COMPETITIVE PROCEDURES FOR BROADCASTING - RENEWAL AND TRANSFERS

Robert E. Babe
and Philip Slayton

Study Prepared for the
Department of Communications

FINAL REPORT
September, 1980

ROBERT E BABE ASSOCIATES • CONSULTANTS

BROADCASTING • TELECOMMUNICATIONS • ECONOMICS • PUBLIC POLICY
304-456 McARTHUR, OTTAWA • K1K 4B5 • 613-746-6472

19 September 1980

Mr. Gilles Desjardins
Acting Director- General
Broadcasting and Social Policy
Department of Communications
300 Slater Street
Ottawa, Ontario

Dear Mr. Desjardins,

On behalf of Philip Slayton and myself I am pleased to submit our joint report entitled Competitive Procedures For Broadcasting- Renewal and Transfers; DSS File No. 16 ST 36100-8-1466.

Dean Slayton and I are pleased with this Report and are grateful for being granted an extension of time in order to carry out revisions to our submission of April 1980.

We look foward to comments on our study.

Yours truly,

Robert E. Babe

Robert E. Babe

COMPETITIVE PROCEDURES FOR BROADCASTING - RENEWAL AND TRANSFERS

Robert E. Babe

and Philip Slayton

TERMS OF REFERENCE

The consultants were requested to prepare a report concerning the issue of competitive applications for renewal and transfer of broadcasting licences under the Broadcasting Act. The report is to address economic, regulatory and policy issues which the Department of Communications must assess given its responsibilities to all interested parties and governments under existing legislation. The report is to describe as a minimum existing CRTC procedures and practices, existing challenges to CRTC procedures, financial and procedural policy considerations, alternatives to competitive licensing, and policy recommendations.

AUTHORSHIP

While this is a consensus report, it is useful to attribute authorship to specific sections. Chapter V "Legal Issues" was authored by P. Slayton, while Chapter VI was written by R. Babe in consultation with P. Slayton. The remaining sections were authored by R. Babe.

EXECUTIVE SUMMARY

Broadcasting in Canada has always been viewed by policy-makers as having special significance. The present legislation, for example, states that broadcasting should help "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada"; that the programming provided by each broadcaster should be "of high standard, using predominantly Canadian creative and other resources".

Unfortunately, attainment of these goals has proved elusive, due first to the audience attractiveness of American programs that can be received in Canada on US border stations through cable television or otherwise, and second to the fact that private television broadcasters in Canada find it more lucrative to procure programming relatively cheaply from US sources than to themselves engage in quality domestic productions, a much more expensive proposition.

Consequently, Canadian television broadcasting in the private sector is failing to achieve the goals set by Parliament in the Broadcasting Act, notwithstanding its extraordinarily high profitability. For example, Canadian programs are often not available on private stations during the time periods most favoured by audiences, and the Canadian programs that are broadcast are usually characterized by low costs, low complexity and low employment (information, game shows and sports). Consequently, in the English language, 90 percent of the viewing of entertainment programs by Canadians is directed at American-originated

material.

The licensing and regulatory authority, the Canadian Radio-television and Telecommunications Commission (CRTC), has been given the mandate and authority to supervise the Canadian broadcasting system in such a way as to achieve the goals set for broadcasting. The CRTC itself believes it has failed in this task.

The two principal means by which the CRTC has attempted to regulate the Canadian broadcasting system are Canadian content quotas and Promises of Performance. The content quotas, as administered hitherto, have been unsuccessful in that they count equally for compliance purposes bingo games and repeats of newscasts with high quality drama. Furthermore, these quotas have permitted the scheduling of Canadian programs in time periods and seasons when fewer Canadians are watching television. And in any event, enforcement of the content quotas by the CRTC has been more the exception than the rule.

Nor have Promises of Performance been effectively enforced by the regulator. When licensed initially, and in an effort to attain the licence, applicants submit programming and other plans to the CRTC. It is on the basis of such plans and promises that the Commission issues the licence. Although such Promises of Performance are often not fulfilled, the CRTC's licence renewal proceedings have been such as to virtually guarantee licence renewal, irrespective of performance.

It is within the foregoing context that the consultants

address the issue of competitive procedures for licence renewal and transfer.

With regard to licence renewals, proponents believe that such procedures would induce present licensees to live up to their obligations to a greater extent than is now the case, and given blatant failure to do so, facilitate the licensing of an alternative party. By inducing, through competition for licence renewal, more expensive program undertakings than is at present the case, competitive renewal procedures could also reduce the rates of return earned by the television broadcasting and cable television industries which the consultants term "supranormal". Insofar as television broadcasters have been given a position of trust and responsibility through the privilege of utilizing the radio frequency spectrum for broadcast transmission, some believe it is inappropriate that such broadcasters should earn extraordinarily high rates of return in the face of poor programming performance. Similarly, it may also be inappropriate for the cable television industry, which in many ways bears the characteristics of traditional public utilities, including the monopoly aspect, to continue to earn monopolistic profits. Proponents of competitive licensing believe such procedures to be one answer to these problems.

Finally, it is held, competitive procedures could facilitate the even-handed treatment of licence renewals by the regulator. At present, the CRTC must act as both prosecutor and judge due to the fact that detailed and well-researched interventions

are costly to prepare with little or no financial incentive for such intervention. Competing renewals, if combined with quasi-judicial proceedings, could allow the CRTC to act primarily in a judicial capacity, evaluating the evidence developed by interveners who now have a financial incentive to develop data and arguments pertaining to the record of the existing licensee as well as with regard to their own plans.

There are also a number of arguments raised against competitive renewal procedures. First, it is argued that such procedures would increase uncertainty in the industry to such an extent that its financial stability would be undermined. The consultants observe, however, that the present degree of stability as manifested by virtually automatic licence renewals, is a principal cause of the inferior performance characterizing the industry, and in any event the instability argument would be less significant if the CRTC were to administer competitive procedures in an even-handed manner, consistently rewarding good performers with licence renewals.

Second, it is argued, and with some justification, that in competitive renewal proceedings, the regulator is required to compare the track record of existing licensees with "paper promises" of would-be entrants. Notwithstanding the fact that current licensees were also originally licensed on the basis of "paper promises" which may or may not have been adhered to, the consultants recognize that this could indeed be perceived as a problem by the regulator. The question to be asked is

whether this argument is persuasive in light of the added data and argument that competitive proceedings would bring before the Commission and the likelihood that past promises would be adhered to more than is now the case.

Third, it is argued, competitive renewal proceedings give added discretionary powers to the regulatory authority, introducing "subjectivity" into the licensing process, with the possibility of undue government interference in matters pertaining to programming. While such argument is perhaps persuasive in the American context, wherein reliance is placed on competition to create a "marketplace of ideas" from which the Truth, it is believed, will emerge, in Canada unfettered private competition will lead to a marketplace wholly dominated by American ideas and creative resources. The consultants contemplate the necessity of greater government discretion in Canada than is required in the United States.

Proponents of competitive proceedings for <u>transfers</u> of licence have argued that such proceedings would permit the CRTC to choose the best qualified party to assume broadcasting duties, rather than having its options limited to the party brought forth by the out-going licensee.

It is in the financial interest of an out-going licensee to reach agreement with the party willing to pay the highest price to it for the licence, not necessarily the party making programming plans most in keeping with the goals of the Broadcasting Act. Furthermore, such sale or transfer of control entails

the capitalization of the future stream of earnings which accrue to the party leaving the industry, thereby inflating the investment upon which the new entrant must earn a return. Insofar as the type of programming envisaged by the Broadcasting Act is generally held to be unprofitable, this capitalization of future profits and the accompanying inflation of investment will erode the capacity of the incoming licensee to fulfil the goals set for broadcasting.

In this light, competition for licence transfers indeed appears to be desirable. The CRTC would thereby be enabled to choose the best from among several applicants, rather than having its choice limited to the single party brought forth by the seller as at present. Competition could cause applicants to compete in making programming plans in accordance with the goals set for broadcasting, thereby reducing the future stream of profits and the capital gain accruing to the party leaving the industry.

While the consultants recommend adoption of competitive procedures for licence transfers, we also put forth two other policy options that could be introduced in lieu of competitive procedures for licence renewals.

These recommended policy options, which are additional to recommendations for competitive transfer of licence proceedings, would give the benefits held to be forthcoming from competitive renewals without entailing the costs perceived to be associated therewith.

As Option 1, it is recommended that the CBC, CRTC or other public body be empowered to tax all or most of the surplus earnings of television broadcasting and cable licensees (estimated to be about $88 million before tax in 1978) and to apply such funds to the financing of independent productions commissioned by this public authority. This public body would also have the power and responsibility of scheduling these programs for one or two hours a week during peak viewing hours on private stations which would be required to turn over the air-time for this purpose without charge.

The advantages to this approach are that a portion of the peak viewing hours of all licensees would be devoted to Canadian content of a type presumably in accord with the goals set for broadcasting; the airwaves would be opened up for the first time to independent productions; and such is accomplished without increasing the uncertainty of the private sector and without increased regulatory supervision over the programming efforts of licensees. Broadcasting revenues would be applied to the improvement of the performance of the broadcasting system to a greater extent than is now the case, and licences would trade at lower premiums than at present due to the lowered profitability. This option could be implemented by itself, or in combination with the following.

As Option 2, the consultants recommend that data gathering, research and other such support staff and duties be spun-off from the Commission and placed in a new agency entirely

separate from the CRTC. This new office would play an adversarial role in licence renewal proceedings before the CRTC similar to the role played by the Director of Investigation and Research, Combines Investigation Act before the Restrictive Trade Practices Commission. In addition to bringing to the attention of the CRTC apprehended failures of licensees to comply with Promises of Performance and regulations, cross-examining licensees, and arguing before the CRTC appropriate remedies, the office would also support research and interventions on the part of the general public. The agency could be financed by taxation of licensees. It would be empowered to attain any and all data deemed relevant to further its duties of ensuring compliance with CRTC regulations and Promises of Performance.

The CRTC would take on quasi-judicial procedures, and would be held accountable in the courts for due process of law. It would be required to give a full accounting in its decisions of the evidence before it and the reasons for renewing or failing to renew licences. Such full reporting would inform the public and facilitate review by the courts.

It is apparent that private broadcasters should face the real possibility of disciplinary action if they fail to adhere to their own promises and otherwise fail to comply with the intent of the Broadcasting Act. The advantages of the foregoing approach, as compared with competitive licence renewals and with current procedures, are several. First, the burden on

the CRTC of both prosecuting licensees and judging them is negated; it could judge licensees in a more even-handed manner.

Second, licensees with a good track record would not be competing with the "blue sky" promises of applicants without a record, but at the same time they would be induced to comply with Promises of Performance and regulations due to the real possibility of licence non-renewal. The "instability" arguments of competitive licensing are less important insofar as licensees would themselves determine their fate through their own performance.

Third, since the newly-created office would be devoted to enforcement of promises and regulations, greater consistency in the treatment of licensees is to be expected than what could take place under competitive licensing. In the latter instance, much of the burden of prosecution lies with licence challengers; it could be anticipated that competitive renewal proceedings would be subject to great variability depending upon the number and interest of potential challengers and the finances available to undertake an uncertain activity.

It is clear that regulatory reform is required if broadcasting is to be considered seriously as an agency "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. The measures set forth above appear to be very conservative in comparison with other recent proposals for reform (for example, proposals by Stuart Griffiths and Alphonse Ouimet), while at the same time being likely to induce substantial improvement in the performance of the system.

TABLE OF CONTENTS

LIST OF TABLES

SOMMAIRE

PROCEDURES CONCURRENTIELLES RELATIVES A LA RADIODIFFUSION - RENOUVELLEMENTS ET TRANSFERTS

Robert E. Babe

et Philip Slayton

Etude préparée pour le

ministère des Communications

RAPPORT DEFINITIF

septembre 1980

SOMMAIRE

Les responsables de l'élaboration des politiques ont toujours accordé à la radiodiffusion une importance particulière au Canada. La législation actuelle stipule par exemple que la radiodiffusion devrait aider à "sauvegarder, enrichir et raffermir la structure culturelle, politique, sociale et économique du Canada" et que la programmation de chaque radiodiffuseur devrait être "de haute qualité et utiliser principalement les ressources canadiennes créatrices et autres".

Malheureusement, ces objectifs sont difficiles à atteindre, en raison tout d'abord de l'attrait qu'exercent sur les téléspectateurs les émissions américaines qui peuvent être captées au Canada par les stations des régions frontalières à l'aide de la télévision par câble ou d'autres moyens et, en second lieu, en raison du fait que les télédiffuseurs privés canadiens estiment qu'il est plus rentable de transmettre à un coût peu élevé des émissions américaines que de réaliser eux-mêmes des émissions canadiennes de qualité, ce qui constitue une entreprise beaucoup plus coûteuse.

Par conséquent, la radiodiffusion télévisuelle canadienne dans le secteur privé, qui pourtant jouit d'une rentabilité remarquable, ne réussit pas à atteindre les objectifs fixés par le Parlement dans la Loi sur la radiodiffusion. Par exemple, les émissions canadiennes ne sont souvent pas diffusées par les stations privées aux heures que préfèrent les téléspectateurs et les émissions canadiennes qui sont effectivement transmises sont habituellement caractérisées par un coût de production modique, un contenu peu complexe et une réalisation qui fait appel à peu d'employés (bulletins d'informations, jeux et sports). En outre, chez les Canadiens anglophones, 90 p. 100 du temps d'écoute des émissions de divertissement est rempli par des émissions américaines.

L'organisme chargé de la délivrance des licences et de la réglementation, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC), a reçu le mandat de contrôler le système de radiodiffusion canadien de manière à atteindre les objectifs établis en matière de radiodiffusion. Le CRTC lui-même estime qu'il n'a pas réussi.

Les deux principaux moyens par lesquels le CRTC a tenté de réglementer le système de radiodiffusion canadien sont les normes relatives au contenu canadien et les promesses de réalisation. Les normes relatives au contenu canadien, telles qu'elles ont été appliquées jusqu'ici, ont été inefficaces étant donné qu'elles accordent la même importance, lorsqu'il s'agit de s'y conformer, aux jeux de bingo et reprises de dossiers documentaires qu'aux émissions dramatiques de haute qualité. De plus, ces normes ont permis d'inscrire à l'horaire des émissions canadiennes à des heures et des saisons pendant lesquelles moins de Canadiens regardent la télévision. De toute façon, l'application par le CRTC des normes relatives au contenu est devenue l'exception au lieu de la règle.

Par ailleurs, le CRTC n'a pas non plus vu à ce que les promesses de réalisation soient respectées. Au moment de présenter leur demande initiale de licence, les requérants fournissent au CRTC des projets de programmation et autres plans. Le Conseil se fonde alors sur ces projets et promesses pour délivrer la licence. Même si ces engagements ne sont souvent pas respectés, le processus de renouvellement de licences du CRTC aboutit au renouvellement dans presque tous les cas, quelle que soit la performance.

C'est en tenant compte du contexte susmentionné que les experts-conseils ont abordé la question de procédures concurrentielles dans le cas du renouvellement et du transfert des licences.

En ce qui a trait au renouvellement des licences, les partisans de ces procédures estiment que celles-ci inciteraient les titulaires actuels à respecter leurs engagements plus qu'ils ne le font présentement et faciliteraient la délivrance de licence à un autre requérant lorsqu'un titulaire ne fait vraiment aucun effort pour s'y conformer. Outre le fait de pousser à la réalisation d'émissions plus coûteuses en soumettant le renouvellement des licences au jeu de la concurrence, le processus de renouvellement concurrentiel pourrait également réduire les profits réalisés par les industries de la radiodiffusion télévisuelle et de la télévision par câble, profits que les experts-conseils qualifient de "au-dessus de la normale". Étant donné que les télédiffuseurs se voient attribuer une situation de confiance et de responsabilité grâce au privilège qui leur a été accordé d'utiliser le spectre radioélectrique pour la radiodiffusion, certains estiment qu'il n'est pas justifié que ces radiodiffuseurs réalisent des profits extraordinairement élevés en échange d'une programmation de plus ou moins bonne qualité. Parrallèlement, il n'est sans doute pas approprié que l'industrie de la télévision par câble, qui présente à plusieurs égards les mêmes caractéristiques que les services publics traditionnels, y compris l'aspect monopolistique, continue à réaliser des profits monopolistiques. Les défenseurs du processus concurrentiel de délivrance de licences considèrent que ces procédures constituent une solution à ces problèmes.

Enfin, certains soutiennent que les procédures concurrentielles pourraient favoriser le traitement équitable des demandes de renouvellement de licences par l'organisme de réglementation. À l'heure actuelle, le CRTC doit faire fonction à la fois de plaignant et de juge étant donné que la préparation d'interventions détaillées et bien documentées est coûteuse et qu'il n'existe pour ainsi dire pas de stimulant financier encourageant le dépôt des interventions. Le processus de renouvellement concurrentiel, allié à des démarches quasi-judiciaires, pourrait permettre au CRTC d'agir surtout comme un tribunal, en évaluant les preuves soumises par les intervenants qui seraient alors incités financièrement à préparer des arguments se rapportant au rendement du titulaire actuel ainsi qu'à leurs propres projets.

Un certain nombre d'arguments peuvent également être apportés contre le processus de renouvellement concurrentiel. Tout d'abord, certains soutiennent que ce processus augmenterait l'incertitude dans l'industrie dans une mesure telle que sa stabilité financière en souffrirait. Les experts-conseils font toutefois remarquer que le niveau actuel de stabilité, qui se traduit par le renouvellement presque automatique des licences, est une des principales causes du rendement inférieur qui caractérise l'industrie. D'une manière ou d'une autre, cet argument aurait moins de poids si le CRTC appliquait des procédures concurrentielles de façon uniforme, récompensant systématiquement les radiodiffuseurs qui ont fourni un bon rendement par le renouvellement de leurs licences.

En second lieu, certains affirment avec raison que, dans le cas du processus de renouvellement concurrentiel, l'organisme de réglementation doit comparer les antécédents des titulaires actuels avec les "promesses sur papier" des requérants. En dépit du fait que les titulaires actuels ont également reçu une licence à partir des "promesses sur papier" qui peuvent avoir été respectées ou non, les experts-conseils admettent que cette question pourrait poser un problème à l'organisme de réglementation. Il reste à savoir si cet argument est convaincant compte tenu des preuves et données supplémentaires qui seraient fournies au Conseil grâce aux procédures concurrentielles et du fait que les promesses antérieures seraient vraisemblablement respectées plus qu'elles ne le sont actuellement.

Troisièmement, certains soutiennent que le processus de renouvellement concurrentiel accorderait des pouvoirs discrétionnaires à l'organisme de réglementation, introduisant une certaine "subjectivité" dans le processus de délivrance des licences, le gouvernement pouvant ainsi s'ingérer dans les questions relatives à la programmation. Bien que cet argument soit peut-être convaincant dans le contexte américain, où l'on se fie à la concurrence pour créer un "marché d'idées" d'où découlera, croit-on, la Vérité, au Canada, la libre concurrence privée donnera lieu à un marché totalement dominé par les idées et les ressources créatrices américaines. Les experts-conseils estiment que l'intervention du gouvernement est sans doute plus justifiable au Canada qu'aux États-Unis.

Les défenseurs du processus concurrentiel dans les cas de transferts de licence ont soutenu que ces procédures permettraient au CRTC de choisir la partie la mieux en mesure d'assumer les fonctions de radiodiffusion, plutôt que de n'avoir d'autres choix que la partie proposée par le titulaire qui cesse d'exploiter son entreprise.

Il est de l'intérêt du titulaire de licence qui se retire de conclure une entente avec la partie qui est prête à lui verser le montant le plus élevé pour la licence, ce qui ne correspond pas nécessairement à la partie dont les projets de programmation se conforment le plus aux objectifs fixés dans la Loi sur la radiodiffusion. En outre, cette vente ou transfert de contrôle entraîne la capitalisation des profits futurs que réalise la partie qui quitte l'industrie, ce qui augmente l'investissement à partir duquel le nouvel exploitant doit tirer profit. Dans la mesure où le type de programmation prévu par la Loi sur la radiodiffusion est habituellement considéré comme étant non rentable, cette capitalisation des profits futurs et la hausse de l'investissement qui l'accompagne empêcheront le nouveau titulaire de licence d'atteindre les objectifs de la radiodiffusion.

Compte tenu de ce qui précède, le jeu de la concurrence dans le transfert des licences semble en effet être souhaitable. Le CRTC pourrait ainsi choisir le requérant le mieux indiqué, plutôt que de n'avoir d'autres choix que l'unique partie choisie par le vendeur, comme à l'heure actuelle. La concurrence inciterait les requérants à élaborer des projets de programmation conformes aux objectifs de la radiodiffusion, ce qui réduirait les profits futurs et la plus-value qui reviennent à la partie qui quitte l'industrie.

Bien que les experts-conseils recommandent l'adoption du processus concurrentiel dans les cas de transferts de licence, nous mettons également de l'avant deux autres lignes de conduite qui pourraient être adoptées à la place des procédures concurrentielles dans les cas de renouvellements de licence.

Ces lignes de conduite, qui viennent s'ajouter aux recommandations relatives au processus de transfert de licence faisant intervenir la concurrence, présenteraient les avantages que comporte le renouvellement compétitif sans entraîner les coûts s'y rapportant.

En tant que 1re ligne de conduite proposée, il est recommandé que la Société Radio-Canada, le CRTC ou tout autre organisme public soit autorisé à taxer la totalité ou la plupart des recettes excédentaires des titulaires de licences de radiodiffusion télévisuelle et de télévision par câble (que l'on évalue à environ 88 millions de dollars avant l'impôt en 1978) et à utiliser ces fonds pour le financement de productions indépendantes commandées par cet organisme public. Ce dernier serait également chargé d'inscrire ces émissions à l'horaire pendant une ou deux heures par semaine, au cours des heures de pointe, sur les stations privées qui seraient tenues de mettre ce temps d'antenne à sa disposition, sans frais.

L'avantage de cette approche est qu'une partie des heures de pointe de tous les titulaires serait consacrée à des émissions canadiennes qui se conformeraient vraisemblablement aux objectifs de la radiodiffusion; des productions indépendantes seraient diffusées sur les ondes pour la première fois. Il n'en résulterait aucune augmentation de l'incertitude du secteur privé ni de la supervision exercée sur la programmation des titulaires. Les recettes provenant de la radiodiffusion seraient consacrées à l'amélioration du rendement du système de radiodiffusion dans une mesure plus importante qu'elles ne le sont présentement et le transfert des licences se ferait à des prix moins élevés qu'à l'heure actuelle en raison de la baisse de rentabilité. Cette ligne de conduite pourrait être adoptée comme telle ou de concert avec celle qui suit.

En tant que 2e ligne de conduite proposée, les experts-conseils recommandent que la cueillette de données, la recherche et les autres fonctions et services de soutien soient détachés du Conseil et confiés à un nouvel organisme entièrement distinct. Cet organisme assumerait le rôle d'adversaire devant le CRTC au cours des procédures de renouvellement des licences, rôle semblable à celui assumé par le directeur des enquêtes et recherches (Loi relative aux enquêtes sur les coalitions) devant la Commission sur les pratiques restrictives du commerce. Outre le fait de porter à l'attention du CRTC les cas où les titulaires ne se sont pas conformés à leurs promesses de réalisation et où ils n'ont pas respecté les règlements, d'interroger les titulaires et de soumettre au CRTC les solutions les mieux indiquées, cet organisme appuierait également

la recherche et les interventions déposées par le grand public. L'organisme en question pourrait être financé à même des taxes perçues des titulaires. Il serait autorisé à obtenir toutes les données nécessaires pour s'acquitter de ses fonctions, c'est-à-dire veiller à ce que les règlements du CRTC et les promesses de réalisation des titulaires soient respectés.

Le CRTC aurait recours à des procédures quasi-judiciaires et serait responsable de l'application de la loi devant les tribunaux. Il serait tenu d'exposer en détail dans ses décisions les preuves qui lui ont été soumises et les raisons pour lesquelles la licence a été renouvelée ou non. Tous ces détails viseraient à informer le public et à faciliter l'examen effectué par les tribunaux.

Il est évident que les radiodiffuseurs privés devraient envisager la possibilité que des mesures disciplinaires soient prises s'ils ne respectent pas leurs propres engagements ou s'ils ne se conforment pas à l'esprit de la Loi sur la radiodiffusion. L'approche susmentionnée présente de nombreux avantages par rapport au processus concurrentiel de renouvellement des licences et aux procédures actuelles. Tout d'abord, cette ligne de conduite permet de supprimer la tâche ingrate qui incombe actuellement au CRTC, soit intenter des poursuites contre les titulaires puis ensuite rendre un jugement. Grâce à la ligne de conduite proposée, le jugement rendu serait sans doute plus équitable.

En second lieu, les titulaires qui ont fourni un rendement satisfaisant ne seraient pas obligés de rivaliser avec les requérants sans antécédents qui font des promesses séduisantes, mais, par la même occasion, ils seraient incités à se conformer aux promesses de réalisation et aux règlements en raison de la possibilité de se voir refuser le renouvellement de leur licence. Les arguments "d'instabilité" apportés contre le processus concurrentiel de délivrance de licences perdent du poids étant donné que les titulaires décideraient eux-mêmes de leur avenir par le biais de leur performance.

Troisièmement, étant donné que le nouvel organisme viserait à faire respecter les promesses et les règlements, tout porte à croire que les titulaires seraient traités de façon plus équitable et uniforme que dans le cas du processus concurrentiel de délivrance de licences. Dans ce dernier cas, ce serait surtout ceux qui convoitent une licence qui se chargeraient d'apporter les pièces à conviction; on peut s'attendre à ce que le processus de renouvellement concurrentiel soit appliqué de façon très variable selon le nombre et l'intérêt des opposants possibles et les fonds dont ils disposent pour entreprendre une activité aux résultats incertains.

Il est évident qu'une réforme de la réglementation s'impose pour que la radiodiffusion puisse sérieusement être considérée comme un moyen de "sauvegarder, enrichir et raffermir la structure culturelle, politique, sociale et

économique du Canada". Très modérées par rapport aux autres récentes propositions de réforme (celles de MM. Stuart Griffiths et Alphonse Ouimet, par exemple), les mesures énoncées dans ce document permettront sans doute d'apporter quand même d'importantes améliorations au fonctionnement du système.

COMPETITIVE PROCEDURES FOR

BROADCASTING - RENEWAL AND TRANSFERS

CHAPTER I

INTRODUCTION: BROADCASTING SYSTEM GOALS

1. Irreconcilable Goals

The proper starting point for any discussion of a policy issue is what one wishes to accomplish from policy alternatives. To place the issue of competitive licensing procedures for renewals and transfers of broadcasting licences in the proper context, therefore, this paper begins with a discussion of the goals, both implicit and explicit, for Canadian broadcasting.

It is one of the perplexities and challenges of life that goals are seldom uni-dimensional; trade-offs must be arrived at and balances struck between opposing ends. It may well be, for example, that the fundamental social goals of freedom and justice for the individual on the one hand, and social order for the body politic on the other, are mutually contradictory in the sense that an increment to the one may decrease the other.[1] Governments certainly believe this to be true during times of crisis when many existing freedoms are suspended.

In any event, discussion of procedures to be used in allocating radio frequencies for broadcast brings to the fore the issues of freedom and control. In Chapter III of this study, the US policy in licensing is explored in some depth because,

---

1. Gunther S. Stent, "The Dilemma of Science and Morals", Paradoxes of Progress, (San Francisco: Freeman, 1978), pp. 131-151.

the authors believe, the US has adopted a fundamentalist or absolutist stance which sacrifices other benefits that could be forthcoming from a more moderate approach.

Another pervasive issue is: whose freedom? Government "intervention" may be required to redistribute rights in a more equitable manner. Those who lose from such actions may vociferously label such activities "undue control" on the part of government, while those groups benefiting therefrom may view such actions as increasing their freedom. So the notions of freedom vs. control noted above are by themselves insufficient until we take into account the related aspects of whose freedom and whose control.

The issue of relative rights in broadcasting - for broadcasters, cable television companies, audiences, performers, advertisers, the body politic, is central to broadcast licensing procedures. Generally, incremental freedom or increased rights given to one group will be at the expense of another, at least in the absence of technological change. Parenthetically, technological change raises the third great policy issue, that of continuity vs. change.[2]

In any event, we must face the world in a clear-headed manner and recognize that policies seldom, if ever, give costless benefits. Judgement must be applied to inherent tradeoffs

---

2. See Warren J. Samuels, The Classical Theory of Economic Policy (New York: World, 1966) for a thorough, albeit general, discussion of the three great policy issues.

This is as true in the case of competitive licensing as in other policy areas.

2. Goals Set for Canadian Broadcasting[3]

The most often-quoted statement of Canadian broadcasting policy comes from the Broadcasting Act.[4] Broadcasting, the Act says, should "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada"; the "programming ... should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and ... should be of high standard, using predominantly Canadian creative and other resources".

As interpreted by the regulatory body (CRTC) and the crown corporation engaged in broadcasting (CBC), the foregoing statement of goals implies a high level of Canadian content which is attractive to viewers and which contains identifiable Canadian themes, a supply of programs across the various program types, regionalization in program inputs, a lack of monopolization by any individual group or class, and fairness in the treatment of controversial issues.

The explicit goals set for broadcasting in the governing legislation reflect one manifestation of the general responsibility of government for maintaining social order. The nation

---

3. Portions of this section and the next are derived from "Broadcasting in Canada: In Whose Interest?" In Search, Summer, 1980.

4. R.S.C. 1970, C B-11.

building goals of the Broadcasting Act make explicit one particular aspect of this concern which is of special importance in Canada due to her geographic proximity to the United States, relatively low population, and the distribution of her population which is concentrated near the international border.[5]

More generally, however, governments are and must be concerned with the effects of television programming on individual and societal behaviour and attitudes. Studies regarding the relationships of television programming on the one hand and acts of violence, crime, sexual stereotyping, attitudes toward racial minorities, drug abuse and so forth on the other hand, exemplify some of these apprehensions with regard to the effects of present-day television programming on societal evolution.[6]

Indeed, public policy toward television broadcasting may well be of greater significance than policies concerning any other industrial sector. This is due to the importance of broadcasting, and television in particular, in influencing

---

5. See E.S. Hallman with Henry Hindley, Broadcasting in Canada: Studies on Broadcasting Systems (Don Mills: General Publishing, 1977) p. 5.

