

# NOTES

## THE DARKENED CHANNELS: UHF TELEVISION AND THE FCC

FCC Chairman Newton Minow's description of the average day's selection of television programs as a "vast wasteland" has crystallized widespread public concern over the failure of television to realize its potential as an educational and cultural force. Critics have found TV programs poor in quality and stereotyped in format; the spread of educational stations across the country has been disappointingly slow. One factor bearing on the availability of programs of high quality is the scarcity of broadcasting stations in many areas of the country — a scarcity attributable neither to economic inability of those areas to support stations nor to the natural limitations of the broadcast spectrum. Mr. Minow has dedicated himself to the goal of getting more stations on the air. "We will broaden the viewers' choice by lighting up the vacant channels," he stated, expressing his faith that an increased number of stations "means a rich variety of services for many tastes."<sup>1</sup> If an increase in stations could indeed bring more program diversity, this would be a major accomplishment which the Commission could not have achieved by direct regulation of program content without possibly coming afoul of section 326 of the Communications Act<sup>2</sup> as well as the first amendment to the Constitution. Moreover, if an extensive national educational television network is to become a reality, there must be more channels available which can compete with existing stations for viewers.

The paucity of stations has resulted from the concentration of broadcasting within the narrow confines of the very-high frequency (VHF) band (channels 2-13) and the failure to make extensive use of the ultra-high frequency (UHF) band (channels 14-83). In response to this situation, the Commission on August 3, 1961, initiated a rule-making proceeding to consider some far-reaching proposals designed to breathe new life into UHF broadcasting. This Note will trace the thirteen-year struggle of the Commission to develop a national system of channel allocation which would promote the optimum use of the available spectrum space. Then in the light of this history an attempt will be made to evaluate the FCC's current proposals.

### I. FCC PERFORMANCE IN ALLOCATING CHANNELS — 1949-1961

#### A. *The First Policy: Intermixture*

1. *The Sixth Report and Order.*—In 1945 the Commission, obligated by statute to distribute broadcast licenses and frequencies so as "to provide a fair, efficient, and equitable distribution" of television service

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<sup>1</sup> Gould, *Room For More TV*, N.Y. Times, Jan. 28, 1962, § 2, p. 15, col. 1 (city ed.).

<sup>2</sup> 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1958).

among the states and communities,<sup>3</sup> established a table allocating the VHF channels to the country's 140 largest markets.<sup>4</sup> In 1948, beset by the tremendous postwar flood of applications for new licenses, the Commission issued a "freeze order" suspending all action on such applications until further study had been made of the channel-allocation problem.<sup>5</sup> After a three-year rule-making proceeding open to all those concerned with television, the Commission in 1952 lifted the "freeze order" and adopted its Sixth Report and Order,<sup>6</sup> which established a nationwide city-by-city table of television channel assignments amendable only by rule-making.<sup>7</sup> The table provided for the use both of the VHF channels and of the hitherto-unused UHF channels. Over two thousand channel assignments were reserved for more than 1200 communities; 252 channels were reserved for educational use. These assignments were based on the following priorities:

Priority No. 1. To provide at least one television service to all parts of the United States.

Priority No. 2. To provide each community with at least one television broadcast station.

Priority No. 3. To provide a choice of at least two television services to all parts of the United States.

Priority No. 4. To provide each community with at least two television broadcast stations.

Priority No. 5. Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.<sup>8</sup>

Significantly, the table provided for the intermixture of VHF and UHF channels within the same markets.

The decision to intermix was made in the face of strong opposition. Many television manufacturers had recommended that the overlap of UHF and VHF assignments be held to a minimum.<sup>9</sup> Substantial objections had been persistently raised by two of the networks. As early as 1949 CBS had taken a stand against intermixture<sup>10</sup> on the ground that

<sup>3</sup> Communications Act of 1934, § 307(b), 49 Stat. 1475 (1936), 47 U.S.C. § 307(b) (1958).

<sup>4</sup> Bowles, *Supporting Brief*, appended to AD HOC ADVISORY COMM. ON ALLOCATIONS TO THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., 2D SESS., ALLOCATION OF TV CHANNELS 40 (Comm. Print 1958) [appended brief hereinafter cited as BOWLES REPORT].

<sup>5</sup> 13 Fed. Reg. 5860 (1948).

<sup>6</sup> 1 RADIO REG. 91:601 (FCC 1952).

<sup>7</sup> BOWLES REPORT 49; see Yankee Network, Inc., 4 RADIO REG. 164 (FCC 1948).

<sup>8</sup> Sixth Report and Order, 1 RADIO REG. 91:601, para. 63 (FCC 1952) [hereinafter cited as Sixth Report].

<sup>9</sup> Reply by Commission to Questions of Senate Interstate Commerce Committee, 1 RADIO REG. 91:125, 91:132 (FCC 1949).

<sup>10</sup> In August 1949, it said, "... the proposed table of allocation . . . is unsound to the extent that it establishes widespread mixing of VHF and UHF channels in individual communities." CBS Statement Re FCC Report 49-948, quoted in *Hearings on the UHF-VHF Allocations Problem Before the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess., pt. 2, at 792 (1956) [hereinafter cited as 1956 Hearings].

"UHF stations would be required to operate at a serious competitive disadvantage with the VHF stations."<sup>11</sup> Later, CBS reiterated its opposition, pointing out that in a community allotted only one or two VHF channels mere uncertainty as to UHF's competitive ability might discourage construction of a UHF station and thus deprive the public of competitive service.<sup>12</sup> CBS suggested an alternative: "In cases where three or more VHF assignments [in a given city] cannot be made, the Commission may find that UHF channels should be used exclusively."<sup>13</sup>

DuMont, the weakest of the then four major networks, was the most vigorous opponent of intermixture; it argued that UHF stations would be at a grave disadvantage in areas with existing VHF service because: (1) UHF transmitting equipment was inferior to available VHF equipment in power and efficiency; (2) large established VHF audiences would be withheld from UHF stations because of the need to buy adapters and in many cases to erect new receiving antennas for UHF; (3) UHF was not received as well in built-up or rough-terrain areas; (4) in large metropolitan markets, advertisers would prefer VHF stations with established receiver audiences and would prefer networks with VHF affiliates.<sup>14</sup> DuMont did not limit itself to criticism of the Commission's proposals; it was the only party to submit, as an alternative to the Commission's proposal, a national allocation plan<sup>15</sup> which avoided intermixture everywhere except in one metropolitan area.<sup>16</sup> A subsequent modified version required some intermixture, but assigned at least four VHF channels to as many major markets as possible.<sup>17</sup> On the assumption that a network required a VHF outlet in a high percentage of the largest markets in order to survive,<sup>18</sup> the modified plan was designed to permit at least four networks to exist.<sup>19</sup> Both plans were rejected.<sup>20</sup>

<sup>11</sup> CBS Comments, Docket No. 8736 *et al.*, September 1949, quoted in *1956 Hearings* at 792.

