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FCC DISCRETION TO DISPENSE WITH EVIDENTIARY HEARINGS ON
ALLEGED PUBLIC INTEREST ISSUES

Folkways Broadcasting Co. v. FCC, 375 F.2d 299 (D.C. Cir. 1967)

Folkways Broadcasting Company, the licensee of the sole AM broadcast facility in Harriman, Tennessee, appealed to the District of Columbia Court of Appeals the decision of the Federal Communications Commission granting the application of F. L. Crowder, Folkways' former owner, for construction and licensing of a second AM broadcast facility in Harriman.¹ Folkways' petition to the Commission to deny Crowder's application alleged that the grant of the broadcast license would be inconsistent with "the public interest, convenience, and necessity" required by the Communications Act of 1934.² On the basis of evidentiary materials supplied by the petitioner and the applicant, but without granting a hearing, the Commission rejected Folkways' contentions and granted Crowder a construction permit.³

On appeal Folkways claimed that it should have been entitled, as a matter of right, to a Commission hearing prior to any decision on the merits because it had raised substantial issues of fact in its petition.⁴ The Commission argued that it had the authority to require evidence and affidavits in support of allegations;⁵ that the requirement of evidentiary support was in the interest of administrative efficiency; that efficiency was itself a matter of public interest, convenience and necessity;⁶ and that the evidence submitted with Folkways' petitions failed to indicate a public interest issue.⁷

1. *Harriman Broadcasting Co.*, 2 F.C.G.2d 320 (1966), *rev'd sub nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967).

Intervention before the FCC is accorded to "parties in interest." 47 U.S.C. § 309(d)(1) (1964). The right to appeal an FCC decision is accorded to "aggrieved parties" and those whose interests have been adversely affected. 47 U.S.C. § 402(b) (1964). The courts have treated these classifications as equivalent. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 524-25 (1965); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511, 1512 (1966); see *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

2. 48 Stat. 1085 (1934), *as amended*, 47 U.S.C. § 309(a) (1964).

3. *Harriman Broadcasting Co.*, 2 F.C.G.2d 320 (1966), *rev'd sub nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967).

4. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 300 (D.C. Cir. 1967).

5. 47 U.S.C. § 309(d)(2) (1964).

6. 47 U.S.C. § 309(d)(1) (1964). The Commission also relied upon the legislative history of the amendments to these provisions. See H. R. REP. No. 1800, 86th Cong., 2d Sess. 2-3 (1960); S. REP. No. 1231, 84th Cong., 1st Sess. 1-4 (1955).

7. *Harriman Broadcasting Co.*, 2 F.C.G.2d 320, 328 (1966), *rev'd sub nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967); see *KGMO Radio-Television Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964).

In *Folkways Broadcasting Co. v. FCC*,⁸ the Court of Appeals held that Folkways was entitled to a hearing so long as it appeared on the face of the petitions that a substantial public interest issue existed. The court reasoned that, despite the Commission's authority to promulgate rules for pleading and to require submission of evidence prior to a hearing, it would be inconsistent with the public interest to use that authority to deny a hearing once the pleadings had raised a substantial issue of fact. The order of the Commission was reversed and the case remanded to the Commission for a hearing on the merits.⁹ In view of the recent decision permitting representatives of the general public to challenge FCC orders,¹⁰ and the tendency of existing licensees to attempt to delay grants of new licenses,¹¹ the decision in *Folkways* raises serious issues concerning the adequacy of the public interest standard as it has been interpreted by the courts and the Commission and the extent of FCC discretion in regard to public interest issues.

In reviewing action taken by the FCC, the primary concern of the federal courts has been to insure full litigation of the public interest, which they have defined on an *ad hoc* basis.¹² Reversals of the Commission are

8. 375 F.2d 299 (D.C. Cir. 1967).

9. Following the remand of the *Folkways* case, the Commission authorized a temporary permit to Crowder under 47 U.S.C. § 309(f) (1964) pending the outcome of the hearing. Folkways again appealed and the court held that the grant of the temporary permit was inconsistent with its determination that a public interest issue was unresolved and, hence, the temporary permit was not authorized by § 309(f) in the absence of emergency conditions required but not present in the instant case. *Folkways Broadcasting Co. v. FCC*, 379 F.2d 447 (D.C. Cir. 1967).

10. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The *United Church of Christ* case has generated a wealth of commentary. See generally, Comment, *supra* note 1; Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U.L.Q. 416; 80 HARV. L. REV. 670 (1967); 44 TEXAS L. REV. 1605 (1966). For a discussion of the original FCC decision in the case, see Comment, *National Policy and the "Public Interest"—A Marriage of Necessity in the Communications Act of 1934*, 114 U. PA. L. REV. 386 (1966).

11. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 303 (D.C. Cir. 1967); *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 837 (D.C. Cir. 1965); *Givens, Refusal of Radio and Television Licenses on Economic Grounds*, 46 VA. L. REV. 1391, 1394-97 (1960). See generally, L. JAFFE, *supra* note 1, at 521, 524; Comment, *supra* note 1, at 1524; Note, *supra* note 10, at 422; 80 HARV. L. REV. 670, 673-74 (1967). Such abuses have led to amendments to the Communications Act; see text accompanying notes 22-33 *infra*.

12. The "public interest" standard was used in the Federal Radio Act, 41 Stat. 1061 (1920) and incorporated in the Federal Communications Act of 1934. See S. REP. NO. 781, 73rd Cong. 2d Sess. 6-7 (1934). The phrase is not included in the definitions section of the Act and has depended upon the Commission and the courts for interpretation. H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 54-55 (1962); Comment, *Na-*

usually based on abuses of administrative discretion or on action taken on the basis of an inadequate record.¹³ In the early cases, the public interest was viewed narrowly as the expression of a Congressional desire to insure clear radio reception. Contested license application cases turned on the possibility of signal interference resulting from unrestricted access to the radio spectrum.¹⁴ Standing to appeal an FCC order was limited to those "directly affected" by the grant or denial of an application.¹⁵ This standing rule and the limited concept of public interest combined to place most of the possible adverse effects of a Commission decision beyond the scope of judicial review. In *FCC v. Sanders Bros. Radio Station*¹⁶ the court attempted to remedy this situation by permitting existing licensees to contest FCC orders granting new licenses, even though such existing licensees were not "directly affected" by the order. Mere competition resulting in economic detriment to the existing licensee was not of itself a relevant issue before the Commission, nor was it a basis for appeal.¹⁷ Competitors were, however, able to assert issues related to the public interest, and they were conceived to be acting as "private Attorney Generals,"¹⁸ since no other parties would be sufficiently aware of FCC action.

The *Sanders* rationale has been expanded by subsequent decisions defining issues upon which the existing licensee might appeal Commission rulings. In line with the early cases that sought to narrowly define the public interest, the Supreme Court, in *FCC v. NBC (KOA)*,¹⁹ held that electrical interference with the existing licensee's signal was in some instances contrary to the public interest. In *Carroll Broadcasting Co.*

tional Policy and the "Public Interest"—A Marriage of Necessity in the Communications Act of 1934, 114 U. PA. L. REV. 386 (1966); cf. 80 HARV. L. REV. 670, 672 (1967).

13. E.g., Willis, *Judicial Review of FCC Decisions, 1965-1966*, 20 FED. COM. B. J. 169 (1966); Willis, *Judicial Review of FCC Decisions, 1964-1965*, 19 FED. COM. B. J. 49, 49-50 (No. 2 1965); see L. JAFFE, *supra* note 1, at 521-525.

14. E.g., *Journal Co. v. Federal Radio Commission*, 48 F.2d 461, 463 (D.C. Cir. 1931); accord, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

15. E.g., *Pulitzer Publishing Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937).

16. 309 U.S. 470 (1940).

17. *Id.* at 473; accord, *Easton Publishing Co. v. FCC*, 175 F.2d 344, 346 (D.C. Cir. 1949). Although the absence of a remedy has traditionally implied the absence of a right, the Court noted in *Sanders* that the absence of a right does not necessarily preclude the existence of a remedy. The *Sanders* case has been termed the "watershed" case in the expansion of standing before administrative agencies. Note, *supra* note 10.

18. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943); accord, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). The phrase "private Attorney Generals" is used to designate appellant's function in accordance with the Constitutional requirement of a "case or controversy."

19. 319 U.S. 239 (1943); accord, *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

*v. FCC*²⁰ the court permitted an important extension of the public interest concept. It held that a public interest issue was raised by an allegation that the competition would result in a net reduction of service to the broadcast community, because neither the existing nor the new station would have sufficient revenues to support public service broadcasts. "At that point the element of [economic] injury [to a competitor] ceases to be a matter of purely private concern."²¹ An allegation that the grant of another license will cause a net reduction in public service broadcasts has come to be called a "Carroll issue."

The liberalization of the standing rules beginning with *Sanders* has resulted in existing licensees attempting to delay a prospective competitor's entry into the field.²² The Commission, in an effort to prevent abuses of this kind, sought to condition the grant of a hearing by requiring that allegations be supported by evidentiary material.²³ If the evidence was found inadequate to support the petition to deny the application, the Commission would dismiss the petition and act on the application. In *Federal Broadcasting Sys. v. FCC*²⁴ the court held that the Commission's dismissal of a petition to deny for failure to specify facts and issues with particularity was beyond the Commission's discretionary power. As in the instant case, the court insisted that the Commission rely solely upon the allegations of the petition itself in determining whether the petitioner was entitled by right to a hearing on the issues.²⁵

20. 258 F.2d 440 (D.C. Cir. 1958).

21. *Id.* at 443.

22. The opportunity to delay the granting of a license by alleging that the increase in competition will cause a reduction in public service creates an artificial barrier retarding entry into broadcasting. See Givens, *supra* note 11, at 1394-1400.

KGMO/Missouri-Illinois Broadcasting is an illustrative case. After the Commission rejected KGMO's petition to deny Missouri-Illinois Broadcasting's application, for failure to support its allegations, the Court of Appeals reversed. *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964). On remand the Commission several times allowed KGMO to amend its petition. When the Commission finally set the case for a hearing, it decided to combine KGMO's renewal application with Missouri-Illinois' application. Fearing a comparative hearing at which only one party would prevail, KGMO withdrew its petition and, together with Missouri-Illinois, requested that both applications be granted. In this the Commission acquiesced. *Missouri-Illinois Broadcasting Co.*, 1 F.C.C.2d 780 (1965). The Commission's acquiescence was based on its determination that KGMO's action in the case was merely a delaying tactic, but such acquiescence is subject to criticism as an abuse of discretion. See Commissioner Cox's dissenting opinion, 1 F.C.C.2d 780, 781; Note, *supra* note 10, at 428-30; *cf.* notes 39-40 *infra*.

23. *Veterans Broadcasting Co.*, 3 P & F RADIO REG. 1113 (1954), *rev'd sub nom.* *Federal Broadcasting Sys. v. FCC*, 231 F.2d 246 (D.C. Cir. 1956).

24. 231 F.2d 246 (D.C. Cir. 1956).

25. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 303 (D.C. Cir. 1967); *Federal Broadcasting Sys. v. FCC*, 231 F.2d 246, 250 (D.C. Cir. 1956).

Following the decision in *Federal Broadcasting*, Congress, at the request of the Commission, added provisions to the Communications Act granting the Commission the authority to require evidentiary material in support of petitions to deny applications.²⁶ The Commission had hoped that by obtaining this power to dismiss protests whose factual bases did not support public interest issues it could end abusive practices by existing licensees who sought to delay the granting of licenses which would create competitors.²⁷ Unfortunately, the result of this amendment was that petitions to deny were more generally framed, and alleged issues rather than facts. The FCC, dissatisfied with this turn of events, prompted Congress to enact the 1960 amendments authorizing the Commission to require specific factual allegations and affidavits in support of those allegations.²⁸ Under the 1960 provisions, hearings would be required only when, after consideration of the pleadings and the supporting affidavits "and other materials of which the Commission may take notice,"²⁹ substantial and material issues of fact remain concerning the applicant's ability to serve in the public interest, convenience and necessity. If the Commission decides that there are no material issues of fact, and that the undisputed facts do not of themselves raise a public interest issue,

