

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON
IN WHICH COMMISSIONER QUELLO JOINS

A VHF station asks us for permission to relocate its transmitter in order to allow it to serve a larger audience. Two VHF competitors object, on the pretext that the proposed expansion of service could have an adverse impact on the development of UHF television service. There is no UHF television station on the air in this market, and there is no likely prospect of there being one in the next ten to fifteen years. Nevertheless, we deny the petitioner authority to relocate its transmitter. The interests of over a million potential viewers in new or improved service are being lightly written off as a cost of preserving a faint hope that UHF may have a future in this market.

I agree with the majority, at least in principle, that we ought to be mindful of UHF impact in deciding cases like these. But there ought to be some practical limits on our solicitude. This case presents us with a situation where the probability of UHF entry into the market is remote for the foreseeable future; on the other hand, the petitioner, if we allowed its proposal, would provide a new, usable service to an area of more than one million people. Particularly in the context of our vaunted policy of maximizing programming diversity, I cannot comprehend how the majority can sacrifice additional VHF service for the faint possibility of future additional UHF service. This to me is roughly akin to trading two birds in the hand for one in the bush.

The majority's reasoning proceeds essentially as follows:

(1) We have a policy of promoting UHF--even to the point of protecting it against competition to the extent necessary to help it become established or survive; (2) The presence of VHF competition in an area where UHF channels are allocated diminishes the chance of UHF becoming established or surviving if it is established; (3) The allocation of UHF broadcast channels to the Winston-Salem/Greensboro/High Point market indicates a determination by the Commission that UHF is potentially viable in this area; (4) Therefore, any applicant that proposes VHF service into this area must prove that it will have no impact on UHF. In this case, according to the Commission, the applicant failed to sustain this burden of proof.

This syllogism unjustifiably assumes that the mere fact of allocating a channel to a particular market represents a judgment that a station could be viably operated on that channel. At most, an allocation represents a rough estimate that someday a station will be successfully developed. In this case, however, the estimate more nearly resembles a prayer, and that prayer is what a new VHF service is required to rebut. The Commission displayed a great deal more sense in Atlantic Telecasting Corp., 3 FCC 2d 442, 444 (1966), aff'd sub nom, Lee v. FCC, 374 F.2d 259 (D.C. Cir. 1967):

"Certainly the unsupported conclusion that any improvement of the service contours of a VHF station in an area in which a UHF station is allocated is, per se, fatal to the prospects for successful UHF operation is not warranted. Such a view would severely restrict the Commission's ability to authorize improvements in facilities of VHF stations because there are few areas in the United States to which UHF channels are not allocated."

To be sure, the majority does not here purport to find that the mere existence of the UHF allocation is fatal to the proposed expansion of VHF service; but that is nevertheless the effect of its decision to place on the applicant a burden of proving there will be no adverse impact on the potential for UHF development, and holding it to strict standards in sustaining that burden. This allocation of burdens is unreasonable.

The Commission's designation order placed on the VHF objectors the burden of coming forward with some evidence on UHF impact, while the applicant, WBTV, was given the ultimate burden of persuasion on this issue. 23 FCC 2d 931 (1970).^{1/} The objectors, that is, got a burden so light anyone could lift it, while the applicant was given a burden so heavy that no one could lift it. Thus, the objectors were said to have sustained their burden by the testimony of two witnesses, both staunch UHF advocates, who testified generally that a UHF station could be established in this market. That was regarded as sufficient to sustain their burden and thereby put the applicant to his burden of either proving that the proposed operations of WBTV would not have any

1/ That allocation was consistent with some prior cases, inconsistent with others. Compare South Carolina Educational TV Commission, et al., 20 FCC 2d 550 (Rev. Bd. 1969) (burden on applicant; with VHF Channel Assignment in Mt. Vernon, Illinois, 17 P&F Radio Reg. 2d 1620 (1969) (on objectors). In light of this inconsistency, I think it behooves the Commission at the very least to come up with a clearer statement of policy on the question of UHF impact and burden of proof than is evident in this case. See Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). However, for me consistency is secondary to reasonableness; a policy of uniformly placing on applicants the burden of proving no impact on UHF in cases like this would merely earn the dubious distinction of being consistently wrong.

effect on UHF or that there was no promise of UHF in the market. Now, the burden of proving the nonexistence of a fact is difficult at best, but in the present case where it is necessary to speculate on an event (impact) which is contingent on future events (the establishment of a UHF) at an indefinite time in the future (no time period was specified), it is virtually impossible. About the only conceivable way that the applicant could carry such a burden was to establish that a UHF station would not likely be developed in the market anyway. This the applicant attempted to do with its own "expert" witnesses. However, the Commission decides that the applicant's proof is not sufficient to overcome the presumption of UHF viability which is derived from the mere allocation of a UHF channel to the market.