<sup>12</sup> Statement of William B. Lodge, Docket No. 8736 *et al.*, October 25, 1950, pp. 3-4.

<sup>13</sup> *Id.* at 4. CBS called attention to the probable difficulty in selling UHF receivers in areas with existing VHF service and to UHF's lesser geographical coverage. It believed that it would be some time before a UHF station would be able to compete on an equal basis with a VHF station. Statement of Joseph H. Ream, Executive Vice-President of CBS, quoted in Brief of Allen B. DuMont Laboratories, Docket No. 8736 *et al.*, Nov. 1, 1951, p. 19 [hereinafter cited as DuMont Brief]. Statement of Joseph H. Ream, Executive Vice-President of CBS, in Docket No. 8736 *et al.*, Sept. 1951, quoted in *1956 Hearings* at 792.

<sup>14</sup> See, e.g., Comments and Proposals of Allen B. DuMont Laboratories, Docket No. 8736 *et al.*, May 7, 1951, pp. 15-16 [hereinafter cited as Comments and Proposals]. These arguments against intermixture were equally applicable to cities where VHF service would in the future be established before UHF service, and were to a large degree applicable to cities where UHF service would become established first, given the bias of networks and advertisers in favor of VHF.

<sup>15</sup> Sixth Report, para. 70.

<sup>16</sup> Allen B. DuMont Laboratories, A National Television Allocation Plan — Vol. VI, Docket No. 8736 *et al.*, Revised Oct. 23, 1949 to Feb. 6, 1950, p. X-87 [hereinafter cited as National Plan]. Compare maps showing the extent of intermixture in DuMont's 1949 plan with the FCC's proposed 1949 Plan, National Plan, pp. X-89, X-91.

<sup>17</sup> Comments and Proposals, pp. 26-27; BOWLES REPORT 100.

<sup>18</sup> Comments and Proposals, p. 23.

<sup>19</sup> BOWLES REPORT 100.

<sup>20</sup> The first plan was rejected on technical grounds which have been seriously

Whereas the opponents of intermixture emphasized the probable consequences of VHF's economic superiority, the Commission stressed VHF's superior coverage, reasoning that since VHF signals travel farther than UHF signals, VHF should be assigned to as many communities as possible to ensure television service to outlying rural areas. But because of the great range of the twelve available VHF channels, in order to prevent interference of one with another there could be permitted only one or two VHF stations in many cities; thus intermixture would be necessary to avoid limiting many markets to these one or two stations. The Commission was convinced that its plan would establish UHF — at least in the long run — as an integral part of a nationwide competitive service. UHF would be employed in those areas where it would be the only service or would be essential to provide a choice of service. The Commission explicitly assumed that the allocation of UHF channels would spur manufacture of all-channel receivers and technological improvement of UHF equipment.<sup>21</sup>

Although the Commission's determination to distribute VHF channels as widely as possible was consistent with its schedule of priorities placing nationwide coverage above all else, the decision ensured that UHF would be confronted with VHF competition almost everywhere. Though success of intermixture required the creation of confidence in UHF on the part of broadcasters, advertisers and the public, the decision created the impression that UHF was generally inferior to VHF. Moreover, the Commission's faith in the development of UHF's competitive potential seems unjustified. There were to be too few sizable all-UHF cities to have any significant effect on the development of UHF generally. Sixty-five of the one hundred largest markets had more than one commercial VHF assignment.<sup>22</sup> Thus, as a rule a new UHF station in a major market would be faced with competition from at least two VHF stations. And the FCC's determination to continue all 108 pre-freeze VHF stations on their original channels<sup>23</sup> placed UHF in an even more shaky competitive position in these key markets, since the VHF stations were already entrenched and a high percentage of the public owned VHF-only receivers.<sup>24</sup> The Commission seems to have dismissed too readily the

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questioned. BOWLES REPORT 99-100 n.21. The modified plan was rejected in the Sixth Report, paras. 77-81. DuMont and CBS were not the only parties to oppose intermixture. Sixth Report, para. 190; Letter Relating to Docket No. 8736, From RCA to the FCC, March 23, 1950, recommending that the latter avoid intermixture "in so far as practical," quoted in Comments of RCA and NBC, Docket No. 11532, Dec. 15, 1955, p. 12. See S. REP. No. 2769, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as 1956 REPORT].

<sup>21</sup> Sixth Report, paras. 189, 199-200. Commissioners Hennock and Jones dissented, expressing doubts about UHF stations' ability to compete under the plan adopted. 1 RADIO REG. 91:1024-25, 91:1048-50, 91:1059-61.

<sup>22</sup> BOWLES REPORT 99.

<sup>23</sup> BOWLES REPORT 47. There are indications that the FCC felt it would be expensive and unfair to force some of the pre-freeze stations to change to UHF. See Comments and Proposals, pp. 5-6.

<sup>24</sup> Former Commissioner Robert F. Jones made the following remarks about the Sixth Report (from which he dissented) in a recent letter to the *Harvard Law Review*:

If I may indulge in reasonable speculation, I would add that existing TV

lesson of the early competitive experience of FM radio which, like UHF, could not be received on existing sets.<sup>25</sup> It was true, as the Commission pointed out,<sup>26</sup> that UHF would not be faced with a fully matured competing VHF service in 1952 whereas AM radio was fully developed when FM came on the scene. But FM had marked technical advantages over AM and still had difficulty becoming established.<sup>27</sup> One would have thought that the technical disadvantages of UHF would have been enough to outweigh any "immaturity" of VHF service. The Commission recognized that UHF might have competitive problems at the start, but it was determined not to allow this fact "to obscure the long-range goal of a nationwide competitive television service, in which stations in the UHF and VHF bands will constitute integral parts."<sup>28</sup> The Commission failed to discern that its long-range goal might never be reached unless the competitive disadvantages of UHF were dealt with effectively.

