

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

Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees BC Docket No. 78-108

#### MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1986; Released: November 6, 1986

By the Commission: Commissioner Dennis not participating.

#### Background

1. The Commission has before it various petitions which seek reconsideration or clarification of the *Report, Order and Policy Statement* ("Policy Statement")<sup>1</sup> revising our policies on the character qualifications of broadcast applicants.<sup>2</sup> These petitions essentially question the propriety of applying the new policies to cases under review on the *Policy Statement's* effective date. Petitioners also claim that the public interest requires consideration of character issues on a comparative basis in licensing proceedings, as well as inquiry into alleged antitrust misconduct prior to final adjudication. In addition, clarification is requested regarding attribution of misconduct between corporate applicants and their unincorporated divisions. The Commission received no oppositions or replies to these petitions.<sup>3</sup>

#### Alden's and KTC's Petitions

2. *Retroactivity of Policy Statement.* In the *Policy Statement*, we stated that the new policies would be applied to pending proceedings. Specifically, we said that "[a]ll proceedings which are currently before the Commission, its staff, or any other Commission body should, where appropriate, be resolved consistent with the policies set forth" in the new *Policy Statement*, including appeals of Review Board decisions pending before the Commission on the *Policy Statement's* effective date.<sup>4</sup> Both Alden and KTC contend that this aspect of the Commission's *Policy Statement* should be reconsidered, at least insofar as it eliminates character as a comparative factor in hearings between applicants for broadcast stations. Alden, a mutually exclusive applicant for new television stations in three separate comparative proceedings, contends that a retroactive change in policy deprives it of due process. In this regard, Alden alleges that, in filing and prosecuting its application, it relied upon the *1965 Policy Statement on Comparative Broadcast Hearings*,<sup>5</sup> which provided for comparative preferences or demerits on character

grounds. Our new *Policy Statement*, Alden asserts, deprives it of these benefits. Accordingly, Alden proposes that this policy be applied only on a prospective basis.

3. Similarly, KTC contends that our decision to eliminate character as a comparative consideration in licensing proceedings should not be applied to cases that have been litigated but are still under review by the full Commission. KTC claims that "such a retroactive application of a policy, even if legally permissible, would be injurious to the parties and to the public. . . ."<sup>6</sup> The public interest would be harmed, KTC asserts, because failure to consider character on a comparative basis may enable applicants who have previously been assessed comparative demerits to prevail in hearings.

4. We will not alter our previous determination as to the proper scope of application of the *Policy Statement*. Cases on appeal before the full Commission will be governed by the *Policy Statement*, including our new policy deleting consideration of character issues on a comparative basis.

5. First, as the *Policy Statement* explains, our application of the new character standards to pending proceedings comports with the traditional judicial practice of deciding cases in accordance with principles in effect at the time of the decision. This approach necessarily results in a limited retrospective application of the criteria to cases under review at the time the new policies became effective. However, this is permissible and does not violate due process. As the Court of Appeals for the District of Columbia Circuit has stated, "an agency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest."<sup>7</sup> Since we determined that our prior approach to character warranted modification because it no longer served the public interest, it is appropriate to apply the new policies to pending proceedings.<sup>8</sup>

6. Second, this approach is consistent with past Commission practice. Specifically, in adopting the *Policy Statement on Comparative Broadcast Hearings* in 1965, we decided to apply these new policies to pending cases, including those cases under review on its effective date.<sup>9</sup> Similarly, in eliminating the suburban community policy, the *Berwick* doctrine, and the *de facto* reallocation policy, we found that the public interest would best be served by applying the new standards to pending cases, including appeals of Review Board decisions pending at the time these new policies became effective.<sup>10</sup> Moreover, in that proceeding, we specifically rejected arguments similar to those advanced by KTC and Alden, finding that application of these new policies to pending cases did not violate any hearing rights of applicants. Accordingly, KTC's and Alden's requests for reconsideration of the application of the *Policy Statement* are denied.<sup>11</sup>

7. *Elimination of Character Issues on a Comparative Basis.* KTC also requests reconsideration of the Commission's decision to exclude character issues from consideration as comparative factors in broadcast licensing hearings between mutually exclusive applicants. Although KTC has no quarrel with the Commission's desire to eliminate trivial inquiries into alleged character deficiencies, KTC contends that refusing to consider character issues on a comparative basis could result in applicants with very serious character defects obtaining grants. Consequently, KTC asks the Commission to reinstate its former policy of awarding character demerits on

comparative basis. In the alternative, if character issues are considered only for purposes of an applicant's basic qualifications to be a licensee, KTC suggests the Commission provide that certain defects, which were formerly considered to be less than disqualifying, now warrant disqualification under the new policy.