6. George Comstock, Steven Chaffee, Nathan Katzman, et al. Television and Human Behavior (New York: Columbia, 1978), and (Ontario) Royal Commission on Violence in the Communications Industry Report, Volume I: Approaches, Conclusions and Recommendations (Toronto: Queen's Printer for Ontario, 1977).

society's values and thereby the future evolution of society itself. Since viewing of television programming constitutes the most favoured leisure time activity of North Americans, (on average, North Americans spend some 26 hours a week in front of their television sets and an additional 21 hours a week listening to radio),[7] the effects of television programming and viewing on social and individual behaviour patterns and perceptions are profound.

Billions of advertising dollars are spent each year in North America with the single-minded intent of altering human perceptions and behaviour. To this end, the knowledge of behavioural science is enlisted, complete with testing of galvanic skin responses and brain wave patterns in test audiences.[8] However, should the behaviour alterations induced by advertising (or television programming generally) threaten the social fabric, as is claimed by some serious scholars,[9]

---

7. Tony Schwartz, The Responsive Chord (Garden City: Anchor Press/Doubleday, 1974), p. 52.

8. Deborah Dowling, "Brainwaves: The Ultimate Advertising Test?" Financial Post, 3 March 1979, p. 14; Eric Barnouw, The Sponsor: Notes On a Modern Potentate (New York: Oxford, 1978), p. 113; Frank Mankiewicz and Joel Swerdlow, Remote Control: Television and the Manipulation of American Life (New York: Quadrangle/New York Times, 1978), p. 295.

9. Daniel Bell, Christopher Lasch and others for example, state that over commercialization of the medium may be causing a breakdown in empathy toward others through incessant preaching of self-gratification.
Daniel Bell, The Cultural Contradictions of Capitalism (New York: Basic Books, 1976) and Christopher Lasch, The Culture of Narcissism: American Life in An Age of Diminishing

it is the duty of government to redress the problem. A number of authors have also noted the "homelessness" of the modern mind and have attributed their perception of widespread alienation, in part, to the type of messages propogated by the mass media.[10] In this view:

> The patterns of our perceptions, the patterns of our understanding, the patterns of our action, and the patterns of our artifacts are central, both to our present predicament and to the possibilities of dealing with it.... The life so eagerly sought will only come as we not merely rearrange but re-conceive, re-intuit, and re-sense ourselves - our past, present and future. Somehow, our future lies beyond our present myths, models and paradigms.[11]

Expectations (New York: Norton, 1978). Also, "The Enemies of Intimacy" by George P. Elliot Harpers', July, 1980.

10. Joseph Weizenbaum, for example, while noting the technological miracles entailed in the delivery of television programming, laments the fact that such technology, combining and refining as it does some of the human species' highest intellectual achievements, is used to deliver to the masses "an occasional gem buried in immense avalanches of the ordure of everything that is most banal and insipid or pathological in our civilization".
Joseph Weizenbaum "Once More: The Computer Revolution", in Michael L. Dertouzos and Joel Moses (eds.) The Computer Age: A Twenty Year View (Cambridge: MIT, 1979) p. 442.

11. Ruben F. W. Nelson, The Illusions of Modern Man (Toronto: Macmillan Company of Canada for the Ministry of State for Urban Affairs, 1976) p. 19. Also, Peter Berger, Brigitte Berger and Hansfried Hellner, The Homeless Mind: Modernization and Consciousness (New York: Vintage, 1974); Theodore Roszak, Where the Wasteland Ends (Garden City: Doubleday, 1972), especially pp. 101 - 252; Jacques Ellul, The Technological Society (New York: Vintage, 1964); Francis A. Schaeffer, How Should We Then Live? The Rise and Decline of Western Thought and Culture (Old Tappan: Fleming H. Revell, 1976); Gary Gumpert and Robert Cathcart (eds.) Inter/Media: Interpersonal Communication in a Media World (New York: Oxford,

The federal government in Canada has taken two major steps designed to help us "re-conceive" and "re-intuit" ourselves. By creating and sponsoring the Canadian Broadcasting Corporation (CBC), the government has pursued directly through an arm's-length crown corporation the goals of nation building and the production and distribution of quality indigenous programming. By creating and funding the Canadian Radio-television and Telecommunications Commission (CRTC), the federal government has pursued indirectly the same goals; the CRTC is responsible for licensing and supervising both the public and private sectors of Canadian broadcasting.

Nevertheless, government cannot, and should not, pursue its goals of nation building and maintenance of a just social order single-mindedly, as other groups also have stakes in the outcomes.

3. Unofficial Goals

Control of television will always be shared among various interest groups, but over time, some interest groups may be expected to gain dominance over others. It is assumed that each control group will endeavour to use the medium primarily for its own ends, limited only or at least primarily by the countervailing power of the other interest groups.

1979); Horace Newcomb (ed.), Television: The Critical View (New York: Oxford, 1979); C.S. Lewis The Abolition of Man (London: Oxford, 1943).

In addition to government, there are five other major camps that share control over television broadcasting; private station owners, cable television companies, advertisers, the creative element, and viewers. The relative importance of each of these groups in shaping broadcasting is not static. Their impact is influenced by many social, technological, financial and legal factors. What is problematic for government policy-makers in pursuing the legislated goals for broadcasting is that the interests of the other controlling groups must be taken into account whenever decisions are made, despite the fact that the different camps tend to harbour differing outlooks on the function and goals of broadcasting.

The profit motive of private owners is generally antagonistic to the goals set by government for broadcasting.[12] Rather than present programming that is "varied and comprehensive", station owners generally wish to maximize audiences to each program period through a strategy of "common denominator" programming. Instead of striving to present a service that is "predominantly Canadian", private owners are induced to present as much American programming as possible since such programs can be procured at a small fraction of the cost entailed in producing Canadian programs of equal audience attractiveness.

---

12. These points are documented more fully in the following chapter and in Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation. (Ottawa: Minister of Supply and Services for the Economic Council of Canada, 1979).

While station owners may be willing to permit their outlets to be used to "provide reasonable, balanced opportunity for the expression of differing views on matters of public concern", most also wish to supply, themselves, the programming for the Canadian content portion of their broadcast schedules. Thus, they own and control both the production and distribution aspects of broadcasting, thereby limiting the extent to which independent producers have access to the airwaves.

Finally, it is advertisers, not viewers, who financially compensate broadcasters. Thus, the programming is evaluated by many broadcasters in terms of its ability to sell goods through holding audience attention between commercial messages, rather than in terms of its inherent artistic merits, depth of meaning, contributing to the cultural goals set for broadcasting, or satisfying audience tastes.

Cable television companies constitute another important power bloc. The historic role of cable television has simply been to capture off air signals originated by others and to deliver these signals to the household for a fee. Thus far, cable companies have escaped attempts to require payment to copyright holders on the program origination side, and profit regulation in the provision of their monopolized service on the viewers' side.

Generally, the greater the number and diversity of signals carried, the greater the number of cable subscriptions and hence, cable revenues. Therefore, cable operators are

interested in expanding the technical capacity of their systems, in finding program content from the cheapest sources that will cater to audience tastes and appetites, and in devising rate structures that will distinguish among various viewing groups (as opposed to the present flat fee schedule).

The interests of cable companies conflict with those of government in a quality indigenous broadcasting system; cable companies have historically relied on the importation of American signals for their revenue base. The interests of cable companies also conflict with those of established broadcasters which view with apprehension cable's erosion of their traditional markets through signal importation. Broadcasters also oppose plans for satellite/cable networks under the auspices of the cable industry for the same reason. And, cable's reluctance to pay for the programming it carries has meant that Canadian creative talent has yet to benefit in any significant way from the existence of cable television.

Advertisers constitute the third private group exercising control over television. Advertising is the true content of private television; the program is only the device to get audiences to watch the advertisements. If advertising failed to work, television advertisers would quickly abandon the medium. Therefore, commercial broadcasters and advertisers share the goal of presenting programming that complements the

selling of goods and services.[13]

Broadcasters and advertisers are, of course, in a buyer-seller relationship, so their interests do not totally converge. For example, broadcasters are interested in restricting competition within the system, while advertisers favour increased competition both to lower the price charged for ad time and to narrow program appeal. Narrow, specialized programming allows for target advertising to groups most likely to purchase a given product.

The creative element - writers, artists, performers, producers and crews - constitute another interest group. This group favours creative freedom, and for that reason, this group will be at odds with advertisers whose commercial interruptions dictate the pacing, structure, tone, style and (to a degree), the content of the programming.[14] The creative group also opposes the practice of private Canadian stations and networks of procurring Canadian programming almost exclusively from vertically-affiliated production houses at the exclusion of independent productions. The creative element, too, has an interest in the incomes generated from this work.

---

13. See ibid and Jerry Mander, Four Arguments for the Elimination of Television (New York: Morrow Quill Paperbacks, 1978), for example.

14. Creative freedom is also opposed by network executives - to such an extent that in 1979 one hundred Hollywood producers and writers joined forces to protest what they perceived to be undue artistic interference on the part of New York broadcast executives. The executives, who

There is a natural conjunction between the interests of audiences and creative personnel. Both groups oppose monopoly, the latter because monopoly is inhospitable to creative freedom and weakens their bargaining position. Both groups will favour new forms of financing and new technologies, the latter because of the possible elimination of advertising and the prospect of increased remuneration.

Audiences, the fifth and final interest group to be discussed here, exert control over programming whenever a degree of competition exists, even though it has been determined that the amount of time spent viewing television is quite independent of the number and types of programs available.[15] An expanding array of program alternatives increases audience power over television content. Therefore, audiences favour increased competition among broadcasters and have demonstrated this sentiment through subscriptions to cable and the purchase of new technologies such as video recorders. But, in favouring increased competition audience interests conflict with those of commercial broadcasters, and to the

---

check every script carefully before it is made into a program, insist programs adhere to "scientifically-based formulas" which prescribe minimum quotients of sex and violence to satisfy their perception of audience tastes.

15. CBC Research, Patterns of Television Viewing in Canada: A Project Conducted for the President's "Study of Television in the Seventies" (Ottawa, CBC, 1973).

extent that such increased competition increases the availability of US programs, possibly with the interest of government also.

A desire on the part of audiences for less superficial and involving programming (if such is the case) will place audiences in opposition to advertisers and commercial broadcasters, but into conjunction with the desires of the creative element.

To summarize, the interests of the six groups controlling television are in many ways conflicting. In pursuing the goals articulated in the Broadcasting Act, government must take into account the interests and expectations of all groups as to what television broadcasting should do.

4. Synthesis

The goals, implicit and explicit, for Canadian broadcasting are multifaceted, and will vary according to whom one talks. A number of the goals are mutually inconsistent; for example, profit maximization on the part of private broadcasters is inconsistent with the high levels of Canadian content sought by government. Policy proposals must strike a balance among conflicting goals.

It has been reasonably well established over recent decades that the goals of the body politic ("safeguard, enrich and strengthen...") have been subserved to the goals of private

broadcasters and advertisers.[16] Furthermore, incomes and the creative freedom desired by the creative element appears to be tied to the relative position of the public vs. private element in the broadcasting system; the former, however, has been allowed to decline in relative importance in recent years[17] with the result that the interests of Canadian creative talent are still underserved.[18] Finally, the consumers' interests, while diffused and hence ineffective as a lobbying force, have been aided by emerging techniques of broadcast reception, beginning with cable television; while such techniques have expanded the choice of programs, it is not clear that the diversity in terms program types or depth of meaning within program types has expanded significantly, however.

5. The Role of Government

The role of government in arbitrating interests is paramount. Broadcasting differs from most other sectors of the

---

16. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation (Ottawa: Minister of Supply and Services for the Economic Council of Canada, 1979); Frank Peers, The Public Eye: Television and the Politics of Canadian Broadcasting 1952 - 1968 (Toronto: University of Toronto Press, 1979).

17. Robert E. Babe, "Public Policy and the Problem of Structural Change in Canadian Broadcasting" in Peter S. Grant (ed.), New Developments in Canadian Communications Law and Policy, (Toronto: Law Society of Upper Canada, 1980), p. 297.

18. Hugh Edmunds et al. A Study of the Independent Production Industry with Respect to English Language Programs in Canada with Recommendations for Policy Action (Windsor: Centre for Communications Studies, University of Windsor, 1976).

economy insofar as each undertaking is licensed by the government. Through the licensing process, government controls entry into the industry, the degree of domestic competition, the permissible extent of foreign ownership, the mix of public vs. private broadcasting, the extent of vertical integration, the type of transactions among firms (eg. network operations), and so forth. In brief, government continually recreates the structure of the broadcasting industry and in that sense is fully responsible for the performance of the system and its cultural outcomes.

Government must influence performance and cultural outcomes. It has no choice. Were it to make different decisions as to who can engage in broadcasting and on what terms, for example, a free entry decision with "deregulation", there would be definite conduct and performance implications. In brief, government cannot stand aside and be neutral with respect to cultural outcomes. The discussion regarding the role of government in broadcasting, therefore, should not centre on the degree of government intervention or "interference", but rather on the nature of the outcomes that result from government policy.[19]

Licensing policies go to the heart of governmental influence over private sector broadcasting and the arbitration of

---

19. For a general discussion on the impossibility of a neutral government, see Warren J. Samuels "Interrelations Between Legal and Economic Processes", Journal of Law and Economics, Vol. 14, 1971.

conflicting interests in Canadian broadcasting. It is within this context that the issue of competitive procedures for licence renewals and transfers should be analyzed.

6. Outline

Chapter II "Regulation and Performance of Canadian Broadcasting" contains the following sections: (1) performance of Canadian broadcasting, assessed from the point of view of the six interest groups; (2) a description of CRTC procedures and practices; (3) challenges to CRTC procedures; and (4) technological change.

Chapter III "Licensing Practices in Other Jurisdictions" looks at US and UK regulatory and licensing policies. While the underlying ideologies of these two systems are diametrically opposed, both have adopted competitive renewal procedures and their experience can be brought to bear on the Canadian policy issue.

Chapter IV, "Competitive Licensing in the Canadian Context - Merits and Demerits" contains the following sections: (1) economic and financial issues, including such items for consideration as the existence and size of surplus profits and techniques for appropriating the surplus, and (2) administrative and regulatory issues for competitive renewals and transfers.

Chapter V is devoted to an analysis of the "Legal Issues" pertaining to competitive licensing.

Chapter VI discusses alternatives to competitive procedures and recommendations.

CHAPTER II

REGULATION AND PERFORMANCE OF CANADIAN BROADCASTING

1. Performance of Canadian Broadcasting[1]

This section summarizes briefly broadcasting system performance as it could be viewed by the six participating groups described in Chapter I.

Government

Government has attempted to implement its cultural goals both through direct participation in the broadcasting industry (CBC) and through licensing and regulation of public and private entities by an independent regulatory board (CRTC). Whereas direct participation through the CBC has been characterized by some varied degrees of success, regulation has been less successful.[2] The programming successes of private television broadcasters in Canada have been limited largely to the fields of news and public affairs. Much more broadcast time is devoted to this type of programming by Canadian stations and networks than is the case in

---

1. Except where otherwise noted, reference material is derived from Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation.

2. In addition to ibid, see also Canadian Broadcasting and Telecommunications: Past Experience, Future Options, a report prepared for the Canadian Radio-television and Telecommunications Commission (Ottawa: CRTC, 1980).

the United States. The private television stations, and especially affiliates of the CTV Network, are generally felt to do a good job in covering local affairs. Notwithstanding the importance of these program efforts, however, there are some deep-rooted problems in Canadian broadcasting.

News comprises over 50 percent of the prime time Canadian content schedule on private television, due primarily to its low cost, with the remainder of the schedule also being filled with programs of low complexity, low employment and low costs - sports, game shows, and light musical offerings. Higher forms of indigenous drama and comedy are virtually non existent on private television.

Consequently, the level of employment of creative talent on private television is low. During the period from 1975-76 to 1977-78 on CTV, the number of prime time ACTRA assignments declined by 30 percent, from 1704 to 1278, and the number of prime and non-prime time assignments fell from 3830 to 2750.[3]

By way of contrast, Canadian programming on the CBC is much more diversified and includes some high quality drama and comedy. The CBC is Canada's largest patron of the arts, annually bringing before Canadian audiences about 30,000 Canadian artists, musicians, commentators, actors and performers. The CBC also lends support to Canadian symphony

---

3. Canadian Council of Filmmakers, CTV Television Network Ltd., intervention prepared for submission to the CRTC on the subject of the application for renewal of the network licence 17 January 1979, p. 22.

orchestras, ballet companies, and so forth which would have difficulty surviving without this support. The CBC provides 47 percent of the total income of ACTRA performers, whereas CTV and its private affiliates provide only 6 percent.[4]

A second deficiency concerns scheduling. Canadian programming on private stations tends to be scheduled during the periods when the potential audience is lowest. Between the hours of 7 p.m. to 9:30 p.m., the hours during which potential audience is greatest, Canadian content on private stations averages 10 to 15 percent. Canadian programming on private television is concentrated in the summer months when potential audience is lowest.

By way of contrast, the CBC devotes about 60 percent of the hours between 7 and 9:30 p.m. to Canadian productions in the fall and winter, with a lower proportion in the summer months. Overall, Canadian prime time productions account for 70 percent of the CBC's fall and winter schedule between 6 p.m. and midnight, compared to 40 to 50 percent on private television.[5]

Furthermore, much of the Canadian programming by private stations does not appear to be favoured by audiences. In November 1977, 47 percent of the hours broadcast by CTV were Canadian originated, but such programming accounted for only 29 percent of CTV's total viewing hours; in the case of

---

4. A.W. Johnson, Touchstone for the CBC, (Ottawa), June 1977, p. 6

5. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation. pp. 75 - 84.

Global, 41 percent of the program hours were Canadian, but such programming accounted for only 19 percent of Global's total viewing hours; Canadian independents broadcast an average 39 percent Canadian content, but such Canadian programs accounted for only 18 percent of such stations' total audience.

By way of contrast, on CBC-owned and operated stations, 63 percent of the schedule was Canadian and such programming accounted for 64 percent of these stations' total audience.[6]

Moreover, private television stations have failed frequently to meet the minimum Canadian content requirements, despite the fact that repeats of newscasts, bingo games and even televised goldfish bowls have been used and are accepted by the CRTC for regulatory purposes as complying with the regulatory definition of Canadian content.[7] It is also apparent that many stations fail to comply with the Promises of Performance made when licensed initially and upon licence renewals.[8]

---

6. CBC, The CBC's Programming Services, submitted to the CRTC in support of applications for renewal of network licences, May 1978, p. 144.

7. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, pp. 185 - 194. The goldfish bowl refers to a daily half-hour "program" run on CITY-TV, Toronto during the 1977 season.

8. Ibid, for case studies of Global, CITY-TV, and independent stations in Vancouver, Calgary, Edmonton and Winnipeg. See also CRTC "Public Announcement: Statement Regarding Review of Promises of Performance of Toronto-Hamilton Area Television Stations", 9 August 1979, and Decisions CRTC 79-496, CRTC 79-497, CRTC 79-498, CRTC-499, CRTC 79-500, CRTC 79-501, and CRTC 79-502, all issued simultaneously with the foremention Public Announcement.

Finally, in both the public and private sectors, Canadian programs are produced primarily by the stations or networks, themselves, thereby excluding independent productions.

From the standpoint of the national goals set for broadcasting, performance of the system is poor. English language viewers spend only 29 percent of the total viewing time watching programs which are Canadian, although French speaking viewers spend 65 percent of viewing hours with domestic programs.[9] In terms of entertainment programming, English speaking Canadians view Canadian programming for 10 percent of the time and US programming for 90 percent; in the case of French speaking audiences, US programs account for 52 percent of the time viewing entertainment programs.[10]

Private Broadcasters

By most indicators, private broadcasters should be well satisfied with their financial performance at least. Profits are consistently well above the competitive rate of return,[11] audience levels are high and growing[12], revenues have increased

---

9. CRTC, TV in Canada: What Canadians Choose to Watch, Committee of Inquiry into the National Broadcasting Service: Background Research Paper, 1977, p. 5.

10. CRTC, Special Report on Broadcasting in Canada, 1968-1978 Vol. 1 (1979), p. 49.

11. See Chapter IV infra. "Competitive" is defined as the cost of attracting new capital to the industry.

12. CTV audience share rose from 18.9% in 1967 to 25.0% in 1977, while Canadian independents increased from 2.5% in 1967 to 10.3% in 1977. Ibid. p. 29.

steadily at an average annual rate of growth of over 15 percent.[13] This is so despite the apprehensions that have been expressed continuously since 1968 regarding cable television. (Cable penetration in Canada increased from 13 percent in 1968 to 49 percent in 1977).[14]

The major problems facing private broadcasters appear to be uncertainty regarding technological change and the resulting increased competition on the one hand and apprehensions regarding possible regulatory actions on the other.[15] The possibility of 50 + channels through fibre optic cable systems, direct broadcast satellite, video cassettes and other technical devices may well cause broadcasters to view the future with apprehension. Of course, a large part of their historic apprehension has been due to the very high rates of return earned by the industry and the market pressures for entry induced thereby.

Cable Television

Cable television is defined legally as a "broadcast receiving undertaking" and therefore the regulatory powers of the CRTC pertain to cable's role as a component of the broadcasting system. In addition to its functions of

---

13. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, p. 57.

14. CRTC, Special Report on Broadcasting in Canada, 1968-1978, p. 16.

15. Stylianos Perrakis and Julio Silva-Echenique, "The Profitability and Risk of Television Stations in Canada", paper commissioned by Department of Communications, 1980.

distributing program material originated by others and itself, however, cable also bears many of the characteristics of traditional public utilities and common carriers, and some fairly persuasive arguments can be marshalled to the effect that cable should be so treated.[16] At present, cable falls between two stools and hence escapes much regulatory attention due to the lack of definition as to its role.

Cable television in recent years has been approaching maturity, given its current service offerings and present regulatory techniques. By 1978, 75 percent of Canadian households had the option of subscribing to cable television, and in the absence of a technological break-through or a major shift in regulatory policy (for example, the requirement that cable extend service through the principles of cost averaging and cross subsidization, principles adhered to by public utilities[17]), it is unlikely that this figure will pass much beyond 80 percent. Cable penetration by 1978 also appeared to have stabilized at about 70 percent of households passed by cable and 50 percent of Canadian households.

---

16. Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, J.V. Clyne, Chairman, Telecommunications and Canada, (Ottawa: Minister of Supply and Services for the Department of Communications, 1979), pp. 11 - 22.

17. Traditional public utilities, such as telephone, electricity, pipelines, water, exhibit characteristics that are shared also by cable television: monopoly, capital intensity, a direct physical link between the producer and consumer, social importance, and association with the fields of transportation and/or communication.

Reflecting both this maturity and the absence of profit regulation, cable rates of return have become quite high in recent years (24 percent return on net assets before tax in 1978) and, consequently, cable-generated revenues are now seeking outside investment opportunities. One reflection of this is a widescale consolidation movement in the industry; the amalgamation of Rogers' Cable TV, Canadian Cablesystems and Premier Communications has brought 30 percent of cable subscribers under the control of a single entity. Another manifestation is the proposed offering of new services, such as pay television, at additional levies. Finally, also reflecting the maturity and profitability of the Canadian cable industry, large scale investment activity by Canadian cable firms offshore is evident; "it is estimated that close to $300 million will be invested by Canadian cable companies in US cable systems and pay-TV operations within the next three years".[18]

Perhaps the most important controversy concerning cable at the present pertains to its program origination role. Cable

---

See Charles Phillips, The Economics of Regulation (Homewood: Irwin, 1969) p. 4 and James Bonbright, Principles of Public Utility Rates (New York: Columbia, 1961) p. 8 for standard definitions of public utilities.

It was for the foregoing reason that the Clyne Committee recommended regulation of cable television as a public utility. See Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Telecommunications and Canada, p. 21.

18. Canadian Broadcasting and Telecommunications: Past Experience, Future Options, p. 63.

systems often have a great deal of idle or underutilized capacity and it is in the financial interest of cable operators to fill up this capacity with additional services and to charge additional levies for such incremental services. For a number of years the CRTC has encouraged community programming on the part of cable companies in order "to enrich community life"; such programming, however, was to "complement" rather than "compete" with the offerings of traditional broadcasters. Recently, however, cable systems have been authorized to program "special programming channels" and cable networks linked via satellite may be formed to deliver such programming nationally. A number of these programming services are seen by broadcasters as being competitive with the offerings of existing broadcasters - music specials, network television from France, childrens' programs, and of course, the 35 US channels currently carried on US satellites which could be delivered by Canadian cable systems.

Generally it is the position of the Canadian cable industry that cable companies should be permitted to deliver any and all program services regardless of source. This position was put forth forcefully, for example, by cable engineer Israel Switzer.

> [We must] give up this cultural sovereignty nonsense and recognize that Canada and the U.S. are one single entertainment market just as they are one single automobile market. We all like the same kind of TV programs, all speak and write the same language (Quebec will have its own completely separate system) and what is at stake

> is really economics - employment and gross national product. We need an "ENTERTAINMENT PACT" like the "AUTOPACT" (but more equitable) which assures us of a fair share of Canadian/U.S. entertainment production and which allows entertainment to flow freely back and forth across the border. Oshawa makes American cars with Canadian labour. As long as we maintain a satisfactory level of employment in the television industry what does it matter whether we make "American" shows or "Canadian" ones? There is really so little difference as to be immaterial.[19]

Advertisers

Although advertisers frequently complain about the unilateral increases in advertising rates charged by broadcasters, they appear to be quite satisfied with the broadcasting industry. The licensing of additional stations by the CRTC has served to increase the supply of advertising time and competition among broadcasters to the advantage of advertisers.

Creative Element

The creative element has not been particularly well served by the private sector of broadcasting. As noted above, employment is low; the programs lack complexity and depth of meaning; independent productions are foreclosed from distribution.

Audiences

Canadian audiences served by cable usually have complete access to the full range of North American network programming

---

19. Israel Switzer, "How I Learned to Love the Satellite", in Peter S. Grant (ed.), New Developments in Canadian Communications Law and Policy, p. 179.

in the English language. For the 50 percent of Canadian homes subscribing to cable, viewers often have full access to the three US networks plus Canadian stations and networks; for those without cable the largest portion of US network programming is available on Canadian stations. This is not to say, however, that the full range of audience tastes are satisfied by the predominantly commercially-oriented system of television broadcasting that exists in North America.

Canadians can receive a good deal of Canadian news and public affairs on television and the limited amount of Canadian drama and comedy provided by the CBC.

Audiences seem to have an insatiable appetite for more choice in television programming.

2. CRTC Procedures and Practices

Canadian content quotas represent the major regulatory attempt at implementing the goals of the Broadcasting Act. The public purpose with which broadcasting has been cloaked is manifested on the regulatory side by Canadian content requirements. However, Canadian content, and especially the type envisaged by the Broadcasting Act, is contrary to the financial interests of private broadcasters. Not only does Canadian content cost more to procure than American programming, it also attracts smaller audiences and hence decreases revenues.

The CRTC itself appears to believe that its content

quotas have failed.[20] In its 31 December 1979 Public Announcement entitled "Canadian Content Review", the Commission stated:

> Recent evidence suggests that at least 68% of the total viewing of English-language programs done by the average Canadian is devoted to watching foreign-produced programs. When news, public affairs, and professional sports is removed, 90% of viewing is devoted to foreign-produced entertainment programs. With the exception of the Canadian Broadcasting Corporation, Canadian English-language broadcasters offer Canadian audiences virtually no Canadian entertainment programming in peak viewing periods and next to no Canadian drama - light or serious - at any period in their schedule.

Reference has been made above to the scheduling practices of stations in the private sector, the types of programs that can qualify as Canadian content, the foreclosure of independent productions.

Moreover, it is not uncommon for several stations to fail to meet their Canadian content quotas each year. For example, for the broadcasting year ended 31 September 1975,

---

20. "Our conclusion is that the existing regulations are not producing the desired results. They have not resulted in varied and comprehensive Canadian programming presented at times when most Canadians are watching television - not in the private sector at any rate".
CRTC, Program Policy Branch "Canadian Content Study - Television" August 1979, quoted in Canadian Broadcasting and Telecommunications: Past Experience, Future Options, p. 29.

17 private stations did not meet minimum Canadian content quotas, but no disciplinary action was taken.[21] In any event, the maximum fine for violation of Canadian content regulations is $25,000 for the first year and $50,000 for subsequent years;[22] the fine equals the cost of about one hour of Canadian programming.

Content quotas, even when enforced strictly as to the quantitative requirements, are not sufficient by themselves to ensure programming excellence.[23] While the reluctance of the CRTC to involve itself in detailed evaluations of program quality is understandable in the light of the potential for censorship that could be seen to result from such activities, the point remains that in the absence of some sort of quality control, broadcasters can be expected to continue to cut their losses with low cost, unpopular programming scheduled in off-peak hours.

The other major tool by which the CRTC has attempted to regulate performance is through Promises of Performance. When applying for a new licence, or seeking a renewal for an

---

21. CRTC, Broadcast Programs Branch, Television Station Performance Handbook 1974-75. The CRTC does not normally publish statistics or normally otherwise make available to the public data concerning the adherence to Canadian content quotas by private stations.

22. Broadcasting Act, S. 29 (1).

23. "The quantitative content requirements for television have not ... been successful in the sense of getting more Canadians to watch Canadian programs. Nor have they in the main resulted in 'quality' productions".
Canadian Broadcasting and Telecommunications: Past Experience, Future Options, p. 29.

existing licence, each broadcaster must also submit his programming plans for the term of the licence. In large measure, the CRTC must rely upon these "Promises of Performance" in deciding whether or not to issue or renew the licence. Under a provision of the 1968 Broadcasting Act, these promises are enforceable in law if and when attached to the licence as a condition of licence; failure to comply with conditions of licence can lead to licence revocation. Applicants seeking new licences often undertake bold and innovative commitments in an effort to convince the CRTC of their rightful place as a part of the broadcasting system. The Commission, of course, must make its licensing decisions on the basis of these programming proposals. As has been noted elsewhere in some detail, these Promises are often ignored once a licence has been secured.[24]

In contrast to applicants seeking new licences, applicants seeking renewals do not generally volunteer bold and innovative programming proposals. The CRTC's record of renewing licences and the procedures followed at renewal hearings do not encourage applicants to offer more than the minimum.

