

Applicant, Character Qualifications
Character Qualifications, Situations Defining
Qualifications, Character

Notice of Inquiry initiated to review and clarify the role of "character" qualifications in broadcast licensing process. Proceeding will attempt to identify the regulatory objectives underlying an examination into "character" and determine whether those objectives can be achieved in a simpler and more direct manner than at present.

GEN Docket No. 81-500

FCC 81-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Policy Regarding Character Qualifications
In Broadcast Licensing

Gen. Docket No.
81-500

NOTICE OF INQUIRY

(Adopted: August 4, 1981; Released: August 6, 1981)

BY THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN; AND
FOGARTY ISSUING SEPARATE STATEMENTS

Introduction

1. The Commission is initiating this proceeding in order to gather information and views that will assist in establishing a more coherent licensing policy regarding what are currently referred to as the "character" qualifications of applicants for broadcast authorizations. Over the years, this agency has treated "character" as an essential element of a broadcaster's qualifications. We have, in the past, considered a wide range of conduct in examining applicants' character. Throughout this period, however, the Commission has utilized "character" as a criterion for granting or refusing broadcast licenses without the benefit of a comprehensive policy statement detailing the relevance of the character examination to the broadcast licensing scheme and identifying what conduct is pertinent to the analysis.¹ Without such clear guidelines, the Commission, as well

¹ The only policy guidance was issued thirty years ago on one aspect of the issue. *Establishment of a Uniform Policy to be Followed in Licensing of Radio Stations in Connection with Violations by an Applicant of Laws of the U.S. Other than the*

as broadcasters and the public, have been uncertain regarding what conduct is truly relevant to a broadcaster's qualifications.² The Commission often has used "character" as a general reason for disqualifying applicants when a range of misconduct has occurred at a station. It also has used "character" as a reason for inquiring into alleged misconduct of companies affiliated with the applicant or one of its principals. However, the "character" concept has not always been applied with precision, and the Commission appears to have accorded inconsistent treatment to licensees involved in seemingly similar misconduct.³

2. The purpose of this proceeding is to examine and to clarify the role of "character" as a qualification in the licensing process, and, in so doing, to identify the regulatory objectives underlying an examination into "character". We shall consider whether we can achieve these objectives in a simpler and more direct manner than at present, and we hope to specify what behavior is reasonably related to predicting an applicant's ability to operate a broadcast station in a manner consistent with the public interest.

3. A clearly articulated licensing policy should allow the Commission to focus on behavior which is truly relevant to broadcast licensing and to tailor its actions to these licensing goals. Such a policy statement will facilitate more consistent and, thus, fairer decisionmaking by the Commission. Licensees too will understand better how various kinds of misconduct will affect their ability to acquire, retain and assign broadcast properties. Moreover, from a practical standpoint, a clear statement of policy will reduce the substantial amount of time and resources now spent by this agency examining questions relating to an applicant's conduct which, even if resolved against the applicant, would not cause the Commission to deny the application.

Background of the Character Qualification Criterion

4. The Federal Communications Commission is empowered to grant applications for broadcasting licenses only where the Commission finds that the public interest, convenience or necessity will be served by such grants.⁴ While the public interest concept is, by its nature, an imprecise standard,⁵ it has come to embrace the interest

Communications Act of 1934 as Amended, 42 FCC 2d 399 (1951) [hereinafter "Uniform Policy"].

² See e.g. *Central Texas Broadcasting Co.*, 74 FCC 2d 393, 413 (1979) (dissenting opinion of Commissioners Fogarty and Jones.)

³ See e.g. *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965); *George J. Herrnreich*, 72 FCC 2d 511, 514 (1979).

⁴ 47 U.S.C. §§307(a), 309(a)(1976).

⁵ "Public interest, convenience or necessity" means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority." Caldwell, *The Standard of Public Interest, Convenience or*

of the listening public in the larger and more effective use of radio and is not limited in scope merely to the technical aspects of broadcasting.⁶ Thus, broadcasting has been considered a business "impressed with the public interest", and broadcasters have been held accountable to the listening public for their performance.⁷

5. The early debates on proposed legislation to regulate radio clearly show that Congress intended to vest in the licensing agency the authority to exercise its discretion to grant or deny applications for broadcast facilities in the name of the public interest.⁸ to facilitate a public interest evaluation,⁹ Congress granted the agency

Necessity as Used in the Radio Act of 1927, 1 Air L. Rev. 295, 296 (1930). See also H.J. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, at 54-55 (1962):

The only guideline supplied by Congress in the Communications Act of 1934 was "public convenience, interest, or necessity." The standard of public convenience and necessity, introduced into the federal statute book by [the] Transportation Act, 1920, conveyed a fair degree of meaning when the issue was whether new or duplicating railroad construction should be authorized or an existing line abandoned. It was to convey less when, as under the Motor Carrier Act of 1935, or the Civil Aeronautics Act of 1938, there would be the added issue of selecting the applicant to render a service found to be needed; but under those statutes there would usually be some demonstrable factors, such as, in air route cases, ability to render superior one-plane or one-carrier service because of junction of the new route with existing ones, lower costs due to other operations, or historical connection with the traffic, that ought to have enabled the agency to develop intelligible criteria for selection. The standard was almost drained of meaning under section 307 of the Communications Act, where the issue was almost never the need for broadcasting service but rather who should render it. [Footnotes omitted].

⁶ *National Broadcasting Co. v. FCC*, 319 U.S. 190, 216 (1943).

⁷ *KFKB Broadcasting Association, Inc. v. FCC*, 47 F. 2d 670, 672 (D.C. Cir. 1931).