8. We will deny KTC's requests. As the *Policy Statement* clearly provides, we have eliminated consideration of character on a comparative basis because we could no longer justify comparative evaluation. Specifically, we found that comparative character evaluation would increase the cost, complexity, length, and subjectivity of comparative hearings without sufficient benefit, particularly in light of the new guidelines concerning matters that would be deemed relevant to an applicant's character. However, we have retained character as a basic qualifications issue. In this regard, applicants with alleged character defects will still have to establish that they possess sufficient basic qualifications to become Commission licensees. This inquiry will include relevant FCC-related misconduct and non-FCC misconduct as set forth in our *Policy Statement*. Moreover, contrary to petitioner's assertions, this approach will prevent applicants with character defects from becoming licensees. In fact, we note that, since the *Policy Statement's* adoption, there have been at least three instances where applicants for renewal of license or a construction permit have been disqualified on the basis of character defects.<sup>12</sup> Finally, we reject petitioner's suggestion that we alter our standard for considering character as a basic qualifications issue. Having determined that the public interest does not warrant consideration of non-disqualifying character issues on a comparative basis, it would make no sense to now consider those same types of character issues as disqualifying.<sup>13</sup> Accordingly, KTC's request for reconsideration of our policy deleting character on a comparative basis is denied.<sup>14</sup>

#### UCC's Petition

9. UCC asserts that our *Policy Statement* limits the scope of relevant misconduct in the broadcast field to violations of the Communications Act or of the Commission's rules or policies. UCC believes that this is not permissible because the Commission cannot categorically specify every broadcast related activity which may contravene the public interest. However, the scope of relevant misconduct in the broadcast field is not as limited as UCC believes. Rather, the *Policy Statement* states, in pertinent part, that non-FCC misconduct, which may in some cases be germane to the Commission's character inquiry, "may include broadcast station related misconduct *not specifically proscribed by the Act or the Commission*."<sup>15</sup> Indeed, the *Policy Statement* provides that the Commission "will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, and with certain specified non-FCC misconduct which demonstrate the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies."<sup>16</sup> In other words, misconduct in the broadcast field which does not violate the Communications Act or the Commission's rules or policies is still relevant for purposes of determining character qualifications of broadcast applicants provided that there has been an adjudication and it falls into one of the categories of relevant non-FCC misconduct.<sup>17</sup> Consequently, it is incorrect for UCC to assert that, in the broadcast field, we have nar-

rowed the scope of Commission inquiry solely to violations of the Communications Act or of our rules and policies. Moreover, we also indicated that, if circumstances warrant, we would revisit the question of modifying the scope of non-FCC related misconduct that would be considered relevant for determining character qualifications.<sup>18</sup>

10. *Anticompetitive Misconduct*. UCC next characterizes the policy on antitrust and anticompetitive practices established in the *Policy Statement* as egregious error. Petitioner asserts that the public interest standard of the Communications Act primarily embraces concerns over potential monopolistic practices in broadcasting and requires consideration of allegations of anticompetitive or antitrust activities whether or not there has been an adjudicated violation of the antitrust laws. In support of this proposition, UCC cites *NBC v. U. S.*,<sup>19</sup> *FCC v. Sanders Brothers Radio Station*,<sup>20</sup> and *FCC v. National Citizens Committee for Broadcasting (NCCB)*.<sup>21</sup> We disagree. Although the Commission has been, and will continue to be, concerned with broadcast-related anticompetitive practices by its licensees and applicants, these activities are only one factor that the Commission weighs in determining whether the grant of any application would serve the public interest.<sup>22</sup> Further, the great weight of authority does not support the petitioner's assertion that the Commission is required to consider allegations of anticompetitive activities, even when such activities have not been considered in any other forum. Indeed, Supreme Court cases cited by the petitioner hold that the Commission's authority to scrutinize allegations of anticompetitive or antitrust activities is *permissive and not mandatory*.<sup>23</sup>

