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Administrative Law-Community Representatives Have Standing To Challenge FCC License Renewal-*Office of Communication of United Church of Christ v. FCC*

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RECENT DEVELOPMENTS

ADMINISTRATIVE LAW—Community Representatives Have Standing To Challenge FCC License Renewal—*Office of Communication of United Church of Christ v. FCC**

When the owners of a Jackson, Mississippi television station applied to the Federal Communications Commission (FCC) for a renewal of their broadcast license, representatives of the local Negro community filed a petition with the Commission, requesting it to deny the renewal.[1] Petitioners contended that a renewal of the applicant's license would not be in the public interest since the station had consistently violated the Commission's "fairness doctrine" which requires broadcasters to encourage and implement a fair presentation of all sides of any controversial public issue discussed over their facilities.[2] Specifically, petitioners alleged that, in its local programs dealing with racial integration, the licensee had presented only pro-segregationist viewpoints.[3] The Commission dismissed the petition without a hearing on the ground that petitioners had no standing to intervene in the licensing proceedings[4] since they had failed to

* 359 F.2d 994 (D.C. Cir. 1966) [hereinafter cited as principal case].

1. A joint petition was filed by the United Church of Christ of Jackson, Mississippi, Aaron Henry, President of the Mississippi National Association for the Advancement of Colored People, and Reverend Robert L. T. Smith, a leader of the Mississippi Freedom Democratic Party. A second petition, filed by the Mississippi AFL-CIO alleging that the licensee's programming was heavily weighted in "opposition to organized labor, its leadership and objectives," was dismissed for want of any "substantial and material questions of fact." Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1153 (1965). All petitioners, with the exception of the Mississippi AFL-CIO, joined in the appeal of the Commission's memorandum opinion and order; Lamar Life Broadcasting Company participated as intervenor.

2. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250-51 (1949); see, *e.g.*, Metropolitan Broadcasting Corp., 19 RADIO REG. 602, 605 (1960); FCC, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964). In a 1959 amendment to the Communications Act, Congress affirmed the Commission's view that broadcasters should "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557 (1959), 47 U.S.C. § 315(a)(4) (1964). For an historical analysis and current evaluation of the "fairness doctrine," see generally Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961).

3. Racial integration may be a "controversial issue" within the purview of the "fairness doctrine" when discussed on its merits in a program broadcast by a licensee. Lamar Life Ins. Co., 18 RADIO REG. 683 (1959). The violations alleged in the principal case were far from subtle. During Network programs which advocated racial integration, the licensee deliberately interrupted its transmission of the program with the sign "Sorry—Cable Trouble." In addition, strongly pro-segregationist programs were broadcast without any demonstrable effort to secure opposing views. Principal case at 998.

4. The term "intervene" is used herein to refer broadly to any method by which a party may formally participate in a licensing proceeding before the FCC, including, at a minimum, the filing of a "petition to deny" a pending license application. See note 26 *infra*.

show that they would suffer "some injury of a tangible and substantial nature" from the administrative action in question.[5] The Commission, however, did consider petitioners' allegations as an "informal objection" to the renewal application, and, as a result, granted a license renewal for only one year, instead of the usual three.[6] Further, it conditioned subsequent renewals on the licensee's making "demonstrable efforts" to meet the needs of the local Negro community as well as adhering strictly to the standards of the "fairness doctrine."[7] On appeal to the District of Columbia Circuit Court of Appeals, *held,* reversed. Petitioner's allegations must be considered in an evidentiary hearing on the renewal application because: (1) petitioners had standing to challenge the license renewal since they were responsible representatives of the listening community whose participation in the proceeding was necessary in order to provide an effective means for the Commission appraisal of the licensee's performance of its duty to operate in the public interest; and (2) the Commission had failed to support adequately its finding that renewal of the license without a hearing would be in the public interest.

The Federal Communications Act of 1934 charges the FCC with the responsibility of assuring that the "public interest, convenience and necessity" will be served by any exercise of its authority to grant or renew a broadcasting license.[8] To assure full and adequate attention by the FCC to considerations involving the public interest, the Act authorizes any "party in interest" to question the propriety of the grant or renewal of a license by filing with the Commission either a "petition to deny" the pending license application if the Commission has not set a date for a hearing on the application[9] or a "petition for intervention" in the licensing proceeding if a hearing has been set.[10] Furthermore, if a "petition to deny" is filed, the Act requires that there be a hearing on the application if the petition raises a substantial question of fact as to whether the grant of the application would be in the public interest[11] or if "for any reason" the Commission is unable to make a finding that the grant would be consistent with the public interest.[12] If the Commission dismisses a "petition to deny" and grants the license without a hearing, con-

5. Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1149 n.11 (1965); *accord,* Northern Pac. Radio Corp., 23 RADIO REG. 186, 189 (1962); Gordon Broadcasting, 22 RADIO REG. 236 (1961).

