

Character Qualifications, Abuse of Process
 Character Qualifications, Concealment
 Character Qualifications, Effect of Criminal Conviction
 Character Qualifications, Effect of Misrepresentation
 Character Qualifications, Lack of Candor
 Character Qualifications, Non-Applicant

Report and Order and Policy Statement adopted establishing general guideline principles to be used in evaluating the character qualifications of b/c applicants. This action establishes the range of relevant behavior, both FCC related and non-FCC related, which the Commission will consider in its licensing process. Policies pertaining to character implications in the corporate and multiple ownership context are clarified. This action eliminates character as an issue in comparative proceedings unless the character defect goes to the applicant's basic qualifications.

— *Character Qualifications*

Gen Docket '81-500

FCC 85-648

**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

REPORT, ORDER AND POLICY STATEMENT

Adopted: December 10, 1985; Released: January 14, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. Before the Commission is our *Notice of Inquiry* (hereinafter "NOI") in Gen. Docket No. 81-500¹, regarding character qualifications in broadcast licensing, and the comments and reply comments submitted in response thereto. Also before the Commission is our *Notice of Proposed Rule Making* (hereinafter "NPRM") in BC Docket No. 78-108², concerning establishment of new broadcast rules mandating the submission of timely and accurate responses to Commission inquiries by permittees and licensees, and the comments filed in response to that NPRM.³ The related nature of these proceedings makes their joint consideration appropriate.⁴

II. Purpose of the Proceeding

2. Section 308(b) of the Communications Act states in pertinent part that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station'" (Emphasis supplied.) Similar language regarding construction permit applications is found in Section 319(a), and, under the provisions of Section 310(d) of the Act, applications for transfer or assignment of permits or licenses are treated as if the proposed transferee or assignee were filing under Section 308. The finding of facts regarding qualifications is not, however, an end in itself. Rather, it is a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application before it.⁵

¹ 87 FCC 2d 836 (1981).

² 43 Fed. Reg. 14693 (April 7, 1978).

³ A complete list of those commenting in both proceedings appears as Appendix "A".

⁴ See our discussion of BC Docket No. 78-108 in the NOI, 87 FCC 2d at 855, n. 59.

⁵ See Sections 307(a), 309(a), and 319(c) of the Communications Act. Under Section 309(i), only the qualifications of the "tentative selectee" are fully examined. The sole broadcast service currently subject to licensing by lottery is

3. In the NOI, the Commission observed that we had, over the years, "considered a wide range of conduct in examining applicants' character." We stated that this action had been taken "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."⁶ It was the Commission's objective in this proceeding, we said, to develop a "clearly articulated licensing policy" which would allow us to "focus on behavior which is truly relevant to broadcast licensing and to tailor [our] actions to these licensing goals." Such a policy, we hoped, would facilitate "more consistent and, thus, fairer decisionmaking by the Commission." It would also "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."⁷

4. The fundamental thrust of the NOI, then, was the Commission's concern that those "character" matters considered in broadcast licensing proceedings be clearly relevant to the licensing process, and that the process be made more equitable and efficient.⁸ We explained that one source of difficulty in reaching such an objective has been the lack of Congressional guidance as to the definition of "character" to be utilized by the Commission. This has, on occasion, led to use by either the Commission or the courts of a wide-ranging notion of "moral" character of limited value in the licensing process.⁹ Use of the absolutist concept of

low power television ("LPTV").

⁶ We noted that the only policy guidance on this issue, which deals with but one aspect of it, was adopted more than thirty years ago. *Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations Cases in Connection with Violation by an Applicant of Laws of the U.S. Other than the Communications Act of 1934, as Amended*, 42 FCC 2d 399 (1951) (hereinafter "Uniform Policy").

⁷ NOI, *supra* note 1, at 837.

