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### Recommended Citation

Ashton R. Hardy and Lawrence W. Secret III, *Religious Freedom and the Federal Communications Commission*, 16 Val. U. L. Rev. 57 (1981).

Available at: <https://scholar.valpo.edu/vulr/vol16/iss1/2>

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## **RELIGIOUS FREEDOM AND THE FEDERAL COMMUNICATIONS COMMISSION**

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The efforts of religious broadcasters to operate broadcasting stations according to the tenets of their faiths have, at times, collided with the secular duties imposed by the acceptance of a broadcasting license. Religious broadcasters who feel a duty to speak out on contemporary issues or the immutable truths of faith have questioned the requirements for "fairness," "equal time," or for hiring practices which forbid, in some instances, employment only of adherents to particular doctrines. And yet, the collision is unavoidable so long as competing views are allowed in a free marketplace of ideas and the number of available broadcast frequencies are fewer than those seeking a radio or television outlet.

Commercial broadcasters have accepted the plethora of government regulations and requirements, though often with reluctance, as a cost of doing business; but some religious broadcasters view these same regulations as stifling religious expression and forcing them into compromising positions. The Federal Communications Commission ("FCC"), which regulates the air waves and grants licenses for their use, has grappled often with the competing interests of the religious broadcaster's intended use of a frequency to advance a theology and the government's desire for uniform application of its rules and policies. In the opinion of some religious broadcasters, these rules and policies have the effect of restraining the uninhibited exercise of religious expression.

The Commission's "Fairness Doctrine," for example, requires all broadcasters, religious and secular, that air one side of a "controversial issue of public importance" to provide a fair presentation of opposing views within their overall programming. On its face, nothing could

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† The authors acknowledge that they are deeply indebted to Dennis Kahane, Associate of Jones, Walker, Waechter, Poitevent Carrère & Denègre, New Orleans, Louisiana, formerly Attorney-Advisor to the Broadcast Bureau, Federal Communications Commission, and John S. Logan, Associate of Kirkland & Ellis, Washington, D.C., for their assistance in the preparation of this article.

appear to be fairer: the policy is designed to facilitate the robust debate on the urgent issues that emerge among citizens living in a free society. In practice, however, many commercial broadcasters minimize the airing of ideas or commentaries that would impose Fairness Doctrine obligations upon them, and the FCC has seldom enforced the component of the Fairness Doctrine that requires a broadcaster to initiate coverage of public issues. In contrast, religious broadcasters whose very purpose in broadcasting is to disseminate their views on God and society, seldom shirk from their responsibilities to inform the community of both transitory and eternal concerns, and, thus, they become obligated to broadcast the conflicting opinions of those with views that may be diametrically opposed to their faith. Chief Judge Bazelon, of the United States Court of Appeals for the D.C. Circuit, addressed this very issue in his dissenting opinion in the famous *Brandywine* case,<sup>1</sup> and concluded that "[t]he ratio of 'reply time' required for every issue discussed [would force the religious broadcaster] to censor its views—to decrease the number of issues it discussed, or to decrease the intensity of its presentation."<sup>2</sup> According to Judge Bazelon, "[e]ase of administration is of no weight in this field where precious constitutional freedoms hang in the balance."<sup>3</sup>

Unquestionably, religious broadcasters zealously seek to protect their liberties, and their broadcasts are not lost in the ether to an unlistening populace. By way of example, consider the petition filed by Jeremy D. Lansman and Lorenzo W. Milam, in December 1974, requesting that the FCC "freeze" applications by religious institutions for TV or FM channels reserved for educational stations. This petition, which did not concern religious broadcasters on commercial frequencies where the bulk of religious programming is to be found, was unanimously denied by the Commission on August 1, 1975. During the eighteen months following the Commission's denial of the petition, more than five million letters<sup>4</sup> poured into the Commission, written by Americans who, misunderstanding the petition and the Commission's action, protested what they believed was a plan to ban religious broad-

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1. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973) (affirming the denial of renewal of license to Dr. Carl McIntire).

2. *Id.*, 473 F.2d at 70.

3. *Id.*

4. At last count, over 11 million letters have arrived at the Commission addressed to this issue and they continue to be sent by misinformed citizens who believe the government is considering taking religious broadcast programs off the air in a proceeding they believe was begun by the famous atheist Madelyn Murray O'Hair.

casting. During 1977, the *Washington Post* reported that an average of 8,000 letters per day were arriving at the FCC in opposition to the already denied petition.<sup>5</sup>

Religious broadcasters do not form a monolithic entity. They are as diverse in their opinions and programming as is the American religious community. A listener can, with a sweep of his dial, go from high church to evangelical, from a mass to a revival. The religious institutions operating these stations are not all of one mind or one message. The very diversity of the American religious scene protects the public's interest in the ability to hear alternative viewpoints.

The religious broadcaster faces some unique problems. In some cases, it is difficult for outsiders to agree to classify his institution as "educational" and thus qualified for an educational reserved FM channel. Then there is the question as to what is a religious educational "institution": need it be only a church, or must it have an affiliated educational facility? The unique problem of fund-raising by religious broadcasters and the desire by some churches to employ only individuals adhering to their doctrines have created singular problems at the FCC as well.

As one reads through the Commission decisions, a governmental bias disfavorable to the religious broadcaster will not jump from the opinions. Taken case-by-case, each reported decision may appear reasonable when read with the view that insofar as their broadcast licenses are concerned, religious broadcasters are no different from any other broadcaster. If one should accept this proposition as axiomatic, then the case decisions may appear logical and unflawed. But religious broadcasters are indeed different from secular commercial broadcasters and are properly endowed with religious protections guaranteed by the Constitution, protections no less valid now in our electronic age than they were when the Bill of Rights was adopted in the early days of our republic.

When one abandons a case-by-case review and examines the totality of the record, it becomes apparent that some policies, though on their face equally applicable to secular broadcasters, have a disproportionately harsh impact on religious broadcasters. In addition, apart from published policies, discrimination can take many forms such as the intolerably long wait some religious broadcasters have faced when filing applications with the Commission.

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5. *Washington Post*, February 17, 1977, at A-16.

### I. THE FAIRNESS DOCTRINE AND RELIGIOUS BROADCASTING

The *Red Lion*<sup>6</sup> case has long been recognized as one of the United States Supreme Court's most significant pronouncements in the area of broadcast law. In *Red Lion*, the Court upheld as constitutional Federal Communications Commission regulations relating to the broadcast of "personal attacks" and political editorials which had been adopted by the FCC to implement its Fairness Doctrine. In its decision, the Court concluded that these Fairness Doctrine regulations enhanced rather than infringed upon the freedoms of speech and press protected under the First Amendment and thus the Court applied to broadcasting a theory of First Amendment free speech analysis that has never been applied to the conventional press.

The case arose at Radio Station WGCB, licensed to the Red Lion Broadcasting Company. WGCB, on November 27, 1964, broadcast a 15-minute commentary by the Reverend Billy James Hargis as part of a series entitled "Christian Crusade." Hargis discussed at length a book entitled "Goldwater-Extremist on the Right," by Fred J. Cook. In the broadcast, Hargis said that author Cook had been fired by a newspaper for making false charges against city officials, that he had worked for a communist-affiliated publication, that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency, and that his book had been written to "smear and destroy Barry Goldwater." Cook heard the broadcast and demanded free time pursuant to the Commission's personal attack rule. Station WGCB refused his request.

Following a complaint by Cook, the FCC concluded that the Hargis broadcast did constitute a personal attack on Cook, and that Red Lion had failed to meet its obligations under the Fairness Doctrine. In response to Red Lion's arguments concerning its First Amendment liberties, the Supreme Court held:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.

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6. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.<sup>7</sup>

The *Red Lion* case was born at a religious broadcast station, but, though a landmark holding in media law, it is not of singular interest to religious broadcasters, as it contains no discussion of religious broadcasting as distinguished from secular broadcasting.

For the religious broadcaster, the *Brandywine-Main Line*<sup>8</sup> case, decided by the District of Columbia Circuit Court of Appeals, stands as one of the major cases. This case had its genesis in 1964 when Radio Station WVCH in Chester, Pennsylvania determined to cease broadcasting Dr. Carl McIntire's "Twentieth Century Reformation Hour." In order to provide for a media outlet in the Philadelphia, Pennsylvania area, Dr. McIntire's Faith Theological Seminary negotiated for the purchase of Radio Stations WXUR and WXUR-FM at Media, Pennsylvania. In its application to the Commission, the seminary proposed continuing WXUR and WXUR-FM's general format of broadcasting entertainment, talk shows and short newcasts, and in addition two one-hour religious programs each weekday as well as religious programs until noon on Sunday. The seminary stated in its application that it sought the broadcast license "for the principle purpose of broadcasting the Gospel of our Lord and Saviour Jesus Christ, for the defense of the Gospel, and for the purposes set forth in the Charter of Incorporation."<sup>9</sup> Oppositions to the seminary's application were filed by some fifteen community groups including a number of individuals and churches located within the community. In response to some of these oppositions the seminary stated its intent to "'make time available on an equal and non-discriminatory basis to all religious faiths requesting time for the presentation of religious programs.'"<sup>10</sup>

The Commission granted the seminary's application for transfer of the stations on March 19, 1965, but went to great lengths in its decision to reiterate the seminary's duties and obligations under both the Fairness Doctrine and the Personal Attack Rule. The Commission stated specifically: "In reaching this determination, we have relied upon the specific representations by the transferee indicating

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7. *Id.*, 395 U.S. at 394.

8. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

9. *Id.*, 473 F.2d at 20.

10. *Id.* at 21.

awareness of a licensee's responsibilities. In any event, this grant is subject to the same conditions applicable to all broadcast grants . . . [including, among itemized conditions] . . . that [Brandywine] will abide by the requirements of the Fairness Doctrine."<sup>11</sup> The seminary took over responsibilities as the new licensee and began broadcast operations on April 29, 1965.

The new licensee lost no time in making substantial changes in the station's program format and began broadcasting programs having little relationship to those proposed in the transfer application. In the words of the court: "All of these programs shared one common characteristic: they were devoted almost solely to coverage and discussion of viewpoints on controversial issues of public importance. Personal attacks on the honesty, integrity, and character of both groups and individuals were, unfortunately, not infrequent."<sup>12</sup>

Only seven months after the seminary took over the operation of station WXUR, the Media Borough Council and the Pennsylvania General Assembly's House of Representatives voted a public condemnation of the station. Thereafter WXUR began broadcasting a program called "Interfaith Dialogue," a program which the seminary had promised in its transfer application, but which had been delayed in its initial appearance until after the condemnation.