6. Section 307(d) of the Communications Act, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 307(d) (1964), authorizes renewals for less than three years at the discretion of the Commission.

7. See generally Note, 33 GEO. WASH. L. REV. 764 (1964) (discussing scope of Commission authority to grant conditional licenses).

8. 74 Stat. 889 (1960), 47 U.S.C. § 309(a) (1964).

9. 74 Stat. 890 (1960), 47 U.S.C. § 309(d)(1) (1964).

10. 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964).

11. 74 Stat. 891 (1960), 47 U.S.C. § 309(d)(2) (1964).

12. 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964).

sideration of the petition is adjudicatory in nature,[13] and the grounds for the Commission's actions must be set forth in a separate memorandum.[14] This furnishes a basis for immediate judicial review and a possible stay of the Commission's order pending disposition of the appeal.[15] An appeal may be made by any party "aggrieved" by the Commission's order,[16] and the courts and the Commission have assumed that a "party in interest" whose petition has been denied is an "aggrieved party."[17]

The FCC has narrowly construed the term "party in interest," so as to include only (1) licensees alleging present or potential electrical interference from an applicant, and (2) parties, including licensees, who can show that they would suffer direct and substantial *economic* injury from the granting of an application.[18] Prior to the decision in the principal case, the courts had apparently given at least tacit approval to this construction, for in no instance had standing to contest a licensing order been upheld on any other ground,[19] although no case specifically denied that other grounds

13. See Administrative Procedure Act § 2(d), 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001(d) (1964). In considering the merits of a "petition to deny," the Commission is guided by "rules applicable to a motion for summary judgment." See S. REP. No. 690, 86th Cong., 1st Sess. 4 (1959).

14. S. REP. No. 690, *supra* note 13, at 4. See also FCC Rules §§ 1.561, 47 C.F.R. § 1.561 (1966); 1.580(i), (j), 47 C.F.R. §§ 1.580(i), (j) (1966); 1.591(c), 47 C.F.R. § 1.591(c) (1966).

15. See H.R. REP. No. 1800, 86th Cong., 2d Sess. 12 (1960).

16. 66 Stat. 719 (1952), as amended, 47 U.S.C. § 402(b) (1964).

17. See Philco Corp. v. FCC, 257 F.2d 656 (1958), *cert. denied*, 358 U.S. 946 (1959); Metropolitan Television Co. v. United States, 221 F.2d 879, 880 (D.C. Cir. 1955); Camden Radio Inc. v. FCC, 220 F.2d 191 (D.C. Cir. 1955).

18. See, *e.g.*, Arkansas Radio & Equip. Co., 6 RADIO REG. 2d 734 (1966) (citizens' committee); Loyola Univ., 24 RADIO REG. 766 (1962) (labor union); Northern Pac. Radio Corp., 23 RADIO REG. 186 (1962) (individual members of the public; judgment creditor of licensee); Evansville Television, Inc., 16 RADIO REG. 257 (1957) (local Chamber of Commerce); Kansas State College, 8 RADIO REG. 261 (1952) (association of radio and television broadcasters); Capital Broadcasting Co., 8 RADIO REG. 229 (1952) (group of local transit riders); E. D. Rivers, Jr., 6 RADIO REG. 552 (1950) (unincorporated association of licensees).

19. The term "party in interest" was not defined in the 1960 legislation which created the "petition to deny." However, in a 1952 revision of the protest procedure then in force, Congress indicated that interpretation of the term "party in interest" was to be governed by the criteria which had been applied in defining a "person aggrieved" under § 402(b). See S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951) (The House Report, H.R. REP. No. 1750, 82d Cong., 2d Sess. 1, 10-11 (1952), omitted any definition of "party in interest"). Although the courts have never construed the term "person aggrieved" as necessarily restricting judicial review to persons showing a likelihood of economic injury, standing under § 402(b) has never been granted on any other grounds. See, *e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940); Southwestern Publishing Co. v. FCC, 243 F.2d 829 (D.C. Cir. 1957); Elm City Broadcasting Corp. v. United States, 235 F.2d 811, 815 (D.C. Cir. 1956); Metropolitan Television Co. v. United States, 221 F.2d 879, 880 (D.C. Cir. 1955); National Broadcasting Co., KOA v. FCC, 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943); Yankee Network, Inc., v. FCC, 107 F.2d 212, 215 (D.C. Cir. 1939); *cf.* National Anti-Vivisection Soc'y v. FCC,

may exist.[20] The principal case is the first to test whether a member of a licensee's audience has standing to compel an evidentiary hearing on its renewal application without having shown a direct economic or technical interest in the proceeding.

