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Senate

FCC AGAINST RKO: BUREAUCRATIC OVERHILL?

Mr. HELMS. Mr. President, I was in the broadcast business for many years before I was elected to the Senate. In all those years, I cannot recall a more unusual action on the part of the Federal Communications Commission than the decision involving RKO General, Inc., the owner of several television stations around the country.

The FCC has ruled, in a comparative renewal proceeding, that RKO is no longer qualified to hold a broadcast license for its stations in Boston, New York, and Los Angeles. This denial was based on certain reciprocal trade practices as well as alleged improprieties of RKO's parent company, General Tire & Rubber Co.

In the hearing, Mr. President, the Commission found that certain questionable actions of GTR somehow influenced the conduct of RKO as a broadcast licensee. To do this. the Commission examined dealings which occurred 20 years ago—matters which were settled in a court-approved decree in 1970. Thus, it seems that questionable actions of the past, for which neither RKO nor its parent GTR was found guilty, will prevent RKO from continuing to broadcast in three large service areas. This is in spite of the company's fine record of service as a broadcaster over the past 35 years.

FCC Commissioner James H. Quello dissented in the case. In his opinion, he referred to the Commission action as "gross bureaucratic overkill," which "represents the most harsh and unwarranted punishment in the history of communications." I am inclined to agree.

I commend Commissioner Quello's statement to my colleagues. He paints, in very graphic words, a grim picture for an important segment of our private enterprise system, which our Federal bureaucrats seem determined to destroy.

Mr. President, I ask unanimous consent that the text of Commissioner Quello's dissenting statement be printed in the RECORD.

There being no objection, the text was ordered to be printed in the RECORD, as follows:

DISSENTING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

In re RKO General, Inc. (WNAC-TV), Boston, Massachusetts Comparative Renewal Proceeding (Dos. 18759-61).

The Commission majority by a 4-3 decision has determined that RKO General is not qualified to remain a broadcast licensee. This example of gross bureaucratic overkill represents the most harsh and unwarranted punishment in the history of communications.

This decision immediately affects RKO's television stations in Boston, New York and Los Angeles. The decision may also affect its other television station in Memphis, as well as its twelve radio stations throughout the country. The decision, even though subject to appeal, has already adversely affected some 45,000 innocent stockholders. The stock sold off 4¼ points, about 19 percent, with initial loss in value of approximately 95 million dollars the day after the decision was announced. And the decision, premised on inferences, will further levy a sanction involving several hundred millions of dollars. Not only does the punishment not fit the crime, the conclusions do not fit the record.

In order to find RKO unqualified to remain a licensee the majority has concocted a tenuous nexus between RKO and its parent com-

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pany, General Tire and Rubber Company. The web of guilt by association is spun from a paucity of factual evidence and a plethora of inferences. The reversal of the Administrative Law Judge's decision is based on unproven charges and unsupported staff conclusions.

The majority has determined that RKO cannot be trusted to serve the public interest as a broadcast licensee. In order to make such determination there must be a nexus between the misconduct perceived by the FCC majority and anticipated future broadcast operations. Yet, such a requisite nexus is obviated in this case by specific legal restrictions, i.e., the Justice Department's trade relations consent decree and the SEC consent decree. Further, the single overlapping officer of GTR and RKO, Thomas F. O'Neill, has stated on the record that he intends to resign his positions as a director and Chairman of the Board of GTR upon a determination by the Commission that RKO is qualified to remain a broadcast licensee. In the face of these factors, I fail to see any evidence of record—or even an inference, for that matter—that RKO's future conduct as a broadcast licensee would not be in the public interest.

The Commission gave RKO the opportunity to submit mitigating evidence in response to the Report of the Special Review Committee of the GTR Board of Directors. The only matter raised in the Report relating to broadcasting was the trade and barter transactions of RKO. The Report concluded that RKO's policy was to utilize barter consideration properly in the conduct of its business. No material violations of this policy were found. The Report did find incomplete and unreliable documentation and record keeping with respect to accounting and reporting of barter transactions. In mitigation, RKO has shown that investigations conducted since the Report have produced much more copious documentation of the disposition of barter considerations than was initially obtained, and that an ongoing IRS audit has indicated that its audit did not involve fraud. Thus, RKO's submissions have reasonably satisfied the questions raised in the Report with respect to it.