⁸ Applicants' claims of inequitable treatment are a frequent feature of proceedings involving character. The Commission's obligation to explain departures from precedents in this area, and, where it relies on factual differences with such precedents, to explain the relevance of those differences to its purposes and those of the Communications Act (unless the differences are so obvious as to remove the need for explanation) was made clear in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). See also, *White Mountain Broadcasting Co. v. FCC*, 598 F.2d 274, 277-280 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 963 (1979). As to the epic length and complexity which proceedings involving character issues may assume, see *RKO General, Inc. v. FCC*, 670 F.2d 215, 218-221 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Mid-Florida Television Corporation*, 87 FCC 2d 203, 204-209 (1981).

⁹ The broadcast definition of character in this vein appears to have been articulated in *Mester v. United States*, 70 F. Supp. 118, 122 (E.D.N.Y. 1947),

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"moral" character requires the Commission to explain why behavior which evidences sufficiently "bad" character to warrant denial of an application in one instance does not mandate the same result in another, apparently similar case.¹⁰

5. Additional difficulties arose, the Commission observed, in the disparity of treatment which had been accorded existing licensees, whose broadcast record might be factored into Commission analyses in mitigation of character "defects," and new nonbroadcaster applicants, as to whom no such record was available. Further complexity was involved in the disposition of "character" issues involving owners of groups of stations. For example, if the judgment is made that a broadcaster is of sufficiently "bad" character to be denied license renewal in one community, may that same "bad" entity still be allowed to retain a license in another community?

6. Our review of the record in this proceeding and the experience gained from years of evaluating the character qualifications of numerous applicants convinces us that substantial changes to the Commission's character policies are warranted. Generally, the Commission considers an applicant's character in two contexts. Initially, the Commission conducts an inquiry as to whether an applicant possesses the basic threshold character qualifications necessary to be a licensee or permittee. The second setting in which character issues may be raised is as part of a comparative proceeding. Once a character issue has been designated in a comparative proceeding, the Commission makes a determination whether an applicant should receive a comparative demerit. In this regard, the Commission's character evaluations in

aff'd per curiam, 332 U.S. 749 (1947), cited with approval in such cases as *Southeastern Massachusetts Broadcasting Corp.*, 12 FCC 363, 372 (1947); *WKAT, Inc.*, 29 FCC 221, 238 (I.D. 1958); *Armond J. Rolle*, 31 FCC 2d 533, 536, (Rev. Bd. 1971); and *RKO General, Inc.*, 78 FCC 2d 1, 48-49 (1980), *aff'd in part, remanded in part on other grounds, RKO General, Inc. v. FCC*, *supra* note 8. As to the dangers inherent in the use of such terminology as "good moral character," see *Konigsberg v. State Bar of California*, 353 U.S. 252, 262-264 (1957).

¹⁰ See *supra* note 8. The Commission is not, of course, bound "to deal with all cases at all times as it has dealt with some that seem comparable," *FCC v. WOKO*, 329 U.S. 223, 228 (1946), and it frequently occurs that decisions turn on meaningful distinctions found in the course of case-by-case reviews. As to the difficulty of reconciling apparently disparate treatment, however, see *Cumberland Broadcasting Corporation v. FCC*, 647 F.2d 1341 (D.C. Cir. 1980) (Brief acquiescence in attorney misconduct does not warrant disqualification); *WADECO, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980) (lengthier period of apparent acquiescence in attorney's actions leads to disqualification); *WEBB, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969) (good faith reliance on counsel in case where application not properly amended avoids disqualification).

comparative proceedings have necessarily resulted in an attempt to determine which applicant possesses the best character and have caused parties to such proceedings to seek to impugn each others' character in pursuit of comparative hearing advantages.

7. We believe it is appropriate to modify both aspects of the Commission's character inquiry. With regards to the basic threshold character evaluation, we find that the scope of the present inquiry is overly broad. Accordingly, future inquiries into an applicant's basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies. An analysis of these specific traits will serve as guidelines for all future inquiries regarding applicant misconduct. Thus, while we shall continue to refer to such evaluations as a character inquiry, the scope of our analysis will be much narrower than the term "character" implies. Consistent with this new approach, we will modify the range of both FCC related and non-FCC related misconduct that will be considered relevant to our inquiries.¹¹ In addition, modifications will be made to threshold character inquiries arising in the corporate and multiple ownership contexts. Second, we believe that once the basic character fitness of a potential licensee has been established, character issues should not be considered as a comparative issue. Thus, character issues will no longer be designated as comparative issues in either competing new or in comparative renewal proceedings.

