RADIO AND TELEVISION STATION TRANSFERS: ADEQUACY OF SUPERVISION UNDER THE FEDERAL COMMUNICATIONS ACT

Over five hundred radio and television stations were transferred in a recent twelve month period reflecting the increasing significance of transfers in regulation of the industry.[1] While the history of radio regulation traces back to 1910,[2] the first legislation controlling transfers was the Radio Act of 1927 which required "the consent in writing of the licensing authority."[3] The Communications Act of 1934 re-enacted this provision and added the "public interest" criterion as a basis for judging transfers.[4] Under this vague statutory mandate, the FCC has emphasized a number of factors in approving or disapproving transfer applica-

1. For purposes of this Note, "transfer" will refer to transfer and assignment of stations (which naturally includes the license), and transfers of construction permits. From September 1, 1953 to August 30, 1954, approximately 515 radio and television stations were transferred or assigned. *Broadcasting-Telecasting,* September 7, 1953 to August 30, 1954. This represents a fivefold increase over the number of transfers which occurred in 1939. 86 CONG. REC. 434-437 (1940).

In the early forties Herbert M. Bingham, member of the Federal Communications Bar Ass'n, had this to say: "[d]ue to economic growth and development of the industry, to the large investments made in individual stations, and to the value of such stations when established and placed in operation, it is no longer possible to deal with this subject [transfers] casually or as an incident to other subjects. The transfer section should be dealt with as one of the major licensing provisions of the act, of equal or greater in importance than other licensing provisions." *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5497,* 77th Cong., 2d Sess. 42 (1942).

2. The Ship Act of 1910, 36 STAT. 629 (1910), was the first attempt to regulate radio. It required passenger ships to be equipped with radio apparatus. The Act of 1912, 37 STAT. 302 (1912), was enacted principally to foster radio-telegraphy, and vested in the Secretary of Commerce power to grant licenses. The Radio Act of 1927, 44 STAT. 1162 (1927), created the Federal Radio Commission. This commission had more regulatory powers than did the Secretary of Commerce under former legislation. The act was held constitutional in City of New York v. Federal Radio Commission, 36 F.2d 115 (D.C. Cir. 1929), *cert. denied,* 281 U.S. 729 (1930). The Communications Act of 1934, 48 STAT. 1064, 47 U.S.C. § 151 *et seq.* (1934), shifted complete authority to regulate radio to the Federal Communications Commission.

For discussion of the early history and development of radio regulation, see SOCOLOW, THE LAW OF RADIO BROADCASTING § 25-54 (1st ed. 1939); EDLEMAN, LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947 1-11 (1950); O'Leson, *History of Radio Regulation,* in RADIO ANNUAL 627-638 (1942).

3. 44 STAT. 1167 (1927).

4. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934). While this provision represents the first application of "public interest" to transfer regulation, it was originally applied in regard to licenses in the Radio Act of 1927, 44 STAT. 1166 (1927).

This phrase "public interest, convenience or necessity" was adopted from public utility regnlation. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927,* 1 AIR L. REV. 295, 303-313 (1930); see Segal and Warner, *"Ownership" of Broadcasting "Frequencies": A Review,* 19 ROCKY MT. L. REV. 111, 115 (1947).

tions.[5] Primary attention was given the relation of sale price to the value of the station,[6] qualifications of the transferee,[7] benefits to the public from transfers,[8] and prevention of trafficking in licenses.[9]

In a series of proposals to amend the Communications Act beginning in 1942, it was advocated that the FCC be limited to a consideration of a transferees' qualifications.[10] These proposals aroused objections from the FCC which maintained that such limited inquiry would permit trafficking and auctioning of licenses and would eliminate controls over marginal licensees.[11] When the Act was amended in 1952, the "public in-

5. One important test is the qualifications of the transferor prior to the transfer. If the transferor has been found unqualified, the transfer application is denied. WOKO, 10 FCC 454 (1945); *cf.* D.R. James, Jr. 9 Pike & Fischer RR 917 (1953). Consistent with this principle is the Commission's refusal to approve a transfer unless the transferor's license is renewed. Julio Conesa, 11 FCC 200 (1946); *accord,* KFNF, Inc., 11 FCC 78 (1945).

6. The significance of the sale price for the station as a factor in transfers is discussed in a great many cases. See Edward J. Nobel, 11 FCC 569, 571-574 (1946); Magnolia Petroleum Co., 6 FCC 605, 606-611 (1938); Pacific Radio Corp., 5 FCC 427, 427-428 (1938); Exchange Avenue Baptist Church, 5 FCC 333, 336-337 (1938); Lancaster Broadcasting Service, Inc., 2 FCC 164, 166-167 (1935).

7. See Radio Corp. of America, 10 FCC 212, 213 (1943); Lee E. Mudgett, 8 FCC 227, 228 (1940); Anchorage Radio Club, Inc., 7 FCC 306, 313 (1939); R. W. Hoffman, 6 FCC 498, 501 (1938); Exchange Avenue Baptist Church, 5 FCC 333, 341 (1938); First Congregational Church of Berkeley, 3 FCC 417, 421 (1936).

8. See Evening News Publishing Co., 9 Pike & Fischer RR 1096, 1097 (1953); Sunland Broadcasting Co., 6 Pike & Fischer RR 1053, 1076 (1950); Edward H. Butler, 9 FCC 141, 142 (1942); Sapp and Sapp, 6 FCC 521, 523 (1938); Smith and Mace et al., 5 FCC 342 344 (1938); Reynolds, Hughes, and Allen, 4 FCC 382, 384 (1937); *contra:* Walton Broadcasting Co., 10 Pike & Fischer 10 (1953); Lancaster Broadcasting Service, Inc., 2 FCC 164 (1935); Red Oak Radio Corp., 1 FCC 163 (1934).

9. See City of Sebring, Fla., 11 FCC 873, 890 (1947); KFNF, Inc., 11 FCC 78, 88-89 (1945); Hearst Radio, Inc., 7 FCC 292, 295 (1939); Tornek, 4 FCC 193, 196 (1937).