11. Our *Policy Statement* expresses concern over the public interest ramifications of broadcast related anticompetitive practices by licensees and applicants and states our intention to consider adjudicated violations of antitrust laws in connection with character inquiries in licensing proceedings. This change in policy was based upon a balancing of several considerations. First, it reflects our belief that, where broadcast-related activity does not violate state or federal antitrust or anticompetitive laws or Commission rules or policies, licensees should not be penalized for engaging in activities that meet the requirements of law. Second, it takes into account that concerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position in the Commission's regulatory scheme and that such activity may be predictive of an applicant's proclivity to comply with Commission rules and policies. Third, this change in policy recognizes that the Commission is not the appropriate agency to engage in the initial investigation, adjudication, or enforcement of the antitrust laws. We continue to believe that these reasons warrant our change in policy. Moreover, UCC has cited no errors of fact or law in the Commission's decision which justify or necessitate reconsideration of that decision.<sup>24</sup>

#### CBS Petition

12. CBS requests the Commission to clarify the *Policy Statement* by indicating that we "will, in reaching licensing decisions, consider non-FCC related misconduct by the nonbroadcast *divisions* of an applicant corporation to the same extent as we would [consider] such misconduct by an applicant's nonbroadcast subsidiary, parent, or related subsidiary corporations."<sup>25</sup> CBS believes that its proposed clarification would fill a gap in the *Policy Statement*

while at the same time advancing the *Policy Statement's* purpose of limiting the scope of character inquiries to areas which are relevant to the Commission's licensing goals. CBS asserts that corporate applicants should have the ability to follow their business judgments in adopting divisional structures, without having to concern themselves that such decisions may be subjected to harsher treatment in licensing proceedings. In support, CBS cites *Copperweld v. Independence Tube Corp.*,<sup>26</sup> noting that the Supreme Court has warned against the creation of policy which "imposes grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." Accordingly, CBS believes that there should be no difference in consequence whether non-FCC related misconduct occurs at a nonbroadcast division of a corporate applicant or at a related nonbroadcast subsidiary in terms of attributing this misconduct to a corporate applicant.

13. After reviewing CBS' petition, we conclude that its suggested clarification is not warranted. In setting forth policies regarding the attribution of non-FCC related misconduct between parent companies and their broadcast subsidiaries, or between broadcast subsidiaries and related nonbroadcast subsidiaries, the Commission sought to exclude, generally, such misconduct from consideration in broadcast licensing proceedings unless there were common principals actively involved in the day-to-day operations of the broadcast subsidiary. Even under these circumstances, the Commission would focus on the actual involvement of the common principals in both the misconduct and the day-to-day activities of the broadcast subsidiary. Moreover, mitigating factors would be taken into account in assessing the significance of the misconduct on the applicant's broadcast operations, such as corporate actions to "neutralize" the misconduct and to prevent its reoccurrence. Underlying this approach was the Commission's view that misconduct should not be attributed unless there is a sufficient nexus between the broadcast subsidiary and the nonbroadcast parent company or related subsidiary. We continue to hold that this is a reasonable basis for considering misconduct by parent companies and nonbroadcast subsidiaries, and CBS appears to concur with this view.

14. However, we do not believe that it would be appropriate to extend this policy to misconduct that occurs at the nonbroadcast division of a corporate applicant. Although CBS asserts that separate divisions of a corporation generally have separate officers and employees and that corporate divisions should be considered as "autonomous" as subsidiary corporations, we do not have sufficient information in the record of this proceeding to draw such conclusions. Rather, it is a well established principle of corporation law that a corporate subsidiary has a separate identity from its parent company "whereas unincorporated departments or parts of a corporation are not entities separately considered."<sup>27</sup> Furthermore, corporate divisions are traditionally treated as part of the same corporation for tax and accounting purposes and not as separate, corporate units. Consequently, we will not grant CBS' request.<sup>28</sup> However, we do not intend by this decision to cause those kinds of structural changes in licensees which are changes in form only, not in substance. Consequently, if the extent of separation and insulation between an applicant corporation and a nonbroadcast division is analogous to that existing between a licensee corporation and its parent corporation or a related subsidiary corporation, then we will not preclude an applicant from making such a showing and

requesting that non-FCC related misconduct occurring at a nonbroadcast division should be governed by the same standards as if the misconduct occurred at a parent company or a related subsidiary. Such a showing could be made in an application or during a hearing, and the burden would be on the corporate applicant to demonstrate that its nonbroadcast division is the functional equivalent of a related subsidiary for purposes of attributing misconduct.<sup>29</sup>

