

# POLICY BY RULE OR *AD HOC* APPROACH— WHICH SHOULD IT BE?

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The cornerstone of the procedural requirements set forth in the Administrative Procedure Act, which became law in 1946, was the dichotomy between adjudication and rule-making.<sup>1</sup> Stated very simply, rule-making is agency action regulating future conduct and is intended to implement and prescribe law or policy, while adjudication is intended to cover application of law and policy to past conduct or to licensing determinations. Nevertheless, just as court decisions in applying law to specific cases may lay down new law and policy for the future, agency adjudication also has a prospective application. In the eleven years since the enactment of the Administrative Procedure Act, the procedural requirements applicable to the two different activities have been extensively refined by court decisions. Nevertheless, rather than being greatly clarified, the demarcation between these two has become somewhat blurred. Furthermore, interpretative decisions have made it more apparent that there is a broad area for agency action in which policies are formulated by rule on the one hand, or by *ad hoc* adjudication on the other, solely at the discretion of the agency.

This article is not concerned with the legal question of where agency action *must* be adjudicatory or rule-making, but rather with the discretionary question of when a proposed action *ought* to be taken by rule-making instead of adjudication. The great strength of the administrative process, as contrasted with the purely judicial, is the flexibility made possible by the broad areas existing for discretionary action by an agency. The continued development and advancement of the administrative process, rather than its decline or demise, may well depend upon the wisdom exercised in these areas of discretion. Therefore, a critical examination of the various considerations which may determine whether agency policy, and particularly that of the Federal Communications Commission, is developed through rule-making, or case-by-case adjudication, or some hybrid method is desirable. Before turning to these considerations, it is believed appropriate to set out briefly the legal background of the topic.

## I

### BACKGROUND—OR CHENERY REVISITED

Prior to the Supreme Court's decision in the second *Chenery* case,<sup>2</sup> considerable doubt existed as to the propriety, at least in certain circumstances, of agency develop-

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<sup>1</sup> 60 STAT. 238-39 (1946), 5 U.S.C. §§ 1003, 1004 (1956).

<sup>2</sup> SEC v. *Chenery Corp.*, 332 U.S. 194 (1947).

ment of policy by case-by-case adjudication rather than appropriate rule-making proceedings. This doubt stemmed in large part from the first *Chenery* case,<sup>3</sup> and, in the communications field, from *Heitmeyer v. FCC*.<sup>4</sup> In the latter case, the court of appeals, in reversing a Commission opinion denying an application where the applicant proposed to use borrowed funds, strongly criticized the Commission for its failure to promulgate any general rule as to minimum financial qualifications of applicants for licenses:<sup>5</sup>

On such an important question we think the public is entitled to have the statute implemented by a regulation setting out clearly and concisely just what the Commission regards as a minimum standard . . . . Evidently Congress has the same intent. . . .

The second *Chenery* case conclusively settled the question of agency authority to develop policy through adjudication.<sup>6</sup> The Supreme Court, in upholding the SEC's right to proceed by order instead of by rule, stated:<sup>7</sup>

. . . problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective.

<sup>3</sup> *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The Commission, relying on certain equity cases, had refused to approve a corporate reorganization plan until it was amended to provide that preferred stock purchased by the management while reorganization plans were pending before the Commission would be surrendered to the corporation at cost plus interest. *Federal Water Service Corp.*, 8 S.E.C. 893, 917 (1941). The Supreme Court reversed, but the precise ground for reversal was not clear. At one point, the Court seemed to hold that the Commission could proceed only by rule-making, not by adjudication:

"Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. . . . But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority." 318 U.S. at 92-93.

But the Court's central holding appeared to be that the equity cases relied upon by the Commission did not sustain the agency's position. Thus, the Court concludes its opinion:

"We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. at 95. See Note, 56 HARV. L. REV. 1002 (1943); KENNETH C. DAVIS, *ADMINISTRATIVE LAW* 552-55 (1951).

<sup>4</sup> 95 F.2d 91 (D.C. Cir. 1937).

<sup>5</sup> *Id.* at 98.

<sup>6</sup> The Court's holding in the second *Chenery* case was foreshadowed by the following language in *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946):

"Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle."

<sup>7</sup> 332 U.S. at 202-03. The Commission, upon remand, see note 2 *supra*, had entered the same order, based this time on its experience with conflicts of interest in reorganization proceedings. See *Federal Water Service Corp.*, 15 S.E.C. 849 (1944). The Commission noted the Supreme Court's "indication" of the advisability of a general rule covering trading by insiders during reorganization, but expressly declined the invitation as of that time.