8. We shall now turn to a discussion of the specific issues raised by the NOI in this proceeding. An analysis of issues relating to narrowing the focus of our threshold character inquiry appears in Section III below. Section IV contains a discussion of the issues relating to character in the comparative context. Our decision regarding the issues raised by the NPRM in BC Docket No. 78-108 can be found in section V.

III. Issues Analysis

9. The Commission addressed the issues inherent in the consideration of "character" by raising a series of questions in the NOI

¹¹ FCC related misconduct describes activity which violates the Communications Act or a specific Commission rule or policy. See 47 U.S.C. § 151 et. seq.; 47 C.F.R. §§ 0.1 et. seq. The term non-FCC misconduct describes misconduct which may be a violation of law but does not specifically contravene the Communications Act or a specific Commission rule or policy. In this regard, we note that non-FCC misconduct may include broadcast station related misconduct not specifically proscribed by the Act or the Commission. See *infra* at para. 31.

on which parties might comment. At the same time, we indicated our tentative views on these matters. We believe it appropriate to resolve the issues before us in a similar fashion. Thus, our format in this document will be to present the question first set forth by the Commission in the NOI, summarize our initial (NOI) views on the matter, discuss the comments received, and state our conclusions as to the policy to be followed in the future.

A. "Character" vs. "Conduct"

I. Questions in the NOI

10. The first two questions raised in the NOI lend themselves to joint consideration:

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

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

11. As to the purpose served by scrutinizing an applicant's character qualifications, the Commission stated in the NOI that while the applicant's legal, technical and financial qualifications help to establish the entity's ability to perform, they do not "tell us whether we can rely on the applicant to perform prospectively all of the obligations of a broadcast licensee." Thus, we tentatively concluded that "our concern with probable future behavior is unavoidable," and that if 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."¹²

12. However, the Commission questioned whether we should continue to attempt to forecast an applicant's reliability as a licensee by examining its *character* as such. Would it not be more appropriate, we asked, for the Commission to "evaluate *directly* the relevance of an applicant's past *misbehavior* to its capacity to use the requested radio authorization in the public interest." (Emphasis supplied). We stressed the point that in the licensing process, the "only relevant misconduct" might well be "that which aids us in predicting what type of broadcast activity may

¹² However, we questioned whether we should continue to try to predict the prospective broadcast performance of a new nonbroadcaster applicant. We asked whether, as to this new applicant, with no broadcast record, an alternative might be to "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." See *infra* para. 49.

be expected in the future." We suggested that past consideration of applicants' "moral" character had involved inquiries going substantially beyond these boundaries. Thus, we queried whether the Commission was "required specifically to consider an applicant's moral character during the licensing process." We requested comment on the actual nature of the duty, if any, imposed upon the Commission by Section 308(b) and Section 319(a).

2. Comments Regarding What Section 308(b) Requires

13. It appears that the threshold issue in this aspect of this proceeding is the matter of what sort of inquiry into character, if any, the Communications Act requires. Commenting parties' views in this regard may generally be summarized as concluding that, at the least, the Commission has substantial discretion under the statute to determine the manner in which it will consider character issues. Parties such as CBS, Inc. ("CBS") believe that the inquiries authorized by Sections 308(b) and 319(a) are permissive, while other commenters, including Citizens Communications Center ("Citizens"), see the provisions as mandatory. However, almost all of those commenting on this point agree that the Commission is allowed significant latitude as to the scope of the inquiry to be conducted. American Broadcasting Companies, Inc. ("ABC") and Tribune Company ("Tribune") further note that the focus of Section 308(b) and Section 319(a) is the consideration of the qualifications of the applicant "to operate the station," a concern which does not appear to mandate examination of an applicant's "moral" character in the licensing process.¹³

