from the Commission.

To authenticate our legal position regarding our contention of the unconstitutionality of the proposals set forth in the notice of Docket No. 15083, we have briefly set forth in Appendix D United States Supreme Court decisions regarding similar matters.

V. THE PROPOSED RULES AND WASHINGTON BROADCASTERS

The Washington State Association of Broadcasters has several times gone on record in support of the NAB Codes and has urged broadcasters in the State of Washington to subscribe to them. We have, however, never threatened, cajoled or embarrassed the individual broadcaster. Each knows his community and audience best. Each must make his own decisions in light of his own circumstances and that of his community. We respect his judgment and his integrity. Without them, he will cease to exist. He lives in a community and serves its best interest without charge. If he fails in his responsibilities and too often makes the wrong decision, his community will spurn his offerings in favor of a vast array of services of others, including, but certainly not limited to, other broadcasters. For, as Congress intended, the public and the elements of free enterprise are the great regulators. They are the great judges of morality and of service. But as prohibition demonstrated, morality cannot be legislated.

NAB has consistently selected outstanding *professional* broadcasters to draft codes of self-regulation. They have battled among themselves in an effort to conceive one set of rules to govern the divergent interests of the nation. In spite of their best efforts, the task of creating a single set of time limits to apply to the diverse elements found in a national industry has proved impracticable. Even the code director himself, Robert Swezey, has said the time standards are ineffective and have outlived their usefulness. "The whole roof is rotten so why put on another shingle." (See Broadcasting, vol. 64, No. 21, p. 30, May 27, 1963.) The Code Board members will admit they do not have an adequate answer to the failure of the broadcasters to accept the Codes. If the Board knew the answers, and if a single answer were obtainable, it would have been accomplished. A state-by-state analysis of Code subscriptions has revealed no common answers.

This is not the fault of NAB. It is more a matter of too many divergent communities, personal tastes, and economic and sociological differences. As noted by the notice of proposed rulemaking, the Codes have again and again been amended and modified. A representative group of the most experienced broadcasters in the world has for literally decades attempted to unite these interests into one magna carta of broadcasting. The accomplishments have been many indeed. One cannot compare the full scope of the broadcasting industry with the full scope of any other media without refreshing pride.

We urge NAB to keep trying to improve the Codes. But at least for now, the Codes seem too imperfect for even complete voluntary subscription, let alone involuntary government compulsion.

We ask then why the Commission has expressed interest in adopting the Codes? Surely not because of those 1926 to 1932 authorities cited by the notice of proposed rulemaking. Surely not by what was found in the Omaha hearings. Once they become a part of the Commission's rules and regulations, the commercial time limitations would become more inflexible. And why did the Commission perform a lobotomy on the Codes and dissect only the commercial time limitations? The Codes were obviously intended to serve as a whole. Is it because it would be so obviously unconstitutional for the Commission to enter into programming tastes? We ask why the Commission even desires to enter into this field; previous Commissions did not.

WSAB has respect for the Commission and its sincerity. It is charged with the responsibility of literally millions of licenses in commercial and noncommercial broadcasting, space communications, etc. With all of the Commission's vast responsibilities, how can it hope to adopt and regulate intangibles that full-time professional broadcasters have not yet been able to perfect?

Referring more specifically to the State of Washington, when WSAB first undertook to prepare this comment, the first statement made was that a specific station could "live with" the time limitations on any day but Thursday. Since the management could not meet the radio Code on Thursdays, the station does not subscribe. This was typical of the many variations in broadcast needs observed throughout the State. Other variations involved seasons of the year, times of the month and week, and even segments of the day that prohibited code subscription in *fact*, although in *spirit* all felt they complied with the principles if not the letter of the Codes.

Leading industries in the State of Washington are lumber, fishing, agriculture, tourists, and construction. Each of these is at least in part seasonal. The seasons may or may not coincide. Any experienced broadcaster knows that the typically low revenues in early months of each year must be offset by other

months—if not, the quality of programming must decline as was recognized by the FRC in 1932, *supra*. The needs and desires of Omak, Washington (population 4,068 and served by one radio station), are not the same as Seattle, Washington (population 557,087 and served by many radio and television stations). There is not a single broadcaster or FCC staff member, or anyone else in the world, who knows the community of Omak's broadcasting needs like the local radio station. And what is good for Seattle may or may not be good for Omak in any given year, or month, or week, or day.