10. The Sanders Bill (H.R. 5497, 77th Cong., 2d Sess.) was the first in a series of proposed amendments. This bill seemed to limit the "public interest" test to the transferee's ability to construct and operate a station, rather than applying it to the entire transfer proceeding. *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5497,* 77th Cong., 2d Sess. 6 (1942). The White-Wheeler Bill was similar but would have specifically required that the transferee's qualifications equal those of an original licensee. *Hearings before the Senate Interstate and Foreign Commerce Committee on S. 814,* 78th Cong., 1st Sess. 4 (1943). Subsequent proposals were even more restrictive, specifying that a transferee's qualifications equal those of an original licensee and completely abolishing the "public interest" criterion. See *Hearings before a Subcommittee of the Committee on S.1333,* 80th Cong., 1st Sess. 49 (1947); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1973,* 81st Cong., 1st Sess. 6 (1949); *Hearings before the Committee on Interstate and Foreign Commerce on S.658,* 82d Cong., 1st Sess. 5 (1951). Each of these last two bills passed the Senate.

11. In discussing the proposed substitution of the transferee's qualifications for the "public interest" criterion, Wayne Coy, Chairman of the FCC stated: "There are, as we see it, two basic dangers in the proposed change. In the first place by limiting the Commission's considerations of a proposed transfer solely to the qualifications of the proposed transferee, the Commission would be deprived of any control over trafficking in radio licenses. This is a serious problem in and of itself. But also, it would permit a person to secure a valuable broadcast license and then auction it off to the highest

terest" test was retained,[12] with the added provision that transfer applications should be "disposed of as if the proposed transferee or assignee were making application under § 308 [licensing provision] for the permit or license in question."[13] This reference to the licensing section requires the FCC to determine whether the proposed transferee possesses the qualifications of an original licensee.[14] Since the commission has in the past considered the qualifications of a transferee under the "public interest" test,[15] it may be questioned why the statutory requirement was added. It might be contended that the only possible significance of the inclusion of this criterion is that it was intended to be the sole consideration in judging transfers.[16] Such an interpretation is unjustified. Before a transfer can be approved the statute requires a finding that the "public interest, convenience and necessity will be served thereby."[17] The

bidder. . . ." *Hearings before the Committee on Interstate and Foreign Commerce on S. 658*, 82d Cong., 1st Sess. 73 (1951). Similar statements were made by Charles R. Denny while he was Chairman of the FCC. *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333*, 80th Cong., 1st Sess. 51 (1947).

12. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934), as amended, 66 STAT. 716, 47 U.S.C. § 310(b) (1952) provides in part that no license or construction permit should be granted except: ". . . upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." This language was added by the House after the bill had been passed by the Senate. 96 CONG. REC. 7506 (1952).

13. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934), as amended, 66 STAT. 716, 47 U.S.C. § 310(b) (1952).

14. "It should be emphasized that the Commission's authority . . . to determine whether the proposed transferee possess the qualifications of an original licensee or permittee . . . is expressly stated." SEN. REP. No. 44, 82d Cong., 1st Sess. 9 (1951).

15. SEN. REP. No. 44, 82d Cong., 1st Sess. 9 (1951) discussing the transfer provision states: ". . . the Commission's authority . . . to determine whether the proposed transferee possesses the qualifications of an original licensee or permittee is not impaired or affected in any degree."

A comparison of the cases indicates that qualifications required of licensees and transferees have been basically the same. Factors considered by the Commission in non-competitive license and transfer proceedings include: financial qualifications, Radio Enterprises, Inc., 7 FCC 169, 174 (1939) (licensing), George F. Courrier, 9 FCC 139, 140 (1942) (transferring); legal qualifications, Sam Klaver, 6 FCC 536, 537-538 (1938) (licensing); KVOS, Inc., 6 FCC 22, 26 (1938) (transferring); technical qualifications, Frank Wilburn, 1 FCC 146, 147-148 (1934) (licensing); Exchange Avenue Baptist Church, 5 FCC 333, 337 (1938) (transferring); factors reflecting the character of the applicant, Calumet Broadcasting Corp. v. FCC, 160 F.2d 285, 287-288 (D.C. Cir. 1947) (licensing); Mester v. FCC, 70 F.Supp. 118, 122-123, *aff'd per curiam*, 332 U.S. 749 (1947), *rehearing denied*, 332 U.S. 820 (1947) (transferring); miscellaneous factors considered such as quality of program service, John C. Hughes, 5 FCC 120, 122 (1938) (licensing); Smith and Mace, 5 FCC 342, 344 (1938) (transferring).

For discussions of licensing requirements, see EDELMAN, THE LICENSING OF RADIO SERVICE IN THE UNITED STATES, 1927 TO 1947, 59-90 (1951); Note, 25 ST. JOHN'S L. REV. 245 (1951).

16. See Wall and Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 153 (1953). The writers raise the possibility of this interpretation. This construction requires the limitation of the "public interest" test to a consideration of only the transferee's qualifications.

17. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934), as amended, 66 STAT. 716, 47 U.S.C. § 310(b) (1952). See Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 303-313 (1930).

only stated restriction on the FCC's evaluation of "public interest" is that it may not consider whether a third party would be more qualified than the intended transferee.[18] As recent cases indicate, the range of considerations beyond this limitation established under the "public interest" test prior to the 1952 amendments is preserved.[19] An understanding of the present status of transfer law must be based on an evaluation of various factors considered under this test.

The sale price of the station was at one time a salient consideration in transfers.[20] Although legislation to eliminate profits made from transfers has been proposed, there has never been a direct enactment imposing such restrictions.[21] Congress has specifically provided that a license is for the use of the airwaves alone; a license does not confer ownership.[22] Consequently, to prevent the licensee from obtaining a profit from the sale of his license, the FCC required a reasonable relationship between the value of station assets and price.[23] The parties were often allowed

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18. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934), as amended, 66 STAT. 716, 47 U.S.C. § 310(b) (1952). The statute provides that the, ". . . Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

19. See D.R. James, Jr., 9 Pike & Fischer RR 917, 920 (1953) (by implication); Versluis Radio and Television, Inc., 9 Pike & Fischer RR 1123 (1953) (by implication).

20. EDLEMAN, THE LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947 95-97 (1950); Warner, *Transfers of Broadcasting Licenses Under the Communications Act of 1934,* 21 B.U.L. REV. 585 (1941); Salsbury, *The Transfer of Broadcast Rights,* 11 AIR L. REV. 113, 125-138 (1940); Stewart, *The Public Control of Radio,* 8 AIR L. REV. 131, 141-144 (1937).

21. One proposed amendment suggested that the Commission should not approve transfers or assignments if the consideration were greater than the reasonable value of the apparatus and studio equipment. H.R. REP. No. 9971, 69th Cong., 2d Sess. 1162 (1926).