⁸ The concept of a licensing authority's discretion to grant or deny applications can be found in the early drafts of what eventually became the Radio Act of 1927. See H.R. 4132, 67th Cong., 1st Sess. (1921); H.R. 7357, 68th Cong., 1st Sess. (1924); H.R. 9971, 69th Cong., 1st Sess. (1926). Indeed, it was the decision in *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed* 266 U.S. 636 (1924) (holding that the Secretary of Commerce had no discretionary power as to the grant or denial of license applications), which moved Congress to action in 1926 and 1927.

⁹ See H.R. 7357, 68th Cong., 1st Sess. (1924); H.R. 9971, 69th Cong., 1st Sess. (1926). Twice, in formulating the Administration position, Secretary of Commerce Herbert Hoover addressed the public interest concept. The first instance was in 1924:

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

Hearings on H.R. 7357 Before the House Comm. on Merchant Marine and Fisheries, 68th Cong., 1st Sess. 10 (1924).

The second was in 1926:

[T]he bill recognizes that the public interest is paramount in all forms of radio

have interpreted the term in accordance with its commonly understood meaning.¹⁴ One court concluded that "character" embraced all of an individual's "qualities and deficiencies regarding traits of personality, behavior, integrity, temperament, consideration, sportsmanship, altruism, etc., which distinguish him as a human being from his fellow men."¹⁵ Such a definition is obviously too broad to be of much use in making licensing decisions. Yet, the Commission similarly has evaluated "character" in an all-inclusive way. On one occasion the Commission declared that the character of an applicant should be measured "by its past observance of moral, ethical, legal and professional rules of conduct."¹⁶ Thus, in analyzing applicant qualifications, the Commission often has found itself in the position of a moral arbiter, judging whether the applicant before it possesses the requisite moral and ethical capacity to operate a broadcast station in the public interest.

7. Related to the character examination is the concept of the broadcaster as a public trustee, held to a high standard of conduct in its fiduciary relationship with its community of license.¹⁷ This special status of the broadcaster as a steward of the airwaves has been used as a basis for the imposition of special obligations and responsibilities by the Commission.¹⁸ This treatment has been justified primarily upon the limited amount of available broadcast frequencies¹⁹ as well as the substantial influence which broadcasting

¹⁴ One popular dictionary defines the term "character" as "a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force, and judgment." Webster's New International Dictionary 376 (1971).

¹⁵ *Mester v. U.S.*, 70 F. Supp. 118, 122 (E.D.N.Y.), affirmed per curiam, 332 U.S. 749 (1947).

¹⁶ *WKAT, Inc.*, 29 FCC 221, 237 (1958).

¹⁷ The Federal Communications Commission's predecessor, the Federal Radio Commission, proclaimed that "[t]he very bulwark of broadcasting under present day conditions is the confidence which the listener extends to [it]." *Matter of Schaeffer Radio Co.* (1930), reproduced in part in *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 Fed. Comm. B.J. 5, 131 (1950). The Federal Radio Commission's interest in assuring that licensees were worthy of public trust was further reflected in its pronouncement that:

[although] [t]he conscience and judgment of a station's management are necessarily personal, . . . the station itself must be operated as if owned by the public. . . . It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: "Manage this station in our interest." . . . The standing of every station is determined by that conception. *Id.* at 14.

¹⁸ The Supreme Court's interpretation of the Communications Act of 1934 has helped to cast broadcasters in a fiduciary role with the public. See *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 389 (1969); see also *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 118 (1973).

¹⁹ "[B]ecause the number of available broadcasting frequencies is limited, the

has been deemed to have on the public.²⁰ Thus, because they have been considered public trustees of a limited and valuable resource, broadcasters have been set apart and held to higher standards of conduct than have business operators in private enterprises.

8. The Commission has operated under the regulatory premise that there is a nexus between character and future licensee performance; that an applicant with good character more likely will meet the elevated standards of a public trustee. One who has in the past led an exemplary life in and out of broadcasting has been presumed likely to serve the public interest as a broadcaster in the future. As a general proposition, this premise may be sound. Ordinary human experience leads to the conclusion that the past is a guide to the future and that an applicant's past actions form a basis for predicting how it will perform in the future. However, upon closer reflection, we believe that the hypothesis may have serious limitations.

9. For example, good *moral character* is no guarantee of competent broadcast service. On numerous occasions, the Commission has acted to deny renewal where a broadcaster has demonstrated his inability properly to manage a station. In these cases the Commission has looked to those qualities which affect broadcast performance, such as awareness of legal requirements, adequacy of supervision and ability to make decisions. Such attributes bear no relationship to a licensee's personal observance of moral and ethical rules of conduct,²¹ yet they say much about whether service is being provided in the public interest.²² Similarly, poor "character" may not necessarily result in poor broadcast service.²³

10. The use of a concept of moral character has forced the Commission into inconsistent decisions about what constitutes good or bad character. Because the Commission has discussed "character" in absolute terms—one with bad character must lose its license—the Commission has been faced with distinguishing good from bad character in cases involving differing degrees of the same types of

Commission is necessarily called upon to consider the character and quality of the service to be rendered." *KFKB Broadcasting Association Inc. v. FCC*, *supra*, 47 F. 2d at 672.

²⁰ In one case, the court affirmed the Commission's consideration of a particular applicant's character in deciding that the applicant should not "be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people." *Mansfield Journal Co. v. FCC*, 180 F. 2d 28, 33 (D.C. Cir. 1950).

²¹ See note 16, *supra*.

²² See e.g., *Heart of the Black Hills Stations*, 32 FCC 2d 196 (1971), *recon. denied* 36 FCC 2d 568 (1972), *aff'd without opinion*, No. 72-1804 (D.C. Cir. February 26, 1973). One commentator has recently termed these qualities as a licensee's "competence qualifications." See Sharp and Lively, *Can the Broadcaster in the Black Hat Ride Again? "Good Character" Requirement for Broadcast Licensees* 32 Fed. Comm. B.J. 173, 176 (1980).