Over the period 1969-75, the CRTC issued 1,144 licence renewals. Of these, 95.0 percent were regular renewals, 4.3

---

24. Robert E. Babe, Canadian Television Broadcasting Structure Performance and Regulation, pp. 185 - 194.

percent (49) were short term renewals with a clear, disciplinary intent, and 0.7 percent (eight instances), the Commission announced its intention not to renew the licence.[25]

Of the eight licence non-renewal decisions, three involved unauthorized transfer of control; three resulted from simultaneous approval to transfer control or assets to a second party selected by the vendor; one involved managerial disputes whereby a new licence was subsequently awarded to one portion of the old management; and another resulted from inferior performance. Over the life of the Commission, it actually failed to renew only four licences.[26]

Of the 49 instances of short term renewals, 17 related to performance, including four instances in which the CRTC used this device to get a geographic extension of service.

The CRTC, in its renewal and transfer of licence proceedings, does not hear competing applications. In renewing licences, then, the CRTC has but one applicant before it; it has no proposals by which to compare. In addition, it has staff reports evaluating the activities of the licensee, although such studies are not part of the public record. In addition, it may hear representations from the general public, employees of the licensed undertaking, or from competitors regarding the performance of the licensee. Except in those

---

25. Ibid. pp. 186 - 194.

26. These are: Wawa Cablevision (Decision CRTC 73-71); CHIN-AM (Decision CRTC 70-72);CJLX-AM (Decision CRTC 73-19); CHER-AM (Decision CRTC 71-120.

few instances in which "class action" is brought before the CRTC by groups such as the Consumers' Association or the Canadian Broadcasting League, or in cases where a rival undertaking believes the licensee is unjustly transgressing on his rightful domain, there is no financial incentive to intervene. Detailed interventions may cost a good deal to prepare.

The reluctance of the CRTC to hear competing applications is due both to the CRTC's conception of the appropriate procedures by which to regulate broadcasting and to its concern over the possibility of eroding the investment of existing licensees.

With regard to procedures, the CRTC has viewed itself primarily as an administrative tribunal, minimizing its judicial role. It considers that it should have the major role in fact-finding (of which interventions can play an important part) and in directing behaviour of licensees through Promises of Performance and otherwise. In light of the administrative perception of its role, it has been reluctant to "judicialize" broadcasting by permitting cross-examination, financial disclosure, competitive licensing, full reporting of reasons for decisions. Evidently, the Commission believes that informal, administrative procedures lend themselves best to the "non-technical", "non-economic", "cultural"

C.C. Johnston, The Canadian Radio-television and Telecommunications Commission, draft study for the Law Reform Commission of Canada, 1979, p. 2 - 83.

pursuits that the Commission perceives to characterize its mandate.[27] In addition, the CRTC's workload is heavy (during 1978-79 it processed over 2,000 applications); competitive hearings, it can be argued, would lengthen the hearing process. Moreover, the CRTC has some reservations over how competitive hearings, when only the existing licensee has a track record, could be handled fairly[28], and whether such procedures might not undermine the financial stability of the industry.

With regard to transfer of licence hearings, it is the policy of the CRTC to hear as applicant the party proposed by the outgoing licensee only. Again, other parties are granted intervener status. While the CRTC approves the great majority of transfer applications (82 percent between 1968-75), it has recently adopted the policy that major transactions should contain "significant benefits". If the proposed transfer of licence does not meet with CRTC criteria, the outgoing licensee is free to then present an alternative buyer at a subsequent hearing for CRTC scrutiny. It is, of course, in the financial interest of the outgoing licensee to reach agreement with the party offering him the best deal for the licence and facilities, not necessarily with the party making

---

27. Ibid, pp. 2 - 54, 78 - 80, 2 - 56.

28. CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", 25 July 1978.

the best programming proposals. Generally, profitable undertakings have been observed to sell at significant premiums above book value and this is to the detriment of the future performance of the broadcasting industry; an inflated selling price increases the investment upon which a new owner must earn a rate of return, making it likely that discretionary program expenditures (Canadian programming) will be reduced in order to permit the earning of a high profit rate.[29]

By permitting the outgoing licensee (subject to CRTC approval) to select his successor at the exclusion of all other parties, the CRTC is limiting its own discretionary powers as to choosing the successor, permitting licences to trade at high premiums above the physical investment entailed in the station, and reducing competition for the licence, possibly to the disadvantage of the public and the mandate of the Commission.

3. Challenges to CRTC Procedures

These forementioned procedures of the Commission were first challenged in 1976 by Capital Cable Co-operative (a non-profit organization based in Victoria) which attempted to

---

29. In 1980, for example, the CRTC approved the transfer of a radio licence from a licensee in receivership to the party brought forth by the receiver, Clarkson Company. While Clarkson received bids from seven different parties, it brought before the CRTC only the bidder offering the highest purchase price, $2.5 million.
See Andrew J. Roman, "Competition for Cable Licences", In Search, Summer, 1980.

submit an application for licence in competition to that of the existing licensee, Victoria Cablevision, whose licence was scheduled for renewal hearings. The Co-op was granted intervener status only and refused applicant status. This ruling was appealed to the Federal Court (Trial Division) which overturned the CRTC decision, ruling that the Commission was compelled to hear the Co-op application before renewing the licence of Victoria Cablevision.[30] On 12 April 1976, the Federal Court of Appeal set aside the Trial Division's Order on the basis that the CRTC possessed full discretion to hear or not hear competing applications. By decision 77-193 (23 March 1977), the Victoria licence was renewed for four years; a subsequent appeal to Cabinet was dismissed.

On January 25, 1977, the CRTC held a public hearing on an application by MacLean-Hunter Cable TV Limited for permission to take over Western Cablevision Ltd. and its parent company MSA Cablevision Ltd., serving New Westminster, Surrey and other communities on the lower mainland of British Columbia. An unincorporated association, the Lower Fraser Valley

---

30. In his judgement, Mr. Justice Dubé stated:
"Neither Victoria Cablevision nor Capital Cable Co-operative have a vested right in a broadcasting licence, but in my view, both have a right to be heard. To be sure, the former, if he has complied in all respects with the terms of its present licence, has a priority right to be heard, but there is nothing to be found in the Act to the effect that the latter should not be heard at all".

"In the Federal Court of Canada, Trial Division, In The Matter of the Broadcasting Act, and In The Matter of Capital Cable Co-operative and The Canadian Radio-Television Commission and Victoria Cablevision Limited", judgement rendered 2 February 1976.

Committee for the Community-Based Cablevision Services (CCBCS), supported by the Canadian Broadcasting League (a non-profit, "public interest" lobbying group), granted intervener status by the CRTC, applied for leave to apply for the licences in competition with MacLean-Hunter.

The CCBCS and CBL argued that any transfer of licence proceeding in fact entails two applications - a revocation of the existing licence and a subsequent award of a new licence, since the CRTC is not specifically empowered by the Broadcasting Act to approve licence transfers. In dismissing the petition to apply for the licences by CCBCS in Decision CRTC 77-275, the Commission stated that it believed it had authority to approve licence transfers, and consequently, would not hear competing applications.

Finally, in October 1978, the Association for Public Broadcasting in British Columbia (APPBC) petitioned the CRTC to give it applicant status to acquire the licence of C.-C.T.V. a cable television firm serving Courtenay, B.C. and surrounding area, in competition with R.D. Ellis, the applicant supported by the existing licensee. The CRTC denied the APPBC petition and the case was appealed to the Federal Court.

On 16 June 1980, judgement of the Federal Court was rendered by Mr. Justice Urie. The Court ruled that "the Commission had the right to determine that, in the circumstances of this case, it ought not to accede to the Appellant's request to depart from its usual policy in relation to

granting or refusing approval of the sale of assets of a licensee to another".[31]

4. Technological Change

Technology is expanding the capacity of the distribution system. Fibre optics can conceivably deliver 50, 100 or 300 television channels to the home. It is stated that, at present, 35 satellite channels from the US are blanketing Canada, waiting for reception by earth station "dishes".[32]

This superfluity of signals makes less important than hitherto the technical reasons for licensing and regulation and, it is asserted, makes it impossible and undesirable to regulate for the social reasons:

> [The] Canadian content [on pay TV], of course, will be no more Canadian in content than any of the movies now being made in Canada for tax reasons only. That, plus the flood of U.S. material that already submerges everything except Knowlton Nash's spectacles on regular Canadian TV, will put an end once and for all to the dream of Canadian content. Canada can no longer be saved by a content fence.[33]

---

31. Court File No. A-512-79.

32. Committee on Extension of Service to Northern and Remote Communities, The 1980's: A Decade of Diversity - Broadcasting, Satellites, and Pay-TV (Ottawa: Minister of Supply and Services for the CRTC, 1980), p. 18.

33. Blaik Kirby, "100 TV Channels Free for Taking", Globe and Mail, 21 March 1980, p. 1.

In like manner, Canadian Cablesystems optimistically speaks of "programming that can serve specialized tastes and interests", in place or in addition to the "mass-oriented broadcast networks".

Technology to many appears to have a life of its own; policy-makers appear to view themselves as prisoners of technology. Thus, the CRTC's Committee on Extension of Service to Northern and Remote Communities declares starkly that "this new technological universe is no longer to be regarded as visionary; it is already taking shape at a pace that is inexorable", and, of necessity, this perception had the effect of colouring the whole of the Report.[34] Similarly, the special report on broadcasting prepared for the CRTC stated:

> Although the broad objectives for Canadian broadcasting are set out in the Broadcasting Act, the manner of their implementation is dependent on the nature of the system.[35]

In other words, rather than viewing the technology and institutions as tools which are manipulable for the purpose of carrying out well defined goals, there appears to be a prevalent attitude that these goals must be subserved to the

---

Canadian Cablesystems Ltd., Application for Control of Premier Communications Limited, 1980, p. 18.

34. Committee on Extension of Service to Northern and Remote Communities, The 1980's: A Decade of Diversity, Broadcasting, Satellites, and Pay-TV, p. 2.

35. Canadian Broadcasting and Telecommunications: Past Experience, Future Options, p. 79.
Likewise Canadian Cablesystems declares, "Change is always hard to accept, especially when it is impossible to predict just how the new order will feel. But change cannot be avoided by denying its necessity, and in the rapidly evolving telecommunications arena, such a policy would

technology and institutions since the latter are viewed as being "inexorable".[36]

Technology today is expanding the capacity of the television distribution system. And, in the words of Israel Switzer, "The U.S. experience has shown that TV services [also] expand to satisfy the audience available to receive them; as more and more cable systems installed satellite receive capability, more and more program services became available."[37] If creative resources are in scarce supply, however, at some stage, the intrinsic quality of the programming must become diluted and debased as such resources are spread over more and more outlets. Switzer himself recognized this tendency when he added:

> I will not comment on the "worthiness" of these services. I'm just the plumber who puts the pipes together. I don't care what people flush down them.[38]

---

amount to a form of national suicide."

Canadian Cablesystems Ltd., Application for Control of Premier Communications Limited, p. 19.

36. This is a position that is recognized and bemoaned by a number of writers. For example, Lewis Mumford, The Myth of the Machine, Vol. 2: The Pentagon of Power, (New York: Harcourt, Brace, Jovanovich, 1970); Langdon Winner, Autonomous Technology: Technics-Out-of-Control as a Theme in Political Thought (Cambridge, Mass.: MIT, 1977); Jacques Ellul, The Technological Society; Daniel Boorstin, The Republic of Technology: Reflections on Our Future Community. (New York: Harper and Ross, 1978).

37. Israel Switzer, "How I Learned to Love the Satellite", pp. 178 - 9.

38. Ibid.

It may well be, then, that one justification for government regulation of broadcasting will become much less important - frequency scarcity and the necessity to allocate privilege. In such a case, government will have to face squarely the issue of whether it wishes to regulate to maintain quality standards in broadcasting.[39] Cable programming on the two-way QUBE system in Columbus, Ohio, for example, in addition to scanning each household every six seconds to record what is being viewed, features a pornography channel with titles such as Dr. Feelgood and Hot Times; one of the US pay television services being carried by satellite to cable systems throughout the country is dedicated to 24 hours a day X and R rated movies and the two cable systems in New York City feature a thrice weekly program in which women pedestrians are induced to disrobe in alleyways and halls before the cable camera.[40]

It may well be that current concerns regarding the cultural effects of broadcasting upon the "fabric of Canada" will be dwarfed in the years to come by concerns regarding ultra-violence, pornography and other forms of human degradation.

Technology is taking us a long way away from the idealistic phraseology of the Broadcasting Act. And this brings us back to the concerns of Chapter 1 and the role of government. At this stage, it may be well to bring forth again, in greater detail, Weizenbaum's lament regarding the uses to which

---

39. Ralph Heintzman, "Liberalism and Censorship", Journal of Canadian Studies, Winter 1978-79.

40. John Wicklein, "Wired City, USA: The Charms and Dangers of Two-Way TV", The Atlantic, February 1979, p. 36; Blythe Babyak, "On the Prowl With Ugly George", New York Magazine, 1 September 1980, pp. 35 - 37.

communications technology is put.

> We may recall the euphoric dreams articulated [in the 1920's] by the Secretary of Commerce Herbert Hoover at the dawn of commercial radio broadcasting and again by others when mass television broadcasting was about to become a reality. It was foreseen that these media would exert an enormously beneficial influence on the shaping of American culture. Americans of every class, most particularly children, would, many for the first time, be exposed to the correctly spoken word, to great literature, great drama, to America's most excellent teachers, and so on. We are all witnesses to what actually happened. The technological dream was more than realized. Scratchy low-bandwidth radio was replaced by high-fidelity FM, then by stereo broadcasting of the finest sound quality. The tiny black-and-white television screen grew to impressive size and was painted "in living color". Satellite communication systems made it possible to display almost any event taking place, even in outer space, on television screens in homes anywhere on Earth. But the cultural dream was cruelly mocked in <u>its</u> realization. This magnificent technology, more than Wagnerian in its proportions, combining as it does the technology of precise guidance of rockets, of space flight, of the cleverest and most intricate electronics, of photography, and so on, this exquisitely refined combination of some of the human species' highest intellectual achievements, what does it deliver to the masses? An occasional gem buried in immense avalanches of the ordure of everything that is most

> banal and insipid or pathological in our civilization.[41]

If this view of the technological universe is accepted, the increased competition made possible by new technologies does not constitute an argument for "deregulation" as some would wish us to believe.

---

41. Joseph Weizenbaum, "Once More: The Computer Revolution" in Michael L. Dertouzos and Joel Moses (eds.), The Computer Age: A Twenty-Year View, p. 442.

CHAPTER III

LICENSING PRACTICES IN OTHER JURISDICTIONS

I UNITED STATES

1. Rationale for Regulation and Powers of the FCC

Regulation of broadcasting in the United States appears to be founded on three major premises: first, that government must allocate frequencies to prevent interference and maintain standards in transmission; second, that government intervention is required to further the marketplace of ideas and prevent monopolization of the media; and third, some minimal government supervision is required to maintain programming standards. On the other hand, the US government and its regulatory authority have been highly circumspect in direct regulation of programming due to the fear that such activities would be seen as censorship.

Frequency Allocations

The earliest form of broadcast control on the part of government in the US was the abolition of totally free entry into broadcasting. It was realized early that some sort of allocative mechanism (control) had to be developed to prevent chaos (lack of order) in the use of the radio frequency spectrum.[1]

---

1. Erik Barnouw, A Tower in Babel: A History of Broadcasting in the United States to 1933 (New York: Oxford, 1966).

In Canada, by the Telegraphs Act of 1906, a licence for a wireless telegraph station, or use of apparatus in regard thereof, was required before such a station could commence

In market-based economies, the usual method of allocating resources is through private property rights coupled with exchange. Although there are indeed some adherents to the view that the radio frequency spectrum could and should be allocated according to such principles,[2] this was not the allocative mechanism adopted in the US (nor in any other country of the world). Rather, radio frequencies were declared to be public property to be allocated by a commission created for the purpose whose guiding principle was to be "the public interest, convenience and necessity"; once a licence was granted, it could not be transferred without the approval of the commission. Furthermore, licences were not to be granted into perpetuity but for a limited period of time only.

One factor inhibiting the declaration of private property rights was the non materialist or invisible nature of the radio spectrum and the technical complications entailed in enforcing full private proprietary rights therein.[3] The

---

operations. This legislation was applied to broadcasting in Canada commencing in 1920. Having once obtained a licence, however, broadcasters were generally free of government regulation.

2. R. H. Coase, "The Federal Communications Commission" Journal of Law and Economics, Vol. 2, October 1959; also William Meckling "Management of the Frequency Spectrum" in The Radio Spectrum: Its Use and Regulation (Washington: Brookings, 1968), pp. 26-34.

3. William K. Jones, "Use and Regulation of the Radio Spectrum: Report on a Conference" in The Radio Spectrum: Its Uses and Regulation, (Washington: Brookings, 1968); and Harvey J. Levin, The Invisible Resource: Use and Regulation of the Radio Spectrum, (Baltimore: John Hopkins Press, 1971).

technical arguments aside, however, the US government also wished to play an activist role in order to prevent private monopolization of radio and to maintain standards of programming.

Monopolization

The prohibitions of the Sherman antitrust law apply to broadcasting. While the FCC itself is not charged with the duty of enforcing that law, it must "administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve".[4] Indeed, one of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and "the preservation of our broadcasting system on a free competitive basis".[5]

It was deemed that competition was especially important in the media insofar as monopolization would erode the marketplace of ideas, held to be vital for the effective functioning of a free society. That the effective functioning of the marketplace of ideas could, however, entail direct government involvement in reallocating rights and privileges was

---

4. FCC Report on Chain Broadcasting (1941), cited in S.R. Barnett "Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters", Stanford Law Review, Vol. 22, January 1970, p. 258.

5. FCC Amendment of the Multiple Ownership Rules (1953) quoted in S. R. Barnett, "Cable Television and Media Concentration" p. 253.

acknowledged by the Supreme Court in the Associated Press case:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. .... That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[6]

An activist role for the FCC in promoting free speech in broadcasting was affirmed in the Red Lion case which was

---

6. Opinion of Mr. Justice Black, Associated Press v. U.S. 32G U.S. 1, 65 S.Ct. 1416, 89 L. Ed. 20.3 (1945), in Louis B. Schwartz Free Enterprise and Economic Organization: Concentration and Restrictive Practices, 3rd ed., (Brooklyn: Foundation Press, 1966) pp. 479 - 492.

a challenge to the Commission's Fairness Doctrine. Note the following excerpts from the court's judgement.

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves....
>
> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.... It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monpolization of that market, whether it be by the Government itself or a private licensee.[7]

The FCC has attempted to promote diversity in the broadcast media through several policies: limitations on group

---

7. Opinion of Mr. Justice White, Red Lion Broadcasting Co. Inc. et al v. Federal Communications Commission et al., 395 U.S. 367, 9 June 1969.

ownership of stations;[8] the "Fairness Doctrine"[9]; prime-time access and chain broadcasting regulations[10], for example.

Standards

Furthermore, regulation was invoked originally as the US government wished to maintain some control over program standards. Secretary of State, Herbert Hoover, put this position before the House Committee in 1924:

> Radio communication is not to be considered as merely a business carried on for private gain, for private advertisement or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the same general principles as our other public utilities.[11]

---

8. No one group can have multiple broadcast interests in the same service (AM, FM, or TV) in the same community, and no single owner can control more than 7 AM, 7 FM, 5 VHF TV and 2 UHF TV licences.
Testimony of Nicholas Johnson before Special Senate Committee on Mass Media, Ottawa, 17 March 1970, p. 32:12.

9. The Fairness Doctrine requires stations "to devote a reasonable amount of broadcast time to the discussion of controversial issues" and "to do so fairly, in order to afford reasonable opportunity for opposing viewpoints".
See Walter Emery, Broadcasting and Government, (East Lansing: Michigan State University Press, 1971), pp. 332 - 337; and Fred W. Friendly, The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting (N.Y.: Vintage, 1976).

10. These policies are all designed to limit network control over affiliates and are discussed in Emery, Broadcasting and Government. pp. 306 - 314.

11. Quoted in Frank Peers, The Politics of Canadian Broadcasting 1920-51. (Toronto: University of Toronto Press, 1969), p. 11.

The 1927 legislation creating the Federal Radio Commission (FRC) contained few specific proscriptions limiting the "freedom of speech" of broadcasters: "Obscene, indecent or profane" language was prohibited, as was the broadcast of lotteries, and false distress messages.[12] While the specific prohibitions contained in the Act were few, control was delegated to the new regulatory commission to interpret the "public interest, convenience, and necessity" in regard to program standards.

The 1927 Act declared that the FRC had no power of censorship and that "no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications". Yet, the Commission had also the legal mandate of ensuring that the "public interest, convenience and necessity" was being fulfilled by each broadcaster and it was not only empowered, but required to not renew licences if such was not the case.

From the absolutist point of view, the failure of the FRC (or latterly the FCC) to renew a licence on programming grounds could be viewed as censorship after the fact and, consequently, be in violation of both the US Constitution

---

12. Walter Emery, National and International Systems of Broadcasting: Their History, Operation and Control (East Lansing: Michigan State University, 1969), p. 9.

and the wording of the Communications Act.[13] Such a point of view, if supported by the courts, would have done away with all Commission control over programming. In the Brinkley case and subsequent cases,[14] however, the courts held censorship to be defined solely as prior restraint.

> There has been no attempt on the part of the Commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the Commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.[15]

---

13. R. H. Coase, "The Federal Communications Commission" Journal of Law and Economics, 1959.

"The situation in the American broadcasting industry is not essentially different in character from that which would be found if a commission appointed by the federal government had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village of the United States. A proposal to do this would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press....

"The Commission has many favors to give, and few people with any substantial interests in the broadcasting industry would want to flout too flagrantly the wishes of the Commission."

Pp. 7, 12.

14. Frank Kahn, Documents in American Broadcasting (N.Y.: Appleton-Century-Crofts, 1968).

15. KFKB Broadcasting Association, Inc. v. Federal Radio Commission, 47 F. 2d 670 (D.C.C.v.) Feb. 2, 1931.

"Dr." Brinkley operated a Kansas station to sell drug products, and even goat-gland transplants performed at

2. Regulatory Philosophy and Practices

The FCC has correctly stated that on the one hand it is required to license stations in the public interest, convenience and necessity", while on the other hand, it is forbidden to exercise powers of censorship. The FCC has been required to balance its role as regulator, ensuring that radio frequencies are used in the public interest, with the faith in the marketplace of ideas and the distrust accorded undue government involvement.[16]

One way in which the FCC has attempted to improve program decisions is by requiring licensees to carry out ascertainments of community needs. Licensees are required to "make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in their communities and to provide programming to meet those

---

his private hospital, to cure diverse ailments and solve personal crises. He alternated over-the-air medical diagnoses and prescriptions for "Dr. Brinkley's No. 6" or "Dr. Brinkley's No. 17" with hymns and inspirational talks.

See Eric Barnouw, The Sponsor: Notes on a Modern Potentate. (New York: Oxford, 1978), pp. 25 - 26.

Also, National Broadcasting Co., Inc. et al. v. United States et al. 319 U.S. 190, 10 May 1943.

16. FCC, Report of the Federal Communications Commission to the Congress of United States Re the Comparative Renewal Process. (1976); pp. 41, 48 - 49.

needs and interests".[17] Licensees are required to maintain certain demographic data (population figures, proportions of males and females, minorities, youth and the elderly). The FCC has also developed "a list of community elements that the licensee is required to contact in interviewing community leaders" to aid licensees in ascertaining the "problems, needs, and interests of the community leaders and general public".[18] Licensees are required to provide supporting data regarding how their assessments of community needs have been reflected in programming.

The second major way in which the FCC has tried to improve program performance without intruding its own views is through the Fairness Doctrine.

The third major way, which will be discussed at length in the following section, is through its licensing practices and procedures.

As interpreted by the FCC, program "standards" to be promoted are grouped into two principal areas: licensees' programming designed to meet ascertained community needs or problems, and the licensees' compliance with the Fairness Doctrine.[19] The FCC favours program diversity, "fairness, accuracy and comprehensiveness in the treatment of controversy

---

17. Ibid. p. 56.

18. Ibid. pp. 56 - 7.

19. FCC Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process. (1976), p. 59.

irrespective of profit considerations", including reasonable access to the airwaves by significant groups; balanced program schedules "to meet local as well as national needs, minority as well as majority tastes"; and programming that will "develop better tastes in the audiences, and not simply to satisfy the tastes of existing groups".[20]

More than any other country in the world, the United States places great faith in private enterprise and the marketplace of ideas as the means of attaining the Truth. Public ownership of radio frequencies and public regulation of licensees have been perceived as means of encouraging the "free" play of ideas, without imposing meritorious program plans on licensees. Regulation and licensing in the US were deemed necessary in large part due to spectrum scarcity and fears of undue monopolization of the airwaves that could result, it was felt, if broadcasting was unregulated and unlicensed.

Consequently, the FCC has not been particularly hardnosed in enforcing its program standards:

> The Commission prescribed no particular percentages of time for the different program categories.... Licensees were

---

20. Harvey J. Levin "Federal Control of Entry in the Broadcast Industry", Journal of Law and Economics, Vol. V, October 1962, pp. 50 - 55; and Walter Emery, Broadcasting And Government: Responsibilities and Regulations (East Lansing: Michigan State University Press, 1971), chapts. 19 - 22.

> warned that they would be required to give an account of program performance in connection with applications for renewal of license....
>
> There has been a persisting reluctance on the part of a majority of Commission members to carry on extensive surveillance activities regarding broadcast programming, and in no case in recent years [up to 1971] has license renewal been refused solely on the grounds that the station's programs failed to measure up to the Commission's public interest criteria.[21]

3. Licensing Policies

Qualifications of Licensees

By section 310(a) of the Communications Act, broadcasting licences may not be held by alien or foreign governments or corporations if any officer or director thereof is an alien or if more than 20% of the stock is owned by aliens, foreign governments, or corporations.

The FCC is directed to issue or renew licences only if the "public interest, convenience and necessity" will be met thereby. To this end, the Communications Act directs applicants to supply such information as the Commission may direct respecting his "citizenship, character, and financial, technical and other qualifications". The FCC is required to study these facts and satisfy itself "that the applicant is legally, financially, technically and otherwise qualified

---

21. Walter Emery, Broadcasting and Government, pp. 320 - 324.

to operate a station in the public interest".[22]

While there is a "positive burden of proof on every applicant to show that he has the financial resources to build and operate the type of station proposed ... the Commission has established no hard and fast rules with respect to financial qualifications; decisions have been based largely on the facts of each case".[23]

Moreover, the Commission makes findings as to the "character" of prospective licensees - elements such as "honesty and reliability, moral, financial and social responsibility, and respect for law and order".[24] However, the FCC has developed no hard and fast rules respecting adequate character qualifications.[25]

Applicants for licences cannot violate the Commission's regulations pertaining to concentration of ownership, overlapping markets, and so forth.

Violation of the law, and particularly the antitrust laws, on the part of licensees and applicants, may disqualify the parties for licences.

---

22. Emery, pp. 230-1.

23. Ibid. p. 232.

24. Ibid. p. 234.

25. Ibid. p. 240.

Provided the foregoing criteria are met, a sole applicant for a new licence will generally be granted a licence provided a frequency is available.

Competing Applications for New Licences

Sometimes two or more applicants apply for the same licence, in which case a comparative hearing is held. The successful applicant will have demonstrated to the satisfaction of the FCC that it is not only qualified to hold a licence, as discussed above, but also that it is the best qualified.

In comparative hearings over the years, the FCC has developed criteria by which to weight the merits of competing applications:[26]

(a) Factors contributing to "the best practicable service to the public", including:

(i) integration of management and ownership; also, owners' attributes such as local residence, participation in civic affairs, previous broadcast experience, etc.;

(ii) proposed program service, including program proposals, ascertainment efforts, staffing and equipment plans, and the likelihood of

---

26. FCC, Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process (1976), pp. 11 - 20.

effectuating these proposals;

(iii) applicant's past broadcast record, when the record is unusually good or unusually bad;

(iv) efficient use of the radio spectrum, chiefly technical factors but also the extent of program duplication.

(b) Factors contributing to "a maximum diffusion of control of the media of mass communications"; interest in other means of mass communications would disadvantage an applicant.

Critics have held that the FCC has been very inconsistent in applying its criteria, however. Noll, Peck and McGowan, for example, assert that their "statistical analysis reveals that the FCC has abandoned its stated policy objectives in granting licences; local ownership, news and public affairs programming, and local program origination all detract from the likely success of an application".[27]

The Commission has stated that the foregoing comparative criteria "were not designed as incentives of incumbent licensees and do not operate as such". Rather, "the criteria are structural in nature and were developed to enable the

---

27. Roger Noll, Merton Peck, and John McGowan, Economic Aspects of Television Regulation, (Washington: Brookings, 1973), pp. 113 - 114.