22. 48 STAT. 1064, 47 U.S.C. § 151 (1934), as amended, 66 STAT. 711, 47 U.S.C. § 151 (1952). There was a similar provision in the Radio Act of 1927. 44 STAT. 1162 (1927). The policy of the act has always been clear that no person is to have a property right in his license. For early analysis of the property concept in radio see Zollmann, *Recent Federal Legislation Radio Act of 1927,* 11 MARQ. L. REV. 121 (1927); Taugher, *The Law of Radio Communication with Particular Reference to a Property Right in a Radio Wave Length,* 12 MARQ. L. REV. 179 (1928); Note, 39 YALE L.J. 245, 250 (1929).

23. In one case the Commission stated: "Conceivably the purchase price paid for a broadcast station may be so high that the conclusion is inescapable that a valuation has been placed on the station's operating assignment . . . We do not believe that such is the case here." WNAX Broadcasting Co., 6 FCC 397, 406 (1938). The implication is that a valuation of the license would have been disapproved.

A series of decisions approved transfers where the relationship between the price for the station and its value was reasonable. See KID Broadcasting Co., 11 FCC 99, 100-101 (1945) (sale price $108,000; replacement value $75,000); Albert Steinfeld & Co., 6 FCC 714, 715-716 (1939) (price $35,000; replacement value $29,640.54); Blye, 6 FCC 383, 384 (1938) (price $27,000; replacement value $24,937.06); Pacific Radio Corp., 5 FCC 427, 427-428 (1938) (price $14,000; replacement value $13,000); Smith and Mace, 5 FCC 342, 343-344 (1938); (price $17,000; replacement value $11,262.57); Gillette Rubber Co., 2 FCC 127, 129 (1935) (price $30,000; estimated replacement value $32,121.25). See

to justify discrepancies between price and cost, however, by including as assets the capitalized earning power[24] and expenses[25] and a wide range of intangible assets.[26] An unreasonable relationship between price and value was never held sufficient ground alone for disapproving a transfer.[27] Frequently, the price factor was entirely ignored.[28] In the *Selma Seitz* decision in 1938, the FCC expressly stated that price was no longer a primary consideration,[29] and in subsequent cases completely avoided the price element.[30] In 1945 the Commission admitted to Congress its inability adequately to consider price, except in limited circumstances, and

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Segal and Warner, *"Ownership" of Broadcasting "Frequencies": A Review,* 19 ROCKY MT. L. REV. 115, 122 (1947); Note, 10 AIR L. REV. 189 (1939).

The Commission has also been influenced by the "bare-bones" policy in public utility law which is designed to prevent any valuation of a license, limiting the price to the value of the physical equipment. See Travelers Broadcasting Service Corp., 6 FCC 456 (1938). However, this doctrine has played a negligible role in the regulation of price in radio license transfers. See Warner, *Transfers of Broadcasting Licenses Under the Communications Act of 1934,* 21 B.U.L. REV. 585, 613-616 (1941); *see* Western Broadcast Co., 3 FCC 179, 186 (1936).

24. William Penn Broadcasting Co., 4 FCC 627, 631 (1937); Western Broadcasting Co., 3 FCC 179, 186 (1936).

25. *E.g.,* Magnolia Petroleum Co., 6 FCC 605, 606 (1938); Sapp and Sapp, 6 FCC 521, 522 (1938); Bishop and Roosevelt, 5 FCC 301, 302 (1938); KXL Broadcasters, 4 FCC 186, 191 (1937); Oklahoma Broadcasting Co., 3 FCC 464, 465 (1936). *But cf.,* Travelers Broadcasting Service Corp., 6 FCC 456, 463 (1938).

26. Various factors have been included within the scope of intangible assets. See, for example, Reynolds, 4 FCC 382, 384 (1937) (advertising contracts); Western Broadcast Co., 3 FCC 179, 187 (1936) (prosperous sales area); Beverly Hills Broadcasting Corp., 4 FCC 250, 252 (1937) (offers of competing purchasers); WGAR Broadcasting Co., 5 FCC 540, 544 (1937) (network franchises); Western Broadcast Co., 3 FCC 179, 188 (1936) (established audience); Exchange Avenue Baptist Church, 5 FCC 333, 337 (1938) (good will of church, the transferor).

27. In those cases denying transfers where there was a vast discrepancy in value and price paid, the Commission stressed other reasons for prohibiting the tranfer. See Liberty Life Insurance Co., 9 FCC 104, 106 (1942); Travelers Broadcasting Service Corp., 6 FCC 456, 461-463 (1938); Jackson, 5 FCC 496, 500 (1938).

28. See Edward H. Butler, 9 FCC 141 (1942); KVOS, Inc., 6 FCC 22 (1938); Red Oak Radio Corp., 1 FCC 163 (1934). The Commission would frequently list the price and compare it with the value of the station without attempting to justify discrepancies. *E.g.,* Nolan S. Walker and Edward P. Graham, 5 FCC 234, 236 (1938) (100% mark up on net worth); Bishop and Roosevelt, 5 FCC 301, 302 (1938) (sale price $57,500; net worth $33,981.80); Beverly Hills Broadcasting Corp., 4 FCC 250, 252-253 (1937) (price $125,000; book value of assets $40,839.96). For an expression of alarm over the unreasonable prices in station transfer, see Stewart, *The Public Control of Radio,* 8 AIR L. REV. 131, 141-144 (1937).

29. 7 FCC 315 (1938). In this case there was a great difference between price and value, but the Commission stated ". . . our primary consideration, from the standpoint of the public interest, deals not with the prevailing relationship between contract price and the items to be transferred, but rather with the qualifications of the proposed transferees and their ability to provide the public with an improved broadcast service." *Id.* at 318.