²³ See note 25, *infra*.

conduct. Having declared that certain conduct amounts to bad character in one case (with the resulting loss of license), the Commission, at times, has been hard pressed to explain why the same conduct is not proof of bad character and does not mandate disqualification in other, apparently similar cases. Consequently, while the Commission's licensing judgments themselves are sound, the use of the concept of character in explaining those decisions has engendered controversy and confusion.

11. Moreover, in practice the Commission has applied its character analysis differently to existing licensees and new applicants. With respect to incumbent broadcasters, the Commission scrutinizes the licensees' conduct during the preceding license term for acts which are inconsistent with a licensee's duty to serve the public interest and, where misconduct is discovered, measures its significance against the overall performance of the station. Thus, the Commission may find an existing licensee's character to be unsatisfactory, yet, after weighing the severity of the infraction against other factors relevant to the public interest standard (such as past station performance), may reach a decision short of non-renewal.²⁴

12. New applicants, however, have no broadcast record against which to measure their past actions and, instead, must rely on promises of future performance to convince the Commission that any previous misconduct is not an accurate indicator of their future behavior as broadcasters.²⁵ Further, the Commission has fewer options to apply to new applicants with known character defects. Where it finds a new applicant's "character" unsatisfactory the Commission has no choice but to deny its request for a license. As a result, new applicants may thus suffer a disadvantage when contrasted with renewal applicants.²⁶ Similar character shortcomings may thus receive differing treatment, depending upon whether the applicant is an incumbent licensee or merely seeking to become one.²⁷

²⁴ In the case of *Westinghouse Stations License Renewal*, 44 FCC 2778 (1962), the Commission renewed the licenses of a broadcaster whose corporate parent had been found guilty of participating in serious antitrust violations. The Commission granted renewal despite the "most serious reflection on [the] applicant's character," due to "countervailing circumstances"—a superior and uncommon broadcast record. 44 FCC 2d at 2783-2784. Where the Commission finds that infractions have occurred, it may also choose to award the licensee a short-term renewal, impose a monetary forfeiture or send a letter of admonition.

²⁵ New applicants can offer non-broadcast evidence in a hearing to dispute or to mitigate alleged character defects.

²⁶ This difference becomes especially noticeable in the "comparative renewal" proceeding, where an incumbent licensee is to be compared to a new applicant.

²⁷ See *General Electric Co.*, 45 FCC 1572, 1597 (1964): "[i]f General Electric were a newcomer . . . the record would raise a substantial question as to whether General Electric should be entrusted with the responsibilities to operate broadcast facilities."

qualification is in our opinion, extremely troublesome. The term's definition is unclear and its measurement imprecise. Also, it may not be, in its strictest application, a sure indicator of future broadcast service. Its uniform application to existing licensees and new applicants yields disparate results. Moreover, the Commission's attempts to apply the standard to multiple-owner licensees have resulted in decisions which contain confusing reasoning. The character requirement forces the Commission to perform the exceedingly difficult exercise of attempting to demonstrate why behavior in one case did not evidence bad "character" even though similar behavior in another case did. While the Commission has often asserted that an applicant lacking character must be denied, in practice the Commission has treated character as but one factor for predicting future service in the public interest. The Commission's inquiry into character qualifications is but an intermediate step in the licensing process. The ultimate licensing question to be answered under the Communications Act is not whether an applicant has character, but rather, whether the applicant can be expected to serve the public interest as a broadcaster. 47 U.S.C. §§308, 319. Any character inquiry supposedly is conducted to assist the Commission in reaching that public interest determination. To the extent that the character examination obfuscates rather than facilitates that determination, it is necessary to inquire whether the Commission has allowed the process to gain dominance over its goals.

16. With the preceding analysis in mind, we believe that the time has come to assess whether the goals of the public interest standard may be reached without the problems inherent in the present application of the "character" standard. We therefore invite all interested parties to submit comments on, or related to, the discussion above as well as the questions posed below.²⁹ These questions are by no means exhaustive. Rather, they merely indicate some areas of Commission concern. Information not directly responsive to these questions but relevant to the general subject matter of the Inquiry is welcome and invited. To facilitate staff review, each response should clearly state the precise topic or question being addressed.

(a) What purpose is served by scrutinizing an applicant's so-called "character" qualifications?

17. In the past we have examined an applicant's "character" to judge whether the applicant can be depended on to operate a broadcast facility in a manner consistent with the public interest.

inconsistent with its findings that he was qualified to operate Stations KFPW-TV and KGTO-TV. Eventually, the Commission reconsidered its denial of KAIT-TV on other grounds. 72 FCC 2d 511 (1979).

²⁹ To further assist interested parties in focusing their comments, we have offered our views on many of these questions. Our views are only tentative, and we expressly invite all interested parties to offer their comments on our discussion.

Other qualifications help to establish an applicant's ability to perform³⁰ but do not tell us whether we can rely on the applicant to perform prospectively all of the obligations of a broadcast licensee.³¹ While the scope of our examination into an applicant's reliability may need revision, we believe that our concern with probable future behavior is unavoidable. Where we have reason to believe an applicant cannot be expected in the future to fulfill its obligations as a broadcast licensee, its application should be denied.

18. However, we welcome comments as to whether we should continue to try to predict a new applicant's future broadcast performance. Rather than trying to guess what kind of broadcaster an applicant might be, should we instead withhold judgment at the time of initial licensing and rely on our forfeiture and revocation powers to deal with actual problems with a licensee's performance?

(b) Is there a better way to evaluate an applicant's future reliability than the kind of wide-ranging inquires conducted in the past?

19. As discussed above, the Commission's present manner of forecasting an applicant's reliability by examining its character is both inefficient and confusing. We seek comment on whether it should be abandoned. We also seek comment on whether, in reaching a licensing decision, the Commission should evaluate directly the relevance of an applicant's past misbehavior to its capacity to use the requested radio authorization in the public interest. Should the Commission consider an applicant's specific misconduct as evidence that, if granted a license, the applicant would not use it for the public interest and that a grant of a license would not encourage the larger and more effective use of radio? Is the only relevant misconduct that which aids us in predicting what kind of broadcast activity may be expected in the future?