3. Conclusions on Section 308(b) Requirements

14. The Commission acknowledges, as the National Citizens Committee for Broadcasting ("NCCB") points out, that in the *Uniform Policy* the Commission itself concluded that Section 308(b) both gave it "the authority and imposed upon it the duty" to examine basic character qualifications "in evaluating applicants for radio facilities." However, even in that document the Commission indicated its awareness of its discretion as to the substance of such examinations, stating that these inquiries obviously did not "include every aspect of an applicant's behavior, but only that part which has some reasonable relationship to ability to

¹³ See *infra* para. 21.

operate a broadcast station in the public interest.”¹⁴

15. A review of the case law on this point indicates that the courts have on a number of occasions read Sections 308(b) and 319(a) to require Commission inquiry into character.¹⁵ This has not, however, been the conclusion reached in at least two recent cases. In *National Association of Regulatory Utility Commissioners v. FCC*,¹⁶ the D.C. Circuit Court of Appeals interpreted Section 308(b) as leaving it “within the discretion of the Commission to decide which facts” relating to the factors, such as character, enumerated in that section, “it wishes to have set forth in applications.” The Court found that “this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate.” This being so, the Court concluded, it necessarily followed that in the matter then in dispute the Commission was not required to consider the subject of financial fitness at all if it deemed that area “irrelevant to its regulatory scheme.” In a subsequent case, *Black Citizens for a Fair Media v. FCC*,¹⁷ the D.C. Circuit Court of Appeals, citing *NARUC I* with approval, reaffirmed the Commission’s discretion over the nature of the inquiries to be conducted as part of the licensing process.¹⁸

16. Upon reflection, we are of the view that the better-reasoned approach is that taken in *NARUC I* and *BCFM*. That is, we find that the list of subjects as to which the Commission “may inquire” in sections 308(b) and 319(a) is neither exhaustive nor

¹⁴ *Uniform Policy*, 42 FCC 2d at 400.

¹⁵ The cases generally provide little supporting analysis. See *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594 598 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979), *reh. denied*, 442 U.S. 947 (1979); *Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196, 200 (D.C. Cir. 1974); *WEBR, Inc. v. FCC*, *supra*, at 164; *L.B. Wilson, Inc. v. FCC*, 397 F.2d 717, 719 (D.C. Cir. 1968); *Charles P.B. Pinson, Inc. v. FCC*, 321 F.2d 372, 374 (D.C. Cir. 1963); *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942). See also, *KSIG Broadcasting Company v. FCC*, 445 F.2d 704, 709-710 (D.C. Cir. 1971).

¹⁶ 525 F.2d 630, 645 (D.C. Cir. 1976) *cert. denied*, 425 U.S. 992 (1976) (hereinafter “*NARUC I*”).

¹⁷ 719 F.2d 407 (D.C. Cir. 1983) *cert. denied* 104 S. Ct. 3545 (hereinafter “*BCFM*”).

¹⁸ The commission’s discretion, the Court observed, runs both to defining the public interest and to determining the FCC procedures which “best assure protection of that interest.” The Court did, however, read Section 308(b) “to require the inclusion of certain technical information, such as licensee ownership, although it does not prescribe specific questions.” *Id.*, at 413. As to the matter of the Commission’s discretion, see generally *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); *FCC v. WOKO*, *supra* note 10, at 227-229; *Stahlman v. FCC*, *supra* note 15, at 127; *FCC v. Pottsville Broadcasting Company*, 309 U.S. 134, 138, 143-146 (1940).

mandatory. These statutory sections do not of themselves require that the Commission make any inquiry into the character qualifications of broadcast applicants.¹⁹

17. Whether and, if at all, to what degree the Commission ought to inquire into the character qualifications of its broadcast applicants is thus a matter which must be determined by consideration of the "regulatory scheme" of the Communications Act. In this regard, it appears that the relevant inquiry to be made is whether the "public interest" standard embodied in the Communications Act requires or would be served by the continuation of Commission inquiries into character as part of the licensing process. Assuming such an inquiry is appropriate, the question becomes whether an evaluation of an applicant's behavior should include all aspects of the applicant's character or whether the inquiry should focus on specific traits that are directly relevant to our regulatory scheme. Our resolution of this question is advanced by consideration of the responses to our question in the NOI as to the purpose served by scrutinizing an applicant's character qualifications.