The Commission's approval of Brandywine's transfer to the seminary provided the new owners with an initial license term running only until August 1, 1966. Thus, within one year and three months after the seminary took over the operation of the stations, the Commission designated the renewal applications for hearing to determine whether the applicant had fully and candidly advised the Commission of its program plans in connection with the transfer application and whether the applicant had complied with the Commission's Fairness Doctrine and the Personal Attack principle. The Commission also designated an issue as to whether the applicant had used the facilities of the station to serve its sectarian and political views and to raise funds for their support rather than to serve the community generally, and whether this constituted a misrepresentation to the Commission in the original transfer application.

Hearings were held in Media, Pennsylvania beginning on October 2, 1967, and the record was not closed until June 26, 1968, after a more than 8,000-page record and several hundred exhibits had been com-

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11. *Id.* at 23.

12. *Id.* at 24 (citation omitted).

piled. The court, in a footnote in its decision, publicly censored Brandywine's counsel, who the court called "injudicious, rude, impudent and directly obstructive to the proceedings before the examiner," and stated that the record before the court was "replete with one instance after another of obstreperous behavior on Mr. Cottone's part."<sup>13</sup>

While the Hearing Examiner's Initial Opinion would have granted the renewal to Brandywine, the Commission refused to adopt his opinion, and concluded, "that Brandywine under its new ownership did not make reasonable efforts to comply with the Fairness Doctrine during the license period."<sup>14</sup> The Commission stated,

We are not concerned with the social, political, or religious philosophy of the licensee or any person using its facilities. Our interest is in the right of the public to a reasonable opportunity to hear contrasting views on controversial issues; whether this right has been accorded by the licensee can be determined only in the context of issues, not by generalized political labels. In the face of particular attention being drawn to the necessity for fairness at the time control of the station was transferred, the record shows no reasonable attempt to meet the station's obligations in this area.<sup>15</sup>

The Commission found that during the seminary's stewardship of WXUR, Brandywine had failed to give required notice to parties attacked, had failed to send required copies of transcripts, tapes or summaries, and, similarly, had failed to offer opportunities to aggrieved parties to reply as required.

The Commission stated that an independent basis for denying the Brandywine renewal application was that the station had failed to live up to its original representations concerning programming. The Commission specifically found that the program "Interfaith Forum," on which the seminary had heavily relied in the transfer application, did not appear until ten days after the Media Borough Council's resolution, and that the show, once begun, was not the interfaith round table discussion that had been promised, but rather an interview show on which students or faculty of the Faith Theological Seminary interviewed fellow seminarians. The Commission also found that in the first nine days after control of Brandywine was transferred to the seminary

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13. *Id.* at 27, n.39.

14. *Id.* at 29.

15. *Id.* at 31.



on April 29, 1965, WXUR had replaced a number of promised entertainment programs with seven new nonentertainment programs, and that "logic dictates . . . that the plans for each of these programs predated the actual transfer."<sup>16</sup>

The D.C. Circuit concluded that the record of Brandywine was "bleak in the area of good faith," and that "at best, Brandywine's record is indicative of a lack of regard for fairness principles; at worst, it shows an utter disdain for Commission rulings and ignores its own responsibilities as a broadcaster and its representations to the Commission."<sup>17</sup> The court determined that "during the entire license period Brandywine willfully chose to disregard Commission mandate," and that "[w]ith more brazen bravado than brains, Brandywine went on an independent frolic broadcasting what it chose, in any terms it chose, abusing those who dared differ with its viewpoints."<sup>18</sup> The court concluded that, "[s]uch maneuvering has proven to be not so wise gamesmanship on the part of a licensee. Brandywine's abuses in this area are so blatant as to be sufficient to shock the conscience of the court."<sup>19</sup>

The Court stated that the "most disturbing"<sup>20</sup> aspect of this case was not the Fairness Doctrine violations, but Brandywine's program misrepresentations. The changes which took place within the very first few days following the WXUR transfer "show a common design on the part of the licensee to engage in deceit and trickery in obtaining a broadcast license."<sup>21</sup> "Brandywine sought through subterfuge to gain its license and then proceed to broadcast the type of material it believed to be most suitable—the type of material that would forward the ends of the fundamentalist movement—in utter disregard for either the public or their earlier representations to the Commission."<sup>22</sup> The court continued:

This is a case in which the blind need for a radio outlet in the Philadelphia market has led men experienced in the broadcast industry to misrepresent the facts and to attempt to deceive a regulatory body all to a single end—propagation on the media of their philosophic dogma. These men may

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16. *Id.* at 34.

17. *Id.* at 46-47.

18. *Id.* at 47.

19. *Id.* at 50.

20. *Id.* at 51.

21. *Id.*

22. *Id.*

have possessed the highest aims for their cause but these aims were blind to the needs of the general public. Misrepresentations conceived to win a soap-box from which to shout one's views are the basest overexaggeration of the liberties guaranteed in the first amendment.<sup>23</sup>

The opinion stressed the corollary rights of the public:

Since the airwaves are a scarce commodity and have been deemed a public trust it is easy for us to see that Dr. McIntire and his followers have every right for their views to be broadcast. Their right to operate a radio station is no different from the rights of any other group in America. Their rights are neither superior nor inferior. In seeking a broadcast station they had to meet the same requirements as anyone else seeking a license. The first of these requirements is candor and honesty in representations to the Commission. Their dismal failure in this regard is evidenced by this 8,000 page record. These men, with their hearts bent toward deliberate and premeditated deception, cannot be said to have dealt fairly with the Commission or the people in the Philadelphia area. Their statements constitute a series of heinous misrepresentations which, even without the other factors in this case, would be ample justification for the Commission to refuse to renew the broadcast license.<sup>24</sup>

Chief Judge Bazelon, who dissented from the Court's opinion in *Brandywine*,<sup>25</sup> stated, "if we are to go after gnats with a sledgehammer like the fairness doctrine, we ought at least to look at what else is smashed beneath our blow."<sup>26</sup> The Chief Judge's separate opinion found that the determination not to renew the WXUR license had "dealt a death blow to the licensee's freedoms of speech and press."<sup>27</sup> Furthermore, he continued, "silencing WXUR . . . has denied the listening public access to the expression of many controversial views. Yet, the Commission," he wrote, "would have us approve this action in the name of the fairness doctrine, the constitutional validity of which is premised on the argument that its enforcement will *enhance* public

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23. *Id.* at 51-52.

24. *Id.* at 52.

25. *Id.* at 63.

26. *Id.* at 64.

27. *Id.*

access to a marketplace of ideas without serious infringement of the First Amendment rights of individual broadcasters."<sup>28</sup>

While WXUR was undoubtedly devoted to a particular religious and political philosophy, Judge Bazelon concluded, "[I]t was also a radio station devoted to speaking out and stirring debate on controversial issues. The station," he continued, "was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area."<sup>29</sup> Removing WXUR from the air, the dissenting opinion stated, "has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be."<sup>30</sup>

Taking serious issue with the constitutionality of the Fairness Doctrine, the Chief Judge wrote that, "even if WXUR had not been removed from the air but simply ordered to comply with the FCC's ruling, the effect would have been strangulation."<sup>31</sup> The application of the Fairness Doctrine to WXUR, the Chief Judge opined, "would have forced WXUR to censor its views," because of the ratio of reply time required for every issue discussed on the station.<sup>32</sup> Chief Judge Bazelon concluded, "The ramifications of this chilling effect will be felt by every broadcaster who simply has a lot to say."<sup>33</sup>

Both the *Red Lion* and *Brandywine* cases are of significance to religious broadcasters because the Fairness Doctrine and Personal Attack rules, while fully applicable to all broadcasters, have a special impact on the religious broadcaster. Secular broadcasters may avoid Fairness Doctrine complications by eliminating any controversial programming, or by reducing discussions of issues to a milquetoast review. The religious broadcaster, however, has as his *raison d'etre*, the obligation to speak out on contemporary moral issues and the constant truths as seen through his faith. Thus it is on the shoulders of the religious broadcaster that the full weight of the Fairness Doctrine falls. The Fairness Doctrine, which applies *prima facie* to all broadcasters, has its greatest effect on religious broadcasters.

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28. *Id.* at 63-64 (emphasis in original).

29. *Id.* at 69 (citations omitted).

30. *Id.* at 70 (emphasis in original).

31. *Id.*

32. *Id.*

33. *Id.*

Lest this discussion be misunderstood, it is clear that there are many instances of Fairness Doctrine violations by secular broadcasters and the networks. No broadcaster is exempt from the Fairness Doctrine, and all must be constantly and keenly aware of its impact and requirements. But being aware of its Fairness obligations, the typical commercial broadcaster can avoid potential problems by limiting to a bare minimum his controversial issues; most religious broadcasters cannot and will not be muzzled in their exercise of their religious freedom to discuss issues and the answers found in their faiths.<sup>34</sup>

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34. The Fairness Doctrine merely codified existing and longstanding fairness obligations. One of the early cases on point is *Trinity Methodist Church, S. v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir., 1932), *cert. denied*, 288 U.S. 599 (1933). The Radio Commission, a forerunner to the present FCC, had designated Trinity Methodist's renewal application for hearing, based on a pattern of broadcast attacks by the church's minister, the Reverend Doctor Shuler. Dr. Shuler had charged particular California judges with "sundry immoral acts;" he had made "defamatory statements against the board of health;" he had charged that one labor temple in Los Angeles was "a bootlegging and gambling joint;" he alluded "slightingly" to Jews and "made frequent and bitter attacks on the Roman Catholic religion." He once broadcast that he had "certain damaging information against a prominent unnamed man, which, unless a contribution (presumably to the church) of a hundred dollars was forthcoming, he would disclose. As a result, he received contributions from several persons." *Id.* at 852. Dr. Shuler had twice "been convicted of attempting in his radio talks to obstruct the orderly administration of public justice." *Id.* at 851. The Court affirmed the Commission's decision not to renew the station's license. The court stated:

If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice of personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

*Id.* at 852-53.