Although the Commission's restrictive interpretation of a "party in interest" is probably designed to prevent it from being overburdened by a "host" of frivolous protests,[21] it does impose significant limitations on the availability of review of a Commission determination that a licensee has met or is meeting its obligations to present its programs in accord with the public interest. In the principal case, for example, the licensee was charged with repeated violations of the Commission's "fairness doctrine," adherence to which is considered an essential element of operating in the public interest.[22] Since violations of the "fairness doctrine" cannot normally be discovered by the Commission's own investigative machinery,[23] reliance is necessarily placed on public protest to reveal conduct which might be deemed violative of the public interest standard.[24] However, the

234 F. Supp. 696 (N.D. Ill. 1964) (writ of mandamus ordering FCC to conduct hearing or revoke license of broadcaster denied). See generally Note, 55 COLUM. L. REV. 209 (1955).

20. The courts had held, however, that when a petitioner has alleged economic injury as a basis for standing as a "party in interest," but fails to demonstrate a sufficient economic injury, such a petitioner does not have standing. See, *e.g.*, Southwestern Publishing Co. v. FCC, *supra* note 19, at 833.

21. See Brief for Appellee, pp. 35-37; S. REP. No. 44, *supra* note 19, at 8.

22. FCC, *supra* note 2, at 1258; principal case at 1007.

23. The FCC relies upon three sources of information for measuring adherence to its regulations with respect to program content. First, the Commission checks content by comparison of the licensee's proposed programming (at the time of grant or last renewal) with that actually presented, determined on the basis of a random selection or sampling of the station's program logs. See 47 C.F.R. §§ 1.6; 73.112(c)(3), .116 (1966). This procedure, however, is capable only of measuring "program balance" (the percentage of time devoted to entertainment versus, for example, news, religious, educational or "public service" programs) and is not sufficiently detailed to reveal whether there has been a fair presentation of all sides of a controversial issue discussed on a given program. See generally FCC, *Network Programming Inquiry*, 25 Fed. Reg. 7291, 7295-96 (1960). See also The Tribune Co., 9 RADIO REG. 719, 752-60 (1954), *aff'd sub nom.* Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir. 1955).

Second, the Commission makes use of field monitoring, aural or visual, of programs broadcast by licensees. Information obtained from this source is likewise inadequate to disclose lack of adherence to the "fairness doctrine."

Third, the Commission relies on information supplied from public protests and complaints. See 47 C.F.R. § 0.81 (1966). See generally FCC 30TH ANNUAL REPORT 51 (1964); FCC 26TH ANNUAL REPORT 37 (1960).

Inherent in both program log analysis and field monitoring studies is the difficulty that a broadcaster may have complied with the requirements of the "fairness doctrine" in making a "good faith," though unsuccessful, effort to secure presentation of an opposing view. Absolute adherence to the "fairness principle" may thus be frustrated by the public itself where spokesmen for opposing views refuse to come forward. Neither procedural check employed by the Commission would disclose this difficulty, with the result that the Commission would have to resort to further, though futile, investigation.

24. The Commission itself has acknowledged this reliance:

failure of a broadcast station to present fairly all sides of a controversial issue can, at best, result in only indirect economic injury to proponents of excluded viewpoints,[25] so that many persons contesting license renewals because of alleged "fairness doctrine" violations would be denied standing were the Commission's restrictive construction upheld.[26] Without standing to present a formal "petition to deny," a complainant's only alternative is to present his arguments by an "informal objection" to the pending application.[27] As a means of providing the Commission with information concerning improper operations, the "informal objection" procedure is theoretically as adequate as the "petition to deny," for the Commission may order an evidentiary hearing on the basis of the objection, and the complaining parties may be requested to appear and present evidence of the alleged misconduct.[28] However, as a means of assuring

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> There are over 5,000 broadcast stations in operation. The Commission, obviously, can make independent inquiry into the service of only a few of these. Indeed, unless there is some reason to do so no ancillary investigation is usually made to determine the extent to which or manner in which a licensee has discharged his responsibility. It is to the public that the Commission must look for much of the information useful in evaluating community broadcast service. This is especially true with regard to license renewal.