The Court noted the retroactive effect of the Commission's order but held that "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effects of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."<sup>8</sup>

It is unnecessary to labor the point further. *Chenery* establishes the agency's discretion to proceed either by general rule or by individual *ad hoc* decision, and that decision has not been subsequently narrowed. The applicability of the *Chenery* principle to FCC action, while once in some doubt, is now clear.<sup>9</sup>

## II

### THE PERTINENT CRITERIA FOR CHOOSING BETWEEN GENERAL RULE-MAKING OR INDIVIDUAL *Ad Hoc* DECISION

While agency discretion to choose between proceeding by general rule-making or individual *ad hoc* decisions is thus clear, the criteria or bases upon which that discretion should be exercised are more obscure. One central proposition does stand out: The agency should set out, as fully and precisely and as soon as possible, "the guiding principles of administrative behavior."<sup>10</sup> For the administrative agency is not in the narrowly confined position of the courts who can develop law in, for example, the antitrust field only when a suitable case is presented to them.<sup>11</sup> The agency has available to it a whole arsenal of administrative devices by which it can develop and announce new policies for the edification of the regulated persons or groups. It is, therefore, almost axiomatic that, wherever feasible or appropriate, such policy should not be "sprung" upon the surprised party in a particular adjudicatory decision, but rather should be made clear through prior rule-making proceedings. As aptly stated by the Court in the second *Chenery* case:<sup>12</sup>

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

The question, however, is when is it feasible or appropriate to employ rule-making, and when not. Viewed generally, the considerations or criteria favoring the *ad hoc* approach are believed to be threefold.

<sup>8</sup> 332 U.S. at 203.

<sup>9</sup> *Storer Broadcasting Co. v. United States*, 220 F.2d 204 (D.C. Cir. 1956), *rev'd*, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1957). This case is discussed in detail, *infra* p. 669. See *ABC v. United States*, 110 F. Supp. 374, 383-84 (S.D.N.Y. 1953), *aff'd*, *FCC v. ABC*, 347 U.S. 284 (1954); *CBS v. United States*, 316 U.S. 407, 421 (1942).

<sup>10</sup> U.S. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 29 (1941).

<sup>11</sup> See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 145-48 (1921).

<sup>12</sup> 332 U.S. at 202.

### 1. *The complex or varying factual nature of the problem*

Where the particular problem is "so specialized" or so dependent for solution on the various complex factual situations presented as to render it "impossible of capture within the boundaries of a general rule," the *ad hoc* approach is necessary as indicated by the Court in *Chenery*.<sup>13</sup> While, as shown by the example commission situation described at p. 665, *infra*, this criterion does have validity in many situations, it should not be promiscuously applied. There is a tendency, I think, to decide against rule-making solely because a rule cannot be drawn which will clearly delineate or predict the agency's action on a given problem involving a complex factual situation. But a broad rule can be drawn in many such situations which, although not foretelling the outcome of agency action, does serve the fundamental purpose of unmistakably informing the public of the agency's basis or stake in the particular problem.<sup>14</sup> It is this latter consideration, and not precise predictability of agency action, that is the touchstone of administrative rule-making.<sup>15</sup>

To illustrate, the SEC in the *Chenery* situation could easily have promulgated a very broad rule which simply indicated its concern and future scrutiny of all trading by insiders during reorganization to determine whether such trading met the "fair and equitable" standards of section 11 of the Holding Company Act.<sup>16</sup> While such a rule would not necessarily inform parties of the Commission's ultimate holding as to their particular transaction, it would put them on notice as to the necessity for meeting a general standard of fairness; and it might have led to informal negotiations or consultation with the agency to avoid later controversy. In this way, the harshness of retroactive *ad hoc* adjudication, which so disturbed the dissenters in *Chenery*, could have been avoided.

### 2. *Need for accumulating expertise*

The agency may not know enough about the particular problem to warrant issuance of rule-making. This may be due to either the newness of the agency or the problem before it. It may, therefore, be necessary to proceed on a case-by-case basis until the necessary experience to draft an appropriate rule has been accumulated.

<sup>13</sup> *Id.* at 202-03. See also ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *op. cit. supra* note 10. And in the Benjamin Report, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 295 (1943), Mr. Benjamin states that it may be that ". . . the formulation of regulations should await clarification of the problem by the process of adjudication in a variety of cases . . . it [agency] may, finally, determine that a particular problem is of too great complexity to permit of any codification. . . ."

<sup>14</sup> An example in the communications field is the Commission's TV overlap rule, stating that no license for a TV station shall be granted to a party if such party "owns, operates, or controls another television broadcast station which serves substantially the same area." 47 C.F.R. § 3.636 (Supp. 1956). The question of what constitutes "substantially the same area" prohibited by this rule must be resolved on facts of the particular case, and often in hearing, but the rule does serve to alert applicants to the Commission's general policy on this matter. See *The Enterprise Co.*, 9 PIKE & FISCHER RADIO REG. 816, 818N-818Q (1954) [hereinafter cited as "R.R."]; *cf.* *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 515-19 (D.C. Cir. 1955).

<sup>15</sup> Further, when the parties have thus been apprised of the agency's concern, they can often take steps to learn whether their particular proposal contravenes the agency policy. Such steps might take the form of informal conversations or a formal request for a declaratory ruling.

<sup>16</sup> 49 STAT. 821 (1935), 15 U.S.C. § 79k (1952).