## II. CIVIL RIGHTS AND EQUAL EMPLOYMENT OPPORTUNITY: THE IMPACT ON RELIGIOUS BROADCASTERS

Another area of great concern to religious broadcasters relates to their hiring practices, a matter that was examined by the D.C. Circuit in a case known as *The King's Garden, Inc.*<sup>35</sup> The FCC had found that King's Garden, licensee of radio station KBIQ-FM and KGDN in Edmonds, Washington had discriminated on religious grounds in its employment practices. King's Garden, relying upon a 1972 Amendment to a 1964 Civil Rights Act, claimed exemption as a religious entity from the Act's ban on religious discrimination in employment. While FCC regulations exempted employment "connected with the espousal of the licensee's religious views,"<sup>36</sup> King's Garden believed the 1972 Amendment allowed it to discriminate on religious grounds in all of its employment practices. The Court, stating that the 1972 exemption was of "very doubtful constitutionality,"<sup>37</sup> found that the exemption "invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion."<sup>38</sup>

Judge J. Skelly Wright, writing for the court, noted that King's Garden readily conceded that it was obligated to adhere to the Fairness and Personal Attack rules of the Commission, and said that:

King's Garden wishes us to assume that Congress now regards sectarian broadcasters as regulable "public trustees" so far as programming is concerned but as "institutions of God" untouchable by "the hands of Caesar" so far as employment practices are concerned. We would require a sentence or two of pertinent legislative history before crediting Congress with so bizarre a notion.<sup>39</sup>

The court found this argument "defective," reasoning that, "[a] religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'"<sup>40</sup> According to the court, the Commis-

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35. *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974).

36. *Id.* at 53.

37. *Id.*

38. *Id.* at 55.

39. *Id.* at 59.

40. *Id.* at 60 (citations omitted).

sion's role in drawing lines between the secular and religious aspects of broadcast operations was a difficult and delicate task, but "one which the First Amendment thrusts upon every public body which has dealings with religious organizations."<sup>41</sup>

Chief Judge Bazelon wrote a separate short decision concurring with the court,<sup>42</sup> and stated that the 1972 amendments to the Civil Rights Act would normally be superior to the Commission's Equal Employment Opportunity rules, and would thus completely exempt religious organizations from the Civil Rights Acts' ban on religious discrimination. However, Chief Judge Bazelon viewed the amendment as a violation of the establishment clause of the First Amendment, and stated his belief that the exemption was therefore unconstitutional and not binding on the FCC.

The Commission elaborated on its *King's Garden* views in a declaratory ruling for the National Religious Broadcasters, Inc.<sup>43</sup> The Commission held that writers and research assistants hired for the preparation of programs discussing a licensee's religious news and persons hired to answer religious questions on call-in programs were exempt from the non-discrimination rules. On the other hand, the Commission said there was no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program. In a footnote to the ruling the Commission stated that it was not dealing with a particular person's title but with his function. Thus, the Commission said a secretary does not become exempt from the non-discrimination rules by changing his or her title to writer or research assistant.

Another case involving a religious licensee's employment and programming practices arose in connection with the purchase of station KRON-FM in San Francisco by the Mormon Church.<sup>44</sup> In this instance the assignee, Bay Area Broadcasting Company, was totally owned by Bonneville International Corporation, which in turn was totally owned by Deseret Management Corporation which in turn was totally owned by the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, the Mormon Church. The Commu-

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41. *Id.* at 61.

42. *Id.*

43. In Re Request of Nat'l Religious Broadcasters, Inc. for a Declaratory Ruling, 43 F.C.C.2d 451 (1973).

44. In Re Chronicle Broadcasting Co. and Bay Area Broadcasting Co., 59 F.C.C.2d 335 (1976).

ity Coalition for Media Change filed a petition seeking to block the assignment of KRON-FM to the Mormons on the ground that the doctrines of the Mormon Church professed that Blacks and women were inferior and that these doctrines had prevented the church from providing Blacks and women with the same treatment in employment practices that it provided to white males. The Community Coalition contended that both the businesses and social practices of the Mormon Church and its subsidiaries had demonstrated that these doctrines of inferiority were followed by corporations owned and controlled by the Mormon Church. The petitioner further claimed that while the Mormon Church had changed from its former position to accept Blacks as members of the church, it still prevented Blacks or women from entering the two priesthoods from which the elders who control the church were chosen. The petitioner further contended that since twelve white males in effect controlled all the corporations and businesses of the Mormon Church, it was not possible for the church to comply with the Commission's Equal Employment Opportunity requirements.

The assignee, Bay Area Broadcasting Company, stated that, contrary to the petitioner's contentions, it was the policy of the Mormon Church "that it is morally evil to deny anyone the right to employment, full educational opportunity, or any privilege of citizenship."<sup>45</sup> Further, it stated that it and its parent corporation, Bonneville International Corporation, were "'committed to meeting not only the regulations of the FCC relating to equal employment but to all applicable equal employment policy requirements promulgated by the United States Government.'"<sup>46</sup>

In its memorandum and opinion in order, the Commission stated that:

[a]s concerns assignee, the Mormon Church, and its other subsidiary corporations, we emphasize that the Commission's regulatory authority does not extend to an examination of their religious beliefs. In other words, we do not consider as relevant to our determination the religious beliefs of any faith. We do consider as relevant those allegations relating to the non-religious practices of the Church and its subsidiaries and whether any of these entities can comply with Commission Rules and policies pertaining to broadcast licensees.<sup>47</sup>

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45. *Id.* at 337.

46. *Id.*

47. *Id.* at 339 (citations omitted).

The Commission, without further elaboration, found that the petitioner had failed to support its contentions that the church followed a doctrine of Black and female inferiority in its business and social practices, and denied the petition and concurrently granted the application.

Do religious broadcasters have an absolute need to have employees who have accepted the faith and who can act as proper spokespersons? The Commission says certain employees are exempt and others are not. We are given examples: a writer is exempt, a secretary is not. Yet, often such neat categorization of job duties may not be possible in the typical religious broadcast station, which is usually a small operation with limited employees doing whatever tasks are necessary. Can a secretary, of a different faith, hired in compliance with the rules, be expected to perform fully and to stay at the job with the knowledge that she cannot be promoted to be a researcher or writer because of theological differences? Discrimination is not only against the law, it is against the best interests of society. But we do allow for exemptions. Chinese restaurants can, upon application (virtually always granted) to the Department of Labor, be allowed to hire only Chinese help. It is presumed necessary that all the waiters be able to speak to the chef. Religious broadcasters are much in the same position. In dishing up an assortment of music and talk, the recipe must truly be reflective of the views and values of the particular faith. A salesman, for instance, might sell beer advertising before he learns that his employer frowns on alcohol.

In this regard, it is perhaps useful to distinguish between broadcasters who happen to have chosen a religious format in a commercial decision, and those who program according to the tenets of their faith. In this latter case, which is the usual situation, an established church group forms or purchases a radio station with the purpose of disseminating its views as seen through its faith. Is it not unrealistic and unworkable to require the church to hire members of other faiths, unbelievers, disbelievers, agnostics, and atheists, to aid in this mission?

Another matter involving the Mormon Church concerned the renewal of the license of station KIRO-TV in Seattle, Washington.<sup>48</sup> A petition to deny the renewal application, treated as an informal objection because of procedural irregularities in the petition, had been filed by the Citizens Institute, a community group in the Puget Sound Basin

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48. In Re KIRO, Inc., 58 F.C.C.2d 86 (1976).



area. In its petition, Citizens Institute alleged that KIRO-TV had abused its facilities by "purveying favorable propaganda about, and/or proselytizing for, the Mormon Church, KIRO-TV's ultimate corporate owner, in direct violation of both the Establishment and Free Exercise clauses of the First Amendment to the Constitution of the United States." The petitioner further alleged that KIRO-TV had biased its news programming in favor of the religious and social views of the Mormon Church for local standards of taste and appropriateness.

Again, the Commission dismissed the petitioner's allegations finding that Citizens Institute had failed to present any substantial evidence that the Mormon programs were not in the public interest, and rejected the petitioner's contentions that because Mormons were a minority in the Seattle, Washington area, the station's programs could not be in the public interest. The Commission specifically accepted that KIRO-TV had broadcast numerous programs by various denominations on both a paid and non-paid basis and in a nondiscriminatory fashion, and found this evidence to refute the petitioner's allegations.

These two Mormon church cases point up, most clearly, the difficulties faced not only by religious broadcasters whose doctrines conflict with licensee responsibilities, but by the Commission in its attempt to tread lightly on the dividing line between religious freedom and governmental regulation. In this last case, the Commission accomplished this goal by avoiding any finding concerning whether the Mormons had used the station for "purveying favorable propaganda about, and/or proselytizing for, the Mormon Church . . ." <sup>49</sup> Instead, the Commission sought not to reach this very difficult constitutional issue by finding merely that the petitioner had failed to make its case. The Commission essentially disposed of the earlier Mormon Church case on similar grounds, gingerly side-stepping the question whether the racial and gender discrimination necessary for elevation to the church's leadership impacted on its licensee responsibilities, and found, instead, that the petitioner had failed to support its contentions. But while the Commission will avoid any head-on collision with a major, established church, this immunity does not appear to follow in its dealings with smaller church groups. The question is raised whether a totally different disposition would have resulted in *Red Lion* and *Brandywine* had major churches been involved. If this is so, then it is not the First Amendment that protects religious broadcasters, but political considerations.

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49. *Id.* at 86-87.

In 1976, the Commission granted an application assigning the license for station KVDO-TV in Salem, Oregon to the Oregon State Board of Higher Education.<sup>50</sup> A petition for reconsideration was filed by Intercontinental Ministries, Inc., an organization that stated that it was devoted primarily to religious work and goals, was interdenominational in scope and interest, and represented the Christian community in the Salem, Oregon area. Among the petitioner's contentions was that the State of Oregon, consistent with the First Amendment to the Constitution of the United States, was prohibited from broadcasting religious programs as had been proposed in the application for assignment of license. The petitioner claimed that the Commission had erred in stating that " 'the State of Oregon . . . like any other applicant is subject to no constitutional objections which would constitute a bar to a grant of its application.' "<sup>51</sup>

Upon reconsideration the Commission stated,

[w]e believe it is clear that if the State of Oregon were to propose programming for the advancement or inhibition of religion, then such could be circumscribed by the Constitution. (Citation omitted.) However, we are of the view that the guidelines set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 Sup. Ct. 2105 (1971), (*i.e.*, whether the State activity has a secular purpose, whether its primary effect will not advance or inhibit religion, and whether it will not foster excessive government entanglement with religion) will be satisfied, and that no constitutional bar exists which would prevent the State of Oregon from broadcasting its proposed programs."<sup>52</sup>

The Commission dismissed the petition for reconsideration and affirmed its grant of the KVDO-TV license to the Oregon State Board of Higher Education.

### III. RELIGIOUS BROADCASTING ON EDUCATIONAL RESERVED CHANNELS

Probably no aspect of the Commission's policy toward religious broadcasting has received the outpouring of public comment that has been accorded the Commission's efforts to deal with religious broadcasting on the educational reserve channels. For many years, Commission policy in this field was marked by the issuance of decisions on an

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50. In Re Corvallis TV Cable Co. and State of Or., 59 F.C.C.2d 1282 (1976).