. . . [The Commission] shall make the grant, deny the petition, *and issue a concise statement of the reasons for denying the petition which statement shall dispose of all substantial issues raised by the petition.*³⁰

The 1960 amendment rejects the model of a civil proceeding in which a complaint warrants a hearing whenever it alleges facts sufficient to withstand a demurrer; rather, it contemplates a pre-hearing testing of the evidentiary basis of the petition. This testing functions like the preliminary hearing in criminal proceedings in which evidence is introduced and, on the basis of that evidence, the defendant is either released or bound-over for trial. Following the filing of the applicant's reply to the petition to deny, the petitioner and the applicant are required to present affidavits and other evidentiary material. On the basis of this material the Commission will decide whether to grant a hearing. The fact that the Commission may decide, on the basis of this preliminary evidence that no substantial or material issue of fact is presented does not mean that the petition to deny the application failed to raise a substantial issue—an issue which, had it

26. Act of Jan. 20, 1956, ch. 1, 70 Stat. 3; S. REP. No. 1231, 84th Cong., 1st Sess. 1-4 (1955).

27. Act of Jan. 20, 1956, ch. 1, 70 Stat. 3.

28. 47 U.S.C. § 309(d) (1964); H. R. REP. No. 1800, 86th Cong., 2d Sess. 2-3 (1960).

29. 47 U.S.C. § 309(d)(2) (1964).

30. *Id.* (emphasis added).

been supported by the evidence, would entitle the petitioner to relief. A petitioner is entitled to a hearing only if there is a substantial factual question remaining after the evidence accompanying the petition and answer has been considered or if the undisputed facts indicate the presence of a public interest issue. It would seem that Congress' clear intention, as embodied in the 1960 amendments, was to authorize the FCC to decide many of the protests coming before it on the basis of the preliminary evidence, without having to resort to a full hearing.³¹ While it is clear that Congress gave the Commission broad discretion as to whether the applicant or the petitioner should bear the burden of proof on an issue raised by a petitioner once a hearing has been declared necessary,³² no such discretion exists in regard to the petition itself. The petitioner must, by the issues presented and the preliminary evidence before the Commission, convince the Commission that it is entitled to a hearing as a matter of right.³³

The amendments vesting authority in the Commission to dismiss petitions to deny applications prior to a hearing have not been successful in increasing the administrative efficiency of the FCC because of the courts' inclination to favor full litigation of public interest issues. As in the instant case, the courts have been reluctant to sustain the distinction between a "substantial and material issue of fact" and a "substantial issue" contained in the petition³⁴ or to uphold the pre-hearing testing which the distinction contemplates. Although the authority to require evidentiary material prior to the grant of a hearing has been recognized, the Commission has been denied the right to dismiss when it has failed to notify the petitioner of its requirements³⁵ or when it has abused its authority by setting standards which could not be met.³⁶ In attempting to balance the public interest and

31. H. R. REP. No. 1800, 86th Cong., 2d Sess. 2-3 (1960).

32. 47 U.S.C. § 309(e) (Supp. 1967).

33. See text accompanying notes 26-32 *supra*.

34. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 305 (D.C. Cir. 1967); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966); *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965). *But see Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967) (Tamm, J., dissenting); *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 838 (D.C. Cir. 1965) (Bazelon, C. J., dissenting).

35. *E.g.*, *Southwestern Operating Co. v. FCC*, 351 F.2d 834 (D.C. Cir. 1965); *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964).

36. *E.g.*, *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961); *Interstate Broadcasting Co. v. United States*, 286 F.2d 539 (D.C. Cir. 1960).

In regard to petitions to deny based on *Carroll* issues, the Commission has advanced the following as "necessary allegations" to be contained in the petition to deny and to be substantiated by preliminary evidence: (1) a listing of *specific* advertisers that would drop their advertising with the petitioning station or would split their time with the new station; (2) the particular public service programs that would have to be dropped,

administrative efficiency, there can be little doubt that the courts have given greater weight to the former. The rule as it now appears, *despite* the statutory language, is that where issues of the public interest are framed by a petition to deny an application, the Commission *must* grant a hearing.

