AGENCY-CLIENTELE RELATIONS: A STUDY OF THE FEDERAL COMMUNICATIONS COMMISSION*

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I. INTRODUCTION

In recent years there has been much scholarly criticism of regulatory agencies.[1] Critics have focused on both the substantive policies of regulation and the procedures by which agency decisions are reached.[2] Many observers charge that agency overregulation has prevented market allocation of goods and services by the regulated industry.[3] Others argue that the raison d'être for government regulation, the natural monopoly, cannot be successfully regulated.[4] Such criticisms chal-

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1. The term "regulatory agency" refers to the agencies which traditionally have been given statutory authority to regulate business activity, such as the CAB, FCC, FPC, FTC, ICC, NLRB, and SEC. These differ from other agencies which provide benefits—social or economic—to particular groups of citizens as a result of government largesse. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). It is suggested that clientele and other interests relating to these two groups of agencies are substantially different and conclusions drawn from this study cannot suggest much about relationships in the benefit-dispensing agencies.

2. For the two best recent surveys of administrative agency problems, *see* Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

3. *See, e.g.*, G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY (1974); PROMOTING COMPETITION IN REGULATED MARKETS (A. Phillips ed. 1975); THE CRISIS OF THE REGULATORY COMMISSIONS (P. MacAvoy ed. 1970); Cutler & Johnson, *Regulation and The Political Process*, 84 YALE L.J. 1395 (1975); Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

4. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

The allocation of a scarce resource by non-market means also serves as a justification for state regulation. *E.g.*, H. LEVIN, THE INVISIBLE RESOURCE (1971); DeVany, Eckert, Meyers, O'Hara, & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969);

lenge the basic legitimacy of the regulatory process itself, and its underlying political, social, and economic justifications.[5]

Other critics question the decision-making procedures of regulatory agencies.[6] They focus on the tendency of these bodies to become captives of their clientele.[7] The manner in which agencies may be captured varies. Regulatory agencies and the industries they are charged with regulating enjoy a high rate of personnel interchange, particularly in managerial positions. Agency heads who are not reappointed by the President frequently are employed by the regulated industry; agency decisions unfavorable to the industry jeopardize future exchanges.[8]

In addition, the client appears regularly before the agency, requesting various policy determinations. Often the agency must rely on the industry and its experts to provide the technical information upon which the agency acts. Because consumer or the general public's opposition to industry demands is usually unorganized, the agency is rarely exposed to an alternative to the industry's position. Thus, the agencies

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Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROB. 505 (1969); Levin, *The Radio Spectrum Resource*, 11 J. L. & ECON. 433 (1968).

5. *See, e.g.*, S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION (1974); THE CRISIS OF THE REGULATORY COMMISSIONS, *supra* note 3.

6. *See* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); Sabatier, Social Movements and Regulatory Agencies: Is "Clientele Capture" Inevitable? (1974) (paper delivered at Western Political Science Ass'n Meeting). For procedural changes, see Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972). For structural changes, see R. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS (1971); THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATIONS, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) [hereinafter cited as the Ash Council Report].

7. For the first major exposition of this theory, see M. BERNSTEIN, *supra* note 6. For other discussion of this point, see Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954); Lazarus & Onek, *supra* note 3, at 1075; Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 708 (1972); Sabatier, *supra* note 6, at 1-9. Sabatier focuses on a case-study test of the capture hypothesis. Stewart, *supra* note 2, at 1685-88, presents a useful set of subdivisions of this argument which sheds substantial light on the meaning of the thesis. *But see* Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231, 232 (1970) (all political institutions are captives of one or more political clientele).

8. For an interesting treatment of this phenomenon, see Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission*, 63 GEO. L.J. 705 (1975). *See also* Thomas, *Politics, Structure, and Personnel in Administrative Regulation*, 57 VA. L. REV. 1033 (1971).

over time are persuaded by the claims of the industries they regulate and repeatedly make decisions favorable to them.[9] In view of this, several commentators have proposed abandoning the regulatory agencies' "independence,"[10] to make them politically accountable.[11] Others favor

9. *See* note 6 *supra* and accompanying text. Although not an advocate of the clientele-capture thesis, R. NOLL, *supra* note 6, at 40-46, presents a cogent statement of it. *See also* Noll, *Selling Research to Regulatory Agencies* in THE ROLE OF ANALYSIS IN REGULATORY DECISIONMAKING: THE CASE OF CABLE TELEVISION (R. Park ed. 1973), which develops a particular subcategory of the thesis positing that the agency's decisions tend to be designed to create the least political conflict possible. Decisions which are acceptable to most of the clientele will, in the long run, be those which predominate in agency policies. The reason for this is that the agency does not want to face possible reversal or reprimand from another political arena such as an appellate court or the Congress, and a decision supported by most of the clientele will tend to produce the least political opposition.

10. For a presentation of the case for the current lack of agency independence, see Cutler & Johnson, *supra* note 3, at 1402-05. *See also* Freedman, *supra* note 2, at 1047-51 (discussing this "problem" in the administrative process). Wilson, however, in *The Politics of Regulation* in SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 158 (J. McKie ed. 1974), points out that some agencies, such as the FCC, were designed to allocate resources among users, and may not have been intended to be independent; in fact, their close identity with the clientle was part of the initial outline of the legislation.

11. One such proposal would require agency members to be elected or to represent functional categories of constituents in an effort to balance the interests and pressures which have surfaced in agency politics. *See* Stewart, *supra* note 2, at 1790-98. Such proposals aim to place agencies in the political system, thus making them responsive to the political pressures to which other institutions (such as the executive and legislative branches) and actors (congressmen and the President) are subject. The success of such suggestions seems doubtful given the problems of identifying constituencies, and establishing a selection (or election) process required to insure the public accountability of such agency members. Other proposals are designed to make the agencies more responsive to political institutions, if not to make the agencies themselves more politically responsive. *See* Cutler & Johnson, *supra* note 3; R. NOLL, *supra* note 6.

The Ash Council Report proposed making the agencies (with few exceptions, including the FCC) into single-administrator agencies within the executive branch so that the President would have closer and more explicit control over agency decisions, operations, and policy directions. This suggestion was intended to make the agencies more responsive to the executive and managerially more efficient. In part, this would be achieved by reducing the collegial nature of the agencies, and by placing the agencies under direct supervision of the Chief Executive. Despite President Nixon's efforts at executive reorganization, the Ash Council did not produce any actual restructuring of agencies, although it did result in a variety of scholarly criticisms of the proposal. For example, one law review published an entire issue on various reactions to the Ash Council Report, 57 VA. L. REV. 925, 925-1108 (1971). *See also* R. NOLL, *supra* note 6.

The extreme form of these proposals to politicize regulatory agencies is in the current proposals in Congress to eliminate various agencies. As a prime example, the Mikva proposal, the "Regulatory Agency Self-Destruct Act," H.R. 11278, 94th Cong., 1st Sess. (1975), would have had regulatory agencies self-destruct on July 4, 1976,

continued agency independence so long as their proceedings and procedures are open to greater public participation.[12]

What groups, besides the industry being regulated, should be allowed or required to participate in agency proceedings?[13] Traditionally, only the interests of well-organized groups with resources sufficient to intervene formally were given consideration by the agency. Recently, however, courts and commentators have begun to examine the utility of granting unstructured interest groups access to agency proceedings.[14] The type of agency proceeding often determines whether access will be given.[15] For example, a general consumer interest group can contribute most effectively to rule-making proceedings that call for policy statements rather than technical data or specific evidence. The concerns of other groups, however, may be more adequately presented by "public interest" law firms in formal, trial-type hearings. Those interest groups directly injured by alleged violations of agency rules or threatened by proposed agency actions, as well as groups with knowledge bearing directly on an agency's decision, arguably have a right to intervene in such an adversarial proceeding.

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if Congress and the President determined that the agency had inadequately promoted the "public welfare." Without defining the standards by which agency performance was to be judged, the proposal permitted another review in seven and fourteen years after this first review to insure that the surviving agencies continued to function in a way which Congress and the President judged to be in the public welfare. The political burden such an institutional arrangement would place on the subjected agencies is clear, and one could suggest that the agencies involved would devote a good deal more of their time, if not all of it, to justifying their existence to congressional committees and the President, rather than formulating regulatory policy. The current legislative oversight suggests that agencies are already sensitive to such political pressures. *See* R. RIPLEY & G. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY (1976); Krasnow & Shooshan, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 10 HARV. J. LEGIS. 297 (1973).

12. *See* Gellhorn, *supra* note 6, at 359; Lazarus & Onek, *supra* note 3, at 1070, 1092-93. *See also* note 14 *infra* and accompanying text.

13. For a discussion of interests that might contend for representational rights before agencies in various proceedings, see Stewart, *supra* note 2, at 1762-69. *See also* Gellhorn, *supra* note 6, at 376-82; Comment, *supra* note 7, at 731-34.

14. *See, e.g.*, National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See also* Stewart, *supra* note 2; Comment, *supra* note 7.

15. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 531-34 (1972); Gellhorn, *supra* note 6, at 369-72; Comment, *supra* note 7, at 735.

Beyond the rule-making—adjudication dichotomy, the various intermediate stages of formality and specificity in agency proceedings require ad hoc consideration of the potential contributions intervening public participants can make to the agency's decision-making processes. In assessing the benefits of greater access, agencies must weigh the costs to potential intervenors and the agency itself. The problem is that the least resourceful, most unorganized interest may have the greatest stake in a decision. The issue thus is whether and under what circumstances the agency should *facilitate* intervention by such an interest.[16]

Commentators have assumed that any changes in agency procedures will result in substantive policy changes.[17] The actual effects of such changes, however, may be agency-specific.[18] Therefore, the impact of changes in judicial, statutory, or agency procedures on its policies should be assessed in relation to a particular agency, its clientele, and its functions.[19] The balancing of competing interests may result in only minor substantive changes; for example, the cost barrier to nonclientele interests may preclude intervention in situations where the regulated client is likely to seek appellate review of unfavorable agency decisions. In addition, the regulated clientele may exert pressure on other political institutions to offset any substantive policy changes.

Despite these problems, intervenors and other affected parties are placing increased pressure on agencies to accommodate their claims.[20]

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16. For a discussion of one kind of agency facilitation—funds for impecunious intervenors, see Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975).

17. *See* note 6 *supra* and accompanying text. *See also* Stewart, *supra* note 2, at 1776.

18. Gellhorn, *supra* note 6, at 388-89.

19. The actual impact will probably depend on an intensely political process within the agency in which the various clientele interests, both new and established, will seek to have the agency balance one set more heavily than the others, and thus use procedural innovations to specific interest advantage. Stewart, *supra* note 2, at 1790. For the thesis that regulatory agencies make decisions which cause the least amount of disturbance in the political system, see R. NOLL, *supra* note 6, at 40-45. *See also* Lazarus & Onek, *supra* note 3, at 1071; McLachlan, *Democratizing the Administrative Process: Toward Increasing Responsiveness*, 13 ARIZ. L. REV. 835 (1971).

20. *See* note 14 *supra* and accompanying text. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), suggests that conservationists with an aesthetic interest in the agency decision may intervene. National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970), suggests that the beneficiaries of agency operation should be allowed to intervene in formal proceedings. There is no clear indication, however, that such intervention is required in

As these groups gradually obtain the resources to pursue their claims in the courts or legislature, the regulatory agencies will be forced to consider their interests in reaching decisions, or be faced with repeated, costly, and often successful appeals. Thus, agencies may eventually adjust their status quo orientation in response to the pressures from intervenors and other decision-making institutions.

Although appellate courts[21] are now exerting pressure on agencies to expand their decisional processes to include certain nonclientele interests, they appear to be acting without clearly defined goals.[22] This Article will examine the recent court-mandated procedural changes of one regulatory agency—the Federal Communications Commission (FCC).[23] Using empirical data, the Article will study the effect of the FCC's efforts to remedy complaints about its processes on its operation. Unfortunately, because each agency has its unique clientele, sovereigns, and subject matter jurisdiction, a case study such as this can provide no basis for generalizations. The author hopes, however, that such an empirical study will provide a sound foundation upon which to evaluate efforts to change one agency's procedures, and subsequently, its decisions.[24]

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informal, agency-clientele negotiations, although they might affect the intervenor's interest as much as a formal hearing.