2. *Experience under the Sixth Report.*—By May 1954 it was apparent that UHF was not faring well in an intermixture system. Although 127 UHF stations were actually on the air, even more VHF stations had been added in the same period so that the VHF total was almost twice that of UHF. Five UHF stations had gone off the air, fifty-four UHF construction permits had been cancelled, and many other UHF permittees faced difficulties in obtaining adequate financing.<sup>29</sup> Moreover, those UHF stations facing VHF competition were fighting insolvency. Although in communities with only one VHF station some UHF stations were doing well, in communities with two or more VHF stations UHF stations were suffering extensive deficits and their prospects for success were "exceedingly doubtful."<sup>30</sup> The elements of UHF weakness under intermixture fed on each other. Pre-Sixth-Report sets could not receive UHF. Small audiences for UHF stations meant a less desirable network affiliation or none at all,<sup>31</sup> less advertising revenue,<sup>32</sup> and less money for

licensees had an influence on the weight given both economic and technical factors. The allocation plan was designed to cause the least disruption to the existing channel assignments of these pre-freeze licensees. Accordingly, practical, rather than optimum, efficiency considerations dictated the minimum mileage separations employed. The power, antenna height, and separations adopted embraced nearly every pre-freeze assignment, and gave each such licensee a tremendous windfall.

Letter From Robert F. Jones to the *Harvard Law Review*, Oct. 20, 1961.

<sup>25</sup> See *Ibid.*

<sup>26</sup> Sixth Report, para. 197.

<sup>27</sup> See SIEPMANN, *RADIO TELEVISION AND SOCIETY* 56-58 (1950).

<sup>28</sup> Sixth Report, para. 200.

<sup>29</sup> BOWLES REPORT 50.

<sup>30</sup> Testimony of Dr. Frank Stanton, President of CBS, *Hearings on Status of UHF and Multiple Ownership of TV Stations Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 974-75 (1954) [hereinafter cited as Stanton Testimony]; STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG., 1ST SESS., *TELEVISION NETWORK REGULATION AND THE UHF PROBLEM* 4-5 (Comm. Print 1955) [hereinafter cited as PLOTKIN REPORT].

<sup>31</sup> *Id.* at 4, 6; STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 84TH CONG., 1ST SESS., *INVESTIGATION OF TELEVISION NETWORKS AND THE UHF-VHF PROBLEM* 7 (Comm. Print 1955) [hereinafter cited as JONES REPORT]. Sometimes UHF stations even lost some of their most popular network programs to their VHF competitors.

<sup>32</sup> PLOTKIN REPORT 3-6; JONES REPORT 8, 27.

improved transmitting equipment or increased power.<sup>33</sup> The strong networks, CBS and NBC, succeeded in acquiring VHF affiliates in most of the top markets having only two VHF channels.<sup>34</sup> Since the most popular network programs were on VHF, the public had little incentive to buy,<sup>35</sup> and manufacturers little to produce, the more expensive all-channel receivers. The expected economies from mass production of all-channel receivers<sup>36</sup> and from improvements in all types of UHF equipment did not ensue.<sup>37</sup>

3. *Early Deintermixture Petitions.*— Since intermixture seemed to be the primary cause of UHF broadcasters' troubles, they sought a remedy through deintermixture<sup>38</sup> — the reassignment of channels by rule-making to make a given community either all VHF or all UHF.<sup>39</sup> In disposing of early petitions for deintermixture, or even partial deintermixture, the Commission showed itself unwilling to reexamine the intermixture philosophy of the Sixth Report. For example, with respect to St. Louis, which had one VHF and two UHF stations in operation, the Commission rejected a proposal to delete the two remaining VHF channels assigned to the city and substitute four UHF's.<sup>40</sup> Two later petitions for deintermixture of smaller cities were similarly disposed of.<sup>41</sup>

By late 1954 and early 1955 the Commission had become sufficiently aware of UHF's plight that it would no longer dismiss deintermixture proposals with nothing more than a reiteration of the Sixth Report premises. At that time broadcasters from Madison, Peoria, Hartford and Evansville, cities with only UHF stations on the air, petitioned for deletion of the commercial VHF channels assigned to those cities, 17 contending that experience had proved UHF's inability to compete successfully in intermixed markets.<sup>42</sup> The Commission denied these petitions on the ground that the parties applying for the VHF channels had spent much time, effort and money in processing their applications.<sup>43</sup>

<sup>33</sup> See, e.g., Initial Decision of Hearing Examiner, FCC 61D-113, p. 42, Docket No. 11757 (FCC July 20, 1961) (Evansville Deintermixture Show Cause Proceeding).

<sup>34</sup> Only 33 of the top 100 markets were originally assigned more than two VHF channels. Thus, DuMont and ABC became competitively weak networks. PLOTKIN REPORT 5-6; JONES REPORT 28. See testimony of Ernest L. Jahncke, Jr., Assistant to the President, ABC, 1956 Hearings 781.

<sup>35</sup> PLOTKIN REPORT 3-4.

<sup>36</sup> JONES REPORT 27.

<sup>37</sup> See PLOTKIN REPORT 4-5.

<sup>38</sup> See 1956 REPORT 9.

<sup>39</sup> Stanton Testimony 978.

<sup>40</sup> Broadcast House, Inc., 10 RADIO REG. 7 (FCC 1953).

<sup>41</sup> Arlington James Henry, 11 RADIO REG. 322 (FCC 1954) (denial of request to deintermix Tyler, Texas, by requiring station under construction to go on the air on a UHF, instead of a VHF, channel); Central Texas Television Co., 11 RADIO REG. 329 (FCC 1954) (denial of request to delete second VHF assignment in an area where one VHF and one UHF were operating).

<sup>42</sup> As evidence of this, they cited the testimony in the *Hearings on Status of UHF and Multiple Ownership of TV Stations Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. (1954).

<sup>43</sup> Monona Broadcasting Co., 11 RADIO REG. 477 (FCC 1954); West Cent. Broadcasting Co., 11 RADIO REG. 482a (FCC 1954); General-Times Television Corp., 11 RADIO REG. 625 (FCC 1954); Premier Television, Inc., 11 RADIO REG. 909 (FCC 1955).