This method of proceeding slowly and developing the agency rule as the needed expertise is built up has a great deal to recommend it. The first impression or reaction to a matter often turns out to be quite erroneous, after development of all the facts and considerations. In a sense, this question of "ripeness" for rule-making is similar to that dealt with by the Supreme Court in deciding whether some difficult issue is "ripe" for its review. But here again, I believe that this consideration should not be used as an excuse to avoid promulgation of a broad rule, *wherever* appropriate, in order to advise interested parties of the agency's general direction or attitude. Such a broad rule can later be made more specific, when insight on the problem has been obtained through numerous *ad hoc* adjudications involving application of the rule to factual situations.

### 3. *Inability to foresee problem*

It is a misnomer to label this factor as one favoring an *ad hoc* approach. It is, however, a fact of administrative life that no agency can anticipate by rule all the problems, whether general or specific, that may confront it. When such an unforeseen problem arises, the agency has the choice of making a policy determination in the particular case or of withholding action until the conclusion of general rule-making proceedings to establish a governing rule. The latter course may, however, be precluded by the delay entailed. In short, the problem is before the agency, and the fact that it has not been anticipated does not excuse the agency from acting.

On the other side of coin, the following considerations strongly indicate the use of rule-making:

#### 1. *Desirability of definitive guides to agency action*

This point has already been made and needs no elaboration. To the extent that the agency knows the policy it desires to follow, to that same extent it should inform those coming within its regulation of that policy.

#### 2. *Avoidance of retroactivity*

As a corollary to 1., it is obviously desirable to avoid, if possible, the harsh effect of *retroactive* application of agency policy inherent in the case-by-case method. While, as shown by the second *Chenery* decision,<sup>17</sup> the factor of retroactivity does not render the *ad hoc* adjudication invalid, it certainly goes against elemental notions of fair play when it is considered that the agency, unlike the courts, is not restricted to this one method of dealing with those regulated.

The FCC, to a large extent, does not engage in retroactive procedures because of the statutory scheme, which requires prior Commission consent to construction

<sup>17</sup> 332 U.S. at 203-04. The Court in *Chenery* relied upon *Addison v. Holly Hill Co.*, 322 U.S. 607, 620 (1943). The latter case involved a retroactive change in a defective regulation defining the "area of production" under § 13(a) of the Fair Labor Standards Act, which exempts employees in specified occupations "within the area of production (as defined by the Administrator). . . ." 52 STAT. 1067 (1938), as amended, 29 U.S.C. § 213(a)(10) (1952). *But cf.* *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932). See Note, 60 HARV. L. REV. 627 (1946); CARDOZO, *op. cit. supra* note 11.

of facilities, modification of licenses or permits, transfer of license, etc.<sup>18</sup> Further licenses are for limited periods, must be renewed regularly, and licensees do not obtain property rights on any frequency beyond the term of the license.<sup>19</sup> But there have been occasions where after a grant of the application, the Commission's policy has changed, and after that change, retroactive *ad hoc* action has been taken. Thus, the Commission's "duopoly policy" was sharply reversed in 1944 and, as a consequence, hearings were held in about 45 cases which resulted in the multiple owner being required to divest himself of one of the two stations which he had previously owned in the same community.

Another example of retroactive Commission *ad hoc* adjudication reached the courts, and its treatment there is indicative of the distaste and hostility that such a procedure can arouse in given circumstances. In *Churchill Tabernacle v. FCC*,<sup>20</sup> the Commission in 1943 had refused to renew a radio station's license until the licensee repudiated a long-term contract between itself and the Tabernacle. The latter had owned the radio station in question, and had sold it in 1931 to the present licensee, upon the contractual provision, *inter alia*, that it would be allowed to use a substantial portion of the station's broadcast time over a 100-year period. The Commission approved the arrangement and granted the licensee renewals of license until its action in 1943. Upon review, the court of appeals, stressing the importance of exhausting "all possible avenues of compliance with the congressional purpose before requiring complete destruction of the private interest," reversed,<sup>21</sup>

. . . for the reasons we have stated, we think the case should be remanded to the Commission to determine, on sufficient findings, whether a contract, modified as to the length of its existence, but allowing a reservation for a reasonable broadcast time, would be contrary to public interest. *And we find nothing in the present rules or practice of the Commission to forbid some such arrangement on these lines.*

Upon remand, the Commission promulgated rules defining the length of contract and hours of time which could be legally reserved.<sup>22</sup> Upon appeal, the validity of these rules was sustained.<sup>23</sup> The matter of reserved time contracts thus points up the desirability of avoiding the harsh retroactive situation and of proceeding, wherever possible, by more reasonable rule-making efforts.<sup>24</sup>

<sup>18</sup> See, e.g., §§ 308, 309, 319, 310(b) of the Communications Act of 1934, as amended, 66 STAT. 714-18, 47 U.S.C. §§ 308, 309, 319, 310(b) (1952).