21. The Supreme Court has not directly dealt with the question of intervention in agency proceedings. The cases most on point are the standing cases: Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and the recent decision relating to the allocation of intervention-litigation costs among parties to such a case: Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

22. The District of Columbia Circuit Court of Appeals did state that the groups eligible to intervene must be "responsible and representative." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966). The only other indication given by the court in this opinion was that such intervenors usually concern themselves with a wide range of community problems, and represent broad rather than narrow interests—public rather than private or commercial interests. The court sought to meet the need of providing "a means for reflection of listener appraisal of licensee's performance as the performance meets or fails to meet the licensee's statutory obligation to operate the facility in the public interest." *Id.* at 1006.

23. *See* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969); notes 67-70 *infra* and accompanying text.

24. Thomas, *supra* note 8, suggests that empirical studies provide a basis for theoretical discussion, because without empirical data, any suggestion might seem successful until it faced the test of real world application. Once it is put into operation, and tested, it may quickly fail. Freedman, *supra* note 2, presents an essay on the fundamental complaints regarding agencies. It appears that the remedy of broadened public participation which will be examined here, carries no guarantee as a solution to the prob-

II. THE CONTEXT OF FCC OPERATION

A. *Functions and Authority of the FCC*

The FCC was created in 1934[25] to regulate two separate aspects of communications: spectrum management, formerly lodged in the Federal Radio Commission, and interstate communications common carriers, originally assigned to the Interstate Commerce Commission. The Commission was granted power to regulate communications common carriers in order to prevent these natural monopolies from setting monopolistic prices.[26] Advocates of agency regulation argue that a single supplier should be permitted to provide a service in cases where competition would result in costly duplication of heavy capital investment services.[27] Although its assumptions have been challenged,[28] this theory of natural monopolies continues to be the basic justification for the Commission's regulatory power.

Unlike the Social Security and Veteran's Administrations which supply benefits to the recipient groups, the FCC has the authority to grant licenses to and approve the tariffs for various communications carriers.[29] In addition, the Commission has jurisdiction to approve construction permits for interstate communications systems[30] and to regulate the development and use of international communications. With the emergence of satellite communications in the past fifteen years, the FCC has become the center of international[31] and domestic satellite communications systems through the licensing of INTELSAT and DOMSAT users.[32]

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lems. The public participation solution seems to be simply the most visible of several current "remedies" for the problems which people find in agency decisions and policy directions.

25. The Communications Act of 1934, as amended, 47 U.S.C. § 301(f), Title II; 47 U.S.C. §§ 201-223 (1970), relates to common carrier regulation.

26. *See* 2 A. KAHN, THE ECONOMICS OF REGULATION ch. 4 (1971); Posner, *supra* note 4.

27. *See* notes 2 and 4 *supra* and accompanying text.

28. Posner, *supra* note 4.

29. 47 U.S.C. §§ 201, 203, 204, 205 (1970).

30. 47 U.S.C. § 214(a) (1970).

31. Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744 (1970). This statute gives the FCC jurisdiction over various aspects of communications satellites. *See* 47 U.S.C. § 721 (1971).

32. R. NOLL, M. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973); M. SNOW, INTERNATIONAL COMMERCIAL SATELLITE COMMUNICATIONS: ECONOMIC AND POLITICAL ISSUES OF THE FIRST DECADE OF INTELSAT (1976).

One of the Commission's recent and most significant policy efforts has been to inject some competition into the common carrier industry.[33] In certain long-distance communications services, the Commission now favors competition among the common carriers.[34] The entry of a small, specialized carrier into the market previously allocated to a single carrier, American Telephone and Telegraph Company (AT&T) was heralded as a major substantive policy change in the late 1960s.[35] AT&T, however, immediately undertook the development of new technology that would enable it to provide the same low use, low cost service offered by the challenger. Such behavior illustrates the economic and political power of the vested interest clientele vis-a-vis the new entrant and the agency; their superior technological resources often enable them to offset or diminish the effects of even major agency policy changes.[36]

The Commission's second major responsibility is to regulate private and commercial domestic broadcasting.[37] Because the radio spectrum is a limited, exhaustible public resource,[38] the Commission authorizes the construction of broadcasting facilities,[39] licenses the actual broadcast user, and allocates specific portions of the electromagnetic spectrum to these users.[40] The Commission regulates the frequency,[41] power,[42] and kinds of transmissions such broadcasters may engage in.[43]

Although the FCC is most visibly concerned with mass media broadcasting, there are many other broadcast users who depend on license

33. Cox, *The Federal Communications Commission*, 11 B.C. INDUS. & COM. L. REV. 595 (1970).

34. *See* Microwave Communications, Inc., 18 F.C.C.2d 953 (1969). The Commission authorized the construction of a second microwave system between St. Louis and Chicago to compete with the AT&T long-line system already in operation. The competing service would be used primarily by small computer users, who could not afford a complete AT&T leased line because of the low volume of transmissions and the high cost of the leased line.

35. Cox, *supra* note 33.

36. *See* PROMOTING COMPETITION IN REGULATED MARKETS, *supra* note 3; Shepherd, *The Competitive Margin in Communications* in TECHNOLOGICAL CHANGE IN REGULATED INDUSTRIES (W. Capron ed. 1971).

37. 47 U.S.C. §§ 301-330 (1971).

38. H. LEVIN, *supra* note 4, presents a well developed outline of this resource scarcity and suggests proposals for allocation.

39. 47 U.S.C. § 319 (1970).

40. 47 U.S.C. § 301 (1970).

41. 47 U.S.C. § 303(c) (1970).

42. 47 U.S.C. § 303(f) (1970).

43. *E.g.*, 47 U.S.C. §§ 303(b), 325 (1970).

allocation from the Commission for the continued success of their businesses.[44] For example, taxi companies and other land-mobile operators rely heavily on radio communications to operate their businesses. Many services, both emergency (ambulance and law enforcement) and commercial (delivery and transportation), would be unable to perform effectively without such communications. These hundreds of thousands of commercial users compete for limited spectrum space and create a variety of allocation and clientele problems for the Commission. These users cannot operate without licensure by the FCC, yet the Commission must weigh their demands against those of other important users.[45]

Given the technological limitations of the spectrum and its usage, the Commission has devoted most of its effort to making a few major allocation decisions. These include bandwidths for television[46] and AM and FM radio channels as well as frequency allocation tables. These tables specify the broadcasting channels available to a particular applicant in a specific geographic region of the country.[47] Having made these fundamental decisions, the agency concerns itself with the license applications of individuals who seek to operate within the guidelines established by the agency, or who desire a waiver of an established rule. These basic allocation decisions may have profound effects on the development of an industry. For example, the FCC reallocated the FM broadcasting frequencies in 1945 and permitted the then experimental VHF television allocations to become permanent assignments. Some observers feel this early allocation retarded FM broadcasting at such a critical juncture in its development that the industry will never fully recover.[48]

Often the decision on a particular license application has far reaching ramifications. Thus, the denial of a license renewal application for WHDH in Boston in the late 1960s[49] resulted in a major legislative

44. For an example of the Commission's regulations relating to some of these special users, see 47 C.F.R. Parts 89 and 93 (1976).

45. *See* H. LEVIN, *supra* note 4, at 129-37, 205-15.

46. 47 C.F.R. §§ 2.106, 2.202 (1976).

47. 47 C.F.R. Part 73, subparts A and B (1976).

48. E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION ch. 5 (1973).

49. 16 F.C.C.2d 1 (1969). One example of this is the area of broadcast license renewals where the FCC has substantially altered the position of the incumbent in obtaining a renewal. This has not always been successful, as the Congress can and does

effort by the established broadcasters. Although these efforts to restore the licensing procedure that favored the renewal applicant[50] failed, the FCC was forced into a defensive position and eventually retreated from its WHDH decision.[51] It now appears that an established broadcaster can expect favorable consideration of his renewal application unless some major failing is brought to the attention of the agency.[52]

Occasionally the fundamental allocations established by the Commission have been challenged. Land-mobile radio users, for example, have recently sought to obtain larger spectrum ranges for their uses. The problem these interests face, however, is that, although not currently in use, much of the spectrum sought has been allocated and *reserved* for particular clients. Thus, a major portion of the UHF spectrum is reserved for television broadcasters even though few of the license allocations have been taken because of economic and technical constraints. As a result, some potential users will not be licensed because their use does not conform to the agency's primary determination regarding that portion of the spectrum. Although commercial and emergency land-mobile users have made small gains in the vast areas of the UHF spectrum,[53] clientele broadcasting interests have opposed these changes and the agency has been unwilling to permit wholesale encroachment by others into its general plan for spectrum usage.

The Commission has also come under substantial pressure from certain broadcast interests to regulate cable television systems.[54] The Commission initially held that CATV was not a common carrier and

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get involved. Nevertheless, the WHDH case in Boston was a major adjustment of the status quo through a renewal adjudication.

50. *See* Everett, *FCC License Renewal Policy: The Broadcasting Lobby Versus the Public Interest*, 27 SW. L.J. 325 (1973); Goldin, *"Spare the Golden Goose"—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Comment, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854 (1969); Comment, *Public Participation in License Renewals and the Public Interest Standard of the FCC*, 1970 UTAH L. REV. 461.

51. *See* Everett, *supra* note 50; Goldin, *supra* note 50.

52. *See* Everett, *supra* note 50; Goldin, *supra* note 50.

53. *E.g.*, Channel 1 of the VHF television broadcast spectrum is completely occupied by mobile users—there are no Channel 1 TV broadcast stations in this country. Also, some small segments of the UHF spectrum have been given to these mobile users.

54. There are various treatments of CATV or Cable Television, and its regulation. One of the more comprehensive is REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971).

therefore the FCC did not have jurisdiction over it.[55] Furthermore, it doubted whether it had jurisdiction to regulate cable under the "broadcast" provisions of the Communications Act of 1934 because CATV systems did not use the airwaves to broadcast, and did not have to seek licenses for broadcasting.[56] The Commission petitioned Congress for authority to regulate cable, but was denied this power. As a result of mounting clientele pressure, however, the FCC gradually began to regulate cable television systems in the early 1960s.[57] The Supreme Court ultimately approved the FCC's action on the basis of the Commission's "ancillary jurisdiction";[58] control of cable television, the Court reasoned, was necessary to achieve the Commission's general policy objectives.[59] In view of the Court's endorsement, the Commission entered the regulation of CATV systems energetically in the late 1960s and issued its first comprehensive set of regulations in 1972.[60]

B. *FCC Clientele and Sovereigns*

Although a substantial amount of literature exists which discusses the relationship between an administrative agency and the business interests it regulates,[61] the generalizations do not necessarily describe the actual dynamics within a specific agency.[62] For example, the FCC is

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55. Frontier Broadcasting Co., 24 F.C.C. 251 (1958).

56. D. LEDUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL ch. 5 (1973).

57. Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

58. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

59. The Supreme Court cited and quoted 47 U.S.C. § 301 (1970):

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a *rapid, efficient, Nation-wide*, and worldwide wire and radio communication service . . . . (emphasis added).

60. For the current CATV regulations under which the FCC deals with CATV, see 47 C.F.R. Part 76 (1976).

See Cohen, *Regulatory Report/Broadcast, Cable Industries Face Off on Cable Reform Plan*, 1976 NAT'L J. 159; SUBCOMM. ON COMMUNICATION OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE (Subcomm. Print 1976).

61. *See* notes 7-10 *supra* and accompanying text.

62. *See* Wilson, *supra* note 10, for an enlightened discussion to the effect that the particular agency, clientele, and statute may be structured to benefit the clientele, but not because of any conspiracy. Rather, the agency may be created at the behest of the industry to rationalize or systemize an otherwise chaotic allocation process. Wilson suggests, with good historical support, that this is a basic element in the creation and operation of the FCC.

charged with regulating a clientele that includes large communications carriers, small broadcasters, trade associations, and specialized groups of users. These actors present the agency with a diverse range of controversies; they also provide it with various kinds of technical and political support.

1. *Clientele*

There are two major categories of FCC clientele: the communications services, both common carriers and broadcasters, and the organizations that represent their respective interests. The common carrier clientele includes the powerful industry giants such as AT&T, Western Union, ITT, and COMSAT, as well as the weaker, but often judicially protected, challengers such as Microwave Communications, Inc.[63] The broadcasters consist largely of small, individual or chain operations which seek to protect their own licenses, as well as the general interests of AM and FM radio, and VHF and UHF television. These groups are also represented by general broadcast organizations such as the National Association of Broadcasters, and specialized broadcast groups such as the National Association of Business and Education Radio.

In addition to these regular clients, other groups occasionally appear before the agency to protect their interests. Equipment manufacturers, for example, have an obvious interest in advocating policies that expand the markets of their own clients. Thus, mobile radio equipment manufacturers have actively sought greater spectrum allocations for land-mobile communications, and electronics and communications companies have benefited greatly from participating in the Commission's allocation decisions.