Commission to choose grantees for new facilities who fit its [FCC's] preconceived notion of what the broadcast industry should look like .... They are, at best, predictive of future performance".[28]

Licence Transfers

Section 310(b) of the Communications Act provides that no licence for a broadcast station may be assigned or the control of a station transferred without the prior written consent of the Commission. The section also contains the following provision, however:

> In acting thereon [an application for transfer] the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

The latter clause was added to the Communications Act in 1952.[29] As noted by Emery, for several years prior to 1952, the FCC had adopted a procedure whereby applicants other than the one proposed by the existing licensee could apply in competition with the party proposed by the existing licensee to acquire a broadcasting licence "upon the same terms and

---

28. FCC Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process. pp. 41 - 42.

29. Walter Emery, Broadcasting and Government, p. 346.

conditions" as those agreed to by the licensee and the proposed purchaser. In 1952 Congress amended S. 310(b), prohibiting competing applications in transfer cases, but still requiring that the FCC scrutinize the qualifications of those seeking to purchase stations and to determine whether such sales would be in the public interest.[30]

In reporting to Congress, the Senate Interstate and Foreign Commerce Committee supported the amendment in the following manner:

> One of the purposes of the proposed new language in this subsection is to annul the so-called Avco procedure adopted several years ago by the Commission to prevent a licensee from selling his property to a proper person of the choice but requiring an opportunity for others to make bids for any radio station proposed to be sold. The committee believes that there is no provision of present law which authorized the Commission to employ such a procedure and it deems such procedure an unwise invasion by a government agency into private business practice.
>
> The committee regards it significant that the Commission dropped the so-called Avco procedure several months ago as unsatisfactory and a cause of undue delay in passing upon transfers of licenses. It should be emphasized that the Commission's authority to see to it that stations are operated in the public interest and to determine whether the proposed transferee possesses the qualifications of an original licensee or permitee is not impaired or affected in any degree by this subsection.[31]

---

30. Ibid. p. 346.

31. Quoted in ibid, p. 347.

The FCC and Congress have both expressed concern, however, over the issue of "trafficking" in licences. The majority of FCC commissioners have held the position that they have no legal authority to make a determination on the propriety of any price paid for a licence, and that price standing alone is not of particular significance. If, however, the FCC believes that a high price to be paid for a station will "over-commercialize" the operation and cause the new owner to neglect public service programming, or lead otherwise to financial difficulty, then the Commission will consider the public interest aspects of the transfer.

Beginning in 1962, the FCC adopted the practice of hearing most transfer applications by vendors who had held the licence for less than three years.[32]

Noll, Peck and McGowan have summarized FCC policies on licence transfer applications in the following manner:

> Nor has the Commission attempted to evaluate the fitness of new owners of an existing station. Licence transfers are virtually automatic as long as the old licensee can show that he did not "traffic" in the license - that is, obtain a license solely for the purpose of selling it. The reason for the passive transfer policy is, again, the financial stake: Owners should be permitted, according to the FCC, to liquidate their assets. Of course, passive transfer policies provide a loophole that renders untenable strong policies on

---

32. Ibid. pp. 351 - 2.

> any other kind of license grant - new or renewal.[33]

The FCC itself made the following remarks concerning the absence of comparative hearings at the licence transfer proceedings:

> Ironically, it resulted in no comparative evaluation when a broadcaster wished to sell its facility to an outside party, but retained such an evaluation when the broadcaster intended to continue to provide service to the public.[34]

Licence Renewals

Broadcast licences in the US are issued for a maximum term of three years, subject to renewal. Renewal proceedings have always been comparative hearings in that parties other than the existing licensee can file competing, mutually exclusive applications for the same frequency. Under section 307(d) of the Communications Act of 1934, it is provided that:

> Action of the Commission with reference to the granting of such application for the renewal of a licence shall be limited to and governed by the same considerations and practices which affect the granting of original applications.

---

33. Roger Noll, Merton J. Peck and John J. McGowan, Economic Aspects of Television Regulation (Washington: Brookings, 1973), pp. 115 - 116.

34. FCC, Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process, (1976).

Nevertheless, the Commission, supported by the courts, has advocated "a heavier burden on applicants seeking to displace incumbent licensees".[35] Indeed, the FCC has "preferred the proven, though unexceptional record of performance of an incumbent over the untested proposals of a challenger"[36], and has stated that "a licensee who has operated in good faith can expect to be renewed absent compelling reasons for non-renewal."[37]

In Hearst Radio Inc. (WBAL) (1951), the FCC determined that licensees falling short of the mark could nevertheless acquire the desired programming record "by upgrading programming after designation for hearing; in short, it made it extremely difficult to challenge an incumbent."[38] Then, in the Wabash Valley Broadcasting Corp. (WTHI-TV) case, the Commission "gave the past broadcast record of the licensee such weight in the final analysis as to overcome the preferences awarded to the challenger; the Commission held that Wabash would prevail on the basis of its record and that those comparative shortcomings which resulted since the time it first

---

35. FCC, Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process, p. 9.

36. Ibid. p. 10.

37. Ibid. p. 21.

38. 15 FCC 1149 (1951), cited in FCC Report To The Congress of the United States Re The Comparative Renewal Process. p. 26.

received its license ... would not be of decisional significance."[39]

The FCC favoured existing licensees in comparative proceedings to such an extent that Noll, Peck and McGowan assert that "The FCC has failed to use the one sanction that it has - refusal to renew a license - to enforce the local service policy".[40] Similarly, Owen, Beebe and Manning have characterized the renewal process in the following manner:

> The license-renewal process has always been the heart of the FCC mechanism of program-content regulation. Its purpose is to ensure that the stations will broadcast the "right" set of programs from the FCC's public-interest point of view ....
>
> The licenses are, however, only very rarely not renewed, and then only in extraordinary circumstances, no doubt in part because television licensees have an enormous incentive not to do things that will endanger their licenses....[41]

There has been one notable exception to the foregoing, the WHDH case, in which a competing applicant displaced an incumbent. The original licence issued to the Boston Herald-Traveller had been before the courts for a number of years due to improper ex parte contacts with the chairman of the

---

39. 35 FCC 677 (1963), cited in ibid.

40. Roger Noll, Merton Peck and John McGowan, Economic Aspects of Television Regulation, p. 115.

41. Bruce Owen, Jack Beebee and Willard Manning, Television Economics (Lexington: Heath, 1974), p. 173.

FCC. In a 1969 decision, the FCC ruled that the program record of an incumbent licensee was of relevance in comparative renewal proceedings only if that record "exceeds the bounds of average performance",[42] thereby substantially reversing the precedents noted above. Having excluded WHDH's past record from consideration, the FCC then relied upon the standard comparative criteria that had evolved in connection with the award of new licences in comparative hearings. Under these criteria, WHDH, due to its ownership by a local newspaper, was disadvantaged:

> As would be the case for many if not the majority of licensees, the standard criteria - emphasizing diversification of ownership and management did not operate in WHDH's favour. The licensee's relationship with the Boston Herald-Traveler Corporation brought a demerit on the diversification criteria. Likewise, its integration of ownership and management was deemed "small". WHDH also received a demerit for an unauthorized transfer of control.[43]

Subsequently, the FCC stated, however, that WHDH was without precedential value insofar as the initial licensing had been under continuous litigation until the decision in 1969;[44] that is, the FCC was treating WHDH as a new licence award.

---

42. 16 FCC 2d. (1969), cited in FCC Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process. p. 29.

43. Ibid. p. 30.

44. Ibid. p. 31.

The following year the Commission attempted to further erode any precedential value that might have been contained in the WHDH case by issuing a Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants wherein the FCC stated that "the comparative renewal procedure must be administered in a way which does not undermine the stability of the broadcast industry". Specifically,

> It proposed to accomplish this by first evaluating the renewal applicant's program service during the preceding license term. If the service was found to be "substantially attuned to meeting the needs and interests of its area", the station, absent other deficiencies, would be renewed and competing applications would be denied.... In short, the Commission concluded that the standard comparative criteria, which are, after all, merely presumptive guides as to how an applicant might serve the public, are not pertinent when an existing performer has a solid, substantial record.[45]

The Commission's policy statement was declared unlawful by the Court of Appeals for the District of Columbia in 1971.[46] The Court ruled "that a broadcasting licensee applying for renewal had no advantage over rival applicants...".[47] As noted by Noll, Peck and McGowan, this decision "caused a considerable outcry at the FCC and in the industry, and the

---

45. Ibid. p. 33.

46. Ibid.

47. Roger Noll, Merton Peck and John McGowan, Economic Aspects of Television Regulation, p. 115.

introduction into Congress of a bill to make licence renewals nearly automatic."[48]

Over the interval from 1971-76, the FCC conducted comparative licence renewal hearings on the premise, affirmed by the courts, that "given two relatively equal applicants, the public interest in reasonable security in the broadcast industry compelled a decision favouring the incumbent."[49]

In recent decisions (24 January 1980) however, the FCC made a notable exception to its policy of automatic licence renewals by stripping RKO General of three television licences - Boston, New York and Los Angeles. The parent company, General Tire and Rubber, had been found guilty of business misconduct in attempts to oblige companies wishing to do business with General Tire to place advertisements on RKO, of making pay-offs to foreign government officials, of making illegal political contributions, and of other irregularities. The FCC termed these business practices "so extensive and serious" that RKO could no longer be trusted with the ownership of the stations. The Boston licence was awarded in a comparative hearing (and subject to appeal) to the party

---

48. Ibid.

49. FCC, Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process. p. 39.

bringing RKO's business practices to the attention of the FCC. It is significant that the programming performance of RKO, though considered generally to have been substandard (one of the films ran on Million Dollar Movie sixteen times during one week), this performance was not a factor in the licence revocations.[50]

In 1976, the FCC petitioned Congress to amend the Communications Act so as to make comparative hearings at licence renewal time unlawful. In support of its petition, it submitted the document already herein referred to, assessing comparative renewal proceedings.

It is, therefore, now appropriate to itemize those factors associated with comparative renewal procedures deemed by the FCC to be detrimental. Essentially, there are four such factors.

1. Possibility or likelihood of undue government interference in programming. The comparative renewal process "carries with it an ever present threat of undue government intrusion into broadcaster discretion" due to the "subjectivity inherent in the process".[51] The Commission continued:

---

50. "Unbridled Licence?", The Economist, 9 February, 1980, p. 40; and Peter Dworkin, "The O'Neill Brothers' $350-Million Hassle with the FCC, Fortune, 21 April 1980, pp. 128 - 135.

51. FCC, Report of the Federal Communications Commission to the Congress of the United States, p. 41.

> The subjectivity is inherent in the nature of the process because the decisional elements within each criteria are qualitative in nature.... A process so inherently subjective will always be vulnerable to charges of manipulation no matter how honorable the individual Commissioners may be. This in itself undermines the public's faith in government and should be avoided if possible.[52]

The FCC has attempted to develop quantitative criteria by which to judge performance in order to remove "subjectivity", but has correctly concluded that quantitative criteria alone are inadequate;[53] in fact, the FCC states that "they tell the regulator very little".[54]

2. Comparative criteria developed by FCC unsuitable for renewals. The Commission states that it is inappropriate to compare the broadcasting record of a licensee who has had to face the realities of the marketplace with untried competitors who are free to make unrealistic program proposals. "It is more a test of a lawyer's skill in 'puffing' a proposal and still keeping it credible than it is of the applicant's actual intent and ability to program in the public interest.... No competing applicant will have developed a record to compare to the incumbent's and it is totally unrealistic to compare the broadcaster's actual record to a challenger's mere paper promise."[55]

---

52. Ibid. p. 47.

53. Ibid. pp. 47, 49 - 50.

54. Ibid. p. 52.

55. Ibid. p. 46.

Moreover, the Commission stated that the comparative criteria it had developed for hearings in the initial award of licence "were not designed as incentives for incumbent licensees and do not operate as such".[56] Rather, such criteria (integration of ownership and management, diversity in ownership of media) are "structural" criteria "at best, predictive of future performance".[57] Furthermore, "broad issues of industry structure should be considered in an overall proceeding and not on an ad hoc basis".[58]

Rather than focusing on the comparative structural criteria, the FCC stated attention should be drawn to the licensee's past performance. But since only one of the applicants in a comparative renewal proceeding has a past performance record, it is appropriate to judge this record in isolation from other proposals.

3. Stability. The FCC also stated that voiding comparative proceedings would increase the financial stability of the broadcasting industry.[59]

4. Cost and Time. "Comparative hearings are inherently costly and time consuming.... Challenging an existing licensee

---

56. Ibid. p. 41.
57. Ibid. p. 42.
58. Ibid. p. 43.
59. Ibid. pp. 47 - 48.

requires considerable wealth".[60]

In view of the foregoing perceived deficiencies of comparative renewal proceedings, the FCC recommended that Congress allow the Commission to approve licence renewals on the merits of each case without reference to competing applications.

The specific issues raised by the FCC pertaining to comparative proceedings will be assessed in the Canadian context in a subsequent chapter. At this point, however, it is important to offer a general assessment of the relevance of the US experience to Canada.

4. Relevance to Canada

The American broadcasting system is founded on somewhat different assumptions than is Canadian broadcasting. Much greater emphasis has been placed upon competition among private broadcasters as a means of approaching the Truth through the effective operation of the marketplace of ideas. Consequently, the chief job of the regulator has been perceived to be to facilitate the operation of this marketplace of ideas within the constraint of spectrum scarcity. The regulator has shown a reluctance to interfere with or second guess the programming decisions made by duly authorized licensees.

Moreover, American broadcasting is premised on fears of government censorship and propaganda to a much greater extent

---

60. Ibid.

than is Canadian broadcasting. There is no government-owned entity equivalent to the CBC in the US, for example. This also helps to explain the reluctance of the FCC to exercise "subjective" judgements in comparative hearings.

The US courts and the FCC have determined, however, that the stimulation of the "free flow" of information does require activist government. In the Associated Press case it was stated "Freedom to publish means freedom for all and not for some". In Red Lion it was declared that "No one has a First Amendment right to a license or to monopolize a radio frequency.".

The FCC has struck the balance between the "public interest, convenience and necessity" criteria on the one hand and the perceived desirability of a competitive, privately-run broadcasting system free of undue government interference on the other by largely limiting its supervision of broadcasting to judging the qualifications of initial licensees while refraining from disciplining licensees for inadequate programming in renewal cases and refusing to consider the relative merits of alternative applicants in transfer cases; by requiring licensees to undertake ascertainments of community needs, while not challenging licensees' demonstrations of their implementation of such needs through programming; and through the Fairness Doctrine.

A more activist government policy has proven necessary in Canada to attain even the minimal goals set for American broadcasting in the US. Adoption of FCC policies in Canada would result in domination of our airwaves by US-originated programming. Our marketplace of ideas would be largely American, and our own writers, artists and performers would be excluded. Therefore, the balance struck between freedom of licensees in the US and control by government in "the public interest" cannot be applied in Canada without sacrificing Canadian participation.

In Chapter I it was noted that freedom vs. control must be contemplated within the context of whose freedom and whose control. It has been noted by some observers that in the US, FCC policies have often appeared to favour the freedom or rights of existing broadcasters at the expense of would-be entrants. Some have held that the FCC, rather than trying to increase competition among broadcasters, has in fact consistently acted to suppress emerging competition. In particular, note is made of FCC policies toward UHF channel allocations, FM radio and cable television, all of which helped preserve the market position of existing broadcasters.[61] Under these circumstances, the reluctance of the FCC to scrutinize carefully licence renewals could be interpreted as

---

61. See Committee on Interstate and Foreign Commerce, Allocation of TV Channels: Report on the Ad Hoc Advisory Committee on Allocations (Washington: United States Government Printing Office, 1958); Edwin Krasnow and

being consistent with a policy of aiding the market position of existing licensees.

The extent to which the marketplace of ideas actually operates in the commercial milieu of American television has also been questioned. Eric Barnouw, for example, notes that the relative merits and demerits of roll-on vs. spray vs. cream deodorants receive frequent airing, but the consumption ethic per se is seldom questioned.[62] In other words, it is alleged, the freedom which is protected has been the freedom of large advertisers and the three networks to "shape public opinion to suit [their] own ends, to create wants and appetites, which thus control what choices people shall have".[63] Some are much more free than others to disseminate messages, and it has been shown that the commercial mode of finance tends to exclude those views that are not synergistic with the sale of goods and services.[64] US television is not lacking in

---

Lawrence Langley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1972); Martin H. Seiden Cable Television U.S.A.: An Analysis of Government Policy (N.Y.: Praeger, 1972), for example.

62. Eric Barnouw, The Sponsor: Notes on a Modern Potentate (N.Y.: Oxford, 1978), p. 98.

63. Harry Skornia, Television and Society, (N.Y.: McGraw-Hill, 1965), p. 75.

64. Eric Barnouw, The Sponsor, pp. 114 - 121.

domestic critics.[65] Economic studies have generally concluded that US television is not rich in diversity; rather it is characterized by slight product differentiation associated with oligopoly.[66]

Others have noted that howsoever beneficial the American notions of private competition with minimal regulatory intrusion may be for the US domestic market in aiding the pursuit

---

65. Nicholas Johnson, How to Talk Back to Your Television Set. (N.Y.: Bantam, 1970); Harry Skornia, Television and Society (N.Y.: McGraw-Hill, 1965); Fred Friendly, Due to Circumstances Beyond Our Control. (N.Y.: Vintage, 1967); Frank Mankiewicz, Remote Control: Television and the Manipulation of American Life. (N.Y.: Ballantine, 1978); Rose Goldsen, The Show and Tell Machine, (N.Y.: Delta, 1978), Tony Schwarz, The Responsive Chord, (N.Y.: Anchor, 1974); Horace Newcomb (ed.), Television: The Critical View, (N.Y.: Oxford, 1979); Eric Barnouw, The Sponsor: Notes on a Modern Potentate (N.Y.: Oxford, 1978); Jerry Mander, Four Arguments for the Elimination of Television, (N.Y.: Morrow Quill, 1978); Edwin Krasnow and Lawrence Langley, The Politics of Broadcast Regulation, (N.Y.: St. Martin's, 1973); Samm Sinclair Baker, The Permissible Lie (Boston: Beacon Press, 1968); Edward Jay Epstein, News From Nowhere, (N.Y.: Vintage, 1973).

66. Peter Steiner, "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting", Quarterly Journal of Economics, 1952; Peter Wiles, "Pilkington and the Theory of Value", Economic Journal, 1953; Jerome Rothenberg, "Consumer Sovereignty and the Economics of TV Programming" Studies in Public Communications, 1962; John McGowan, "Competition, Regulation and Performance in Television Programming", Washington University Law Quarterly 1967; John Beebe, Institutional Structure and Program Choices in Television and Cable Television Markets, Stanford University Center for Research in Economic Growth, Memorandum 131, 1972; Peter Steiner "Monopoly and Competition in Television: Some Policy Issues", Manchester School of Economics and Political Science, 1961; Bruce Owen and Willard Manning, The Television Rivalry Game, Stanford

of Truth, such policies would entail cultural suicide in developing countries with smaller markets as they would be overrun by the American product.[67]

More than any other country, the United States places great faith in the marketplace of ideas as the means of attaining the Truth. Public ownership of radio frequencies and public regulation of licensees were perceived to be a means of encouraging this free play of ideas. As noted above, government regulation and licensing in the US have been attributable in large part to spectrum scarcity and fears of undue monopolization of the media that could result if the media were unregulated and unlicensed. Advancing communications technology, however, as exemplified by cable systems and communications satellites, is fast turning scarcity into plenty,

---

University Center for Research in Economic Growth, Memorandum 152, 1973; Harvey Levin, "Program Duplication, Diversity and Effective Viewer Choices: Some Empirical Findings", American Economic Review, 1971; Edward Greenberg and Harold Barnett, "TV Program Diversity - New Evidence and Old Theories," American Economic Review, 1971.

67. Herbert Schiller, Mass Communications and American Empire (N.Y.: Kelly, 1969); Alan Wells, Picture-Tube Imperialism: The Impact of U.S. Television on Latin America (Maryknoll: Orbis, 1972); Rosemary Righter, Whose News: Politics, the Press and the Third World, (N.Y.: Times Books, 1978); Kaarle Nordensteng and Herbert I. Schiller (eds.), National Sovereignty and International Communication: A Reader. (Norwood: Ablex, 1979).

thereby weakening a principal historic justification of regulation in the US. Bills have recently been before Congress for "deregulation" of broadcasting, including perpetual licences. In principle, technology makes capacity for signal delivery unlimited, and some would view this occurence as beneficial in terms of expanding freedom of the viewer to choose. Given the historic reluctance of the FCC to intervene directly into programming matters, even in the age of scarcity of channels, one can anticipate even further withdrawal of government in the years to come with the emerging technology.

II UNITED KINGDOM

1. System Evolution

By way of contrast to the American ideals of competition and the "marketplace of ideas", broadcasting in the United Kingdom was developed with the notion of minimizing market forces in order that broadcasting could serve to "raise" cultural values. Since both British and Canadian broadcasting have in common the notion that broadcasting material should not be totally determined by market forces, and since for both systems commercial motives have come to play ever increasing roles, it is useful to survey briefly the evolution of British broadcasting policies.

In the early 1920's it became apparent that the limited number of radio frequencies available for broadcasting in England would not be sufficient to accommodate all parties seeking broadcasting licences; in addition, some felt that the broadcast of music was "wasteful and frivolous". Consequently, in 1922, the Government decided to form one company to monopolize broadcasting. The British Broadcasting Company, the monopoly created at the initiative of Government, was a joint venture of major equipment manufacturers. By allocating all frequencies to a monopoly, the Government was able to avoid criticism that would have been forthcoming if it was required to choose among competing applicants.[68] However, problems in regulating the performance of this private institution led to pressures for change.

In 1927, on recommendation of two government committees, the British Broadcasting Corporation was created; it was a public corporation rather than a company owned by private interests; it was to offer broadcasting service on a monopolized basis; it was to be unencumbered by commercial pressures as its finances were to be obtained from licence fees on radio receivers. These three features of British broadcasting were retained until 1954 when the establishment of the Independent Television Authority ended the BBC monopoly.

---

68. Roger Manwell, On the Air: A Study of Broadcasting in Sound and Television (London: Andre Deutsch, 1953), p. 11.

Under the monopolized structure, free of commercial incentives, the BBC pursued a policy significantly different from the American ideals of the "marketplace of ideas" and "consumer sovereignty":

> Under the leadership of Sir John Reith, the BBC emphasized "serious", "educational", and "cultural" broadcasts. While popular tastes were not ignored, the prevailing philosophy was to provide a service that would raise the level of intellectual and aesthetic tastes, to give the public "something better than it now thinks it likes".[69]

Successive government committees praised the programming performance of the BBC and recommended the retention of its monopoly. Nevertheless, a commercial, second television service was created in 1954, apparently in response to pressures brought on the Government by commercial interests and the public's perception that the BBC had been slow in offering a second service.[70] The BBC, of course, argued (to no avail) against the introduction of commercial competition, and it is worth noting the classic arguments supporting monopoly in broadcasting:

> The BBC provided the most carefully reasoned case for monopoly in its presentation to the Beveridge Committee in May, 1950. Monopoly, it wrote, could best be justified by the

---

69. Walter Emery, National and International Systems of Broadcasting: Their History, Operation and Control. p. 86.

70. Burton Paulu, British Broadcasting in Transition, (Minneapolis: University of Minnesota Press, 1961), p. 14.

> 'crucial test of standards', which it defined as 'the purpose, taste, cultural aims, range and general sense of responsibility of the broadcast service as a whole'. The BBC continued, 'Under any system of competitive broadcasting all these things would be at the mercy of Gresham's Law' (the tendency of bad money to drive good money out of circulation) .... The good, in the long run, will inescapably be driven out by the bad .... And, because competition in broadcasting must in the long run descend to a fight for the greatest possible number of listeners, it would be the lower form of mass appetite which would more and more be catered to in programmes.[71]

Although the Independent Television Authority was created as a commercial venture, to be financed through advertising revenues, it is important to note that attempts were made in structuring ITA to segregate programming decisions from advertising influence. First, program contractors (producers) were to supply programming over transmitters owned by the government. The Authority, itself, was not to supply programs; rather, it was to select and schedule programs and to contract with 14 producing companies for program creation. The law provided that the Authority was to ensure "that the programs in each area maintain a high general standard in all respects, and in particular, in respect of their content and quality,

---

71. Ibid., p. 10.

and a proper balance and wide range in their subject matter....[72] Second, under the 1954 Act, ITA itself sold commercial time, not according to the program, but in time slots; advertisers had no more idea what would appear next to an advertisement than when purchasing space in a newspaper. With the arrival of commercial radio in Britain, ITA was renamed the Independent Broadcasting Authority to encompass its new responsibilities.

2. Independent Broadcasting Authority

IBA is a creature of Parliament[73], with directors appointed by the Government. IBA is charged with providing television and "local sound" broadcasting services additional to those of the BBC. The material is to be "of high quality". However, so far as may be consistent with the observance of the requirements of the Act, the Authority is not to itself supply the programs, but rather to contract with independent programmers.

In order to carry out its duties, IBA is empowered inter alia to establish, install and use the equipment and facilities associated with broadcasting; to "arrange for the provision (by programme contractors or otherwise) of, or (if need be) themselves provide programmes"; to ensure programming meets

---

72. Walter Emery, National and International Systems of Broadcasting: Their History, Operation and Control, p. 94.

73. Independent Broadcasting Authority Act, 1973, Chapter 19, as amended.

proper standards;[74] to draw up a code for programs respecting among other things the depiction of violence; to schedule programs; to draw up codes for advertisements and otherwise control the scheduling of advertisements for broadcast.

With respect to program contracts, the IBA is precluded from entering into contracts for periods longer than six years but is not precluded from entering into successive contracts with the same program contractor (with or without competition). The IBA has power to suspend contracts for

---

74. By Section 4 of the forementioned Act, the programs broadcast by IBA shall meet the following requirements:

(a) Nothing is [to be] included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling;

(b) A sufficient amount of time in the programmes [shall be] given to news and news features and ... all news given in the programmes (in whatever form) shall be presented with due accuracy and impartiality;

(c) Proper proportions of the recorded and other matter included in the programmes [shall be] of British origin and of British performance;

(d) The programmes broadcast from any station or stations [shall] contain a suitable proportion of matter calculated to appeal specially to the tastes and outlook of persons served by the station or stations and, where another language as well as English is in common use among those so served, a suitable proportion of matter in that language;

. . . . . .

(f) Due impartiality [shall be] preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy.

cause. Program contractors pay rental payments to IBA for broadcasting facilities plus "additional funds" based on advertising receipts which are transferred to the Government.

3. Competitive Contracting Procedures[75]

IBA has a choice at the end of a contract period either to invite competitive applications for the contract (with the possibility that the existing contractor would be successful and have the contract renewed or to renew a contract without inviting competing applications.

The initial IBA contracts ended first in 1964. IBA extended those contracts until 1968, but announced that all would then be open for competition.

Applications for the 15 television contracts were invited in 1967. For nine of these, one or more competing applications were submitted, ranging in most cases from one competing application to ten separate applicants in one case. All applicants submitted written applications and were interviewed, in private, by IBA. Decisions about the award of contracts were made on the basis of judgement of which applicants would provide the best program service.

Three entirely new companies were awarded contracts, one

---

75. Except as otherwise noted, this section is based on a letter dated 27 August 1976 from Anthony Pragnell, Deputy Director General (Administrative Services), IBA, to Herschel Hardin, President, Association for Public Broadcasting in British Columbia.

existing contractor was not re-awarded a contract, two contractors were jointly offered a single contract on the condition that they amalgamated. Eleven of the existing contractors were re-awarded contracts.

Anthony Pragnell echoes a concern of the FCC in summarizing competitive contracting:

> On the one hand is the view that the industry needs stability; on the other hand is the view that no company once having been awarded a contract should regard itself as irrevocable.... [Furthermore] one of the problems of competition [concerns the question of] how one fairly assess[es] the potential of a newcomer against the proved record of an existing company. The problem is perhaps keener in our system where the Authority has the duty of continuous supervision of the system and is not likely to allow any company to fall below a respectable level of performance.

IBA issued a document in February 1979 entitled "ITV: Future Contracts and the Public".

Beginning in 1979, IBA was starting to make arrangements for television contracting for the period 1982-1988. Before making the new appointments, the Authority would consider whether changes and adjustments should be made to the existing contract areas and decide upon the terms of the new contracts. Then, through public advertisement, IBA would invite applications for these contracts from existing program companies and from new groups.

IBA announced means for public consultations before the private interviews with applicants and the award of contracts. In addition, IBA would rely upon "the findings of a major research survey" and "expert assessments of programmes, written comments, ratings and appreciation indices, and attitude surveys, as well as what it may learn through other kinds of direct contact with individuals and groups, both specialist and non-specialist."

III CONCLUSIONS

The US and the UK are both democratic countries, prizing the liberties and individual rights associated therewith. They have adopted remarkably different systems and values respecting broadcasting, however. Canadian policy toward television, in terms of government control vs. marketplace control, would be between the extremes.

It is unfortunate that the full benefits from both extreme positions cannot be attained simultaneously - they are, however, mutually inconsistent. A balance must be struck.

CHAPTER IV

COMPETITIVE LICENSING IN THE CANADIAN CONTEXT - MERITS AND DEMERITS

The merits and demerits held to pertain to competitive renewals and transfers can be discussed under three broad headings: economic and financial issues, administrative and regulatory issues, and legal issues. The foregoing embrace both broadcasting and cable television. Discussion pertaining to broadcasting, however, will be limted to television, thereby excluding radio.

1. Economic and Financial Issues

The economic and financial debate concerning competitive licensing has centred upon the magnitude and appropriation of surplus "rents" attributable to restricted entry (licensing) or other barriers to entry on the one hand, and the need for industry stability and planning on the other. Advocates of competitive licensing believe the "auctioning off" of franchises to the highest bidder in terms of either money payments or performance undertakings could in large measure replace detailed government regulation or, alternatively, be an effective regulatory tool in addition to those currently at the disposal of the regulator. Others assert that the ensuing risks if competition were applied to renewals and transfers would undermine the financial stability of the industry, thereby causing a deterioration in the performance of licensees as they become tempted to "take the money and run".

Moreover, concern is expressed with regard to the relative bargaining strength of an out-going licensee and the incumbent over the valuation of physical plant and equipment.

The Existence of the Surplus

Most observers agree that both the television broadcasting and cable television industries are highly profitable.

Economists at the University of Alberta estimated television broadcasting profits as a percent of total financial capitalization to be 32.2% for 1975, well above the competitive rate of return (estimated to be 13%). By revenue group, percentage return ranged from a low of 13.3% for stations with revenues under $1.8 million, up to 39.6% for stations with revenues over $4.5 million.[1] They concluded "all of these rates of return appear to be far in excess of those required to attract investment capital to the industry ...[since] we find no evidence to suggest that broadcasting is of above average risk...."[2]

Similarly, Perrakis and Silva-Echenique found that for a sample of 16 television stations that had changed hands

---

1. University of Alberta, Ownership of Canadian Broadcasting, study for the Department of Communications, March 1979. A revised version of this study is to be published by the Institute for Research on Public Policy.