4. Comments on Purpose of "Character" Scrutiny

18. We note that most commenters, including the National Radio Broadcasters Association ("NRBA"), the National Broadcasting Company, Inc. ("NBC"), Tribune and CBS, believe the proper focus of our qualifications inquiry is, as the Commission suggested in the NOI, prediction of the reliability of the broadcast service to be provided the public by the applicant. In taking this approach, NBC and others state, the Commission's concern should be with the predictive nature of significant past *conduct* upon the licensee's future broadcast performance, rather than with the morally-tinged *character* concept. The National Association of Broadcasters ("NAB"), however, suggests that the way to avoid judgments regarding "good" and "bad" character is to focus the Commission's licensing process on deterrence of misconduct and minimize "the making of predictive judgments concerning licensee fitness."

¹⁹ We observe that this view also appears in accord with Judge Wright's dissenting opinion in *BCFM*. *BCFM*, *supra* note 16, at 430-431. Additionally, this reading is consistent with general principles of statutory construction. 2A C.D. Sands, *Sutherland Statutes and Statutory Construction* § 57.11 (4th ed. 1972).

19. Contrary to this approach, NCCB and the National Black Media Coalition ("NBMC") state that inquiring into *character* itself is necessary to fulfill the Commission's duty to ensure that broadcasters operate in the public interest. Citizens contends that as deregulation of broadcasting proceeds, the Commission's need to rely on its licensees' judgment and good faith increases, and that the character inquiry is relevant to trustworthiness. The Office of Communication, United Church of Christ ("UCC") views the inquiry into character qualifications as a positive means of determining the ability of the licensee to make good on its promises and obligations to the Commission, its advertisers and the general public.

20. ABC argues that as Section 308(b) is concerned with the Commission's inquiry into the qualifications of the applicant "to operate the station," the Commission should narrow its definition of "character" to the traits necessary to accomplish that purpose. To achieve that objective, ABC contends, the Commission must first define what constitutes station operation in the public interest, at least for these limited purposes. A grant would be consistent with the public interest, ABC suggests, if the Commission can find that "(a) the applicant can reasonably be expected to be honest and candid in its dealings with the Commission . . . and (b) the applicant can reasonably be expected to operate the broadcast facility consistent with the requirements of the Act, Commission rules and policies."²⁰ The essential affirmative character traits which are relevant to the Commission's statutory objectives, ABC concludes, are honesty and responsibility.²¹

5. Conclusions About Character and the Public Interest Standard

21. The Commission enjoys broad discretion "both to define the public interest and to determine what procedures best assure protection of that interest."²² We find that there is great merit to

²⁰ The Commission, ABC states, does not appear to have ever required more, citing *Central Texas Broadcasting Co., Ltd.*, 74 FCC 2d 393, 396 (1979).

²¹ As to the NOI's question regarding the usefulness of continuing to attempt to predict a new, non-broadcaster applicant's future broadcast performance, parties commenting on the matter, including CBS, ABC and Citizens, generally suggest that such inquiry, including some consideration of past nonbroadcast misconduct, if any, may be necessary. However, NAB argues that such inquiries regarding new applicants are of dubious value. See *infra* paras. 26-30.

²² *BCFM*, *supra* note 17, at 413. See, also, *FCC v. WNCN Listeners Guild*, *supra* note 18, at 596; *FCC v. Pottsville Broadcasting Company*, *supra* note 18 at 137-138 (1940).