#### SPACE's Petition

15. *Broadcast Networks.* SPACE, a nonprofit organization representing a variety of groups involved with the manufacture or use of satellite earth station reception equipment, seeks reconsideration or clarification of our *Policy Statement* in three remaining respects. First, SPACE requests the Commission to clarify that the *Policy Statement* does not overturn Commission and court precedent upholding the regulation of broadcast network practices. In this regard, SPACE suggests that the *Policy Statement* could be interpreted as a relaxation or deregulation of Commission oversight of the practices of broadcast networks. Consequently, SPACE asks us to clarify that the *Policy Statement* does not preclude private parties from raising questions concerning network practices in licensing proceedings.

16. At the outset, we note that SPACE has not cited the basis in the *Policy Statement* that has prompted its requested clarification. As a result, we perceive no need for any extended discussion. Nevertheless, we note that the Commission presently has regulations affecting practices by broadcast networks. For example, Section 73.658 of the Commission's Rules contains, *inter alia*, restrictions on the amount of network programming affiliated stations may air in prime-time hours.<sup>30</sup> It also prohibits, with certain specified exceptions, networks from syndicating or having a financial interest in the programs they air. Further, it affects the content of network affiliation agreements. The *Policy Statement* in no way modifies these rules. On the contrary, a violation of these and any other pertinent rules is a relevant area of concern in broadcast licensing proceedings because such misconduct is "FCC-related." As the *Policy Statement* explains, violations of the Communications Act or of FCC rules or policies are considered for purposes of character inquiry because they are probative of applicants' honesty and reliability for future compliance with Commission rules or policies. Moreover, certain types of non-FCC misconduct would also be relevant, including violations of the antitrust laws that are broadcast related, if there has been a final adjudication. Finally, we note that networks are often multiple station licensees, and, like any other multiple owner, any misconduct within the parameters of this *Policy Statement* could have an effect on other commonly owned stations.<sup>31</sup>

17. *Satellite Cable Networks.* SPACE also requests the Commission to clarify that the *Policy Statement* does not preclude inquiry into the programming and distribution practices of satellite cable networks in broadcast licensing proceedings.<sup>32</sup> In support of its request, SPACE alleges that these cable networks are injuring earth station owners by scrambling their signals and by engaging in various anticompetitive practices. We will deny SPACE's request since it is beyond the scope of this proceeding. We note that satellite cable networks, like any other entities which may apply for broadcast licenses, are subject to our *Policy*

Statement for purposes of determining character qualifications. However, at the present time, the Commission has no regulations or policies specifically affecting satellite cable networks.<sup>33</sup> Consequently, this is not the appropriate forum for the Commission to decide what type of regulations, if any, should apply to satellite cable networks, or to consider the character-related implications of the conduct alleged by SPACE.

18. *Scope of Policy Statement.* As a final matter, SPACE petitions the Commission to clarify the applicability of the *Policy Statement* to common or private common carriers. Citing a recent common carrier case in the Domestic Public Land Mobile Radio Service ("DPLMRS"),<sup>34</sup> SPACE asserts that we improperly broadened the scope of our *Policy Statement* to include common carriers. However, this interpretation is incorrect. As we have consistently stated in both the *Notice of Inquiry*,<sup>35</sup> and in the subsequent *Policy Statement* in this proceeding, these new policies apply only to applicants for broadcast licenses. Indeed, common carriers are distinguished from broadcasters for purposes of character qualifications because no content regulation is involved<sup>36</sup> and because such issues are adjudicated on a case-by-case basis without the guidance of a specific policy statement. As a result, reference is occasionally made in common carrier cases to broadcast policies and precedents as aids in resolving character issues.<sup>37</sup> Consistent with this approach, the case cited by petitioner, *Baker Protective Services, Inc.*, involved, *inter alia*, the issue of whether antitrust violations by a related subsidiary and a parent company should be attributed to a renewal applicant in the DPLMRS service. In resolving this question, the Review Board applied policies established by our *Uniform Policy on Violations of Laws*,<sup>38</sup> concluding that the misconduct should not be attributed. Thereafter, we affirmed this decision, noting that "[n]othing in our new character policy statement [which superseded the *Uniform Policy*] would dictate a different result herein."<sup>39</sup> This reference to the broadcast *Policy Statement* was thus merely a supporting reason for affirming the Review Board's decision and not an extension of our broadcast policies to common carriers.

