THE FEDERAL COMMUNICATIONS COMMISSION AND TIME BROKERAGE: A REGULATORY CHANGE OF COURSE

Stephen F. Sewell*

Over a period of more than fifty years, the Federal Communications Commission’s position with regard to broadcast licensees engaged in substantial amounts of time brokerage has changed from grudging acceptance to encouragement. This article will provide the bases for the changes and comment on the Commission’s current regulatory position. Time brokerage initially might seem to be a matter of relatively modest importance, but the Commission’s recent rulings on that topic raise several important issues, including the standard used by the Commission to determine the locus of control of broadcast stations, anticompetitive practices, and a licensee’s normal renewal expectancy, if challenged by a competing applicant at renewal time.

I. BACKGROUND

A. The Basics of Time Brokerage

A typical broadcast station arranges for programming and, through its own sales staff, sells time to local advertisers. The station may also hire a sales representative or affiliate with a network to obtain revenues from regional and national advertisers. Some broadcasters may also engage in “time brokerage,” which is defined as the sale by a broadcast licensee of “discrete blocks of time to a ‘broker’ who then supplies the programming to fill that time and sells the commercial spot announcements to support it.”1 While large blocks of time are typically involved, the Commission has dealt with time brokerage of as little as ten-minute programs.2 A time broker “bears the risk of its resale; that is, he is directly liable to the licensee for payment of the time.”3 Broadcast licensees are not common carriers, so no licensee is obligated to sell time to any person, including time brokers. In fact, many licensees do not sell time to brokers as a matter of station policy. An informal 1992 Commission survey of broadcast stations showed that only 17 of the 284 stations questioned, or six percent, engaged in some time brokerage.5

B. The Statutory Basis for the Commission’s Concern

Under the Communications Act of 1934 (“Act” or “Communications Act”), as amended, licenses to operate broadcast stations can be applied for by individuals or entities upon written application, setting

---

* Member, State Bar of Wisconsin; formerly attorney, Federal Communications Commission.


3 In re Liability of Fort Collins Broadcasting Co., Memorandum Opinion and Order, 38 F.C.C.2d 707, para. 15 (1972). Accordingly, time brokerage is not involved where the risk of resale is absent, such as in a case where a licensee hires a person who both announces and sells time during a particular program.

4 47 U.S.C. § 153(h) (1988) (“[A] person engaged in radio broadcasting shall not insofar as such person is so engaged be deemed a common carrier”). See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (holding that there is no right of paid access to air time under either the public interest standard of the Communications Act or the first amendment to the Constitution).

5 Broadcast Station Time Brokerage Survey, Public Notice, 7 FCC Rcd. 1658 (1992). See also Part-Time Programming, supra note 1, for more detail as to the extent and nature of time brokerage, as it existed in 1980.
forth specified information. If a grant of the application would serve the public interest, as defined by the Act and the Commission's rules and policies, section 309(a) of the Act requires the Commission to grant the application. Once the license is issued, section 310(d) provides that a license or any rights granted by it cannot be assigned or transferred to a new party without the Commission's prior approval.

Pursuant to the statutory scheme, the Commission holds the licensee accountable for the programs broadcast and for compliance with Commission and statutory requirements. The concept of licensee accountability antedates the Communications Act. Chairman E. O. Sykes of the Federal Radio Commission, testifying on the legislation that later became the Communications Act, characterized the Radio Act as placing "upon the individual licensee of a broadcast station the private initiative to see that those programs that he broadcasts are in the public interest . . . Then that act makes those individual licensees responsible to the licensing authority to see that their operations are in the public interest." The advantage of the statutory scheme is that it places responsibility in the hands of "an identifiable, regulated entity - the licensee," rather than in the hands of transient, unregulated parties such as time brokers or other program suppliers. Throughout its history, therefore, the Commission has emphasized that a broadcast licensee's responsibilities are nondelегable, particularly with reference to programming. Until recently, the Commission believed that the practice of selling "substantial segments of their programming schedule" to brokers would raise "questions as to whether the licensee thereby relinquished or diminished control of programming."

II. THE DEVELOPMENT OF TIME BROKERAGE POLICIES AND RULES

A. First Statements

The first mention of time brokerage occurred in 1938 in Metropolitan Broadcasting Corp., which involved a comparative hearing among several mutually exclusive applicants for new or modified broadcast stations. The Commission found one of the applicants unqualified because he had previously been an officer and director of a licensee of a station that failed to exercise adequate control of 15 1/4 hours per week of brokered programming. Because the Commission did not amplify the basis for its conclusion, it is not possible to determine the extent to which time brokerage was a problem by itself, whether the lack of control of that programming was determinative, or whether other derelictions cumulatively warranted denial of the application for a new station. Further, the opinion does not state whether the application was denied because the applicant was unqualified to hold an authorization at all, or was basically qualified, but comparatively inferior to the other applicants in the proceeding.

Just two years later, the subject came up again under the guise of a "management contract." Westinghouse Electric and Manufacturing Company ("Westinghouse") and the National Broadcasting Company ("NBC") executed a contract that expressly reserved to Westinghouse "the ownership, operation and control" of the stations, but designated NBC as:

- the sole agent of Westinghouse with authority to furnish all programs broadcast from the stations, to enter into agreement with others in [NBC's] own name and description and on [NBC's] own account and risk for the sale of such broadcast programs, and to charge fees and collect

---

6 47 U.S.C. § 308(a) and (b) (1988).
8 47 U.S.C. § 310(d) (1988). This section of the Act was initially designated as section 310(b), but was redesignated as section 310(d) in 1974. Pub. L. No. 93-505, 88 Stat. 1576 (1974). For ease of reference, section 310(d) will be used throughout this article.
11 E.g., In re The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Report, 48 F.C.C.2d 1, para. 26 (1974); Report and Statement of Policy Re Commission En Banc Programming Inquiry, 44 F.C.C. 2303, 2313-14 (1960); In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, para. 6 (1949); Report on Chain Broadcasting, 66, Government Printing Office (May 1941)(quoted in National Broadcasting Co. v. U.S., 319 U.S. 190, 205-06 (1943). Note that it is the responsibility for programming that is nondelegable, not the production of programming. The Commission has long recognized that a licensee may delegate to others the production of a program or program series.
12 In re Clarifying Paragraph (c) of Section 1.613 Concerning the Filing of Agreements Involving the Sale of Broadcast Time for Resale, Order, 33 F.C.C.2d 653, para. 2 (1972)(hereinafter Filing of Agreements).
After review of the arrangement, the Commission ordered hearings on Westinghouse's four pending license renewal applications to determine whether the licensee had in each case “assumed the responsibilities and discharged the duties of a licensee;” whether it had “disposed of any of the rights granted in the station’s license to any other person” in violation of section 310(d) of the Act; and whether NBC was operating the stations without a license.18

Westinghouse sought reconsideration of the hearing orders on the ground that it had since voided the NBC management contract and, in its place, negotiated a standard network affiliation contract with NBC. Further, Westinghouse had hired its own staff, produced its own local programming, and set its own advertising rates. The Commission granted reconsideration and the license renewal applications to Westinghouse on the basis of the amended arrangement. In so doing, the Commission observed that the recitation in the first contract regarding Westinghouse’s retention of control was not determinative in light of the other provisions of the first contract. Rather, the Commission concluded that by permitting NBC to operate the stations under the terms of the contract, “Westinghouse disposed of rights and privileges granted to it by the terms of its licenses and to all intents and purposes transferred control of the stations [to NBC] without obtaining the written consent of the Commission as required” by section 310(d) of the Act.19

The Commission adopted the first rule pertaining to time brokerage in 1945. The Commission did not limit the amount of time that could be sold to brokers. Instead, it adopted a rule that required certain contracts to be filed with the Commission, including management and time brokerage contracts.20 As was often the case at that time, before the adoption of the Administrative Procedure Act,21 the Commission provided no rationale for adopting the rule, other than to state that it would serve the public interest. As noted above, however, the Commission subsequently stated that the purpose of the rule was to insure the retention of licensee control.22 On three occasions, the Commission made minor changes in the rule.23

There are numerous enforcement actions taken by the Commission under the rule. In some cases, the Commission conducted hearings on a variety of issues specified against an applicant, including the failure to file time brokerage agreements.24 In 1960, Congress amended the Act to grant the Commission authority to fine licensees for violations of the Act and the Commission’s Rules.25 The digests disclose several fines for failure to file time brokerage contracts, sometimes as a single violation,26 but usually as one of several violations.27 Thus, the failure to file time brokerage contracts, by itself, is considered a minor violation that is not license threatening.