51. *Id.* at 1284 (citation omitted).

52. *Id.* at 1284-85.

*ad hoc* basis with no accompanying rationale to support the agency's action. This absence of agency discussion served to mask a policy which, in fact, discriminated against religious applicants. In the 1970's an overt effort was made to disqualify religious broadcasters from the educational reserved band. While this effort was turned back, proposals now pending before the agency could have the effect of making many religious applicants ineligible in this band.

#### A. *Eligibility Under FCC Regulations*

The educational reserved channels consist of those FM radio and UHF television channels which have been set aside by the Commission for purposes of fostering nonprofit, noncommercial educational broadcasting.<sup>53</sup> The Commission's rules define only in general terms those persons and groups who are qualified to be educational licensees. As a result, the Commission's policy toward granting applications for these channels has been developed primarily on an *ad hoc* basis and, as the Commission itself has recognized, often has lacked consistency. As we shall demonstrate, the *ad hoc* policy often creates barriers to religious applications that are not faced by secular organizations.

Section 73.621 of the Commission's rules defines the persons eligible to apply for non-commercial educational UHF television broadcast stations. A similar provision governs applications for educational FM radio stations. The Commission's rules provide that:

[n]oncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.<sup>54</sup>

The rules do not set forth the specific standard for determining eligibility, but only indicate the factors that should be considered. For example, "[i]n determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education shall be taken into consideration."<sup>55</sup> Similarly, "[i]n determining the eligibility of privately controlled educational

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53. The UHF stations reserved for educational broadcasting are specified in 47 C.F.R. § 73.606(a) (1980); the channels available for assignment for educational FM broadcasting are set forth in 47 C.F.R. § 73.501(a) (1980).

54. 47 C.F.R. § 73.621(a) (1980).

55. *Id.* at § 73.621(a)(1).

organizations, the accreditation of state departments of education or recognized regional and national educational accrediting organizations shall be taken into consideration.”<sup>56</sup> As discussed below, the FCC has distinguished in practice between “educational organizations” and “educational institutions.” In general, the Commission has permitted educational institutions to become licensees on the educational reserved band only in cities where they operate a school.

Under the Commission’s rules, noncommercial educational television broadcast stations are permitted to transmit educational, cultural and entertainment programs, as well as programs designed for use by schools and school systems in connection with regular school courses, including routine and administrative material.<sup>57</sup> Educational stations may also broadcast programs produced by or furnished by persons other than the licensee, provided that no consideration except the program and the cost incidental to its production and broadcast are received by the licensee. In other words, the licensee may not air programming for profit as if he were a commercial broadcaster.

#### B. *Early Development of FCC Policy on Eligibility*

The Commission has had a great deal of difficulty defining exactly what “educational” means in the context of eligibility for licenses on the educational reserved channels. With respect to religious broadcasters, the Commission’s initial development of policy came in a series of actions without opinion.<sup>58</sup> An early statement of the Commission’s policy on educational allocations came in *S. Nisenbaum*,<sup>59</sup> a decision on a petition for rulemaking to limit eligibility to educational institutions or affiliated bodies that were accredited by state departments of education or recognized regional and national educational accrediting organizations. The petitioner sought the proposed rule change because of a fear that individuals and groups unable or unqualified to acquire commercial FM broadcast facilities would apply for non-commercial educational FM broadcast frequencies merely by organiz-

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56. *Id.* at § 73.621(a)(2). If a municipality or other political subdivision has no independently constituted educational organization such as a board of education, the municipality itself may be eligible for a noncommercial educational television broadcast station. However, in such circumstances, the Commission requires “a full and detailed showing” indicating “that a grant of the application will be consistent with the intent and purpose of the Commission’s rules and regulations relating to such stations.” *Id.* at § 73.621(b).

57. *Id.* at § 73.621(c).

58. The rationale of these actions eventually was set forth in a series of published opinions, discussed in text accompanying notes 60-67 *infra*.

59. 19 P&F Rad. Reg. 1175 (1960).

ing nonprofit corporations and stating that their objectives were educational. The purpose of the petition was to ensure that educational FM stations would be under the control and direction of educators who supposedly would develop genuinely educational programs.

The Commission determined that the restrictive proposal examined in *S. Nisenbaum* was not in the public interest. According to the Commission, "[i]t cannot be assumed that an educational organization under private control is not a *bona fide* educational organization with responsible management and without worthy educational objectives simply because it lacks accreditation by a recognized accrediting organization because of ineligibility for accreditation or some other reason."<sup>60</sup> The Commission found that such a limitation would not be conducive to the most fruitful development of the FM noncommercial educational broadcast service. The few licenses held by privately controlled educational organizations had been granted, according to the Commission, "only after thorough consideration of their qualifications as nonprofit educational organizations and their showings that they would provide a nonprofit and noncommercial broadcast service for the advancement of an educational program."<sup>61</sup>

With this background, the Commission subsequently returned, without opinion, several applications for noncommercial educational channels filed by religious groups, thus—in effect—finding that these groups did not meet the qualifications for licensees on the educational reserve band.<sup>62</sup>

The rationale of the Commission's decisions with respect to religious organizations applying for educational channels was first set forth in an opinion in the case of *Bible Moravian Church, Inc.*<sup>63</sup> The application of the Bible Moravian Church was returned by the Broadcast Bureau as unacceptable for filing because the applicant was not considered to be an educational organization within the meaning of the Commission's Rules, but rather, a religious organization and, as such, ineligible to hold the requested authorization. The Bible Moravian Church petitioned for reconsideration on the grounds that it was in

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60. *Id.* at 1176.

61. *Id.* at 1177.

62. *See, e.g.,* Keswick Foundation, Inc., 26 F.C.C.2d 1025 (1970); Christ Church Foundation, Inc., 13 F.C.C.2d 987 (1968). Christ Church Foundation subsequently organized the National Educational Foundation and resubmitted the application. The application was again rejected. After further organizational changes to establish the separation of the National Educational Foundation from Christ Church Foundation, the application was accepted for filing. *See* Bible Moravian Church, 28 F.C.C.2d 1, 2 (1971).

63. 28 F.C.C.2d 1 (1971).

fact an eligible educational organization. The Church argued that education is the “quintessence” of religion and a principal purpose of the Church.<sup>64</sup> The Church also stated that, since accreditation of applicants is not mandatory, its application was not patently defective and could not be returned without consideration.

The Commission denied the suggestion in the Church’s petition that the Commission had taken the position that there was no overlap between organizations having educational as distinguished from religious purposes. According to the opinion, organizations with religious purposes could be qualified where “the primary thrust is educational, albeit with a religious aspect to the educational activity.”<sup>65</sup> The Commission stated, “we look to the application as a whole to determine which is the essential purpose and which is incidental.”<sup>66</sup> Despite the authority in the Church’s Articles to engage in educational activity, the Commission noted that it could find no real evidence that this purpose had been significantly implemented. Rather, the Commission believed, based on the Church’s statement of programming policies and objectives submitted with its application, that its purpose was its function as a place of public worship. While recognizing that the Church was a “nonprofit organization with meritorious purposes,”<sup>67</sup> the Commission found that the purpose of the proposed station was primarily worship, not education.

### C. *The Lansman and Milam Petition*

In 1974, religious broadcasting and the educational band came into the spotlight. In December 1974, Jeremy D. Lansman and Lorenzo W. Milam filed a petition with the Commission requesting, among other things, a freeze on all applications by religious “Bible,” Christian, and other sectarian schools, colleges and institutes for licenses on reserved educational FM and TV channels.<sup>68</sup>

The Lansman and Milam Petition—popularly dubbed the “Petition Against God”—gained instant notoriety because it included a vituperative attack on religious broadcasting and religious programming. In substance, the petition challenged the Commission’s licensing of religious organizations and institutions in the educational reserved band as a policy contrary to the public interest and as in violation of

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64. *Id.* at 1.

65. *Id.* at 2.

66. *Id.*

67. *Id.*

68. Petition for Rulemaking, No. RM-2493 (filed December 1974).

the First Amendment. Even though the Commission rejected the Lansman and Milam Petition in August 1975, comments and responses to the petition have continued to pour in and now number in the millions. Public response to the petition has generated so much mail as to cause serious administrative difficulties within the Commission itself. Even after the rejection, many persons unaware of the Commission's action have continued to send mail, to such extent that in January 1981, FCC Chairman Charles Ferris, in remarks before the annual convention of the National Religious Broadcasters, again clarified that the petition has been dismissed.

In rejecting the Lansman and Milam Petition, the Commission stated that it maintained a position of neutrality toward religious applicants for allocations on the educational reserved channels.<sup>69</sup> The Commission criticized the petitioners' proposal to disqualify all religiously affiliated organizations and institutions from eligibility to operate on educational reserved channels. According to the Commission, this would result in "discrimination against a school or university simply by virtue of the fact that it is owned and operated by a sectarian organization."<sup>70</sup> The Commission stated that the First Amendment requires governmental agencies "to observe a stance of neutrality toward religion, acting neither to promote nor inhibit religion."<sup>71</sup> Under this principle of neutrality, the agency stated that religious groups, like other groups, may become broadcast licensees and that, like other licensees, religious groups will be subject to enforceable public obligations.<sup>72</sup>

The Commission reiterated its policy that "a religious organization that qualifies as educational because it operates a school or university is eligible to operate a broadcast station on a channel reserved for noncommercial educational use in the community where it operates the school."<sup>73</sup> However, where an organization's central or primary purpose is religious, the Commission stated that it would be ineligible for an educational channel absent an affiliation with an educational *institution* in the community of license. The Commission criticized the Lansman and Milam Petition as expressing "personal" views on religious programming and for submitting unproven assumptions that

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69. See *In Re Revision of Rules Permitting Multiple Ownership of Non-Commercial Educ. Radio and Tele. Stations in Single Mkts*, 54 F.C.C.2d 941 (1975).

70. *Id.* at 949.

71. *Id.* (citing *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974)).

72. *Id.* at 949.

73. *Id.* at 949-50 (citations omitted).

programming on religiously affiliated stations "is stultifying and/or timid."<sup>74</sup>

#### D. *The Moody Bible Case*

Following the rejection of the Lansman and Milam Petition, the Commission continued its *ad hoc* approach toward determining the eligibility of religious organizations for channels in the educational reserve band. However, the decision in *The Moody Bible Institute*<sup>75</sup> indicated that the Commission was not entirely comfortable with its case-by-case approach to determining the educational status of religious institutional applicants.