As the court observed in *Sanders*, it is necessary for someone to be in a position to challenge FCC orders which may be contrary to the public interest even when no individual is directly affected by the order.³⁷ Without this protection, few, if any, license grants would be contested and there would be no substantial check on the Commission's discretion.³⁸ On the other hand, it is possible that the liberalization of standing rules beginning with *Sanders* has proven an unsatisfactory palliative, not only because it reduces administrative efficiency,³⁹ but because the public interest still lacks effective champions.⁴⁰ The standing of an existing licensee to challenge FCC orders creating a competitor is readily subject to abuse when the alleged issues may be phrased generally and unsupported by facts. While

supported by pertinent cost data; and (3) information concerning the ability and the intention of the new station to carry some or all of the public service programming in question. See *Missouri-Illinois Broadcasting Co.*, 3 P & F RADIO REG. 2d 232 (1964); *Tree Broadcasting Co.*, 1 P & F RADIO REG. 2d 15 (1963); *Missouri-Illinois Broadcasting Co.*, 1 P & F RADIO REG. 2d 1 (1963). Although recognizing the difficulty of pleading specific facts to support a *Carroll* issue, the FCC concluded in *Tree Broadcasting* that a lack of specificity in pleading is indicative of an inability to prove the allegations at a subsequent hearing. It should be noted that the Commission's approach has been accepted by the courts when the petitioner failed to allege *any* specific facts to support a *Carroll* issue. *NBC v. FCC*, 362 F.2d 946, 959 (D.C. Cir. 1966). On the other hand, the decision in *Folkways* indicates that the courts' conception of what constitutes a "specific fact" is less demanding than the Commission's. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 305 (D.C. Cir. 1967).

37. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 472, 474 (1940).

38. *Id.* at 475.

39. It has generally been recognized that intervenors before the FCC are concerned primarily with protecting their personal interests. Danaher, J., dissenting in *KGMO*, referred to the court's decision there as "shackling" the administrative process and causing unwarranted delays. *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920, 925 (D.C. Cir. 1964). The attempt to improve administrative efficiency has been the primary motive behind the amendments to § 309. H. R. REP. No. 1351, 88th Cong., 2d Sess. 5 (1964); H. R. REP. No. 1800, 86th Cong., 2d Sess. 2-3 (1960); S. REP. No. 1231, 84th Cong., 1st Sess. 2-4 (1955). The court recognized the problems of administrative delay in the instant case, but felt that the protests were not wholly responsible for the delay. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 303 & n.11 (D.C. Cir. 1967). On the other hand, the Commission has followed a liberal policy in allowing protestants to amend their petitions: in the instant case, *Folkways* was allowed to amend its petition up to two years following filing.

40. *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 838 (D.C. Cir. 1965) (Bazelon, C. J., dissenting). Despite the concept of "private Attorney Generals," it is generally agreed that those who bring protests under *Sanders* are concerned primarily with private interests without regard to the public interest.

it is true that the principal abuse which results from the invocation of *Sanders* is usually only the delay in granting a license creating an additional station, it is doubtful that such delay is itself consistent with the public interest. Both the courts and the Commission have repeatedly held that the public interest is better served by having a variety of stations serving a given area.⁴¹ So long as the profit to be made from operating without competition during the period of delay remains greater than the cost of contesting applications, the process will continue.⁴²

In *Folkways* the Commission made a good faith attempt to comply with the statutory language. Each of the issues presented by Folkways' petition was discussed by the Commission and explanations were given for their rejection.⁴³ Folkways' primary contention had been that the grant of the license would cause a net reduction in broadcast service to the community (the *Carroll* issue).⁴⁴ In view of independent data concerning the economic strength and growth of the community and the number of potential advertisers, the Commission rejected the allegation that the community could not support an additional broadcast facility.⁴⁵

In reversing the Commission's decision, the majority of the court acknowledged that the Commission had the right "to insist upon more than

41. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 472 (1940); *Pulitzer Publishing Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937). In considering applications, the issue has rarely been the *need* for broadcast service, but rather who should render the service. *E.g.*, *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962) (*Suburban Broadcasters*); *H. FRIENDLY*, *supra* note 12, at 54-55; *Givens*, *supra* note 11, *passim*.