ABC's conclusion that for the purposes of the present discussion, a license grant would be in the public interest if the applicant can be expected to be honest in its dealings with the Commission and can also be expected "to operate the station" consistent with the requirements of the Communications Act and the Commission's rules and policies. ABC identifies the "character" traits of honesty and responsibility as relevant to fulfilling these objectives. Viewed from this perspective, we believe that inquiry into "character" as an element of the licensing process is consistent with the regulatory scheme. As the Commission long ago observed, licensing "enables future conduct." Issuance of an authorization "entails at best only an estimate that performance under the license will be worthy." Thus, it is wholly appropriate that in aid of the forecasting process, the Commission looks "for clues as to risks and for evidence as to expectable performance."²³ We believe, however, that the current broad ranging character inquiry may not properly isolate those aspects of behavior which are necessarily probative as to an applicant's future conduct. In this regard, we find that future evaluations should be narrowly focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communications Act or the Commission's rules or policies. As Citizens suggests, deregulation emphasizes the significance of the Commission's judgments regarding applicants' prospective performance.

22. Further, it does not, upon consideration of the record developed in this proceeding, appear that it is necessary to halt review of character matters as such in order to reach the objectives which were identified in the NOI and appear to be concurred in by most commenting parties: Commission consideration under "character" criteria only of matters clearly relevant to the licensing process, with that process made more equitable and efficient.²⁴

23. The key factor involved in the support of some commenters for a "conduct" as opposed to a "character" standard generally appears to be the desire for elimination of the morally-tinged decision-making of the past. However, establishing a dichotomy between "conduct" and "character" is not necessary to achieve-

²³ *Westinghouse Broadcasting Company, Inc.*, 44 FCC 2778, 2783 (1962) (hereinafter "*Westinghouse I*").

²⁴ As ABC notes in its reply comments, the question which emerges is not whether the Commission should confine its inquiry to relevant behavior, but what behavior is relevant.

ment of less value-laden decision-making.²⁵ The record developed herein clearly indicates that neither Sections 308(b) and 319(a) nor the public interest standard embodied in the Communications Act mandates the type of "good vs. bad/evil" treatment of "moral" character which sometimes colored past Commission deliberations. Focusing on the character traits necessary "to operate the station," as ABC suggests, seems a proper move in the direction of a more relevant, less value-laden character inquiry. This is the case both as to applicants who are now licensees and as to new nonbroadcaster applicants. ABC describes these traits as honesty and responsibility, for which the record indicates that the terms "truthfulness" and "reliability" might properly be substituted. Whether an applicant has or lacks these qualities is, of course, a matter which can only be addressed by considering behavior.²⁶ The "better way" to evaluate an applicant's future "reliability" than the sort of inquiries conducted in the past is generally identified by commenters addressing the issue as a narrowing of Commission concern to encompass only misconduct relevant to operation of broadcast stations.²⁷ And so a fundamental issue which the remainder of this document seeks to address is the nature of the conduct relevant to making the requisite character findings. We 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

²⁵ Further, it is the case that character is exemplified by conduct.

²⁶ We observe that deterrence is also an element of the character qualifications process, as the deterrent effect of our actions helps to ensure future reliability and truthfulness. See *FCC v. WOKO*, *supra* note 10, at 228. Thus, deterrence is a factor which exists within the penumbrae of the character traits with which we are concerned. See *infra* para. 103.

²⁷ Section 73.24(d) of the Commission's Rules, which was adopted June 30, 1939, (4 Fed. Reg. 2714, 2716), requires that an applicant for an AM station be of "good" character. Similar rules were not adopted for the other broadcast services. We will interpret Section 73.24(d) consistently with the action taken herein. We do not find, as ABC suggests, that it is necessary either to amend Section 73.24(d) or to add similar rules for the other services. It should be noted that as to our question regarding a "better way" to evaluate future reliability, some commenters, such as NCCB, contend the current policies, if clarified, would be well-suited to effectuating the Commission's proper purposes. Commenters including BML Associates ("BML"), a minority-owned consulting firm active in the communications industry, and the National Association for Better Broadcasting ("NABB") argue that the Commission should continue to be concerned with what sort of persons ought to be permitted to become "fiduciaries for the public."

and to comply with our rules and policies.