2. Ibid. pp. 16 - 17.

over the period 1972-77, "the average annual 'economic [or surplus] profit' per station in our sample was equal to $716,005, which is quite substantial".[3] However, the authors detected substantial "technological and regulatory risk" in the industry; otherwise, they believe, stations would have traded at even higher premiums given the surplus profits to be earned.

Table 1 shows estimated rates of return earned by the private television broadcasting industry over the period 1969-78. Rates of return in Table 1 are pre-tax returns and are calculated by taking earnings accruing to share capital plus interest expense on debt as a percent of net fixed broadcasting assets plus working capital.[4] The returns so calculated depict the average rates of return earned on investment, regardless of whether such investment was financed through equity or through debt. The advantage of this approach, as compared to rates of return on equity only, is that it neutralizes variations among firms in the debt/equity ratio. It is to be emphasized that the returns calculated in Table 1 are best estimates only and may be subject to

---

3. Stylianos Perrakis and Julio Silva - Echenique, "The Profitability and Risk of Television Stations in Canada", paper prepared for Department of Communications, 1980.

4. Rate of return figures are slightly understated due to the use of capital at year-end, rather than mid-year, as the denominator.

TABLE 1

PRIVATE TELEVISION BROADCASTING PROFITABILITY 1969 - 1978

($'000)	1969	1971	1973	1975	1977	1978
TOTAL OPERATING REVENUE	106,574	115,790	170,747	233,571	330,978	403,465
OPERATING EXPENSES	76,502	92,060	126,107	178,210	247,341	299,088
DEPRECIATION	6,984	8,258	9,281	11,200	14,103	15,490
NET OPERATING INCOME BEFORE TAX (including interest)	23,088	15,472	35,359	44,161	69,534	88,887
NET FIXED ASSETS AT YEAR-END	43,314	47,739	58,590	91,785	115,993	122,296
ESTIMATES OF WORKING CAPITAL	13,835	12,813	19,493	22,705	38,466	38,878
% RATE OF RETURN ON NET ASSETS PLUS WORKING CAPITAL BEFORE TAX	40.4	25.6	45.3	38.6	45.0	55.1

Note: 1. Working capital estimated by prorating total for radio and television by ratio of television revenues to revenues accruing to radio plus television.

2. Rate of return defined as earnings plus interest before tax over net fixed assets plus working capital.

3. Operating revenues and expenses include "other revenue" and "other expenses" respectively, and "adjustments" for years subsequent to 1971.

Source: Statistics Canada, Radio and Television Broadcasting (annual)

error and accounting anomalies;[5] nonetheless, the estimates are instructive in evaluating the profitability of the industry.

Table 1 shows that the pre-tax return on investment earned by the private television broadcasting industry over the period 1969-78 ranged from a low of 26 percent in 1971 to a high of 55 percent in 1978, with an average return for all years of 41.7 percent. By any standard of comparison, these are high rates of return indeed.

The cable industry also is generally felt to be highly profitable. The University of Alberta study concluded:

> "The net after tax profits are lower than television but greater than radio. Also, larger firms are more profitable than medium size or small size cable firms. Cable firms received an average 14% rate of return [after tax] on cable fixed assets (in 1975). This is a weighted aggregate measure and does not reflect the very large profit differences among cable firms."[6]

In like vein, Perrakis and Silva-Echenique state "there is little doubt that CATV operations have been highly profitable in Canada,"[7] but they also conclude that "investors

---

5. Statistics Canada, Radio and Television Broadcasting 1978 catalogue number 56-204, pp. 6 - 7, and Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, p. 68.

6. University of Alberta, Ownership of Canadian Broadcasting, p. 27.

7. Stylianos Perrakis and Julio Silva-Echenique, "The Profitability and Risk of CATV Operations in Canada", paper prepared for Department of Communications, 1980, p. 4.

perceive a CATV system purchase as a risky investment [possibly due to] a perceived possibility of adverse regulatory action.... The prices paid for the CATV systems are consistent with a risk premium of 50 or 60% of expected operating profits".[8]

Table 2 depicts cable television profitability over the period 1969-1978. Profitability has been increasing through time, due in part at least to rising over-all penetration ratios. The percentage return on physical capital was at a low in 1969 at 11%, but by 1978 had risen to 24% before tax. The average pre-tax return for the period was 19.4%.[9]

Objections have been expressed to the accrual of evidently high rates of return earned by television broadcasting, and more recently, by the cable television industries. Cable

---

8. Ibid. pp. 18 - 19.

It is relevant to note Wood Gundy's contrasting assessment of risk in the cable industry: "Unlike the broadcasting and publishing companies in the communications group, cable television revenues are not advertising-based. Hence, earnings are not tied to the business cycle. Furthermore, cable service is looked on almost as a necessity by those who are subscribers. In difficult economic times, cable would be one of the last services to be cancelled by the householder". Wood Gundy, Ltd., "Progress Report: The Cable Television Industry", 26 February 1975.

9. Rate of return figures are somewhat understated due to the use of year-end net assets, rather than mid-year assets, in the denominator.
Note also that working capital is excluded from the denominator (rate base) for calculation of cable television rates of return. Inclusion of working capital would raise the rates of return due to the deficits in this item over the period.

TABLE 2

CABLE TELEVISION PROFITABILITY 1969 - 1978

($'000)	1969	1971	1973[1]	1975[1]	1977[1]	1978[1]
TOTAL OPERATING REVENUE	37,853	67,794	103,997	158,769	229,595	269,811
OPERATING EXPENSES	23,162	37,667	52,943	81,956	126,433	145,644
DEPRECIATION	6,603	13,459	20.974	32,227	42,701	48,760
NET OPERATING INCOME BEFORE TAX (including interest)	8,088	16,668	30,080	44,586	60,461	75,407
NET FIXED ASSETS AT YEAR-END	71,659	103,507	148,661	200,777	269,810	311,900
RATE OF RETURN ON NET FIXED ASSETS	11.3	16.1	20.2	22.2	22.4	24.2

Note: 1. Excludes systems with under 1,000 subscribers

2. Rate of return defined as earnings: plus interest before tax over net fixed assets.

3. Operating revenue and expenses included in "other revenue" and "other expenses" respectively and "adjustments".

Source: Statistics Canada, Cable Television (annual)

television is both a natural and an enfranchised monopoly and some would deem it inappropriate that these companies be allowed to receive rates of return higher than those required to attract new capital.[10] Similarly, broadcasting stations make use of radio frequencies which are public property; it may not be appropriate that television stations should continue to earn economic profits from this position of trust and privilege.

It is to be emphasized that the foregoing rates of return are industry-wide averages. While high rates of return to individual firms in competitive industries may indicate superior service to the public, and on that grounds be justified, high industry-wide rates of return represent restrictions on competition (barriers to entry);[11] in the present instances, government licensing plus (in the case of cable television) technological monopoly contribute to these entry barriers. The existence of supranormal profits on an industry-wide basis

---

10. See Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, J.V. Clyne Chairman, Telecommunications and Canada, p. 21; also A.J. Roman, "Competition for Cable Licences", In Search, Summer 1980.

11. Joe S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (Cambridge: Harvard, 1965); Joe S. Bain, "Relation of Profit Rate to Industry Concentration", Quarterly Journal of Economics, August 1951; H. Michael Mann, "Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries 1950-1960" Review of Economics and Statistics, August 1966; William G. Shepherd, The Treatment of Market Power: Antitrust, Regulation and Public Enterprise (New York: Columbia University Press, 1975), pp. 92 - 113.

over a substantial period of time in the case of television broadcasting at least, due (in part) to a government bestowed privilege, is not justified by economic criteria.

Table 3 depicts some financial ratios for the broadcast industry (radio and television combined), Bell Canada, and the cable industry over the period 1972-1977. The comparisons depict the relatively favourable position occupied by broadcasters. Bell Canada, unlike the broadcasting and cable companies, is constrained through regulation to a maximum rate of return on invested capital; the intent of regulation is to eliminate the economic or supranormal profits that its monopolized position and the essential nature of its service would otherwise permit the company to earn. While it is held that rate of return regulation may induce a company to inefficiently expand its capital intensity,[12] comparisons of Bell's financial ratios are nonetheless interesting insofar as they indicate the type of ratios that can exist for a financially viable firm in the absence of large monopoly profits.

Cable companies share Bell's monopoly and capital-intensity characteristics, although they have not been regulated to date

---

12. Harvey Averch and Leland Johnson "Behavior of the Firm Under Regulatory Constraint", American Economic Review, 1962.

TABLE 3

RATIOS COMPARING BROADCASTING, TELEPHONE AND CABLE 1972 - 1977

	BROADCASTING	BELL	CABLE
1. Additions to assets / Total funds used	.316	.759	.563
2. Net profits / Total funds used	.369	.211	.159
3. Net Profits & Depreciation / Total funds used	.563	.552	.461
4. Dividends / Total funds used	.208	.165	.088
5. Internal financing / Total financing	.554	.631	.558
6. Outside investments / Total funds used	.174	.006	.143
7. Debt / Total capitalization	.329	.479	.554
8. Retained earnings / Share capital	1.595	.308	1.732
9. Retained earnings / Net fixed assets	.878	.117	.282

Sources: Tables A, B, C, D, E, F in Appendix I

as to rate of return.

Broadcasters too are regulated, albeit not as to rate of return. For both the telephone and broadcasting industries, regulators attempt to prohibit profit maximizing behaviour. In the case of Bell Canada, the cost of providing service tends to be determined by Bell itself, and the regulatory agency approves the level of rates that will generate a "just and reasonable" return on investment. In the case of broadcasting the companies, themselves, attempt to maximize revenues through prices charged for advertising time while the CRTC merely attempts to induce a certain level of Canadian content, serving to inflate expenses (and perhaps decrease revenues).

It will be noted from Table 3 that over the period 1972-1977 Bell Canada applied 75.9% of all funds utilized to construction in its industry, whereas the cable industry used only 56.3% for cable construction and broadcasters only 31.6%. From an economic point of view, rates of return serve the primary purpose of inducing the inflow of new capital to an industry for the explicit purpose of capital expansion in the industry. In the broadcasting and cable industries, less relative use is made of the inflow of capital for internal expansion than is the case with Bell Canada, even though the latter earns a much lower rate of return. Reflecting these trends, it is noted that broadcasters have used 20.8% of the flow of funds for dividends and 17.4% for outside investments,

whereas, Bell Canada used only 16.5% for dividends and 0.6% for outside investments; the cable industry used 8.8% for dividends and 14.3% for outside investments.

Net profits form an important part of the funds used by broadcasters: 36.9%. This compares with 21.1% for Bell Canada and 15.9% for the cable industry. Depreciation (a component of the gross reward to capital) constitutes a much more important source of funds for Bell and the cable industry than for broadcasters, however.

The stability of the broadcasting industry is also depicted by the relatively low debt to total capital ratio: 32.9% for broadcasters, as compared to 47.8% for Bell and 55.4% for cable. Retained earnings are a very important component of total capital for broadcasters; indeed retained earnings are 159.5% of share capital for broadcasters and 173.2% of share capital in the case of cable companies, but equal only 30.8% of share capital in the case of Bell. Retained earnings account for 87.8% of net fixed assets in the case of broadcasters, 11.7% in the case of Bell Canada, and 28.2% in the case of cable.

It is to be noted that the data summarized above and contained in Table 3 depict the consolidation of television with radio broadcasting. Since television is significantly more profitable than radio, we can conclude that Table 3 understates the disparities in financial ratios between television broadcasting and the other sectors. Moreover, since the cable

data presented amalgamate highly penetrated systems with low penetration systems, some major cable companies will be performing better than average; indeed, since penetration has been increasing for the industry through time, averaging 1972 to 1977 data will understate industry results for recent years.

To summarize our findings to this point:

(a) Retained earnings constitute a much more important source of funds for broadcasting than for telephone or cable where debt, share capital and depreciation are more important. The low debt ratio for broadcasting indicates that external financing could be relied upon to a much greater extent than at present, replacing high levels of retained earnings.

(b) Significantly more funds raised in broadcasting and cable are used for external acquisitions and investments than is the case in the telephone industry. Conversely, the telephone industry applies a much greater proportion of funds raised to new construction. Cable falls between the extremes.

(c) Broadcasting, as contrasted with cable and telephone, is not a capital-intensive industry. Revenues in television broadcasting in 1977 were 2.14 times greater than net fixed assets plus working capital; for cable television revenues were 0.85 times net fixed assets; revenues for Bell Canada were 0.37 times net fixed assets.

(d) By all accounts, returns earned by both broadcasting and in recent years by cable television are well above the cost of attracting new capital.

Capitalizing The Surplus

Even if it were assumed for sake of argument that the current rates of return earned by the broadcasting and cable industries are justified or desirable, it does not follow that licences should trade in the marketplace at substantial premiums above the book value of assets. If a new licensee acquires control of a licence for a significant premium above the physical investment, its realized rate of return will be below that which would have accrued in the absence of the transfer. In order to restore the realized rate of return to levels existing prior to the transfer, the new licensee would have to either cut back on expenses (services) or increase revenues (perhaps through scheduling US programming in better time slots, as one example).

It can be shown that for a firm earning and anticipated to earn a return on investment equal to the rate of return required to attract investment funds (i.e. the "cost of capital"), the market value of the firm's shares will approximate the book value of the firm's assets per share (i.e. net fixed investment at original cost per share).[13] An intuitive

---

13. Robert Gelhaus and Garry Wilson, "An Earnings - Price Approach to Fair Rate of Return in Regulated Industries" Stanford Law Review, January 1968.

explanation for this equality is that an asset purchased by a firm for investment purposes may be thought of as representing two forms of value: first, the purchase price of the asset (its original cost less accumulated depreciation) represents both the physical value of the asset and the investor sacrifice to purchase the asset; second, the asset will produce a stream of earnings in the future and the present value of this stream of earnings gives the value of the asset placed in the production process. When the purchase price of an asset equals its value in the production process, the asset is exactly earnings the minimum rate of return required for its purchase (i.e. the "competitive rate of return" or "the cost of capital") and no monopoly profits are accruing to the firm.

Suppose, for example, an investor is considering the purchase of an asset valued at $100 that will be fully depreciated at the end of five years. The asset is expected to yield $30 a year "cash flow" - that is operating profits plus depreciation. The following Table depicts the life of the investment.

The present value of the stream of cash flow at 10% discount (interest) rate is $113.73; at a 20% discount rate present value is $89.72; at a 15% discount rate present value is approximately $100. (Calculations are based on revenue accruals at year-end for simplicity). If the investor feels that he must earn 15% on investment (cost of capital), the

TABLE 4

HYPOTHETICAL INVESTMENT

	Present (begin year 1)	END OF YEAR				
		1	2	3	4	5
Net Investment	$100	$80	$60	$40	$20	$ 0
Depreciation in year		20	20	20	20	20
Cash Flow		30	30	30	30	30
Net Earnings		10	10	10	10	10

Present Value at 20% discount rate = $\frac{30}{1.2} + \frac{30}{(1.2)^2} + \frac{30}{(1.2)^3} + \frac{30}{(1.2)^4} + \frac{30}{(1.2)^5} =$

$25 + 20.83 + 17.35 + 14.47 + 12.05 = 89.72$

Present Value at 10% discount rate = $\frac{30}{1.1} + \frac{30}{(1.1)^2} + \frac{30}{(1.1)^3} + \frac{30}{(1.1)^4} + \frac{30}{(1.1)^5} =$

$27.27 + 24.79 + 22.54 + 20.49 + 18.63 = 113.73$

Present Value at 15% discount rate = $\frac{30}{1.15} + \frac{30}{(1.15)^2} + \frac{30}{(1.15)^3} + \frac{30}{(1.15)^4} + \frac{30}{(1.15)^5} =$

$26.09 + 22.68 + 19.73 + 17.15 + 14.92 = 100.56$

present value value of the stream of earnings plus depreciation will equal (approximately) the purchase price of the asset ($100) and the investment will be undertaken. In this case, the book value of the asset ($100) approximately equals the value in production of the asset ($100) because the actual rate of return (15%) equals the cost of capital required to induce the investment.

If, on the other hand, the investor feels that the investment need yield only 10% in order to draw forth his investment (determined by surveying generally prevailing interest rates and the risk associated with the investment), the present value of the stream of earnings will be $113.73, greater than the book value of assets ($100).

To summarize, the market value of an undertaking is determined by the anticipated stream of earnings discounted to the present by the "cost of capital". Market value of the undertaking will be greater than, equal to, or less than book value on assets depending upon whether the anticipated actual rate of return is greater than, equal to, or less than the cost of capital.

The stream of earnings that will be generated by a cable company, and hence factors that will determine the present value of the stream of earnings or the market value of the cable system, include:

* penetration levels, both the number of subscribers as a percent of homes passed by the cable and as a

percent of homes in the licensed area;

* density of households per mile of cable, as an indicator of capital costs per subscriber;
* growth potential - in terms of licensed area, penetration, and new services;
* probability of rate increases;
* operating costs, income tax, interest expense.

In January 1974, Burns Bros. and Denton set out a means of valuing a cable system.[14] While somewhat dated in terms of the numbers used, the methodology is still instructive. They made four assumptions:

(i) A return of 12% to 15% based on net cash flow (i.e. monies available for acquisition or dividends) is required by investors. Net cash flow equals gross cash flow (earnings plus deferred tax plus depreciation), less capital expenditures for maintenance of existing systems;

(ii) 40% of gross cash flow is required for additions to fixed assets. Therefore, a return of 7% to 9% of gross cash flow is required;

(iii) The gross cash flow will grow to the investment horizon at an annual average of 15%;

---

14. Burns Bros. and Denton, The Canadian Cable Television Industry: An Industry Overview, January 1974.

(iv) The investment horizon of an investor is only five to eight years. Earnings coming in after eight years have no present value. In justifying this assumption, they state:

> The horizon of the investor in terms of the intrinsic value of the company is between five and eight years. The exact horizon will be a function of the current industry environment and outlook. In this sense, the horizon is an adjustment for risk - e.g., political interference. The greater the potential risk, the shorter the horizon. The upper limit was chosen because it represents a common payback period used by the industry itself in deciding upon acquisitions. The lower limit is a common horizon used by institutional investors in setting up a long-term portfolio ....
>
> We do not consider flows beyond the horizon period. This is of course unrealistic, but it does provide a way to compensate for the increased uncertainty as one tries to predict farther out. [emphasis added].

Under these assumptions, Burns Bros. and Denton stated that seven to twelve times current year's gross cash flow was appropriate for valuing cable companies. Insofar as the cable industry has made greater approaches to "maturity" since this report was written, seven to ten times cash flow may now be appropriate.

A second technique sometimes mentioned to value cable companies is to place a rule of thumb on the value per subscriber. While this approach does not distinguish between new systems (low penetration) and mature systems, it is worth

noting that Rogers' Telecommunications placed a value of $150 per subscriber for the section of its system it sold in conjunction with its acquisition of Canadian Cablesystems in 1979. Value of cable companies per subscriber has probably risen sharply over time with increased penetrations, however.

Table 5 depicts : the gross cash flow of the cable industry for the years 1972 - 1977 ; the market value of the cable industry estimated at seven times, ten times, and twelve times cash flow; the multiples of these estimates of market value to net fixed assets; subscribers; market value of the industry at $150 (for 1977) per subscriber; and the multiple over net fixed investment calculated therefrom. The Table indicates that cable companies can be expected to trade, on average, at prices two to three times their net asset value. These estimates are in accord with the date in Table 2 where the rate of return earned in recent years (24% in 1978) has been observed to be well above the rate of return permitted Bell Canada of 13 to 14 percent before tax;[15] we take the Bell Canada rate of return to be a benchmark in judging the

---

15. The regulatory authority (Canadian Transport Commission) in 1974 set Bell's rate of return after tax at 8.5 to 9.1 percent. With a 50 percent debt/equity ratio and a 50 percent corporate income tax rate, the pre-tax return is 13 to 14 percent. The rate base employed by the CTC in regulating Bell Canada was total financial capital (debt plus equity plus retained earnings) rather than net assets; however, the two measures of capital are analogous since Bell Canada has historically kept a close correspondence between net assets and total capitalization.

TABLE 5

CABLE TELEVISION INDUSTRY - MARKET VALUE 1972 - 1977
(OVER 1,000 SUBSCRIBERS)

($ Millions)

	1972	1975	1977
Gross Cash Flow	27.0	52.5	75.3
Market Value:			
(i) 7 times cash flow	189.0	367.5	527.1
(ii) 10 times cash flow	270.0	525.0	753.0
(iii) 12 times cash flow	324.0	630.0	903.6
Subscribers (all systems, including those under 1,000 subscribers)	1,689,335	2,860,937	3,417,223
Market Value:			
(iv) $150 per subscriber	not applicable	not applicable	512.6
Net Fixed Assets	121.2	200.8	269.8
Market Value / Net Fixed Assets (ratios):			
(i) 7 times cash flow	1.56	1.83	1.95
(ii) 10 times cash flow	2.23	2.61	2.78
(iii) 12 times cash flow	2.67	3.14	3.35
(iv) $150 per subscriber	not applicable	not applicable	1.90

Source: Statistics Canada, Cable Television, annual; and calculations as described in the text.

cost of capital for the cable industry.

No systematic analysis of cable selling prices to assets has yet been carried out, although there are fragmentary pieces of information. The purchase price by Canadian Cablesystems for control of Premier Communications, for example, is consistent with the foregoing analysis. Cablesystems in 1980 offered $86.5 million for a company consisting of $37.5 million in net fixed assets. Total book value of equity (including retained earnings) in the company at the time of proposed takeover was $29.4 million. Therefore, whether one takes a fixed asset base or an equity base, it is clear that the purchase price was two to three times the price that would be offered were Premier constrained by regulation to a competitive rate of return.[16] Monopoly profits were capitalized in the sale and accrued to the party leaving the industry.

Further to this topic, R. E. Babe presented some data for one company - Maclean-Hunter Cable TV. Over the period 1969 - 1975, goodwill accounted for 30 to 40 percent of total assets for that company, indicating that acquisition premiums had been substantial.[17]

Perrakis and Silva-Echenique concluded that cable systems reflected significant regulatory risk when transferred insofar

---

16. All data from Canadian Cablesystems Limited Application for Control of Premier Communications Limited, pp. 276, 296.

17. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation. p. 132

as the transfer prices did not fully capitalize earnings at a "riskless" discount rate. They state:

> The prices paid for the CATV systems are consistent with a risk-premium of 50 of 60% of expected operating profits. These are "reasonable" values, given the lively regulatory debate that existed during the sample period (and still exists today).
>
> The conclusion to be derived from these results is that the probability of regulatory action is a major factor contributing to the risk of CATV firms. Such an action may take any number of forms such as rate-of-return constraints, revenue-sharing with broadcasters, and/or increased expenditures or local programming or other subsidized broadcasting.
>
> All of these actions are perceived as reducing the expected profitability of CATV systems below their current level.[18]

During the period 1968 - 75, 176 cable television systems changed hands.[19] Between 1972 and 1976, 145 cable systems changed hands, one third of the number of systems in existence in 1976.[20]

---

18. Stylianos Perrakis and Julio Silva-Echenique, "The Profitability and Risk of CATV Operations in Canada", pp. 20 - 21.

19. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, p. 181.

20. CRTC, Report of the Ownership Study Group to the CRTC Ownership of Private Broadcasting: An Economic Analysis of Structure, Performance and Behaviour, October 1978, p. 24; and CRTC Ownership of Private Broadcasting: Major Ownership Transfers in Broadcasting, 1972-76 - An Analysis of Price Determinants, Background Study V, (1978), pp. 39 - 49.

Trading of licences in the television broadcasting industry at substantial premiums above the asset value of the stations is also a problem. Over the period 1968 - 75, 50 television stations changed hands[21]; between 1972 - 1976, 19 television stations changed hands.[22]

Once again, no systematic analysis of transfer prices compared to fixed investment value has been undertaken. However, the low capital intensity coupled with high profitability would be cause for concern even in the absence of data on selling prices.

R. E. Babe noted that one broadcasting company, CHUM Ltd., which has had an active acquisition program, had a disproportionate amount of intangible assets in its balance sheet. In 1973, of total non-current assets of $19.3 million, 13.5 million (70 percent) were intangible assets. CHUM had paid up to 23 times the asset value for its acquisitions.[23] It was also noted that a profitable television station had changed control at a price five times the asset value, while the (at the time) money-losing Global Television changed hands at a premium about double original investment.[24]

---

21. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, p. 181.

22. CRTC, Ownership of Private Broadcasting: Major Ownership Transfers in Broadcasting, 1972 - 76. An Analysis of Price Determinants - Background Study V, p. 16

23. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, p. 89

24. Ibid., pp. 89 - 90.

Stylianos Perrakis and Julio Silva-Echenique, however, concluded that "only a small portion" of economic profits of television stations are capitalized in transfers of licences; the authors attribute this finding to technological and regulatory risk.[25] Technological risk is attributable to factors such as cable competition and video cassettes, while regulatory risk would stem from the possibility of increased broadcast obligations from the CRTC. Indeed, the authors state:

> [The results] indicate strong misgivings on the part of investors about the future economic prospects of private commercial television in Canada.[26]

Techniques for Appropriating the Surplus

Economists who have more faith in the market as an allocative mechanism than in regulatory tribunals have suggested that auctioning-off the right to use a radio frequency channel could appropriate the surplus (present value of future returns) to the government while removing government discretion in awarding licences. Harvey Levin, for example, puts forth the case for auctioning-off new licences and licences subject to transfer, although for licence renewals he suggests competitive bidding could serve to "bid up capital

---

25. Stylianos Perrakis and Julio Silva-Echenique, "The Profitability and Riak of Television Stations in Canada", p. 23.

26. Ibid.

charges beyond their present level and, combined with renewal uncertainty, act to reduce service standards seriously and to intensify ownership and area concentration".[27] Levin's main concern, however, is with regard to appropriating the surplus for the government, not program standards. Levin asserts that the FCC in the United States has granted radio and television privileges on the basis of "clumsy rationing procedures based on highly debatable criteria"[28] and that unless the regulators "impose far less ambiguous service standards than hitherto"[29], broadcasters are likely to retain surplus profits.

Perrakis and Silva-Echenique recommended that "the de facto property rights to the licence ... be transformed into de jure rights by auctioning-off the licenses for periods of time longer than the current five years, subject to the current content regulations. The revenues generated in this way could be used for Canadian programming production subsidies".[30]

In like vein, Richard Posner has suggested the auctioning process for cable systems in order to recapture monopoly profits.

---

27. Harvey J. Levin, "Federal Control of Entry in the Broadcasting Industry", Journal of Law and Economics, 1962, p. 61. The debasement of programming assumes broadcasters are not maximizing profits now.

28. Ibid.

29. Ibid.

30. Stylianos Perrakis and Julio Silva-Echenique, "The Profitability and Risk of Television Stations in Canada", p. 24.

Whereas Levin, in the case of television, is worried about monopoly profits due to the FCC's reluctance or inability to enforce program service standards, Posner recommends auctioning of cable franchises as an alternative to rate of return regulation, a regulatory device that may induce inefficiency on the part of the licensee. Whereas Levin opposes auctioning of broadcast licences at renewal time due to possible over-capitalization, Posner, in speaking of cable, recommends relatively short licence periods with frequent renewal auctions in order to adjust for continually changing circumstances.[31] The fact that plant and equipment are likely to outlast the franchise term need not inhibit bidding by rivals. It is asserted:

> Insofar as the economic life of cable plant is considered a problem when the franchise term is short, it can be solved in either of two ways: (1) by a provision in the franchise requiring the franchisee, at his successor's option, to sell his plant (including improvements) to the latter at its original cost, as depreciated; or (2) by specifying in the franchise itself the "option price" at which the franchisee would be willing to sell his plant at some future date....[32]

However, Posner notes, auctioning at renewal time could create problems regarding investment in capital unless the

---

31. Richard Posner, Cable Television: The Problem of Local Monopoly (Santa Monica; RAND, 1970), p. 22.

32. Ibid. p. 23.

investor were assured of recovering his investment:

> Even if we left determination of the transfer price to negotiation between the old and new franchisee, the short-term franchise would probably have an adverse effect on planning for long-range growth in demand. A firm which cannot be in business for more than three, or five, or seven years, will not build for the more distant future. It might build a plant designed to wear out after five years, thereby minimizing its costs and rates, but possibly imposing much higher costs in the long run than if a sturdier plant were built. [emphasis added] [33]

He concludes "none of the alternative regulatory designs (including no regulation), are free from difficulty."[34]

Finally, one of the present authors suggested that competitive renewal and transfer procedures could be a useful regulatory tool to induce compliance with regulations and Promises of Performance and induce more costly Promises of Performance. This recommendation followed from the observations that profits were very high, licences traded with great

---

33. Ibid. p. 24.

This is one reason why the CRTC refuses to hear competitive renewal applications.

The Commission states: "Long-term investment and loans will not be forthcoming and there will be a [sic] unhealthy pressure on licensees to maximize short-term profits if licensees are not able to expect that good performance will normally result in renewal of licence."

CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", 25 July, 1978, p. 35.

34. Richard Posner, Cable Television: The Problem of Local Monopoly, p. 34.

frequency at apparently high premiums, yet content quotas were filled primarily with low-grade programming and Promises of Performance were not adhered to.[35] These problems stem in part from the virtually automatic licence renewal policies of the CRTC and, it was felt, competitive renewal hearings could induce better performance as a consequence of the fear of losing a licence. In the case of transfers, licences would not necessarily go to the party proposed by the outgoing licensee who had, presumably, offered the best deal to the outgoing licensee.

Summary and Evaluation

The economic and financial arguments favouring competitive renewals are summarized:

(i) Competitive renewals could transfer (a portion of) the surplus profits from the licensee to the government in the case of auctioning, or alternatively, could erode surplus profits through increased program commitments and other unprofitable service promises in the case of competitive Promises of Performance. The risk of losing a licence when faced with renewal competition could well induce licensees to offer the maximum possible from their franchise.

The economic and financial arguments in opposition to competitive renewals are summarized:

---

35. Robert E. Babe, Canadian Television and Broadcasting Structure, Performance and Regulation, pp. 229-233.

(i) Competitive renewals based on cash payments to the government, as recommended by Posner and by Silva-Echenique and Perrakis would build up capital charges in a manner similar to what now takes place when licences are transferred. Since licensees might be even more inclined than at present to maximize revenues in such circumstances, performance could well deteriorate. (This could be, to some extent, compensated for by subsidization by government of unprofitable activities from funds thus collected). Competitive renewals in the context of service promises rather than money payments for licences, would not increase capital charges in this manner, however.