42. While it might be argued that raising the cost of contesting applications would prevent such abuses, this might also have the effect of defeating legitimate protests. The alternative to increasing the cost is decreasing the period of delay, particularly where the protest is a sham. Only by granting the Commission authority to dismiss baseless protests can one reduce the cost/delay ratio without impairing the presentation of issues actually concerning the public interest.

For an illustration of the abusive practices, see note 22 *supra*. See also the series of *Interstate* cases: *Interstate Broadcasting Co. v. United States*, 286 F.2d 539 (D.C. Cir. 1960) (*Grossco*); *Interstate Broadcasting Co. v. FCC*, 285 F.2d 270 (D.C. Cir. 1960) (*Patchogue*); *Interstate Broadcasting Co. v. FCC*, 280 F.2d 626 (D.C. Cir. 1960) (*Big River*). *Red River Broadcasting Co. v. FCC*, 267 F.2d 653 (D.C. Cir. 1959) is also illustrative of the lengths to which an existing licensee will stretch his point in an effort to delay. Despite the petitioner's arguments, the court in *Red River* held that possible electrical interference affecting only 200 out of more than 300,000 recipients of broadcast service did not give the petitioner standing before the FCC to contest the application.

43. *Harriman Broadcasting Co.*, 2 F.C.C.2d 320 (1966), *rev'd sub nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967).

44. See *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958); text accompanying notes 20 & 21 *supra*.

45. *Harriman Broadcasting Co.*, 2 F.C.C.2d 320, 324-28 (1966), *rev'd sub nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967); see *Folkways Broadcasting Co. v. FCC*, *supra* at 307-09 (dissenting opinion).

mere conclusional allegations” which result in delay and wasted energy.⁴⁶ In the present case, however, the court felt that the Commission’s specificity requirement was so restrictive as to make it impossible for the petitioner to obtain a hearing on the *Carroll* issue. Given the speculative nature of the damages involved, the court held that specification was impossible.⁴⁷ The majority and dissenting opinions focus on different aspects of the case. The concern of the majority is to reiterate that the precise issues involved in the *Carroll* case were raised and required a hearing.⁴⁸ The dissenting opinion and the Commission, on the other hand, were primarily concerned with the evidence needed to sustain a *Carroll* issue, evidence which must demonstrate that the loss in revenues to the existing licensee would result in a reduction of service rather than a mere decrease in profits.⁴⁹

When the standing rules were expanded to include representatives of the general public in *Office of Communication of the United Church of Christ v. FCC*,⁵⁰ the court indicated that the Commission would be able to exercise its discretion both in selecting representatives of the public and in determining whether public interest issues were at stake. In light of the present case, and the court’s consistent preference for litigation over a more efficient administrative procedure, it would appear that the ability of the Commission to exercise such discretion when the public interest is concerned is illusory at best.

In cases such as *Folkways*, in which the Commission is concerned with the initial grant of an application, the desirability of increasing the number of radio stations serving a community should not foreclose examination of other public interest issues.⁵¹ But this must not be taken to mean that the

46. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 303 (D.C. Cir. 1967); *accord*, *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 837 (D.C. Cir. 1965); *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964).

47. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 304 (D.C. Cir. 1967).

48. *Id.* at 304-05.

49. *Id.* at 307-08; *Harriman Broadcasting Co.*, 2 F.C.C.2d 320, 326 (1966), *rev’d sub. nom.* *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967).

50. 359 F.2d 994 (D.C. Cir. 1966).