<sup>19</sup> Sec. 309(d) of the Communications Act of 1934, which provides in pertinent part as follows: "Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein. . . ." 66 STAT. 715, 47 U.S.C. § 309(d) (1952).

<sup>20</sup> 160 F.2d 244 (D.C. Cir. 1947).

<sup>21</sup> *Id.* at 248. (Emphasis added.)

<sup>22</sup> 47 C.F.R. §§ 3.139, 3.241, 3.659 (Supp. 1956) (the so-called "reserved time" rules).

<sup>23</sup> *Felman v. United States* (unreported) Civil No. 49 C. 227, N.D. Ill., *aff'd*, 339 U.S. 973 (1950).

<sup>24</sup> *Cf. Regents of Georgia v. Carroll*, 338 U.S. 586 (1950).

### 3. *Sound administration*

The case-by-case method, involving a lengthy hearing, examining initial decision, exceptions, oral argument,<sup>25</sup> etc., is more time-consuming than the usual rule-making proceeding of comments filed in response to a notice of proposed rule-making. Further, the *ad hoc* method is likely to involve litigation in a multiplicity of cases, whereas the rule-making, except for the occasional hearing required on a waiver request or difficult factual situation, often settles the matter without any need for future litigation. But what is more important, sound administration demands that an agency which has reached a fixed policy on some matter not require an applicant to go through a burdensome and *useless* hearing. Such a time-consuming procedure is unfair to the applicant and dissipates the agency's resources, which are undoubtedly taxed to the fullest. And it does not promote compliance with agency policy, perhaps without litigation, as a rule can do.<sup>26</sup>

### 4. *Appropriateness of rule-making techniques*

The development of a quasi-legislative policy on an *ad hoc* basis suffers from the fact that in individual cases, there are ordinarily a very limited number of participants and a variety of issues. On the other hand, by utilizing the rule-making procedure, the agency is able to afford all interested parties an opportunity to participate and present their views on a single question of basic policy affecting both the public at large and individual licensees or prospective licensees of the agency. In short, broad policy should be shaped by the agency members relying heavily on their expert staffs, with the views of as great a portion of the people likely to be affected taken into account. And here it should be noted that with the congressional tendency to provide for stricter separation of function in adjudicatory cases, the agency is often, to a considerable degree, cut off from its staff when it chooses the adjudicatory route.<sup>27</sup>

### 5. *Reviewability*

In statutory schemes like the Communications Act, where, to a great extent, the agency regulates by specifying that a license will not be issued on the establishment

<sup>25</sup> See, e.g., § 409(b) of the Communications Act of 1934, as amended, 66 STAT. 721, 47 U.S.C. § 409(b) (1952). Cf. *American Trucking Ass'ns v. United States*, 344 U.S. 298, 318-20 (1953).

<sup>26</sup> Thus, the Supreme Court, in commenting on the Commission's Chain Broadcasting Rules in *CBS v. United States*, 316 U.S. 407, 418 (1942), stated:

"Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails."

<sup>27</sup> See § 4(d) of the Communications Act of 1934, as amended, 66 STAT. 711, 47 U.S.C. § 154(b) (1952), for an example of an extremely strict separation of function in all adjudicatory matters. I do not mean to imply that the agency would be isolated from its staff in adjudicatory policy proceedings; the staff could file formal pleadings. But such limited participation by the agency's expert staff, through an appropriate bureau which became party to the proceeding, does not meet the really intensive and continuous participation that is desirable in assisting the agency to formulate its underlying policies. See Fisher, *Communications Act Amendments, 1952—An Attempt to Legislate Administrative Fairness*, elsewhere in this symposium.

of certain facts, the fixing of agency policy by rule rather than adjudication makes the seeking of review in the courts more feasible. For, it takes considerable courage for a licensee, whose application for renewal has been denied because of some policy established in an *ad hoc* case, to challenge that policy in the courts; for the most part, such licensees would simply modify their operation in a way to meet the policy.<sup>28</sup> When the policy has been formulated in a rule, however, that rule can immediately be challenged either by the licensee (without endangering its permit) or by some interested party who is adversely affected. Thus, in the case of the Chain Broadcasting Rules, it was uncertain, as the Supreme Court noted, that any licensee would endanger its license by refusing to comply with regulations.<sup>29</sup> But the networks affected had standing to immediately seek review of the rules and did so.<sup>30</sup> The desirability of having the courts pass on the legality of basic agency policies at the earliest opportunity needs no discussion.<sup>31</sup>

### III

#### FCC EXAMPLES ILLUSTRATING ABOVE CRITERIA

The foregoing are believed to be the applicable guideposts for determining whether to proceed in a given situation by rule-making or by *ad hoc* adjudication (or, perhaps, by a general declaration of policy in a public release). A judgment involving some of these criteria is called for on the basis of the facts of each situation. While some examples in the communications field have already been noted, it is believed that the administrative technique here applicable can be best pointed up by further and more specific examples of commission action.