H.R. REP. No. 281, 88th Cong., 1st Sess. 218 (1962).

25. An exception might arise where the advocates of one side of a given controversial public issue have an economic interest of their own at stake in the issue's outcome. For example, a group of property owners favoring urban renewal of land adjacent to their own property might well be economically injured in the event that an influential local broadcaster carried only programs opposing the project, which eventually influenced its defeat.

26. The principal case appears to have been the first dealing with the question of standing of persons protesting license renewal on the grounds of past violations of the "fairness doctrine."

Standing to be heard does not, however, automatically give a petitioner the right to appear before the Commission in an evidentiary hearing. Initially, it is significant only in that (1) the Commission must give formal consideration to the petitioner's allegations (in its "petition to deny"), and (2) such consideration is adjudicatory in nature, so that an appeal may be prosecuted from an adverse determination by the Commission. It is only when the allegations present "a substantial and material question of fact" as to whether a renewal would be consistent with the demands of the public interest that the application must be designated for a hearing in which the "parties in interest" may appear.

27. See FCC Rule 1.587, 47 C.F.R. § 1.587 (1966). When the Commission concludes that a petitioner has not demonstrated that it qualifies as a "party in interest," (or, where petitioner may be a "party in interest" but has failed to raise an issue as to whether a grant of the application would be in the public interest) the Commission may treat the petition as an "informal objection" to the license application, under § 1.587 of its Rules and Regulations. Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1153 (1965).

28. [I]n the event a hearing is ordered, if a person not a "party in interest" to a proceeding feels that he has information which might assist the Commission in the determination of any pending matters, he may request intervention. 47 CFR 1.223(b) or appear and give evidence as a public witness, 47 CFR 1.225. And he will not be precluded from giving any relevant, material, and competent testimony because he lacks a sufficient interest to justify his intervention as a party in the matter.

Brief for Appellee, p. 39.

adequate protection to the public, an "informal objection" is substantially less desirable than a formal "petition to deny." Although the Commission professes to apply the same standards in determining whether an "informal objection" necessitates an evidentiary hearing as it does in evaluating a formal "petition to deny,"[29] it can dismiss the "informal objection" without an opinion,[30] so that it is impossible to ascertain not only what significance the Commission attached to the allegations in the "informal objection," but whether any consideration was given to them at all. Thus, unless a petitioner has the standing necessary to require the Commission to render an opinion discussing its resolution of the allegations, there is no basis for judicial review of an actual failure or refusal of the Commission to act on meritorious objections. This may frustrate attempts by the public to secure a full examination of a licensee's allegedly improper programming and may even discourage public protest in the first instance.[31]

In the principal case, the court recognized that public opinion is an essential factor to be considered in the assessment of a licensee's performance and that an effective expression of such opinion has been largely precluded by the Commission's restrictive interpretation of standing.[32] Moreover, the court rejected the Commission's contention that Congress intended to make electrical interference and economic injury the exclusive bases for standing,[33] since it found in the congressional reports recognition "that the issue of standing was to be left to the courts."[34] The court regarded standing as basically a "practical and functional concept," designed to insure the genuineness and legitimacy of the interests of those seeking to participate in a license renewal proceeding,[35] and it felt that the legitimacy of these interests could be adequately assured if standing were limited to "responsible and representative" members of the listening community.[36] By liberalizing the criteria for standing, the

29. See Brief for Appellee, pp. 39-40, 55.

30. See NBC v. FCC, 7 RADIO REG. 2d 2067, 2078 (D.C. Cir. 1966); Letter From Ben F. Waple, Secretary, FCC, to the *Michigan Law Review*, Feb. 28, 1966. However, if in the Commission's view, the objection raises a "substantial and material question of fact" as to whether the issuance of a license to the applicant will be in the public interest, the FCC theoretically should resort to an evidentiary hearing on the questions presented before acting finally on the application. See 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964).

31. See Brief for Appellants, p. 23.

32. See principal case at 1005.

33. *Id.* at 1000-01.

34. *Id.* at 1002.