(ii) Competitive renewals could increase uncertainty of licensees, thereby shortening the time horizon. As noted by Posner, unless safeguards are built in that a licensee can recover his physical investment upon losing his licence, certainly not an impossible provision, investment in facilities might well decline, causing a deterioration in performance. In the case of broadcasting, it is conceivable that licensees would be more inclined than at present to maximize profits over the length of the licence, rather than "invest" in future licence renewals. This concern, however, is contingent upon CRTC administration and procedures of the competitive renewal process.

The economic and financial arguments favouring competitive transfer hearings are summarized:

(i) The incoming licensee would be chosen on the basis of commitments in terms of programming and other services, or alternatively, on the size of payments to the government, rather than as at present in terms of the price paid to the outgoing licensee. Since the licence would be changing hands in any event, the CRTC would benefit from the alternative proposals.

The economic and financial arguments in opposition to competitive transfers are the following:

(i) Unless there is a provision similar to that exercised by the FCC prior to 1952, whereby parties other than the one proposed by the licensee could apply for transfer of the licence "upon the same terms and conditions" as those agreed to by the licensee and the proposed purchaser, there would seldom be licence transfers. A licensee would be reluctant to enter agreement with one party only to find that he would be forced to sell at a lower price to another party.

On the other hand, if such a provision were incorporated it would not lessen the current capitalization of future profits accruing to the outgoing licensee, although it would permit the regulator to assess different options, a distinct advantage.

2. Administrative and Regulatory Issues

Renewals

The basic administrative and regulatory issues concern whether competitive renewal procedures would facilitate the CRTC's task of inducing fulfillment of the Broadcasting Act's goals or whether the Commission would be granted an undue amount of discretionary power and would find itself bogged down in hearings. The fact that both the FCC and CRTC oppose competitive proceedings, except for initial licence hearings, could be construed as prima facie evidence that competitive hearings would not help in the regulatory task.

Administrative and regulatory arguments favouring competitive renewal hearings are straightforward. First, "Nobody has a vested right to a licence, or a prior right to have a licence allocation renewed; the refusal to allow for competitive applications when an existing licence is about to expire confers special privilege on a particular interest, denies equal rights to other parties and [it is alleged] is repugnant to democratic society".[36] In this view, current regulatory proceedings could be perceived as being unfair.[37]

---

36. "An Appeal to the Governor In Council Re. Capital Cable Co-operative, Canadian Radio-television and Telecommunications Commission, Victoria Cablevision Ltd., The Broadcasting Act, and CRTC Decision 77-193", 23 March 1977, p. 8.

37. This argument is to be contrasted with the CRTC's case against competitive renewals, also on ground of fairness: "In a competitive licence renewal hearing [it would be difficult to treat] an incumbent licensee with a 'track

This argument, of course, goes to the heart of relative rights as discussed in Chapter 1: whose freedom is being preserved? The US courts have held that there is a presumption that an existing licensee will retain his licence in the absence of clear demonstration that superior service could be rendered by someone else; the licensee's investment in capital dictates that he should have some advantage in any renewal proceeding. This sentiment is echoed in Canadian courts. Even Mr. Justice Dubé, who ruled in favour of competitive renewals, stated:

> To be sure, the former [the existing licensee], if he has complied in all respects with the terms of his present licence, has a priority right to be heard....[38]

Nevertheless, there is no apparent reason under the criterion of fairness, why competing applicants should not be heard. We can agree that the existing licensee, due to his capital investment, should have an advantage over others in securing a renewal, but fairness as a criterion seems to dictate the right to be heard. (Other criteria may supersede this one, however).

At present, interventions in opposition to licence

---

record' and a new applicant without [one] ... on an even-handed basis and subject to the same criteria".

CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", 25 July 1978, p. 35.

38. "In the Federal Court of Canada, Trial Division, In The Matter of The Broadcasting Act, And In The Matter of Capital Cable Co-operative And The Canadian Radio-Television Commission And Victoria Cablevision Limited", judgement rendered 2 February, 1976.

renewal are accepted by the CRTC. Interveners can document their case as to why an existing licence should not be renewed, although they would not be entitled to spell out their own proposals. Interventions at present, then, generally come from public interest groups as there is little or no financial incentive to intervene. Competitive renewals would serve to give financial incentive to other groups to appear before the CRTC, provide evidence on the existing licensee's performance, and to offer alternatives. In Mr. Justice Dubé's judgement, such activity would be of benefit to the CRTC and the public generally:

> Competition would greatly assist the CRTC in achieving its objectives, namely "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" as enunciated under Section 3 of the Act. Should the CRTC renew, without hearing other applications, it may discover too late that better and more acceptable alternatives have been passed by, perhaps to the detriment of the people in the area to be served.[39]

It is apparent that there is much merit in this position. At present, the CRTC must rely primarily upon its staff reports and submissions by the licensee itself in evaluating performance. The increase in information and argument that

---

39. Ibid.

would be forthcoming with competitive proceedings should better enable the Commission to assess past performance.

Finally, competitive proceedings could provide incentives for superior performance. At present, economic incentives dictate that licensees do as little as possible in fulfilling the goals of the Broadcasting Act. And the CRTC must make a judgement of whether or renew or not renew in the absence of alternative proposals. Competitive renewal proceedings could induce licensees to better performance through the incentive of securing an additional term as licensee. In full realization that it would be facing competition upon expiration of the licence, a licensee could well wish to build up a superior record, rather than a minimal satisfactory record as often seems to be the case at present.

There are, however, a number of administrative and regulatory arguments against competitive renewals. First, there may be established a market for applications. Levin notes that in the US some of the profits of licensees are used to bribe other groups to not apply for the licence at renewal time.[40] Such side payments do little in the way of improving performance of the broadcasting system, and arguably could decrease performance. (On the other hand, if licences were

---

40. Harvey J. Levin, "Federal Control of Entry in the Broadcast Industry", Journal of Law and Economics, 1962, p. 59.

awarded to the highest bidder, such payments would probably not take place, and in any event would not decrease performance).

Second, as argued by the FCC, competitive renewals give added discretionary powers to the Commission itself, introducing "subjectivity" into the licensing process, with the possibility of a perceived undue amount of government interference in matters pertaining to programming. One can well understand these apprehensions, especially with regard to the American "competitive" system of broadcasting wherein the major reason for regulation is said to be to facilitate the marketplace of ideas rather than to impose "non-market" types of program material.

In Canada, however, regulation was instituted for the purpose of influencing programming more than facilitating the marketplace of ideas. In the absence of regulation, the "marketplace of ideas" in Canadian television broadcasting would be largely American.

The FCC, as noted above, has tried to "objectify" comparative renewal hearings by using quantitative standards, but the FCC concluded such quantitative standards "tell the regulator very little". The CRTC too, with its Canadian content quotas, has attempted to regulate through quantitative ("objective") standards in the belief that it would not be intruding unduly into program content; content quotas have not been very satisfactory, as the CRTC itself now

realizes.[41]

This appears to be one of those unfortunate instances noted in Chapter I where trade-offs must be made and balances struck. We would all prefer regulation to be completely unnecessary. But, taking for granted that some regulation is necessary due to the perverse system of incentives facing private broadcasters and cable companies, a balance must be struck between the relative powers of the Commission (subject to judicial review for due process of law) and the freedom of licensees. Given the size and nature of the problems facing Canadian vs. US broadcasting, we would anticipate the Canadian regulator to require more power than his US counterpart.[42]

Third, both the FCC and the CRTC have stated that competitive renewals are not workable since only the existing licensee has a track record, while competitors have only promises. In the words of Commissioner Lee of the FCC, competitive renewals allow "a new applicant to submit a 'blue sky' proposal tailor-made to secure every comparative advantage while the existing licensee must reap the demerits of

---

41. CRTC, Public Announcement "Canadian Content Review" 31 December, 1979.

42. From an absolutist point of view, the government should not be involved directly in broadcasting due to the potential for propaganda and censorship that could result. Canadian experience with the CBC indicates that public broadcasting expands, rather than contracts, the flow of ideas, however.

hand-to-hand combat in the business world".[43]

We in Canada have had a good deal of experience in 'blue sky' proposals when the initial licence is awarded. Reporting in 1965, the Fowler Committee stated:

> A promise made by a broadcaster to obtain a licence to operate a radio or television station should be an enforceable undertaking, and not a theoretical exercise in imagination or a competitive bid in an auction of unrealistic enthusiasm. Promises made should be carried out, or some good explanation given as to why they cannot be carried out. When performance is flagrantly below the level of the promises made, it should not be necessary to wait until the expiry of the licence to remedy the default....[44]

The CRTC has not had notably greater success than did the old Board of Broadcast Governors (to whom the above remarks pertain) in holding licensees to their Promises of Performance.[45]

---

43. Quoted in FCC, Report of the Federal Communications Commission to the Congress of the United States Re The Comparative Renewal Process, p. 30.

Similarly, the CRTC asks "how, in a competitive licence renewal hearing, an incumbent licensee with a 'track record' and a new applicant without are dealt with on an even-handed basis and subject to the same criteria".

CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", 25 July, 1978, p. 35.

Refusal to hear competing applications altogether does not appear to be a step toward the sought after fairness, however.

44. Committee on Broadcasting, 1965 Report (Ottawa: Queen's Printer, 1965), p. 107.

45. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation, pp. 183 - 194.

An important question to be asked is whether competitive renewals would cause broadcasters to comply to a greater extent than at present with their past promises. On this question, there may well be two points of view, depending on regulatory policy during the licence period. As discussed in the Economic and Financial section above, uncertainty of licence renewals could conceivably cause broadcasters to shorten their time horizon, to "take the money and run", if the regulator allowed them to. On the other hand, it is also possible that greater adherence would be paid to commitments in the hope of gaining a renewal; the regulator has a part to play here, too, by consistently renewing the licences of licensees that have adhered substantially to past promises and revoking licences of licensees where performance is flagrantly below anticipated levels. Regulatory surveillance during the licence term with the possibility of suspension and/or revocation when performance is clearly substandard, and a capacity to tax or fine stations on profits earned through failure to comply, for example, would minimize any undesirable tendency of licensees to "take the money and run".

It is to be stressed that, contrary to Commissioner Lee's statement quoted above, competitors in the licence renewal process play a role in addition to simply making promises. In presenting their cases, they may also be expected to survey critically the past performance of existing licensees and, provided quasi-judicial proceedings were adopted by the CRTC,

place the present licensee under intensive cross examination.

The FCC also stated competitive hearings are costly and time consuming. They would certainly be more time consuming than current CRTC proceedings. Nevertheless, steps can be taken to reduce the cost. As recommended by C. Christopher Johnston, panels of three commissioners could hear, decide and report on all such hearings, rather than having the full executive committee make decisions (a requirement of the current Broadcasting Act).[46] In addition, again as recommended by C.C. Johnston, the number of commissioners could be enlarged to facilitate lengthier hearings. Moreover, if the CRTC were to adapt quasi-judicial procedures in competitive licensing cases, it could rely upon factual material presented by interveners and applicants rather than, as at present, upon staff, for information; while competitive hearings would require an expansion in the number of commissioners, judicialization of proceedings could reduce the requisite staff support.

Transfers

It was noted previously that prior to 1952, the FCC permitted competitive applications for licence transfers provided that all parties offered the same terms to the outgoing licensee as the party proposed by the outgoing licensee. Although Congress in 1952 made such practice by the regulator ultra vires, there appears to be no good reason why such negative

---

46. C. Christopher Johnston, The Canadian Radio-television and Telecommunications Commission, draft report prepared for the Law Reform Commission, p. two - 64.

legislation should be adopted for Canada.[47] Indeed, the opposite is the case.

If the CRTC would admit competing bids from parties willing to match the terms of transfer, the Commission would be able to select from various alternatives, while at the same time allowing the departing licensee to get the most for its licence, if such is felt to be fair and/or desirable. (As has been argued above and elsewhere permitting the out-going licensee to get the most for its licence is not necessarily a desirable practice, however, insofar as the capitalization of future profits will inhibit an incoming licensee from fulfilling the goals of the Broadcasting Act to the maximum extent permitted by his environment).

The Commission, itself, has noted that "denial [of permission to transfer a licence] is often an invidious choice in that it may mean leaving control of a licensee in hands which may no longer wish to operate it, and not knowing whether there are any other prospective purchasers and whether any such purchasers would be more or less suitable in terms of the public interest".[48] Given the perceived pressure on the

---

47. Congress acted on apprehension of "undue government interference" in the operations of private business (an argument we reject in the Canadian context for reasons noted above) and delay in effecting transfers (a small price to pay if performance can thereby be improved).

48. CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters" 25 July 1978, p. 44.

Commission to approve licence transfer applications,[49] it certainly seems appropriate that all parties should be heard if no significant financial harm be done thereby to existing licensees.

The CRTC has rejected competitive transfer of licence proceedings, however. It states:

> The Commission has given serious consideration to the possibility of implementing a competitive transfer system whereby if control of a licensed undertaking were to be transferred, the situation would be treated as if the existing licence was being surrendered and a new one in its place being applied for, with any interested parties entitled to submit competing applications. Such a procedure has been strongly advocated by a number of critics and interveners. The Commission finds, however, that while there is much merit in theory in such a process, there are also such formidable obstacles to its implementation as to render it impracticable. One such obstacle is illustrated by taking the case of the sale of the control bloc only of shares of a holding company which controls a number of licensee and non-licensee companies.
>
> To require surrender of the licences in such a case might be most unjust to those shareholders (who may even constitute a majority) not in the control bloc. Indeed, the control bloc may well not be large enough to carry the often necessary vote of shareholders to approve surrender of the licences. To demand in such a case competing bids for the control bloc of shares may well constitute an unwarranted interference in the market and extension of Commis-

---

49. Over the period 1968-75, the CRTC approved 82% of licence transfer applications, a total of 423 transfers. Robert E. Babe, Canadian Television Broadcasting, p. 181.

> sion jurisdiction and would in any event be of no value to those who wished and were financially able to apply for only one of the licences controlled by the holding company.[50]

There are two arguments that can be made against the CRTC's reasoning quoted above. First, the CRTC is assuming the procedure to be followed is revocation (or "surrender") of a licence and issuance of a new licence; this is in response to legal arguments on the part of the Canadian Broadcasting League and the Association for Public Broadcasting in British Columbia that the CRTC is without power to transfer licences and can only revoke licences and issue new ones.[51] The point of law aside, (an attempt to force the CRTC to hear competing applications against its will), there is no reason whatsoever why the CRTC could not award licences to third parties after a competitive hearing in the same procedural manner used at present (changing the condition of licence). The only question to be resolved would be proper compensation to the party losing the licence for the associated fixed assets.

---

50. CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", pp. 44 - 45.

51. See "Appelant's Factum - In The Federal Court of Appeal, Between The Association for Public Broadcasting in British Columbia, Appellant, and The Canadian Radio-television and Telecommunications Commission, and Comox Reception Limited and Courtenay-Comox Television Limited, and Cablenet Limited and Comox Valley Cablevision Limited, Respondents", Court File No. A-512-79; and "In The Federal Court of Appeal - Memorandum of Points of Argument Submitted on Behalf of the Appellant, In The Matter of An

If the FCC's pre-1952 policy were adopted, values for individual broadcasting properties would have to be broken down in the case of multiple licence transfers, and licences transferred individually, rather than collectively as at present. This would appear to be a desirable innovation in any event.

The second objection to the CRTC's reasoning is philosophical. The CRTC has, in effect, stated that broadcasting in Canada is largely controlled by diversified companies with publicly traded shares, severely limiting the Commission's licensing powers. Insofar as the Commission's regulatory powers pertain to the licence only, and not to the corporation, the CRTC has stated it possesses few powers to regulate broadcasting.

Simply because shares in public corporations trade in the marketplace and control over corporations can be transferred in this manner does not dictate that broadcasting licences be so traded, unless the CRTC wills this to be the case. When shares in public companies are traded, the pro rata share of the assets and liabilities are also traded; the

---

Appeal From Section 26 Of The Broadcasting Act, R.S.C. 1970 c. B-11 And Amendments Thereto, And In The Matter Of An Appeal From A Decision Of The Canadian Radio-television and Telecommunications Commission, Canadian Broadcasting League, Appellants and The Canadian Radio-television And Telecommunications Commission And Rogers' Telecommunications Limited And Canadian Cablesystems Limited, Respondents", Court file No. A-296-79.

valuation is based (primarily) on the stream of earnings expected to be generated by those assets. Licences could well be awarded to third parties who would then purchase the assets required for broadcasting and for which they would pay fair compensation. The physical assets devoted to broadcasting are not valueless in the absence of a licence simply because the new licensee must engage in broadcasting activities.

The main points to be resolved, then, entail what constitutes a "fair" price for the physical assets associated with broadcasting, and how such a "fair" price should be determined.

As noted previously, prior to 1952, the FCC declared a "fair" price to be the price negotiated between the seller and his most favoured buyer; anyone matching the terms and conditions agreed to between those parties was allowed to apply in competition. The disadvantage to this approach is that it would not lessen the trafficking in licences and would continue to increase the capitalization under which new licensees operate. It would, however, allow the CRTC to select from more than one applicant. This procedure would continue the current practice of giving the out-going licensee the maximum price he can extract from his licence.

The minimum price a licensee should be able to get (in the absence of bankruptcy or financial loss) is the undepreciated value of assets (plus 10%). Such a price would prevent undue capitalization while at the same time protecting the outgoing licensee from experiencing a loss on the sale of

its assets. The CRTC could ensure that such a price were paid. If the CRTC were to enforce this price as "fair", it would receive fewer applications for licence transfer since a licensee would be exchanging assets in use at high value for the replacement price of assets, a much lower value.

A purchase price between the two extremes could also be considered "fair" to an outgoing licensee, however, and could be subject to bargaining between the outgoing licensee and the incumbent.

CHAPTER V

LEGAL ISSUES

1. Competitive Application: The Legal Context

The Broadcasting Act[1] is silent on the issue of competitive applications for either renewal or transfer of broadcasting licences. Section 17 talks of issuing, amending and renewing in a general way. Section 19 dealing with hearings, and section 21 about procedure, likewise ignore the issue, as do the sections dealing specifically with licences. The Act offers no explicit instruction or guidance on the competitive applications issue. Nor does the CRTC Act afford any assistance.

It might be argued, as a general point, that the statement in the Act that "Broadcasting undertakings in Canada make use of radio frequencies that are public property..." (s. 3(a)) carries with it a notion of full competition for licences. Otherwise, so the argument might go, "public" property becomes "private" property (i.e. the property of the licensee). This analysis is incorrect. First, the principles of statutory construction do not permit such a wideranging interpretation of legislation. Second, as we point out later, the statement in section 3 of the Act uses "property" in a vague and hortatory sense, and not in any technical legal sense. And, third, a

---

1. R.S.C. 1970, chap. B-11, as varied by the Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c. 49.

licence over property, however renewable, is not itself a property right and does not change the fundamental nature or ownership of the licensed property.

A comparison of s.19(1) of the Broadcasting Act (dealing with the issuing, revocation and suspension of a licence) and s.19(3) (dealing with renewal) shows that the statute differentiates clearly between issuing and renewing, placing the Commission under less constraints when it comes to renewal. Section 19(1) states that "A public hearing shall be held by the Commission..." Section 19(3) says that "A public hearing shall be held by the Commission ... unless the Commission is satisfied that such a hearing is not required...". Any obligations or constraints following from the requirement of public hearings can be avoided in the case of renewal if the Commission chooses not to hold a hearing, i.e., "is satisfied that such a hearing is not required...". The Act does not deal separately with transfer: we address the implications of this omission below.

Section 21 of the Broadcasting Act empowers the CRTC to "make rules respecting the procedure for making applications, representations and complaints to the Commission and the conduct of hearings under section 19 [public hearings] and generally respecting the conduct of the business of the Commission...". The Commission, apparently relying on the difference between s.19(1) and s.19(3) mentioned above, has

adopted different procedures for issuing and renewal:

> When the issue of a licence is in prospect, competing applications are invited ... and are heard at the same time. When a licensee applies for renewal of its licence, the Commission hears the application and determines whether or not to renew. Any person is entitled to file an intervention to such renewal to attempt to demonstrate why the licence should or should not be renewed.... An application for the licence by another party will not, however, be heard in competition with the renewal application.[2]

When it comes to changes in the effective ownership or control of licensees or undertakings, "persons other than the vendor and purchaser may file interventions but may not themselves under current procedures apply for the licence in question or for control of the undertaking in question".[3] After its recent review of these procedures, the Commission concluded, albeit with some hesitation, that "no major procedural change in this regard is feasible...".[4] The Commission assimilates transfers to renewal rather than issuing.

The courts appear to have directly considered the

---

2. CRTC, "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters" July 25, 1978, p. 33.

3. Ibid., p. 43

4. Ibid., p. 45.

competitive applications issue only twice.[5] In the Capital Cable case[6], dealing with renewal, the applicant asked for a writ of mandamus to order the CRTC "to hear the application of the applicant for a cable television licence ... on the grounds that the practice of the CRTC to hear only an application to renew a licence, along with interventions, and then hear other applications for the said licence only if the application is refused is contrary to law and rules of natural justice".[7] At trial, Dubé J. ordered a writ of mandamus to issue, but the federal Court of Appeal set aside the decision of the Trial Division. Pratte J. for the Court simply said that "We have not been persuaded ... that, in the circumstances of this case, the CRTC had the legal duty to hear the respondent's application for a renewal of its own licence".[8]

---

5. For an account of judicial review of CRTC broadcasting decisions, see C.C. Johnston, The Canadian Radio-Television and Telecommunications Commission, draft study prepared for the Law Reform Commission of Canada, pp. 199 - 207.

6. In re the Broadcasting Act and in re Capital Cable Co-operative and the Canadian Radio-Television Commission and Victoria Cablevision Limited [1976] 2 F.C. 627, overruled [1976] 2 F.C. 633.

7. [1976] 2 F.C. 627, at p. 628.

8. [1976] 2 F.C. 633, at p. 634.

In APBBC v CRTC et al.[9], a transfer case, the appellant appealed against a CRTC decision (78-724) denying a motion by the appellant requesting that the CRTC withhold its decision on an application for the "transfer" of a licence pending consideration of a "competitive application" to be made later by the appellant. The applicant had asked the CRTC to approve the acquisition by a new company (Comox Valley Cablevision) of the cable television undertaking of the vendors, an application by CVC for a licence for the undertaking upon surrender of the current licence held by the vendors, and an application by CVC to transfer effective control of CVC, through the transfer of shares, to another company (Cablenet). Mr. Justice Urie, for the Federal Court of Appeal, commented that:

> ... the sole issue of any consequence raised by the appeal, is whether, when an application is made to the Commission for the issuance of a new licence, section 19 of the Broadcasting Act, R.S.C. 1970 c. B-11 requires that the public hearing envisaged by the section must include hearings on the applications received from all parties desiring to obtain the licence for the area sought and not just that of a proposed purchaser of the assets of any existing licensee.[10]

---

9. Association for Public Broadcasting in British Columbia v Canadian Radio-Television and Telecommunications Commission et al., Federal Court of Appeal judgement A-512-79, rendered July 16, 1980.

10. Ibid., p. 4.

Urie J. concluded that s. 19 does not contain this requirement. First, he considered, following a review of the Broadcasting Act, that part of the CRTC's regulatory mandate "includes the procedure to be followed to effect the issuance, revocation, suspension or renewal of ... licences"[11]; "the only duty on the Commission in connection with the issuance of a licence or the revocation of an existing one, is to hold a public hearing as required by section 19..."[12]. Secondly, Urie J. considered that s. 24(1) of the Act means that "an applicant for revocation ... is entitled to ask the Commission to consider that the Applicant's consent be conditional on the Commission approving of the transfer of the Applicant's assets to another person".[13] Finally, Urie J. observed that the CRTC did not appear to "rigidly or slavishly" adhere to a policy of not calling for competitive applications:

> ... it heard the Appellant's preliminary motion, reserved its decision thereon and while it ultimately rejected it, it did not do so without considering its merits as its reasons disclose. The Commission, thus, did not, as I see it, fetter its discretion in making a decision by adhering rigidly to a fixed policy.[14]

---

11. Ibid., p. 8.

12. Ibid., p. 9.

13. Idem.

14. Ibid., p. 10.

It seems fairly clear that, so far as the "general legal context" is concerned, the CRTC is under no clear obligation to entertain competitive applications for licence renewal or transfer. Of course, this conclusion says nothing about the desirability of changes in the law that would require competitive applications. Apart from general policy considerations, some guidance as to desirable changes might be found in consideration of related legal concepts and areas of law, for example, the law dealing with licences. We consider this aspect of the question later in this paper.

2. Competitive Applications: The Specific Legal Arguments

The general approach of those in favour of competitive applications is a policy approach, although it often assumes a legal guise. Good examples appear in an undated press release of the Association for Public Broadcasting in British Columbia (on the Courtenay-Comox cable TV licence). The press release accuses the CRTC of violating "basic principles of fairness":

> ... the CRTC, by allowing the outgoing licensee to choose and hence to limit possible successors, is abdicating its licensing responsibilities to a special interest.

And then:

> ... the CRTC's practice of excluding competition allows cable licensees both to make enormous unregulated profits during the tenure of their licences and to capitalize the monopoly value of the licence

> when the licence is sold. Although the licence is supposed to be public property it is, in effect, sold as a private corporate asset of the outgoing licensee.

It should be clearly understood that the APBBC, in using emotive words such as "fairness" and "public property", is invoking policy and not law. The claim is one of bad policy, not illegality. These policy arguments are frequently repeated. In its petition to the Governor-in-Council on the Courtenay-Comox matter[15] the APBBC stated that "it is fundamentally unfair to allow an outgoing licensee to prevent anyone who so wishes from applying for a licence with which he is finished.... The CRTC's practice allows a licensee to sell the licence and to obtain a capital gain on the sale of an asset which is not his, but public property". And even civil rights are called up: "This civil principle of equal rights is so basic to the integrity of any public procedure, that only in the most extraordinary circumstances ... should the principle be waived".[16]

---

15. Association for Public Broadcasting in British Columbia, petition to the Governor-in-Council to set aside the issue of a broadcasting licence by the Canadian Radio-Television and Telecommunications Commission: In the matter of the Canadian Radio-Television and Telecommunications Commission decision 78-724, December 1, 1978.

16. An appeal to the Governor-in-Council Re Capital Cable Co-operative, Canadian Radio-Television and Telecommunications Commission, Victoria Cablevision Ltd., The Broadcasting Act, and CRTC Decision 77-193, March 23, 1977.

Putting such rhetoric aside, there are some precise legal arguments of substance that have been before the courts. Transfer, rather than renewal is the more difficult case; that is because, as we have noted, s. 19(3) of the Broadcasting Act, dealing with renewals, does not even require the Commission to hold a public hearing, and in the face of this provision it is very difficult indeed to argue that the Commission must consider competing applications. But the Act says nothing at all about transfer. This omission has led to the argument that, according to the statutory scheme, transfer must be treated as the surrender or voluntary revocation (pursuant to s. 24) of a licence, and the issuing of a new licence under s. 19(1). Accordingly, so the argument has been, a public hearing is mandatory. This argument is captured in three questions put to the Court in the joint stated case in Stephen Chitty et al. v The CRTC et al.:

> 5. Does the defendant CRTC, have jurisdiction to hear and determine an application for approval of the transfer of control of a corporate broadcasting undertaking licensee, through the transfer of the issued shares of the said licensee?
>
> 6. Should the defendant, CRTC, have treated the applications by the Two Cable Licensees as applications for the revocation of the broadcasting undertaking licences issued to them, coupled with an application for a new licence in the same areas?
>
> 7. Does the acceptance or hearing by the CRTC of an application for transfer of the effective control of a corporation holding

> a broadcasting licence, by means of transfer of shares in the context of The Broadcasting Act, constitute in law the surrender and revocation of the existing licence?

The plaintiff's argument in the Chitty case elaborates:

> 2. The CRTC is a statutory body, and only has such powers as are granted to it by statute. The Broadcasting Act does not grant the CRTC power either to transfer, or to allow licensees to transfer licences.
>
> .....
>
> 7. ... the transfer of effective control of a licensee amounts to the transfer of the licence itself. ... The CRTC has no jurisdiction to authorize the transfer of effective control of the licensee.

There is substance to this "statutory argument". Transfers are not dealt with by the Act. It is an accepted rule of statutory construction that "nothing is to be added to ... a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express".[17] There is no reason to believe that the legislature intended to provide for transfers; indeed, as would-be-applicants in "transfer" situations have pointed out, the scheme the legislature has set forth can well take care of such problems in terms of revocation of the old licence and the issuing of a new one.

But the statutory argument is not conclusive; there is something to be said on the other side. As it was put in

---

17. P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th ed., (London: Sweet & Maxwell, 1969) p. 33.

the Chitty case:

> 11. The defendant, CRTC's practice with respect to the instant applications was consistent with its practice in similar cases, to treat the matter as an application pursuant to the conditions of licence, for approval of the transfer of control of the broadcasting undertaking licensed, with the licence itself remaining unaltered in the same corporate entity. In such circumstances, no application by any party for the issue to it of the licence, or for a new licence to replace the existing licence, is entertained by the defendant CRTC.

In other words, the licence is not revoked with a new licence being issued; the "licence itself" remains "unaltered in the same corporate entity". The matter is to be treated as an amendment to the licence conditions, and under s. 19(2)(a) of the Broadcasting Act a public hearing is only required when amendment is in issue "if the Executive Committee is satisfied that it would be in the public interest to hold such a hearing...". The "unaltered in the same corporate entity" argument has been met with this reply: "There is no provision in the statute which authorizes the distinction created by the Commission between natural persons and corporations, which gives the latter the ability to transfer licences (by means of the sale of shares) but not the former" (arguments of the appellant in Chitty, p. 38).

If the "statutory argument" is right, the CRTC must hold public hearings in transfer cases. If the "statutory argument" is wrong, the Commission need not, but may, hold

hearings; in practice, apparently, it usually does.[18] Two questions now become important. What are the requirements, if any, of a "public hearing", i.e., how must a public hearing be conducted? Secondly, are those same requirements present if the public hearing is discretionary only?