14 In re Westinghouse Electric and Manufacturing Co., Opinion and Order on Petition to Reconsider and Grant Without Hearing, 8 F.C.C. 195, 195 (1940) [hereinafter Westinghouse].
15 These issues appear in each of the four hearing orders and are identically worded. The orders are set out serially at 5 Fed. Reg. 3397-98 (1940).
16 Westinghouse, supra note 14, at 196.
18 5 U.S.C. 553 (c) (1988). Under that statute, the Commission must accompany the adoption of a rule with “a concise general statement of their basis and purpose.” Id.
19 Filing of Agreements, supra note 12, para. 2.
20 In re Amendment of Section 1.342 of the Commission’s Rules, 9 Rad. Reg. (P&F) 1547 (1953) (excluding from the definition of “time brokerage” time bought by advertising agencies on behalf of sponsors); See Filing of Agreements, supra note 12, para. 2. (excluding “barter” and “tradeout” agreements from the definition of time brokerage, which effectively overruled the Commission’s action in In re Rand Broadcasting Corp., 22 Rad. Reg. 2d (P&F) 155 (1971)); In re Reregulation of Radio and Television Broadcasting, 25 Rad. Reg. 2d (P&F) 1719, para. 5 (1972) (eliminating the filing requirement for time brokerage contracts, but obligating retention of the contracts at the station for Commission inspection).
21 See e.g., In re Portorican American Broadcasting Co., Decision, 14 F.C.C. 239 (1949).
24 See e.g., In re Liability of Rhode Island Broadcasting Co., Memorandum Opinion and Order, 12 F.C.C.2d 708 (1968); In re WMIE, Inc., 5 Rad. Reg. 2d (P&F) 494 (1965).
In Cosmopolitan Broadcasting Corp., the licensee had sold approximately seventy-five percent of its time to brokers, and the licensee's failure to supervise the many brokers resulted in a variety of violations of Commission requirements; for example, logging violations, and the broadcast of false and misleading advertising. The Commission found that the licensee had in fact abandoned control of the station to the brokers, and denied the license renewal application.

There are other cases dealing with substantial time brokerage, but these included serious, unrelated issues as well. In Carol Music, Inc., the licensee sold twelve hours per day, seven days per week to a broker. Although station personnel selected specific records to be played, the broker specified the format, had its own rate card, and sold all of the advertising during the brokered periods. The presiding hearing officer found that the licensee had abandoned control, but only during the periods brokered. He found that the licensee had disposed of "rights granted to it under the station's license without prior knowledge or approval of the Commission," in violation of section 310(d) of the Act. Among the other issues involved the use of the station's subcarrier to transmit gambling information to illegal gambling parlors. The Commission's decision in Continental Broadcasting, Inc., involved a finding of abandonment of control primarily involving time brokers, but the licensee had also made misrepresentations to the Commission. A misrepresentation, by itself, may result in loss of license.

In both Continental and Carol the Commission did not accord specific weight to the various violations, so it is unknown as to whether the abandonment of control to the broker in those cases, by itself, would have resulted in loss of license.

D. Time Brokerage Between Separately Owned Stations Serving the Same Area

1. The Purposes Underlying the Cross-Interest Policy

The Commission has closely reviewed situations where one station sought to broker time on a competitor. Its concern was based on its cross-interest policy, which developed in case law as a corollary to the multiple-ownership rule. The rule limits the number of broadcast stations that a person or entity can own or control. That rule has evolved considerably over time, but at this time an entity can own AM and FM stations in the same area. Further, upon an appropriate showing, the Commission may approve the acquisition of additional broadcast combinations, such as owning two FM stations or an FM-TV combination in the same area. The purposes of the rule are to "encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and . . . to safeguard against undue concentration of economic power." The cross-interest policy has the same purposes and is intended to cover situations that are not within the precise terms of the rule, but where the goals underlying the rule would be thwarted.

---


*Cosmopolitan, 581 F.2d at 919-20.


*Id. at 400.


*The case involved the broadcast of four brokered programs, totalling about 12.5 hours each broadcast week. Assuming a broadcast week of 126 hours (18 hours per day), the brokered time represented less than 10 percent of total program-

---

*See e.g., FCC v. WOKO, Inc., 329 U.S. 223 (1946).

*47 C.F.R. § 73.3555 (1994). The rule specifies ownership restrictions in addition to those described here; for example, limits on the number of stations that can be commonly controlled nationally.


*In In Re Application of Wisconsin Television, Ltd., 102 F.C.C.2d 1001 (1985), the Commission stated that the "policy is grounded in our concern over the potential for conflict of interest, unfair competition, and detriment to the public interest which may result from certain types of business relationships, not expressly covered by the terms of the multiple ownership rule." Id. at 1004 (quoting Eastern Broadcasting Corp., 30 F.C.C.2d 745, 755 (1971). For example, the multiple-ownership rules do not apply to employees, but the Commission might question under the cross-interest policy a situation where an individual appeared as both the general manager of one television station and the controlling stockholder of another television sta-
2. Applicability of the Cross-Interest Policy to Time Brokerage Agreements Between Separately Owned Stations Serving the Same Area

In WCVL, Inc., the licensee of an AM-FM combination petitioned the Commission to permit it to broker time on the only other station licensed to the same city. Under the multiple-ownership rule then in effect, an entity could not control more than one AM or one FM station in the same area. The proposed licensee/broker wanted to buy nine hours per week from its FM competitor to broadcast local high school sports events, which involved about ten percent of the competitor's broadcast week. The Commission stated that the "policy against cross interests is strongly applied to preserve full, arm's-length competition of all types between independently owned stations serving substantially the same area." In order to permit time brokerage between such stations, the Commission placed the burden on the petitioner to show that "a situation must exist which shows at the threshold that no other arrangement can be made other than the time brokerage arrangement." The Commission concluded that the petitioner's own economic and programming judgments did not meet that standard, and denied the petition.

In contrast, the licensee made the requisite showing in Station WWSM. There, the licensee had been broadcasting local, predominantly white high school sports events. The station wished to continue carrying those games, but had changed to a black-oriented music format. The licensee sought approval for its plan to buy time on a nearby station to present the football games of a predominantly black high school in the area. No other station in the area showed an interest in carrying the latter games. The broker proposed to buy 2.5 hours for each game, for a nine-game season. The Commission granted its approval, but cautioned that its ruling was limited to the specific facts presented.