19. *Conclusion.* After carefully reviewing the petitions for reconsideration, we reaffirm that the public interest is best served by revision of our policies and rules on character qualifications as set forth in the *Policy Statement*. Moreover, the petitioners have not demonstrated any errors of fact or law that would warrant its modification.

20. The requirements contained in this *Memorandum Opinion and Order* have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden imposed on the public.

21. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Alden Television Inc., and Alden Communications Corp., CBS Inc., Satellite Television Industry Association, Inc., and The Office of Communication of the United Church of Christ and Telecommunications Research and Action Center ARE DENIED.

22. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Kannapolis Television Company IS DISMISSED as described above and IS DENIED IN ALL OTHER RESPECTS.

23. IT IS FURTHER ORDERED, That the Motion to Strike filed by Community Action Communications, Inc., IS GRANTED IN PART and IS DENIED IN ALL OTHER RESPECTS.

24. Authority for this action is contained in Sections 4(i), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended.

25. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

#### FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

#### FOOTNOTES

<sup>1</sup> 102 FCC 2d 1179 (1986), 51 Fed. Reg. 3049 (January 23, 1986), *petition for review pending sub nom. National Association for Beuer Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. filed March 17, 1986). On May 16, 1986, the court granted the Commission's motion to hold the review proceedings in abeyance pending action on the petitions for reconsideration.

<sup>2</sup> The petitions were filed on behalf of the following groups: (1) Kannapolis Television Company (KTC); (2) Alden Television, Inc., and Alden Communications Group (Alden); (3) CBS, Inc. (CBS); (4) The Office of Communication of the United Church of Christ and the Telecommunications Research and Action Center (hereinafter jointly referred to as UCC); and (5) SPACE, the Satellite Television Industry Association (SPACE).

<sup>3</sup> However, a motion to strike KTC's petition was filed on behalf of Community Action Communications, Inc. (CAC). KTC and CAC have been competing applicants for a new television station in Kannapolis, North Carolina, and at the time KTC's petition was filed, the grant of a construction permit to KTC was under review by the Commission. In its motion, CAC contends that KTC's petition for reconsideration should be stricken because it improperly raises the merits of character issues that are pending in the Kannapolis television proceeding. We will grant the motion in part and deny it in all other respects. Consistent with precedent, we will consider KTC's petition only to the extent that it suggests changes in our character policies on a general basis, and, in all other respects, the petition is dismissed. *See, e. g., Policy Statement*, 102 FCC 2d at 1235 n.128.

<sup>4</sup> *Policy Statement*, 102 FCC 2d at 1235. Pursuant to paragraph 122 of the *Policy Statement*, the new policies became effective upon publication in the Federal Register. *See* note 1, *supra*.

<sup>5</sup> 1 FCC 2d 393 (1965).

<sup>6</sup> Petition for Reconsideration, filed by KTC at 5 (February 24, 1986) [hereinafter referred to as "KTC Petition"].

<sup>7</sup> *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981). In this case, the court held that it would be an "idle and useless formality" to remand the case to the Commission to determine whether it had properly applied its "Top 50 Market Policy," when that policy had been deleted by the Commission.

<sup>8</sup> We note that on June 19, 1986, KTC filed, along with other parties, a joint request for settlement of its comparative hearing proceeding for a new television station in Kannapolis, North Carolina. *See* note 3, *supra*. The Commission subsequently rejected the settlement agreement, finding CAC unqualified to be

a licensee on character grounds. The Commission also granted the construction permit to KTC. See *Memorandum Opinion and Order*, FCC 86-444, adopted October 15, 1986.