The interest of the general public has recently achieved greater access to agency proceedings through representation by various citizen groups. Although the agency itself is charged with protecting the public interest,[64] courts have facilitated participation by an increasing range of public interest groups because of dissatisfaction with agency performance.[65] In *Office of Communication of the United Church of Christ v.*

63. *See* note 34 *supra* and accompanying text.

64. 47 U.S.C. §§ 205(a), 302(a) (1970).

65. *See* note 14 *supra* and accompanying text. *See generally* D. GUIMARY, CITIZENS' GROUPS AND BROADCASTING (1975); Botein, *Citizen Participation in the Regulation of Cable Television*, 24 CATH. U.L. REV. 777 (1975).

FCC,[66] the Court of Appeals for the District of Columbia clearly expressed its concern that the FCC was only capable of representing the interests of those whom it regulated. In *United Church* two citizen groups, a local church and a national church organization, petitioned to intervene in a television license renewal hearing. Both groups alleged racial and religious discrimination, excessive commercialization, and violation of the Fairness Doctrine.[67] The FCC denied the petition and granted a provisional, one-year renewal.

In reversing the Commission's decision, the court of appeals held that "responsible" representatives of television viewers were entitled to participate in agency proceedings.[68] The court reasoned that although the FCC was given the statutory duty to decide issues in the "public convenience, interest, or necessity,"[69] it was impossible for the agency to perform that function entirely by itself. Therefore, the court concluded that the agency would benefit from participation by responsible groups representing public interests.[70]

2. *Sovereigns*

"Sovereigns" refers to those institutions that exert political, legislative, or judicial control over administrative agencies.[71] Each of the three branches of government has authority over the FCC. The precise nature of that authority, however, varies considerably with the institution.

Congress exerts the most extensive control over the FCC. It created the agency, provided it with its original jurisdiction,[72] and has subse-

66. 359 F.2d 994 (D.C. Cir. 1966).

67. The "Fairness Doctrine" imposes affirmative responsibilities on the broadcaster to provide coverage of issues of public importance that adequately and fully reflect differing viewpoints. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

68. 359 F.2d at 1003.

69. *See* note 64 *supra.*

70. 359 F.2d at 1005. Such consumers "are likely to be the only ones 'having a sufficient interest' to challenge a renewal application."

71. For a discussion of agency "sovereigns" such as the executive branch, or congressional committees or subcommittees which have some political or statutory control over agency operations, see A. DOWNS, INSIDE BUREAUCRACY (1967).

72. In the case of the FCC this is the Communications Act of 1934, as amended, 47 U.S.C. § 301(f) (1970).

quently passed various amendments altering the agency's power.[73] In addition, Congress exercises a variety of influential oversight functions.[74] Congressional committees and subcommittees[75] annually review and approve the agency's budget, and investigate specific issues or policies. These oversight powers are effective tools for influencing agency operations and decisions.[76]

In contrast, the executive branch exerts influence over general policy matters. The most obvious example of this is the presidential appointment of FCC members.[77] The agency is comprised of seven commissioners—including a chairman designated by the President—each serving a seven-year term.[78] A comparison of the laissez-faire approach of the Eisenhower appointees with the aggressive regulatory policies of the Kennedy Commissioners demonstrates the tremendous influence of the Commissioners' regulatory philosophies on substantive agency policy.[79] Furthermore, executive agencies and task forces often formulate substantive policy positions which the President recommends for agency action.[80] Such recommendations have varied historically from policy suggestions to presidential directives.[81]

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73. *See, e.g.*, Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744 (1970); All-Channels Receiver Act, 47 U.S.C. § 303(s) (1970).

74. *See* Krasnow & Shooshan, *supra* note 11.

75. In particular, these are: the Senate Communications Subcommittee of the Commerce Committee, formerly chaired by John Pastore (D.R.I.) and the Communications Subcommittee of the House Interstate and Foreign Commerce Committee formerly chaired by the late Tobert MacDonald (D. Mass.).

76. *E.g.*, the deintermixture controversy of the late 1950s and early 1960s shows this direct constituent influence on specific legislators. R. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS: A CASE STUDY OF REGULATION OF CABLE TELEVISION (1975); E. KRASNOW & L. LONGLEY, *supra* note 48. The current debate over the deregulation of CATV systems, *supra* note 60, illustrates the influence of the Subcommittee in issuing critical reports on agency policy.

77. 47 U.S.C. § 154(a) (1970); SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES: THE FEDERAL COMMUNICATIONS COMMISSION AND THE FEDERAL TRADE COMMISSION 1949-1974 (Comm. Print 1976) [hereinafter cited as APPOINTMENTS].

78. 47 U.S.C. § 154(a) (1970).

79. APPOINTMENTS, *supra* note 77, at 380.

80. Note 60 *supra*. Prior to the Nixon Administration, President Johnson used the task force approach to explore problems in Communications. *See* FINAL REPORT ON THE PRESIDENT'S TASK ON COMMUNICATIONS POLICY (1968).

81. R. BERNER, *supra* note 76, ch. III; Besen, *The Economics of the Cable Television 'Consensus'*, 17 J.L. & ECON. 39 (1974); *See* 47 C.F.R. Part 76 (1976); Appendix C of *Cable Television Report and Order*, 36 F.C.C.2d 143, 260 (1972). *See also* Appendix D, 36 F.C.C.2d at 284.

In the past decade the judiciary has played an increasing role in shaping the contours of FCC policy and procedure. By extending standing to public interest groups, courts have attempted to ensure broader participation in agency proceedings. Likewise, by affording members of the general public judicial review of agency action, interests formerly unrepresented are now judicially protected.

Appellate courts have also rendered decisions affecting the agency's substantive policies. In a series of decisions, the Court of Appeals for the District of Columbia[82] has required that anti-smoking messages by the American Cancer Society be allowed free air time,[83] and that broadcasters provide pro-environmental statements to balance the advertisements of automobile manufacturers and retail gasoline distributors.[84] In addition, the courts have been instrumental in defining the statutory limits of the Commission's jurisdiction.[85] Decisions upholding the agency's power to regulate CATV systems[86] and to regulate and promulgate rules with respect to the entrance of communications common carriers into the nonregulated field of data processing[87] illustrate the judiciary's willingness to expand FCC jurisdictional authority even in the absence of explicit statutory provisions.

C. *FCC Institutions and Processes*

The structure of the agency itself influences its decisional processes. The FCC has developed a series of steps for deciding cases depending on several factors. Thus, as a case raises more fundamental questions or becomes more controversial and the numbers and kinds of parties increase, agency procedures become more elaborate.

1. *Agency Organization.* As Figure I illustrates, the Commission is currently composed of four subject matter bureaus, outlining the major areas of agency business, and one enforcement bureau.[88] The Safety

82. 47 U.S.C. § 154(e) (1970) provides that the Commission's principal office shall be located in Washington, D.C.

83. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

84. Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971).

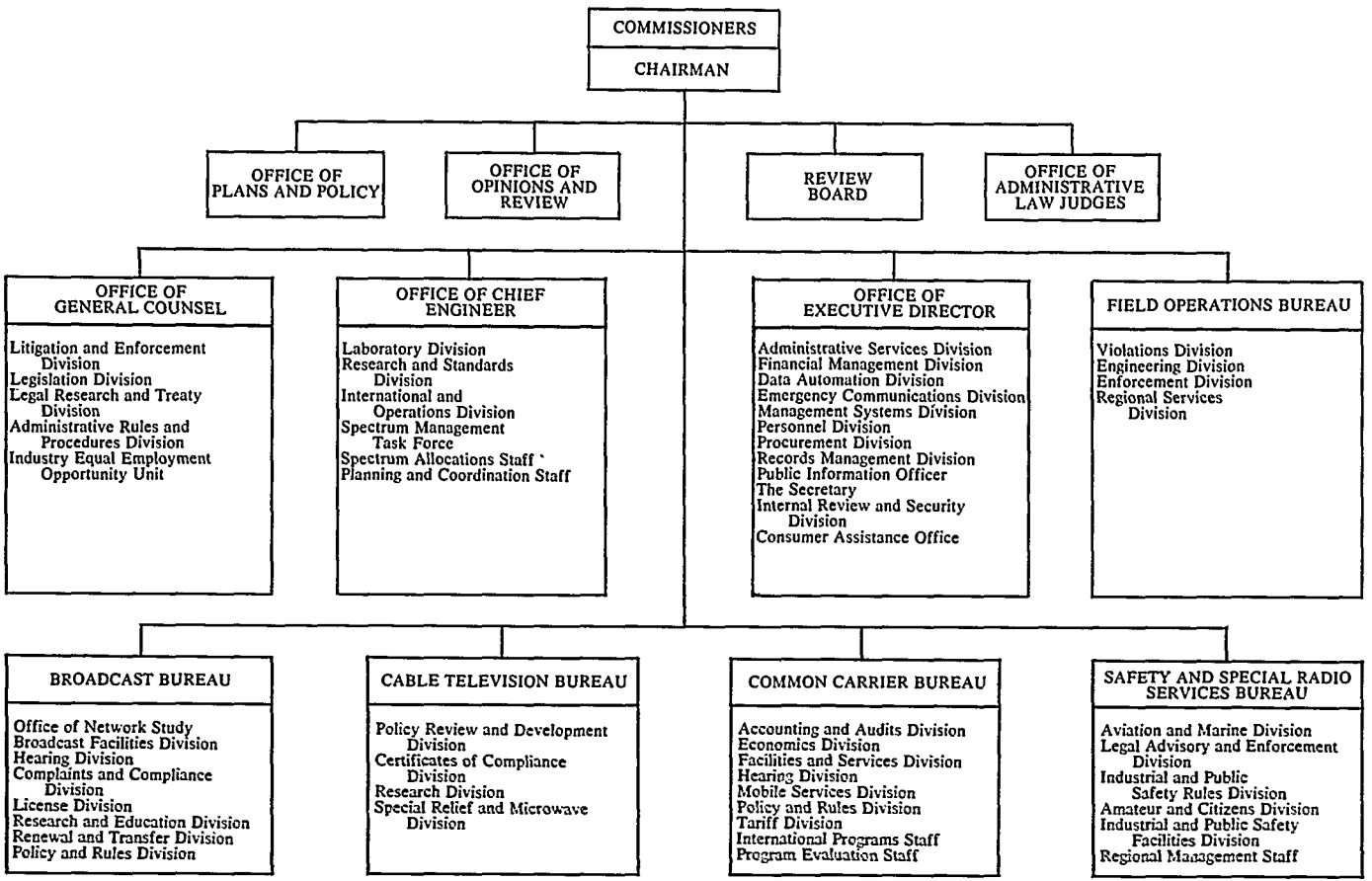
85. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); *see* text accompanying note 58 *supra.*

86. *Id.*

87. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

88. For a discussion of the current organization of the FCC, see W. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS ch. 4 (1971). A list of those occupying the bureaucratic leadership positions can be obtained by consulting the current FCC Annual Report.

Figure I. Organizational Diagram of FCC



and Special Radio Services Bureau, which considers the license applications of amateur radio operators and the many individual spectrum users who require radio communications for their businesses, processes the largest volume of FCC work.[89] The Broadcast Bureau, the most specialized division within the agency, grants licenses and approves construction permits for domestic commercial broadcasting systems. The Common Carrier Bureau, assigned to regulate interstate common carriers, establishes telephone tariffs and authorizes the construction of long-distance communications.[90] Finally, the Cable Bureau, the newest agency organization, regulates CATV system development.[91]

2. *Decisional Parameters.* The FCC has developed a series of procedures designed to streamline the decision-making process by allowing most applications to be routinely processed or summarily decided.[92] When application is made to the agency, the appropriate bureau initially determines whether the case is routine or requires specific consideration by the Commission. Routine matters are disposed of by the bureau's staff in a manner consistent with established policies and decisions,[93] while cases presenting important issues are considered by the Commission.[94] The staff may either present the specific case to the Commission at its weekly meeting for discussion and approval of recommended action, or propose that the agency establish a general policy for deciding similar cases in the future. When a particular case is designated for a Commission hearing, the Office of Opinion and Review gains administrative authority over the case, and the Commis-

89. Johnson & Dystel, *A Day in the Life: The Federal Communications Commission*, 82 YALE L.J. 1575, 1589 (1973).

90. For a description of a major undertaking by the Common Carrier Bureau in the mid-1960s, see COX, *supra* note 33, at 673-74. *See also* M. IRWIN, THE TELECOMMUNICATIONS INDUSTRY: INTEGRATION VS. COMPETITION ch. 5 (1971).