B. Predicting Applicant Reliability

1. Questions Regarding Range of Relevant Behavior

24. As to this point, it is appropriate to consider the third question raised by the Commission in the NOI:

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

25. The Commission set forth lengthy tentative views under this heading, concluding as an initial step that "our attention as a regulatory agency should be focused on matters directly relevant to performance as a broadcaster in the public interest." As to non-FCC misconduct, we contended that 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 solicited comment as to whether Commission considerations could be limited 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."

a. Existing Licensees

26. The Commission further divided the discussion into consideration of the treatment to be afforded applications involving existing licensees as differentiated from the handling of filings from new applicants. We suggested that as to existing licensees, "the best predictor of future service is the applicant's past [broadcast] service". We questioned whether in forming our judgments as to how such applicants might perform in the future our licensing concerns

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.

b. New Nonlicensee Applications

27. As to new nonlicensee applicants, the primary focus of the Commission's NOI discussion was "whether any misconduct which does not involve broadcasting is relevant to our licensing responsibility and, if so, which types of misconduct are perti-

ment.” The Commission remarked that we had previously “examined nonbroadcast related misconduct on the theory that it demonstrates a propensity to violate regulations designed for public protection.” We stated that while we did not “doubt the appropriateness of examining *pertinent* aspects of an applicant’s past history,”²⁸ we did question “the pertinence of most activities engaged in outside the field of broadcasting to predicting future broadcast conduct.” We specifically solicited comment as to whether the current scope of the *Uniform Policy* is appropriate.

2. Comments Regarding Range of Behavior Relevant to Applicant Reliability

a. Existing Licensees

28. Commenters including ABC, NBC, American Family Corporation (“AFC”), Tribune, CBS, and John Blair & Company/Post-Newsweek Stations (“Blair/Post Newsweek”) generally concur with the Commission’s tentative decision that inquiries regarding existing licensees should focus on the applicant’s broadcast record. Thus, NBC states that the Commission should limit its considerations to specific conduct which has had a substantial impact on the licensee’s broadcast service, which is likely to recur and which would therefore indicate that the licensee’s future service as a broadcaster would not serve the public interest. CBS proposes that the questionable behavior’s impact on the broadcast audience be the key issue. CBS contends that whether a licensee has made loans at usurious rates of interest or been involved in questionable activities abroad seems to be of highly dubious relevance to the broadcast service provided to the audience. NRBA would confine the inquiry to instances of clear misrepresentation to the Commission, and to station-related misconduct only as that is relevant to future reliability. ABC would, however, make an exception to the broadcast-only rule for consideration of non-FCC misconduct “so egregious as to preclude a continued finding that the applicant is honest and reliable.”²⁹

²⁸ Citing *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D. C. Cir. 1950).

²⁹ ABC states in support of this exception that if “character” were absolutely limited to broadcast performance, “a licensee could, for example, assassinate the President of the United States and still receive a regular renewal if no defect were found in its station operations.” ABC argues that “[s]uch a result would be outrageous.” A related stance is taken by BML which suggests that the Commission at the least should consider the fact that an applicant is “a murderer, or a terrorist, or had been convicted of felonies involving moral turpitude.”

29. A different position on the issue is taken by parties including NCCB, UCC and the Committee for Community Access ("CCA"). They contend that both broadcast and nonbroadcast behavior is relevant to the degree such behavior raises questions about an applicant's ability to serve the public interest. UCC further states that in examining nonbroadcast conduct, the Commission should not be bound by the determinations of other forums, which may have nothing to do with the scheme of broadcast regulation. Citizens, NBMC and NCCB argue that Commission and various parties have overstated the difficulties and flaws inherent in implementation of our traditional system of character review.