III. DEREGULATION AND TIME BROKERAGE

A. Deregulation

Starting in 1979, the Commission began major deregulatory actions. The following year, the Commission significantly changed its position on time brokerage in Part-Time Programming. The Commission there set out a policy of "general encouragement" of time brokerage, which could "foster healthy program competition and diversity of programming by encouraging independently produced programming." Such a result, "comports fully with the Commission's interest in moving from regulatory to competitive incentives. . . ." The Commission further found that although the radio industry typically seeks a specialized audience, there are some groups "whose tastes continue to go unmet because they are too small to support an entire weekly schedule" of specialized programming. The Commission also predicted that there would be opportunities for employment of minorities in the industry as a result of time brokered programs directed at minority groups. The Commission made clear that these changes did not alter the licensee's underlying responsibilities: "Although we are encouraging the use of time brokerage to increase program diversity, this should not be taken as indicative that the Commission has lessened its concern about abdication of control over station operation as a whole or station programming in particular." In a 1989 reexamination of its cross-interest policy, the Commission determined that it should abolish the prohibition against one station brokering time on another station in the same market. The
Commission noted the substantial increase in the number of media outlets since the inception of the cross-interest policy, and the concomitant increase in competition and diversity.\(^{81}\) The Commission found that due to competitive conditions, a station brokering its time to a competitor risks losing some of its audience to the competitor. "Thus, the amount of choice available to listeners and viewers insures that competition will be vigorous in order for a station to retain its share of the audience."\(^{103}\) Because a licensee entering into a time brokerage contract must retain control of its programming, the Commission believed that the fact that some programming may be provided by a competitor did not raise the same diversity questions that would be raised if stations in the market were under common ownership or shared key employees.\(^{104}\) The Commission also noted that the antitrust laws would be available to remedy any anticompetitive arrangements.\(^{105}\)

The Commission also made related policy changes that facilitated time-brokerage arrangements. Prior to deregulation, the Commission had prohibited combination rates and other joint sales practices between licensees of separately owned stations.\(^{86}\) The Commission eliminated this policy in 1986,\(^{86}\) noting that combination sales practices had been upheld by the courts in nonbroadcast cases where the parties established that such rates or practices led to efficiencies and reduced costs, and did not affect competition adversely. Further, the potential for abuses, not actual violations, was not an appropriate basis for regulation, in the Commission's view.\(^{87}\) It also listed possible benefits resulting from the abolition of the policy; for example, aiding fledgling FM stations in obtaining national sales representatives. Accordingly, the Commission concluded that brokering time on another station in the same market should no longer be subject to a flat ban against joint sales practices, if the joint sales fall within the limitations of the antitrust laws.\(^{88}\)

B. Adjudications Under Deregulation

In 1990 and 1991, the Commission issued six rulings under the new regulatory approach described above, in which one station in a market (the brokered station) would sell time to another station in the same market (the brokering station).\(^{89}\) The rulings and the policy that evolved from them will be referred to here as the "Spanish Radio" rulings or policy, after the lead case. There are variations in facts in those rulings, but they contained the following common elements: (1) the amount of time permitted to be brokered was all or nearly all of the brokered stations broadcast week, including news and issue-oriented programming; (2) the area served in common by the two stations was very substantial, often involving encompassment of one station's service area by the other, and always involving substantial overlap of the stations' principal-community contours, the strongest field intensity contour used by the Commission for administrative purposes; (3) the licensee of the brokered station reduced its staff substantially, usually by eliminating all or most of its sales, programming, promotion and traffic staffs, but retaining at least a general manager and some engineering staff; and (4) all brokered licensees asserted that they would retain ultimate control, and specifically retained the right to cancel or suspend programs and commercials, and to substitute programs they considered to be of greater importance.

The Commission approved all of the time brokerage agreements. The Spanish Radio rulings noted the licensees' recitation about retention of control of the brokered station. The rulings also noted the Commission's encouragement of time brokerage set out in Part-Time Programming\(^{107}\) and the fact that decision did not set any limits on the amount of time that a station could broker. Four of the rulings cited Southwest Texas Public Broadcasting Council\(^{81}\) as an example of an extensive management contract

---

81 Id. para. 37.
82 Id.
83 Id.
84 Id.
87 Unnecessary Broadcast Regulation, supra note 56, para 47.
88 Id. para. 48.
107 Part-Time Programming supra note 1.
81 In re Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713 (1981). There, the licensee held a license for a noncommercial television station, and had entered into a man-
that did not involve an unauthorized transfer of control to the manager. Further, the decisions cited Cross-Interest Policy which recognized the abolition of the ban on brokerage by one station on another in the same market. Some of the decisions also cited the elimination of the flat ban on joint sales practices in Unnecessary Broadcast Regulation. The decisions reminded all licensees involved that the brokered station must remain responsive to the issues confronting its city of license, as reflected in their issues/programs lists and must comply with the laws, rules and policies relating to political programming. Other decisions stated that the brokered station “must continue to air its own station identifications, maintain its own main studio within its principal-community contour, and maintain its own public inspection file . . . .”

The various Spanish Radio decisions set out several cautionary points. “[W]hile we may approve a time brokerage agreement, the Justice Department may determine that the enforcement of antitrust laws is necessary to remedy an anticompetitive arrangement that may occur as a result of the implementation of . . . [the] agreement.” Further, the Commission reminded the licensees of brokered stations that if they were not responsive to local issues, they might not be entitled to a “renewal expectancy,” if challenged at renewal time by a competing application for a new station.

The Spanish Radio rulings are silent as to the

C. Codification of the Spanish Radio Policy

In 1991, the Commission sought comment on its proposal to amend its radio multiple-ownership rule by permitting an increase in the number of stations that could be under common control, both locally and nationally. At the time the Commission issued the Notice of Proposed Rulemaking in that proceeding, four of the six decisions that established the Spanish Radio policy had been issued. The Commission recognized that the effect of an increase in the local ownership limit could be amplified if licensees also brokered time without restriction to stations in the market. Accordingly, it sought comment on time brokerage specifically, and on other joint ventures

68 [the]

69 [the]

70 Id.

71 Id. The renewal expectancy is described and discussed more fully in section IV.C.3., below. Briefly, if an application for a new station is filed against an application for renewal of license of an existing station, one of the factors used to choose a winner will be the performance of the renewal applicant during the past license term. Renewal applicants that establish a strong performance are said to have a renewal expectancy, which is a factor that will be considered when comparing the two applicants.

72 As of May 31, 1994, there were 9,958 commercial AM and FM radio stations on the air competing for revenues. Broadcast Station Totals As Of May 31, 1994, FCC News Release of June 7, 1994. The same News Release also disclosed that there were 1,689 noncommercial FM stations on the air that compete with commercial stations for listeners and, to a lesser degree, for advertising revenues. All stations face increasing amounts of competition from other sources, such as music channels available on many cable television systems. The Commission cited a study of the National Association of Broadcasters finding that 58 percent of all radio stations lost money in 1991: In Re Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd. 2755, para. 2 n.3 (1992); reconsideration in part, 7 FCC Rcd. 6387 (1992).

After review of the comments, the Commission did increase the number of radio stations that could be under common control. It also determined that a licensee of one station could broker more than fifteen percent of the time on a competing station only if it could own the brokered station under the amended multiple-ownership rule. The Commission further imposed a twenty-five percent limit on the amount of simulcasting or program duplication between the two stations and directed that a copy of the time-brokerage contract be filed with the Commission and placed in both stations' local public inspection files.