35. *Ibid.*

36. *Id.* at 1005. It is not clear, however, that Congress intended to *encourage* public protest. Indeed, the legislative history reveals at least some sympathy for the Commission's concern that an overly broad standard for public intervention at the administrative level might inundate the agency with frivolous protests. Nonetheless, no attempt was made to specify who could intervene beyond the broad category of

court in the principal case has significantly improved the ability of members of a licensee's audience to challenge the propriety of the license renewal. Furthermore, it has increased the number of cases in which the Commission must, in a formal memorandum, justify its granting of a renewal despite public complaints of past programming misconduct. Although an added burden is thereby placed upon the Commission, an important step has been taken to insure that the interests of the public are reflected in a licensee's programming.

The court's opinion, however, does present several problems, perhaps the most serious of which stems from the approach it used in concluding that the short-term renewal of the license was "erroneous."[37] The court found that petitioners' allegations of programming misconduct, if proved, would "preclude, as a matter of law, the required finding that renewal of the license would serve the public interest."[38] In addition, in concluding that the Commission's opinion did not adequately support its finding that the public interest would be served by a renewal,[39] the court implicitly rejected the Commission's "policy determination" that the one-year license renewal was justified by the special needs of the licensee's community and the licensee's specific assurance that its future programming would fulfill the demands of the "fairness doctrine";[40] indeed, the court suggested alternative considerations which it thought the Commission's opinion should have reflected.[41] Thus, the court's opinion can be read as suggesting to the Commission the result it should have reached on the merits. The propriety of such an approach would certainly be questionable, since policy determinations are clearly within the exclusive scope of the Commission's expertise.[42] However, the Federal Communications Act does provide a basis by

"party in interest," and the very presence of the intervention provisions reveals a Congressional intent to admit relevant and responsible public opinion. See note 18 *supra* and accompanying text.

37. Principal case at 1009.

38. *Id.* at 1008-09.

39. *Ibid.*

40. *Id.* at 1008.

41. [T]here are other reasons why one station in Jackson might be better than two for an interim period. For instance, . . . Appellant Smith alleged that the other . . . station in Jackson had agreed to sell him time only if WLBT did so. It is arguable that the pressures on the other station might be reduced if WLBT were in other hands—or off the air. The need which the Commission thought urgent might well be satisfied by refusing to renew the license of WLBT and opening the channel to new applicants . . . on the theory that another, and better suited, operator could be found to broadcast . . . with brief, if any, interruption of service.

Id. at 1009.

42. See FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276-77 (1933); *cf.* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38, 144-45 (1940). Compare FCC v. RCA Communications, Inc., 346 U.S. 86, 90-91, 94 (1953).

which the court's holding may be supported. Section 309(e) of the Act provides that a hearing must be held on an application for renewal unless the Commission can make an affirmative "finding" that the renewal would serve the public interest.[43] In order to determine whether the Commission adequately supported its "finding," however, the court must necessarily consider the sufficiency of the factors upon which the Commission relied. Thus, if the language of the court in the principal case can be construed as simply a statement that the evidence upon which the Commission relied was inadequate to support its "finding," the court's decision may be viewed as a traditional exercise of judicial review.[44] So construed, the court's comment that "a history of programming misconduct of the kind alleged [largely "fairness doctrine" violations] would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest"[45] may be read as essentially dictum. Yet, even if the language is dictum, the court is apparently indicating that it believes that the Commission should give greater weight to "fairness doctrine" violations, rather than viewing them, as it has in the past, as simply one fact to be considered in determining whether the licensee has been operating in the public interest. In thus urging greater regulation of program content, the court may have placed the Commission in a difficult position, for although some governmental regulation of program content may be a justifiable incident of the Commission's statutory mandate,[46] increased restraints imposed upon the licensee's freedom

43. 74 Stat. 891 (1960), 47 U.S.C. § 309(d)(2) (1964); *cf.* 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964). It is not entirely clear, however, whether the language of the statute was intended to require the Commission to include, in its memorandum dealing with the allegations of a "petition to deny," an express justification of its "finding" that renewal would be in the public interest. Indeed, the legislative history suggests the contrary:

> The Commission would not be required to write an opinion in support of the grant as in a hearing case, but would [only] be required to dispose of each substantial question presented by the petitioner . . . .

S. REP. No. 690, 86th Cong., 1st Sess. 4 (1959).

44. See, *e.g.*, American Broadcasting Co. v. FCC, 179 F.2d 437, 444-45 (D.C. Cir. 1949); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938).