30. See Radio Corp. of America, 10 FCC 212 (1943); Edward H. Butler, 9 FCC 141 (1942); George F. Courrier, 9 FCC 139 (1942); John P. Scripps, 9 FCC 206 (1942); Federated Publications, Inc., 9 FCC 150 (1942); Lee E. Mudgett, 8 FCC 227 (1940); Anchorage Radio Club, Inc., 7 FCC 306 (1939).

requested Congressional direction.[31] Guiding legislation did not ensue and the commission continued to exclude price as an element in transfers.[32] Recently a four million dollar sale was consummated without consideration of the price.[33] Commissioner Lee in a concurring opinion did point out that a seventy-five percent profit was made in the sale but concluded that he did not, ". . . complain at the fact that the licensee is making a very substantial profit."[34]

Permitting unlimited prices for stations is inimical to public interest even though the public has no direct financial interest in radio.[35] The public does have an interest in receiving efficient radio and television service, and in order to further this interest, Congress preserved competition in the field of broadcasting.[36] The freedom of an entrepreneur to develop his business and sell it for a profit is fundamental to an effective competitive system. One writer points out that if the FCC had restricted all profits from the sale of stations because the government owned the license under which it operated, new investment would not be attracted.[37] There would be less expansion and lack of interest in the industry.[38] While there are advantages derived from competition, it must be remembered that, in the broadcasting field, frequencies are limited and licenses are a prerequisite to operation. Exorbitant prices are demanded for sta-

31. The FCC sent letters to the Senate Interstate Commerce Committee and the House Interstate and Foreign Commerce Committee requesting Congressional direction as to the policy the FCC should follow in passing on the sale of radio stations. 11 Ann. Rep. of FCC 12-13 (1945).

The Commission in one case during the year attempted to clarify its policy on the relation of price to transfers. In essence, price was to be considered in only three situations: when the price paid indicated trafficking, adversely affected the licensee's financial qualifications or resulted in over-commercialization. See Powel Crosley, Jr., 11 FCC 3, 23 (1945).

32. In 1946, the FCC approved a transfer involving "good will" as an asset worth over $2,000,000. It expressed its inability to cope with price differences without congressional directives feeling that it did not "have the legal power to disapprove the transaction because of the price." Edward J. Noble, 11 FCC 569, 576 (1946). Succeeding decisions avoided price discussions. See Evening News Publishing Co., 9 Pike & Fischer RR 1096 (1953); Sunland Broadcasting Co., 6 Pike & Fischer RR 1053 (1950); KPMO, 6 Pike & Fischer RR 137 (1950).

33. Wrather-Alvarez, Inc., 10 Pike & Fischer RR 539 (1953).

34. *Id.* at 540.

35. But see ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 119-120 (1940). The author contends that the people actually have a financial interest in radio since they pay directly by the purchase of sets, and electricity, and they pay indirectly by purchasing products of sponsors. While this is true, the interest appears to be too remote to merit serious consideration.

36. See ENGINEERING DEPARTMENT OF THE FCC, REPORT ON SOCIAL AND ECONOMIC DATA PURSUANT TO THE INFORMAL HEARING ON BROADCASTING 43 (1938). For a discussion of other systems of broadcasting throughout the world see CHESTER AND GARRISON, RADIO AND TELEVISION 137-153 (1950).

37. Rose, *op. cit. supra* note 35, at 112-113.

38. *Ibid.*

tions, a substantial premium being paid for the license itself.[39] Such a payment is not a compensation for developing a successful station, but a reward for merely acquiring a license. It has been indicated that excessive prices for stations intensifies the pressure to make a profit, possibly resulting in "over-commercialization."[40] Program quality may be sacrificed for less expensive methods of operation.[41] Potential transferees are the highest bidders,[42] and there is no necessary relationship between the person willing to make the largest investment and the most competent operator.

A further outgrowth of the excessive price is possible stimulation of trafficking in licenses.[43] The procurement of licenses for the purpose of selling them for a profit is usually referred to as trafficking.[44] While attempts to regulate this practice by direct legislation failed, the FCC did establish prohibitions by refusing to grant licenses or approve transfers when the evidence disclosed an intent to assign the license rather than use it.[45] During recent congressional hearings, a radio executive revealed that trafficking was "going on to a degree . . . worthy of attention."[46] A recent decision in which a license was awarded to a party just two years after he had sold one for a $100,000 profit indicates the current FCC attitude toward this practice.[47] The competitor for the license was fore-

39. Justin Miller, President of the National Association of Radio and Television Broadcasters, in reply to a question asking what represents the difference between the purchase price and the tangible property, said: "A great deal of that value is incident to the fact that he has rights under a license to use a particular frequency. We need not make any bones about that." *Hearings before the Committee on Interstate and Foreign Commerce on S.658,* 82d Cong., 1st Sess. 360 (1951). A publication reported the following: "Twenty-five of the 40 major sales since 1949 have been for prices of more than a million dollars. Many stations brought 2 million to 3 million." U. S. News and World Report, Aug. 27, 1954, p. 40. BROADCASTING-TELECASTING YEARBOOK (1953-1954) lists the major sales for 1953, eighteen of which were for over a million dollars. Larger sales included: WABT—2.5 million; KHJ-TV—2.5 million; KNXT—3.6 million; KFMB-TV—3 million; KOTV—2.5 million; WOR-TV, AM, FM—4.5 million plus lease. *Id.* at 300-301.

40. SIEPMAN, RADIO'S SECOND CHANCE 165-166 (1946).

41. Rose, *op. cit. supra* note 35, at 112.

42. Siepman, *op. cit. supra* note 40, at 166. See Powel Crosley, 11 FCC 3, 12-13 (1945).

43. Siepman, *op. cit. supra* note 40, at 165.

44. Warner, *Transfers of Broadcasting Licenses Under the Communications Act of 1934,* 21 B.U.L. REV. 585, 595 (1941).

45. Hearst Radio, Inc., 7 FCC 292, 295 (1939); City of Sebring, Fla., 11 FCC 873, 890 (1947). In KFNF, Inc., 11 FCC 78, 88-89 (1945) the Commission announced its disapproval of purchasing a station merely to eliminate it from the broadcast field without using it and thus giving a more suitable frequency to another station.

46. Statement of Harry Bannister, General Manager of Stations WWJ, WWJ-FM, WWJ-TV in Detroit, Michigan, at *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333,* 80th Cong., 1st Sess. 298 (1947).