The Moody Bible Institute had applied for FM station licenses on the educational reserve band in East Moline, Illinois, and Boynton Beach, Florida. The Commission's Broadcast Bureau initially opposed the Moody application on the ground that the proposed operations would be religious rather than educational in nature. However, in a brief two sentence order, the Commission held that the Moody Bible Institute was qualified to operate noncommercial educational FM broadcast stations in the cities for which it had applied and ordered that the applications be granted. The two concurring statements, one by Chairman Wiley, in which Commissioner Hooks joined, and a second by Commissioner White, questioned the policy of issuing orders without an accompanying opinion which would set forth a coherent explanation of agency policy. Chairman Wiley's statement expressed particular concern "that our present standard is unclear with respect to the eligibility of religious vis-a-vis nonreligious organizations."<sup>76</sup> While recognizing that religious organizations must have their applications judged on the same basis as nonreligious organizations, Chairman Wiley stated that "[u]nfortunately, based on past cases, it is not readily apparent that *all* organizations applying for Section 73.503 grants have been so judged."<sup>77</sup>

Commissioner White's concurring statement likewise questioned the standards that the Commission had applied to religious educational organizations. Commissioner White stated that "religion and education have been intertwined throughout history," and that "it is not the province of government to say that religion, or theology, is unacceptable as a subject of education and instruction." Her concur-

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74. *Id.* at 950.

75. 66 F.C.C.2d 162 (1977).

76. *Id.* at 163.

77. *Id.* at 164.



rence focused upon the Commission's responsibility to avoid infringement of the free exercise of religion or speech. According to Commissioner White, the agency's efforts to determine the religious nature of the institution applying for the station intruded impermissibly upon the freedom of expression. Commissioner White also questioned the effect of the policy in placing on "primarily religious" applicants the additional burden of showing that the operation of a school in the community to which the station is to be licensed. In reviewing the *ad hoc* policy, Commissioner White concluded that the requirement that a school be operated in the city of license had been applied only to religious organizations,<sup>78</sup> and that the requirement was clearly discriminatory.<sup>79</sup>

#### E. *Proposals for New Standards of Eligibility*

Following the decision in *Moody Bible*, which gave somewhat equivocal endorsement to the continuation of the *ad hoc* policy on eligibility for license in the educational reserve band, the Commission issued a set of "processing guidelines" which purported to establish a nondiscriminatory policy for handling religious applicants. In addition, the Commission issued a *Notice of Inquiry* in an effort to bring some consistent standards to its determination.<sup>80</sup> The *Notice of Inquiry* did not deal specifically with religious broadcasting, though the standards of eligibility proposed in the *Notice* likely would have an impact upon many religious applicants for licenses on the educational reserved channels. According to the Commission, the impetus for the *Notice* was that following the development of its *ad hoc* policy, "cases arose in which the educational nature of an applicant or its purposes might not be entirely clear."<sup>81</sup> The Commission's concern was, "to insure that an applicant's proposal is designed to serve educational purposes. In so doing, the Commission had examined the totality of the application to determine the applicant's primary purposes and to insure that they were educational."<sup>82</sup> The Commission requested comments on five alternative standards for determining eligibility.

78. *Id.* at 167.

79. As Commissioner White noted, the Commission had granted several licenses to educational foundations which were *not* religiously affiliated even where the educational organization did not maintain a school at all, much less a school in each community of license. *Id.* (concurring statement).

80. FCC Eligibility for Non-Commercial Educational FM and TV Broadcast Station Licenses, 43 Fed. Reg. 30,842 (1978).

81. *Id.* at 30,842 (¶ 3).

82. *Id.*

Under the first alternative, the Commission would delete the restriction of the reserve channels for noncommercial educational purposes. Instead, it would permit the channels to be used by any non-profit organization recognized by the Internal Revenue Service. Thus, the allocations could be used for noncommercial purposes not previously permitted by the Commission. The Commission expressed some concern that this approach might be contrary to congressional intent, as expressed in recognizing a particular category of "educational" non-commercial radio and television stations through the Public Broadcasting Act of 1967.<sup>83</sup> The Commission viewed this approach as "the most profound departure from past practices."<sup>84</sup>

Under the second alternative, the Commission would adopt the standards provided by the former Department of Health, Education and Welfare<sup>85</sup> for purposes of administering grants for construction of educational broadcast facilities pursuant to the Educational Broadcast Facilities Act of 1962.<sup>86</sup> This approach would shift the onus to another government agency to resolve the issue of eligibility for educational stations. Although the Commission did not raise the issue, it would appear that adoption of grant standards of another governmental agency for purposes of determining eligibility for licenses on the educational reserve band would have a definite impact upon most religious applicants. Certainly, questions of violation of the establishment clause of the First Amendment would be raised more sharply, since eligibility for license would depend upon eligibility for federal funds that could not be used to "advance religion."

Under the third alternative, the Commission would redefine the eligibility standards to encompass only full-time, general curriculum schools or institutions which are qualified to award degrees or issue diplomas. Under this standard, the Commission could avoid deep inquiries into the educational purposes of the applicant, since all applicants would be expected to operate the station in conjunction with an educational institution. This proposal would also affect a number of unaffiliated educational foundations, such as the Pacifica Foundation, and a number of other foundations set up and established specifically for the purpose of operating public television or radio stations in some communities. The Commission suggested the possibility of grandfathering existing licenses.

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83. Codified at 47 U.S.C. § 396 (1976 & Supp. 1979).

84. 43 Fed. Reg. 30,843 (¶ 6).

85. These functions have since been transferred.

86. 47 U.S.C. § 390 *et seq.* (1976 & Supp. 1979).

Under the fourth alternative, the Commission would focus on the nature of the educational program to be furthered. This proposal would shift the focus from the purposes of the organizational applicant itself and focus instead on the proposals for operation of the station. A drawback to this approach would be the need for the Commission to inquire into what programming would be offered, and thus risk some danger of running afoul of First Amendment concerns through intrusion into speech.

The fifth and final alternative would impose stricter ascertainment requirements on public broadcasters, much like those imposed upon commercial broadcasters. Thus, educational broadcasters would be required to assess the community needs and then offer programming designed to meet those needs. The same approach has long been used in commercial broadcasting as a means to insure broadcasting in the public interest, while avoiding detailed inquiries into the nature of the programming itself. Of course, since the Commission issued its *Notice of Inquiry*, it has decided to repeal ascertainment requirements for commercial radio broadcasters. Thus, while a rationale could be formulated for applying ascertainment to educational broadcasters, the fact that the Commission has rejected this approach as unnecessary and wasteful for commercial broadcasters may militate against the adoption of a similar rule for noncommercial broadcasters in general. The Commission also invited comments on other standards which could be adopted.

The Commission has never acted upon its 1978 *Notice of Inquiry*, and it appears likely at this stage that any further action on it will be in the hands of the new FCC Chairman and the new Commissioners appointed by President Reagan. The proceeding at this time is not active.

In summary, the Commission's policies regarding broadcasting on the educational reserve band have proceeded thus far in an *ad hoc* fashion and little explanation has been given about the factors which govern licensing decisions. While the Commission has frequently stated its objective of remaining neutral toward the religious nature of applicants and of treating secular and religious applicants alike, its position that religious broadcasting is not necessarily educational has, at times, caused sharp differences in the treatment of religious and secular applicants. Religious organizations applying for educational reserved channels have often been subject to an additional requirement of demonstrating that they operate or are affiliated with a school or other educational institution in the community which they propose to serve. The application of this "school in the city" standard appears

to be much less strict where nonreligious applicants are involved. Finally, in view of the agency's pending rulemaking on licensing standards, future policy for the educational reserve band remains very much in doubt.

#### IV. IMPACT OF FCC RULES ON FUNDRAISING BY RELIGIOUS BROADCASTERS

FCC policies affecting fundraising activities have particular relevance to religious broadcasting because many religious broadcasters rely upon voluntary contributions to meet their program expenses. While the FCC has never promulgated specific rules concerning fundraising by religious broadcasters, it does police fundraising practices indirectly through its triennial license renewal. Limitations on the fundraising practices of broadcasters are, of course, much stricter for noncommercial educational stations, since the Commission has a substantial concern that some fundraising practices closely approach commercial broadcasting, and thus are improper for stations operating on the educational reserved band. Since secular educational stations also engage in fundraising over-the-air, the FCC's policies on fundraising over educational stations are—as one might expect—much more settled.

##### A. *The Faith Center Case*

In recent years the FCC has shown an increased willingness to scrutinize the fundraising practices of religious broadcasters, even with respect to programming on commercial stations. The Commission has stated that fundraising practices may be relevant in determining whether a broadcaster has the requisite character qualifications to remain a licensee of the Commission. While the decisions have not laid down express formulations of the restrictions on a religious broadcaster's fundraising practices, the boundaries of the Commission's concern can be discerned from decisions involving FCC investigations, particularly the celebrated *Faith Center* renewal case.

Some religious broadcasters have questioned whether the "free exercise" clause in the First Amendment of the Constitution bars inquiry into the fundraising practices of religious broadcasters.<sup>87</sup> The Commission has taken the position that a broadcast license is a public trust which carries with it enforceable public interest obligations,

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87. See, e.g., *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980); *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, 71 F.C.C.2d 324, (1979).

regardless of the religious status of the licensee.<sup>88</sup> Thus, the Commission's stated policy is to enforce all its rules equally with regard to all broadcasters, whether religious or not. In its *Faith Center* decision, the Commission expressed its belief that this policy avoids issues of favoring or disfavoring religion, or of government entanglement in religious affairs, which might arise if the Commission gave preferred status or special privileges to either group. Thus, the Commission has construed the First Amendment guarantees of religious freedom as permitting incidental restriction of religious-oriented affairs, so long as an important governmental purpose is involved and the purpose of the regulation is not to favor or harm religion.

### 1. Background

In the *Faith Center* decision, the Commission affirmed the dismissal with prejudice of the renewal application of Faith Center, Inc., for television station KHOF-TV in San Bernardino, California. The decision was based on a finding that Faith Center had failed to prosecute its application for renewal by refusing in bad faith to reply to a request for discovery of evidence filed by the Broadcast Bureau during the proceeding. The majority of the discovery request related to Faith Center's fundraising practices. Thus, the Commission never reached the legal or factual issues of whether the fundraising practices of Faith Center were contrary to Commission rules and policies.

Faith Center's KHOF-TV renewal application was originally designated for hearing in October 1978 on issues concerning alleged fraud by broadcast and failure to provide information to the FCC. The Broadcast Bureau alleged that the licensee had refused to permit inspection of records of fund solicitations. The FCC had also sought to obtain videotapes of programs on which fundraising appeals allegedly had been made. According to the Commission's opinion, the FCC had sought this information because of allegations of misconduct in connection with Faith Center's fundraising practices; namely, that Faith Center had raised money for specific projects that were never carried out, that some funds obtained from over-the-air solicitations were used for other organizations in which the president of Faith Center had an interest, and that fundraising appeals had been accompanied by false statements that Faith Center's president contributed his own funds to the church and received only one dollar per year.