The majority infers misrepresentations to the Commission by virtue of RKO's filing of financial reports (FCC Form 324) which did not include an accurate total value of tradeout and barter transactions. RKO has since supplied a detailed description of barter and trade transactions, company policy in recordation of the transactions, the reasons for excluding its memorandum method of accounting from financial reports other than those submitted to FCC, and emphasized the continuing concern that such records be accurately compiled and reflected for FCC reporting purposes. John B. Fitzgerald, controller for RKO, stated in his affidavit that, as to the alleged inaccuracies on the 324 Reports ". . . I had no knowledge that any errors existed at the time the reports were certified by me as being true and correct to the best of my knowledge, information and belief." Mr. Fitzgerald indicates his personal knowledge of errors in the barter and trade estimates reported to the Commission came as a result of both the Special Review Committee's investigation and his subsequent request for each RKO station to review its 324 reports to determine whether there had in fact been errors. In RKO's detailed showing with respect to the barter and trade practices, I find a wealth of material indicating good faith efforts and certainly no intent to file inaccurate or misleading financial information with respect to any RKO station. At most, there was a failure by omission, not commission.

Contrary to the conclusion of the majority, I do not believe the record establishes that the questioned activities of GTR in any way influenced the conduct of RKO as a broadcast licensee. And while this Commission may consider alleged misconduct attributable to a broadcast licensee's parent corporation, the end result in this case is that investigation by the appropriate federal authorities of the overseas activities as well as domestic political contributions of GTR or its subsidiaries resulted in consent decrees with no judicial finding of guilt. Further, the activities investigated did not affect the broadcast performance of RKO General, nor were the audiences of the RKO stations in any way defrauded, deceived or poorly served.

RKO broadcast operations are virtually autonomous. Admittedly GTR has de jure control of RKO; however, by long established policy the GTR Board has placed de facto control of RKO broadcast-related operations and other business activities in the RKO Board of Directors. The Chairman of the Board of RKO, T. F. O'Neil, has for 18 years been the only interlocking director between RKO and its parent, and there have been no other overlapping officers or other employees between GTR and RKO.

The record reflects that T. F. O'Neil has played only a limited role in the affairs of GTR, and that he was in no way involved in the questioned activities of GTR and its other subsidiaries. Mr. O'Neil has stated that he did not even know of such questionable matters at the time of their occurrence but learned of them only as a result of subsequent reports. The record does not reflect to the contrary nor has Mr. O'Neil's affidavit been controverted, and the majority has no

basis on which to believe otherwise except as a matter of speculation. I find it difficult to establish a nexus between RKO and GTR based on such tenuous inferences.

In order to bulwark its strained conclusion as to the nexus between GTR and RKO, the majority reaches back to matters arising nearly 20 years ago. The Department of Justice filed a civil complaint against General Tire and RKO General in 1967, charging those companies with engaging in anti-competitive practices. The complaint alleged that General Tire and its subsidiaries—including RKO—had engaged in reciprocal trade dealings from at least 1961 to 1967 and that those activities violated the Sherman Antitrust Act.

It is interesting to note that the Department's complaint was apparently the first case dealing with the issue of whether reciprocal trade dealings, standing alone, violated the antitrust laws. RKO General Inc. (KHJ-TV), 8 FCC 2d 632, 633 n. 4 (Rev. Bd. 1967). The civil suit initiated by the Justice Department was terminated in 1970 by virtue of a court-approved consent decree.

There was no judicial finding of guilt. The FCC Administrative Law Judge noted that all phases of reciprocal dealings allegedly engaged in by General Tire and subsidiaries were explored in the Boston proceeding. In assessing the record, the ALJ considered the following factors: (1) the relevant legal and economic concepts were in a state of flux during the time covered by the record here involved; (2) neither responsible public officials nor the courts had given any definite rulings of the applicability of the antitrust statutes; and (3) there was no certainty at the time of their occurrence that General Tire's trade relations practices were improper. Accordingly, the ALJ concluded there was no present basis for charging General Tire or its subsidiaries with knowing and willful misconduct and, hence, no basis either to disqualify or to assess a comparative demerit against RKO.

By virtue of the consent decree GTR and its subsidiaries were precluded throughout the 1970's from those reciprocal trade practices which might be questionable. And if an inference is to be drawn, certainly the logical conclusion is that GTR and its subsidiaries—including RKO—will refrain from questionable trade practices in the future. The door closed on this matter in 1970. Yet the majority seizes upon the alleged misconduct—which I emphasize, was not judicially determined to be improper or illegal—and draws adverse inferences from this isolated and remote period in time. Guilty once—guilty forever? Guilty? Of what?