91. For a discussion of the emergence of the Cable Bureau, after having been an agency task force for some time, see R. BERNER, *supra* note 76, ch. IV. Berner also discusses the substantial influence which the Cable Task Force and Bureau had on the development of FCC policy toward CATV in the late 1960s and early 1970s.

92. *E.g., Summary Decision Procedures*, 34 F.C.C.2d 485 (1972); 47 C.F.R. § 1.251 (1976).

93. For a description of institutional decisions and the legal questions relating to them, see K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 11 (1958).

94. Johnson & Dystel, *supra* note 89, provides a comprehensive, if critical, view of the agenda process by which items surface for Commission consideration. R. BERNER, *supra* note 76, ch. IV, outlines the manner in which the staff can manipulate the agenda to achieve its own, rather than the Commission's, policy objectives.

sion policy controls. The relevant bureau becomes a party in the hearing, and presents evidence supporting its own policy position.

The Commision has also created a Review Board composed of agency staff members which has substantial power to consider interlocutory decisions made by Administrative Law Judges and to deal with other routine questions.[95] Although analysis of the Review Board's work is sketchy, it appears that the Board is able to serve the Commission adequately on several matters that would otherwise require Commission consideration.[96]

3. *Decisional Processes.* The decision-making process used in a particular case will depend on the uniqueness of the question presented; whether the staff has been given policy guidelines or believes that it can make the decision;[97] whether there are intervenors or other challengers; whether a waiver of agency rules is requested; and whether the Commission wants to consider the particular case on its merits, or as part of a larger policy question. For example, almost all requests for amateur radio operator's ("ham") licenses and Citizen Band applications are handled routinely by the agency staff according to the general policy outlines established by the Commission. These policies, regarding the electromagnetic spectrum allocations for such operations, are published in the Federal Register and are available to the public.

The licensing of commercial broadcast stations is also usually handled routinely by the agency staff. Because the Commission has established criteria for both the initial issuance and renewal of licenses,[98] the staff can easily apply the criteria to the particular applicant and reach a decision. The Commission is required to make a decision only when the applicant does not meet all the criteria and seeks a waiver, or when important general policy questions arise.[99]

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95. 47 C.F.R. § 0.161 (1975). For a discussion of the operation of the Review Board, its purposes, and its early accomplishments, see Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969). *See also* Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325 (1968).

96. Freedman, *supra* note 95.

97. *See* Johnson & Dystel, *supra* note 89.

98. 47 U.S.C. § 307(d) (1970). For a description of these criteria, see W. EMERY, *supra* note 88, ch. 13.

99. A license renewal may be treated by the Commission itself if there is a challenge to the renewal, or if the application has any other unique characteristic. The

Although most cases are resolved through the informal processes described above, some requests require formal agency consideration. There are two kinds of formal Commission action. An individual hearing may be provided in cases involving unique problems, such as a challenge to a license renewal or a request for a waiver of a Commission rule. Alternatively, a formal agency rulemaking proceeding will be held where several cases pose similar problems. Figure II illustrates the decisional spectrum on which a particular case or a general policy issue might be placed during FCC consideration. At the left end of the spectrum, an individual application is routinely processed by the agency staff. The majority of agency business falls within this portion of the spectrum. The right end of the continuum contains cases that can be considered either in an individual hearing or agency rulemaking proceeding. Few cases actually reach the formal consideration stage. The middle region of the spectrum involves cases brought to the Commission's attention by the staff because either a unique question is raised, or there exists no clear policy directive from the Commission. The staff usually recommends a preferred disposition, which the Commission generally approves.[100] Thus, even in cases raising special problems, the staff exerts a substantial influence on the Commission's final resolution of the case. The majority of business before the FCC, therefore, is controlled by the agency staff either acting upon Commission guidelines or its own expertise.[101]

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challenge may come from two distinct sources. First, a competitor may seek to have the license granted to him, and denied to the incumbent. This may result in a complex comparative hearing. *See* Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings,* 43 U. CHI. L. REV. 573 (1976).

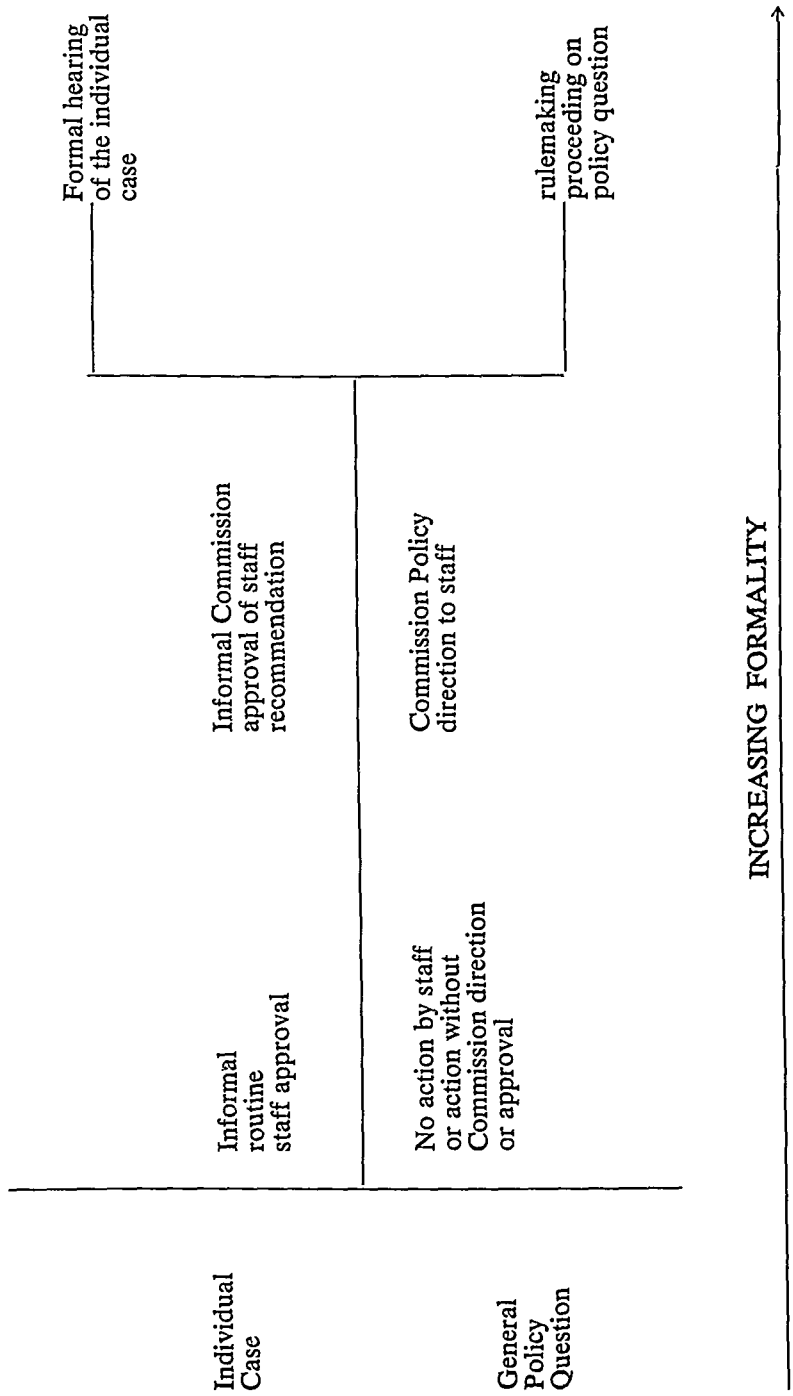
The competitive hearing process has been criticized recently because the criteria the Commission uses may not be very coherent or rational, and because the incumbent broadcasters and their interest groups have sought economic and license protection from the agency, the courts, and the Congress. For a good, current analysis of these efforts, see *Id.*

The second source of a challenge to renewal is the presence of a citizen's group intervenor from the broadcast area. Such an effort does not result in a competing application for the license or the comparative hearing. Nevertheless, it does require individual Commission attention as a result of the decision in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

100. For a good description of the weekly agenda and meeting which is the process involved in the middle region of Figure II, see R. BERNER, *supra* note 76; Comment, *supra* note 99.

101. *See* Johnson & Dystel, *supra* note 89.

Figure II. Spectrum of FCC Decisional Procedures.



III. Federal Communications Commission Business

This section of the study focuses on an empirical examination of the business with which the FCC deals. Although debate about the agency and its clientele demonstrates the need for such an undertaking, few discussions present such an analysis. Yet without empirical data, statements regarding the impact of intervenors on agency decisions or the truth of the clientele-capture theory[102] can only be evaluated on an impressionistic level.

The study examines the purposes and degree of success of the parties who use the agency. It also explores the outcome of particular requests presented to the Commission in order to examine the clientele-capture thesis. A final series of questions concerns the reasons for the kinds of cases, parties, and outcomes documented.

A. *The Data*

The data base of this study is composed of those cases decided by the Commission or its Review Board and published in the official Federal Communication Reports for Fiscal Year 1972 (585 cases).[103] A random sample (85 cases) of those cases reported for Fiscal Year 1974 was also taken as a means of exploring possible changes in agency operation during the early 1970s. The 585 reported cases represent over fifty-seven percent of all cases decided in 1972. The remaining cases are only noted generally in the Reports and data from them could not be collected. The study also does not include those unreported cases informally resolved by the staff.

The cases analyzed below represent questions that the staff could not routinely decide and thus fall in the middle or on the right-hand side of the spectrum presented in Figure II. Although they represent only a small proportion of the total FCC business, they clearly are the issues and cases that presented important policy questions which the Commission or Review Board was required to decide.

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102. *See* notes 7-10 *supra* and accompanying text.

103. In the subsequent discussion, Fiscal Year 1972 will be referred to as 1971/72, and Fiscal Year 1974 will be 1973/74.

104. The Review Board decided 405 and 423 interlocutory appeals for 1971/72 and 1973/74 respectively. Personal correspondence from Aston R. Hardy, FCC General Counsel, December 2, 1975.

B. *Cases and Parties*

In describing the general features of the Commission's work for the two years here studied, several characteristics should be noted. First, the Commission, rather than its Review Board, decided approximately seventy-five percent of the reported cases. This is largely because much of the Review Board's work involves consideration of routine interlocutory matters[104] which are not reported.[105] Secondly, although the Review Board disposes of most interlocutory matters that arise during hearings before administrative law judges, the data suggest that about eight to ten percent of the Commission's cases concern interlocutory decisions. Nevertheless, the fact that the Commission reversed very few of the Review Board's decisions on interloctuory matters during the two years under study (two of 405 and one of 423 respectively)[106] illustrates the Commission's reliance on the work of its Review Board.

The kinds of cases treated by the FCC for the period studied are outlined in Table 1. The most important figures relate to the percentages in each category for each year, and the relative percentage changes between the two years under examination.

Table 1 Categorization of FCC Business by Type of Case and Year*

Type of Case	Year 71/72 (N)	71/72 %	73/74 (N)	73/74 %	Total (N)	Total %
Construction Permit	(52)	8.9	(9)	10.6	(61)	9.1
Petition	(379)	64.8	(48)	56.5	(427)	63.7
Licenses	(50)	8.5	(5)	5.9	(55)	8.2
Liability	(38)	6.5	(8)	9.4	(46)	6.9
Complaint	(18)	3.1	(0)	——	(18)	2.7
Rate Revision	(11)	1.9	(1)	1.1	(12)	1.8
Cease & Desist	(7)	1.2	(5)	5.9	(12)	1.8
Distant Signal	(24)	4.1	(9)	10.6	(33)	4.9
Interim Authorization	(6)	1.0	(0)	——	(6)	.9
Total	(585)	100.0	(85)	100.0	(670)	100.0

*Source: Appropriate volumes of FCC Reports.

105. The number of Review Board cases reported in 1973/74 is not useable here because there is no way of determining, from the sample, the total number of cases.

106. *See* note 105 *supra.*

Construction Permits involve the Commission's initial permission for a broadcaster to begin construction of a broadcast facility, or alter existing operating facilities.[107] A Petition seeks a particular, unique disposition of the case from the Commission, and often includes such things as waivers of the Commission's rules, interlocutory matters during the course of the trial, or petitions to deny a license renewal application. The majority of cases before the Commission and the Board during the two years involved such petitions. A License Request occurs after a broadcast facility has been constructed and broadcasting is ready to begin. This category includes requests for license transfers to new owners of broadcast stations as well as license renewals. License permits also must be obtained by non-broadcast services such as land-mobile and emergency vehicle operations. Because not all stations that receive construction permits enter into operation, there is some discrepancy between the number of requests for construction and license permits.