51. *See* *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962) (*Suburban Broadcasters*); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958). In *Suburban Broadcasters*, the Commission denied the grant of a license because the applicant had made no attempt to determine the broadcast needs of the community involved, particularly with regard to public service broadcasts. In affirming the Commission’s action, the court held that it was within the Commission’s authority to “. . . require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them.” *Henry v. FCC*, *supra* at 194. In *Carroll* the court held that the Commission should consider the economic impact of a new station on the ability of all the stations serving an area to continue public service broadcasts. *See* text accompanying note 21 *supra*. *See also* *Givens*, *supra* note 11, *passim*.

public's interest in having additional broadcast facilities should be irrevocably subordinated to the private interests of existing licensees. In seeking the power to dismiss petitions to deny applications without full hearings, the Commission is attempting to serve the public interest beyond any consideration of administrative efficiency.⁵² This is especially apparent in cases which involve challenges to applications for renewal of existing licenses. The issue was raised in *United Church of Christ*, when the Commission unsuccessfully contended that the public interest in maintaining broadcast service by the existing licensee pending a decision on the merits should control.⁵³ The arguments in favor of allowing the existing licensee to continue broadcasting pending a decision on the merits of the challenge lie not merely in the economic injury to the licensee resulting from withholding his broadcast rights, but more emphatically in the disruption of public service—particularly when the final order of the FCC does in fact result in renewal of the license.⁵⁴

52. Comment, *supra* note 1, at 1523-27; 80 HARV. L. REV. 670, 674 (1967).

53. 80 HARV. L. REV. 670, 674 (1967). *But see* Comment, *supra* note 12.

54. The Commission feels that the public interest is jeopardized by a reduction in service caused by the withdrawal of broadcast licenses and has shown reluctance to remove a station from the air for this reason. Despite a record of airing segregationist material and refusing equal time to opponents of segregation, the Commission renewed station WLBT's license for a year contingent upon WLBT giving balanced service to the community, because the Commission felt that WLBT's continued existence was essential. The Commission's hope was that the station would demonstrate that it was capable of broadcasting in the public interest. *Lamar Life Broadcasting*, 1 F.C.C.2d 1484 (1965). This action was reversed by the court in *United Church of Christ*, which held that WLBT's past record of service demonstrated the necessity of an evidentiary hearing as to the station's ability to operate in the public interest. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The practical effect of the court's action was to remove WLBT from the air pending the outcome of the hearing.

Prior to *United Church of Christ*, the Commission had used similar procedures. In *KWK Radio*, the Commission refused renewal of a license because the station had operated fraudulent quiz programs. *KWK Radio, Inc.*, 34 F.C.C. 1039, *aff'd*, *KWK Radio, Inc. v. FCC*, 337 F.2d 540 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 910 (1965). Several groups applied for the license formerly held by KWK and, pending a comparative hearing on these applications, the Commission permitted the former licensee to broadcast as a trustee for the applicants, subject to renewal after 60 days. *KWK Radio, Inc.*, 1 F.C.C.2d 758 (1965) (60 days, July 31 to Sept. 30). Unlike the one-year broadcast authorization in *United Church of Christ*, the shorter periods of authorization in *KWK Radio* were consistent with 47 U.S.C. § 309(f) (1964). Although only one renewal of such a temporary authorization is expressly permitted by the statute, three renewals were made by the Commission. *KWK Radio, Inc.*, 2 F.C.C.2d 437 (1966) (30 days, Jan. 31 to Feb. 28); *KWK Radio, Inc.*, 1 F.C.C.2d 1393 (1965) (60 days, Nov. 30 to Jan. 31); *KWK Radio, Inc.*, 1 F.C.C.2d 876 (1965) (60 days, Sept. 30 to Nov. 30) (inexplicably, this order is also printed at 1 F.C.C.2d 1499). Following this series of temporary authorizations, one of the applicants was nominated to continue the operation of the station pending the final decision at the comparative hearing. *Beloit Broadcasters*,

In their dealings with the Commission, the courts are primarily concerned with insuring that the public interest entrusted to the Commission will not be shortchanged in an effort to achieve administrative efficiency⁵⁵ or because of an inadequate investigative staff.⁵⁶ The court in *Folkways* held out the possibility that a clearer statement by the Commission of the reasons for which it rejected Folkways' petition, especially if based on evidence independently gathered by the Commission, might have eliminated some of the delay in the processing of this application.⁵⁷ The real difficulty, however, lies in the Commission's failure to clarify its requirements for the contents of petitions to deny applications by merely repeating the statutory language in its regulations⁵⁸ and in its failure to work with the courts to-

Inc., v. FCC, 365 F.2d 962 (1966); see *Pike-Mo Broadcasting Co.*, 2 F.C.C.2d 207, 427, 590, 946 (1966). This nominee, Radio Thirteen-Eighty, Inc., eventually was granted the license at the conclusion of the comparative hearing. It would seem that when renewals of licenses are contested, as in *United Church of Christ*, such a "trustee" could be appointed even in the absence of applicants willing and able to operate the station, thus preserving both facets of the public interest.