20. We also seek comment on whether the Commission is required specifically to consider an applicant's moral character during the licensing process. We believe that Sections 308(b) and 319(a) of the Act *permit* the Commission to require an applicant to furnish certain information, but we question whether they impose any duty upon the Commission to inquire into every aspect of an applicant's past behavior.³² However, even were the Commission required to examine an applicant's moral character, we seek

³⁰ These are the applicant's legal, technical, and financial qualifications.

³¹ "Licensing is prospective—it enables future conduct. In discharging its licensing function, the Commission puts the public interest out at risk since the issuance of an authorization entails at best only an estimate of the likelihood that performance under the license will be worthy." *Westinghouse Stations License Renewal*, *supra*, 44 FCC at 2783.

³² We recognize that courts, on occasion, have expressed a contrary view. See e.g. *Lebanon Valley Radio, Inc. v. FCC*, 503 F. 2d 196 (D.C. Cir. 1974), where the court, in dictum, stated that "[t]he Communications Act of 1934, as amended, not only allows, but unequivocally requires the Commission to consider an applicant's

comment on whether the permissive statutory language gives the Commission the discretion to focus its inquiry on only those matters which are substantial and directly relevant to the Commission's licensing responsibility. We believe that any court decisions suggesting the Commission must conduct a broader examination have been based on the Commission's own expansive language. We seek comments as to whether, by distinguishing in advance between relevant and irrelevant behavior, we can avoid inquiry into matters which do not assist us in our objective of ensuring that the listening and viewing public is well served.

(c) What types of behavior are reasonably related to predicting an applicant's future reliability as a broadcaster?

21. Generally, we believe that our attention as a regulatory agency should be focused on matters directly relevant to performance as a broadcaster in the public interest. We lack the expertise and the resources to interpret other statutes and to make value judgments about behavior unrelated to the broadcast licensing function. Thus, we seek comment on whether the Commission can limit its concern to misconduct which directly affects the broadcaster's use of licensed facilities and the broadcast service to be rendered to the public as well as the Commission's ability to protect the public. We also would like comments about relevant behavior for an existing broadcast licensee and for an applicant who has no previous record as a broadcaster.

(i). *Existing Broadcast Licensees.*

22. For an existing broadcaster, the best predictor of future service is the applicant's past service as a broadcast licensee. Thus, we would like comments on whether, in the process of forecasting how an applicant will perform in the future, our concern in licensing should be limited to broadcast misconduct such as misrepresentation or lack of candor to the Commission, deception or defrauding of the broadcast public, abuse of broadcast facilities through fraudulent or anticompetitive commercial practices, and violations of the Communications Act or the Commission's rules and policies.³³

23. The Commission's scheme of regulation rests upon the assumption that applicants will supply it with accurate information. Because the Commission's monitoring and enforcement resources

character." It is noteworthy that the court cited no authority for its statement. See also *TV 9, Inc. v. FCC*, 495 F. 2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

³³ See *FCC v. American Broadcasting Co.*, 347 U.S. 284, 290, n.7 (1954) ("... the public interest, convenience and necessity standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding.")

are limited, it must make decisions, to a large extent, on the basis of licensee representations.³⁴ Consequently, the Commission must be able to have confidence that its licensees are honest and that the data submitted by them are dependable. Dishonest practices threaten the integrity of the licensing process.³⁵ Historically, where the Commission has believed that an applicant's general integrity and future reliability were in doubt due to its past misrepresentations³⁶ or lack of candor, the Commission has denied the application before it.³⁷ We would like comments on whether we should continue to consider misrepresentation and lack of candor as serious breaches of the trust we should place in the broadcaster.

24. The Commission also has been concerned that broadcasters do not abuse the licensing privilege conferred on them through deceptive or fraudulent programming. Indeed, the single consistent objective of the Commission's attempts to define service in the public interest over the years has been the provision of quality programming oriented to the needs and interests of the licensee's service area. Since the Commission cannot order such programming or even define it with specificity because of the prohibition against censorship contained in Section 326 of the Communications Act of 1934,³⁸ the Commission must place heavy reliance on the broadcaster's integrity in carrying out the trust placed in him. Deceptive or fraudulent programming goes to the essence of this trust. Thus, we believe we should continue to consider such unethical broadcasting conduct as fraudulent contests, deceptive advertising, news staging and news distortion to be adverse reflections on an applicant's qualifications to serve the public interest. However, we would like comments as to whether all such unethical conduct should be given equal weight when evaluating a renewal applicant's qualifications. We also request comments concerning whether some types of

³⁴ This factor has become even more compelling since the advent of radio deregulation.

³⁵ Likewise, licensee practices which abuse the licensing procedure also undermine the integrity of the Commission's decisionmaking process. Such conduct includes but is not limited to filing strike applications and petitions and harassing one's opposition.

³⁶ The Commission has stated that its concern applies even where the matter misrepresented is insignificant in itself. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

³⁷ See e.g., *FCC v. WOKO*, 329 U.S. 223 (1946); *Golden Broadcasting Systems*, 68 FCC 2d 1099 (1978); *Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975); *Milton Broadcasting Co.*, 34 FCC 2d 1036 (1972); *Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 698, *affirmed without opinion*, 486 F. 2d 1314 (D.C. Cir. 1972); *WWIZ, Inc.*, 36 FCC 561, *recon. denied*, 37 FCC 685, *affirmed sub nom. Lorain Journal Co. v. FCC* 351 F. 2d 824 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 967 (1966); *WMOZ, Inc.*, 36 FCC 292 (1964); *Palmetto Broadcasting Co.*, 33 FCC 250; (1962), *affirmed sub nom. Robinson v. FCC*, 334 F. 2d 534 (D.C. Cir.) *cert. denied*, 378 U.S. 843 (1964).