##### A. *Ad Hoc* Procedure

One of the best examples of Commission *ad hoc* procedure is its treatment of programming problems. Under the Communications Act of 1934, as amended,<sup>32</sup> the essential responsibility for what shall be presented over the air rests with the station licensees themselves, and the Commission has no authority to interfere with the management of stations in the day-to-day exercise of that responsibility. The Commission's authority is primarily limited to a periodic review, usually upon application

<sup>28</sup> This "gun-at-the-head" consideration would be lacking in cease and desist proceedings. See § 312(c) of the Communications Act, 66 STAT. 716, 47 U.S.C. § 312(c) (1952). However, even here rules promote review of commission action. For example, a licensee receiving a cease and desist order because of the carrying of a particular program might not think the single program worth the expense of protracted litigation, including even the initial commission hearing. But a sponsor, presenting the program over several stations, might well appeal. In the absence of a declaratory ruling, such a party could challenge the policy only if it were embodied in a rule.

<sup>29</sup> *CBS v. United States*, 316 U.S. 407, 413, 423-24 (1942).

<sup>30</sup> *CBS v. United States*, *supra*; *NBC v. United States*, 319 U.S. 190 (1943); see also *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1957).

<sup>31</sup> In this respect, the worst avenue an agency can take in establishing its policy is that of a general policy declaration. For such a declaration, however great its effect or influence on those regulated, is not reviewable. See *Hearst Radio Co. v. FCC*, 167 F.2d 225 (D.C. Cir. 1948), involving an attempt to review a portion of the Commission's Blue Book (Public Service Responsibilities of Broadcast Licenses, 1947).

<sup>32</sup> 62 STAT. 862 (1948), 47 U.S.C. § 326 (1952).

for a renewal of license, of the over-all operation of a station to determine whether each station is fulfilling its obligation to operate in the public interest. But it is apparent that the question of operation in the public interest is one so "varying in nature as to be impossible of capture within the boundaries of a particular rule" (factor 1, *supra*), and that the Commission must, therefore, treat programming problems on a case-by-case basis.<sup>33</sup>

An example of factor 3, *supra*—the necessity to use *ad hoc* procedure because the problem has not been foreseen—is the so-called *Macon* situation.<sup>34</sup> Following the 1952 lifting of the "freeze" on processing television applications, two Macon AM stations filed competing applications for a permit to operate on UHF Channel 47 in Macon. In order to avoid the time-consuming comparative hearing needed to choose the better applicant and to get on the air before the establishment of VHF service in the area, the two decided to merge and form a new company. The Commission was thus presented with a novel situation, not anticipated by its rules or any prior decision—namely, whether the combination of competing AM licensees for a joint venture in a field other than AM broadcasting is contrary to the public interest, because of possible impairment of the competitive relation of the two AM stations. The Commission balanced this negative consideration against the favorable factors of early development of UHF service in the area and detailed plans for separate and independent operation of the two AM stations, and found that public interest would be served by a grant. It should be noted that the decision could not be postponed until the conclusion of some general rule-making without the loss of the "critical" factor of the desirability of "early establishment of UHF service in Macon."

#### B. General or Detailed Policy Declarations

An example of Commission procedure by issuance of general policy statements is the *Editorializing* Report.<sup>35</sup> In 1948, the Commission held hearings on its own motion because of its "belief that further clarification of the Commission's position with respect to the obligation of broadcast licensees in the field of news, commentary, and opinion was advisable." After hearing 49 witnesses and receiving comments from 21 other persons or groups, the Commission issued its Report in 1949.<sup>36</sup> The essence of that Report is that the licensee, in order to meet its obligation to operate in the public interest, must be fair in the presentation of controversial issues—that he must allow both sides to be heard. A rule embodying this "fairness" doctrine

<sup>33</sup> Several of these cases have reached the courts. Thus, it is now established that a broadcast licensee may not utilize a license to operate a station, given him to serve the "public interest," for the sole or primary purpose of advancing his own private interests. *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931), or to foster his own particular ideas on social problems while vilifying and blackmailing opposing groups or attacking racial or religious minorities, *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 284 U.S. 685 (1932). See, also, *Independent Broadcasting Co. v. FCC*, 193 F.2d 900 (D.C. Cir. 1951), *cert. denied*, 344 U.S. 837 (1952).

<sup>34</sup> *Macon Television Co.*, 8 R.R. 897 (1953).

<sup>35</sup> *Editorializing by Broadcast Licensees*, 1 R.R. 91:201 (1949).

<sup>36</sup> FCC release No. 215, June 2, 1949.

could not have accomplished any more. For, the Report notified licensees and the public of the Commission's position as fully as possible,<sup>37</sup> and it is not believed that such a position, even if embodied in a rule, would be appealable outside the context of an actual commission order in some case.

The so-called "political broadcast primer" illustrates a more detailed commission policy statement. Under section 315 of the Communications Act,<sup>38</sup> the broadcast licensee, if he has permitted any person who is a legally-qualified candidate for any public office to use his station, "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Over the years, a considerable body of commission rulings have been issued, interpreting this provision in particular factual situations. In September 1954, the Commission issued a "primer," recapitulating its rules in this field and summarizing its more important rulings. It stated:<sup>39</sup>

The purpose of this report is the clarification of licensee responsibility and course of action when situations discussed herein are encountered. In this way, resort to the Commission may be obviated in many instances, and time—which is of such importance in political campaigns—will be conserved.