Particularly in situations involving problems of censorship and freedom of speech, whether initiated by the Commission or by various civic-minded organizations, it would seem preferable not to withdraw licenses until both administrative and judicial proceedings have settled the issue adversely to the broadcaster. Cf. Arlen, *Watchman, What of the Night? . . . Or, God Bless Our Public Interest: Further Fables for Our Time*, THE NEW YORKER, Feb. 3, 1968, at 98.

In regard to the summary renewal of all licenses in Missouri and Iowa which was criticized in Arlen, *supra*, at 103, see Millstone, 2 *on FCC Oppose TV Renewals*, St. Louis Post-Dispatch, Feb. 21, 1968, § A, at 31, col. 1, for a report of Commissioners Cox and Johnson's dissenting opinions. Commissioner Johnson referred to the "cynical squandering of the [FCC's] valuable largess" and stated that the present license and renewal procedures served neither the public nor the broadcast industry.

55. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299 (D.C. Cir. 1967). The majority opinion includes this statement:

The court does not relish the task of devising different standards from those adopted by the Commission. Undue interference by the court is itself contrary to the public interest, but we respectfully suggest that the Commission seek a ground upon which the *Carroll* doctrine can stand which will avoid unnecessary and time consuming hearings but which at the same time will not make the right to a hearing practically unattainable.

Id. at 305. See generally, L. JAFFE, *supra* note 1, at 521-25; Willis, *Judicial Review of FCC Decisions, 1965-1966*, 20 FED. COM. B. J. 169 (1966); Willis, *Judicial Review of FCC Decisions, 1964-1965*, 19 FED. COM. B. J. 49, 49-50 (No. 2 1965).

56. According to Arlen, *supra* note 54, at 104, there are only three members of the FCC staff directly concerned with investigating the public interest.

57. In its conclusion the majority opinion hinted that it was merely the Commission's handling of the dismissal and not the dismissal itself which was improper. *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 305 (D.C. Cir. 1967).

58. The relevant portion of the statute reads:

The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

ward a meaningful definition of the "public interest, convenience, and necessity." The courts' attempts to deal with the problem alone on an *ad hoc* basis has been of questionable success, and often the courts and the Commission appear to be working at cross-purposes.⁵⁹

Although a major redrafting of the Communications Act has been suggested elsewhere because of the apparent unworkability of the "public interest" standard,⁶⁰ its very flexibility in the light of changing conditions in the industry may warrant its retention. At the same time, it is clear that the Commission, broadcasters and the general public would all profit by an expansion of the Commission staff handling non-technical public interest issues. In view of the courts' rejection of Commission attempts to dismiss petitions to deny applications without a full hearing, Congress should explicitly grant or deny such authority. In regard to challenges to the renewal of licenses, the Commission should be given express authority to allow the licensee to continue to broadcast pending a final decision on the merits of the challenge.

The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit. 47 U.S.C. § 309(d)(1) (1964).

The relevant portions of the regulations read:

Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. 47 C.F.R. § 1.580(i) (1967).

The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. 47 C.F.R. § 1.580(j) (1967).

See *KGMO Radio-Television, Inc. v. FCC*, 336 F.2d 920 (D.C. Cir. 1964). *See also* Note, *supra* note 10, at 431; Comment, *supra*, note 12; 80 HARV. L. REV. 670, 672 (1967).

59. As is demonstrated by the Commission's action on remand in the present case. *See* note 9 *supra*.

60. *Cf.* H. FRIENDLY, *supra* note 12, at 72-73; L. JAFFE, *supra* note 1, at 524-25.