47. Versluis Radio and Television, Inc., 9 Pike & Fischer RR 1123 (1953). A competing applicant for the television station in question offered to prove that a $100,000 profit had been made by his competitor on the sale of a former license. This proof was

closed from raising the issue of trafficking, the Commission stating that re-entry into broadcasting within two years indicated only ". . . a possible attachment to that area."[48]

Trafficking raises a serious threat of inferior and mediocre standards of broadcasting to the detriment of the public interest. Applicant R may compete for a license with the intent to transfer it to S if he wins.[49] In a close decision, he defeats applicant T and transfers immediately to S who may have only minimum qualifications, perhaps much less than T. The public never gets the benefits of R's or T's superior qualifications. There is a grave inconsistency in providing elaborate procedures for licensing to determine the best qualified applicant only to have the basis for the decision shattered by a transfer.[50] The seriousness of the problem was recognized by the FCC in 1945 in its adoption of the AVCO rule.[51] This rule in essence required transferors to advertise their proposed transfers in order to enable interested parties to compete for the station.[52] This rule was abandoned by the Commission in 1949,[53] and the possibility now of comparable regulation seems precluded by the 1952 amendments.[54]

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disallowed.

48. Verslius Radio and Television, Inc., *supra* note 47, at 1141.

49. The successful licensee may operate the station and then sell it later. However, the effect on the public is about the same as if he sold it immediately.

50. Commissioner Lee recently stated: ". . . I am concerned because the transfer processing does not answer for me the question as to how the prospective purchaser would have fared in a comparative hearing . . ." Concurring opinion in Wrather-Alvarez, Inc., 10 Pike & Fischer RR 539, 540 (1954). Similar expressions are found in Commissioner Lee's dissenting opinion in Aladdin Radio and Television, Inc., 10 Pike & Fischer RR 773, 776 (1954).

51. The AVCO rule, requiring a competitive transfer system, was an outgrowth of the Powel Crosley decision, 11 FCC 3 (1945), approving a transfer of the Crosley assets, which included a radio station. The large sum of money involved in the transaction and the apparent lack of interest of the transferees in the station highlighted the inadequacies of the existing system of transfers. See Siepman, *op. cit. supra* note 40, at 165-183.

52. 47 CODE FED. REGS. § 1.321 (Supp. 1946). Both the FCC and the applicant would give public notice of pertinent details of the application, including the terms of the sale, the name of the proposed transferee, and a statement that any other party wishing to apply for the facilities might do so on the same contract terms and conditions as set forth in the contract. If there were other applications for the station, all would be considered and a hearing held, the most competent applicant winning the license. The primary objectives, as summarized in Associated Broadcasters, Inc., 12 FCC 688, 698 (1948), were (1) securing the best qualified persons as broadcast licensees, (2) preventing undue concentration of radio facilities, and (3) encouraging open competition among qualified persons desiring to operate radio facilities.

For a comprehensive discussion of the AVCO procedure, see statement by Charles R. Denny, former Chairman of the FCC, in *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333,* 80th Cong., 1st Sess. 49-50 (1947).

53. In abandoning the rule, the Commission said: "Experience under the AVCO rule has failed to realize the expectations with respect to making possible a choice between two or more competing applications for assignments or transfer of control. Moreover, the AVCO rule in many cases produces severe hardships on parties interested in assignments or transfers of control." 17 U.S.L. WEEK 2574 (June 14, 1949).

54. *Supra,* note 18.

An earlier method used by the Commission to control transfers hinged on the requirement of a resulting public benefit as justification for a sale.[55] Unless improved service, which encompassed an extensive group of factors,[56] was indicated, applications for transfer were generally denied.[57] The FCC seemed recently to depart from this established policy.[58] Abandonment of this practice gives even more freedom to transfers and may deprive the public of additional improvements it formerly might have received from such transactions.

Except for requiring minimum qualifications in transferees, there are currently few substantial restrictions on transfers. Limitations developed by the Commission under the "public interest" criterion have lost their effectiveness. This permits a possible lowering of the competitive level and may result in mediocrity in the industry.[59] The increased im-

55. See Parmer, 2 FCC 172, 175 (1935). The importance of this factor of resulting public benefit was emphasized by the Commission in Selma Seitz, 7 FCC 315, 318 (1939), "[O]ur primary consideration from the standpoint of the public interest, deals . . . with the qualifications of the proposed transferees and their ability to provide the public with an improved broadcast service."

While this was the expressed policy of the Commission, one commentator maintained that an analysis of all decisions, including those not dignified by a written opinion, indicated that an affrmative showing of some benefit was not always essential, particularly where no detriment to the public interest was apparent. Salsbury, *The Transfer of Broadcast Rights*, 11 AIR L. REV. 113, 142 (1940).

56. Edward H. Butler, 9 FCC 141, 142 (1942) (elimination of multiple ownership); R. W. Hoffman, 6 FCC 498, 500 (1938) (improved coverage); Memphis Commercial Appeal Co., 6 FCC 419, 421 (1938); Magnolia Petroleum Co., 6 FCC 605, 612 (1938) (greater use of local talent); Exchange Avenue Baptist Church, 6 FCC 333, 337 (1938) (improved technical equipment); Reynolds, Hughes, and Allen, 4 FCC 382, 384 (1937) (sounder financial basis).

57. See WGAR, 4 FCC 540, 548 (1937); Travelers Broadcasting Service Corp., 6 FCC 456, 462 (1938). In the early years of its existence, the Commission tended to overlook a requirement of public benefit. See Lancaster Broadcasting Service, Inc., 2 FCC 164 (1935); Red Oak Radio Corp., 1 FCC 163 (1934).

58. See Walton Broadcasting Co., 10 Pike & Fischer RR 10 (1953). In this case the only justification for approval of a transfer was that the transferees wished to invest in the broadcast field in their former home state. Commissioner Bartley, dissenting, stated, ". . . if the reasons for the transfer are limited to those stated by the transferees . . . then I would consider a grant of the application to be a departure from our long established policy concerning protection of the public interest." *But see* Aladdin Radio and Television, 10 Pike & Fischer RR 773, 775 (1953) in which language indicates some consideration of the public benefit.

59. It might be contended that competition in the industry compensates for lower standards, making the inferior and less competent obtain higher levels. In Gulf Coast Broadcasting Co., 4 FCC 103, 106 (1937), it was argued that competition between local stations results in improvements in the program service of each and promotes the public interest. But see speech by Wayne Coy in 96 CONG. REC. 3480 (1950); Hettinger, *The Economic Factor in Radio Regulation*, 9 AIR L. REV. 116, 121 (1938).

Competition between superior and less competent broadcasters may tend to raise the standard of the inferior. But the rapidity and quantity of transfers today appear to be too great for the industry to absorb and elevate their standards. If this is the condition, then competition exists among the less competents and the level they reach falls short of that established by superior broadcasters. The level upon which competition exists is more important than competition itself.

portance of transfers only intensifies these possibilities and works against the achievement of the Commission's purpose of securing the best possible service for the public.