Whether or not an administrative tribunal is subject to the requirements of natural justice depends on what the parent statute says, and on the function and character of the tribunal. With respect to the CRTC, the statutes give little or no help. The Commission is given broad discretion to determine its own procedure, although a provision granting discretion does not necessarily rule out natural justice.[19] On the question of function and character, Johnston has said this:

> If one examines the Broadcasting Act, it seems clear that the primary purpose of the public hearing process is to assist the Commission in carrying out an essentially administrative function which is the licensing and supervision of broadcasting undertakings in

---

18. The CRTC's public announcement of July 10, 1969, "On the Pricing of Broadcasting Undertakings", states:
It is ... the policy of the Commission to scrutinize applications for transfer of assets of licensees or for transfer of control of licensees in a manner comparable to its examination of applications for licences for new undertakings.
Consistent with previous practice, such applications are subject to public hearings, at which objections may be raised and at which companies or persons other than the purchaser proposed by the current licensee may apply for the licence.

19. See Reid and David, Administrative Law and Practice (Toronto: Butterworths, 1978) p. 54.

> accordance with the policies set out in section three of the Act. Some indicators in the Act which tend to support this view are the fact that the holding of hearings in some cases is discretionary, that the wording of the public hearing Section, 19, refers to hearings "in connection with" rather than "to determine" licensing matters and that a separate section, 17, which gives the Commission its authority in licensing matters, makes no reference to public hearings but makes the prerequisite of the exercise of this authority the furtherance of the policy objectives set out in Section 3.[20]

In support of this view Johnston relies on The Queen v Board of Broadcast Governors.[21] The Board had made a recommendation to the Minister that a licence be granted to the applicant provided the applicant submitted an acceptable technical brief, which he did. A competitor asked that the Board's decision be quashed on the basis that he was not given an opportunity to see the technical brief. At trial this argument was upheld, but the Court of Appeal overturned the trial decision. The Court of Appeal held that the Board had lived up to its procedural obligations, and that the Board's decision was a recommendation only and did not affect legal rights. Said Laidlaw J.A.:

---

20. C.C. Johnston, "Notes on Procedure at CRTC Public Hearings" (1972) Can. Comm. L.R. 143.

21. [1962] O.R. 657.

> If the Board takes the steps and follows the procedure prescribed ... it then becomes vested with the discretionary power to make such recommendations "as it deems fit". The act of making that recommendation is in my opinion purely administrative in character.[22]

Laidlaw later stressed that the Board was not, however, free to do anything it pleased:

> No doubt the Board was under a duty to conduct the hearing in good faith and in a fair manner free from prejudice or bias and also to give [the parties] a proper opportunity of being heard. At the same time it is plain that the hearing required by s.s. (3) was not intended to be a trial ... I think the Board was free to prescribe and follow its own course of procedure.[23]

The CRTC, of course, unlike the Board, does not merely recommend, but makes decisions that affect legal rights. In Confederation Broadcasting v CRTC[24] the CRTC renewed a licence for less than one year, the frequency to be reassigned at the end of that term. The appellant argued that such an order was ultra vires the Commission in a renewal hearing, and that natural justice had been violated since the Commission had not given sufficient notice to the appellant of the main issue. Spence J., speaking for four members of the Supreme Court, held that, per Board of Education v. Rice,[25] the

---

22. Ibid., p. 664

23. Ibid., p. 669.

24. [1971] S.C.R. 906.

25. [1911] A.C. 179.

Commission was required to give "a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".[26] This, said Mr. Justice Spence, the Commission failed to do. Ridge v Baldwin[27] holds that natural justice requires among other things the right to have notice of charges of misconduct and the right to be heard in answer tc those charges; Spence J. concluded that the Commission did not respect these requirements. The other members of the Court, on the natural justice issue, held simply that sufficient notice had been given.

Confederation Broadcasting certainly suggests that in some circumstances aspects of natural justice may be relevant to the Commission. The case is not, however, strong authority, because of the other issues involved and because of the way the Court divided. And, of course, it had nothing to do with competitive applications and at best might offer some general guidance for the solution of that problem. Are those who seek to apply competitively "parties in the controversy"? Almost certainly not. And, even if they are, what constitutes "fair opportunity" in that context? In general, the APBBC decision suggests strongly that the Johnston analysis

---

26. Supra n. 24, at p. 926

27. [1963] 2 All E.R.

is right; as Urie J. said in that case, "The nature of the hearing was for it [the CRTC] to determine as the independent public authority charged with the regulation and supervision of the Canadian broadcasting system".[28] Perhaps, however, one should not forget Urie J.'s cautious comments about fettering discretion.

As for discretionary public hearings, the general view seems to be that, although a hearing need not be held, once it is held the obligations of a public hearing (whatever they may be in the circumstances) attach. And, indeed, the discretion to hold or not to hold a hearing itself may not be absolute. Reid and David write:

> The nature of the power [vested in the tribunal] may affect the way in which it [the discretion] may be exercised. Hence, any apparently wide discretion might be circumscribed by its use in relation to judicial or quasi-judicial power.[29]

But, for the CRTC, as we have seen, there is no clear authority to the effect that the full panoply of natural justice applies to Commission hearings in general, or renewal and transfer hearings in particular; and it is certainly not clear, in any event, that natural justice requires "competitive applications" in the strict sense. For proponents of competitive applications the argument from administrative law is weak indeed.

---

28. Supra n. 9., p. 11.

29. Supra n. 19, at pp. 19 - 20.

One group of legal arguments concerning competitive applications, the statutory construction/natural justice group, is inconclusive. There is another group of arguments - the "common law" arguments, or, more particularly, arguments from the nature of a licence. These arguments attempt to show in general that treatment of licences by the CRTC, and in particular the Commission's refusal to hear competitive applications, have created licences in the nature of private property, contrary to the statutory "public property" nature of radio frequencies. Related arguments suggest, for example, that the common law of licensing, in the absence of express statutory authorization, does not allow a licensee to assign or transfer his licence results in the transfer of the licence itself (which is contrary to law). So, for example, the plaintiff's argument in Chitty makes this point:

> 32. Neither the common law nor the provisions of the Broadcasting Act provide for the creation of a property right in a licence. However, the present practice of the CRTC in the course of transfer application hearings creates such a right in the buyer, by allowing the value of the licence to be sold.

The ordinary meaning of a licence is, simply, permission by competent authority to do an act which, without such permission, would be unlawful.[30] A well-known example of a

---

30. See Black's Law Dictionary (5th ed., 1979), p. 824; Jowitt's Dictionary of English Law (end. ed., 1977), p. 1095; Stroud's Judicial Dictionary (4th ed., 1973), p. 1536.

common law licence is when the owner of land allows the licensee to do some act which would, but for the licence, be a trespass. Such a licence, at common law, can be revoked at any time. It is personal; that is, it creates no proprietary interest. A statute may create licences in the same sense: the statute provides that the appropriate authority may give permission to a person to do an act which, without such permission, is made unlawful by the statute.

Can a broadcasting licence ever give a property right? Certainly at common law a licence to do some act with respect to the property of another does not confer any proprietary interest on the licensee. Can a licence, under any circumstances, derogate from the "public property" nature of radio frequencies? The "public property" statement in the Broadcasging Act does not necessarily connote more than that the Parliament of Canada controls the use of radio frequencies in the public interest. An analagous provision of the Provincial Parks Act[31] was considered in Green v The Queen.[32] Section 2 of that Act provides: "All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act ...". In

---

31. R.S.O. 1970, c. 371.

32. [1973] 2 O.R. 396.

Green an argument that the Province of Ontario had committed a breach of statutory trust created by this provision was rejected, inter alia, for the following reasons:

> Notwithstanding the philosophical and noble intentions ... of the Legislature to express in the pertinent section an ideological concept, no statutory trust has been created. It becomes necessary to break down the wording thereof: "All provincial parks are dedicated to the people of the Province of Ontario and others who may use them ...". This simply makes clear that all persons ... are entitled to make use of the parks....

In Tito v Waddell (No. 2)[33] Megarry V.C. said:

> When it is alleged that the Crown is a trustee, an element which is of special importance consists of the governmental powers and obligations of the Crown; for these readily provide an explanation which is an alternative to a trust. ... Another explanation can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in the exercise of the Crown's governmental functions.[34]

It seems that, quite apart from the nature of a licence itself, there can be no derogation in a formal sense from the "public property" nature of the radio frequencies: the phrase "public property" in this context is merely hortatory or ideological, and cannot be used to found a legal argument.

CRTC approval of licence "transfer", when a broadcasting undertaking has been sold, has been attacked on the basis

---

33. [1977] 3 All E.R. 129.

34. Ibid., at pp. 216 - 7. See also Kinloch v Secretary of State for India in Council (1882), 7 App. Cas. 819

that the Broadcasting Act does not alter the common law rule that a licence is not transferable, and that the CRTC practice creates, without lawful justification, property rights in the licence. Two observations spring to mind. First, it is not the common law that makes a licence non-transferable, but rather, the concept of a licence as permission given a person to do something that would otherwise be unlawful. Secondly, and more important, the mere fact that a licence holder may obtain a financial benefit through his influence in the granting of a new licence does not mean that he has property rights in the licence.

CRTC approval of "transfer" in the second sense, when a corporate licence holder wishes to sell controlling shares, allows transferring shareholders to obtain a sum of money that reflects the value of holding the licence. The plaintiff's memorandum in Chitty objected to this practice on the basis that:

> He who controls the licensee controls the licence. Thus, if there is a transfer of effective control of the licensee, there is a transfer of effective control of the licence. A transfer of effective control of the licence therefore results in a transfer of the licence itself.

But this argument looks unsound. Arguably, a change of control of a licensee does not result in a transfer of the licence. Suppose ABC Ltd. is the licence holder. Its shares are widely held, with the effect that the 10% shareholding of Mr. X enables him, as a practical matter, to control the

company. The CRTC agrees to Mr. X selling his 10% shareholding to Mr. Y. Arguably, no transfer has taken place. The argument that there has been transfer assumes that the licence was originally held by Mr. X and has been transferred to Mr. Y. Another point in the plaintiff's memorandum in Chitty is this:

> There is no provision in the statute which authorizes the distinction created by the Commission between natural persons and corporations, which gives the latter the ability to transfer licences (by means of the sale of shares) but not the former. The simple device of incorporation cannot be used to permit a person to do what he could not lawfully do as an individual, and thereby to create new rights. Nor does the Act allow the use of the corporate form to abnegate the statutory rights of prospective licensees and members of the public.

But do CRTC practices really make this distinction? A non-corporate licence holder could dispose of his undertaking by the first method of "transfer" permitted by the CRTC (revocation and the issuing of a new licence). And, in any event, the fact that shares of a corporate licence holder can be sold (and thus the control and benefits obtained through the shares transferred), whereas the same could not be done if the licence holder were a natural person, is not a distinction created by the CRTC: it is a distinction inherent in the nature of corporations on the one hand and natural persons on the other hand.

The specific legal arguments in favour of competitive applications are not strong. At best, they are inconclusive.

The most cogent point is that the CRTC is likely obliged by the Broadcasting Act to hold public hearings for so-called "transfer" cases: that is because the statutory scheme requires that transfer applications be treated on the basis of revocation and the issuing of a new licence. Even here, there is a rejoinder of force - the "same corporate entity" reply. But even if it can be shown that public hearings must be held, the battle for competitive applications is far from won (as the APBBC case demonstrates). The requirements for public hearings probably extend no further than giving "parties in the controversy" a "fair opportunity". Those who would like to submit competitive applications are probably not, strictly speaking, "parties in the controversy", and, anyway, interventions should satisfy the "fair opportunity" requirement. Finally, it is not in the nature of a licence to create property in the licensee; the famous "public property" statement in the Broadcasting Act is hortatory and accordingly treatment of licences (whatever it is) cannot derogate from that part of the Act; and the mere fact that a licence holder obtains a financial benefit through his influence in the granting of a new licence ("transfer") creates no property rights.

The specific legal arguments do not decide the competitive applications issue. Nor do they offer much guidance to those seeking a solution. These arguments can best be regarded as expression of a more fundamental point. That point simply is that CRTC practices and procedures have derogated from the

principles of the Broadcasting Act. The legal arguments are one-way - and not the most effective way - of drawing attention to this derogation.

3. The Real Point

We have suggested that the legal arguments for competitive applications are really proxy arguments. They stand in place of attacks on the CRTC for failing - in its practices and procedures - to promote a broadcasting system of the kind intended by the Broadcasting Act. Failure of the legal arguments to withstand close scrutiny does not mean that these arguments do not represent sound cricitisms of the Commission and the system it controls. Failure does suggest that advocates of competitive applications have chosen the wrong forum. Rather than seek redress through the courts, they would do better to seek political intervention - perhaps appropriate amendment of the Act itself. We explore what might be considered appropriate in the final chapter of this paper.

What is at issue is not really public hearings and natural justice, or what "public property" means in the Broadcasting Act, or whether it is contrary to the common law of licences to permit a so-called "transfer", or the transgression of some vague requirement of "fairness". The controversy appears at bottom to be about two points of substance and one of procedure, in descending order of importance. First, licence holders do not provide "quality"

programming and in many cases do not observe their Promises of Performance, and yet this failure seems not to be taken into account by the CRTC at renewal time or when a "transfer" is contemplated. Second, the profits of licence holders are substantially greater than those of entrepreneurs in most other industries, and this (so it is said) is unjustified and inherently objectionable. Third, CRTC procedures do not take into account the differing information and transaction costs of relevant interests and therefore regulation as "an exercise in political brokerage among competing interests, each seeking to maximize its self-interest"[35] is impeded.

This paper has described these points of controversy. We pointed out earlier that private television stations often fail to meet the minimum Canadian content requirements; that many stations fail to comply with the Promises of Performance made when licensed initially and upon licence renewals; and that "the existence of supranormal profits on an industry-wide basis over a substantial period of time ... due (in part) to a government bestowed privilege, is not justified by economic criteria". (page IV - 9). And we have discussed how some relevent interests (broadcasters and advertisers) have fared much better as a result of government

---

35. Michael J. Trebilcock, Leonard Waverman and J. Robert S. Prichard, "Markets for Regulation: Implications for Performance Standards and Institutional Design", in Ontario Economic Council, Government Regulation (Issues and Alternatives - 1978) p. 35.

regulation than other equally relevant interests (artists and audiences).

These problems in the operation and administration of the Canadian broadcasting system go beyond the specific legal arguments, even if those arguments are meritorious. The controversy is not captured by complex points about the legal status of a licence, or about how the concept of property - as a precise and technical legal matter - applies to radio frequencies. The solution may be found in structural and administrative changes, supported by changes in the law, of the sort we now describe.

CHAPTER VI

SYNTHESIS AND RECOMMENDATIONS

Broadcasting licences have been issued in Canada to private interests with the legal proviso that licensees conduct their affairs in a manner that will help "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada". In order to ensure that licensees conduct their affairs in a manner substantially in accord with these goals, Parliament provided for regulation of the broadcasting system by the CRTC, which was given substantial powers in furtherance of its mandate.

The CRTC was empowered to license those individuals and groups whose programming plans and other qualifications caused the Commission to believe that such licensing would contribute to the goals set for broadcasting. The Commission was authorized to attach "Promises of Performance" as conditions of licence and to revoke licences for failure to comply therewith.

Furthermore, the CRTC was empowered to renew or not renew broadcasting licences based on the performance of licensees. It was empowered to enact regulations respecting programming and other matters to which all licensees and/or licensees of a particular class must adhere. It was empowered to file suit in the courts for failure to comply with regulations.

The scheme set for regulation, on paper, seems sound..

Notwithstanding the adverse financial incentives under which it is more profitable for Canadian television stations to replay American programs than to originate high quality indigenous productions, and more profitable for cable television companies to import American signals than it is to contribute to the goals set for Canadian broadcasting, the powers granted the CRTC appear to be sufficient to ensure significant compliance with the goals set for broadcasting.

The CRTC, however, has been reluctant to exercise explicitly its powers and to enforce its own regulations and the Promises of Performance upon which it has based its initial licensing decisions. Moreover, it has refused to pass judgement on the quality of the Canadian programs presented by private broadcasters with the result that bingo games, televised goldfish bowls and repeats of newscasts have qualified as Canadian content. It has not influenced the scheduling practices of private broadcasters with the result that Canadian programs are shunted into off-peak viewing hours. It has not regulated cable profits, notwithstanding the fact that the Commission enfranchises cable companies on a monopoly basis.

One can be somewhat sympathetic to the CRTC insofar as its legislated mandate is indeed a difficult one. One can understand, for example, the reluctance of the CRTC to pass explicitly on the quality of Canadian productions since such valuations, if carried out in an over-zealous manner, could be viewed as censorship. Similarly, the revocation or failure

to renew a broadcasting licence for non-compliance with Promises of Performance and/or content quotas is obviously a serious step that should not be taken irresponsibly.

Nevertheless, the authors believe, the CRTC's reluctance to exercise the disciplinary powers granted the Commission by Parliament through the Broadcasting Act has proven detrimental to the performance of the Canadian broadcasting system.

While we can agree that it would be undesirable for a government agency to stand in detailed judgement with respect to the quality of each program aired, at the same time, we believe that the CRTC has erred in the opposite direction by implicitly ruling that any and all television programs produced in Canada contribute to the goals set for broadcasting. Given the perverse system of incentives facing broadcasters, complete inaction by the CRTC with regard to matters of program quality is tantamount to CRTC endorsation of low-quality productions.

The CRTC cannot stand neutral with respect to matters of program quality. Either implicitly or explicitly it passes judgement on each program. By refusing to comment negatively on bingo games and other such Canadian content, the CRTC is implicitly giving its regulatory support to such programs. The Commission needs to strike a balance between total implicit support of the program efforts of broadcasting undertakings as currently is its practice,[1] and detailed explicit

---

1. In its public announcement concerning a review of Canadian content regulations, the CRTC has proposed

approval and disapproval of programming. The one extreme policy is associated with cheap programming bearing little relation to the enrichment of the social and cultural fabric of Canada; the other extreme policy position is associated with censorship. Both extremes are undesirable, and, the consultants believe, the CRTC should redress the balance it has struck between the extremes.

Similarly, virtually automatic licence renewals as currently characterize CRTC procedures represent an extreme position of protecting the financial position of existing licensees at the expense of the cultural goals set for broadcasting, the interests of the creative element, and the interests of Canadian audiences in high quality Canadian programming.[2]

---

inter alia breaking down content requirements into categories of programs, substituting a points system based on production costs for time quotas, and basing content on a percent of revenues.

To the extent that the CRTC attempts to rely exclusively on quantitative measures as opposed to qualitative valuations, however, it is unlikely any reforms to Canadian content regulations will be totally satisfactory. CRTC "Public Announcement, Canadian Content Review" 31 December 1979.

2. Insofar as US programming is widely available to Canadian audiences through direct reception off-air or via cable of US stations, it is difficult to attribute the CRTC's reluctance to enforce its mandate to a concern over the availability of popular US programming in Canada. In 1977, 73 percent of English Canadian audiences had access to at least two US channels and 78 percent had access to at least one US channel.
CRTC, Special Report on Broadcasting in Canada 1968 - 1978 Vol. 1 (1979), p. 43.

Without doubt, the financial position of existing licensees should not be abrogated irresponsibly; neither, however, should such interests be held to be sacrosanct. The Commission should strike a new balance between those extremes.

In the field of public utility regulation, the regulatory authority must strike a balance between the interests of the company on the one hand and those of the company's customers on the other hand.[3] While neither television broadcasting nor cable television companies have yet been declared to be public utilities, such principles of balance should come to be of relevance to the CRTC in its regulation of private broadcasting.

Fundamentally, what must be decided once more by policy-makers in Canada is what broadcasting is expected to do. One

---

3. Note, for example, the declaration of the Board of Railway Commissioners for Canada pertaining to the permissible level of revenues authorized for the Bell Telephone Company of Canada:

> "Non discriminatory rates should be established by the Company sufficient to produce revenue to cover its operating expenses, its current maintenance expenses, a proper amount of depreciation and amortization, including income taxes, interests, dividends upon its stock, and a reasonable surplus. Having done this, the public should not be asked to contribute further."

B.R.C. "Application of the Bell Telephone Company for Approval of its Revised Tariff of Rates for Local Exchange Services", C.R.C. No. 6057, Twenty-third Report of the Board, 31 December 1927, p. 20.

point of view asserts that television broadcasting has no cultural effects (or, alternatively, that the cultural effects are spontaneous, natural and unimportant), and therefore, little or no government control is required. Recall the vivid metaphor developed by Israel Switzer, for example:

> I will not comment on the 'worthiness' of these [program] services. I'm just the plumber who puts the pipes together. I don't care what people flush down them.

Nor would it we wise to underestimate the extent to which this sentiment is extant in Canada today. Certainly this is the view sometimes propogated by the broadcasting and cable industries which view content quotas and other program regulations as impediments to "the free flow of information."[4]

An alternative point of view (to which the current authors subscribe) holds that broadcast programming indeed has significant cultural implications, that people are profoundly affected, for better or for worse, by the various types of information that they absorb.

Our educational system, as one important example, is founded upon the assumption or belief that the quality of life is affected by the quality of information. The magnitude of advertising expenditures is another example of the belief that information influences behaviour and perceptions. And this is the underlying philosophy of our present broadcasting legislation.

---

4. Canadian Cable Television Association, letter of Michael Hind-Smith, President, to J.G. Patenaude, CRTC, 26 May 1980.

If it is accepted that the quality of information that is disseminated affects the quality of life and of society, then public policy toward television must be viewed as being of grave importance, given the predominant position of television as a medium of information in our present-day society. We must, then, begin to care again what people flush down their pipes.

Ruben Nelson, in a general context, has articulated one important factor explaining the current vacuum in public policy toward broadcasting:

> It is all too clear that our experience of this world is genuinely contradictory, and that we are perfectly capable of believing incompatible things about ourselves at one and the same time. We see, so to speak, with "forked eyes".
>
> What we do not have is a vision which has sufficient power to unify and make sense of our confusion, according to which we can redirect our attention and efforts, and hence our society. So, we live with it in the hope that ultimately it doesn't matter, and yet fearing that it does. It is not surprising, then, that we are torn between our growing sense of fear, our lingering hopes, and our sense of impotence.[5]

The Broadcasting Act, of course, does articulate a vision as to what broadcasting should do. The notions of deregulation and free entry, however, are antithetical to such purposes.

---

5. Ruben F.W. Nelson, The Illusions of Urban Man (Toronto: MacMillan Company of Canada for the Ministry of State for Urban Affairs, 1976), p. 23.

Presuming that the goals expressed in the Broadcasting Act still have validity, we must balance fairness for licensees with inducement to good performance. To the present, the balance has been skewed in favour of licensees as demonstrated by the extraordinarily high returns earned by the industries and their poor performance.

If it can be agreed that the CRTC has been granted extensive and sufficient powers to regulate the broadcasting system in a manner consistent with the goals set for broadcasting, but that through a reluctance to exercise explicitly such powers (for whatever reason), the CRTC has permitted the system to perform well below its potential, the policy question becomes how the Commission can be induced to responsibly exercise those powers to the advantage of the performance of the system without over-stepping the bounds of reasonableness.

The consultants now suggest three options the government could consider as a means of furthering the goals set for broadcasting. One of the options is competitive licensing procedures. The options are set forth in a general, rather than in a detailed manner.

Option 1

A public body (the CBC, the CRTC, or a newly-created body) could be required through legislation to tax all or most surplus earnings of broadcasting licensees (including cable licensees) and to allocate the funds so collected to independent productions. (The tax could be termed a spectrum utilization fee).

All licensees would be required to turn over a minimum amount of time (a few hours a week in peak time) to independent productions which would be scheduled by the CBC, CRTC, or other public authority on such stations. Air time would be turned over on the basis that radio frequencies are public property.

Seed funds would be granted by the public authority for script development, and programs selected and financed by the public authority in a manner consistent with the goals set for broadcasting.

In this context, it is useful to estimate the magnitude of excess profits accruing to the private television broadcasting and cable television industries in 1978 and 1977. These estimates provide guidelines as to the magnitude of funds that could be taxed away from the private sector of the Canadian broadcasting system and applied to the funding of independent productions.

For this purpose, it is again useful to use rates earned by Bell Canada as the benchmark. In keeping with standard public utility concepts, excess profits are defined as returns to capital over and above the minimum necessary to attract new capital to an industry. The CRTC, for example, attempts to set Bell Canada's rates at such a level that the return to capital approximates the "cost of capital", that is, the cost of attracting new funds to the firm. It is to be noted that Bell Canada has been able to undertake annually a construction program in excess of $1 billion, although permitted an after-tax return on total capital of under 10 percent throughout the

past decade. In its most recent application for rate increases, Bell stated:

> A return in 1980 of 9.7% [after tax] on average total capital ... will be below what the Company considers to be a fair return, but should enable Bell Canada to continue with its program to raise the capital funds necessary to carry out its construction program [$1.3 billion in 1980] and meet other financial requirements in the short run.[6]

In 1978, Bell Canada earned 9.3 percent on average total capital and in 1979 earned 9.7 percent on average total capital; its construction program in those years totalled $1.0 billion and $1.1 billion respectively.[7]

An after-tax return of 10 percent on total capital is equal to a pre-tax return of 15 percent, assuming that debt constitutes 50 percent of total capital and assuming an effective corporate income tax rate of 50 percent.

These rates of return are to be compared to the returns accruing to the television broadcasting and cable industries as contained in Tables 1 and 2 (pp. IV-4,7). In four of the six years depicted in Table 1, the return accruing to television

---

6. Bell Canada, General Increase in Rates, 1980, Part B - Memoranda of Support (English), 19 February 1980, Exhibit B-80-350, p. 11, and Exhibit B-80-300, p. 1.

7. The data on Bell's annual construction program are presented to rebut the "back of the envelope financial analysis" which says that telephone companies are not profitable and "who would invest in them?"

broadcasters was in excess of 40 percent, with a high in 1978 of 55.1 percent; the average for the period was 41.7 percent. Similarly, the cable television industry as a whole is now quite profitable with an annual return on investment before tax approaching 25 percent.

Table 6 estimates the surplus profits before tax accruing to the television and cable television industries in 1977 and 1978, assuming that television broadcasting required a return of 18 percent before tax (a return twenty percent greater than the 15 percent earned by Bell Canada), and that cable television required a return of 15 percent before tax. On this basis, surplus profits in these sectors of private Canadian broadcasting totalled 67.7 million in 1977 and $88.5 million in 1978. A portion (possibly as high as $\frac{1}{4}$) of these amounts were paid to the government in corporate income tax.

Total programming expenses, including production of commercials) totalled $138.0 million in 1977 and $176.5 million in 1978 in the case of private television broadcasters; in the case of cable television, program expenses were $13.5 million in 1977 and $16.3 million in 1978.[8] While most, if not all, of the cable television expenditures on programming went to Canadian-originated material, it is not known precisely what proportion of programming expenditures by private television broadcasters went to Canadian-originated material, but, as asserted by Canadian Cablesystems, "It is undoubtedly low";[9] Cablesystems projects

---

8. Statistics Canada, Radio and Television Broadcasting, and Cable Television.

9. Canadian Cablesystems Limited, Submission to the CRTC on Canadian Content Review, July 1980, p. II-8.

TABLE 6

SURPLUS PROFITS ACCRUING TO TELEVISION AND CABLE TELEVISION INDUSTRIES 1977, 1978

(in Thousands of Dollars)

	1977			1978		
	Tele-vision	Cable	Total	Tele-vision	Cable	Total
Investment at year-end	154,449	269,810	424,259	161,174	311,900	473,074
Realized Net Operational Income Before Tax and Interest Expense	69,534	60,461	129,995	88,887	75,407	164,294
Net Operating Income Required for a Return of 18% for Television and 15% for Cable Television	27,801	40,472	72,323	29,011	46,785	75,796
Surplus Profits	41,733	19,989	61,722	59,876	28,622	88,498

Source: Calculations based on assumptions in text and data in Statistics Canada Radio and Television Broadcasting and Cable Television.

that only about 40 percent of the program budget, or about 14 percent of revenues of private broadcasters, are devoted to Canadian programs.[10] In this light, an excess profits tax (or spectrum utilization tax) of $88 million can be seen as bringing forth a substantial increase in Canadian productions.

Since the methods by which the regulatory authority at present tries to induce compliance with the goals of the Broadcasting Act are admitted to be inadequate, an approach more likely of success would be to tax surplus funds and to apply directly such funds to Canadian productions. In other words, rather than having the total amount of cross subsidy take place solely within the firm at the discretion of management, subject only to generally applicable Canadian content quotas and weak enforcement of Promises of Performance, cross subsidy would now be undertaken by a public authority on the basis of taxation of profits, earned largely from the importation of US programming.

The second aspect that must be addressed concerns scheduling and, indeed, access to the airwaves. To date, vertical integration and perverse incentives generally have precluded the scheduling of Canadian productions during peak viewing hours and independent productions at any time. Therefore, it is suggested that a public authority, in addition to the

---

10. Ibid.

foregoing taxation powers, also be empowered to apply these funds for script development and the funding of independent productions and to schedule such independent productions on the CTV Network and other private stations without compensation for one or a few hours a week during peak time.[11]

The program time devoted to these independent productions should probably be free of commercials in order that the decisions respecting program selection be entirely free of commercial considerations. The funds derived from taxation of licensees could be supplemented by public funds.

In brief, for a portion of the peak hours on private stations, a Canadian equivalent of the British IBA would assume program responsibility.

There are some difficulties with this proposal, primarily determining surplus profits.[12] Conceptually surplus profits

---

11. If two hours a week for 26 weeks were so "appropriated", this could reduce revenues to the CTV Network and affiliates by about $4 million for the year, calculated as follows:

> Assume one 30 second spot generates $3,770 (65% of AA rate). Two hours of programming time, that is forty 30-second spots, are worth $150,800 per week or $3.9 million for 26 weeks.