b. New Nonlicensee Applicants

30. Comment regarding the consideration of nonbroadcast misconduct in cases involving new nonlicensee applicants was quite diverse. ABC and CBS see the need to make predictive judgments as requiring some scrutiny of nonbroadcast activity. Citizens and UCC argue that such inquiries are needed because, *inter alia*, an initial evaluation of character cannot be replaced by forfeiture or revocation proceedings, which are too complex and place too heavy a burden on the Commission. NAB contends that such inquiry should be confined in scope if the Commission feels compelled to conduct it. NAB would limit consideration of the nonbroadcast activities of new applicants to adjudicated felony convictions (which would not be automatically disqualifying). NAB observes that there is substantial ground for a presumption of reliability to be accorded to any applicant, absent serious indications to the contrary. Blair/Post-Newsweek take the position that since wrongdoing in nonbroadcast affairs is not necessarily predictive of service to the public, the burden should be on the party asserting that a character defect inheres in such behavior to make the connection. We are of the view that the range of non-FCC behavior should be the same for both new non-broadcaster applicants and incumbent licensees/permittees.

3. Conclusions on Range of Relevant Non-FCC Behavior

31. A character qualification established by government "must have a rational connection with the applicant's fitness" to do the thing sought to be done.³⁰ Our consideration of the record

³⁰ *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U. S. 232, 239 (1957).

developed herein, together with our experience in administering the *Uniform Policy* for more than three decades, leads us to the conclusion that the necessary "rational connection" cannot be found in many of the types of situations as to which the Commission has over the years considered the non-FCC misconduct of its broadcast applicants.

32. In the *Uniform Policy*, the Commission stated that "pertinent aspects of the past history of the applicant"³¹ would "clearly include any violation of Federal law," noting that we had in the past considered such conduct as "violations of Internal Revenue laws, conspiracy to violate antitrust laws, false advertising and other deceptive practices." The Commission held that it was "irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case," that no significance was to be awarded to the nature of the tribunal making the finding, and that even if no suit has been filed, or a suit filed but not heard or finally adjudicated, "the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the Commission."

33. Through the years, the Commission has generally declined "to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the law in question."³² Nonetheless, we have been led to consider an incredible range of non-FCC behavior.³³ Even egre-

³¹ Citing *Mansfield Journal Co. v. FCC*, *supra* note 28.

³² *Revision of FCC 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 FCC 2d 750, 763 (1976). For a recent review of our practice in this regard, See *Alan K. Levin*, FCC 84R-18, 55 R.R.2d 981 (Rev. Bd. 1984) (dictum), *rev denied* FCC 85-130, *appeal pending sub nom. Levin v. FCC*, No. 85-1255 (D.C. Cir. 1985).

³³ See e.g. *KCOP*, 37 RR2d 1051 (1976) recon. denied 39 RR 2d 965 (whether wrestling matches violate state law is for the State Athletic Commission to decide); *Kaiser Broadcasting Corporation*, 31 RR 2d 46 (1974) (conviction of applicant for antitrust violations relying on past decisions of legality then overruled was not disqualifying); *Sande Broadcasting Corporation*, 38 RR 2d 685 (1976) (criminal acts of shareholder did not require hearing where shareholder not involved in daily operations and removed from corporation prior to felony conviction); *Sunshine Wireless, Inc.*, 45 RR2d 1699 (1979) (five year old National Labor Relations board findings of failure to bargain do not impact renewal); *Abbey J. Butler*, 47 RR 2d 852 (1980) (grant without hearing denied where one transferee had signed securities law consent order, other transferee denied membership on a commodities exchange); *Tri-Cities Broadcasting*, 4 RR 2d 642 (Rev. Bd. 1965) (judgment against 10% shareholder for nonpayment of rent not conduct related to matters entrusted to the Commission); *D&E Broadcasting Co.*, 4 RR 2d 791 (Rev. Bd. 1965), 5 RR 2d 745 (1965) (whether or not applicant knowingly imported three horses into U.S. in violation of Tariff Act, the duty involved is only \$19.50, he's not disqualified).