On reconsideration, however, the Commission reversed its decision and instituted rule-making proceedings directed toward deintermixture of these four cities.<sup>44</sup> Then, in November 1955, the Commission took still another tack. It declared that the problem of intermixture was national in scope and that "both fairness and practicability preclude an ad hoc approach."<sup>45</sup> Accordingly, the Commission denied the petitions for local deintermixture and initiated a general rule-making proceeding on the subject.<sup>46</sup> But while the Commission was thus indicating that basic changes in its allocation policy were in the offing, it refused to stay grants of VHF construction permits in hitherto all-UHF areas,<sup>47</sup> and even assigned a new VHF channel to a predominantly UHF area.<sup>48</sup> This reluctance to call a temporary halt to new intermixture could only make any future solution by way of deintermixture more difficult.<sup>49</sup>

### B. The Second Policy: Selective Deintermixture and All-UHF

1. *The Second Report on Deintermixture.*—A wide variety of proposals were presented to the Commission in its general rule-making proceeding. Some parties sought to sidestep UHF's difficulties by providing for more VHF stations.<sup>50</sup> ABC, the weakest of the three remaining na-

<sup>44</sup> Notices of Proposed Rule Makings, 1 RADIO REG. 53:1005, 53:1011, 53:1015, 53:1019 (FCC 1955).

<sup>45</sup> First Report on Deintermixture, 13 RADIO REG. 1511, 1517 (FCC 1955).

<sup>46</sup> First Report on Deintermixture, *supra* note 45.

<sup>47</sup> See, e.g., Radio Wisconsin, Inc., 13 RADIO REG. 349 (FCC 1955); Evansville Television, Inc., 13 RADIO REG. 369 (FCC 1955). FCC denial of stays of grants of VHF channels assigned under the Sixth Report was affirmed in *Coastal Bend Television Co. v. FCC*, 231 F.2d 498 (D.C. Cir.), *affirmance upheld on rehearing en banc*, 234 F.2d 686 (D.C. Cir. 1956).

<sup>48</sup> First Report on Deintermixture, 13 RADIO REG. 1511 (FCC 1955). The allocation of this VHF channel to the small town of Vail Mills in the Albany-Schenectady-Troy area was stayed by the court of appeals. *Greylock Broadcasting Co. v. FCC*, 231 F.2d 748 (D.C. Cir. 1956). But on reconsideration en banc, the stay was vacated. *Van Curler Broadcasting Corp. v. United States*, 236 F.2d 727 (D.C. Cir. 1956).

<sup>49</sup> For example, Channel 7 went on the air in Evansville in September of 1956, and it was decided to deintermix Evansville in February, 1957. *Evansville Deintermixture Case*, 15 RADIO REG. 1573 (FCC 1957). Before any changes could then be made, the VHF licensee had to be accorded a hearing under §§ 303(f) and 316 of the Communications Act, 48 Stat. 1082 (1934) and 66 Stat. 718 (1952), 47 U.S.C. §§ 303(f) and 316 (1958). *But see* *Marietta Broadcasting, Inc.*, 21 RADIO REG. 787 (FCC July 11, 1961). The *Evansville* hearing did not terminate until July 1961. Initial Decision of Hearing Examiner, *supra* note 33, at p. 61. The matter is now once more before the full Commission for final decision. This problem was avoided with respect to Peoria because the construction permit for the VHF station was conditioned on the decision to be reached in the rule-making proceeding. Letter From the Federal Communications Commission to the *Harvard Law Review*, March 7, 1962.

<sup>50</sup> One plan would have granted any application for a VHF station "so long as its signal will not interfere with that of an existing station to a greater extent than might have occurred under the *Sixth Report and Order* in the most unfavorable permissible circumstances . . ." *Proposals and Comments of Columbia Broadcasting System, Inc.*, Docket No. 11532, Dec. 14, 1955, p. 11-14 [hereinafter cited as *CBS Proposals*]. CBS did not favor this plan. *Id.* at 11-15 to 17. Another proposal would have done away with the Table of Assignments and thrown all channels open for distribution on the basis of individual application, in the same manner as is done with AM Radio. *Comments of Joint Committee on Educational Television*, Docket No. 11532, Dec. 15, 1955, p. 7 [hereinafter cited as *JCET Brief*]. The JCET did not favor this plan. *Ibid.*

tional networks,<sup>51</sup> needed VHF outlets in those major markets which had only two VHF assignments. It proposed the use of VHF "drop-ins" (channel assignments additional to those of the Sixth Report) at reduced mileage separations and the reassignment for commercial use of some unused VHF educational channels.<sup>52</sup> CBS, apparently ready to accommodate ABC if it could at the same time prevent the establishment of additional networks, presented two alternative plans, each of which would have barred any real possibility for a fully developed UHF band by providing for a third VHF channel in most major markets.<sup>53</sup> On the other hand, NBC made proposals designed to strengthen UHF. It urged both repeal of the excise taxes on all-channel receivers to make them competitive in price with VHF-only receivers, and deintermixture on a basis sufficiently broad to create a number of predominantly UHF markets from which UHF could spread to other areas.<sup>54</sup> NBC also recommended that UHF stations be allowed to use higher power, directional antennas, and boosters.<sup>55</sup> Nevertheless, the network urged caution: "The Sixth Report and Order is not perfect," it concluded in a masterful piece of understatement, but "the large distillate of wisdom and sound principle it contains" ought not to be abandoned hastily, without a sound alternative plan.<sup>56</sup>

On June 25, 1956, the Commission issued its Second Report on Deintermixture.<sup>57</sup> Somewhat surprisingly,<sup>58</sup> the report came to the conclusion that the best long-range solution was the shift of all television to the

<sup>51</sup> DuMont went out of the network business on Sept. 15, 1955, after ten years of operation, a casualty of the allocation plan it had so strenuously opposed. See BOWLES REPORT 94 n.5, 100.

<sup>52</sup> Reply Comments of Radio Corp. of America and National Broadcasting Co., Docket No. 11532, Feb. 8, 1956, pp. 2-3 [hereinafter cited as NBC Reply]; JCET Brief, pp. 11-12.

<sup>53</sup> Plan I would have increased from 52 to 84 the number of the 100 leading markets with at least three "substantially competitive" stations. This would be accomplished through 26 VHF drop-ins, seven transfers of VHF assignments to larger markets, four switches of unapplied-for VHF assignments to other markets, and deintermixture of two markets where no VHF grants had been made. CBS proposals, p. 4. Plan II virtually abandoned UHF, substituting a 15-channel VHF system, based on the assumption that more VHF spectrum space could be obtained from other users. It would have allowed for at least three VHF stations in each of the top 100 markets. *Id.* at 6-7. CBS contended that "the limited role for VHF [in this plan] seems justified in the light of the experience to date with UHF operations." *Id.* at 11-11.

<sup>54</sup> Comments of Radio Corp. of America and National Broadcasting Co., Docket No. 11532, Dec. 15, 1955, pp. 11-12 [hereinafter cited as NBC Comments].