The remaining categories in Table 1 account for a relatively small proportion of the Commission's work. Liability involves the Commission's assessment of fine and forfeiture provisions for violations of the Commission's rules and regulations.[108] The increase in the number of cases in 1973/74 may indicate that the Commission is now devoting more time to policing and sanctioning broadcasting violations. Complaints involve the raising, by a listener, competitor, or alternative user, of some question about the behavior of a licensee. The small number of these cases in 1971/72 and their disappearance in 1973/74 is not significant[109] because most complaints are treated informally and are settled through an understanding or agreement. Thus, they rarely reach the Commission's hearing stages. Rate Revisions involve common carrier requests for changes in their interstate tariffs, and as indicated in Table 1, constitute a relatively small portion of the Commission's business.[110] Cease and Desist Orders are another enforcement element of the Commission's authority.[111] Again, the increased proportion of these cases in 1973/74 may indicate that the

107. W. EMERY, *supra* note 88, ch. 15.

108. 47 U.S.C. §§ 502, 510 (1970).

109. For treatment of the agency's handling of informal complaints, see Canon, *The FCC's Disposition of 'Fairness Doctrine' Complaints*, 13 J. BROADCASTING 315 (1969).

110. Johnson & Dystel, *supra* note 89.

111. *Id.*

Commission is more willing to exercise its formal, enforcement powers over broadcast violations. The Distant Signal category relates to CATV systems and permission to import distant signals. During 1971/72, CATV operators were required to get authorization from the Commission before importing distant signals. In 1973/74 the CATV operator had to obtain a Certificate of Compliance before commencing operation. The increase in these cases during this latter period reflects the Commission's 1972 rules regarding CATV operation, and the increased effort by CATV to expand into new markets by obtaining such Certificates. As the data suggest, CATV cases constituted an increasing portion of Commission business during 1973/74, and are expected to become more prominent.

Table 2 FCC Petition Cases Categorized by Type of Petition*

	Year			
	71/72		73/74	
Type of Petition	(N)	% of total cases	(N)	% of total cases
Petition relating to rules	(93)	15.9	(15)	17.7
Previous Orders	(140)	23.9	(18)	21.2
Issues in Case	(74)	12.6	(12)	14.2
Time Extension	(16)	2.7	(3)	3.6
Total	(323)	55.1	(48)	56.7

*Source: Appropriate FCC Reports.

The largest category of Commission business according to Table 1 is the Petition seeking particular Commission treatment of a case. Table 2 presents a breakdown of Petition cases. The data indicate that most petitions relate to orders previously issued by the Commission or the Review Board in the same case. Thus, these petitions are generally interlocutory orders. Petitions regarding Commission rules focus largely on waiver of the rules, and these cases comprise at least fifteen percent of the Commission's formal business. This suggests that the Commission devotes considerable time to considering the granting of waivers of established rules. Issues-in-the-Case also relates to interlocutory matters, and includes petitions to deny as well as petitions either to include or exclude certain parties or issues from the case.

Table 3 FCC Cases Categorized by Type of Party and Year*

Type of Party	Year 71/72 (N)	71/72 %	73/74 (N)	73/74 %	Total (N)	Total %
Common Carrier	(65)	11.1	(9)	10.6	(74)	11.0
TV Broadcaster	(156)	26.7	(13)	15.3	(169)	25.2
Radio Broadcaster	(216)	36.9	(36)	42.4	(252)	37.6
CATV	(56)	9.6	(14)	16.5	(70)	10.5
Radio/Microwave Service	(13)	2.2	(4)	4.7	(17)	2.5
Outsider	(56)	9.6	(5)	5.9	(61)	9.1
FCC Bureau	(21)	3.6	(2)	2.3	(23)	3.4
Other (govt. agency)	(2)	0.3	(2)	2.3	(4)	0.6
Total	(595)	100.0	(85)	100.0	(670)	99.9

*Source: Appropriate FCC Reports.

Table 3 presents the proportions and types of parties that have appeared before the Commission in these cases.[112] The percentages in each category for each year loosely correlate with the kinds of cases presented before the Commission. (Table 1) Cases involving Common Carriers, however, include both rate revisions and licensing proceedings. The closest correspondence between parties and cases involves CATV applicants and the Distant Signal category of cases. The proportion of CATV applicants increased nearly seven percent between 1971/72 and 1973/74, and the proportion of Certificate of Compliance cases increased over six percent during the same period.

TV and Radio Broadcasters have traditionally been major agency clients. It is interesting, however, to note the relative proportion of business brought to the FCC by these industries (63.7% in 1971/72 and 57.8% in 1973/74). Thus over half the Commission's business involves a commercial broadcaster as applicant. Common Carriers, CATV applicants, and Outsider applicants each constitute about ten percent of the Commission's business. The category Outsider Applicants includes complaints from individual citizens, public interest groups, and particular organizations—political parties, equipment manufacturers, educational bodies, and local government units—re-

112. Note that throughout this analysis, the actual numbers in cells of the tables are not as important as the percentages or proportions of cases in each cell. The proportional distribution permits comparisons between 1971/72 and 1973/74, and among categories within a year.

questing an FCC order requiring a broadcaster to permit certain programming, or allowing the group or individual access to commercial air time. The percentage of this category for 1971/72 is substantially higher than that for 1973/74. This may indicate that outsiders actually lost access to the Commission during the latter period. It is more likely, however, that because application can be made by any "party in interest," the diminished proportion of outsiders applying may reflect either a lower level of efficacy before the Commission among such groups, or a decline in their need for formal Commission assistance.[113] During both years citizens' groups such as those present in the *United Church* case[114] constituted the primary group of Outsider applicants.

The small proportion of applicants involving Radio/Microwave Service included various mobile users. The primary participants in this category were maritime users of radio frequencies seeking licensing for special purposes. FCC Bureaus (Common Carriers, Broadcast, and Safety and Special Radio Services) initiated a small proportion of the cases; as noted above,[115] they appeared more frequently in Commission hearings as secondary parties. In those few cases involving the staff as an applicant, a bureau has sought to have the Commission establish a general policy that could be applied to subsequent cases. The Other category involves applications by other governmental agencies requesting a particular FCC allocation or permit, usually for either the Department of Defense or the Department of State.[116]

Table 4 FCC Business Categorized by Presence or Absence of Intervenors and by Year*

	Year			
	71/72		73/74	
Type of Intervention	(N)	%	(N)	%
No Intervenor	(225)	38.5	(33)	38.9
1 Intervenor	(300)	51.3	(42)	49.4
More than 1 Intervenor	(60)	10.2	(10)	11.7
Total	(585)	100.0	(85)	100.0

*Source Appropriate FCC Reports.

113. For empirical support for this decline, see J. GRUNDFEST, JR., CITIZEN PARTICIPATION IN BROADCAST LICENSING BEFORE THE FCC 58-60 (RAND Report, R-1896-MF, 1976).

114. 359 F.2d 994 (D.C. Cir. 1966).

115. *See* note 90 *supra* and accompanying text.

116. Coase, *The Interdepartment Radio Advisory Committee*, 5 J.L. & ECON. 17 (1962).

The data presented in Table 4 indicate the proportion of cases in which there were one or more intervenors. For purposes of this table, an intervenor is inclusively defined as any party in a case other than the original applicant. On this basis, there was an intervenor who took a position different from that of the applicant in over fifty percent of the cases, and in another ten percent of the cases there were two or more opponents. Thus, for both years of this study, intervenors were present in more than sixty percent of the reported cases.

The Communications Act of 1934 specifies that "(a)ny party in interest may file with the Commission a petition to deny any application . . . ."[117] Thus, only a party in interest can intervene. The definition of a party in interest, however, is not clear from the statute. Consequently, the Commission can still avoid various kinds of intervention either by refusing to designate a case for hearing,[118] or by refusing to consider a petition to deny because it was filed by a non-party.

The Commission's Rules of Practice and Procedure provide guidelines for intervention.[119] The procedures guarantee that a party in interest may intervene by petitioning within thirty days of publication of notice that a hearing has been scheduled. Other persons may intervene by petitioning within thirty days and persuading the agency in its discretion to permit intervention.[120] Those seeking to intervene after the thirty-day limit must satisfactorily explain their failure to file within the allotted time period. As a matter of practice, the thirty-day limit is rarely waived.[121]

Tables 5a and 5b indicate several important characteristics about intervention. Nearly all intervenors in the study were competitors—Common Carriers, TV and Radio Broadcasters, and CATV. Although the relative percentages among the competitors changed over time, 77.6 and 80.6% of all first-party intervenors were competitors (Table 5a). A different pattern exists for second party intervenors (Table 5b) because the FCC staff frequently appeared as a second in-

117. 47 U.S.C. § 309(d) (1971).
118. Comment, *supra* note 7, at 761-65.
119. 47 C.F.R. § 1.223 (1975).
120. 47 C.F.R. § 1.223(b) (1975). Such intervention can be challenged for abuse, but discretion is generally upheld. *See* WFTL Broadcasting Co. v. FCC, 376 F.2d 782 (D.C. Cir. 1967); Western Conn. Broadcasting Co., 38 F.C.C.2d 977 (1973).
121. 47 C.F.R. § 1.223(d) (1975).

Table 5a FCC Cases with Intervenors Categorized by Type of Intervenor* (one intervenor)

Type of First Intervenor	Year 71/72 (N)	% of 360	73/74 (N)	% of 58
Common Carrier	(54)	15.0	(6)	10.3
TV Broadcaster	(96)	26.7	(11)	19.0
Radio Broadcaster	(113)	31.4	(18)	31.0
Radio/Microwave	(4)	1.1	(7)	12.1
CATV	(17)	4.7	(7)	12.1
Outsider	(17)	4.7	(3)	5.2
FCC Bureau	(56)	15.6	(6)	10.3
Other	(3)	0.8	(0)	——
Total	(360)	100.0	(58)	100.0

*Source: Appropriate FCC Reports.

Table 5b FCC Cases with Intervenors Categorized by Type of Second Intervenor*

Type of Second Intervenor	Year 71/72 (N)	% of 60	73/74 (N)	% of 10
Common Carriers	(15)	25.0	(3)	30
TV Broadcasters	(3)	5.0	(1)	10
Radio Broadcasters	(4)	6.7	(1)	10
CATV	(1)	1.7	(0)	—
Radio/Microwave	(1)	1.7	(0)	—
Outsiders	(4)	6.7	(0)	—
FCC Bureaus	(32)	53.3	(4)	40
Others	(0)	——	(1)	10
Total	(60)	100.1	(10)	100.0

*Source: Appropriate FCC Reports.

tervenor.[122] In addition, most intervenors were agency clientele who perceived a competitive threat from the application, or who sought to replace the licensee applicant in a comparative license proceeding. This is neither unexpected nor deleterious to the agency's functioning. The clientele, either as applicants or as intervenors, have a substantial economic stake in the agency's decisions, and seek to protect their positions

122. Staff intervention involves those cases in which the Commission or Board mentioned the staff and its position in the case. The staff was probably present in *all* cases, but the figures in Tables 5a and 5b indicate cases in which the staff opposed the position taken by the applicant.

whenever necessary by actively presenting their claims and counterclaims.

Beyond these traditional parties who are almost always allowed to intervene,[123] the issue of outsider intervention illustrates several interesting developments in the agency's intervention rules since the *United Church* decision.[124] It appears that the Department of Justice can intervene in common carrier (telephone rate) cases even after the thirty-day limit has elapsed.[125] The National Association of Broadcasters and an independent VHF television station in New York City, (a large, non-network user of television program transmission services of the telephone company) have also intervened in common carrier transmission rate proceedings.[126] By contrast, the stockholders of the telephone company, and alleged users of the telephone system have not been permitted to intervene in a rate case.[127] This suggests that in cases involving common carrier petitions the clientele and other vested interest groups may be permitted to intervene when they wish. Other outsiders, however, must establish either that they have complied with all Commission rules, or that they have a clear reason for seeking intervention despite the rules.

In the broadcasting area, intervention has only gradually become easier since the *United Church* case. Access has been denied where

123. *See* Florida-Georgia Television Co., 10 F.C.C.2d 722 (1967), where, because of anti-competitive practices, the Review Board permitted a theatre operator to intervene in a hearing involving a VHF television station construction permit. *But see* Middle Georgia Broadcasting Co., 32 F.C.C.2d 974 (1972), where the Review Board denied intervention to a competitive license applicant who sought to intervene more than three years late, with no good cause shown for the delay. Such a delay is obviously an extreme case.