Although the Commission imposed these new restrictions, it essentially affirmed the Spanish Radio policy. It reemphasized the obligation of licensees of brokered stations, like all other stations, to retain control of operations and to provide issue-responsive programming. On reconsideration, the Commission restated the potential pitfalls arising from extensive time brokerage: possible loss of a renewal expectancy; and potential violations of the laws relating to anticompetitive practices. It also clarified some points raised in the comments filed in the proceeding. Some commenters had asked the Commission to reassess the main studio rule, which, as interpreted, requires the presence of at least one full-time managerial and one part-time staff person at the main studio during normal business hours. The Commission stated that subject was outside the scope of the proceeding, so the two-person standard remains applicable to brokered stations. The Commission also decided against limiting the duration of time-brokerage contracts or regulating provisions regarding liquidated damages, in the event of a breach of contract. It did state, however, that if "a licensee agrees to an excessive liquidated damages clause or to an unreasonably lengthy brokerage agreement, that licensee's control of its station may be questioned." Stations operating under time-brokerage agreements not consistent with the new requirements were provided one year to come into compliance.

In January of 1995, the Commission issued a further notice primarily proposing amendments to the television multiple-ownership rule, but also seeking comment on television time-brokerage agreements. The Commission stated there that its experience in radio indicated that time brokerage could "provide

72 Id. paras. 26-30.
73 In re Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd. 2755 (1992) [hereinafter Revision of Radio Rules]. By codifying the Spanish Radio decisions in this rulemaking proceeding, the Commission eliminated for radio broadcast stations any questions that might otherwise have been raised under the multiple-ownership rule and its corollary, the cross-interest policy. At this time, those questions remain unresolved for television stations.
74 Id. para. 65.
75 Id. Section 33.3556(b) defines "duplication" of programming to mean "the broadcasting of identical programs within any 24 hour period."
76 See 47 C.F.R. §§ 73.3526(a)(12), 73.3613(d) (1994).
77 See Revision of Radio Rules, supra note 73, para. 64.
78 47 C.F.R. § 73.1125 (1994).
79 In re Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, Main Studio and Program Originiation Rules for Radio and Television Broadcast Station, Report and Order, 2 FCC Rcd. 3215 (1987). The Commission interpreted the main studio rule, 47 C.F.R. § 73.1125 (1994), to require during normal business hours "management and staff presence on a full-time basis, which may consist of more than two people working on a part-time basis." Petition for Reconsideration of Jones Eastern of the Outer Banks, Inc., Memorandum Opinion and Order, 7 FCC Rcd. 6800, para. 5 n.4 (1992). "Management" includes a wide range of jobs, and specifically includes a "chief engineer with managerial duties." Id. paras. 9-10.
80 See Revision of Radio Rules, supra note 73, para. 66. The Commission has no other requirements regarding the minimum number of employees. Most of the Spanish Radio rulings indicate that the brokered station will remain responsible for operation of the transmitter. There is nothing, however, that would prohibit contracting these duties to another entity, including the brokering station. Further, the Commission's rules permit operation of the transmitter from a remote site, 47 C.F.R. §§ 73.1400, 73.1410 (1994), and at least one contract on file at the Commission specifies a remote control point at the brokering station. If the brokered station also collocates its main studio at the brokering station, and the licensee of the brokering licensee assumes the obligation to staff the studio during normal business hours, the licensee of a brokered stations could theoretically have no one employed at its station.
81 Revision of Radio Rules, supra note 73, para. 66.
82 Id. In addition, the Commission clarified two other aspects regarding the relationship between time brokerage and the amended multiple-ownership rules. Under those rules, the licensee of one station in a market with more than 15 stations cannot buy another station in that market if their combined audience share exceeds 25 percent. Finally, while there is generally no limit on one station brokering time on a station in another market, such arrangements may not be made where the brokering licensee has reached the local ownership limit in the other market.
competitive and diversity benefits to both the brokering parties and to the public.\textsuperscript{84} The notice did not state the basis for that belief. The notice sought comment on the extent to which time brokerage exists in the television industry, and tentatively proposed guidelines and filing requirements very similar to those already in place for radio stations.\textsuperscript{85}

D. Summary of Time Brokerage Contracts on File With the Commission

There has been considerable interest in time brokerage since the codification of the Spanish Radio policy for radio stations. As of July 7, 1994, there were 398 time brokerage contracts available for review in the Commission’s files as a result of the amended filing rule. In order to understand better the results of the Commission’s actions, the author reviewed twenty (about five percent) randomly selected contracts filed with the Commission.\textsuperscript{86} Substantial time brokerage is primarily, but not exclusively, a small-market phenomenon. The median population of the brokered stations’ cities of license is 18,387. The duration of the contracts, assuming no defaults or extensions, ranges from nine months to eight years. In fourteen contracts (seventy percent) the parties elided the monthly fee. In the remaining six contracts, fees range from $1,725 to $12,900 per month.\textsuperscript{87} In five cases (twenty-five percent), the broker had either filed an application to buy the brokered station or had signed a contract to do so.\textsuperscript{88}

Another five contracts (twenty-five percent) give the broker an option to buy the brokered station, while three (fifteen percent) grant the broker a right of first refusal in the event of a sale.

All of the contracts state that the licensee of the brokered station retains full authority over the station and its operations, sometimes specifically mentioning control of finances, personnel and programming. All contracts in some manner grant the licensee the right to reject a program provided by the broker or to substitute programming the licensee believes has greater local or national interest. Seventeen (eighty-five percent) of the contracts provide a general statement as to the programming to be provided by the time broker. These statements often specify that the programming would be in good taste and consistent with the Commission’s requirements and other laws. Alternatively, some of the contracts require the broker to provide entertainment programming, along with commercials, news, public affairs programs and promotions. Fifteen (seventy-five percent) of the contracts either state the licensee’s specific program policies, which the broker is required to follow, or indicate that such policies exist, but have not been submitted. The licensees’ programming policies enumerate anywhere from five to 27 specific provisions. Some of the contracts suggest that it is the broker’s obligation to present issue-responsive programming, others indicate that such programming is the licensee’s duty, while some suggest that the obligations are shared between the parties in varying degrees. Two of the contracts (ten percent) required the broker to provide in advance to the licensee information concerning the programming to be broadcast, such as traffic logs, play lists and scripts, if any. Two other contracts permit the licensee to ask for such information in advance, if it chooses to do so.

The typical contract provides that the broker will provide programming for twenty-four hours per day, seven days per week. In fourteen (seventy percent) of the contracts, the licensee reserved one-half to four hours per week, usually sometime between 4:00 a.m. and 10:00 a.m. on Sunday.\textsuperscript{89} During that time, the licensee of the brokered station “may” present its own programming. Six of the contracts (thirty percent) do not specifically reserve any time for the lic-
The contracts typically require the licensee of the brokered station to hire at least two employees, often identified as a general manager and a chief engineer, and other contracts mention unspecified additional employees. There was no similar lack of precision in the three contracts where the broker's employees were mentioned. In those cases, the broker was obligated to provide on-air talent, engineering personnel or board operators, sales persons and traffic personnel. The responsibility for the operation and maintenance of the station's technical facilities varies widely under the contracts reviewed. One contract specifically contemplates that the control of technical facilities of the brokered station would be from a remote point located in the broker's studio.

Although the contracts do not provide detailed information as to the actual operation of the stations, it is evident that the licensees of the brokered stations have at least reduced the number of their employees substantially and turned over sales and programming functions to the broker for all but a few hours per week. Based solely on the terms of the contracts, control of programming varies from advance review of the broker's proposed programming to simply requiring the broker to provide information to include in the station's quarterly issues/programs list. It is not possible to determine what additional control of programming might result from whatever monitoring of the brokered station's broadcasts by its few remaining employees. This broad overview of the contracts provides relevant background for the following comments.