> The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrative is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions its function is at that point exhausted. It has, as it were, a veto but no positive power of determination.

JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965).

45. Principal case at 1007.

46. See, *e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943); Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962). The Communications Act specifically provides for some regulation of program content. Section 315 of the Act requires that a licensee "afford equal opportunities to all . . . candidates for [a particular] office . . ." if the licensee has permitted one candidate to broadcast. 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315(a) (1964). The same section also proscribes censorship by the licensee of any such political material. See generally Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

of expression raise serious first amendment questions.[47] Indeed, the validity of the restraints imposed by strict enforcement of the "fairness doctrine" is now being considered by both the courts[48] and the Congress.[49]

A second difficulty with the court's reasoning in the principal case arises from its reliance upon "responsibility" and "representativeness" as the primary criteria for determining standing to intervene. While the FCC should, by use of its statutory rulemaking power, define these terms,[50] the court has suggested the construction it would employ, and this construction is quite restrictive. In the court's view, to be "representative," a petitioner should: (1) have "significant roots in the listening community"; (2) concern itself with "a wide range of community problems"; and (3) reflect the "broad as distinguished from narrow interests, public as distinguished from private or commercial interests."[51] The petitioners in the principal case could certainly be described as "representative" of interests which are not only "broad," but are even "national" in scope. However, the application of the court's criteria would exclude spokesmen for private or otherwise "narrow" interests who should not necessarily be denied standing. Consider, for example, representatives of a small group of Puerto Rican citizens who have recently arrived in an ethnically homogenous community from which Puerto Ricans have traditionally been excluded. They would clearly be denied standing to protest biased programming under the criteria suggested by the court, for such a group would not have "significant roots" in the community, could not be considered "representative of broad as opposed to narrow interests" of the community,[52] and would probably not have become "interested in a wide range of community problems." However, the interests and views of a minority group such as this are those which might well be excluded from programs dealing with controversial issues on which the community's ethnic majority takes a contrary position. Since the public interest seemingly requires the expression of more than simply the views and interests of the majority,[53] the

47. American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 495 (1954); Note, 77 HARV. L. REV. 701, 713-14 (1964); *cf.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

48. Red Lion Broadcasting Co. v. FCC, No. 2331-65 (D.C. Cir. 1966).

49. See Broadcasting, Oct. 31, 1966, p. 9, reporting the preparation of questionnaires to solicit comments from broadcasters regarding the "fairness doctrine." The "study conducted by the [Senate Communications] subcommittee . . . has been in works for months . . . [the results of which] will be used to judge whether new legislation is required . . ." in the area. *Ibid.*

50. Principal case at 1005-06.

51. *Id.* at 1005.

52. This would be the case, unless the court is prepared to assume the role of arbiter of what "should" constitute the "true" interests of the community.

53. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248, 1249 (1949); Trin-

Commission should not only permit representatives of all minority interests affected by violations of the "fairness doctrine" to bring such violations to its attention, but it should be required to take such alleged violations into consideration in its licensing order.

In contrast to its explication of "representative," the court offers no definition of the term "responsible." In one sense, the meaning is obvious: to be permitted to have access to the licensing process, a petitioner should be reliable and sincere in its contention. However, it is unclear whether the court thought that "responsibility" requires that a party assert a claim which is actually related to its *own* interests.[54] In the principal case, representatives of the Negro community asserted a claim directly related to their own interest: improper treatment of the issue of racial integration. Yet the NAACP would not and probably should not be considered "responsible" if it had asserted a claim that, in a program discussing new methods of surgery, the licensee had improperly excluded the presentation of a controversial surgical technique. In other words, it would be reasonable for the courts to measure the "responsibility" of a petitioner not only by reference to his *status* in the community, but also with regard to his *relation to the claim* asserted. Indeed, such a correlation may often be essential to the maintenance of a reasonable degree of expertise and an informed discussion in a hearing on a licensee's alleged misconduct. Admittedly, it may not be easy to draw the line in every instance; for example, consider whether the NAACP is a "responsible" representative of an anti-military intervention position in a discussion of the foreign policy of the United States.

Finally, in treating the question of standing, the court followed the lead of the Commission in assuming that every "party in interest" who has standing to intervene at the administrative level would have standing to appeal from an adverse Commission decision as a "party aggrieved."[55] The court's expansion of the criteria for standing as a "party in interest" would thus be applicable in a determination of standing to appeal.[56] Such an assumption may be unwarranted, for "there is no logically necessary relationship between the right to an administrative hearing and a right to appeal."[57] It

ity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).