Such an infinite variety of occurrences exist which make rigid rules impossible that no attempt will be made to completely list them. To cite a few, however, last year Seattle entertained a World's Fair. Seattle broadcasters increased staffs and costs. WSAB provided a statewide network to bring live reports, at least four times a day throughout the State, of events at the Fair. While Seattle was experiencing its World's Fair boom, the great atomic works at Hanford suffered a strike seriously temporarily impairing the economy of central Washington. This year, the giant Boeing Company was threatened with a labor strike, and just the threat slowed Seattle's economy. In other parts of the State, we are now witnessing a serious timber strike. In the irrigated Yakima and Wenatchee areas, however, apple crops appear to be flourishing. Thus, within our State, local economies and advertising revenues rise and fall by the year, season, and hour.

The broadcasters must be alive to each economic cycle no matter what its duration. For only then can the people of our State be provided with the service they deserve, and we feel we provide by virtue of our communities' advertising dollars. Our business and civic leaders support us, and we support them. We can't so well perform if our hands are fettered.

The Commission has asked us to make suggestions and for alternatives for a variety of situations, e.g., daytime stations, sparsely populated areas, obtainable advertising rates, seasonal economies, days of the week, etc. It also asks that we comment on procedures for waivers or exemptions. These requests carry their own answers with them. If all of these matters were separately considered and codified into rules, waivers, or whatever, *the Commission would have a separate "Code" or set of regulations for every station.*

That is essentially what we have now, except each station's code is living, dynamic, and tuned to community needs and capabilities. It is locally imposed and regulated. It is not dictated from 3,000 miles away. It is not encumbered by a mass of government regulations and redtape. In the United States, we have over 5,000 licensees who daily create a living, flexible code attuned immediately to the whims of their locales.

Broadcasters in the State of Washington, however, have gone considerably beyond this. We constantly keep in touch with local citizens and State officials regarding advertising standards. For example, the FCC should know that we have locally communicated with our State Attorney General in such matters as lotteries and used car advertising; that we have self-imposed, voluntary standards of advertising for beer and wine (the nation's most stringent) which we adhere to in conjunction with our State Liquor Control Board; that we are presently working with the State Insurance Commissioner regarding insurance advertising practices; that we have served with citizens' committees regarding obscene literature; that we were the first State in the United States to perfect and pioneer legal notice advertising and are presently helping other States in this endeavor. Each of these things was done through WSAB at considerable expense to its members and were all actively pursued this year. This recitation of current activities makes no attempt to summarize the three preceding decades of WSAB or the past and continuing efforts of individual broadcasters in their local communities. Washington broadcasters know the people of the State of Washington and their needs and desires better than the FCC and better than the NAB. We serve these needs and desires.

We will not comment at length on the Codes themselves, knowing that the Commission, is well aware of their ramifications. The Commission must realize that, under the proposed commercial time limitations, a radio station could technically run 108 ten-second commercials in one hour in programs with participating commercial announcements. The Commission must know of many problems of interpretation that have arisen, and still arise, under the Codes, such as the difference between "piggyback" and integrated television announcements. Since the Commission follows the usual policy of not giving advisory opinions, the broadcaster would be forever interpreting what the proposed rules demand, rather than what is really quality commercial material. The burden

on all stations—especially nonnetwork and those with limited staffs—in attempting to count seconds with the precision required by the proposed time limitations would be heavy, adding one more item to the rising costs in broadcasting.

The "virtue" of complying with time limitations can lead to mediocrity. Instead of providing excellence in commercial copy, the time limitations merely count seconds. Animals and machines can be trained and built to count, but are not capable of understanding subtleties of advertising and tastes of a local community. For some reason unbeknown to us, the Commission seems to suggest that advertising is little more than a necessary evil to provide revenue for broadcast services. The notice of proposed rulemaking refers to advertising only insofar as it provides revenues to support broadcasting. The Commission did not refer to the great service that advertising itself plays in the American economy. The recent New York and Hawaiian newspaper strikes are simple illustrations of the real need for advertising, and the need for media to quickly respond to public needs for advertising, unshackled by arbitrary across-the-board time limitations.