IV. DISCUSSION OF THE COMMISSION'S CURRENT REGULATORY POSITION

A. Introduction

The Spanish Radio rulings represent a substantial shift in the Commission's treatment of time brokerage. With one exception, time brokerage previously involved a limited amount of a licensee's broadcast week, often split among several different brokers. The brokered licensee, however, obtained or produced most of the remaining programming, including local news, public affairs and other issue-responsive programming, and retained its own sales staff. The Spanish Radio policy, in contrast: (1) permits the brokered licensee to rely on the broker as its sole source of income; (2) permits the use of a single source for all programming, including local news, public affairs programs and other issue-responsive programs, as well as for entertainment; and (3) with regard to programming, permits the brokered licensee to limit its involvement to an unspecified degree of monitoring of the station's broadcasts.

The discussion below will first consider the process by which the Commission arrived at the Spanish Radio policy. It will then turn to issues raised when licensees make use of the policy. In that regard, the summary of the time brokerage contracts set out above discloses that not all brokered licensees have gone as far as the Spanish Radio policy permits. Clearly, the greater the distance between a licensee's decision issued to the Spanish Radio Network, the brokered station retained the four hours between midnight and 4:00 a.m. It is not known whether the licensee broadcast during those four hours, or whether the station was dark for all or part of that period. The remaining rulings were based on requests involving nearly all of the broadcast week.

Providing all of the entertainment of a station's entertainment programming, by itself, does not raise the issues discussed below. The Commission has long been aware of the existence of networks and music subscription companies that will provide entertainment programming to radio licensees around the clock, and has not promulgated any regulations limiting such arrangements. The 1992 Broadcasting & Cable Market Place, pp. F-37 through 44, F-62 through 64, lists numerous radio networks and music subscription companies that will provide 24-hour per day entertainment programming in a variety of formats. At one time, the Commission did adopt a policy with regard to music subscription companies, but abolished the policy before it became effective. See generally, Unnecessary Broadcast Regulations, supra note 56.
operation and the outer limits of the Spanish Radio policy, the lower the concerns expressed below will be. The following discussion of those issues is directed at those licensees that take the full measure of the expanded concept of time brokerage.98

B. The Basis for the Spanish Radio Policy

The Commission relied heavily on its decision in Part-Time Programming99 in crafting the Spanish Radio policy. There, the Commission sought to encourage time brokerage, based on a general desire to substitute competitive incentives for government regulation.94 The Spanish Radio policy certainly accomplishes those general goals. The specific grounds for encouraging time brokerage set out in Part-Time Programming, however, were: (1) fostering programming competition and diversity by encouraging independent program producers; (2) providing programming to segments of the audience that are too small to support a full weekly schedule; and (3) offering possible increased opportunity for minorities in the broadcasting industry, to the extent that time brokerage results in programming directed to minority groups.98

The Spanish Radio policy does not appear to encourage independent program producers. To the contrary, it places the programming of a second station in the hands of an existing licensee, not an independent producer, and lessens the number of potential

radio outlets in a market for independent producers. Because the policy places the programming of two stations under the day-to-day control of the brokering licensee, it lessens competition, as compared to separately operated stations.

The policy also lessens diversity, especially in regard to issue-responsive and other informational programming, in the sense that the programming decisions of two stations are made by one entity.99 Moreover, section 73.3556(a) of the Commission’s rules100 specifically permits twenty-five percent program duplication of the programming on the two stations, which affords enough time to permit complete duplication of the broker’s local news, public affairs and issue-responsive programming on the brokered station. Further, the Commission defined duplication as the “broadcasting of identical programs within any twenty-four hour period.”101 The use of the word “identical” permits extensive duplication in the remaining seventy-five percent of the brokered programming. Presumably, a six-hour “Morning Show” would not be “identical” if a few musical selections or public service announcements were varied between the program broadcast by the brokered and the broking stations.102 It follows that there is no assurance that any significant diversity will result. Accordingly, the Spanish Radio rulings standing by themselves do not further the stated objectives of increasing competition and diversity.108

The subsequent codification of the policy in Revi-

---

98 An interesting side light to the material that follows, regardless of one’s views on these subjects, is the working of the administrative process. The relevant statutory provisions have not significantly changed during the regulatory/deregulatory phases of the process. Instead, the changes are in the communications industry and the Commission’s perspective as to where the public interest lies in the regulation of that industry.

99 Supra note 1.

100 47 C.F.R. § 73.3556(a) (1994).

101 47 C.F.R. § 73.3556(b) (1994).

102 At one time, the Commission had a rule that limited the amount of duplication between commonly owned AM and FM stations in a market, again defined in terms of “identical” programming. 47 C.F.R. § 73.242 (1985) (“Duplication is defined to mean . . . the broadcasting of a particular program by one station . . . before or after the identical program is broadcast over the other station”). The digests of the F.C.C. Reports do not disclose any decisions that further define “identical” under that former rule. In the absence of any amplification by the Commission, the programs described in the text would not be “identical” within the dictionary meaning of the word: “being the same: having complete identity . . . .” Webster’s Third New International Dictionary 1122 (3d ed. 1986).

108 In some limited circumstances, diversity might be aided to a limited degree; that is, where the brokered station would go silent in the absence of the brokerage agreement. In that case, whatever differences in programming between the two stations that were broadcast would provide more diversity than having one of the stations dark. That rationale is not expressly stated in the Spanish Radio rulings, but the generally poor financial condition of the radio broadcasting industry was one of the grounds for liberalizing the multiple-ownership rule to permit more commonly owned stations in the same market. A paradox is presented, however, if preserving diversity by saving otherwise failing stations is, in fact, an underlying rationale for the Spanish Radio policy. As noted previously, one of the Commission’s stated goals is to rely, where it can, on economic forces to regulate, rather than by imposing rules. One of the consequences of such a policy should be that some stations will fail if they are
ion of Radio Rules and Policies, in fact involved a balance between the overall economic condition of the radio industry on one hand, and the lessening of competition and diversity on the other. The Commission specifically mentioned diminution of diversity and competition implicit in extensive time brokerage in that balancing process, but made no reference to the factors set out in Part-Time Programming. The change in the Commission’s position is substantial. Before the Spanish Radio rulings the Commission encouraged time brokerage based on specific, potential benefits, notably increased competition and diversity. After codification of the policy, the Commission recognized that unfettered time brokerage could diminish competition and diversity to the degree that limitations had to be imposed by rule.

Another stated basis for encouraging more time brokerage, providing specialized programming to small groups whose interests are now unserved, is also absent under the Spanish Radio policy. Before Spanish Radio, the typical time broker bought a limited amount of time to reach a small audience segment, a practice often described as “narrowcasting.” Such a broker would use its familiarity with its “narrow” audience for program selection and economic support. In contrast, a brokering station typically uses its existing program staff and seeks to maximize the audience of the brokered station by airing a format with a broad appeal. Accordingly, the brokering station has no greater incentive to meet unmet needs of small audience segments than it had before entering the brokerage agreement.

Finally, it is not apparent that permitting one station to broker another in the same market for its entire broadcast day would have any effect on increasing the opportunity for minority employment in the broadcasting industry. Indeed, in light of the substantial reductions of staff at the brokered station that appear to be the rule, and in light of the reduced incentives to hire individuals to produce and present programming to minority groups, lessened opportunities for minority employment would appear more likely. In sum, all the grounds offered in Part-Time Programming for encouraging more time brokerage are not served, or only very weakly so, under the Spanish Radio policy, and only competition and diversity were considered specifically when the Commission codified the policy in Revision of Radio Rules and Policies.