124. 359 F.2d 994 (D.C. Cir. 1966).

125. Better TV Inc., 26 F.C.C.2d 559 (1970); ABC-ITT Merger, 7 F.C.C.2d 336 (1967).

126. AT&T Co., 8 P&F RADIO REG. 2D 579 (1966); AT&T Co., P&F RADIO REG. 2D 225 (1966).

127. AT&T Co., 7 P&F RADIO REG. 2D 515 (1966). The reasoning here was that, absent unusual circumstances, the stockholder's interest is presumed to be represented adequately by the corporation itself. In AT&T, 5 F.C.C.2d 154 (1966), the Commission rejected intervention by alleged small telephone users because the petition was filed six months late, no adequate explanation for the delay was given, and the petition did not show how the party intervening would assist the Commission in deciding the case. The United States Court of Appeals for the District of Columbia affirmed, Telephone Users Ass'n v. FCC, 375 F.2d 923 (D.C. Cir. 1967), although the court stated that generally such users—the general public—would have standing to intervene in a rate proceeding. The court felt the Commission had established reasonable rules for intervention (the 30-day limit), and the delay had not been adequately explained by the petitioner.

groups have failed to establish a real need to intervene. In one instance, the intervenor failed to demonstrate any interest in the grant or denial of a broadcasting construction permit because it did not claim to have members within the prospective audience and it did not suggest any other cognizable right or injury.[128] Two groups, the American Board of Missions to the Jews and Beth Sar Shalom, Inc., were similarly denied the right to intervene as parties to a license renewal proceeding. The administrative law judge reasoned that because each group membership was less than 10,000 out of several million in the service area (New York City), the complaint represented their private interests rather than a public interest within the guidelines of *United Church*.[129] In another case a subscriber to cable television service was denied the right to intervene because he failed to claim that he represented a "responsible group" within the *United Church* principle,[130] and asserted no greater interest than that of any other member of the general public. The examiner did state, however, that the individual should participate in the then-pending *rule-making proceedings* regarding cable television.

Cases allowing outside petitioners to intervene in the broadcasting area fall into two groups. First, the Office of Communications of the United Church of Christ was allowed to intervene in a construction permit proceeding after the thirty-day limit had expired because it demonstrated a good cause for the delay and persuaded the judge that it could contribute to the proceedings.[131] This suggests that an intervenor can establish a credibility or reputation with the Commission that permits it to intervene under most circumstances. Only the Department of Justice and the Office of Communications, however, have been able to avoid the thirty-day limitation.

In the second situation, an organization named Black Efforts for Soul in Television (BEST) was allowed to intervene in the license renewal application of the Alabama Educational Television Commission, even

128. In Pacifica Foundation, 28 P&F RADIO REG. 2D 972 (1973), the examiner did give them the right, nevertheless, to participate as a non-party under 47 C.F.R. § 1.225 (1976). There was an additional error in that the petition to intervene was not filed within the 30-day limit. *See also* Pacifica Foundation, 19 P&F RADIO REG. 2D 631 (1970).

129. RKO General, Inc. (WOR-TV), 30 P&F RADIO REG. 2D 635, *aff'd*, RKO General, Inc. (WOR-TV), 48 F.C.C.2d 829 (1974).

130. Back Mountain Telecable, Inc., 8 P&F RADIO REG. 2D 955 (1966).

131. Lamar Life Broadcasting Co., 48 F.C.C.2d 807 (1974).

though the organization had no members in Alabama.[132] The examiner reasoned that the three Alabamans who sought to intervene could not adequately represent their claims of racial programming bias and racially discriminatory employment practices without the assistance of this unincorporated association. BEST was devoted to increasing the participation of blacks and the presentation of black viewpoints on television and radio. The organization's interests and goals were found to be "patently . . . similar to those of Alabama viewers of educational television programs as evidenced by the present participation of three Alabama citizens."[133] Accordingly, the examiner held that the organization, with experience and funds, could better represent the interests of Alabama citizens than could the three citizens themselves, and should therefore be permitted to intervene. This rationale suggests that if the Commission believes that a claim is valid and warrants presentation, it will permit intervention by an available organization to represent these interests.

The following conclusion may be deduced from these examples: the Commission will permit intervention, "all other things being equal." The intervenor, however, must demonstrate that it is familiar with the case, can contribute to the proceeding, will be affected by the decision, and is "responsible" toward the conduct of a fair hearing. The Commission is more likely to permit someone with a special interest such as a competitor, a creditor, or the Department of Justice to intervene than a party representing a "public interest" group. The Alabama case, however, suggests the FCC will permit someone with a vague interest to intervene if the issue raised is central or highly visible, as in the case of racial discrimination, or if the intervenor will facilitate the expression of a legitimate interest (the viewing audience). The amorphous interests of some groups, such as telephone users or cable subscribers, correspond closely to those of the "consumer" and probably will be permitted to intervene provided the representative organization appears to be legitimate and files a petition within the allotted time.

The kinds of cases that intervenors appeared in for the two years under study do not differ from those reported for the total population (Table 1). Thus, the presence or absence of an intervenor does not

132. Alabama Educ. Television Comm'n, 24 P&F RADIO REG. 2D 248 (1972).

133. *Id.* at 252. The license renewal was eventually denied because of the claims of these intervenors. Alabama Educ. Television Comm'n, 32 P&F RADIO REG. 2D 539 (1974).

seem to be connected with the kind of case involved. Although there is a relationship between certain intervenors (license competitors) and certain kinds of cases (Construction Permits or Licenses), the proportion of cases from each subject matter category that included intervenors is approximately the same as those in which intervenors were not present. This may be due to the large preponderence of competitor intervenors. In fact, the presence of Outsider intervenors appears largely in license cases, which suggests that the primary access point for public interest intervention is in the area set out by the *United Church* court in 1966—broadcast licenses and license renewals.

There appears to be little change in intervention between 1971/72 and 1973/74. The declines from 1971/72 to 1973/74 in TV Broadcaster and Common Carrier intervenors are insignificant. The rise of CATV intervenors probably results from the Commission's adoption of a CATV policy after the first period studied (1971/72), and the growth of the CATV industry by 1973/74. The decline in staff interventions may be due to budgetary and personnel constraints, or to the Commission's failure to outline staff positions. It may also be the result of less energetic staff opposition to clientele applications in 1973/74.

C. *Outcomes*

The decisions of both the Commission and the Review Board suggest several conclusions about the clientele-capture theory in the FCC. The general characteristics of the agency's decisions during the two years under study are presented in Table 6.[134] The data are arranged so

134. The categories of outcomes used here are "granted" and "denied/partial." The "granted" category indicates that the applicant/petitioner received what was sought. A "denied/partial" includes those cases in which the agency denied the application of petitioner, or only partially granted what was sought. These categories are combined because of the small number of partial cases, and because a partial grant indicates an agency decision somewhat adverse to the applicant.

Table 6 Outcomes of FCC Cases Categorized by Intervention*

Intervention	Year 71/72 Grant (N)	71/72 Grant %**	71/72 Deny/Partial (N)	71/72 Deny/Partial %	73/74 Grant (N)	73/74 Grant %	73/74 Deny/Partial (N)	73/74 Deny/Partial %
No Intervenors	(127)	56.4	(98)	43.6	(12)	36.2	(21)	63.6
One intervenor	(103)	34.3	(197)	65.7	(14)	33.3	(28)	66.7
Two or More Intervenors	(20)	33.3	(40)	66.7	(3)	30.0	(7)	70.0
Total	(250)	42.7	(335)	57.3	(29)	34.1	(56)	65.9

*Source: Appropriate FCC Reports.
**Percentages are row percentages.

the presence or absence of intervenors in the case is reflected in the outcomes. The most striking feature of the data is the relatively high proportion of requests granted during 1971/72 where no intervenor was present. The presence of one or more intervenors in those cases, on the other hand, substantially diminishes the percentage of licenses granted. The data for 1973/74 establish a different pattern. The percentage of requests granted in cases without intervenors is substantially lower than that for 1971/72, but is almost identical to the 1971/72 grant rate when one or more intervenors were present in the case. This indicates either that intervenors had a much greater impact in the 1971/72 cases than in the 1973/74 cases, or that some other explanation exists for the relative drop in grant rates between the two years. The suggestion that intervenors simply lost their effectiveness in 1973/74 is not persuasive. The likely impact would be the opposite: As more public visibility is attached to public interest groups, and as such groups become more experienced, their impact on agency decisions should be greater.

A second explanation for the difference between the percentage of requests granted in 1971/72 and 1973/74 is that the members of the Commission changed between the first and second years of the study. This is not borne out, however, by the actual personnel changes made during that period.[135] The more likely but more difficult explanation to substantiate, is that as a result of public criticism, the Commission examined the cases more closely, and granted a smaller proportion of requests during 1973/74, with and without intervenors.

The data presented in Table 7 focus on the outcomes of cases when categorized by the type of case involved. Certain kinds of requests appear more likely to be granted than others. During 1971/72 the cases involving Construction Permits, Licenses, and Distant Signal Authorizations involved relatively high proportions of grants. On the other hand, Petitions, Liabilities, Complaints, and Rate Revisions had lower than average percentages of grants. The high grant rates for Construction Permits, License transactions (renewals and transfers)

135. The personnel changes during the years are as follows:

	1971	*1973*	*1974*
Chairman	Burch	Burch	Wiley
	Bentley	*Wiley*	*Washburn*
	Lee	Lee	Vacancy
	Johnson	Johnson	*Robinson*
	Lee	Lee	Lee
	Wells	*Hooks*	Hooks
	Houser	*Reid*	Reid

Table 7 Outcome of FCC Cases Categorized by Type of Case*

Types Case	Outcome					Year				
	71/72					73/74				
	Grants (N)	%**	Denial/Partial (N)	%	Total (N)	Grants (N)	%	Denial/Partial (N)	%	Total (N)
Construction Permits	(31)	59.6	(21)	40.4	(52)	(5)	55.6	(4)	44.4	(9)
Petitions	(143)	37.7	(236)	62.3	(379)	(10)	20.8	(38)	79.2	(48)
Licenses	(39)	78.0	(11)	22.0	(50)	(4)	80.0	(1)	20.0	(5)
Liability	(3)	7.9	(35)	92.1	(38)	(0)	——	(8)	100.0	(8)
Complaints	(5)	27.8	(13)	72.2	(18)	(0)	——	(0)	——	(0)
Rate Revision	(4)	36.4	(7)	63.6	(11)	(10)	100.0	(0)	——	(10)
Cease and Desist	(3)	42.9	(4)	57.1	(7)	(2)	40.0	(3)	60.0	(5)
Dist. Signal Certificates	(20)	83.3	(4)	16.7	(24)	(7)	77.8	(2)	22.2	(9)
Interim Authority	(2)	33.3	(4)	66.7	(6)	(0)	——	(0)	——	(0)
Total	(250)	42.7	(335)	57.3	(585)	(38)	40.4	(56)	59.6	(94)

*Source: Appropriate FCC Reports.

**Percentages are row percentages.

and CATV Authorizations are not unexpected. Although the granting of a construction permit may be tantamount to the granting of a broadcast license,[136] there is a substantial difference between obtaining permission to build a station, and constructing and operating it. The Commission might assume that all construction permits will not result in operating stations and therefore grant these permits more readily than it otherwise might. License renewals and transfers, on the other hand, have long been the subject of controversy among outside groups who have charged the Commission with yielding to clientele pressure.[137] The data for 1971/72 License cases confirm that the agency grants many renewals (this category involved the highest proportion of grants). Distant Signal Authorizations were also approved with "rubber stamp" frequency by the Commission[138] as it sought to assist the development of CATV systems.

The categories involving low grants suggest several patterns to FCC decisions. The Petition category is an inclusive category that does not lend itself to any particular explanation. Many of the petitions involved interlocutory appeals or requests for waivers,[139] which the Commission does not grant readily. The Liability cases call for the forfeiture of money by the violator. Forfeiture is the closest thing the Commission has to a formal sanction for violation of agency broadcast rules. Apparently by the time such cases reach the Commission, a violation of the agency's rules is clear and the Commission feels compelled to impose liability on the violator. Thus, the Commission generally refuses to grant the petitioner's request that liability be waived. Complaints also involve some sanctioning activity. Although the Commission does grant some Complaints and investigates and penalizes some broadcasters under this category, the low grant rate illustrates the reluctance of the Commission to impose sanctions indiscriminately, especially in cases where the facts and violation are less clear. The grant rate in Rate Revision cases is below the average and suggests that the Commission may require justification for a revision before granting its permission.