<sup>55</sup> *Id.* at 15; NBC Reply, pp. 3-4. A booster is a station which retransmits the signals of a television broadcast station by amplifying and reradiating such signals over the same channel on which they were received. 47 C.F.R. §§ 4.801(a), 4.802 (Supp. 1961).

<sup>56</sup> NBC Comments, p. 22. Some months later, it was to plead in eloquent mixed metaphor that UHF not be left "withering in a state of suspended animation . . ." In the Matter of FCC Inquiry into the Feasibility of Transferring Television Broadcasting to the UHF Band, Comments of Radio Corp. of America and National Broadcasting Co., Sept. 29, 1956, p. 3 [hereinafter cited as Feasibility Inquiry-NBC].

<sup>57</sup> 13 RADIO REG. 1571 (FCC 1956).

<sup>58</sup> The JCET, in its brief in this proceeding, mentioned a proposal to make all television UHF, but dismissed it saying "We do not understand, however, that the Commission is presently giving serious consideration to so radical a solution." JCET Brief, p. 5 n.3.

UHF band. It asserted, however, that prior to such a shift there would have to be a research program aimed at testing and improving UHF transmission and reception, and a transitional period during which the public could obtain UHF receivers. As an interim measure, the Commission would follow a policy of selective deintermixture;<sup>59</sup> proposals to eliminate VHF assignments would be granted if (a) the elimination would not take away all service from a significant number of people, (b) one or more UHF stations were operating in the area, (c) a reasonably high percentage of the sets in use could receive UHF, (d) the terrain was "reasonably favorable for UHF coverage," and (e) the VHF deletion would help to improve "opportunities for effective competition among a greater number of stations." VHF channels would not be added unless such an assignment met a similar criterion of competition improvement, was consistent with spacing requirements, and did not necessitate displacement of a channel from an area in which there was greater need.<sup>60</sup>

2. *The Interim Policy: Selective Deintermixture.*—Although 1957 saw the culmination of a great flurry of deintermixture proceedings instituted by the FCC under the Second Report, few of them resulted in decisions to deintermix. The Commission did resolve to make the following all-UHF: Evansville, Indiana; Peoria, Illinois; Elmira, New York; Springfield, Illinois.<sup>61</sup> Yet petitions to deintermix other cities were denied, over strong dissents, on the basis of tenuous factual distinctions.<sup>62</sup> A striking example of the Commission's fluctuating attitude was its treatment of petitions to deintermix the Albany-Schenectady-Troy area. In the same opinion that announced the general rule-making proceeding relating to

<sup>59</sup> Consideration was to be given to deintermixture of any area for which it was proposed, in a rule-making proceeding for that area alone. (Thus, it invited local proposals of the type it had refused to consider the previous November). The granting of deintermixture would result in the creation of UHF "islands," as explained in NBC Comments, p. 12, by means of the deletion of VHF assignments. However, the rest of the country would remain intermixed. Under a plan of total deintermixture, all television markets in the country would be either all-UHF or all-VHF.

<sup>60</sup> Second Report on Deintermixture, 13 RADIO REG. 1571 (1956) [hereinafter cited as Second Report].

<sup>61</sup> Evansville Deintermixture Case, 15 RADIO REG. 1573, *petition for reconsideration denied*, 15 RADIO REG. 1586, *petition to dissolve show cause proceeding denied*, 15 RADIO REG. 1586e, *petition to make Evansville all-VHF denied*, 15 RADIO REG. 1771 (FCC 1957), *aff'd sub nom.* Owensboro on the Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959); Peoria Deintermixture Case, 15 RADIO REG. 1550c (FCC 1951), *aff'd sub nom.* WIRL Television Co. v. United States, 253 F.2d 863 (D.C. Cir.), *vacated and remanded per curiam on other grounds*, 358 U.S. 51 (1958), *remanded to FCC on allegations of improper ex parte contacts with Commission*, 274 F.2d 83 (D.C. Cir. 1959); Elmira Deintermixture Case, 15 RADIO REG. 1515 (FCC 1957); Springfield Deintermixture Case, 15 RADIO REG. 1525 (FCC 1957), *aff'd sub nom.* Sangamon Valley Television Corp. v. United States, 255 F.2d 191 (D.C. Cir.), *vacated and remanded per curiam on other grounds*, 358 U.S. 49 (1958), *vacated and remanded*, 269 F.2d 221 (D.C. Cir. 1959), *interim report on remand by FCC*, 19 RADIO REG. 1055 (FCC), *remanded for entirely new proceeding because of improper ex parte contacts with Commission*, 294 F.2d 742 (D.C. Cir. 1961).

<sup>62</sup> See, e.g., Hartford Deintermixture Case, 15 RADIO REG. 1540i, *petition for reconsideration denied*, 15 RADIO REG. 1544 (FCC 1957); Madison Deintermixture Case, 15 RADIO REG. 1563, *petition for reconsideration denied*, 15 RADIO REG. 1572 (FCC 1957); Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (FCC 1957), *reversing* 15 RADIO REG. 1501 (FCC 1957).

the UHF problem, the Commission assigned a new VHF channel to Vail Mills, a small town twenty miles from Schenectady. The only other VHF channel assigned to this predominantly UHF area was already on the air in Schenectady itself. Yet the Commission refused to stay the grant pending the outcome of the general rule-making proceeding on the ground that it "would not be justified in withholding this service . . ." which would bring additional service to "a significant number of families."<sup>63</sup> But in February 1957, after the adoption of the Second Report, the Commission found that the area met the criteria for deintermixture and concluded that deletion of both VHF channels was necessary "to remove any artificial restraint on the establishment of additional stations in the area and to create a situation whereby the number of stations can be determined solely by what the traffic will bear."<sup>64</sup> Accordingly, it decided to make the area all-UHF. Only six months later, in response to a petition for reconsideration, the Commission overturned its February decision and made the area a three-VHF market, retaining the VHF channels in Schenectady and Vail Mills and shifting Channel 13 from Utica to Albany.<sup>65</sup> The Commission maintained that its earlier decision was based on the erroneous assumption that it would be impossible to assign a third VHF channel to the area. Since a show-cause proceeding would have been necessary before the Schenectady VHF station could have been shifted to UHF, implementation of an all-UHF deintermixture would have required a prolonged period of time, whereas three VHF's could provide the speedy "interim relief" desired.<sup>66</sup> They "could, in a relatively short period, bring comparable television service to the public."<sup>67</sup> By "comparable" the Commission was evidently referring to the service that could have been provided by the five UHF channels assigned to the area, of which two were already operating and two had construction permits outstanding.<sup>68</sup>

The same type of indecision was displayed with respect to Fresno, California. In 1957 the Commission decided to make Fresno all-UHF,<sup>69</sup> but upon belated reconsideration in 1959 it decided that Fresno ought to be all-VHF so that certain outlying mountainous areas would not lose their service.<sup>70</sup> At that time Fresno had one VHF and two UHF stations operating; two more UHF channels were assigned, one being reserved for educational use. To make the city all-VHF, therefore, the FCC had to add three new VHF channels, and it was perfectly ready to do so. In 1960 the Commission, again reversing itself, made Fresno all-UHF. It based this decision upon studies — some of which were sub-

<sup>63</sup> First Report on Deintermixture, 13 RADIO REG. 1511, 1517 (FCC 1957).