In its decision in Cross-Interest Policy, the Commission stated in reference to time brokerage that the increase in media outlets since the implementation of the cross-interest policy reduced the need to prohibit time-brokerage agreements. The decision also noted that when a station brokers time to a competitor, competitive concerns require it to remain alert to responding to its overall audience, or risk the loss of revenues. On that ground, the Commission overruled its earlier decision in WCVL, Inc., where it denied the request of one licensee to broker about ten percent of a competitor’s broadcast week. That left ninety percent of the week for competition, and for concerns about loss of audience and revenues. In contrast, where one station brokers a competitor twenty-four hours per day, seven days per week, the brokered station is relying on its competitor to retain its audience and has concluded that its income will be greater by using its competitor than by programming the station itself. Thus, both of the major rationale set out in Cross-Interest Policy for permitting brokerage on one station by a competitor are absent under the Spanish Radio policy.

The Commission abolished its former general prohibition against combination sales and joint sales practices between separately owned stations serving the same market on the ground that the prohibition was overly broad. It noted that in some circumstances such practices had been upheld where they led to efficiencies and reduced costs, and where they

105 Id. para. 64. The limits were set out in 47 C.F.R. §§ 73.3555(a)(2) and (3)(iv), 73.3556 (1994). As related above, these rules impose the multiple-ownership restrictions on any station that brokers more than 15 percent of a competing station’s broadcast week, and limits program duplication between the two stations to 25 percent of the brokered station’s broadcast week.

106 Supra note 50, para 37.

107 Id.

108 Supra note 35.

109 Unnecessary Broadcast Regulation, supra note 56, para. 48.
do not affect competition adversely.\textsuperscript{110} Under the Spanish Radio policy, the brokered station remains separately owned and controlled, according to the Commission. As such, the brokered and brokering stations are competitors. A contract whereby a station turns over its programming and sales for the entire broadcast week to a competitor on its face affects competition adversely. The Spanish Radio rulings provide no explanation to suggest a contrary conclusion.

The Commission, like all administrative agencies, is entitled to change its rules and policies. The courts insist, however, that an agency changing rules or policies "must supply reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored ..."\textsuperscript{111} The court's decision in \textit{Action for Children's Television v. FCC},\textsuperscript{112} is instructive here. The Commission had issued several decisions over the years setting out an obligation by television licensees to meet the programming needs of children, needs that had not been met by the operation of normal marketplace forces. The Commission subsequently overruled those rulings in two sentences, one stating that its deregulation of commercialization during children's programming was consistent with its policy of deemphasizing quantitative guidelines, and the other noting that commercialism help support the broadcast of children's programming. In reviewing that action, the court stated that being consistent with "a broad policy does not tell us why that broad policy obtains in what had uniformly been viewed by the Commission as the unique context of children's television programming."\textsuperscript{113} It concluded that the Commission had failed to provide the necessary "reasoned analysis" for departing from its former rules and policies, and remanded for further consideration.

The Commission's decisions in \textit{Part-Time Programming},\textsuperscript{114} \textit{Cross-Interest Policy}\textsuperscript{115} and \textit{Unnecessary Broadcast Regulations}\textsuperscript{116} appear to meet the court test in the context in which they were made. The difficulty arises in extending those rulings to 24-hour-per-day time brokerage. It is clear that the Commission meant to encourage time brokerage and placed no upper limit on the amount or percentage of time that could be brokered. The Spanish Radio policy, as codified, encourages time brokerage to a point where the stated underlying rationale for that policy are almost completely absent. The rulemaking proceeding in \textit{Revision of Radio Rules and Policies}\textsuperscript{117} was focused primarily on relaxing the restrictions on the number of stations that could be under common control. The discussion of time brokerage in that proceeding did not involve further relaxation of the time brokerage policies. Instead, that discussion reflected a concern that the allowable increase in the number of commonly owned stations in an area not be extended by the use of time brokerage. The only specific factor discussed was the concern about diversity, which resulted in the rules applying the multiple-ownership restrictions when one station brokers more than fifteen percent of a competitors time and limiting the amount of program duplication to twenty-five percent. As noted, however, those rules do not insure any significant degree of diversity. The recently issued further notice of proposed rulemaking regarding time brokerage in the television industry does not address these matters.\textsuperscript{118} In the face of no, or cursory, explanations for its change of course, parties relying on the Spanish Radio rulings may be faced with difficult questions if their conduct is ever challenged in court. The Commission seems to have moved from "the tolerably terse to the intolerably mute."\textsuperscript{119} Perhaps amplification of its position will be provided when a decision is issued in the pending television rulemaking proceeding.

\section{C. Issues Raised by the Application of the Spanish Radio Policy}

The preceding material discusses the premises underlying the Spanish Radio policy. Whatever those premises may be, the application of the policy raises additional issues in other areas of Commission regulation. Three of the most important of these are discussed below.

\subsection{1. Anticompetitive Practices}

Commercial broadcasting centers around programming and the sale of advertising. A station that brokers 100 percent of its time to a competitor turns over day-to-day programming decisions and grants

\begin{thebibliography}{9}
\bibitem{110} Id. para. 47.
\bibitem{111} Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).
\bibitem{112} 821 F.2d 741 (D.C. Cir. 1987).
\bibitem{113} Id. at 746.
\bibitem{114} Supra note 1.
\bibitem{115} Supra note 50.
\bibitem{116} Supra note 56.
\bibitem{117} Supra note 73.
\bibitem{118} \textit{Regulations Governing Television Broadcasting}, supra note 83.
\bibitem{119} Greater Boston Television Corp., supra note 109, at 852.
\end{thebibliography}
control of the sale of advertising, including rates charged, to that competitor. Such an arrangement between two separately owned competitors raises serious questions as to anticompetitive practices, such as price fixing. The Commission's failure to take action is not a defense to an antitrust violation. There is nothing in the Communications Act that "compels the conclusion that the FCC was not intended to have any authority to pass on antitrust violations as such, [but] it is equally clear that courts retained jurisdiction to pass on antitrust violations irrespective of Commission action."120

When dealing with the qualifications of a specific applicant, the Commission does not adjudicate alleged antitrust or anticompetitive violations.121 Instead, it will only consider final decisions of the courts or of competent administrative agencies, such as the Federal Trade Commission. The FCC took this position on several grounds: that courts and other agencies have primary jurisdiction to police antitrust or anticompetitive violations. Instead, it will only consider final decisions of the courts or of competent administrative agencies, such as the Federal Trade Commission. The FCC took this position on several grounds: that courts and other agencies have primary jurisdiction to police antitrust and anticompetitive matters; that it desired to avoid duplicating the efforts of those entities; that private law suits were available as an additional enforcement mechanism; and that by avoiding duplicate proceedings, fairness to the parties in any pending law suits would be aided.122 In the Spanish Radio rulings and their subsequent codification, however, the Commission was dealing with a specific applicant, but with a practice affecting a class of licensees.123 Because the time brokerage contracts raise such serious concerns for that class, the Commission could have sought comment from the Justice Department. It chose not to do so, and instead placed the risk solely on the affected licensees. It should be noted that the Justice Department and other agencies involved with enforcement of laws relating anticompetitive practices have, like the Commission, resource limitations. In allocating those resources, enforcement agencies tend to emphasize those activities with the greatest affect on the public and the economy. It appears unlikely that a few economically marginal stations, for the most part located in small markets, would be high on any enforcement priority list. Thus, if the price-fixing and other joint sales practices inherent in the Spanish Radio policy do present violations of state or federal laws dealing with anticompetitive practices, the possibility of any enforcement action may be very small. With the benefit of hindsight, the Commission's failure to seek comment from entities competent to consider anticompetitive practices, such as the Justice Department, is to a degree inconsistent with the Commission's obligation to consider other federal laws in reaching its own public interest determinations.124