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88. With respect to the Commission's equal employment opportunities laws, this interpretation of the constitutional restrictions of the First Amendment was upheld by the D.C. Circuit Court of Appeals in *King's Garden*, 498 F.2d 51 (D.C. Cir. 1974).

The Commission's opinion focused on Faith Center's alleged refusal to answer discovery requests by the Broadcast Bureau during the course of the renewal proceedings. The Broadcast Bureau originally requested discovery on December 8, 1978. After a number of procedural delays, Faith Center submitted a response on February 1, 1979. The Broadcast Bureau, believing the response inadequate, moved for the presiding Administrative Law Judge (ALJ) to compel discovery. The ALJ substantially granted the Bureau's request and held that the constitutional grounds which Faith Center asserted for its refusal already had been rejected at the prehearing conference. Upon the ALJ's refusal to permit direct appeal to the Commission, Faith Center appealed to the Court of Appeals for the D.C. Circuit and sought a stay of the FCC's action based on its constitutional arguments. The court dismissed the appeal on July 13, 1979.

Asserting that Faith Center had not complied with its discovery obligations, the Bureau moved on July 30, 1979, to dismiss Faith Center's renewal application. Repeated efforts by the Bureau to obtain discovery culminated in a December 4, 1979 Order by the ALJ that rejected Faith Center's objections and ordered strict compliance with outstanding discovery requests within two weeks. Faith Center appealed the order to the Commission, which denied the appeal on December 28, 1979.

On January 14, 1980, Faith Center notified the ALJ of its election to pursue a distress sale, and, on February 29, 1980, filed a petition for special relief proposing a distress sale of KHOF-TV and co-owned KVOF-TV and WHCT-TV.<sup>89</sup> The ALJ refused to hold proceedings in abeyance on the grounds that Faith Center had had adequate time to pursue a distress sale and had apparently elected not to do so. Faith Center first had raised the possibility of a distress sale in January 1979, at which time the ALJ had extended the hearing date as an accommodation to Faith Center.

In a March 12, 1980 decision, the ALJ dismissed Faith Center's renewal application for failure to prosecute. According to the FCC, the dismissal resulted from "inadequate 'piecemeal, partial and minimal' "<sup>90</sup> response to discovery by Faith Center, despite multiple

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89. Under the FCC's distress sale policy, a licensee whose renewal application has been designated for hearing may elect to sell his station to a qualified minority-owned buyer rather than risk an unfavorable outcome at hearing. The sale must be for less than 75 percent of the appraised value of the station. Apart from the distress sale policy, the FCC generally will not permit the sale of a station where the renewal application has been designated for hearing.

90. 82 F.C.C.2d at 7.

extensions of time and several orders mandating full compliance. Furthermore, according to the Commission's opinion, "[a]n examination of several of Faith Center's responses to interrogatories convinced the ALJ that Faith's answers were contrived to avoid full and candid disclosure to the Commission, and represented a studied effort to avoid producing any information which could be at all harmful to its case."<sup>91</sup>

## 2. The Commission's Analysis of First Amendment "Free Exercise" Restraints on Regulation of Religious Broadcasters

The Commission, on review, generally agreed with the ALJ's negative assessment of Faith Center's constitutional arguments. Faith Center argued that the First Amendment prevented the Commission from inquiring into how funds collected through over-the-air solicitations were spent because it prohibits an entanglement of church and state. A similar objection was raised to inquiries directed at the expense records of Faith Center's president.

The Commission drew a distinction between freedom to believe, which is absolute, and the freedom to act. According to the decision, conduct may be subject to regulation even if an indirect burden on religious belief may result. The Commission characterized the Broadcast Bureau's inquiry into Faith Center's qualifications as involving not matters of religious belief, but questions of secular fact: whether the funds donated by listeners were used for the purposes for which they were solicited and whether alleged statements relating to the compensation and pledges of Faith Center's president—supposedly made to induce contributions—were in fact true. Recognizing limits on its power to investigate, the Commission said that its examination of Faith Center's affairs was "only in response to allegations of specific fraudulent acts, which we must examine in order to make a determination whether to renew Faith's license."<sup>92</sup>

The Commission found no improper entanglement of church and state because the inquiry focused on a narrow and legitimate governmental interest—the qualifications of Faith Center to remain a licensee in light of allegations of fraud. The decision stressed that the concern with contributions to Faith Center and the compensation of its president arose from charges that these matters were misrepresented in Faith Center's broadcasts. According to the Commission, Faith

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91. *Id.*

92. *Id.* at 19.

Center, by conducting fundraising through broadcasting, elected to occupy a public forum and that such forums are limited in number. Thus, Faith Center subjected itself to public interest obligations, and its exercise of First Amendment rights had to be balanced against injury to the public. The Commission concluded that evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture than special treatment for religious broadcasters.

Having found that Faith Center's constitutional claims were groundless, the Commission concluded that Faith Center was without justification for failing to respond to discovery. The Commission agreed in general that the Broadcast Bureau's discovery requests were legitimate and sought relevant evidence. According to the decision, Faith Center's performance during discovery "display[ed] bad faith" and its "consistent refusals to respond during the discovery phase of this proceeding so obstructed the orderly conduct of these proceedings that Faith has failed to prosecute its application."<sup>93</sup> The Commission pointed in particular to Faith Center's alleged continued failure to respond following an adverse decision by the Court of Appeals on its motion to stay the FCC proceedings.

The Commission also affirmed the ALJ's refusal to permit a distress sale of KHOF-TV. According to the decision, Faith Center's conduct raised more serious questions than merely a dilatory election for a distress sale. The Commission believed that approval of a distress sale would shield Faith Center from the consequences of bad faith obstruction of Commission proceedings. In short, the Commission held that, while a distress sale petition filed early in a proceeding carries a presumption of validity, a licensee is not entitled to this extraordinary relief if his filing is delayed until just prior to hearing.<sup>94</sup>

### 3. Significance of the Faith Center Case

The principal significance of the decision on Faith Center's renewal application lies in demonstrating that the Commission is willing to impose a harsh sanction—dismissing a renewal application with prejudice and denying distress sale relief—for a licensee's refusal in renewal proceedings to provide information on its broadcast-related fundraising activities. However, the decision suggests that sanctions of this magnitude will be applied only for repeated refusals to cooperate following explicit warnings.

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93. *Id.* at 24.

94. *Id.*



Leaving aside the accuracy of the facts relied upon by the Commission, the Commission's First Amendment analysis does not substantially depart from past decisions in which the Commission has asserted that religious organizations cannot become exempt from Commission regulations by merging their licensed franchises into their ecclesiastical structures. The decision does stress, however, the FCC's view that factual representations, unrelated to faith and doctrine and made in a religious broadcast to induce donations, fall within its regulatory purview and may be investigated where fraud is alleged. While the Commission did not indicate that a shifting of funds from the purpose for which they were solicited to some other use would necessarily bear on a licensee's character qualifications, it appears clear that the Commission would take a dim view of such practices absent a *bona fide* reason.

*B. The Potential for FCC Action Against Questionable Fundraising Practices*

In light of the *Faith Center* case and other recent Commission decisions, it appears that the major concern of the Commission with regard to fundraising practices of religious broadcasters is with misrepresentations by licensees made in connection with their over-the-air fundraising efforts. Thus, where the licensee has solicited donations over the air for a particular project, the Commission may inquire to determine whether donations were actually spent for that project and whether representations made to induce contributions were accurate and made in good faith.

In some instances, questions may be raised by licensee conduct even when the licensee himself believed he was acting in good faith. For example, a licensee may solicit funds for a particular project and subsequently determine that the project is not feasible or that funds are no longer required. While the licensee's natural reaction may be to shift the funds to a similar worthy project in need of additional money, the Commission may take a dim view of such a practice if it is contrary to prior representations made to the broadcast audience. Apparently, the theory underlying the Commission's concern is that representations have been made over the air for the purpose of inducing contributions. If contributions are forthcoming, the Commission apparently expects the funds to be used for the stated purpose.

While it is not clear that the FCC necessarily would impose sanctions where funds were shifted from the original recipient in good faith, the safe course for a broadcaster would certainly be to return the funds to the donors or to obtain their consent for the alternative pur-

pose. If a broadcaster can foresee the possibility that a project may not ultimately be able to use the funds solicited, a simpler course may be to ensure that any on-the-air solicitation correctly embodies and describes any alternative uses to which the funds may be put.

As the Commission indicated in its *Faith Center* decision, other representations made to induce donations may also result in problems for a licensee if the representations are not strictly accurate. A representation that an individual fundraiser receives no salary or nominal salary from his organization may be regarded as a promise made to induce contributions, and the FCC may well expect the broadcaster accurately to describe the relevant circumstances. Similarly, a representation that a fundraiser has pledged his own money to a project may also be regarded as a promise made to induce contributions. It is questionable whether a pledge by a fundraiser couched in terms which condition the promise "upon God providing . . . the money" will avoid a possible misrepresentation issue before the FCC.<sup>95</sup>

Thus far, the Commission has not attempted more than incidental inquiries into the off-the-air fundraising activities of religious broadcasters. However, under the same principles applied to secular broadcasters, off-the-air activities are not necessarily beyond the Commission's scrutiny, though, of course, religious broadcasters could raise much stronger First Amendment arguments against inquiries of this nature.

In general, off-the-air conduct by a broadcaster also may be relevant to the question of whether the broadcaster has the requisite character qualifications to remain a licensee of the Commission.<sup>96</sup> Character issues may arise in several ways. In addition to investigations by the FCC or by other governmental agencies, concern about a licensee's character may arise from convictions or civil judgments relating to violations of law. In addition, the Commission may raise an issue of character based upon third party allegations of licensee conduct, even if a violation of law has not been established and even if a licensee has entered into a consent order with a governmental body

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95. Where misrepresentations are purposely made for the purpose of inducing contributions, the broadcaster may have committed a federal crime. See 18 U.S.C. § 1343 (1976).

96. Under 47 U.S.C. § 308(b) (1976 & Supp. 1979) "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station . . ." *Id.* (emphasis added). See also FCC Policy re: Violation by Applicants of Laws of the U.S., 42 F.C.C.2d 399 (1951).

concerning the subject matter of the allegations. Moreover, misconduct need not rise to the level of a violation of law in order for the Commission to consider a licensee's character.