³⁸ 47 U.S.C. §326 (1976).

unethical conduct such as deceptive advertising should be referred to other regulatory agencies rather than scrutinized in Commission licensing proceedings.

25. In addition, the Commission has been concerned about unfair or fraudulent commercial practices engaged in as part of the broadcast business. Such practices include but may not be limited to fraudulent billing practices, misleading coverage maps and network program clipping. Such infractions adversely affect a licensee's sponsors or business partners rather than the listening public. A cogent argument can be made that such commercial misconduct should be left to private remedies in contract law or criminal fraud prosecution and that this Commission, with its limited resources, should not involve itself in policing these activities. On the other hand, in this era of increasing reliance on the competitive marketplace rather than regulatory oversight to achieve public interest goals, a licensee's performance in the commercial marketplace may have increasing relevance to the Commission's licensing responsibility. If broadcasters engage in fraudulent commercial practices which negatively affect the marketplace, the Commission's reliance on the marketplace as a substitute for regulation may be misplaced. The Commission would like comments as to whether or not it can and should leave a resolution of such problems to the commercial marketplace and to those adversely affected by such practices.

26. Similarly, traditional anticompetitive behavior can have serious adverse consequences on the Commission's ability to rely on the competitive marketplace. Both the Commission and Congress have advocated competition in the radio broadcasting industry.³⁹ The Commission's view favoring competition in broadcasting is premised on the belief that the greater the number of licensees, the more likely we are to achieve the First Amendment goal of diversity of ideas and information. An applicant that engages in broadcast-related anticompetitive conduct may undercut this goal by reducing the available pool of information and ideas. Past anticompetitive conduct raises the inference that the applicant will attempt such behavior in the future. In *NBC v. United States*,⁴⁰ the Supreme Court

³⁹ Congressional concern with free competition in broadcasting is evident from the explicit provisions of Section 313 of the Communications Act, 47 U.S.C. §313 (1976). In setting up the Communications Act of 1934, Congress "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *FCC v. Pottsville Broadcasting Co.* 309 U.S. 134, 137 (1940). See *FCC v. Sanders Radio Station*, 309 U.S. 470, 474-476; *Mansfield Journal Co. v. FCC*, *supra*, 480 F. 2d at 33. See also *Uniform Policy*, *supra*, 42 FCC 2d at 404: "It is clear from the legislative history of the [Communications] Act and from various provisions therein that Congress conceived as one of the Commission's major functions the preservation of competition in the radio field and the protection of the public as against the private interest."

⁴⁰ 319 U.S. 190 (1943).

stated that the Commission "might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee."⁴¹ We request comment on the role of broadcast competitive conduct in evaluating an applicant's qualifications.

(ii). *New Applicants.*

27. As discussed above, the Commission is seeking comments on whether its evaluation of an existing broadcaster's reliability should focus on the applicant's broadcast stewardship. With regard to a new applicant who has never been a Commission licensee; the Commission has no such record. We request comment on whether any misconduct which does not involve broadcasting is relevant to our licensing responsibilities and, if so, which types of misconduct are pertinent.

28. Previously, the Commission has examined nonbroadcast related misconduct on the theory that it demonstrates a propensity to violate regulations designed for public protection.⁴² We seek comment on whether it would be proper to limit our scrutiny to include only those illegal and improper activities bearing a clear relationship to an applicant's ability to operate a station in the public interest. We do not doubt the appropriateness of examining *pertinent* aspects of an applicant's past history.⁴³ What we do question is the pertinence of most activities engaged in outside the field of broadcasting to predicting future broadcast conduct. Such behavior may be too inquiry. We are concerned that the Commission's consideration of such conduct frequently places it in the position of a super-agency making decisions based upon conduct over which it lacks direct jurisdiction. The Commission's mission is not, as we view it, to be an arbiter of moral standards. Therefore, we seek comment on whether the Commission should limit its scrutiny of conduct outside the broadcasting area to include only those violations of laws or regulations whose objectives are closely enough

⁴¹ *Id.* at 222. The Court agreed with a Commission report that it was the Commission's duty "to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licenses or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals." *Id.* at 223-224.

⁴² *Westinghouse Stations License Renewals*, *supra*, 44 FCC 2d at 2783. The Commission has stated that the sense of public responsibility revealed in an applicant's outside business dealings should be examined to determine whether he is likely to exercise the proper degree of public responsibility in managing a broadcast station. *Bulova & Henshel*, 3 RR 125, 135, (1964), *affirmed sub nom. Mester v. United States*, 70 F. Supp 118 (E.D.N.Y.), *affirmed per curiam*, 332 U.S. 749 (1947).

⁴³ See *Mansfield Journal Co. v. FCC*, *supra*, 180 F. 2d at 33.

related to broadcast regulatory policies to be useful in predicting the new applicant's reliability as a broadcaster.

29. Areas of potential relevance might include misrepresentation or lack of candor to other regulatory agencies, perjury, fraudulent or deceptive journalistic practices, and anticompetitive or fraudulent commercial practices.⁴⁴ In this regard, we are interested in comments discussing whether the Commission's present policy articulated in *Uniform Policy, supra*, is too broad or not broad enough.⁴⁵ We also specifically seek comment on how the Commission should treat consent decrees agreed to by an applicant.

30. We particularly are interested in comments addressing the relevance of anticompetitive behavior unrelated to broadcasting as a measure of future broadcast performance. In our *Uniform Policy* we stated that:

[w]hen passing upon applications of persons who have engaged in monopolistic practices in other industries, the Commission must be concerned as to whether such persons would also engage in monopolistic practices in radio if they were given a license. Their conduct in other fields is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee.⁴⁶

However, despite this statement, our practice during the past generally has been to take action only the anticompetitive behavior has borne some relationship to broadcasting.⁴⁷

(d) How should the Commission treat misconduct by a corporate applicant?