54. The court pointed out, principal case at 1006, that "the usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the *nature of the claims it asserts as basis for standing.*" (Emphasis added.) At the same time, however, the court appeared to accept the possibility that a group might be responsible and representative without being interested exclusively in the claim it asserts. *Id.* at 1005.

55. *Id.* at 1000 n.8.

56. See *id.* at 1007 n.25.

57. JAFFE, *op. cit. supra* note 44, at 524.

has been suggested that Congress intended the standing requirements for a "party in interest" and for a party "aggrieved" to be determined by similar criteria.[58] The legislative history, however, is not conclusive, and it has been argued with equal conviction that Congress intended that the established criteria for standing to seek judicial review be, at most, exemplary of the criteria to be used for determining standing to intervene at the administrative level.[59] Furthermore, the functional difference between intervention in and judicial review of administrative processes suggests that different standing criteria should be adopted for the two procedures.[60] Standing to intervene at the administrative level is granted primarily for informational purposes.[61] For example, in the principal case, the court expanded standing so as to insure that the Commission would adequately consider allegations of improper broadcasting practices. However, once a record has been compiled on the basis of an evidentiary hearing, standing serves only a remedial purpose insofar as it secures a judicial review of the administrative determination.[62] Thus, those petitioners whose claims were either not considered or were inadequately considered by the Commission should have standing to seek review. However, if a claim has been brought to the Commission's attention, and a hearing has been held on the merits, the petitioner should not have standing to seek review of the Commission's determination, for the ultimate responsibility for applying the "public interest" standard to the facts adduced at the hear-

58. See note 18 *supra*; Brief for appellee, pp. 29-30.

59. See note, 68 YALE L.J. 783, 789 (1959).

60. Professor Davis has provided a useful summary of the distinctions:

> The central problem of intervention is usually the disadvantage to the tribunal and to other parties of extended cross-examination; judicial review involves no such problem. Adequate protection for interests obliquely affected may often be afforded through limited participation; no such compromise concerning judicial review is customary. No constitutional restrictions affect intervention; standing to obtain review is substantially affected by the constitutional requirement of a case or controversy. Intervention means mere participation in a proceeding already initiated by others; obtaining judicial review normally means instituting an entirely new judicial proceeding.

DAVIS, ADMINISTRATIVE LAW TEXT 406-07 (1959).

The court gave no consideration to the possibility that a significant expansion of standing to secure *judicial* review might permit claims to be brought before the court which would fail to meet the requirements of a "case or controversy." In the context of "fairness doctrine" violations, however, the requisite adverse interest would probably be present, even though no economic injury, as such, exists. *Cf.* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

61. Such intervention serves a dual "informational" purpose. First, it places before the Commission evidence bearing on the licensee's past conduct and general fitness to be granted a license. Second, it brings to the attention of the agency interests of other licensees which might be adversely affected by a grant of the license. Hence it serves a *preventive* function as well as one purely informational, and thereby avoids subsequent need for the *remedy* of judicial review.

62. DAVIS, *op. cit. supra* note 60, at 398; JAFFE, *op. cit. supra* note 44, at 522.

ing rests with the Commission.[63] Indeed, it has been said that, under the broad standards governing FCC action, the "court is nearly powerless to invalidate [legitimately] a decision on substantitve grounds."[64] Consequently, increasing access to the courts for a review of a hearing on the merits would not, in most instances, promote the public interest, but rather would tend only to burden the courts with appeals raising issues which are more properly within the realm of the Commission's expertise. Therefore, it would seem unwise to expand the present standards for determining standing to secure a review if such an expansion were to include those who seek review of a Commission determination which is preceded by a hearing on the merits.

Despite the foregoing objections, the court's approach to the problem of standing is a commendable one. But, liberalization of the criteria for standing before the Commission cannot alone assure that the licensing procedures will adequately protect the public interest. Once a broadcaster has applied for a renewal of his license, the formal "petition to deny" is the normal vehicle for the expression of a complaint. Until such an application is filed, however, the informal "complaint" is the principal method of protest.[65] Consideration by the Commission of an informal "complaint" is, like its consideration of the "informal objection," completely discretionary and does not afford a basis for an appeal.[66] In addition, even if allegations in a "complaint" raise a "material question of fact" as to whether a licensee's operations are consistent with the public interest, the Commission need not hold a hearing on a "complaint" until an application for a license renewal is filed.[67] Thus, a

63. See American Broadcasting Co. v. FCC, 179 F.2d 437, 444 (D.C. Cir. 1949); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir. 1938).