Certain activities by religious licensees may have inherent dangers of technical violations of law which could result in a character issue being raised. For example, some religious broadcasters reportedly have publicized the sale of church bonds and other financial instruments over the air. While these promotions may be for laudable purposes, broadcasters should be aware that sales of securities are strictly and meticulously regulated by both state and federal agencies. An oversight or omission or a technique of promotion which would not appear on its face to be morally wrong may often constitute a violation of state or federal law, and thus could result in an issue being designated against a licensee at renewal time.

Procedurally, questions about licensee fundraising activities may arise in a number of ways. The Commission may of course institute revocation or forfeiture proceedings aimed at removing a broadcaster's license or imposing a fine. Additionally, the Commission may raise the character issue at renewal time as a basis for denying renewal of a license. Third parties with an interest in a broadcaster's assigned channel may also raise character issues as a means to disqualify the incumbent licensee and make the channel available for themselves. Finally, in applications for an unoccupied channel, opposing parties or the Commission itself may raise character issues as a basis for disqualifying an applicant.

Conceivably, the Commission could impose a number of sanctions if it should discover that a licensee has engaged in improper fundraising practices. Of course, to sustain in court a decision imposing a sanction on a broadcaster, the FCC would have to demonstrate the reasonableness of its actions in light of the public interest standard. The most drastic sanction is revocation of the license or refusal to renew the license. As a lesser sanction, the Commission may impose a fine or forfeiture. Additionally, the Commission may choose to impose a short-term renewal, and thus require a broadcaster to apply for renewal again before the usual three year period has expired. Short-term renewals may also be conditioned upon reporting by the licensee to the Commission to insure that proper standards are being followed and that the circumstances giving rise to the short-term renewal have been or are being cured.

The Commission has taken the position that a religious organization cannot insulate its on-the-air fund raising practices from scrutiny

merely because the broadcast operation is closely associated with a religious institution. Thus, if a church or similar institution is virtually merged with the broadcast station operation, the Commission may examine its operations. Licensees have been generally unsuccessful in resisting the Commission's efforts to inquire into their fund raising practices under such circumstances, as indicated, for example, by the recent *Faith Center* case.

A licensee may also face problems from the FCC with regard to programs produced by other parties, as well as fund raising on programs which the licensee has produced himself. Thus, if a licensee is aware of the improper fundraising practices of another party whose program he airs, the conduct of the other party may be attributable to the licensee under some circumstances. Moreover, if the licensee is unaware that improper fundraising tactics are being used on programs which he airs, a question may arise as to whether the licensee has maintained adequate control of his license facilities. An issue of this nature can be quite serious and in some instances may support nonrenewal of a broadcast license.

### C. *Self-Regulation by Religious Broadcasters*

The Commission's apparent willingness to inquire into the fundraising practices of religious broadcasters has led many broadcasters to examine their own financial standards and practices to ensure that they abide by the FCC's rules and policies and generally accepted standards of accountability such as those embodied in the "Principles and Guidelines for Fund Raising, Accounting, and Financial Reporting by Christian Organizations" issued by the National Religious Broadcasters (NRB). The NRB's guidelines stress, to a far greater extent than has the Commission itself, the responsibility of religious broadcasters for accuracy and truthfulness in fundraising. For example, the NRB's standards require that all requests for support be "truthful and forthright" and that "funds collected be used for the intended purpose and not be absorbed by excessive fundraising costs." The NRB guidelines state, without qualification, "[t]he donor must be informed at the time of solicitation how the donated funds will be used and the designations, if any, stated by the donor will be observed." The standards also urge that "the governing body [of any organization engaged in religious broadcasting] shall seek to avoid business transactions in which board members, staff, or their family have a financial interest."<sup>97</sup>

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97. The allegation of conflicts between business and fundraising activities was an issue or principal concern to the Commission in the *Faith Center* case.

The NRB guidelines also impose strict standards of financial reporting. For example, an annual audit by an independent accounting firm is required. The guidelines stipulate that annual reports providing a financial summary of the work and the spiritual dimensions of the ministry must be made available to donors and to the public on reasonable request and that reasonable requests from donors for information about designated gifts should be met. The NRB guidelines recognize that fundraising authority and disbursement authority should not be vested exclusively in any one individual and that, in no case, should inside development staff or outside fundraising consultants be reimbursed on the basis of percentage of the funds received by a religious organization. Finally, the NRB guidelines stipulate that requests for funds should not be associated with material objects which are inconsistent with the spiritual purposes of the appeal.

In summary, the FCC's policies regarding fundraising by religious broadcasters thus far do not appear to threaten religious broadcasting or to have a significant negative impact on religious broadcasters. The concerns of the Commission are far narrower than the strict standards which organizations such as the National Religious Broadcasters impose upon their own members. Doubtlessly, however, there will be occasions where individual religious broadcasters, despite good faith actions, may be called to account for and defend their fundraising practices. While, obviously, such a proceeding may be costly and time consuming to the individual licensee affected, nothing in the Commission's actions to date suggests that its power of inquiry will be broadly exercised.

Religious broadcasters have a particularly high obligation to insure that their fundraising activities accord with applicable law and ethical standards. Because of the tendency of the public to generalize, the misdeeds of a few broadcasters may be attributed in the public's mind to all religious broadcasters. Accordingly, the efforts of religious broadcasters and religious broadcasting organizations to encourage voluntary self-regulation is a substantial contribution to the mission of religious broadcasters as a whole.

#### V. RELIGIOUS BROADCASTERS AND COMPARATIVE PROCEEDINGS BEFORE THE FCC

Where more than a single applicant applies for a broadcast channel, the FCC will hold comparative hearings to determine which application to grant. Comparative proceedings arise most often where applicants seek new facilities—that is, previously unallocated chan-

nels. Competing applications may also be filed for a presently occupied frequency. However, since it is generally felt that incumbent licensees enjoy an advantage because of a proven record of performance, relatively few applicants attempt to supplant incumbent broadcasters, unless the incumbent's record indicates extremely poor performance or conduct which might disqualify him altogether as a licensee.

An issue which has been raised often with respect to religious applicants in comparative hearings relates to the specialized nature of the programming proposed.<sup>98</sup> Generally, the question has arisen in terms of whether specialized religious programming should be permitted where other applicants propose more generalized programming appealing to a wider variety of taste. While programming issues of this sort formerly were common in comparative cases, a recent decision by the Commission has made it very difficult to add specialized programming issues. Thus, as we shall discuss, the Commission's comparative treatment of religious programming is unlikely to have a substantial impact upon religious applicants in comparative proceedings.

The Commission's concern with the public interest implications of specialized formats was articulated soon after the passage of the Communications Act of 1934 in *In Re Young Peoples Association for the Propagation of the Gospel*.<sup>99</sup> This case was not a comparative proceeding, but a decision on the qualifications of the Association to be a licensee. As the Commission observed in its decision, the Association proposed to use the station "primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible"<sup>100</sup> and had stated that "in connection with religious broadcasts the station's facilities would be extended only to those whose tenets and beliefs in the interpretation of the Bible coincided with those of the applicant."<sup>101</sup> The Association did not propose similar

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98. When more than one applicant seeks a single frequency, the Commission will designate the applications for a comparative hearing. A comparative hearing is an evidentiary proceeding in which the parties litigate the question of which prospective licensee would best serve the public interest. The FCC, after examining the applications, issues a designation order stating the issues to be resolved in the comparative hearing. The applicants themselves may also seek to add additional issues, including comparative issues which would give them a preference over other applicants, comparative issues which would have a negative impact on other applicants, or basic qualifications issues going to the question of whether a particular party is qualified to be an applicant at all.

99. 6 F.C.C. 178 (1938).

100. *Id.* at 180.

101. *Id.* at 181.

restrictions on the use of the station's time by those not having the same beliefs as the Association when the program to be broadcast was devoted to civic or charitable—rather than religious—purposes.<sup>102</sup>

The Commission concluded that “[w]here the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public.”<sup>103</sup> The Commission believed that if one group were entitled to a station facility for the dissemination of its principles, other associations would likewise be entitled to station licenses on the same ground. Since the Commission believed there was not a sufficient number of broadcast channels to give each group a station license, it declined to grant the license.

The decision in *Young Peoples' Association* rested on the principle “that the interests of the listening public are paramount to the interests to the individual applicant in determining whether public interest would best be served by granting an application.”<sup>104</sup> The Commission did not suggest that all religious applicants would be barred, but focused on the particular proposal of the application which would “extend the use of the station's facilities for religious purposes only to those whose religious beliefs are in accord with those of the applicant.”<sup>105</sup> Relying upon the D.C. Circuit's opinion in *KFKB Broadcasting Association v. Federal Radio Commission*,<sup>106</sup> the Commission stated that “broadcasting should not be a mere adjunct of a particular business but should be of a public character.”<sup>107</sup>

The Commission's concern with specialized formats was carried over into its 1965 *Policy Statement on Comparative Broadcast Hearings*.<sup>108</sup> In the *Policy Statement* the Commission concluded that minor differences in proposed programming among applicants are apt to prove to be of no significance,<sup>109</sup> but “[s]pecialized proposals necessarily have to be considered on a case-to-case basis.”<sup>110</sup> The Commission proposed to “examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.”<sup>111</sup>

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 47 F.2d 670 (D.C. Cir. 1931).

107. 6 F.C.C. at 182 (quoting 47 F.2d at 672).

108. 1 F.C.C.2d 393 (1965).

109. *Id.* at 397.

110. *Id.* at 397 n.9.

111. *Id.*

Under the *Policy Statement*, issues were often sought and occasionally added where an applicant proposed specialized religious programming. Thus, in *In Re Harrison Radio, Inc.*,<sup>112</sup> the Commission stated that “[a] full programming comparison is warranted when one or more applicants propose predominantly specialized programming and others general market programming.”<sup>113</sup> Because one of the applicants in *Harrison* proposed predominantly religious programming while the other proposed general market programming, the Commission decided that the programming proposals of the applicants should be compared under the contingent comparative issue. Additionally, in *Harrison* the Commission added another issue against a religious applicant which proposed significant amounts of religious programming, because the applicant “has not indicated whether it would provide an opportunity for the expression of views by other, including non-Christian religious groups and an issue on this matter will be specified.”<sup>114</sup>

Where a religious applicant proposed predominantly religious programming, but not to the exclusion of other programming, the addition of an issue was less likely. Thus in *In Re Harvit Broadcasting Corporation*,<sup>115</sup> a decision by the Commission’s Review Board,<sup>116</sup> the FCC refused to add an issue where an incumbent licensee in a comparative renewal proceeding had aired 42 percent religious programming in the previous license period, and proposed to devote 37 percent of its broadcasting time during the upcoming license period to religious programming. The Review Board decided that the programming was not “specialized.” In essence, the religious applicant proposed to offer a wide range of religious programming in lieu of the entertainment programming proposed by other applicants.<sup>117</sup> Accordingly, the Review Board declined to add an issue to permit the program proposals to be compared in an evidentiary proceeding.