31. The Commission historically has held its corporate licensees responsible for the behavior of those individuals who operate them.

In considering an application by a corporation, we cannot separate the qualifications of the individual stockholders, officers and directors and those of the corporation since it is through the individuals that the policies of the corporation are formed and carried out. To find that [an individual of the corporation] is disqualified and the corporation qualified would require us to

⁴⁴ We again request comment concerning whether anticompetitive or fraudulent commercial practices should be left to private rights of action or prosecution by federal, state or local authorities having direct jurisdiction over these activities.

⁴⁵ 42 FCC 2d 399 (1951). The Commission's 1951 *Uniform Policy* established a policy to be applied to applicants with a record of antitrust or other law violations. The statement announced that misconduct occurring outside the broadcast field would be considered by the Commission in determining an applicant's qualifications to hold a broadcast license. It also identified a variety of factors to be considered in weighing that misconduct.

⁴⁶ *Id.* at 404.

⁴⁷ See e.g., *NBC, Inc.*, 37 FCC 427 (1964) (anticompetitive activities committed in connection with trade of broadcast properties warranted denial of transfer application and restoration of station to prior licensee); *Mansfield Journal Co. v. FCC, supra*, (anticompetitive practices by applicant newspaper chain directed at local broadcast station supplied grounds for denying initial applications); *National Broadcasting Co. v. U.S.* 319 U.S. 190 (1943) (Commission's Chain Broadcasting regulations upheld).

close our eyes to all facts upon which we could determine the qualifications of applicants.⁴⁸

32. Unlike a sole proprietorship or partnership where the owner or owners often have day-to-day involvement with station operation, in many cases a corporation is owned by stockholders who place their trust in the corporation's officers and directors. These officers and directors may change, and the shareholders may change, but the corporation as a legal entity continues. In light of this flux, assigning a particular character to a corporation is difficult. Yet, consistent with present policy, the Commission may find that a corporate applicant lacks character and deny its application, when those individuals in corporate management technically responsible for any misconduct have long since departed. Thus, innocent investors not party to any misconduct may be punished.

33. We would like comments as to whether we should modify our present policies for dealing with corporate misconduct by allowing that misconduct to be neutralized if those members of corporate management responsible for corporate misconduct⁴⁹ are removed.⁵⁰ However, we are concerned that such a change would permit corporate entities to disclaim responsibility for wrongdoing in connection with matters for which licensees generally provide supervision of proper station operation. Specifically, we are concerned that corporate owners might simply delegate all responsibility for station operation to various employees and purposely avoid knowledge of or responsibility for what occurs. We seek comments about how to deal with this problem and about how to establish incentives for corporations to carry out their supervisory responsibilities and to take steps to avoid misconduct in the future.

34. Further, we request comments about the course we should take in cases where those corporate managers who are responsible for wrongdoing are also the controlling stockholders of the corporate licensee. Would allowing the assignment or transfer of a station in the face of allegations of serious wrongdoing committed by those in control of a licensee encourage misconduct or fail to restrain it?

⁴⁸ *Independent Broadcasting Co.*, 43 FCC 492, 492 (1950).

⁴⁹ We request comment regarding whether the Commission should consider those individuals responsible for misconduct to include only those individuals actively involved in the wrongdoing or instead should extend its definition to include those persons who either had knowledge or should have had knowledge of any improprieties in their official capacity.

⁵⁰ The Commission previously, on occasion, has refused to designate an issue against an applicant where the wrongdoer has terminated his relationship with the company. See *Sande Broadcasting Co.*, 67 FCC 2d 305 (1976); *Quality Broadcasting Co.*, 13 FCC 2d 642 (1965); *KOKA Broadcasting Co.*, 56 FCC 2d 191 (Rev. Bd. 1975). We are not sure at what point such miscreants must be purged to avoid denial, and we request comment on this point. Should it occur before any hearing or final decision on the issue or only after the misconduct and the individual's involvement have been adjudicated?

What if the corporate manager responsible for wrongdoing is a minority shareholder?

35. We also request comments addressed to the question of whether individuals involved in corporate wrongdoing involving broadcast properties should be subject to Commission sanctions for their involvement. Possible sanctions include forfeitures of up to \$20,000 or restrictions on profiting from the sale of their stock.

36. We also ask for comments on the issue of whether corporate licensees should be made to answer for the bad acts of controlling corporate entities, their management and their principals when that misconduct is relevant to the licensee's broadcast operations. We believe that the crucial concerns are whether the controlling company exerts or may exert significant influence over the broadcast operations of the applicant as well as whether the controlling company previously has involved the broadcast subsidiary in improprieties. We request comments regarding what standard should be used for determining whether significant influence is or may be exerted. We also request comments on whether the scope of our inquiry should differ for existing licensees as opposed to new entrants into the broadcast business.

(e) What impact should a finding of misconduct at one station have on the Commission's treatment of other commonly controlled stations?