### C. Rule-Making Procedure

The considerations discussed before are best pointed up by two examples of the Commission's rule-making procedure, its nationwide Table of Assignments in television and its Multiple Ownership Rules. On the first, the Commission did not employ rule-making to establish a nationwide allocation plan in the standard broadcast (AM) field. Rather, it proceeded to develop the AM broadcast band on a "demand only" basis—that is, on a case-by-case consideration of individual applications. But the Commission's long experience in coping with allocations problems on a piecemeal, adjudicatory basis in AM led it to adopt an allocation plan for both the FM and TV services, when these new services were authorized in the 1940's. The history of the growth of the AM service lent support to the conclusion of the Commission that an allocation plan was necessary for the expeditious and satisfactory distribution of television service.<sup>40</sup> In a sense, therefore, this difference in the

<sup>37</sup> As the Report makes clear (see particularly par. 10), and as the Commission has emphasized in many pronouncements, there is no all-embracing formula or rule that can be applied by the licensee to each controversial issue to determine just how to proceed. Rather difficult and close judgments have to be made on every aspect of the matter (e.g., whether the issue is of sufficient importance to the community to warrant presentation; what format should be employed; whether there has been an attack on a particular person; whether someone is an appropriate spokesman for a position; what amount of time, if any, should be allotted, etc.). As to all these difficult questions, definitive standards such as have been evolved to a great extent with respect to the political broadcast section of the Act (§ 315, requiring that "equal opportunities" be afforded legally qualified candidates for the same office) are lacking, and necessarily so because of the nature of the problem.

<sup>38</sup> 66 STAT. 717, 47 U.S.C. § 315 (1952).

<sup>39</sup> FCC Public Notice of Sept. 8, 1954, par. 54-1155.

<sup>40</sup> *Logansport Broadcasting Corp. v. United States* 210 F.2d 24 (D.C. Cir. 1953); *Sixth Report on Television Allocations*, 1 R.R. 91:599, 603-05 (1952). The Commission's Table of TV Assignments in the Sixth Report, allocating 82 channels among some 1,291 communities, is, in the writer's opinion, an outstanding example of detailed rule-making to meet a complex and pressing problem. The Commission

handling of AM as against FM and TV illustrates factor 2—the need for an agency to develop expertise and feel its way to the proper solution.<sup>41</sup>

Turning to the multiple-ownership example, here again the Commission began in the AM field with no rule limiting the number of AM stations which one person could control. And here again, the Commission, when it authorized the new services in FM and TV, decided, in the light of its experience with the *ad hoc* approach in AM, to employ rule-making in dealing with multiple-ownership questions in these new services. It promulgated rules providing that no person could control or own more than one FM or TV station if such multiple ownership resulted in a concentration of control inconsistent with the public interest, and that in any event, no person could own or control more than a specified number of FM or TV stations, the precise number varying over the years.<sup>42</sup>

In the period 1948-53, the Commission re-examined its multiple-ownership policy in an appropriate rule-making proceeding.<sup>43</sup> In its Report issued November 27, 1953,<sup>44</sup> the Commission first took up the question whether it should treat multiple ownership through the piecemeal process of case-by-case adjudication or by rule. It decided, on the basis of its experience, that the fairer and more efficient procedure was by rule-making.<sup>45</sup> The Commission then determined upon the appropriate ceiling for each service (seven stations in the AM and FM bands, five in TV).<sup>46</sup>

stated the following three principal reasons for the adoption of an assignment table (1 R.R. at 91:604):

"A Table of Assignments makes for the most efficient technical use of the relatively limited number of channels available for the television service. It protects the interests of the public residing in smaller cities and rural areas more adequately than any other system for distribution of service and affords the most effective mechanism for providing for non-commercial educational television. It permits the elimination of certain procedural disadvantages in connection with the processing of applications which would otherwise unduly delay the over-all availability of television to the people."

<sup>41</sup> The Commission's handling of TV allocations also points up the difficulty of "amending" rules through adjudicatory proceedings. Until 1948, the Commission permitted changes in its first Table of Assignments, promulgated in 1945, to be made in adjudicatory licensing proceedings. But because each such grant in the licensing proceedings has a chain reaction on assignments elsewhere, the Commission called a halt to this practice, concluding that "the only appropriate method for making changes in the allocation table . . . is by rule-making proceedings." *In re* Yankee Network, 4 R.R. 164, 166 (1948).