12. Strident objections that will undoubtedly be forthcoming from private broadcasters and cable companies will also create a difficulty for government in implementing the proposal.

are clearly defined - earnings over and above the minimum required to attract investment. In any rate case, a regulatory authority must estimate the cost of capital for public utilities. However, accounting categories are inherently arbitrary and manipulable, transactions among affiliated firms (eg. between licensed broadcasters and vertically-related production houses) could siphon-off profits, salaries paid to management could be unduly high; these possibilities and others would require detailed supervision by the regulator over all financial activities of its licensed undertakings to ensure an accurate estimate of surplus profits.

Alternatively, the tax could be based on revenues, rather than profits. This would be much easier to administer.

The advantages of this approach are that a portion of the peak viewing hours of all licensees would be devoted to Canadian content of a type presumably in accord with the goals set for broadcasting, the airwaves would be opened up to independent productions, and such is accomplished without increased regulatory supervision over the programming efforts of licensees. Broadcasting revenues would be applied to improvement of the performance of the broadcasting system to a greater extent than is the case at present; and licences would trade at lower premiums than at present due to the lowered profitability.

Even in the American system of broadcasting, it is held that:

> There is nothing in the First Amendment which prevents the government from requiring a licensee to share its frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[13]

The option could be implemented by itself, or in combination with the following.

Option 2

The consultants believe that significant improvements in the performance of the broadcasting system can be made if the CRTC can be made more accountable in its pursuit of the goals set for broadcasting. This can be accomplished by adopting the following policies.

First, all data gathering concerning finances, ownership, compliance with regulations and Promises of Performance, programming expenditures and scheduling and other matters which have a bearing upon the performance of broadcasting undertakings could be removed from the CRTC and placed within a new agency designed specifically for that purpose. At present, staff reports for the Commission on the performance of licensees are confidential within the CRTC and it is not clear what uses are made of these staff reports in any event.

The new office, entirely separate from the CRTC, would

---

13. Opinion of Mr. Justice White, Red Lion Broadcasting Co. Inc. et al. v. Federal Communications Commission et al., 395 U.S. 367, 9 June 1959.

play an adversary role in licence renewal proceedings before the CRTC similar to the role played by the Director of Investigation and Research, Combines Investigation Act before the Restrictive Trade Practices Commission. In addition to bringing to the attention of the CRTC apprehended failures to comply with Promises of Performance and regulations, and arguing before the CRTC appropriate remedies at licence renewal times, the office would support research and interventions on the part of the general public. The agency could be financed by taxation of licensees. It would be empowered to attain any and all data deemed relevant to further its duties of ensuring compliance with CRTC regulations and Promises of Performance.

In addition, the CRTC should be required by legislation to extract detailed Promises of Performance from each licensee in compliance with the aims of the Broadcasting Act. Such detailed Promises should be attached to licences as conditions of licence and the CRTC should be required by legislation not to renew licences without substantial compliance with regulations and Promises of Performance, in which case competing applications would be called for.

The existence of supranormal profits should constitute prime facie evidence that additional programming plans in accordance with the goals set for broadcasting could be extracted at licence renewal time. It is widely held that programming activities in accord with the goals of the Broadcasting Act are unprofitable and require cross subsidization from revenues

generated by lucrative US programs. Supranormal profits indicate such cross subsidization could be carried further.

Furthermore, the CRTC and the new office should be opened to political scrutiny through greater disclosure. Reports should be publicly available on the financial and programming performance of each licensee and regarding adherence to Promises of Performance and regulations.

Finally, the CRTC should be held accountable in the courts to a greater extent than it now is, for due process of law. It should be required to give a full accounting in its decisions of its reasons for renewing or failing to renew licences, as well as a full review of the evidence before it. Such full reporting would inform the public and facilitate review by the courts.[14]

It is apparent that private broadcasters should face the real possibility of disciplinary action if they fail to adhere to their own promises and otherwise fail to comply with the intent of the Broadcasting Act. One method of making such disciplinary action a real possibility is competitive licensing.

---

14. In the US, regulatory agencies are required by law to follow due process of law, to afford a fair hearing, to make findings supported only by substantial evidence and to act upon such evidence in a non arbitrary manner, and all evidence so used must be on the public record of each case. "Judicial review affords protection to the corporation and the investor".

Irston R. Barnes, The Economics of Public Utility Regulation, (New York: Appleton-Century--Crofts, 1942), pp. 201-204.

Another method without the perceived detriments associated with competitive licensing is the proposal described above.

The advantages of the foregoing approach, as compared with competitive licence renewals and with current procedures, are several. First, the burden on the CRTC of both prosecuting licensees and judging them is negated; it could judge licensees in a more even-handed manner.

Second, licensees with a good track record would not be competing with the "blue sky" promises of applicants without a record, but at the same time, they would be induced to comply with Promises of Performance and regulations due to the real possibility of licence non-renewal. The "instability" arguments attributed to competitive renewals are disposed of since licensees determine their own future through their performance.

Third, since the newly-created office would be devoted to enforcement of promises and regulations, greater consistency in the treatment of licensees is to be expected than what could take place under competitive licensing. In the latter instance, much of the burden of prosecution resides with licence challengers; it could be anticipated that renewal proceedings would be subject to great variability depending upon the number and interest of potential challengers and the finances available to undertake an uncertain activity.

Fourth, the CRTC has stated that competitive licensing might be a change more of "form and not of the substance of

the process".[15] Perhaps we should take the CRTC at its word and conclude that it would not treat seriously competing applications, even if required by law to hear them. The foregoing proposal if introduced would force the CRTC into a position of judging the record of licensees.

As noted above, this proposal could be introduced in conjunction with the first proposal.

Option 3

Competitive licensing constitutes the third option. The advantages and disadvantages of this approach have been described sufficiently within the body of this report. Insofar as the CRTC itself believes that enforced competitive renewal procedures would constitute a change more of "form and not of the substance of the process", and insofar as the record of the US Federal Communications Commission appears to support the CRTC's characterization in this regard, stronger measures as outlined above are required.

However, irrespective of which, if either, of the foregoing options is selected to improve the performance of the broadcasting system, it would appear that competing procedures should indeed be invoked for all transfer of licences. The major criticism entailed with competitive transfer proceedings concerns delay which would be entailed in lengthier proceedings, a cost which the consultants deem to be minor in comparison with the benefits forthcoming therefrom.

---

15. CRTC "Proposed CRTC Procedures and Practices Relating to Broadcasting Matters" 25 July, p. 35.

As noted in Chapter V, the Broadcasting Act asserts that "radio frequencies are public property", but, from a legal point of view, this proclamation does not require the CRTC to hold competitive transfer proceedings. The Broadcasting Act should be revised to firmly reaffirm that no private licensee has a vested interest in any radio frequency and that the CRTC is to be required to award licences up for transfer to the party adjudged most qualified in competitive proceedings.

As discussed previously, the most contentious area regarding licence transfers concerns prices to be paid. At one extreme (as was the practice of the FCC prior to 1952), the regulatory authority could admit as applicants all parties willing to match the terms of the party favoured by the out-going licensee; in such an instance the number of competing proceedings would be few as the licensee itself can be assumed to have identified the party willing to pay the most for the licence. Moreover, such a practice would not lessen the increased capitalization facing new licensees from excessive payments for the licence.

At the other extreme, the regulatory authority could admit as applicants all parties willing to pay the cost of undepreciated fixed assets (plus 10%) associated with the licence up for transfer. In such an instance, there would be few applications for licence transfer before the CRTC since current licensees would be exchanging the value of assets in use (based on discounted future profits) for the much lower purchase cost of

assets for generalized use (book value).

It is to be again emphasized, however, that to the extent the options described above are introduced and succeed in lowering the realized rate of return earned by licensees to the competitive rate of return (i.e. the cost of capital), the market value of the firm will approach the value of its undepreciated fixed assets, and in such an instance, the problem of price of transferred undertakings becomes less important.

It is clear that regulatory reform is required if private broadcasting is to be considered seriously as an agency to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada". The measures set forth above appear to be very conservative in comparison with other recent proposals for reform,[16] while at the same time being likely to induce substantial improvement in the performance of the system.

---

16. Stuart Griffiths, "Alternatives for Canadian Television" in (Ontario) Royal Commission on Violence in the Communications Industry, Report Vol. 7 (Toronto: Queen's Printer, 1977); and Alphonse Ouimet "Rationalizing Canadian Telecommunications: A Plan for Action", discussion paper prepared for Gamma, Université de Montréal and McGill University, November and December, 1978.

A P P E N D I X I

Additional Tables

TABLE A

SOURCE AND APPLICATION OF FUNDS

PRIVATELY OWNED RADIO AND TELEVISION BROADCASTING

($000)	1972	1973	1975	1977	TOTAL ALL YEARS
SOURCE OF FUNDS					
Net profit, broadcast operations	27,948	30,629	34,189	50,768	143,534
Depreciation	14,814	16,270	19,328	25,310	75,722
Other internally generated funds	7,334	1,862	1,965	3,651	14,812
Increase in debt	16,914	17,581	29,794	37,812	102,101
Proceeds from sale of equity	1,587	6,101	2,140	3,717	13,545
Other external sources	9,524	13,581	26,305	23,404	72,814
TOTAL SOURCE OF FUNDS	78,122	86,024	113,721	144,662	422,529
APPLICATION OF FUNDS					
Additions to broadcast assets	17,979	15,294	37,209	52,754	123,236
Investment outside broadcasting and investments	18,133	19,449	13,053	17,157	67,792
Reduction in long-term debt and shares	14,017	16,999	25,212	22,180	78,408
Dividends	13,073	19,216	28,013	20,676	80,978
Other	8,040	11,915	7,378	11,720	39,053
TOTAL FUNDS USED	71,242	82,873	110,865	124,487	389,467
INCREASE IN WORKING CAPITAL	6,880	3,151	2,856	20,175	

Source: Statistics Canada, Radio and Television Broadcasting

TABLE B

SOURCE AND APPLICATION OF FUNDS

BELL CANADA, 1972 - 1977 (NON-CONSOLIDATED)

($ 000)	1972	1975	1977	TOTAL ALL YEARS
SOURCE OF FUNDS				
Net profit, telephone ops.	165,696	213,056	232,895	611,647
Depreciation	222,894	338,260	427,853	989,007
Other internally generated funds	69,163	68,029	94,336	231,528
Increase in long-term debt	148,117	214,953	255,204	618,274
Proceeds from sale of equity	---	123,336	137,559	260,895
Other external sources	41,104	131,656	17,355	190,115
TOTAL SOURCE OF FUNDS	646,974	1,089,290	1,165,202	2,901,466
APPLICATION OF FUNDS				
Addition to telephone assets	491,731	777,377	933,142	2,202,250
Outside investments	8,808	6,088	3,545	18,441
Reduction of debt, shares	40,174	42,577	95,579	178,330
Dividends	110,621	160,263	207,160	478,044
Other	7,045	2,159	14,090	23,294
TOTAL FUNDS USED	658,379	988,464	1,253,516	2,900,359
INCREASE IN WORKING CAPITAL	(11,405)	100,826	(88,312)	

Source: Bell Canada Annual Reports

TABLE C

SOURCE AND APPLICATION OF FUNDS

CABLE TELEVISION 1972 - 1977 (OVER 1,000 SUBSCRIBERS)

($ 000)	1972	1973	1975	1977	TOTAL ALL YEARS
SOURCE OF FUNDS					
Net profit, cable operations	9,284	12,378	15,672	24,425	61,759
Depreciation	16,809	21,959	33,614	45,022	117,404
Other internal sources	1,241	2,188	5,355	7,532	16,316
Increase in long-term debt	23,329	21,667	30,689	34,335	110,020
Sale of equity	2,754	4,803	5,386	4,610	17,553
Other external sources	11,044	2,360	6,235	7,447	27,086
TOTAL SOURCE OF FUNDS	64,461	65,355	96,951	123,371	350,138
APPLICATION OF FUNDS					
Addition to cable assets	42,101	45,200	55,488	75,821	218,610
Investment outside cable industry and investments	5,488	7,380	19,749	22,836	55,453
Reduction in debt, shares	12,683	10,131	13,237	26,996	63,047
Dividends	3,053	2,603	8,973	19,457	34,086
Other	4,882	2,382	3,676	6,398	17,338
TOTAL FUNDS USED	68,207	67,696	101,123	151,508	388,534
DECREASE IN WORKING CAPITAL	3,746	2,341	4,173	28,138	

Source: Statistics Canada, Cable Television

TABLE D

BALANCE SHEET

RADIO AND TELEVISION - 1972 - 1977

($ 000)	1972	1973	1975	1977	TOTAL
ASSETS					
Current	104,580	113,263	146,463	224,252	588,558
Net fixed assets, broadcasting	92,666	97,068	142,154	186,119	518,007
Investments, intangible assets	93,898	125,477	147,025	164,495	530,895
TOTAL	291,145	335,808	435,642	574,866	1,657,461
LIABILITIES					
Current	71,987	75,509	103,515	154,202	405,213
Long-term debt	64,614	71,963	102,208	124,488	363,273
Share capital	45,367	62,539	100,948	76,329	285,183
Retained earnings and surplus	89,663	103,442	89,858	171,962	454,925
Other liabilities	19,514	22,355	39,113	47,885	128,867
TOTAL	291,145	335,808	435,642	574,866	1,637,461

Source: Statistics Canada, Radio and Television Broadcasting

TABLE E

BALANCE SHEET

BELL CANADA (NON-CONSOLIDATED) 1972 - 1977

($ 000)	1972	1975	1977	TOTAL
ASSETS				
Current	295,756	432,486	325,533	1,053,775
Net fixed assets (telephone)	3,400,461	4,680,463	5,777,469	13,858,393
Investments, intangible assets	318,199	323,011	320,402	961,612
TOTAL	4,014,416	5,435,960	6,423,404	15,873,780
LIABILITIES				
Current	178,977	282,908	485,190	947,075
Long-term debt	1,652,238	2,160,926	2,497,159	6,310,323
Share capital	1,496,654	1,778,516	1,977,643	5,252,813
Retained earnings	342,009	595,644	682,748	1,620,401
Other liabilities	334,538	617,966	780,664	1,733,168
TOTAL	4,014,416	5,435,960	6,423,404	15,873,780

Source : Bell Canada, Annual Reports

TABLE F

BALANCE SHEET

CABLE TELEVISION - 1972 - 1977 (OVER 1,000 SUBSCRIBERS)

($ 000)	1972	1973	1975	1977	TOTAL
ASSETS					
Current	18,221	20,466	29,303	31,988	99,978
Net fixed (cable)	121,160	148,661	200,777	269,810	740,408
Investments, intangible assets, etc.	43,004	56,583	85,354	129,976	314,917
TOTAL	182,385	225,710	315,434	431,774	1,155,303
LIABILITIES					
Current	45,586	49,929	70,215	120,825	286,555
Long-term debt	74,212	88,428	113,261	133,672	409,573
Share capital	21,689	26,259	30,877	41,704	120,529
Retained earnings and surplus	28,333	46,075	65,868	68,457	208,733
Other liabilities	12,565	15,019	35,213	67,116	129,913
TOTAL	182,385	225,710	315,434	431,774	1,155,303

Source: Statistics Canada, Cable Television

BIBLIOGRAPHY

BIBLIOGRAPHY

Averch, Harvey; and Johnson, Leland. "Behavior of the Firm Under Regulatory Constraint", American Economic Review, 1962.

Babe, Robert E. "Public Policy and the Problem of Structural Change in Canadian Broadcasting" in Peter S. Grant (ed.). New Developments in Canadian Communications Law and Policy, Toronto: Law Society of Upper Canada, 1980.

Babe, Robert E. Canadian Television Broadcasting Structure, Performance and Regulation, Ottawa: Minister of Supply and Services for the Economic Council of Canada, 1979.

Babe, Robert E. "Broadcasting in Canada: In Whose Interest?" In Search, Summer 1980.

Babyak, Blythe. "On the Prowl With Ugly George", New York Magazine, 1 September 1980.

Bain, Joe S. Barriers to New Competition: Their Character and Consequences in Manufacturing Industries, Cambridge: Harvard, 1965.

Bain, Joe S. "Relation of Profit Rate to Industry Concentration", Quarterly Journal of Economics, August 1951.

Baker, Samm Sinclair. The Permissible Lie, Boston: Beacon Press, 1973.

Barnes, Irston R. The Economics of Public Utility Regulation New York: Appleton-Century-Crofts, 1942.

Barnett, S.R. "Cable Television and Media Concentration, Part I: Control of Cable Systems By Local Broadcasters" Stanford Law Review, Vol. 22, January 1970.

Barnouw, Eric. The Sponsor: Notes on a Modern Potentate, New York: Oxford, 1978.

Barnouw, Eric. A Tower of Babel: A History of Broadcasting in the United States Prior to 1933, New York: Oxford, 1966.

Beebee, John. Institutional Structure and Program Choices In Television and Cable Television Markets, Stanford University Center for Research in Economic Growth, Memorandum 131, 1972.

Bell Canada. General Increase in Rates, 1980. Part B - Memoranda of Support Evidence (English), 19 February 1980

Bell, Daniel. The Cultural Contradictions of Capitalism, New York: Basic Books, 1976.

Berger, Peter; Berger, Brigitte; and Kellner, Hansfried. The Homeless Mind: Modernization and Consciousness, New York: Vintage, 1974.

Bonbright, James. Principles of Public Utility Rates, New York: Columbia, 1961.

Boorstin, Daniel J. The Republic of Technology: Reflections on Our Future Community, New York: Harper and Row, 1978.

Burns Bros. and Denton. The Canadian Cable Television Industry: Overview, January 1974.

Canada, Canadian Radio-television and Telecommunications Commission, Broadcast Programs Branch. Television Station Performance Handbook, 1974-1975 (unpublished, 1977).

Canada, Canadian Radio-television and Telecommunications Commission. Canadian Broadcasting and Telecommunications: Past Experience, Future Options, A report prepared for the CRTC, Ottawa: Minister of Supply and Services for the CRTC, 1980.

Canada, Canadian Radio-television and Telecommunications Commission, Ownership of Private Broadcasting: An Economic Analysis of Structure, Performance and Behaviour, Report of the Ownership Study Group to the CRTC, Ottawa: CRTC, October 1978.

Canada, Canadian Radio-television and Telecommunications Commission. Ownership of Private Broadcasting: Major Ownership Transfers in Broadcasting 1972-1976: An Analysis of Price Determinants, Background Study V Ottawa: CRTC, 1978.

Canada, Canadian Radio-television and Telecommunications Commission. "Public Announcement: Proposed CRTC Procedures and Practices Relating to Broadcasting Matters", 25 July 1978.

Canada, Canadian Radio-television and Telecommunications Commission. "Public Announcement: Canadian Content Review", 31 December 1979.

Canada, Canadian Radio-television and Telecommunications Commission. TV in Canada: What Canadians Choose to Watch, study prepared for Committee of Inquiry into the National Broadcasting Service, background research paper, Ottawa: CRTC, 1977.

Canada, Committee on Broadcasting. 1965 Report, Ottawa: Queen's Printer, 1965.

Canada, Committee on Extension of Service to Northern and Remote Communities. The 1980's: A Decade of Diversity - Broadcasting, Satellites and Pay-TV, Ottawa: Minister of Supply and Services for the CRTC, 1980.

Canada, Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, J.V. Clyne Chairman. Telecommunications and Canada, (Ottawa: Minister of Supply and Services for the Department of Communications, 1979).

Canada, Statistics Canada. Radio and Television Broadcasting, annual, catalogue number 56-204.

Canada, Statistics Canada. Cable Television annual, catalogue number 56-205.

Canadian Broadcasting Corporation. The CBC's Programming Services, submitted to the CRTC in support of applications for renewal of network licences, May 1978.

Canadian Cablesystems Limited. Submission to the CRTC on Canadian Content Review, July 1980.

Canadian Cablesystems Limited. Application for Control of Premier Communications Limited, 1980.

Canadian Council of Filmmakers. CTV Television Network Ltd., intervention prepared for submission to the CRTC on the subject of the application for renewal of the network licence, 17 January 1979.

CBC Research. Patterns of Television Viewing in Canada: A Project Conducted for the President's "Study of Television in the Seventies", Ottawa: CBC, 1973.

Coase, R.H., "The Federal Communications Commission" Journal of Law and Economics, Vol. 2, October 1959.

Comstock, George; Chaffee, Steven; Katzman, Nathan, et al. Television and Human Behavior , New York: Columbia, 1978.

Dowling, Deborah. "Brainwaves, The Ultimate Advertising Test?", Financial Post, 3 March 1979.

Dworkin, Peter. "The O'Neill Brothers' $350-Million Hassle with the FCC", Fortune, 21 April 1980.

Edmunds, Hugh et al. A Study of the Independent Production Industry with Respect to English Language Programs in Canada with Recommendations for Policy Action, Windsor: Centre for Communications Studies, University of Windsor, 1976.

Elliot, George P. "The Enemies of Intimacy", Harpers', July 1980.

Ellul, Jacques. The Technological Society, New York: Vintage, 1964.

Emery, Walter. National and International Systems of Broadcasting: Their History, Operation and Control, East Lansing: Michigan State University Press, 1969.

Emery, Walter. Broadcasting and Government: Responsibilities and Regulations, East Lansing: Michigan State University Press, 1971.

Friendly, Fred. The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting, New York, Vintage, 1976.

Friendly, Fred. Due to Circumstances Beyond Our Control, New York: Vintage, 1967.

Gelhaus, Robert; and Wilson, Garry. "An Earnings-Price Approach to Fair Rate of Return in Regulated Industries" Stanford Law Review, January 1968.

Goldsen, Rose. The Show and Tell Machine, New York: Delta, 1978.

Greenberg, Edward; and Barnett, Harold. "TV Program Diversity - New Evidence and Old Theories", American Economic Review, 1971.

Griffiths, Stuart. "Alternatives for Canadian Television" in (Ontario) Royal Commission on Violence in the Communications Industry, Report Vol. 7, Toronto: Queen's Printer, 1977.

Gumpert, Garry and Cathcart, Robert (eds.), Inter/Media: Interpersonal Communication in a Media World, New York: Oxford, 1979.

Hallman, E.S., and Hindley, Henry. Broadcasting in Canada: Studies on Broadcasting Systems, Don Mills: General Publishing, 1977.

Heintzman, Ralph. "Liberalism and Censorship", Journal of Canadian Studies, Winter 1978-79.

Johnson, A.W. Touchstone for the CBC, Ottawa: Canadian Broadcasting Corporation, 1977.

Johnson, Nicholas. How To Talk Back to Your Television Set, New York: Bantam, 1970.

Johnston, C.C. "Notes on Procedure at CRTC Public Hearings" Canadian Communications Law Review, Vol. 4, 1972.

Johnston, C.C. The Canadian Radio-television and Telecommunications Commission, draft report prepared for the Law Reform Commission, 1980.

Jones, William K. "Use and Regulation of the Radio Spectrum: Report on a Conference" in the Radio Spectrum: Its Uses and Regulation, Washington: Brookings, 1968.

Kahn, Frank (ed.). Documents in American Broadcasting, New York: Appleton-Century-Crofts, 1968.

Kirby, Blaik. "100 TV Channels Free for Taking", Globe and Mail, 21 March 1980.

Krasnow, Edwin; and Langley, Lawrence. The Politics of Broadcast Regulation, New York: St. Martin's Press, 1974.

Langan, P. St. J. Maxwell on the Interpretation of Statutes, 12th ed., London: Sweet and Maxwell, 1969.

Lasch, Christopher. The Culture of Narcissism: American Life in an Age of Diminishing Expectations, New York: Norton, 1978.

Levin, Harvey. The Invisible Resource: Use and Regulation of the Radio Spectrum, Baltimore: John Hopkins Press, 1971.

Levin, Harvey. "Federal Control of Entry in the Broadcast Industry", Journal of Law and Economics, Vol. V, October 1962.

Levin, Harvey. "Program Duplication, Diversity and Effective Viewer Choices: Some Empirical Findings", American Economic Review, 1971.

Lewis, C.S. The Abolition of Man, London: Oxford, 1943.

Mander, Jerry. Four Arguments for the Elimination of Television, New York: Morrow Quill Paperbacks, 1978.

Mankiewicz, Frank and Swerdlow, Joseph. Remote Control: Television and the Manipulation of American Life, New York: Quadrangle/New York Times, 1978.

Mann, H. Michael. "Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries, 1950-1960", Review of Economics and Statistics, August 1966.

Manning, Willard. The Supply of Prime-Time Entertainment Television Programs. Stanford University Center for Research in Economic Growth, Memorandum 152, 1973.

Manwell, Roger. On The Air: A Study of Broadcasting in Sound and Television, London: Andre Deutsch, 1953.

McGowan, John. "Competition, Regulation and Performance in Television Programming", Washington University Law Quarterly, 1967.

Meckling, William. "Management of the Frequency Spectrum" in The Radio Spectrum: Its Uses and Regulation, Washington: Brookings, 1968.

Mumford, Lewis. The Myth of the Machine, Vol. 2: The Pentagon of Power, New York: Harcourt, Brace, Jovanovich, 1970.

Nelson, Ruben, F.W. The Illusions of Modern Man, Toronto: Macmillan Company of Canada for the Ministry of State for Urban Affairs, Information Canada, 1976.

Newcomb, Horrace (ed.). Television: The Critical View, New York: Oxford, 1979.

Noll, Roger; Peck, Merton, and McGowan, John. Economic Aspects of Television Regulation, Washington: Brookings, 1973.

Nordenstreng, Kaarle, and Schiller, Herbert I. National Sovereignty and International Communication: A Reader Norwood: Ablex, 1979.

Ouimet, Alphonse. "Rationalizing Canadian Telecommunications: A Plan for Action", discussion paper prepared for Gamma, Université de Montréal and McGill University, November and December, 1978.

Owen, Bruce; Beebee, Jack and Manning, Willard. Television Economics, Lexington: Heath, 1974.

Owen, Bruce; and Manning, Willard. The Television Rivalry Game. Stanford University Center for Interdisciplinary Research, report No. 5, 1973.

Paulu, Burton. British Broadcasting in Transition, Minneapolis: University of Minnesota Press, 1961.

Peers, Frank. The Politics of Canadian Broadcasting, 1920-1951, Toronto: University of Toronto Press, 1969.

Peers, Frank. The Public Eye: Television and the Politics of Canadian Broadcasting, 1952-1968, Toronto: University of Toronto Press, 1979.

Perrakis, Stylianos; and Silva-Echenique, Julio. "The Profitability and Risk of Television Stations in Canada", paper commissioned by the Department of Communications, 1980.

Perrakis, Stylianos; and Silva-Echenique, Julio. "The Profitability and Risk of CATV Operations in Canada", paper prepared for the Department of Communications, 1980.

Phillips, Charles. The Economics of Regulation, Homewood: Irwin, 1969.

Posner. Cable Television: The Problem of Local Monopoly, Santa Monica: RAND, 1970.

Reid, R.S.; and David, H. Administrative Law and Practice, Toronto: Butterworths, 1978.

Righter, Rosemary. Whose News: Politics, The Press and the Third World, New York: Times Books, 1978.

Roman, Andrew J. "Competition for Cable Licences" In Search Summer, 1980.

Roszak, Theodore. Where the Wasteland Ends, Garden City: Doubleday, 1972.

Rothenberg, Jerome. "Consumer Sovereignty and the Economics of TV Programming", Studies in Public Communications, 1962.

Samuels, Warren J. The Classical Theory of Economic Policy, New York: World, 1966.

Samuels, Warren J. "Interrelations Between Legal and Economic Processes", Journal of Law and Economics, Vol. 14, 1971.

Schaeffer, Francis A. How Should We Then Live? The Rise and Decline of Western Thought and Culture, Old Tappan: Revell, 1976.

Schiller, Herbert. Mass Communications and American Empire, New York: Kelly, 1969.

Schwartz, Louis B. Free Enterprise and Economic Organization: Concentration and Restrictive Practices, 3rd ed., Brooklyn: Foundation Press, 1966.

Schwartz, Tony. The Responsive Chord, Garden City: Anchor Press/Doubleday, 1974.

Seiden, Martin H. Cable Television U.S.A.: An Analysis of Government Policy, New York: Praeger, 1972.

Shepherd, William G. The Treatment of Market Power: Antitrust, Regulation and Public Enterprise, New York: Columbia, 1975.

Skornia, Harry. Television and Society, New York: McGraw-Hill, 1965.

Steiner, Peter. "Monopoly and Competition in Television: Some Policy Issues", Manchester School of Economics and Political Science, 1961.

Steiner, Peter. "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting", Quarterly Journal of Economics, 1952.

Stent, Gunther. "The Dilemma of Science and Morals" in Gunther Stent Paradoxes of Progress, San Francisco: Freeman, 1978.

Switzer, Israel. "How I Learned to Love the Satellite" in Peter S. Grant (ed.), New Developments in Canadian Communications Law and Policy, Toronto: Law Society of Upper Canada, 1980.

The Economist, 9 February 1980.

Trebilcock, Michael J.; Waverman, Leonard; and Prichard, Robert S. "Markets for Regulation: Implications for Performance Standards and Institutional Design" in Ontario Economic Council Government Regulation: Issues and Alternatives, Toronto: Queen's Printer, 1978.

United States, Committee on Interstate and Foreign Commerce Allocation of TV Channels: Report on the Ad Hoc Advisory Committee on Allocations, Washington: US Government Printing Office, 1958.

United States, Federal Communications Commission. Report of the Federal Communications Commission to the Congress of the United States Re The Competitive Renewal Process, 1976.

University of Alberta. Ownership of Canadian Broadcasting, study prepared for the Department of Communications, March 1979.

Wells, Alan. Picture-Tube Imperialism: The Impact of U.S. Television on Latin America, New York: Times Books, 1978.

Weizenbaum, Joseph. "Once More: The Computer Revolution" in Michael L. Dertouzos and Joel Moses (eds.), The Computer Age: A Twenty Year View, Cambridge: MIT, 1979.

Wicklein, John. "Wired City USA: The Charms and Dangers of Two-Way TV", The Atlantic, February 1979.

Wiles, Peter. "Pilkington and the Theory of Value" Economic Journal, 1953.

Winner, Langdon. Autonomous Technology: Technics-Out-of-Control as a Theme in Political Thought, Cambridge, Mass.: MIT, 1977.

Wood Gundy. "Progress Report: The Cable Television Industry" 26 February, 1975.