The procedural law of transfers, liberalized by the 1952 amendments, is more in accord with this aim.[60] The procedure for approving and denying transfers is outlined in Section 309 of the Federal Communications Act.[61] In two respects, this Section merely codifies former law.[62] The FCC may hold a hearing before making a decision,[63] retaining a discretionary power to restrict an intervenor's participation[64] or to grant a rehearing.[65] The FCC also has the right to make a decision without a hearing.[66] The significant change is the addition of a protest provision applicable when the Commission makes a decision without first holding a hearing.[67] In such cases any "party in interest" can demand

60. For a cogent discussion of the new process for obtaining a license see Smith, *Practice and Procedure Before the Federal Communications Commission as Viewed by a Hearing Examiner,* 7 OKLA. L. REV. 276 (1954). The section dealing with procedure for licensing is also applicable to transferees.

61. 48 STAT. 1085, 47 U.S.C. § 309 (1934), as amended, 66 STAT. 715, 47 U.S.C. § 309 (1952). The application of § 309 to transfers is derived from language of § 310(b), 48 STAT. 1086, 47 U.S.C. § 310(b) (1934), as amended, 66 STAT. 716, 47 U.S.C. § 310(b) (1952) which states in part: "Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question." Sections 308 and 309 are applied together.

62. For a general discussion of former procedure before the FCC, see Gary, *Practice and Procedure before the Federal Communications Commission,* 11 AIR L. REV. 112 (1937).

63. 48 STAT. 1085, 47 U.S.C. § 309(b) (1934), as amended, 66 STAT. 715, 47 U.S.C. § 309(b) (1952) provides: "If the Commission shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining . . ." For a comparable provision in previous act, see 48 STAT. 1086, 47 U.S.C. § 309(a) (1934); 47 CODE FED. REGS. § 1.387 (1953).

64. Niagara Frontier Amusement Corp., 10 Pike & Fischer RR 39 (1954).

65. 48 STAT. 1095, 47 U.S.C. § 405 (1934), as amended, 66 STAT. 720, 47 U.S.C. § 405 (1952). The previous law was to the same effect. For a discussion of the provisions of the earlier law see Caldwell, *Federal Communications Commission—Comments on the Report of the Staff of the Attorney General's Committee on Administrative Law,* 8 GEO. WASH. L. REV. 749, 765 (1940).

66. 48 STAT. 1085, 47 U.S.C. § 309(a) (1934), as amended, 66 STAT. 715, 47 U.S.C. § 309(a) (1952) provides in part: "If upon examination of an application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application." For a comparable provision in former law see 48 STAT. 1085, 47 U.S.C. § 309(a) (1934). See also Plotkin, *Procedure Followed by the Federal Communications Commission in Passing upon Applications for Radio Stations,* 17 PA. B.A.Q. 291 (1946).

67. This provision was probably the most controversial provision in the 1952 amendments. The FCC had long opposed its enactment. James Fly, Chairman of the FCC at the time, stated that this rule would subject newcomers in the radio broadcasting fields to harassment and delay. *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5497,* 77th Cong., 2d Sess. 781-783 (1942). Commissioner Wakefield expressed comparable fears. *Hearings before the Committee on Interstate and Foreign Commerce on S.814,* 78th Cong., 1st Sess. 648 (1942). See also the comments of former Chairman, Charles Denny. *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333,* 80th Cong., 1st Sess. 48-49 (1947).

a hearing[68] irrespective of FCC discretionary approval,[69] a prerequisite under former rules.[70] The possible impact of this change is clear when it is considered that nineteen out of every twenty decisions in 1950 were made without a hearing.[71] To avail himself of this section, the petitioner must not only be a "party in interest" but must also phrase the issues and facts of his petition with "particularity."[72] The present trend of decisions points to a liberal construction of the requirement of "particularity."[73] This approach reduces the possibility of excluding legitimate complainants on a technical point. While the phrase "party in interest" is new

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Support for the protest provision came from the Federal Communications Bar Association speaking through Herbert M. Bingham, a member of the association. He criticized the Commission's policy as according existing stations little protection. *Hearings before the Committee on Interstate Commerce on S.814,* 78th Cong., 1st Sess. 484-485 (1943).

68. The exact meaning of "hearing" as recently construed by the FCC is not clear. Section 309(c) provides that if the jurisdictional requirements can be satisfied, the petition shall be set for a "hearing," which is to be "tried in the same manner provided in subsection (b)" which guarantees a "full hearing." The Commission has construed "hearing" under § 309(c) to mean only an oral hearing when questions of law and policy alone are involved. T. E. Allen & Sons, Inc., 9 Pike & Fischer RR 594a (1953); see also Ohio Valley Broadcasting Corp., 10 Pike & Fischer RR 500 (1954); Salinas Broadcasting Corp., 9 Pike & Fischer RR 595 (1953). For a criticism of this interpretation, see Scharfeld, *1952 Report of the Committee on Communications of the Administrative Law Section, American Bar Association,* 13 FED. COMM. B.J. 76 (1953). In support of the Commission's policy see DAVIS, ADMINISTRATIVE LAW § 68 (1951).

69. H.R. REP. No. 1750, 82d Cong., 2d Sess. 11 (1952) in discussing § 309(c) states: "Any such protest must contain allegations of fact to show that the protestant is a party in interest and must specify the facts, matters, and things relied upon. The Commission . . . must enter a finding as to whether the protest meets the foregoing requirements and, if it so finds, the application involved *must* be set for hearing upon the issues set forth in the protest . . ." (emphasis added)

70. 48 STAT. 1095, 47 U.S.C. § 405 (1934) was construed to authorize but not require protest hearings where decisions were made without hearings. See York Broadcasting Co., 6 Pike & Fischer RR 755, 757 (1950); *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5497,* 77th Cong., 2d Sess. 39 (1942).

71. Frank Roberson, Chairman of the Legislative Committee of the Federal Communications Bar Association, pointed out that, between March, 1950, and March, 1951, only 261 of 4,180 applications filed in broadcast matters were designated for hearing. *Hearings before the Committee on Interstate and Foreign Commerce on S.658,* 82d Cong., 1st Sess. 248 (1951).