<sup>42</sup> The first multiple-ownership rule, promulgated in 1940, pertained only to FM stations, and provided in its ceiling that ownership or control of more than six stations would be considered a concentration of control inconsistent with the public interest. See 5 FED. REG. 2382 (1940). In 1941, a substantially similar rule was adopted for TV stations, except that the maximum number of stations was set at three. See 6 FED. REG. 2282, 2284-85 (1941). In 1944, the maximum was raised to five. See 9 FED. REG. 5442 (1944). A multiple-ownership rule for AM stations, adopted in 1943, contained only a restriction relating to ownership or control of more than one station serving the same area. See 8 FED. REG. 16065 (1943). See §§ 3.35, 3.240, and 3.636 of the Commission's Rules, 47 C.F.R. §§ 3.35, and 3.240 (Supp. 1956).

<sup>43</sup> Commission Docket No. 8967.

<sup>44</sup> 9 R.R. 1563 (1953).

<sup>45</sup> The Commission's Report and Order states:

"Our determination here that the problems presented by the multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability is made on the basis of the knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems." 9 R.R. at 1566.

<sup>46</sup> Several changes were effected. Whereas the rules previously spoke in terms of ownership or control, the amended rules forbade *any interest* (other than a less than 1% stock interest in a corporation having

And it succinctly stated the essential purpose of the rule as follows:<sup>47</sup>

Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.

Storer Broadcasting Company, a large multiple owner desirous of getting still larger, challenged the validity of the TV ceiling of five stations in the courts.<sup>48</sup> The Court of Appeals for the District of Columbia Circuit held invalid that portion of the TV rule (section 3.636) establishing the five-station limitation. It ruled that, however laudable the Commission's policies may be, its absolute proscription was inconsistent with the provisions of section 309(b) of the Communications Act "that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected."<sup>49</sup> The court further stated:<sup>50</sup>

Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission. [Footnote omitted.]

It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public interest, convenience, or necessity."

As can be seen, the court's ruling, had it stood, would have had the most far-reaching consequences. Under its interpretation of section 309 (b), there would have been no room for the exercise of the expansive rule-making powers conferred upon the Commission by sections 4(i) and 303 of the Communications Act.<sup>51</sup> For, to require the Commission to consider in each case whether the grant of a particular application, which does not comply with a rule, might, nevertheless, be in the public interest (as the court of appeals would have had it do), would turn binding rules

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more than 50 stockholders) in more than the specified number of stations. Further, the 7-station limitation in AM marked the first time that service was covered by rule rather than case-by-case adjudication. See *Sherwood B. Brunton*, 11 F.C.C. 407 (1946), decided before the adoption of the 1953 rule and denying a transfer of an additional AM station to CBS, on the ground that its ownership of seven stations, and minority or indirect interest in two additional stations, already represented such a concentration of control of AM facilities that it should not be extended.

<sup>47</sup> 9 R.R. at 1568.

<sup>48</sup> *Storer Broadcasting Co. v. United States*, 220 F.2d 204 (D.C. Cir. 1955).

<sup>49</sup> *Id.* at 208-09. 66 STAT. 715, 47 U.S.C. § 309(b) (1952).

<sup>50</sup> *Id.* at 209.

<sup>51</sup> 66 STAT. 711, 47 U.S.C. § 154(i) (1952); 48 STAT. 1082 (1934), as amended, 47 U.S.C. § 303 (1952).

into no more than "policy" announcements settling nothing. Such a result would defeat the basic purpose of rule-making in the licensing field, namely, to permit the Commission to "state . . . in advance" factors which will result in denial of applications.<sup>52</sup>

Upon appeal to the Supreme Court, the latter reversed, finding "the Multiple Ownership Rules, as adopted . . . reconcilable with the Communications Act as a whole" and section 309(b) in particular.<sup>53</sup> The Court held, citing prior precedent,<sup>54</sup> that the Commission can particularize by rule the standards which it will apply in passing on individual license applications, and that it is not required by section 309(b) to reopen, on a case-to-case basis, the policy judgments which the rules embody.<sup>55</sup> As the Supreme Court pointed out, a hearing on a request to waive these rules should be held only in the exceptional case where the multiple-owner applicant "sets out adequate reasons why the Rules should be waived. . . ."<sup>56</sup> Otherwise, the Commission would simply be "wast[ing] time on applications that do not state a valid basis for a hearing."<sup>57</sup> Further, such a hearing would be unfair to the multiple-owner applicant (since it would be a waste of its funds and time also) and to other applicants, since it would clog up the Commission's processes.<sup>58</sup>

It is submitted, therefore, that the Multiple Ownership Rules are a perfect example of the all-important factor previously discussed—sound administration. For clearly every consideration of sound administration demanded that the Commission proceed by rule and not by the wasteful adjudicatory process.<sup>59</sup>

<sup>52</sup> *FCC v. ABC*, 347 U.S. 284, 290 (1954). A "rule" that must be re-examined in every licensing proceeding is a rule in name only. As Judge Learned Hand stated for a three-judge district court in *NBC v. United States*, 47 F. Supp. 940, 945 (S.D. N.Y. 1942), *aff'd*, 319 U.S. 190 (1943): "Such a doctrine would go far to destroy the power to make any regulations at all. . . ."