The 1979 decision in *In Re George E. Cameron, Jr. Communications*<sup>118</sup> significantly limits the extent to which specialized programming issues will be a subject of an evidentiary hearing in a compara-

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112. 18 F.C.C.2d 906 (1969).

113. *Id.* at 908.

114. *Id.*

115. 18 F.C.C.2d 508 (1969).

116. The Commission’s Review Board is an intermediate appellate body between the initial decision maker—the administrative law judge—and the ultimate decision maker in the agency, the full Commission itself.

117. 18 F.C.C.2d at 513.

118. 71 F.C.C.2d 460 (1979).



tive proceeding. While the decision did not specifically discuss religious applicants apart from other applicants, the principles that it laid down for the addition of a specialized programming issue in a comparative proceeding will substantially limit the extent to which program plans of religious broadcasters will provide either an advantage or a detriment in comparative proceedings.

In *George E. Cameron*, one of the applicants proposed a specialized format while the others proposed general market programming. The Commission noted that "[u]nder the practice we have followed since the 1965 *Policy Statement* . . . this difference would have automatically prompted an inquiry under the standard comparative issue into the relative need for these formats."<sup>119</sup> In reversing the position in the *Policy Statement*, the Commission concluded that "[o]n reexamination, it seems to us that this routine practice has resulted in an unnecessary expenditure of resources."<sup>120</sup> The Commission was concerned that decisions on the issues of specialized formats tend to be very subjective and that it is difficult to determine the relative need for one format over another. Moreover, because a licensee may change formats at any time without Commission approval, inquiries into the need for a format had not proved, according to the Commission, to be a satisfactory ground for a choice between competing applicants. Accordingly, the Commission decided "not to allow inquiry into the relative need for program formats under the standard comparative issue, except on a predesignation showing that a proposed specialized format is not available in the particular market in a substantial amount."<sup>121</sup>

The *Harrison* case dealt with the effort of a competing applicant to obtain a preference for a specialized format, rather than a preference for having a general market format in comparison to a specialized format. However, the principles enunciated by the Commission would also restrict the ease with which comparative programming issues could be added to the detriment of a competing applicant with specialized programming, such as a religious broadcaster.

Accordingly, it appears that the Commission's policies affecting religious broadcasters in comparative hearings do not now have a significant negative impact upon applicants who propose religious formats. Obviously, issues might still arise if it appeared that a broadcast applicant in a smaller market proposed to use his facility for religious

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119. *Id.* at 464.

120. *Id.* at 465.

121. *Id.*

programming to the exclusion of other public needs and interests, or if it appeared that the applicant proposed to limit the views which could be expressed on his station.

#### VI. IMPACT OF RADIO DEREGULATION UPON RELIGIOUS BROADCASTING

The Commission's recently concluded proceeding on radio deregulation<sup>122</sup> was a subject of comment by a great number of religious broadcasters and other religious groups who participated in the rulemaking, both in support of and in opposition to the Commission's proposed action. A number of the religious groups filing comments with the Commission appeared to have misunderstood the nature of the Commission's decision and its regulatory background. Thus, many of the concerns about the effect of radio deregulation on the availability of religious programming appear to be misplaced.

In its *Notice of Inquiry and Notice of Proposed Rulemaking*<sup>123</sup> the Commission proposed substantial elimination of rules in four major areas: (1) guidelines for non-entertainment programming; (2) guidelines for commercial programming; (3) program log requirements; and (4) ascertainment requirements. In its *Report and Order*, the Commission generally adopted the proposals leading to the greatest deregulation. The decision was based upon the Commission's determination, through extensive economic and market analysis, that the marketplace—and not the FCC's regulations—were the best assurance that broadcast licensees would provide programming to serve the public interest.

A number of non-licensee religious groups questioned the decision to eliminate the commercial guidelines and the non-entertainment guidelines and suggested that their elimination would foreclose religious programming on commercial stations. Neither of these guidelines, however, has ever been mandatory upon licensees. Under the procedures adopted by the Commission for renewal applications, a licensee who met the guidelines for commercial programming and for non-entertainment programming could have his existing broadcast license renewed at staff level. If the applicant significantly exceeded the commercial guidelines or fell below the percentages in the non-entertainment programming guidelines, the renewal would be referred to the full Commission for action.

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122. Report and Order, \_\_\_ F.C.C.2d \_\_\_, 46 Fed. Reg. 13,887 (1981).

123. 44 Fed. Reg. 57,636 (1979).

As the Commission noted in its *Report and Order*, some views expressed upon the deregulation proposal "were apparently the result of some misapprehension or misperception regarding the nature of current Commission requirements and proposals made in the *Notice* to alter them."<sup>124</sup> As an example, the Commission stated that:

a great deal of concern was expressed that the elimination of the non-entertainment programming guideline would result in the elimination of Commission requirements for the presentation of public service announcements (PSAs), religious programs, "sustaining programming," and "community service programming."<sup>125</sup>

Yet, the Commission imposed none of these requirements prior to the deregulation proceeding. While broadcasters were required to state in their renewal applications how many PSAs they proposed to broadcast on a weekly basis in the upcoming license terms, they were not required to propose any. Similarly, the Commission has never required religious programming, and it is unlikely that the Commission could do so by general rule without running afoul of the establishment clause of the First Amendment (although religious programming could be counted toward meeting the non-entertainment programming guidelines).

Likewise, the Commission believed that the concern for presentation of "sustaining programming" was misplaced. "Sustaining programming" is programming which occupies time provided without charge by the licensees. While the Commission at one time had such a requirement, the "sustaining programming" requirement was eliminated in 1960, some 20 years prior to the Commission's proposal for deregulation.<sup>126</sup>

Based on its study of broadcasters' action in the marketplace, the Commission determined that most broadcasters would have exceeded the non-entertainment programming guidelines even if their religious programming had not been counted. Thus, it appeared that the guidelines themselves were not a significant factor in the decision of many stations to carry religious programming.<sup>127</sup> Similarly, the Commission did not believe that the elimination of the programming guidelines would result in overcommercialization that would drive out meritor-

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124. Report and Order at 13,889.

125. *Id.*

126. See *En Banc Programming Inquiry*, 44 F.C.C. 2,303 (1960).

127. Report and Order at 13,890 (¶ 13).

ious programming. Based on the economic data collected in the proceeding, the Commission determined that the amount of advertising aired by most licensees is generally so far below the commercial guidelines as to demonstrate that factors other than FCC regulations—such as the need to attract listeners—has been responsible for the amount of commercial matter presented.<sup>128</sup>

If the Commission's assessment of the radio marketplace is correct, the decision to deregulate commercial radio should not have a serious impact upon the availability of religious programming on commercial broadcast stations. Moreover, the elimination of the non-entertainment and commercial guidelines, ascertainment procedures, and program log requirements may ease the burden which many religious broadcasters have faced in complying with government regulation.

In addition, the decision may permit a greater degree of specialization and thus reduce the need for religious broadcasters to address certain community needs and interests which might be more appropriately handled through co-located broadcast stations with other formats. The approval of specialization by broadcasters was one of the underpinnings of the Commission's *Report and Order*. For example, the Commission stated "[w]e do not expect broadcasters to fit their non-entertainment programming into a mold whereby each station has the same or similar amounts of programming."<sup>129</sup> While broadcasters will be expected to continue to present programming responsive to public issues, the Commission no longer expects radio broadcasters "to attempt to be responsive to the particular problems of each group in the community in their programming in every instance."<sup>130</sup> However, the deregulation order specifically retains the Commission's Fairness Doctrine requirements, the equal time provisions mandated by statute,<sup>131</sup> and the Commission's policy against intentional discrimination in licensees selection of issues to be addressed in their programming. It also recognized that in small communities, where few alternatives are available to listeners, licensees will be expected to be more broadly based in their programming.

In summary, while the Commission's decision to deregulate commercial radio is to some degree an experiment, the history of marketplace action suggests that the decision will not have a substantial impact upon the amount of religious programming presented by

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128. *Id.* at 13,901 (¶ 83).

129. *Id.* at 13,891 (¶ 26).

130. *Id.* at 13,892 (¶ 26).

131. *See* 47 U.S.C. § 315 (1976 & Supp. 1979).

most commercial broadcasters. Moreover, by specifically recognizing specialization as a public benefit in many instances, the Commission's decision may encourage the development of more focused religious formats than have been presented heretofore. Finally, by removing unnecessary regulatory restrictions, the deregulation decision may be of particular aid to religious broadcasters, many of whom operate on budgets far smaller than those of other commercial AM and FM stations.

### CONCLUSION

The religious broadcaster occupies a unique position that pits him squarely in conflict with the regulatory authority of the government. The conscientious religious broadcaster does not acquire a license simply for money, but for far different reasons than the commercial broadcaster. He may seek to entertain, but that is incidental to a foremost desire to inform. Religion itself may not be controversial—although some would argue otherwise—but the moral positions that are taken by various faiths and churches may be extremely controversial, not only with unbelievers but with other churches as well.

Americans hold to the view that the free competition of ideas in the marketplace will reveal the truth. The religious broadcaster must have the right to place these views in the marketplace, unfettered by unnecessary and excessive governmental regulation that in effect operates to silence or moderate these voices crying out a message of hope. Despite the Fairness Doctrine and the various other impediments in the way of the religious broadcaster, he is still getting the message out. Governmental regulation is not designed to strangle the religious broadcaster. But because of the religious broadcaster's unique position, the full weight and authority of governmental review more often falls his way.

Our Constitution demands that the government maintain a course of neutrality in religious matters, that it do nothing respecting the "establishment" of religion and nothing to inhibit "free exercise" of religion. But where religious belief conflicts with a licensee's responsibilities to operate its station in the public interest, a clear problem, not faced by secular broadcasters, arises. It is a problem not only for the religious broadcaster, but for the Commission and courts as well, as they attempt to steer a course between the often opposing currents of these two foundational principles of our religious freedom under the Constitution. For our rights, our liberties, and our faiths to be protected, we must never drop our vigilance. Throughout history

religious expression has had to struggle with those who would silence the message, either by design or by thoughtless action and inattention. History has not changed, and it is the duty and responsibility of every religious broadcaster, and every member of the religious community, to man the watchtowers to prevent the otherwise certain erosion of our religious liberties.