<sup>9</sup> See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 399-400.

<sup>10</sup> See *Report and Order* in Docket 82-320, 93 FCC 2d 436, 457-58 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

<sup>11</sup> Similarly, we reject KTC's contention that application of our policy deleting character issues on a comparative basis to pending appeals before the Commission will harm the public interest. KTC has submitted no evidence on this point. Its arguments are based on mere speculation. It is well established that, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. Section 1.429 (1985), this is not a sufficient basis for granting reconsideration.

<sup>12</sup> See *Mid - Ohio Communications, Inc.*, 60 RR 2d 986 (Rev. Bd. 1986)(pattern of willful and repeated violations of the Commission rule requiring applicants to report substantial and significant changes in information furnished in pending applications, lack of candor, and misrepresentations by renewal applicant warranted disqualification notwithstanding voluntary dismissal of competing application); *RKO General, Inc.*, MM Docket No. 84-1057, FCC 86D-47 (Contingent I.D., released July 23, 1986)(two applicants in comparative renewal proceeding disqualified for misrepresentation and lack of candor); *Catocin Broadcasting Corp. of New York*, FCC 86D-52, released August 22, 1986 (renewal application denied as "dishonest, untrustworthy, and unreliable.")

<sup>13</sup> See *Policy Statement*, 102 FCC 2d at 1231.

<sup>14</sup> Subsequent to the release of our *Policy Statement*, the Review Board suggested that demerits for character issues may be assessed in some circumstances in broadcast comparative hearings. See *Professional Radio, Inc.*, 59 RR 2d 1173, 1178 n.11 (Rev. Bd. 1986). Thereafter, in a separate comparative proceeding, we clarified that this suggestion is incorrect in view of the clear language of the *Policy Statement* that character qualifications will no longer be considered on a comparative basis. See *Broadcast Associates of Colorado*, 60 RR 2d 721, 723 n.5 (1986).

<sup>15</sup> *Id.* at 1183 n.11 (emphasis added).

<sup>16</sup> *Id.* at 1190-91.

<sup>17</sup> The categories of relevant "non-FCC related misconduct" include: (1) misrepresentations to any other governmental unit, resulting in criminal or civil violations; (2) criminal convictions involving false statement or dishonesty; (3) felony convictions not involving fraudulent conduct provided that there is a *substantial relationship* between the conviction and the applicant's proclivity to be truthful and comply with the Commission's rules; and (4) adjudicated violations of anticompetitive or antitrust laws that are broadcast related.

<sup>18</sup> See *Policy Statement*, 102 FCC 2d at 1208 n.75.

<sup>19</sup> 319 U.S. 109, 222-24 (1943).

<sup>20</sup> 309 U.S. 470, 474 (1940).

<sup>21</sup> 436 U.S. 775 (1978).

<sup>22</sup> See *Policy Statement*, 102 FCC 2d at 1200-03. See also *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (1983), in which the court rejected petitioner's argument that the public interest standard mandated inclusion in license renewal applications of questions concerning programming performance. Therein, the court stated:

Petitioners contend, in effect, that an empowering statute that explicitly grants the Commission broad authority must be read implicitly to impose a highly specific duty. Without more, this is a dubious proposition.

In the instant case, the proposition is no less dubious.

<sup>23</sup> See, e.g., *NBC v. U. S.*, 319 U.S. at 222, where the Supreme Court analyzed the legislative history of the Radio Act of 1927 as well as the Communications Act of 1934 and determined that consideration by the Commission of *even an adjudicated violation* of antitrust laws was discretionary, and not mandatory: "The Commission was thus *permitted to exercise its judgment* as to whether *violation* of the antitrust laws disqualified an applicant from operating a station in the 'public interest'" (emphasis added); *U. S. v. RCA*, 358 U.S. 334, 343 (1959), where the Court stated that Congress had amended the Communications Act "merely to authorize rather than to require the revocation of a license by the Commission after a court had found a radio broadcaster in violation of the antitrust laws" (emphasis added); and *FCC v. NCCB*, 436 U.S. at 795, where the Court stated that the Commission "is permitted to take antitrust policies into account in making licensing decisions pursuant to the public interest standard." But see *Philco Corporation v. FCC*, 293 F.2d 864 (D.C. Cir. 1961) which held that a hearing was required regarding unadjudicated antitrust misconduct by an applicant for license renewal under our former character policies. In reaching this result, the court stated that "competitive practices may make an applicant unworthy [of license renewal] whether or not they violate the antitrust laws." *Id.* at 868. However, *Philco* relies primarily on *NBC v. U. S.*, *supra*, and does not offer independent support that there is a statutory requirement to consider business practices that do not amount to adjudicated violations of the antitrust laws. We believe, therefore, that *Philco* does not preclude the Commission from finding that the public interest is no longer served by its former policy. See also *Policy Statement*, 102 FCC 2d at 1202 n.53.