<sup>64</sup> Albany-Schenectady-Troy Deintermixture Case, 15 RADIO REG. 1501, 1511 (FCC 1957).

<sup>65</sup> Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (FCC 1957).

<sup>66</sup> *Id.* at 1514c.

<sup>67</sup> *Id.* at 1514g.

<sup>68</sup> Albany-Schenectady-Troy Deintermixture Case, 15 RADIO REG. 1501, 1504-05 (FCC 1957).

<sup>69</sup> Fresno Deintermixture Case, 15 RADIO REG. 15861 (FCC 1957).

<sup>70</sup> Fresno Deintermixture Case, 18 RADIO REG. 1733 (FCC 1959).

mitted four months prior to the 1959 decision<sup>71</sup> — indicating first, that the 1958 earnings of the VHF station far exceeded those of its UHF competitors, and second, that UHF coverage was equal to VHF coverage in Fresno.<sup>72</sup> Another reason given in support of the decision must also have been known in 1959: to make Fresno all-VHF would require substandard spacings and adversely affect the range of service of Los Angeles and San Francisco stations. In 1961, the Commission completed the deintermixture of California's San Joaquin Valley by making Bakersfield all-UHF.<sup>73</sup>

Experience in the years since 1956 demonstrates that the selective deintermixture policy of the Second Report has made no significant contribution, on a nationwide level, to the health or growth of UHF broadcasting.<sup>74</sup> Of those cities which had both UHF and VHF stations operating, the FCC has decided to make all-UHF only the six cities mentioned. And even in these, some of deintermixture has been delayed long beyond the date of the decision in the rule-making proceeding by protracted judicial appeals and by the adjudicatory hearing accorded the VHF licensees prior to shifting frequencies.<sup>75</sup> At present, deintermixture still has not been implemented in three of the six cities.<sup>76</sup> On the other hand, petitions to deintermix twelve cities have been denied.<sup>77</sup> More-

<sup>71</sup> The report of the Television Allocations Study Organization, whose Fresno studies were referred to in 19 RADIO REG. at 1584, was submitted to the Commission on March 16, 1959.

<sup>72</sup> Fresno Deintermixture Case, 19 RADIO REG. 158i, *petition for reconsideration denied*, 19 RADIO REG. 1598i (FCC 1960).

<sup>73</sup> Bakersfield Deintermixture Case, 21 RADIO REG. 1549 (FCC 1961), *petition for reconsideration denied*, 21 RADIO REG. 1574a (FCC Sept. 13, 1961).

<sup>74</sup> See Statement on Behalf of the FCC, Presented by Chairman Doerfer to the Senate Committee on Interstate and Foreign Commerce, April 19, 1959, p. 13 [hereinafter cited as Doerfer Statement]. This statement is reprinted in *Hearings on Television Allocations Before the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess., pt. 8, at 4585 (1960).

<sup>75</sup> See note 49 *supra*.

<sup>76</sup> The report of the hearing examiner in the Evansville case is now before the Commission for a final decision. As for Bakersfield, the hearing examiner has decided that it would not serve the public interest, convenience, and necessity to modify the license of the VHF station to specify operation on UHF before the expiration of the current license term on December 1, 1962. Marietta Broadcasting, Inc.—Initial Decision of Hearing Examiner, 22 RADIO REG. 477 (FCC Oct. 20, 1961). Springfield, Ill., is part of a wider area in that state for which a new deintermixture rule-making proceeding was initiated in August, 1961. See Expanded Use of UHF Channels, 21 RADIO REG. 1711, 1714 (FCC Aug. 3, 1961) [hereinafter cited as FCC, Expanded Use of UHF].

<sup>77</sup> Channel Assignment in New Bedford, Mass., 21 RADIO REG. 1691 (FCC July 10, 1961) (deintermixture of Hartford rejected again, but with promise to consider it further in a later proceeding); Channel Assignments in Corpus Christi, 18 RADIO REG. 1793 (FCC 1959); Channel Assignment in Hot Springs, Ark., 18 RADIO REG. 1517, *petition for reconsideration denied*, 18 RADIO REG. 1520a (FCC 1959); Erie, Pa.—Flint, Mich. Channel 12 Case, 17 RADIO REG. 1509, *petition for reconsideration denied*, 17 RADIO REG. 1518b (FCC 1958); Channel Assignments in Champaign-Urbana, Ill., 16 RADIO REG. 1630, *petition for reconsideration denied*, 16 RADIO REG. 1634b (FCC 1958); Channel Assignments in Jacksonville, Fla., 15 RADIO REG. 1732 (FCC 1957); Channel Assignments in Biloxi-Gulfport, 15 RADIO REG. 1704b (FCC 1957); Channel Assignment to Fort Smith-Fayetteville, Ark., 15 RADIO REG. 1678a (FCC 1957); Channel Assignments in Charlotte, N.C., 15 RADIO REG. 1659 (FCC 1957); New Orleans Deintermixture Case, 15 RADIO REG. 1603 (FCC 1957); Madison Deintermixture Case, 15 RADIO REG. 1563 (FCC 1957), *aff'd sub nom.* Winnebago Television Corp. v. United States, 258 F.2d 163 (D.C.

over, two markets, one very promising for UHF, have been made all-VHF.<sup>78</sup>

The FCC has, however, taken some constructive action short of deintermixture. It denied several proposals to add VHF channels to predominantly UHF areas;<sup>79</sup> in one of these areas, Columbia, South Carolina, it is presently conducting a deintermixture rule-making proceeding in the face of great political opposition.<sup>80</sup> In Bakersfield, two UHF channels were added,<sup>81</sup> making the city predominantly UHF and thus eligible for the deintermixture later ordered there. In Walla Walla, Washington, where two commercial VHF and one educational UHF channels were assigned but no permits or licenses had been issued, the Commission changed the VHF assignments to UHF in order to provide the potential for the growth of multiple services in a large part of the state.<sup>82</sup> This action goes beyond the deintermixture criteria of the Second Report, for no stations were operating at all. It represents a marked departure from the basic attitude of the Sixth Report, which favored the widest possible distribution of VHF channels,<sup>83</sup> and represents an attempt to solve potential problems of station scarcity and UHF weakness before they materialize. However, no similar action has been taken subsequently.