Given this treatment of burden of proof, the only thing that has been proved in this case is that the hearing has been a waste of time and money.^{2/} If the Commission is going to foreclose new, competitive VHF services in order to protect possible future UHF service, then it ought at least to be forthright and frank about it. To encourage applicants to waste their money and time, and our money and time, to attempt to prove what the Commission has virtually removed from the realm of proof strikes me as being very poor public policy.

^{2/} Notice should be taken of the great length of time it has taken to reach a final decision. In June 1970, the case was designated for hearing (23 FCC 2d 931). The initial decision of the Administrative Law Judge was issued a year later, in July 1971 (42 FCC 2d 913). Then more than two years elapsed before the Review Board's decision in September 1973 (42 FCC 2d 908). The case is finally presented to the Commission 1½ years later, almost five years since the original designation order.

However, as I indicated at the outset, my disagreement with the Commission is not limited to the procedural question. More fundamentally, I disagree with the policy which underlies the procedure ordained in this case and which in effect forecloses new service to the public in the name of protecting future UHF service. The policy implicitly adopted in this case can only be regarded as a throwback to an earlier era in the history of UHF development which, whatever its merits at the time, I had thought was past or at least in the process of passing.

After the initial years of strict UHF protection, the Commission in 1969 realized that it need no longer

"insulate every UHF station or potential station from any possible small wind of VHF impact, where there is a substantial service benefit involved in a different course. The time when such caution was appropriate has, in our judgment, passed."

VHF Channel Assignment in Mt. Vernon, Illinois, 17 RR 2d 1620, 1630 (1969), aff'd sub nom, Plains Television Corp. v. FCC, 440 F.2d 276 (D.C. Cir. 1971). The policy was further clarified in Cosmos Broadcasting Corp., 2 FCC 2d 729, 732-33 (Rev. Bd. 1970):

"The Commission does not purport to guarantee the absolute success of UHF television broadcast stations . . . Rather, the Commission seeks to protect and encourage UHF television service as much as possible, without, at the same time, foreclosing possible advantages to the public which may be achieved by the improvement of VHF service."

Therefore, a choice is to be made between the policy of "encouraging television broadcast stations to operate with maximum facilities in order to make the most efficient use of channel assignments" and the policy of "fostering the development of UHF broadcasting." Cosmos Broadcasting Corp.,

supra, at 732. The UHF protection policy is favored only when substantial adverse impact on UHF service has been shown. Cosmos Broadcasting Corp., supra, at 733.

There has been no such showing here. There is not even substantial evidence that this future interest in UHF will vest within a period of time prescribed by the rule against perpetuities. The majority concedes that the conclusory statements of the expert witnesses are not enough to constitute affirmative evidence of the potential development of UHF stations in the Winston-Salem/Greensboro/High Point area. Only by indulging in the fiction that the mere allocation of UHF stations represents a credible finding of UHF viability,^{3/} and then putting the applicant to the burden of disproving it, can the Commission decide that UHF has sufficient promise in the market to warrant our solicitous intervention.

The absence of record evidence on UHF promise should not be understood to mean that we have no probative information on the subject. In fact, we do have some information and experience and it all points to

3/ The assignments made in 1966 were never intended to be definitive, witness the ad hoc changes allowed since then, such as VHF power increases, addition of new VHF stations, increases in antenna height. See VHF Channel Assignment in Mt. Vernon, Illinois, supra; Cosmos Broadcasting Corp., supra, Atlantic Telecasting Corp., supra. The Fifth Report and Order, 2 FCC 2d 527 (1966), which assigned the channels in question, even states that many assignments were made

"in places where the development of a demand is somewhat speculative but if it does occur stations operating on those assignments will provide better reception to areas which otherwise must rely upon reception of distant stations." p. 545 (emphasis added).

Indeed, if we are to take seriously the statement that the prior allocation represents a rulemaking determination that is to be disturbed by ad hoc revisions what was the point of the hearing? In any event, such a rationale is contrary to the teaching of WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

a finding opposite to that which the Commission implicitly makes here.^{4/} The realities of UHF development indicate that many UHF assignments are unlikely ever to be occupied. This is due to the fact that the UHF assignments were made on the premise that UHF and VHF stations could compatibly compete in an intermixed market. Experience has shown, however, that the expectations of UHF success generally, and in intermixed markets, has been largely unfulfilled. Of the 662 commercial UHF channels allocated, Commission records show only 191 in operation. Most of the development activity occurred before 1971 at the end of which 189 stations were in operation (of which, 123 stations were in operation by the end of 1966). By 1990 perhaps 60 percent more will come into operation.^{5/}

Very few UHF stations which are not affiliated with networks are profitable. In 1973, Commission records show less than ten percent of 56 such independent stations reported a profit, though the number may be slightly higher due to a variety of accounting peculiarities. Nevertheless, there are no profitable independent UHF stations in markets similar in size (based on market revenues) to Winston-Salem/Greensboro/High Point. Only two of these markets are as small as Winston-Salem/Greensboro/High Point, and in only one does the UHF appear to have a chance to be even marginally viable.^{6/}

4/ Bound as we are by an adjudicatory record, I do not cite this information for its specific bearing on this case, but mostly as "legislative" background (cf. 2 K. Davis, Administrative Law Treatise, §7.05 (1958 & 1970 Supp.)) which will illuminate just how dubious is the Commission's de facto presumption of UHF viability. Inasmuch as the Commission's decision clearly does not rest on any adjudicatory evidence, but on a generalized "legislative" policy, I think it is entirely appropriate to examine all the facts that bear on the policy.