<sup>24</sup> Similarly, SPACE alleges in its petition that the Commission should inquire into unadjudicated antitrust allegations that are communications-related. However, we will deny SPACE's request for the same reasons set forth above.

<sup>25</sup> Petition for Reconsideration and Clarification, filed by CBS, at 1 (February 14, 1986)(emphasis added).

<sup>26</sup> 467 U.S. 752, 773 (1984)(quoting *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962)).

<sup>27</sup> See *I. W. Fletcher, Cyclopaedia of the Law of Private Corporations*, Section 25 at 306 (rev. perm. ed. 1983).

<sup>28</sup> The *Policy Statement* also holds that individual acts of non-FCC misconduct by officers and employees of a parent company or a related subsidiary would not be attributed to a corporate applicant unless the individual (1) has an attributable interest in the applicant corporation or the parent company under the multiple ownership rules, 47 C.F.R. Section 73.3555 (1985), and (2) has actual involvement in the day-to-day operations of the broadcast subsidiary. See 102 FCC 2d at 1219-20. CBS requests that we apply this same standard to individual acts of non-FCC misconduct by the officers and employees of the nonbroadcast divisions of a corporate applicant. However, for the same reasons cited above, we will deny this request. Nevertheless, corporate applicants will not be precluded from making a special showing, as described *supra*, that a division of a corporate applicant should be treated like a subsidiary for purposes of attributing individual acts of misconduct.

<sup>29</sup> We note, moreover, that whereas the presumption governing the relevance of misconduct in another subsidiary will differ from that in a different division, the final determination in either case will turn on the same facts: the involvement of common management principals.

<sup>30</sup> 47 C.F.R. Section 73.658 (1985).

<sup>31</sup> See *Policy Statement*, 102 FCC 2d at 1223-25.

<sup>32</sup> A cable network distributes "satellite cable programming." Pursuant to the Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (codified at 47 U.S.C. Section 605(c)(1)(Supp. II 1984), "the term 'satellite cable programming' means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."

<sup>33</sup> *But see National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1204-05 (D.C. Cir. 1984) (suggesting that customer-programmers who lease or otherwise have access to common carrier facilities may be subject to broadcast regulation under Section 301 of the Communications Act). This matter is currently being considered in the *Notice of Proposed Rule Making*, in Gen. Docket No. 85-305, 51 F.R. 1817, paras. 39-43 (released January 15, 1986) (Subscription Video Services). *See also Notice of Inquiry* in Gen. Docket No. 86-336, Mimeo No. 36804, at para. 93 (released August 19, 1986) (Inquiry into Scrambling of Satellite Television Signals).

<sup>34</sup> *Baker Protective Services Inc.*, 59 RR 2d 1141 (1986).

<sup>35</sup> 87 FCC 2d 836 (1981).

<sup>36</sup> *See, e.g., Arizona Mobile Telephone Co.*, 93 FCC 2d 1147, 1155 (1983), which states, "[T]he fundamental differences between broadcast and DPLMRS proceedings require different standards, and misconduct which could reflect adversely on the character qualifications of broadcast applicants would not have the same impact on the qualifications of a DPLMRS applicant."

<sup>37</sup> *See Puerto Rico telephone Company*, Mimeo No. 2689, released February 21, 1986.

<sup>38</sup> 42 FCC 2d 399 (1951).

<sup>39</sup> *Baker*, 59 RR 2d at 1142 n.1.