37. Where a multiple-owner licensee has been found to have engaged in misconduct at one station, the Commission has considered the relevance of the licensee's behavior at that station to its capacity to provide good public service at its other stations. The Commission has tried to determine whether, as a result of misconduct at the licensee's first station, the Commission has any reason to believe that there is a likelihood of the same or similar misconduct occurring in the future at the licensee's other stations.⁵¹

38. We believe that this determination should depend upon the seriousness of the misconduct at the first station as well as the licensee's past performance at each of its other stations. We do not believe the Commission can avoid considering the impact of wrongdoing involving one station on the licensee's qualifications to remain a licensee for its other stations. However, we would like comments on the proposition that an adverse public interest finding with

⁵¹ Where the alleged misconduct is being investigated or litigated in a Commission proceeding and the renewals of the licensee's other stations are pending, the Commission may, in certain instances, be unable to determine whether the alleged misconduct is relevant to the operation of the licensee's involved stations. We request comment regarding whether, in such cases, the Commission should designate the renewal applications of these other stations for hearing, defer action on their renewals or grant those renewals (assuming they are grantable in all other respects) without prejudice to the taking of further action based on the findings deduced in the ongoing investigation or Commission hearing.

respect to one station should not be extended automatically to a licensee's other commonly held stations. If qualifications are reviewed on the basis of conduct rather than some intangible moral quality, the Commission's attention can be focused on the extent of the wrongdoing which has occurred at a licensee's commonly controlled stations and whether it can be expected to recur at his other facilities. While misconduct at one station certainly is relevant to measuring the probability of similar misconduct at other stations, we would like comments on whether such misconduct should be considered as evidence rather than as a determinative finding.

- (f) What effect should misconduct at one station have upon a multiple-owner licensee's ability to acquire or assign other licenses?

39. The Commission presently decides whether a multiple-owner licensee can sell its non-involved stations by determining at the time of designation whether there is a substantial likelihood that the allegations warranting designation of one station bear upon the prospective operation of the other commonly controlled stations.⁵² If, after considering all the particular facts and circumstances, the Commission concludes that there is a substantial likelihood that the allegations bear upon the operation of other stations, it will take appropriate action to advise the broadcaster that assignment applications for other stations will not be entertained.⁵³ If the Commission does not in some way express any limit on a multiple owner's right to sell its other stations, the broadcaster is free to assign them (subject, of course, to normal processing standards concerning legal, financial, technical and other matters).⁵⁴

40. While we believe that our present procedures regarding the sale of uninvolved stations make more sense than our previous policy of deferring action on the assignment applications of uninvolved licensees⁵⁵, we seek suggestions on whether further changes are warranted. For example, where the Commission believes that there is a substantial likelihood that an allegation warranting designation of one station bears upon the operation of other stations, should the Commission designate those stations for hearing so that the licenses

⁵² See *Grayson Enterprises Inc.*, 79 FCC 2d 936, 940 (1980).

⁵³ *Id.* At present, the Commission may express this limitation by including a statement to that effect in the designation order, by conditioning the renewal of the broadcaster's other stations or by designating the other stations for hearing.

⁵⁴ *Id.* Even if the Commission does not impose any limitation on the right to sell at the time of designation, the Commission still retains the discretion to impose such limitations or take appropriate action against the broadcaster's other stations at a later point if the circumstances warrant; *i.e.* if the hearing record ultimately discloses that the misconduct was more serious than initially believed. Conversely, the Commission may later remove any limitations on selling if the hearing record dispels the Commission's concerns or if new facts and circumstances demonstrate that allowing a sale would serve the public interest.

⁵⁵ *Policy Statement on Qualifications of Broadcast Licensees*, 28 RR 2d 705 (1973).

will have the opportunity to demonstrate that the alleged misconduct involved in the first hearing does not adversely affect the operations of these other stations?⁵⁶

41. We also note that the unrestricted sale of stations may hasten the departure of an undesirable owner from the airwaves, thus sparing the community from further operation by that licensee (See 47 U.S.C. §307(d)) during a typically long and involved hearing. We specifically request comments on whether the public interest would be served better by permitting licensees who have engaged in misconduct to sell their stations with some kind of bar to future ownership or management of broadcast facilities (thus avoiding expensive proceedings and immediately ridding the community of the licensee) despite the fact that the licensee might profit from its wrongdoing.

42. Where a licensee who already has one or more of its licenses in hearing on grounds of misconduct desires to acquire other stations, the Commission's present policy is to defer action on the proposed acquisition.⁵⁷ We request comment on whether it would be preferable to designate the assignment application for hearing so that the licensee will have the opportunity to show that the alleged misconduct in the first hearing does not adversely affect the operation of the new station in the public interest. Another possibility would be to approve the assignment conditioned on the findings in the first hearing.

(g) What factors are appropriate for analysis when examining an applicant's past misbehavior?

43. When examining misconduct, the Commission traditionally has analyzed the substance of the improper activities to determine their relevance and weight with respect to the ability of the applicant to operate its requested broadcast facility in the public interest. While recognizing that there is no simple formula for predicting future conduct in every case, the Commission's 1951 *Uniform Policy* set forth several factors to be considered when evaluating the proper weight to be accorded an applicant's misconduct. Such factors include whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote.⁵⁸ We request comment concerning whether these or other factors provide us with satisfactory criteria for predicting future broadcast behavior. Such additional factors could include, but need not be limited to such things as the seriousness of the misconduct (the degree of harm inflicted on the public), the level of knowledge and involvement of management officials and significant stockholders in the misconduct, and whether prompt corrective action has been taken. We also

⁵⁶ See note 53, *supra*.

⁵⁷ *Policy Statement on Qualifications of Broadcast Licenses, supra*. 28 RR2d at 705.

⁵⁸ 42 FCC 2d at 402-403.

request comment concerning whether there is some point in time (e.g., 10 years before an application is filed) beyond which misconduct should not be considered because of its age. Related to this last factor is the concept of rehabilitation by applicants who have engaged in prior wrongdoing. We seek comment regarding whether there are standards against which an appellant's purported rehabilitation may be measured.

44. We believe that whatever factors are determined to be relevant to our evaluation, the Commission's constant goal should be to ensure licensee reliability. Thus, we request comments on whether the Commission should grant an application in spite of serious wrongdoing where an applicant is able to demonstrate to the Commission's satisfaction that it is capable of being trusted to operate its station in the public interest and that the likelihood of future misconduct is non-existent.⁵⁹

45. Accordingly, the Commission adopts this Notice of Inquiry pursuant to the authority contained in Sections 4(i), 308(b), 319(a) and 403 of the Communications Act of 1934, as amended.