5/ Fishman and Park, A Model of the Determination of the Number of Viable UHF Television Stations (Rand Corp., March 1975) (working note prepared for the FCC).

6/ That one exception is a San Antonio Spanish language station which is an exceptional case due to its service to a particular, substantial part of the market.

It is interesting to note that this market lies at the boundary of the minimum market size which a recent study shows to be large enough to support four VHF stations.^{7/} Another study predicts 0.7 UHF stations for this market in the 1980-1990 period; thus, even that study sees it as marginal for the next 15 years.^{8/}

At present, there are 34 outstanding construction permits for UHF stations, but none of these are for the present market. Combining this fact with the fact of the lack of construction permit applications (with the exception of WUBC)^{9/} since the 1966 assignment, we must presume that entrepreneurs do not view this market as very attractive.

Assuming that a struggling UHF were to offer a signal in this market, what effect would this have on the local populace? The virtue of a "local" station in the Commission's eyes is its contribution to the local populace's general awareness of its immediate environment. Local programming is the measure of this contribution, but struggling UHF stations are not major contributors to this output (as an extreme example, one small UHF station reported spending less than \$200 for all programs in 1973).

How do WBTV's local programming outlays compare with the typical small UHF independents? In 1973, WBTV spent 20 percent of its programming funds on nonfilm programming. This 20 percent amounts to more than 13 times the outlay for the typical UHF independent in comparable markets.^{10/} Part

7/ Besen and Hanley, Market Size, UHF Allocations, and the Viability of Television Stations, pp. 11a-12 (unpublished manuscript, December 1974).

8/ See Fishman and Park in footnote 5, supra., p. 27.

9/ An application for a construction permit for a UHF channel in Winston-Salem was filed on June 16, 1967, BPCT-3987; however, the application was dismissed on March 26, 1968, at the applicant's request.

10/ The nonfilm (local) programming estimate was computed by subtracting film and tape expenses from total programming expenses.

of the difference is in program quality, but there is also wide variance in the proportion of broadcast hours devoted to local news and public affairs. The following tabulation for 1973 demonstrates this latter point:^{11/}

<u>Station</u>	<u>% of Program Hours Devoted to Local News & Public Affairs (6:00 a.m. to Midnight)</u>
WBTV - Charlotte	10.7
WUHQ - Grand Rapids	8.0
WGNO - New Orleans	3.9
WRET - Charlotte	1.7
WYAH - Norfolk (Portsmouth)	7.2
WRIP - Chattanooga	5.3
WDXR - Paducah	2.4

In short, except for a Spanish-language station in San Antonio, there is no example of an independent UHF operating profitably in markets which generate \$5 million to \$15 million in annual revenues. Even in the few instances where such stations attempt to compete with three VHF rivals, they expend very little on local programming. With these data in mind, it does not seem realistic to assume that the well-financed, well-managed and cleverly programmed UHF station the majority contends might succeed will ever materialize, considering the scarcity of such stations in operation anywhere. It has been nine years since the allocation of these channels. How much longer can this insubstantial expectation deny the public of better service through VHF expansion? Why not let WBTV extend its programming--including valuable public affairs programming--to Winston-Salem/Greensboro/High Point? The only potential or actual

^{11/} Television Broadcast Programming Data, 1973, FCC Mimeo 31512 (October 8, 1974).

losers in such event would be the owners of the competing VHF stations, not the viewers.

This brings me to my final objection to the Commission's decision. By allocating the burden of proof of UHF impact to the applicant, the Commission encourages a practice which directly contravenes the Commission's acknowledged duty to encourage competition and the diversity of speakers in the market place. When there are no UHF stations in operation (and even where there are, see, e.g., South Carolina Educational TV Commission, et al, 309 FCC 2d 180 (1973)), the objectors are most likely to be the VHF stations who will be in competition with the applicant if the application is granted. Unable to prevent such competition on any other grounds, the VHF objectors cry "UHF impact." They are, of course, entitled under our rules to raise the interests of others--the theory being that the competitor acts as a "private attorney general" in raising public interest issues. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps-Howard Radio Inc. v. FCC, 316 U.S. 4 (1942). But it is one thing to say that competitors can make these arguments and another to refuse to recognize the underlying character of the interest which is being served in evaluating the arguments raised. That interest here is protectionism, pure and simple, and while I cannot say that such protectionism can never coincide with the public interest,^{12/} I would look at such arguments with a suspecting and skeptical eye. I would therefore insist that UHF impact must, at the very least, be carefully documented lest we permit our concern for UHF development to be turned to the function of cartel management.

^{12/} Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958), among other decisions, compels such a concession.