The pattern for Table 7 during 1973/74 is similar to that for 1971/72. The same categories of cases involve high grant rates—

136. W. EMERY, *supra* note 88; Johnson & Dystel, *supra* note 89.
137. Comment, *supra* note 99.
138. For an explanation of this pattern, see R. BERNER, *supra* note 76.
139. *See* Table 2 and accompanying discussion.

Table 8 Outcomes of FCC Cases Categorized by Type of Party*

Type of Party	Outcome									
	Year									
	71/72					73/74				
	Grants (N)	%**	Denial/Partial (N)	%	Total (N)	Grants (N)	%	Denial/Partial (N)	%	Total (N)
Common Carrier	(29)	44.6	(36)	55.4	(65)	(3)	33.0	(6)	66.7	(9)
TV Broadcaster	(74)	47.4	(82)	52.6	(156)	(6)	46.1	(7)	53.9	(13)
Radio Broadcaster	(78)	36.1	(138)	63.9	(216)	(8)	22.2	(28)	77.8	(36)
CATV	(34)	60.7	(22)	39.3	(56)	(8)	57.1	(6)	42.9	(14)
Radio/ Microwave	(7)	53.9	(6)	46.1	(13)	(2)	50.0	(2)	50.0	(4)
Outsiders	(14)	25.0	(42)	75.0	(56)	(1)	20.0	(4)	80.0	(5)
FCC Bureaus	(13)	61.9	(8)	38.1	(21)	(1)	50.0	(1)	50.0	(2)
Others	(1)	50.0	(1)	50.0	(2)	(0)	——	(2)	100.0	(2)
Totals	(250)	42.7	(335)	57.3	(585)	(29)	34.1	(56)	65.9	(85)

*Source: Appropriate FCC Reports.

**Percentages are row percentages.

Construction Permits, Licenses, and Distant Signal Authorizations (Certificates of Compliance). Although the Rate Revision category had a very high grant rate, it involved only one case and should not be emphasized. The Liability cases show an even stronger tendency by the Commission to impose liability (100%), although no complaints were processed in the 1973/74 sample. The other enforcement category, Cease and Desist, remained at the average 1971/72 grant rate.

The data in Table 8 categorize outcomes by the kind of party making the request. During 1971/72 the parties obtaining the highest rates of grants included the FCC staff, CATV operators, and Radio/Microwave Services. The staff's success is not surprising in view of the various studies measuring their impact on the agency.[140] CATV success relates largely to the Distant Signal category of cases, and the policy apparently followed by the Commission and staff.[141] The Radio/Microwave Services rate of grants might also be connected with the kinds of requests made by this group—for operating licenses in already-existing frequency spaces.

The infrequent winners during this period included Outsiders seeking an affirmative response to some claim. Furthermore, Radio Broadcasters had a substantially below average rate of grants. This might be connected with the kinds of questions they presented—Petitions and Liability claims. When the broadcasters presented licensing issues—transfers or renewals—they were generally treated favorably (Table 7), but the other requests made by many broadcasters, especially Radio Broadcasters, tended to reduce the proportion of grants for that category. The pattern for 1973/74 is basically the same as for 1971/72. CATV, Radio/Microwave Services, and the FCC staff had the highest proportion of grants; Outsiders and Radio Broadcasters received the lowest grant rate.

The data from Tables 7 and 8 suggest several conclusions about clientele capture in the FCC. If the normal rate of grants is taken to be around thirty-five percent,[142] then certain kinds of clientele—Radio Broaadcasters specifically—tend to lose. Other clientele groups, such as Common Carriers, are at the average rate of grants. Still other

140. *See* R. BERNER, *supra* note 76; Johnson & Dystel, *supra* note 89, for a treatment of the staff role in Commission decisions.

141. *See* R. BERNER, *supra* note 76.

142. This is approximately the proportion for all categories, although the 1971/72 grant rate of 42.7% is slightly higher.

groups, especially CATV and Radio/Microwave Services, receive a favorable proportion of FCC grants. This pattern reflects agency policy features more than clientele control of the Commission's decisions. Significantly, the likelihood of having a high or low grant rate appears to be more related to the question presented than to the party presenting it. The CATV and Radio/Microwave Services parties presented questions that the Commission either wished to grant for policy reasons or could easily grant because of an established policy. On the other hand, the Outsider group consistently lost when requesting agency action. This group includes individuals or organizations that seek changes—sometimes dramatic changes—in agency policies. No agency, whether "captured" or not, will easily grant requests that require sharp policy changes.

If intervenors had any impact on the outcome of the agency's decisions, that impact appears only in 1971/72. This indicates that intervention was not the causal factor in granting or denying the request in most cases. The actual impact of intervenors will be explored in the next section of this study.

D. *Relationships and Impact on Outcome*

The preceding tables suggest that intervenors have not had a sharp effect on the decisional outcome of agency cases. Table 6 indicates that although there was a relationship between the presence of intervenors and the proportion of cases granted or denied in 1971/72, it is not clearly a causal one, and in 1973/74, there was no relationship at all. Tables 5a and 5b (the kinds of intervenors) suggest that only a small proportion of intervenors are not clientele competitors. This data suggest that because competing applicants rather than public interest groups are the major source of intervention, the agency does not give the case or the intervening parties special treatment and thus has no basis for denying the application. Rather, the grant and denial of such applications may be based on factors largely unrelated to the presence or absence of a competitor intervenor.

To analyze this proposition, Table 9 presents the data contained in Tables 5a and 5b categorized by type of intervenor and outcome. The table displays only the first or primary intervenors in cases with one or more intervenors.[143] It appears, first, that some intervenors seem

143. There were so few cases involving second intervenors that any presentation of these would add little to the analysis presented in the text.

Table 9 Outcome of FCC Cases Categorized by Type of Intervenor*

Type of Intervenor	Outcome: Year 71/72 Grants (N)	% **	Denial/Partial (N)	%	Total (N)	Year 73/74 Grants (N)	%	Denial/Partial (N)	%	Total (N)
Common Carrier	(22)	40.7	(32)	59.3	(54)	(0)	——	(6)	100.0	(6)
TV Broadcaster	(32)	33.3	(64)	66.7	(96)	(7)	63.6	(4)	36.4	(11)
Radio Broadcaster	(34)	30.1	(79)	69.9	(113)	(7)	38.9	(11)	61.1	(18)
CATV	(6)	35.3	(11)	64.7	(17)	(1)	14.3	(6)	85.7	(7)
Radio/ Microwave	(1)	100.0	(0)	——	(4)	(0)	——	(1)	100.0	(1)
Outsider	(15)	88.2	(2)	11.7	(17)	(2)	66.7	(1)	33.3	(3)
FCC Bureaus	(8)	14.3	(48)	85.7	(56)	(0)	——	(6)	100.0	(6)
Others	(2)	66.7	(1)	33.3	(3)	(0)	——	(0)	——	(0)
Totals	(120)	33.6	(237)	66.4	(357)	(17)	32.7	(35)	67.3	(52)

*Source: Appropriate FCC Reports.

**Percentages are row percentages.

to be present in more denials than others: The FCC staff, CATV, and Common Carrier intervenors during 1973/74 achieved a high rate of denials (success). Secondly, when the rate of denials is compared with the average or total rate of denial for the corresponding year, it appears that for 1971/72 the FCC staff, TV Broadcasters, and Radio Broadcasters were above the average. In 1973/74, Common Carriers, CATV, Radio/Microwave Systems, and FCC staff were above average. During the first year, the two broadcaster categories were only slightly above average, but this may suggest that the presence of a competing intervenor was more likely to result in a denial than was the presence of any other intervenor. The FCC staff appears to have a substantial influence when it intervenes and opposes an application or petition.

The most dramatic changes between the two years were the sharp decline in the impact of TV Broadcaster intervenors and the sharp increase in the impact of CATV intervenors. The latter pattern can be explained by the Commission's increasing sensitivity to CATV policy questions. Pressure within the CATV industry as it became more competitive for profitable markets, as well as the controversial nature of the issues presented in individual applications, raised both the likelihood of competitor intervention and FCC awareness of the issues. As the agency became sensitized to CATV issues, it probably attributed more weight to the competitors' claims. The decline in the impact of TV Broadcaster intervenors is not as easily explained, and may reflect an emerging agency insensitivity to the claims of TV competitors.

Outsiders, such as public interest representatives, had little impact on agency decisions. They succeeded in getting only eleven percent of their cases denied in 1971/72, and thirty-three percent in 1973/74. The increase suggests that the Commission may have become more amenable to the claims of these groups. That process, however, will be quite gradual, and will depend more on the individual merits of each intervenor's claims than on the mere presence of a public interest intervenor.

The data suggest the following conclusions: the established clientele, broadcasters, do not seem to have great strength as intervenors, even when their economic interests are affected by the agency's decision. The CATV interests may be on the rise, both in terms of favorable policy decisions by the Commission and in terms of blocking adverse agency decisions by means of intervention. The Outsider inter-

ests, the original focus of the *United Church* case,[144] and the public interest movement of the late 1960s and early 1970s, do not seem to have had a major impact on the agency's decisions. Although there may be a long term trend in the agency toward increased consideration of the claims of such public interest groups, a larger data base is required to substantiate this pattern.

It is possible that intervenors alter the outcome even though the petition is not completely denied. The parties may compromise and agree to the Commission's grant of a modified petition, or the Commission may issue a partial grant of the original petition. This suggestion is difficult to corroborate because the published reports do not often refer to such compromises. The Partial categories for the data, when separated out, however (Table 6), give limited support for this view of intervenor impact. Given that most intervenors were competitors seeking the allocation of an exclusive resource, it appears likely that they would join in a compromise such as a joint ownership of the license or broadcast facilities. There is evidence in a few cases indicating that the petitioner compromised, or attempted to satisfy the claims of the intervenor, in order to reduce the weight of their claims.[145]

It is possible that the intervenor had some impact on the outcome even if no compromise were reached. A split decision by the agency may indicate that the intervenor persuaded a minority of the Commission of the justness of its claim. To test this theory, the data in Table 10 were collected to show the size of the vote categorized by the presence or absence of intervenors.

It appears that the presence of intervenors actually *increases* the likelihood of obtaining a unanimous vote from the deciding body. This suggests that intervenors are unable to create dissatisfaction within the Commission or the Board simply by being present in the case. The decision-making body may, in fact, solidify more when intervention has been permitted than when there is no outsider or competitor participant in the case.

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144. 359 F.2d 994 (D.C. Cir. 1966).

145. This seems to be the case in Alabama Educ. Television Comm'n, 33 F.C.C.2d 495 (1972); Alabama Educ. Television Comm'n, 24 P&F RADIO REG. 2D 248 (1972). This apparently failed, however, as the FCC eventually denied the license renewal application, *supra* note 132.

Table 10 Vote of Deciding Body Categorized by Status of Intervention*

Type of Intervention	Vote: Year 71/72 Unanimous (N)	Unanimous %**	Non-Unanimous (N)	Non-Unanimous %	73/74 Unanimous (N)	Unanimous %	Non-Unanimous (N)	Non-Unanimous %
No Intervention	(161)	71.6	(64)	28.4	(28)	84.8	(5)	15.2
One Intervenor	(240)	80.0	(60)	20.0	(38)	90.5	(5)	9.5
Two Intervenors	(53)	88.3	(7)	11.7	(10)	100.0	(0)	—

*Source: Appropriate FCC Reports.
**Percentages are row percentages.

Table 11 Outcome of FCC Cases Categorized by Rationale*

Rationale	Outcome: Year 71/72 Grants (N)	% **	Denial/Partial (N)	Denial/Partial %	Total (N)	73/74 Grants (N)	%	Denial/Partial (N)	Denial/Partial %	Total (N)
Procedural Reasons	(50)	37.0	(85)	62.9	(135)	(3)	20.0	(12)	80.0	(15)
Public Interest	(73)	70.9	(30)	29.1	(103)	(5)	71.4	(2)	28.6	(7)
Commission Policy Dictates	(91)	49.5	(93)	50.5	(184)	(16)	40.0	(24)	60.0	(40)
Party is Responsible	(1)	3.9	(25)	96.1	(26)	(0)	——	(3)	100.0	(3)
Burden of Proof	(18)	18.2	(81)	81.8	(99)	(1)	7.7	(12)	92.3	(13)
Issue Already Resolved	(15)	42.9	(20)	57.1	(35)	(4)	57.1	(3)	42.9	(7)
No Reason	(2)	66.7	(1)	33.3	(3)	(0)	——	(0)	——	(0)
Totals	(250)	42.7	(335)	57.3	(585)	(29)	34.1	(56)	65.9	(85)

*Source: Appropriate FCC Reports.