46. Pursuant to the applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before September 25, 1981, and reply comments on or before October 16, 1981. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

47. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and 5 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All comments should be marked clearly General Docket No. 81-500, and will be available for public inspection during regular business hours in the Commission's Public

⁵⁹ As mentioned earlier, the Commission has other remedies available where the misconduct is relatively minor. The ability to impose these lesser sanctions accords the Commission's great flexibility in dealing with various infractions. For this reason, we take specific note of the ongoing rulemaking in BC Docket No. 78-108, which is considering the adoption of rules concerning licensee misrepresentations in written statements to the Commission. While the Commission has always had the right to expect timely and truthful responses from applicants and licensees, amending the Commission's rules in the manner advocated in the rulemaking would allow the Commission to take direct action against applicants who have engaged in immaterial misrepresentations not warranting denial of their applications.

Reference Room at its headquarters in Washington, D.C. All written comments should be sent to: Secretary, Federal Communications Commission, Washington, D.C. 20554. For further information on this proceeding, contact Lee J. Peltzman at (202) 254-6530. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*.

SEPARATE STATEMENT OF MARK S. FOWLER, CHAIRMAN

RE: COMMISSION'S NOTICE OF INQUIRY REGARDING REVIEW OF
CHARACTER QUALIFICATIONS IN BROADCAST LICENSING.

The concept of character has been a tar pit that has managed to snare both licensees and the Commission; murky to the onlooker, perilous to those who become involved with it.

As we explore this area, I want to consider whether the very idea of "character" has been a helpful organizing principle to evaluate those acts of broadcasters that should work as a bar to licensing by the Commission. I am concerned that over the years we have turned the agency into some sort of "good conduct" commission rather than one concerned with areas properly in our purview.

Specifically, I wonder whether character inquiries should be limited only to activities that relate to program service on one hand and to dealings with the Commission on the other. In this latter category, I refer to acts of deceit, abuse of our processes, and other dishonorable conduct which must be viewed as highly objectionable by an agency of limited enforcement resources.

Using a morality-laden word like "character" to describe prohibited conduct of licensees may take our inquiry far afield from what we should actually be concerned about. In the end we may leave the Commission and licensees with no reliable guideposts to evaluate broadcaster conduct, while consuming our limited resources with activities best left to state or federal agencies concerned with anticompetitive trade practices.

I welcome this opportunity for the Commission to receive comments of those who have lived with our character policy. Our focus must be on how to insure that we reach conduct that comes within our mandate of regulation in the public interest while freeing us from overseeing activity not related to this objective.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

IN RE: NOTICE OF INQUIRY INTO CLARIFYING THE COMMISSION'S
REVIEW OF CHARACTER QUALIFICATIONS IN BROADCAST
LICENSING.

Having called for a thorough Commission review of its policy and

precedent concerning the character qualifications of broadcast licensees,¹ I am pleased to join in the adoption of this Notice of Inquiry.

At several points, the Notice appears critical of the current focus of the Commission's character qualifications inquiry, suggesting that it puts the Commission "in the position of a moral arbiter, positing whether the applicant before it possesses the requisite moral and ethical capacity to operate a broadcast station in the public interest." Following this criticism, the Notice further suggests a dichotomy between a moral or ethical evaluation—which may be beyond the Commission's proper purview—and an evaluation of "qualities affecting broadcast performance, such as awareness of legal requirements, adequacy of supervision, and ability to make decisions"—which may be the Commission's more limited regulatory concern. The Notice further states that "good *moral character* is no guarantee of competent broadcast service," and that "poor 'character' may not necessarily result in poor broadcast service."

Whether we call this Notice an inquiry into "character" qualifications or "performance ability," or apply some other euphemism, the critical concern and focus should be one of predicting whether the applicant is likely to operate a broadcast station in a manner consistent with the public interest.² With this ultimate and paramount purpose firmly in mind, I do not regard a proper "character" inquiry as a morality litmus test in any unrealistic, impractical or pristine sense. Rather, I think a proper character inquiry must focus on the critical concept of "trust," since trust is precisely what this Commission and the public must repose in broadcast licensees. While not every infraction of law or ethical rules of conduct need be deemed to cast aspersions on a licensee or applicant's "trustworthiness" and hence on its basic qualifications, I am not convinced that the normative concept of "character" is either outmoded or lacking in regulatory utility. While the Notice observes that "poor 'character' may not necessarily result in poor broadcast service," it stops short of suggesting that "poor character" results in good broadcast service. It bears emphasizing that the Commission's evaluation must

¹ *Central Texas Broadcasting Co.*, 74 FCC 393, 413 (1979), Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones.

² The dichotomy between "competence" and "character" suggested by the Notice is quite problematical. "Awareness of legal requirements, adequacy of supervision, and ability to make decisions"—which the Notice puts in the "competence" category—appear to me to be as much a part of a licensee or applicant's "character" as honesty and integrity. More importantly, I trust that the Notice's suggested dichotomy does not imply that an "awareness of legal requirements" relieves an applicant or a licensee of demonstrating that it is also inclined to *comply* with legal requirements, or, at least, that it is not chronically inclined to violate legal requirements. This concern may be one of "morality" but it is more pertinently one of law, and I believe that the Commission is still interested in ensuring that its licensees are law-abiding.

necessarily deal with likelihoods and probabilities. Realizing that none of us is above reproach, we should recognize nonetheless that according to the course of human experience—if not also the intuition of common sense—there *is* a nexus between good “character” and good conduct. Conversely, it *is* highly likely that poor “character” will lead to poor conduct. The real task for the Commission is to determine what type and kind of evidence is relevant and material to ascertaining the competence and trustworthiness—that is, the “character”—of broadcast applicants and licensees. This Notice of Inquiry is designed to facilitate that determination and it therefore has my support.