We can only hope that the Commission is not actually implying what it seems to in the notice of Docket No. 15083 when the Commission states that "* * * it must be further recognized that broadcast stations cannot be operated primarily in the interest of advertisers * * *." A survey was undertaken by WSAB last year, the tabulations being summarized by the Communications Department of Washington State University. The sixty stations represented by this survey donated more than 672,000 public service announcements in one year to various agencies and campaigns. The value of these announcements—calculated by each station at its lowest commercial rate—came to a total of $3,742,828.00. With or without sponsors, Washington broadcasters have served the public. One Washington telecaster followed a University of Washington crew to *Russia* to telecast the crew race *live*. Other examples are far too many to list.

From the time of the Federal Radio Commission, the FRC and the FCC have expounded the theory of broadcast self-regulation (presumably in compliance with the Congressional acts that created them). We have already reviewed FRC statements in Section II. On July 29, 1960, the FCC released its "Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry" (Docket No. 12782):

"An examination of the foregoing authorities serves to explain why the day-to-day operation of a broadcast station is primarily the responsibility of the individual station licensee. Indeed, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the *individual station* licensee, and that the fulfillment of the public interest require the free exercise of his *independent* judgment. Accordingly, the Communications Act 'does not essay to regulate the business of the licensee. The Commission is given *no* supervisory control over programs, of business management or of policy * * *. The Congress intended to leave competition in the business of broadcasting where it found it * * *.'" [Emphasis added.]

Suddenly the Commission, as now constituted, has reversed that policy so well established. This we cannot understand.

The public has at every turn shown overwhelming support of the industry and the services it provides. Radio and television sets continue to set records in sales. The Commission, itself, selected Omaha as a representative community and found overwhelming community support. Yet, notwithstanding obvious community support (and we are aware of the trickle of letters of complaint that the Commission has received), and notwithstanding the FRC and the FCC's previous declarations, the Commission has now proposed to enter the fields of censorship, rate regulation, programming regulation, business judgment, and the dictation of local needs, desires, interests, and capabilities. We cannot understand, if we hold a public trust, why the Commission refuses to trust the public to know its own needs and desires.

In conclusion, we have strongly opposed the proposals set forth in the notice of Docket No. 15083. We have not made suggestions or alternatives to the Commission's proposal to adopt the NAB Codes' commercial time limitations primarily because there is not such a thing as one set of standards applicable to every locale in this great nation. Nor could several standards, even with various waivers or exemptions, approach the success of the services now

rendered. We fully recognize that the Commission has not said that it *would* adopt the proposed time limitations, and that the Commission has merely proposed the rulemaking for comment prior to the Commission's final determination. After having considered the substance of this comment, and those of others, we sincerely urge the Commission to reject the proposed rulemaking *en masse*.

Respectfully submitted.

JAMES A. MURPHY, *President*.

APPENDIX A

The first cited decision, *R. R. Jackman*, 5 F.C.C. 496, simply denies the transfer of control of a licensee which would create a duopoly in competition with a third station in the market. The transferee planned to increase the amount of commercial programs which would decrease the public program service then being rendered, and "particularly because of the fact that the station operates on a time-sharing basis."

The second decision is cited, *Travelers Broadcasting Service Corporation*, 6 F.C.C. 456, "applications denied because of applicants' commercial policies." This case was again a matter of transfer and had nothing to do with arbitrary across-the-board limitations of commercial continuity. In a ten-page decision, it has exactly two sentences even relative to commercials. There the assignee and assignor of a broadcasting license were subsidiaries of a parent company. The $100,000.00 cash held by the assignor was to be given to the parent corporation and the assignee was to assume indebtednesses so that it would have a "deficit of at least $1,500,000.00 at the time it begins operation of the station." The assignee did not propose to better programming or engineering or in any other way improve public service. As a result, the FCC found the transfer would not be in the public interest. The station could not operate without tending to overcommercialize. But this hardly is authority for anything similar to what the Commission now proposes.