64. JAFFE, *op. cit. supra* note 44, at 521.

65. Section 309(d) of the Communications Act provides only for the filing of a "petition to deny" an application *already* filed with the Commission. See 74 Stat. 889 (1960), 47 U.S.C. § 309(d)(1) (1964).

66. Informal or "general" complaints, filed pursuant to § 1.41 of the Commission's Rules and Regulations, can be dealt with in a variety of ways, ranging from a full investigation of the matter pursuant to § 1.1 of the Rules and Regulations to a simple answering letter. See Letter From Ben F. Waple, Secretary, FCC, to the *Michigan Law Review*, Feb. 28, 1966. See generally FCC, *Applicability of the Fairness Doctrine in Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

67. When a complaint is filed with the Commission, if it determines that sufficient facts are set forth to warrant further consideration, it will:

> promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action.

FCC, *supra* note 66, at 10416. The Commission may, of course, institute a proceeding under § 1.91 of its Rules and Regulations for the revocation or issue of a cease and

complainant may have to wait for as long as three years to present its evidence. In the principal case, over ten years elapsed between the filing of the initial complaints with the Commission and the final disposition of the matter in the court of appeals.[68] Even then, there had been no hearing on the merits of the complaint. Clearly, a given view on a controversial issue will not always be represented by so durable an interest group as the one which issued the complaint in the principal case (NAACP). An *ad hoc* citizens' committee, formed solely for the purpose of supporting a given piece of state legislation or advocating municipal attention to some local grievance, would have neither the stability nor possibly the interest to pursue a complaint before the FCC for even three years. Indeed, such a group might not even continue to exist, and consequently the renewal hearing, when it is finally held, would be of little assistance in ascertaining whether the licensee had operated in the public interest; with only the licensee and Commission as parties, the amount of information elicited at a hearing would not be significantly greater than that elicited through less formal procedures.

A possible remedy to this situation would be to adopt a procedure whereby the Commission would be required to consider a complaint at the time it is filed, and if necessary, to hold an immediate hearing on the specific issues raised by the complaint.[69] Furthermore, the Commission could be required to issue a formal memorandum, which would be judicially reviewable, whenever it is presented with a formal complaint. In the event that a complainant's contentions are rejected, he could seek a judicial determination that, were an application for renewal pending at the time, his complaint would raise a "material question of fact" as to whether renewal of the license would be in the public interest. It is obvious that a procedure which required interim hearings whenever an issue of fact is raised would greatly increase the burden now placed on the agency, and consequently the Commission should be given considerable discretion as to when the hearing should be held. Certainly the prerequisites which must be satisfied before a complainant is entitled to a hearing should be more stringent when the hearing is prior to the filing of a license renewal application than at renewal time, and the scheduling of a hearing should depend on

desist order. 47 C.F.R. § 1.91 (1966). However, the Commission would have to consider a violation as an extremely serious one before such procedure would be undertaken.

68. Principle case at 998.

69. Section 1.1 of the Commission's Rules provides that:

> The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate.

47 C.F.R. § 1.1 (1966). See also 47 C.F.R. §§ 1.89, .91, .92, (1966).

the necessity of considering the information immediately. For instance, a complaint of serious broadcaster misconduct brought by an *ad hoc* interest group would obviously be more in need of a prompt hearing than a protest brought by a local chapter of the NAACP. When such a special hearing is held, the Commission should also be allowed, in its discretion, to determine how best to employ its findings. First, the findings could be placed in the licensee's file (as is common in the case of informal "complaints" under the current procedure) to be considered at the time of license renewal. Second, the findings could be used to support an order by the Commission which reduces the station's license term to one year, necessitating evaluation of the licensee's conduct at the end of one year rather than the usual three.[70] Third, the findings could be used as the basis for a Commission order to the broadcaster to show cause why its license should not be revoked immediately.[71] Whichever of these procedures the Commission decides to adopt in a given case, it will have at its disposal, when the issue of renewal is raised, the information relevant to a proper determination of whether the license renewal would be in the public interest.

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70. See § 1.87 of the Commission's Rules and Regulations, 47 C.F.R. § 1.87 (1966), for procedures regarding the modification of a station license.

71. See 47 C.F.R. §§ 1.89, .91, .92 (1966).