2. Control of Stations

The Spanish Radio decisions all emphasized the importance of a licensee's retention of control of the brokered station. Because de jure control is clearly held by that licensee, the decisions refer to de facto control. Determinations as to de facto control are fact driven, and case-by-case rulings are required.125 In the context of the Spanish Radio rulings, control of programming, personnel and finances would probably be the focus of any inquiry.126 The Spanish Radio Policy permits the licensee of a brokered station to turn programming over to the broker. In most cases, the contracts suggest only a passive review of programming by the licensee of the brokered station. Personnel, as noted above, may be reduced to as few as two part-time employees. The brokered station's only involvement in finances is essentially the receipt of payment for the brokered time and the payment of a few employees and, in some cases, the costs of tech-

120 United States v. Radio Corporation of America, 358 U.S. 334, 343-44 (1959) (holding that approval by the Commission of an agreement to sell a television station does not bar independent civil antitrust actions by the government).

121 In re Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, para. 43 (1986).

122 Id. para. 44.

123 As noted above in section III.D., the Commission's records disclosed that 398 licensees had filed time brokerage contracts by July, 1994.

124 The United States Court of Appeals for the District of Columbia Circuit once observed generally that "[a]dministrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest." LaRose v. FCC, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974). More specifically, the Supreme Court has stated that the Commission "should administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve." National Broadcasting Co. v. United States, 319 U.S. 190, 223 (1943). While suits to enforce the antitrust laws can be initiated by private litigants, the costs to private parties of pursuing such cases lessens their efficacy as an enforcement mechanism.


The kind of operation permitted under the Spanish Radio policy represents a very minimal degree of control. There are Commission rulings in analogous areas that provide some guidance. Specifically, management agreements are a known factor in broadcasting. In fact, section 73.3613(c) of the Commission’s Rules requires that such contracts be filed with the Commission. Whether those contracts constitute a *de facto* transfer of control depends on the terms of the agreements and the implementation of those terms. The Commission approved a management contract in *Southwest Texas Public Broadcasting Council*.

Although the licensee had delegated day-to-day operation of the station to the University of Texas, the licensee can still be fairly characterized as actively involved in the operation and control of the station. In contrast to *Southwest Texas*, time brokerage, by its nature and as evidenced by the contracts reviewed, places the licensee in largely a passive role.

The control of broadcast stations under the Spanish Radio policy reflects some of the factors used by the Commission when dealing with control of stations licensed in nonbroadcast services, such as the microwave stations used by communications common carriers to carry their traffic from one point to another. Section 310(d) of the Act governs transfers of control of those licenses, as well as broadcast licenses. Because the various services are governed by the same statute, there is no legal barrier to the adoption of a single standard of review as to control for all services. There is, however, a significant difference between the broadcast and nonbroadcast services. Nonbroadcast licensees do not control the content of the traffic they transmit. However, a major component of the typical broadcast operation is the exercise of editorial control over its programming or “traffic.” As a matter of policy, the question is why the Commission has deemphasized or ignored control of programming as an important element in determining the locus of control of its broadcast licensees.

The Spanish Radio policy may have altered enforcement policy with respect to compliance with section 310(d) of the Act as applied to broadcast stations. For example, in *Fine Arts Broadcasting, Inc.*, the Commission adopted a policy generally prohibiting proposed buyers of a broadcast station from assuming management positions at the station while a sales application is pending before the Commission, even where the agreement recites that control of the station would remain with the seller while the application is pending. The potential for a violation of section 310(d) was so great as to warrant such a policy. One of the Spanish Radio rulings discussed the *Fine Arts* policy, although the case involved an as-yet unexercised option to buy, not a sales contract. In the circumstances giving rise to the Spanish Radio rulings; the licensee is in difficult

---

197 47 C.F.R. § 73.3613(c) (1994).
198 Supra note 61 and accompanying text. Note that the University, unlike the situation in the Spanish Radio rulings, was not the licensee of any broadcast station. This factual distinction eliminates from the *Southwest Texas* case the concerns expressed above as to possible anticompetitive practices and makes much simpler analysis of the issues regarding the renewal expectancy, which will be discussed in the next section.
199 As noted in section III.D. of this article, of the time brokerage contracts reviewed, only two (10 percent) required advance approval of the broker’s programming by the licensee of the brokered station.
200 The Commission identified elements it would consider in determining the locus of control of microwave stations to include: the unfettered use of all facilities and equipment . . . ; day to day operation and control; determination of and the carrying out of policy decisions, including the preparation and filing of applications with this Commission; employment, supervision, and dismissal, of personnel; payment of financial obligations including expenses arising out of operation; and the receipt of moneys and profits . . . .

In Re Application of Intermountain Microwave, 24 Rad. Reg. (P&F) 983, 984 (1963). By subsequent Public Notices, the Commission’s staff stated that it would use essentially the same factors to determine compliance with section 310(d) in regard to cellular telephone radio stations, and specialized mobile radio systems. See *Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120*, 1 FCC Rcd. 3 (1986); *Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts*, 64 Rad. Reg. (P&E) 840 (1988). The latter Public Notice specifically approved the hiring of management companies. It was directed in part to applicants for new facilities, and additional factors were mentioned that relate to new applicants, including the source of financing; the nature of the contracts between the manager and the equipment supplier, and the ability to terminate the contract for failure to perform.
203 Letter to Roy Russo, SUPRA note 59, at 7587. This decision distinguished the *Fine Arts* policy on the grounds that there was no infusion of capital and no showing that the broker had assumed a management position, both elements found in *Fine Arts*. The second distinction is strained. The broker is technically an independent contractor, not an employee. Yet the broker’s role at the brokered station, or that of its management employees, is the equivalent in all relevant respects to the employee/manager in *Fine Arts*.
financial condition; it turns its programming and sales functions over to a former competitor and relies solely or primarily on that competitor for the income it receives; and substantially reduces its own staff. The licensee of the brokered station essentially serves to supervise and pay the few remaining employees, probably pay the technical operating costs (electric power, for example) and maintenance, cash the checks it receives from the brokering station, and have someone monitor the programming. There appears to exist the same or greater potential for a violation of the Act under the Spanish Radio policy as in the situation found in the Fine Arts case. 183

The Commission has exceedingly wide discretion as to its method of enforcing the Act, and is under no obligation to adopt policies to prohibit situations with a high potential for violations. The Commission is clearly within its discretion in electing to put brokered licensees on notice of their responsibility to retain control and, when violations are found, to impose whatever sanctions are appropriate. The difficulty is that the Commission did not overrule or even mention Fine Arts when it codified the Spanish Radio policy. As noted, twenty-five percent of the time-brokerage contracts reviewed involved brokers that had either executed contracts or filed applications to buy the brokered station. These parties are either at risk of some enforcement action, or are hoping the Commission overruled Fine Arts without so stating.