APPENDIX B

Primarily Private ownership of Broadcasting Facilities	Primarily Govt. ownership of Broadcasting Facilities	No Commerical Advertising; or Time Limitations Imposed	Commercial Advertising With No Time Limitations
Argentina			Argentina.
Australia			Australia.
Austria		Austria.	
Brazil			Brazil.
Canada			Canada.
Chile			Chile.
France			France.
	Germany	Germany.	
	Great Britain	Great Britain.	
Italy		Italy.	
Mexico			Mexico (length of commercials limited).
	Russia	Russia.	
Spain		Spain.	
United States			United States.

APPENDIX C

"Mr. HEDGES. Oh, yes; they pay for the time they use and also for the talent; and I believe that the advertising has resulted in a vast improvement in radio programs, because you have advertisers who are spending money to compete with the other fellow. They want to get a radio audience; and in trying to get a radio audience they want to give the radio audience the most they can.

"Senator SMITH. There are quite a good many incongruities that grow out of it. They will give you a spiel on the seamless sock, and then they will sing, Praise God From Whom All Blessings Flow.

"Mr. HEDGES. That is a blessing, is it not, Senator?

"Senator SMITH. I reckon it would be.

"Mr. HEDGES. I believe, as a broadcaster, that advertising can be greatly overdone. As a broadcaster I insist that it be not overdone on our stations, because I do not want to lose listeners. I want to hold their interest. Advertising that is done should be done primarily for the purpose of building good will rather than for the purpose of building up direct sales.

"Senator SMITH. I think you are correct in that.

"The CHAIRMAN. What portion of a 30-minute program would you say should be devoted to advertising?

"Mr. HEDGES. It all depends on the way you do it. Our rule, however, in our station is that no more than 1 minute out of the 30 minutes is devoted to advertising sponsorship. In other words, the radio listener gets 29 minutes of corking good entertainment, and all he has to do is learn the name of the organization that has brought to him this fine program."

APPENDIX D

The Commission, of course, need not be reminded of the First Amendment dictate providing that "Congress *shall* make *no* law * * * abridging the freedom of speech, or of the press * * *." [Emphasis added.] The jealous guarding of our First Amendment freedoms has very recently been reemphasized by the Supreme Court in declaring a Pennsylvania statute requiring the recitation of the Lord's Prayer unconstitutional in *Abington School District* v. *Schempp*, 10 L. ed. 844 (1963).

The mere fact that the idea communicated is commercial in nature does not remove it from the prohibitions of the First Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951); *Burstyn* v. *Wilson*, 343 U.S. 495 (1951). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties * * *" (*Roth* v. *U.S.*, 354 U.S. 476, 484 (1957)).

Nor can the Commission take refuge in the fact that these are self-imposed standards by the broadcasting industry itself. "* * * where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application" (*Smith* v. *California*, 361 U.S. 147, 151 (1959)). And even though subsequent penalties may be invoked by government within constitutional limits, previous restraints have always been particularly abhorrent to the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931). Nor does the right to extract a license shield a government unit from the prohibitions of the First Amendment. *Soia* v. *New York*, 334 U.S. 558 (1948); *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1960).

MINNESOTA BROADCASTERS ASSOCIATION,
Minneapolis, Minn., October 31, 1963.

Hon. WALTER ROGERS,
House of Representatives,
Washington, D.C.

MY DEAR MR. ROGERS: On behalf of the Minnesota Broadcasters Association, I would like to take this opportunity to notify you of the strong support that the members of our association wish to give to your bill (H.R. 8316) making it clear that the FCC may not adopt a rule limiting commercial time.

We believe that the FCC does not now have the authority to enact such a proposal and that such a proposal would be arbitrary and discriminatory. There certainly could be no single yardstick devised to set up standard commercial time limitations for broadcasting. The net result would be substituting the Government control in Washington for proven regulation by the public. Certainly this would not, in any way, be in accord with our system of free enterprise.

The broadcasting industry, on its own, has made tremendous strides in self-regulation and has conscientiously and continuously endeavored to improve broadcasting standards and will, in the future, continue with unabated diligence.

Sincerely yours,

N. L. BENTSON, *President.*

(Whereupon, at 3:55 p.m., the subcommittee adjourned, subject to the call of the Chair.)

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