The majority further attacks the character of RKO on the dubious grounds of "lack of candor." This conclusion is premised on the failure of RKO to advise the Commission of the issuance in 1976 of a formal order of investigation by the Securities and Exchange Commission. In my opinion, the question was not whether RKO should report the fact of the SEC investigation, but rather when. I do not necessarily fault RKO for employing a policy of "minimal disclosure" in light of the adversarial interests at that time. I do not believe that the SEC investigation was a "formal proceeding" from which there stemmed the obligation under Section 1.65 of the Commission's rules to make full disclosure.

The majority likewise makes much of RKO's "lack of candor" in filing of its financial reports (Form 324) which did not accurately reflect barter and trade transaction totals. As I have pointed out, this filing was made in good faith and the subsequent determination that the barter and trade totals were not complete does not automatically create a lack of candor.

I place great weight on the findings and conclusions of the ALJ who heard this case and was intimately familiar with the totality of details. And, interestingly, his conclusion that RKO was qualified to remain a broadcast licensee is supported by the Commission's Broadcast Bureau which likewise concluded that RKO's renewal of license for WNAC-TV may be granted. And, finally, three Commissioners have concluded also that RKO is qualified to remain a broadcast licensee. In short, the case is not as adversely conclusive as the majority seeks to make it appear.

From a practical standpoint it seems to me that future broadcast performance of RKO will continue to be in the public interest, augmented by new procedures designed to shore up minor deficiencies in its past operations. Upon grant of the license renewal for WNAC-TV, T. F. O'Neil would resign his positions as a director and Chairman of the Board of GTR, thus obviating even the hint of corporate nexus. Most importantly, RKO has committed the sale of WNAC-TV to New England Television Corporation upon the grant of license renewal. This would promote the Commission's goal of increasing minority ownership of broadcast stations, since eight of the proposed transferee shareholders are black citizens with a 12.9 percent ownership interest, four of whom would be directors. Certainly this is a much more desirable and justifiable resolution of the matter than the multi-million dollar penalty which the majority seeks to inflict.

To contrast the moralistic posturing of the

majority with the conclusions of the Special Review Committee, I quote from the final paragraph of the Report's conclusion:

"Finally, the conduct which has been criticized must be viewed in context. General Tire is a large company. Its Annual Report for 1976 shows assets of more than $1.8 billion, sales of more than $2.1 billion, and net income of more than $100 million. The Company has prospered under its present management and thousands of sound, proper actions must have been taken for every questionable or improper one. The Committee believes that the final judgment of permanent injunction entered May 10, 1976 with the Company's consent together with appropriate implementation of the recommendation should result in needed changes."

In the face of this statement the majority continues to insist that the "sins" of GTR, although years old, demand expiation and the GTR's subsidiary, RKO General, will be held liable for such wrongdoing. I fail to understand how the majority can attribute once-removed wrongdoings to future broadcast performance of RKO General.

Today's action is bureaucratic overkill at its worst. It is significant to note that the two major offenses of which GTR and RKO have been accused, the improprieties of GTR and reciprocal trade practices, have been disposed of by consent decrees. Yet the majority has imposed an unbelievably punitive sanction by determining that RKO is no longer qualified to hold broadcast licenses for its television stations in Boston, New York and Los Angeles. The majority will undoubtedly insure that this finding of "disqualification" will extend eventually to the other thirteen broadcast licenses of RKO when they are subject to renewal, even though it "seeks comments" on the matter.

Even assuming, arguendo a degree of misconduct on the part of RKO (and I tend to categorize any such misconduct as errors in judgment), the Commission has repeatedly stated it will consider countervailing factors to overcome or eliminate doubt concerning the effect of the conduct on the applicant's future public interest performance as a broadcast licensee. Yet the majority has given little weight to balancing RKO's excellent record as a broadcaster for over 35 years. RKO is a veritable pioneer in the broadcasting industry and, as such, evidenced its willingness to accept the financial losses involved in such pioneering in order to advance the state of the art. It constructed and has continuously operated FM broadcast stations from the earliest days of FM broadcasting—the financial losses of such early operations are well known. RKO pioneered in the operation of subscription television at substantial financial costs and made the knowledge and experience thus achieved available to the Commission. RKO has been active in the field of radio from a technical standpoint and has been responsible for many technical developments. RKO has contributed to educational broadcasting through financial gifts and the making of equipment and program material available to educational stations. It has contributed to the development of new program sources for television. Such contributions certainly enhance the qualifications of RKO, not only as an experienced broadcast licensee but as a contributor to the public interest in broadcast communication. These factors, coupled with RKO's long-established and consistent autonomy, and the court's continuing jurisdiction to enforce the injunctive provisions of the consent judgment, support a reasoned judgment that the record before this Commission is sufficient for a finding that RKO is a qualified broadcast licensee.