**Percentages are row percentages.

Table 11 outlines the outcome of the cases in terms of the rationales used by the Commission. This may provide some indication of the patterns of reasoning used in the agency proceedings. The first category, Procedural Reasons, includes a variety of justifications for particular decisions. The data indicate this rationale is used primarily to deny petitions. The Public Interest rationale is relied upon quite heavily for granting a request. Given the nebulous meaning of this term, it appears that the Commission will use it whenever possible, especially when there is no specific reason for approving the outcome. The third rationale, that Commission Policy Dictates the outcome, involves the routine guidelines developed for the staff and Review Board and is relied upon when the Commission wishes to pursue existing precedent, or when the Review Board wishes to follow Commission policy. The Party Responsibility category is used almost solely in Liability cases where the Commission insists on imposing the sanction despite the request for an exemption. The proportion of denials clearly indicates its one-sided use. The Burden of Proof rationale is used mostly when the petitioner failed to carry his burden or to substantiate his claims. Denial is the likely result in such cases. The Issue-Already-Resolved justification involves previous settlement of the particular case, by either the parties (applicant and intervenors) or between the party and the staff.

This analysis indicates that the Commission "hides" behind particular rationales to reached desired outcomes. The Public Interest rationale is clearly used when the Commission needs some reason for granting the request. Procedural Reasons and the Burden of Proof are used frequently to justify a denial of requests. The other categories (Commission Policy and Issues-Already-Resolved) have little connection with the outcome.

E. *Subsequent Case Developments*

Parties losing at the Commission level may appeal the decision in the federal courts of appeals.[146] This is extremely costly for both appellants and the agency, however, and the data indicate that only a small number of appeals are taken. Twenty-two of the cases in 1971/72 (3.5%) and two of the cases in 1973/74 (2.4%) were appealed by the losing party.

146. 47 U.S.C. § 402 (1970).

Despite the *United Church* decision,[147] the courts of appeals generally uphold an FCC decision on appeal.[148] The data indicate that the

Table 12 Appellate Court Treatment of FCC Cases by Year*

		Outcome				
		Affirmed		Reversed		Total Decided
Year(FY)	Total (N)	(N)	%	(N)	%	(N)
1973	146	(21)	87.5	(3)	12.5	(24)
1972	142	(27)	87.1	(4)	12.9	(31)
1971	149	(32)	76.2	(10)	23.8	(42)
1970	117	(21)	80.8	(5)	19.2	(26)
1969	99	(31)	75.6	(10)	24.4	(41)
1968	115	(18)	81.8	(4)	18.2	(22)
1967	88	(28)	87.5	(4)	12.5	(32)
1966	67	(28)	93.3	(2)	6.7	(30)
1965	80	(19)	67.9	(9)	32.1	(28)
1964	78	(31)	83.8	(6)	16.2	(37)
1963	70	(20)	76.9	(6)	23.1	(26)
1962	56	(16)	80.0	(4)	20.0	(20)
1961	74	(20)	74.1	(7)	25.9	(27)
1960	89	(21)	91.3	(2)	8.7	(23)
1959	102	(21)	52.5	(19)	47.5	(40)
1958	103	(20)	62.5	(12)	37.5	(32)
1957	99	(12)	48.0	(13)	52.0	(25)
1956	85	(18)	64.3	(10)	35.7	(38)
1955	64	(8)	47.1	(9)	52.9	(17)
1954	47	(3)	75.0	(1)	25.0	(4)
1953	23	(0)	——	(1)	100.0	(1)
1952	11	(1)	25.0	(3)	75.0	(4)
1951	14	(6)	85.7	(1)	14.3	(7)
1950	24	(6)	75.0	(2)	25.0	(8)
1949	27	(9)	60.0	(6)	40.0	(15)
1948	19	(2)	66.7	(1)	33.3	(3)
1947	16	(2)	100.0	(0)	——	(2)
Total		(441)	74.9	(148)	25.1	(589)

*Source: Appropriate FCC Reports.

147. 359 F.2d 994 (D.C. Cir. 1966).

148. For a general discussion of the relationship between agencies and the U.S. Supreme Court, see Canon & Giles, *Recurring Litigants: Federal Agencies Before the Supreme Court*, 25 W. POL. Q. 183 (1972). For substantive discussions of appellate review of FCC decisions for the years covered, see Collins, *Judicial Review of FCC Decisions:* 1968-1969, 23 FED. COM. B.J. 57 (1969); Swift, *Judicial Review of FCC Decisions:* 1969-1970, 24 FED. COM. B.J. 86 (1970); Swift, *Judicial Review of FCC Decisions:* 1970-1971, 25 FED. COM. B.J. 66 (1972); Beizer & Quale, *Judicial Review of FCC Decisions:* 1972, 25 FED. COM. B.J. 251 (1973).

Commission is affirmed approximately fifty percent of the time (10 of 22 in 1971/72 and 1 of 2 in 1973/74). This pattern is strengthened by the data contained in Table 12, which explores appellate court treatment of FCC decisions made prior to 1971/72.[149] One may conclude that either the Commission makes few reversible errors or the court simply defers to the Commission's judgment.

Although the data only illustrate the relationship between the FCC and the courts of appeals (and does not include the Supreme Court), the pattern of support is clear. On the average the appellate courts affirmed approximately three out of every four appeals. This factor, even more than the constraints of delay and expense, may explain why so few losing parties appeal FCC decisions. This data also refutes the conventional wisdom that the clientele will appeal any adverse decision. It appears that a party carefully weighs the costs and likelihood of success before appealing agency decisions.

F. *Alternative Forms of Participation*

This study has focused on formal participation in agency hearings by intervenors. This kind of participation was first extended to television viewers in the *United Church* decision.[150] Alternative forms of participation available to citizen groups, however, might be more efficient and effective in terms of costs and outcomes.[151] Participation in rulemaking procedures, for example, may be less costly for outsider groups and have a significant impact on the Commission's general policy. Through informal negotiation with licensees, citizen groups may be able to secure agreements with the broadcasters regarding programming, ascertainment, hiring practices, or program production, without incurring the expense of filing a formal petition to deny the license renewal application. Although broadcasters have criticized such negotiations because of the potential for blackmail and bad faith *threats* of a petition to deny by the outsider group, the number of such informal settlements has increased substantially in recent years.[152] The leverage provided

149. These cases involve a larger number of appeals than the empirical data for this study probably because of carryover of pending cases from previous years. The figures in Table 12 are only the actual reversals and affirmances during the year; they do not reflect cases settled or withdrawn, or the backlog of cases.

150. 359 F.2d 994 (D.C. Cir. 1966).

151. For a discussion of various forms of participation and their relative efficiency, see J. GRUNDFEST, JR., *supra* note 113, at 5-29, 56-71.

152. *See* J. GRUNDFEST, JR., *supra* note 113; Kutler, Citizen Participation in Broad-

by this threat may give the citizen group more influence in negotiations than in the formal proceeding. In addition, the outsider group may, as part of the settlement agreement, be reimbursed by the broadcasters for its legal and technical expenses.[153]

The Commission has encouraged competing broadcast license applicants to resolve their differences informally and reach an agreement that results in a single license or renewal application.[154] The Joint Petition for Approval of a Dropout Agreement has been widely used by competitors and approved by the Commission. This policy should be extended to include disagreements between broadcast license applicants and outside challengers. It would save the Commission the time and effort involved in examining the case and reduce the costs of intervention for the outsiders. The FCC has only recently formulated a policy regarding such settlements.[155] It accepts the outside negotiation process in principle, and is generally amenable to such agreements when they are presented to it for approval.[156] The issues surrounding this policy relate to programming control, enforcement of settlements, Commission review of settlements, and reimbursement agreements. Although it may be cheaper for the Commission and the outsiders to settle informally, the settlement costs for the broadcaster are often greater than those incurred in an unopposed license renewal application. Nevertheless, with the rise in citizen participation, unchallenged proceedings, formerly widespread, may become infrequent, and the costs of a negotiated settlement may now be the common and cheapest process available to the licensee.

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cast Regulation: A Study of the Local Agreement Process (Unpublished Master's Thesis, University of Pennsylvania, 1974).

153. *See* Office of Communication of United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972); FINAL REPORT AND ORDER IN THE NOTICE OF INQUIRY AND PROPOSED RULEMAKING IN THE MATTER OF REIMBURSEMENT FOR LEGITIMATE AND PRUDENT EXPENSES OF A PUBLIC INTEREST GROUP FOR A CONSULTANCY TO A BROADCASTER IN CERTAIN INSTANCES, Docket 19518, FCC 76-5 (January, 1976).

154. As an example of a Joint Petition for Approval of a Dropout Agreement, see J. T. Parker, 9 P&F RADIO REG. 2D 1358 (1967).

155. For a description of the development of the FCC rule, see J. GRUNDFEST, JR., *supra* note 113, at 59. *See also* FINAL REPORT AND ORDER IN THE MATTER OF AGREEMENT BETWEEN BROADCAST LICENSEES AND THE PUBLIC, Docket 20495, FCC 75-1359 (December, 1975).

156. For an analysis of five cases involving settlements submitted to the Commission for approval after its Rule on Agreements Between Broadcast Licensees and the Public, see J. GRUNDFEST, JR., *supra* note 113, ch. V.

Whether negotiated settlements occur between competing applicants for a license (an established practice) or between the licensee and outsiders (a recent pattern), they are now a widespread practice in the broadcast industry and are likely to increase. Furthermore, the data indicate that because of the expense, delay, and predictable results, formal agency regulatory decisions are declining despite the increased outsider participation required by judicial decisions. Whether these developments are advantageous to the Commission or its clientele is an open question.

IV. Conclusions

This study has focused on a variety of issues relating to clientele treatment by the Federal Communications Commission and the emerging role of public intervenors in agency decisions. Several conclusions may be drawn. First, the opening of FCC proceedings by court decisions has not had a revolutionary effect on agency business, its process, or its decisions. Public intervenors do not appear in many of the agency proceedings, and their presence does not have a substantial impact on the outcomes. Several factors may explain this result. Initially, potential intervenors often do not have adequate notice of the agency proceeding. In addition, they lack the necessary organization, expertise, and funds to intervene. Because these problems have not been resolved by any particular agency or governmental policy, it is unlikely that formal intervention will become widespread or successful.

Furthermore, the opening of agency proceedings to outsiders may increase alternative means of holding broadcasters responsible to "public" interests. The leverage that a citizen group has in threatening intervention may induce the broadcaster to negotiate informally with the group in order to avert opposition in a formal proceeding. Although these alternative means of resolving conflicts between the public and broadcasters may be quite effective, as yet there is no agency supervision of informal agreements and settlements. Such supervision may be necessary in order to guarantee public impact upon the resolution of broadcasting issues.

Finally, the amount and kind of organized opposition to FCC policies may be increasing, even though it might not appear in formal agency proceedings. Public opponents to the regulated clientele may be sensitizing the agency to other public considerations, even though these considerations may fail to reach formal agency proceedings or ultimately

lose. Time and further study are required before definitive conclusions may be reached about the forms of public opposition and their effect on agency decisions.

The clientele-capture thesis is not strongly supported by the data used in this analysis. The percentage of agency denials of requests is sufficiently high (nearly 66%) to suggest that the agency denies a large proportion of clientele requests, with or without intervention by public opponents. Even if an adverse decision deals with an interlocutory matter, rather than the final, substantive issue in a case, the data suggest that the clientele does not always "win" before the agency. The development of CATV during the period studied here may illustrate the emergence of new clientele. The agency's treatment of CATV cases suggests that it may be quite sensitive to this portion of the regulated industry. Whether this treatment will diminish with time is unclear. It is possible, however, that newer portions of the industry may be able to exert greater, and often highly successful, influence on the agency, at least during their incipiency.

The attempts to "democratize" the FCC have not been a resounding success. Gradual, incremental changes in the agency's procedures and policies, however, may have occurred. As with any political institution, the agency has been able to absorb and diminish much of the impact of these "revolutionary changes." No agency, however, remains static, and in its procedures and policy outcomes the FCC appears to have accommodated, at least to some extent, this impetus for change.