There are several reasons why deintermixture under the Second Report proved so ineffective. First, it is fair to say that the Commission did not consistently adhere to the principles of the Second Report. If it was determined that the future of a competitive television system depended on the development of UHF, it is hard to find justification for the Commission's making all-VHF a market in which a UHF station was operating — at least in the absence of a plan for nationwide deintermixture. It was indefensible for the Commission to do this in the Albany-Schenectady-Troy area, which had five UHF channels assigned to it — two of them already on the air — and where eighty per cent of the television homes were equipped for UHF reception.<sup>84</sup> One of the two reasons given by the FCC for its refusal to deintermix Hartford was its finding that the

Cir. 1958), *cert. denied*, 358 U.S. 930 (1959); Hartford Deintermixture Case, 15 RADIO REG. 1540i (FCC 1957), *aff'd sub nom.* Springfield Television Broadcasting Corp. v. FCC, 259 F.2d 170 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 930 (1959); Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (FCC), *reversing on rehearing* 15 RADIO REG. 1051 (FCC 1957).

<sup>78</sup> Columbus [Ga.] Deintermixture Case, 18 RADIO REG. 1723 (FCC 1959); Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (FCC 1957).

<sup>79</sup> *E.g.*, Channel Assignment in Terre Haute, 16 RADIO REG. 1640 (FCC 1958); Channel Assignment to St. Joseph, Tennessee, 15 RADIO REG. 1646 (FCC 1957); Channel Assignment to Clearfield, Pennsylvania, 15 RADIO REG. 1649 (FCC 1957); Channel Assignment to Columbia, S.C., 15 RADIO REG. 1682 (FCC 1957).

<sup>80</sup> Columbia Deintermixture Case, 21 RADIO REG. 1725 (FCC Sept. 27, 1961).

<sup>81</sup> Channel Assignments in Bakersfield, Calif., 16 RADIO REG. 1565 (FCC 1958), *aff'd per curiam sub nom.* Bakersfield Broadcasting Co. v. United States, 266 F.2d 697 (D.C. Cir.), *petition for reconsideration denied sub nom.* Pacific Broadcasters Corp., 18 RADIO REG. 863 (FCC 1959).

<sup>82</sup> Walla Walla Deintermixture Case, 16 RADIO REG. 1636 (FCC 1958).

<sup>83</sup> See Sixth Report, paras. 66, 68.

<sup>84</sup> See Albany-Schenectady-Troy Deintermixture Case, 15 RADIO REG. 1501, 1504-07 (FCC 1957); Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a, 1514k (FCC 1957) (dissenting opinion of Commissioner Bartley).

VHF channel proposed for deletion could not be reallocated, under the spacing requirements, to a city which had a greater need for it.<sup>85</sup> But this consideration had no basis in the Second Report and in any event seems irrelevant. Since Hartford met the deintermixture criteria, presumably it would have been better off without a commercial VHF station. Moreover, the VHF channel thus freed could have been used as an educational station in Hartford itself.<sup>86</sup> The Commission adopted a similar rationale in the *Madison Deintermixture Case*.<sup>87</sup> Madison had one educational and two commercial UHF stations in operation, and had been assigned one VHF channel on which a station was just becoming operational. Receivers within the city were equipped for UHF and the terrain was suitable for UHF reception. It was proposed that the city be made all-UHF, either by shifting the educational station to VHF and allowing the VHF permittee to use the UHF channel or by shifting the VHF assignment to a nearby city, Rockford. The Commission rejected both proposals. It found "little or no likelihood"<sup>88</sup> that the educational station could obtain funds needed for conversion to VHF; to require conversion would force the station off the air completely. The proposed shift of the VHF channel to Rockford was rejected on the grounds that Madison needed it more, and that deintermixture would not be accomplished by such a change since if located at Rockford the channel would still provide Madison with a Grade A signal. But UHF channels ample for Madison's needs could easily have been made available by rule-making. Indeed, a fourth UHF channel has since been assigned to the city.<sup>89</sup> The Commission did not indicate why it was necessary that the VHF channel be either retained in Madison, or shifted to Rockford rather than deleted and replaced by a new UHF channel.

Even had the FCC zealously carried out its selective deintermixture policy, that policy would have failed. It offered too little, too late. By June 1956 many UHF stations had already ceased broadcasting<sup>90</sup> and, as the cumbersome deintermixture proceedings dragged on, more UHF stations went off the air, with the result that some markets which would earlier have met the criteria of the Second Report became no longer "suitable" for deintermixture.<sup>91</sup> Furthermore, few markets could ever have met the deintermixture criteria as these were interpreted. The requirement that the terrain be "reasonably favorable for UHF coverage" was interpreted strictly: in one case, rough terrain in parts of a city's Grade B service area was enough to militate against deintermixture of that city, despite the fact that Grade B VHF signals from other cities covered this terrain.<sup>92</sup> Similarly, the requirement that a "reasonably

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<sup>85</sup> Hartford Deintermixture Case, 15 RADIO REG. 15401, 1546 (FCC 1957).

<sup>86</sup> *Id.* at 1548-49 (dissenting opinion of Commissioner Hyde).

<sup>87</sup> 15 RADIO REG. 1563 (FCC 1957).

<sup>88</sup> *Id.* at 1565.

<sup>89</sup> See 47 C.F.R. § 3.606 (Supp. 1962).

<sup>90</sup> See Graph of Station History, BOWLES REPORT 16.

<sup>91</sup> See *ibid.*; Channel Assignments in Corpus Christi, 18 RADIO REG. 1793 (FCC 1959); Erie, Pa.-Flint, Mich. Channel 12 Case, 17 RADIO REG. 1509 (FCC 1958).