72. H.R. REP. No. 1750, 82d Cong., 2d Sess. 11 (1952) states in part: "Any such protest must contain allegations of fact to show that the protestant is a party in interest and must specify the facts, matters and things relied upon." 48 STAT. 1085, 47 U.S.C. § 309(a) (1934), as amended, 66 STAT. 715, 47 U.S.C. § 309(c) (1952). See Scharfeld, *supra* note 68, at 73-76; Scharfeld, *1954 Report of the Committee on Communications of the Administrative Law Section, American Bar Association,* 13 FED. COMM. B.J. 172-178 (1954).

73. Ohio Valley, 10 Pike & Fischer RR 500 (1954) indicates a departure from the former rigorous requirements of "particularity." *But see* T. E. Allen & Sons, 9 Pike & Fischer RR 591 (1953). For a comparison of several issues and brief discussions justifying their validity or invalidity under the "particularity" requirement, see Van Curler Broadcasting Corp., 19 FED. REG. 5919 (1954). This decision indicates a willingness to accept generally phrased issues as long as specific facts are given in support to indicate a legitimate claim.

to the Commission, the Senate Committee Report seems to limit its meaning to any "person who is aggrieved or whose interests are adversely affected. . . ."[74] This latter phrase is a familiar one to the FCC since it has been used as a basis for appeal under the Communications Act.[75]

The courts in two major cases have ruled that licensees threatened with electrical intereference or those who may suffer economic injury as a result of an FCC ruling are entitled to a hearing and appeal as persons "aggrieved or whose interests are adversely affected."[76] Economic injury to the complaining party must be of a nature which endangers the public interest. In this respect, the petitioner is a private attorney general, protecting the public interest and not his own.[77] Originally, only those existing radio stations threatened by additional competition from new licensees were allowed standing.[78] After the 1952 amend-

74. "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (209 U.S. 470)." SEN. REP. No. 44, 82d Cong., 1st Sess. 8 (1951).

Each of the cases referred to arose under § 402(b)(2), 48 STAT. 1093, 47 U.S.C. § 402(1934), which gives rights of appeal to "any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." See 21 GEO. WASH. L. REV. 368 (1953).

75. See note 74 *supra*. The effect of this change is to make standing to appeal and intervention the same when no hearing is held. See DAVIS, ADMINISTRATIVE LAW § 203 (1951) for a discussion of the differences between appeal and intervention. See also Associated Industries v. Ickes, 134 F.2d 694, 702 (2d. Cir. 1943).

76. FCC v. NBC, 319 U.S. 239 (1942). FCC v. Sanders Brothers, 309 U.S. 470 (1940). See DAVIS, ADMINISTRATIVE LAW § 205 (1951); Notes, 42 MICH. L. REV. 329-330 (1943); 52 YALE L.J. 671 (1943).

The Sanders case was the initial case to determine that the term "aggrieved or whose interests are adversely affected" comprehends one who may be economically injured in the issuance of a license, but dicta in prior cases was in accord; *e.g.*, WOKO, Inc., v. FCC, 109 F.2d 665, 668 (D.C. Cir. 1939); Tri-State Broadcasting Co. v. FCC, 107 F.2d 956, 957 (D.C. Cir. 1939); Great Western Broadcasting Ass'n v. FCC, 94 F.2d 244, 248 (D.C. Cir. 1937). Notes, 11 AIR L. REV. 177 (1940); 5 AIR L. REV. 201 (1934). Two cases, however, held that any allegation of economic injury is vague, problematical and conjectural. See Magnolia Petroleum Co. v. FCC, 76 F.2d 439, 442 (D.C. Cir. 1939); WGN, Inc. v. Fed. Radio Comm., 68 F.2d 432, 433 (1933).

77. Mr. Justice Frankfurter, citing the Sanders Case, said: "The Communications Act of 1934, did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal . . . But these private litigants have standing only as representatives of the public interest." Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942).

78. The Sanders case involved an existing radio station appealing a decision granting a license to a new station in the same area. The scope of this doctrine remained fairly constant. An attempt to extend the theory to include an applicant for a station as one suffering economic injury was denied. Mansfield Journal v. FCC, 173 F.2d 646 (D.C. Cir. 1949).

ments, a rash of attempts to expand this concept were denied[79] but finally, in the *Versluis* decision the FCC, recognizing the competition between radio and television, permitted a radio station to protest the licensing of a television station in the same area.[80] This liberal construction was enlarged in a recent case to permit a newspaper to protest the grant of a television station.[81]

The Commission was reluctant to expand the meaning of "party in interest" in transfer proceedings. In *Camden Radio, Inc.*, a competing radio station sought and was denied the right to protest a transfer approved by the FCC without a hearing.[82] The Commission reasoned that the petitioner had not shown that he would suffer any economic injury from operation of the station by the assignee rather than by the assignor since his competitive situation was unchanged.[83] The District Court reversed the Commission pointing out that no showing of a change in the

79. These cases held that petitioner(s) did not qualify as "parties in interest": Capital Broadcasting Co., 8 Pike & Fischer RR 229 (1952) (members of the public who ride transit lines which were equipped with radios); Kansas State College of Agriculture and Applied Science, 8 Pike & Fischer RR 261 (1952) (association of radio and television broadcasters); Poland Industries, 8 Pike & Fischer RR 398 (1952) (applicant for a construction permit where the same channel was given to another before the petitioner applied); Paul A. Brandt, 8 Pike & Fischer RR 402 (1952) (an individual with no interest other than as a member of the public); NBC, Inc., 8 Pike & Fischer RR 647 (1952) (individual with personal grievance against a station).

80. Versluis Radio and Television, Inc., 9 Pike & Fischer RR 102 (1953), *reversing*, 9 Pike & Fischer RR 104 (1953). The FCC had originally refused to extend the Sanders doctrine to include an AM station in competition with a television station. Commissioner Hennock's dissent in the first decision pointed out: "Since television stations clearly compete with radio stations for both audience and advertisers, an existing radio station has exactly the same sort of economic interest which the Supreme Court found controlling in the Sanders case." *Id.* at 107-108.

In reconsidering its first decision, the FCC apparently accepted the reasoning of Commissioner Hennock. With this change of policy, the FCC enlarged the classification of those qualifying as "parties in interest"; see WHEC, Inc., 9 Pike & Fischer RR 172 (1953) (licensee of a standard broadcast station asserting economic injury from television grant); Salinas Broadcasting Corp., 9 Pike & Fischer RR 192 (1953) (permittee of a television station asserting economic injury from new television station in the area); *accord,* Eugene Television, Inc., 9 Pike & Fischer RR 601 (1953); Cherry & Webb Broadcasting Co., 9 Pike & Fischer RR 1093 (1953). See 102 U. OF PA. L. REV. 1080 (1954).