<sup>53</sup> *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

<sup>54</sup> See *NBC v. United States*, 319 U.S. 190 (1943); *Felman v. United States*, 339 U.S. 973 (1950); *FCC v. ABC*, 347 U.S. 284 (1954).

<sup>55</sup> Upon remand from the Supreme Court, the court of appeals found no error as to those aspects of the Multiple Ownership Rules upon which the Supreme Court had not passed. *Storer Broadcasting Co. v. United States*, 240 F.2d 55 (D.C. Cir. 1956).

<sup>56</sup> §§ 1.701 and 1.702 of the Commission's Rules provide that a party may file a request for waiver of any of the Commission's Rules. Following its loss upon appeal, Storer sought a waiver of § 3.636 in order to acquire a sixth VHF station in Salem, Oregon, but this request was denied by the Commission upon its determination that no adequate grounds had been set out. *Storer Broadcasting Co.*, 14 R.R. 742 (1956).

<sup>57</sup> *Ibid.*

<sup>58</sup> Since a lengthy comparative hearing is needed to resolve any situation where two validly-filed applications are mutually exclusive (*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)), the multiple owner, if automatically entitled to hearing, might delay for years the competing application of some other party, which might otherwise be granted. Under the Multiple Ownership Rules, such clogging of the Commission's process can be prevented by dismissal, without hearing, of the multiple owner's application. *WSTV, Inc.*, 8 R.R. 854, 9 R.R. 175 (1953).

<sup>59</sup> One final commission technique should be noted—the Standards of Good Engineering Practice (1939). These standards set forth certain norms deemed necessary for the construction and operation of AM broadcast stations "to meet the requirements of technical regulations and for operation in the public interest along technical lines not specifically enunciated in the regulations." While "material deviation [from the Standards] will [not] be recognized unless full information is submitted as to the reasonableness of such departure and the need therefor," 47 C.F.R. § 3.181 (Supp. 1956), the Standards do not quite have the "hard and fast" status of rules. *Beaumont Broadcasting Corp. v. FCC*, 202 F.2d 306, 310

## IV

## CONCLUSION

It is the writer's opinion that, in general, rule-making is a sounder way of proceeding than the case-by-case method or general declarations of policy and that, wherever appropriate, it should be employed.<sup>60</sup> Admittedly, the phrase "wherever appropriate" begs the question—but what is meant is that the agency should resolve close questions of procedure in favor of rule-making. It is not meant, of course, that it be used in cases clearly inappropriate—*e.g.*, the FCC programming example—or that the agency should delay action on some unforeseen pressing problem until a rule has been developed—*e.g.*, the *Macon* problem. But every consideration of sound administrative procedure and fair play argues for following the rule-making route, where it can be employed.

The chief objection usually advanced to rule-making—that it is more inflexible and cannot take account of the nuances of the particular situation—is, I think, without merit. If the application of a rule depends on detailed and close consideration of subtle factual variations, a hearing can be held; but it is obviously desirable to have the applicable standard for that hearing set out in the rule. If the facts indicate waiver of the rule, this can be pointed out in a request for waiver, and, where appropriate, a hearing held on the request.<sup>61</sup> And finally, the rule itself is not inflexible. The agency is under a duty to re-evaluate, from time to time, the policy represented by the rule,<sup>62</sup> and, where the public interest so requires, to amend or delete the rule in question. In fact, both of the commission rules chosen as examples in this article have been amended from time to time to meet changed conditions.

In short, to conclude with a mild pun, one yardstick of an agency's maturity is the extent to which it proceeds by rule. Or, stated in terms of the old saw, ours is still a government of laws, not of men.

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(D.C. Cir. 1952). In the cited case, the court observed that "the introduction to the Standards contemplates that they prescribe a flexible general set of rules for the administration of the Communications Act in the public interest, and that the Commission reserves the right to depart from the normal requirements set forth in the Standards when the public interest so requires." It should be noted that in 1955, the Standards, which had formerly existed separate and apart from the Commission's Rules, were bodily and without language change included in the Rules. 47 C.F.R. § 3.182 *et seq.* (Supp. 1956).

<sup>60</sup> This conclusion has little applicability to agencies such as the National Labor Relations Board or Federal Trade Commission, which are largely concerned with adjudicatory evidentiary questions whether some specified unfair practices have been committed.

This conclusion is, of course, not a novel one. On the contrary, it has been reached by many others in much earlier studies of administrative techniques. Thus, Professor Robert E. Cushman, in his study on regulatory commissions accompanying the Report of the President's Committee on Administrative Management, expressed the view that agency policies relating to conduct should be increasingly formulated through rules and regulations. Cushman, *The Problem of the Independent Regulatory Commissions*, in *THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT 207, 230-31 (1937)*.

<sup>61</sup> *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

<sup>62</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943). The Court there stated, in commenting on the Chain Network regulations: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

It should also be noted that the rule-making process, with its requirement for notice and submission of comments, does not necessarily involve a great deal of time before final effectuation.