3. Renewal Expectancy

When the Commission is confronted with an uncontested application, the Commission must determine whether the applicant has established that a grant would be minimally consistent with the public interest standard. When there are two or more pending applications for a vacant channel, the Commission must make a comparative choice from among the applicants that are basically qualified. The comparative factors are set out in Policy Statement on Comparative Broadcast Hearings. 184 The law also permits the filing of an application for a new station against the license renewal application of an existing station. In such a case, the factors set out in the 1965 Policy Statement will be considered. In addition, the renewal applicant may be able to establish that it is entitled to a "renewal expectancy." The strength of the expectancy depends on the merit of the renewal applicant's past record. "Where . . . the incumbent rendered substantial but not superior service, the 'expectancy' takes the form of a comparative preference weighed against other factors . . . . An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no preference." 185

The Commission set out three grounds for the renewal expectancy:

1. There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one. (2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the industry especially considering the large number of group owners. We cannot readily conclude that such a restructuring could serve the public interest. 186

This statement was made in the context of a conventional broadcast operation. Applying the quoted

---

183 This changed enforcement concern also may be coupled with the imposition of modest penalties when violations of section 310(d) are found. The Commission can take away licenses for unauthorized transfers of control and can issue fines of up to $250,000 for violations of the Act and its Rules. In Letter from Donna Searcy, Secretary, to Benito Rish, M.D., 6 FCC Rcd. 2628 (1991), however, the Commission fined a licensee only $10,000 for abandonment of control. It is not known whether this case is indicative of future penalties for violation of section 310(d) of the Act or is limited to its own facts.


---

factors to a 100-percent brokered station, however, presents difficulties. Initially, it should be noted that the renewal expectancy is in part a legal fiction, because it assumes that the renewal applicant will remain the owner of the station after defeating a new challenger. There is no Commission rule that limits the renewal applicant's ability to sell the station, and it is free to do so shortly after the comparative hearing. Where a licensee relies completely or nearly so on the performance of its time broker to establish a renewal expectancy, the legal fiction is attenuated further. The time brokerage contract may expire by its terms, may be abrogated by mutual agreement of the parties, or one of the parties may not perform its obligations under the contract, and so bring about a default. The substitution of one broker for another is not subject to the Commission's review or approval. In those circumstances, the renewal applicant's "proven performance" may be as much a "paper proposal" as the challenger's.

Apart from this general concern about extending the renewal expectancy to 100-percent brokered stations, the first factor quoted above does retain its validity. Assuming no abandonment of control, the renewal applicant has either set out standards for the broker to observe or has monitored the brokers performance sufficiently to assure a performance by the broker that would warrant a renewal expectancy. There is virtually no incentive, however, for the licensee of a brokered station to invest in quality service because it receives a flat fee from the broker, without regard to service. Finally, the Commission's reluctance to restructure the broadcast industry through the renewal process is understandable. This factor presumably is not based on the ground that the Commission wants to aid broadcasters, but that the public will ultimately be better served by broadcasters that perceive a stable environment for their investment. From the perspective of the ownership of broadcast stations, that factor remains for an 100-percent brokered station. To the extent that investment in programming is concerned, however, it is not at all apparent how the public will benefit.

It might be thought that a significant renewal expectancy might be absent or significantly lessened where the renewal applicant relies solely on duplicated issue-responsive programming from the broker's station in the same market. In Radio Station WABZ, Inc. the Commission rejected that contention in a roughly analogous situation. There, WABZ filed renewal applications for its commonly owned AM and FM stations. Victor Broadcasting, Inc. (Victor) filed a mutually exclusive application for a construction permit only for a new FM station. The Commission observed that program duplication was inherently inefficient, but also noted that under the rule then in effect, 100-percent duplication was permitted for commonly owned AM-FM stations in the small market involved in that case. The Commission concluded that WABZ's inefficient use of the frequency by program duplication "only slightly detracts from the station's overall broadcast record, and that a strong comparative preference was warranted. Similarly, substantial time brokerage is permitted under the Spanish Radio policy and program duplication up to twenty-five percent is permitted by Section 73.3556(a) of the Commission's Rule. The broker is presumably under the control of the licensee, so the Commission might reason that duplicated programming from the broker should be accorded the same treatment given to the duplicated programming in Radio Station WABZ, Inc. The

---

187 Section 73.3597 of the Commission's Rules imposes a one-year holding period on the winner of a comparative hearing between two or more applicants for a new station. 47 C.F.R. § 73.3597 (1994) (emphasis added). That rule does not apply to an applicant for renewal of license, which presumably could sell the station as soon as the decision granting its renewal becomes final. No renewal expectancy would be available to the renewal applicant if there has been an unauthorized transfer of control of the station to the broker. The Act places the burden on the renewal applicant to establish that its performance is consistent with the public interest so as to warrant renewal. 47 U.S.C. § 309(a) and (e) (1988); Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 546, 550 (D.C. Cir. 1969). A renewal applicant shown to have granted or abandoned control to a broker cannot claim credit for a performance over which it had no control, regardless of the merits of the broker's programming. Regulations Governing Television Broadcasting, supra note 83, para. 139. The Commission did invite comment on the effect of time brokerage on the renewal expectancy. Clarification of this issue will undoubtedly result from this inquiry. As noted above, section 73.3556 of the Commission's Rules limits program duplication between brokered and broadcasting stations to "25 percent of the total hours in its average broadcast week ...." 47 C.F.R. § 73.3556 (1994). Typically all issue-responsive and other informational programming could be simulcast without running afoul of this limitation.


141 Id. para 50.

142 Id.

143 47 C.F.R. § 73.3556 (1994). The 25-percent limit applies to the entire broadcast day. With this limit, there still can be complete duplication of issue-responsive and other informational programming between the brokered and brokering stations.
Commission, however, has not yet decided the issue.\textsuperscript{148}

V. CONCLUSION

This article has sought to point out some of the issues that follow from the Commission's changed regulatory position regarding extensive time brokerage. Questions as to unauthorized transfers of control may prove the most problematic, in light of the passive, almost superficial indicia of control accepted by the Commission. I believe that some of the brokerage agreements are likely to result in unauthorized transfers and that others may be shams intended to avoid the requirements of section 310(d) of the Act. In my opinion, the Commission failed to give the potential violations of that important statutory provision sufficient weight when it adopted the Spanish Radio policy, or, alternatively, failed to provide sufficient factual support or analysis to support its conclusions.\textsuperscript{148}

There seems to be no current outcry for changes in the Spanish Radio policy, and the likely stimulus for change might not arise until there is an adverse judicial ruling or legislative change. There are, however, many ways to minimize or eliminate the concerns expressed here. One approach would be to adopt, after an appropriate rulemaking proceeding, a rule that: (1) imposes a fifteen percent limit (or some other modest figure) on local time brokerage; (2) adopts a limit on the amount of issue-responsive programming that can be supplied by the broker or, alternatively, a limit on the extent a renewal applicant can rely on duplicated issue-responsive programming to establish a renewal expectancy; and (3) requires the broker to purchase control of the station, subject to Commission approval, if the two licensees want to exceed the fifteen percent benchmark. Such an approach would more effectively implement and enforce section 310(d) of the Act, minimize concerns about anticompetitive practices, and permit resolution of renewal/new applicant comparative cases under existing precedent.

\textsuperscript{148} In re Broadcast Communications, Inc., \textit{Memorandum Opinion and Order}, 97 F.C.C.2d 61 (1984) (involving a renewal applicant that engaged in part-time brokerage). The station did in fact present issue-responsive programming on its own. The decision observed that some of the brokered programming contained issue-responsive material. However, the extent of that material is not precisely stated, and there was an unresolved conflict of fact on that point. The Commission concluded that a renewal expectancy was warranted, but whether that conclusion rested in part on the material broadcast during the brokered programming is not at all clear.

\textsuperscript{148} I make that statement with the benefits of hindsight and of leisurely contemplation, both luxuries not available to a very capable but overworked Commission staff. Those of us who comment on the Commission's decisions should be thankful we have those luxuries.