81. Ohio Valley Broadcasting Corp., 10 Pike & Fischer RR 452 (1954). The Commission decided in a 4-3 decision that § 309(c) was not limited to licensees and permittees of the Commission and that injury from direct competition was sufficient to confer standing. *Id.* at 455-456. See 102 U. OF PA. L. REV. 1080 (1954). This decision should be contrasted with one denying a protest to a taxicab company which argued it would suffer economic injury from the grant of a radio license to a competing cab company. Yellow Cab Co. of Chicago, Ill., 9 Pike & Fischer RR 122a, 123 (1953).

82. 9 Pike & Fischer RR 359 (1953).

83. Commissioner Hennock's dissent argued that the act made no such requirement of showing additional economic injury. *Id.* at 360.

competitive situation was required by the statute.[84]

Underlying the court's position is a possible awareness of potential detrimental consequences stemming from the FCC's decision. In any transfer, there are two possible injuries to the public. One is economic injury to the protesting station which indirectly affects the public,[85] and the other is the detriment from a transferee's lack of qualifications. In a transfer, harm to the public because of economic injury to the protesting station although possible is unlikely since a transfer would probably not alter competition in the area. If additional injury were required for a protest, it would be virtually impossible to dispute transfers. The transferee's potentially inferior qualifications could not be challenged in a hearing permitting the presentation of all relevant facts and issues.[86] The fact that the economic issue has been decided in the original grant of the license should be no bar to the protest hearing since protection of the public interest rather than injury to the complainant is the legal basis of the suit.[87] Since licensing and transferring are comparable in their impact on the public interest, it would be unwise to extend greater protection to the public in one type of proceeding than in the other.[88]

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84. Camden Radio, Inc. v. FCC, —— F.2d —— (D.C. Cir. 1954), 10 Pike & Fischer RR 2072 (1954).

While the act does not require this additional showing of economic injury, the Commission has imposed this requirement. In Channel 16 of Rhode Island, Inc., 10 Pike & Fischer RR 377 (1954) a permittee of a television station had no standing to protest the Commission's decision to give an extension of time for the construction of a competing television station.

The validity of this reasoning was upheld in other cases: Spartan Radiocasting Co., 10 Pike & Fischer RR 287 (1954) (no economic injury caused by the grant of a special temporary authority); Spartan Radiocasting Co., 10 Pike & Fischer RR 587 (1954) (modification of construction permit authorizing change of transmitter site); Tri-State Television, Inc., 10 Pike & Fischer RR 1049 (1954) (extension of time to complete construction caused no economic injury.) *But cf.* Midwest Television, Inc., 9 Pike & Fischer RR 611 (1953) (a change in the transmitter site resulted in a signal of principal city strength being put over a city for the first time and thus new economic injury was found and a protest allowed).

85. FCC v. Sanders Brothers, 309 U.S. 470, 475 (1940).

86. Former Chairman of the FCC, Charles Denny, has said: "[I]t is extremely difficult to determine the qualifications of an applicant simply on the basis of information contained in the application. Moreover, persons in the community may have some relevant information that does not appear in the application. Only a hearing can produce this additional information." *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333,* 80th Cong., 1st Sess. 48 (1947).

87. FCC v. Sanders Brothers, 309 U.S. 470, 476 (1940).

88. The principal factor against broadening the scope of protest proceedings is the impairment of agency efficiency because of delays and undue complication of issues by persons whose sole purpose is to postpone the date at which any television or radio service may be made available to their market areas. DAVIS, ADMINISTRATIVE LAW § 203 (1951). See also comments by Commissioner Doerfer in *Hearings before the Committee on Interstate and Foreign Commerce on Workload of the FCC,* 83d Cong., 1st Sess. 4 (1953).

Regardless of procedural rights to demand hearings,[89] if the FCC is passive in deciding basic issues of trafficking, price, and public benefit, the threat of mediocrity in the industry persists. The primary obligation for imposing restrictions on transfers lies with Congress. Perhaps Congress should reconsider its adopted policy against enabling interested parties to compete for any license to be transferred. Allowing competitive transfers would parallel the system used in licensing and would tend to secure the most qualified applicants.[90] Further, since the transferor under this system can still make his own contract terms and limit transferees to the highest bidders, it might be wise to impose a limitation on the sale price.[91] The owner could be allowed a profit based on his successful operation of the broadcasting business, which has enhanced the station's value, but excessive prices indicating compensation for the license itself could be disallowed.[92]

Even without legislative guidance and standards, the FCC could considerably strengthen its regulation of transfers. In the face of the 1952 amendments it is clear that the Commission could not renew the AVCO rule.[93] However, a showing of some public benefit to be derived from each transfer could be required thus tending to sustain present standards in the industry. The Commission might impose its own discretionary limitation on excessive sale prices for licenses without doing violence to legislative authority.[94] In addition, the Commission should be more willing to consider evidence of trafficking. New legislative guides or revitalized FCC policies could do much to improve the present status of transfer law. More rigid regulation seems necessary in order to secure for the public maximum benefits from broadcasting.

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89. An attempt to remove this liberal protest provision is contained in S.2853, currently before the Committee on Interstate and Foreign Commerce, which provides in part: "The Commission shall within 30 days of the filing of the protest render a decision which decision shall either affirm the grant or designate the application for hearing . . ." S.2853, 83d Cong., 2d Sess. (1954).

90. It is conceded that this changed procedure would necessitate more personnel and would require increased appropriations for the FCC.

91. One writer indicates the dangers of this: "But certainly any process which would give to the Commission the power to determine the propriety of a given price for a particular broadcasting station would . . . plunge the Commission into all the complicated problems of 'fair value.' . . ." Rose, *op. cit. supra* note 35, at 114.

92. For arguments against such disallowance, see Note, 9 AIR L. REV. 77, 78 (1938).

93. SEN. REP. No. 44, 82d Cong., 1st Sess. 9 (1951) states that one purpose of the new section is to annul the AVCO procedure because such a procedure was an invasion by a government agency into private business practice.

94. The process of determining what constitutes a reasonable price is very complicated. This involves all the problems of valuation of assets and it may well be that the FCC could not competently deal with this complex problem.