Finally, I believe a strong, valid argument can be made that the same standard of proof should have been applied as in a revocation proceeding. It is most significant that the Commission did not decide the case on comparative issues, but solely upon the character qualifications of the licensee. This case was initially presented as a comparative renewal case, but the principal issue became the fundamental qualifications of the licensee to remain in the broadcasting business.

The majority has lost sight of the comparative aspects as between the contending parties. Instead, they have focused on the conduct of RKO generally in its trade practices of 20 years ago, and on the corporate nexus between GTR and RKO—not RKO the licensee of WNAC-TV applying for renewal, but RKO General, licensee of 16 broadcast stations and subsidiary of GTR.

All but ignored are the comparative aspects of RKO as licensee of WNAC-TV, and the focus is on its general qualifications to be a broadcast licensee. This is tantamount to revocation of the privilege to continue to do business. The cost of such revocation will amount to several hundred million dollars in broadcast properties now licensed to RKO General. The cost of such revocation includes the unwarranted drop in value of pertinent stock, to the dismay of innocent stockholders. A further cost of revocation of RKO's privilege to engage in radio and television broadcasting will be unmeasured adverse impact on the lives of hundreds of people now employed in RKO studio and television stations—loss of jobs, transfers, embarrassment, bewilderment, resentment. Those who supply software and harware to the RKO broadcast operations face uncer-

tainty of this market in future dealings, with the prospect of curtailment or cancellation of business relations. And the revocation of RKO's privilege of conducting its 35-year broadcast business will impact deleteriously on hundreds of thousands of RKO station listeners and viewers who rely on the service that the stations provide to them and their communities, not in hyper-technical punishment of the corporate licensee of the stations.

My point is that the decision of the majority is in essence a revocation action, not a comparative hearing evaluation and award. The majority's decision has in fact revoked RKO's privilege to continue to do business as a broadcast licensee.

I question the substantiality of the evidence relied upon by the majority in arriving at such a far-reaching decision. Preponderance of the evidence does not appear to be the appropriate standard applicable in a case of this magnitude.

I suggest that a "clear and convincing" standard of proof should be required before we deny RKO the privilege of continuing the broadcast business it has built over the years. I find support for this view in a recent case involving revocation of a broadcast license, wherein the court held that for the FCC to revoke a broadcast license, a "preponderance of evidence" is not enough. The evidence must be "clear and convincing." Sea Island Broadcasting Corporation of S.C. v. FCC, Case No. 76-1735 (January 14, 1980). The Commission there unsuccessfully argued that loss of a broadcast license does not amount to a potential deprivation of a livelihood, as in a cited precedent, since the former licensee may still obtain a job in the broadcasting industry and the revocation of one license "would not necessarily result in the loss of any other broadcasting station's license held by such a licensee."

The court was not persuaded by this argument, stating ". . . The broadcaster who loses his license may get other jobs in the industry, but he has certainly lost a business."

The court held in the Sea Island case that revocation of an FCC license must be governed at the agency level by a "clear and convincing" standard of proof.

Although the RKO case does not technically involve a revocation proceeding, the actual character and effect of this case is one of multiple license revocations. Most assuredly RKO, by the majority's dictates, "has lost a business"—sixteen businesses could be the ultimate loss.

The appropriate standard of proof in a case of this magnitude should have been that of "clear and convincing" evidence. The very nature of the unprecedented sanction, the harshest in the history of the FCC, demands most substantial grounds in justification.

The record could not possibly establish "clear and convincing" evidence. In fact, I do not believe the record can even support the majority's conclusion based on a "preponderance of evidence." However, I remain convinced that the most stringent standard of proof must be utilized before we strip three and possibly sixteen broadcast licenses from a licensee with a 35-year broadcasting record of development, investment, innovation and continued meritorious service in the public interest.

The incredibly harsh findings that RKO General lacks the requisite qualifications to remain a broadcast licensee indicates a mindset that equates bigness with badness. Under these circumstances, all large, multifaceted corporations who own broadcast properties should be on notice that all of their dealings must be not only legal but above any possible reproach. Such a rigid standard with no allowance for human error is virtually unattainable, a fact which could make large corporate owners—and their stockholders—an endangered species.

I dissent—emphatically!