<sup>92</sup> Erie, Pa.-Flint, Mich. Channel 12 Case, *supra* note 91, at 1513.

high proportion of the sets in use" be able to receive UHF was held not satisfied in one city in spite of the facts that it had an existing UHF receiver circulation of sixty to seventy-five per cent and only all-channel receivers were then being sold there.<sup>93</sup> Although under the Second Report deintermixture was possible even if only one UHF station was on the air, all of the six cities which the FCC did make completely UHF by deintermixture had at least two UHF stations operating. This suggests that in areas capable of meeting the terrain and receiver circulation criteria of the Second Report, as they were interpreted, conditions were favorable enough — even with intermixture — to support more than one UHF station. Paradoxically, the Second Report thus gave help not to those UHF cities which most needed it, such as New Orleans, Erie, and Jacksonville — where only one UHF station was operating and where receiver conversion was not overly high — but rather to those intermixed cities in which UHF was already strong enough to withstand VHF competition.<sup>94</sup>

Selective deintermixture could have substantially increased use of the UHF band only if the Commission had been willing to extend deintermixture to markets which had no UHF stations operating. For example, it might have formulated a policy of deintermixing cities large enough to support three or four stations which had but one or two VHF channels among those assigned, since in these cities a choice of service would depend on the success of UHF. The Commission may have been justified in not taking such action if, as it purported to do, it regarded selective deintermixture as only an "interim" measure;<sup>95</sup> if so, one could have expected but limited results. The crucial inquiry, then, becomes whether the Commission effectively promoted its proposed long-range solution of the allocation problem.

3. *The Long Range Goal: All-UHF.* — The Second Report proclaimed an all-UHF system as the most desirable long-run solution to channel scarcity. Yet the Commission made only negligible advances toward this asserted goal. It could have fixed a specific date for conversion of all telecasting to UHF, sufficiently far in the future to allow for a transitional period during which stations would convert their transmission facilities and existing receivers would become obsolete. Such action would have stimulated a strong demand for all-channel receivers and resulted in their virtually complete distribution among the public by the end of the transitional period. The Commission did, in the Second Report, suggest that Congress "examine the advisability of" legislation prohibiting the shipment of VHF-only receivers in interstate commerce,

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<sup>93</sup> New Orleans Deintermixture Case, 15 RADIO REG. 1603, 1608 n.8 (FCC 1957). In another case, a UHF receiver circulation of somewhat less than 50% in the Grade B service area was thought too low, even though the rate of conversion was high within the primary service area. Erie, Pa.-Flint, Mich. Channel 12 Case, 17 RADIO REG. 1509 (FCC 1958).

<sup>94</sup> See, e.g., Marietta Broadcasting, Inc. — Initial Decision of Hearing Examiner, 22 RADIO REG. 477 (FCC Oct. 20, 1961), which held after analysis of their competitive position that the economic situation of the UHF stations in Bakersfield was sufficiently favorable that there was no pressing need to deintermix during the term of the existing license of the VHF station.

<sup>95</sup> Second Report, para. 31.

or eliminating the excise tax on all-channel receivers.<sup>96</sup> But had the Commission in fact made a final decision to convert all television to UHF, it had ample means to effectuate receiver conversion, and any legislation directed thereto would have been superfluous.

The Commission had justified its delay of the decision to change to all-UHF by the need for "a program of expedited research and development." Apparently such a program was to have two objectives: to improve UHF transmission and reception and to "ascertain the extent to which UHF transmission and reception can be improved."<sup>97</sup> Neither of these purposes was realistic. The Commission could not attain the former objective by the mere stating of it; the FCC had no funds or facilities with which to conduct such a program itself, and four years of experience with the Sixth Report had made it painfully clear that such a program would not be undertaken by the industry in the absence of a strong economic incentive. The latter objective was unnecessary — technical facts about UHF were already well known.<sup>98</sup> The Commission felt it knew enough about UHF in 1952 to make UHF a vital part of its national allocation plan. It knew no less in 1956, and four years of experience had, in fact, shown that UHF stations could render satisfactory service.<sup>99</sup> Considering the Commission's expertise it is hard to reconcile the expression of a preference for an all-UHF system with an indefinite postponement of any definite plan for installation of such a system; it must have been clear that the longer the Commission delayed in effectuating a complete changeover to UHF the more difficult and expensive this solution would become. In effect the Second Report of-

<sup>96</sup> *Id.*, para. 24.

<sup>97</sup> Second Report, para. 19.

<sup>98</sup> See ENGINEERING ASPECTS OF TELEVISION ALLOCATIONS — REPORT OF THE TELEVISION ALLOCATIONS STUDY ORGANIZATION TO THE FEDERAL COMMUNICATIONS COMMISSION 726 (1959) (Comments of the Committee for Competitive Television) [full report hereinafter cited as TASO REPORT].

The Television Allocations Study Organization (TASO) was formed at the instance of the Commission, apparently to solve the technical problems outlined in the Second Report. TASO REPORT 41. Its members were five industry groups only two of which, the Committee for Competitive Television (a group of UHF broadcasters) and the Joint Committee on Educational Television, had any real interest in the development and growth of UHF telecasting. The other member groups are the Electronic Industries Association, representing the TV set manufacturers, the Association of Maximum Service Telecasters (AMST), comprising mostly VHF stations operating at maximum authorized power, and the National Association of Broadcasters (NAB), the national trade association of broadcasters generally. See *ibid.* The objectives of TASO were to develop technical information "concerning present and potential UHF and VHF television service"; its functions were to be limited to "technical study, fact finding and investigation and interpretation of technical data." No recommendations as to how to solve the allocation problem were to be made. *Id.* at 43. It has been alleged that this formulation of objectives was originally prepared by the NAB, then known as the NARTB (National Ass'n of Radio and Television Broadcasters), and the AMST. BOWLES REPORT 231 n.29. The Commission took no action either through TASO or otherwise to stimulate the research and development contemplated in the Second Report. The FCC later told Congress that research and development could not have been undertaken by TASO because of antitrust considerations. Doerfer Statement, p. 30. It does not appear why these reasons should not have been known at the time the Second Report was written.

<sup>99</sup> See TASO REPORT 26.

ferred nothing more than the limited remedy of selective deintermixture, and the Report's promise of a truly effective solution to the critical channel allocation problem was only an illusion.

### C. The Third Policy: VHF Squeeze-Ins and All-VHF

Discouraged by the failure of its selective deintermixture policy and dismayed by the continued economic sickness of UHF, the Commission, in April 1959, sought to ameliorate the shortage of channel space by increased use of VHF. Concluding that a fifty-channel VHF system would be the best solution to the allocation problem, it undertook a joint study with the Defense Department and other executive departments to see whether the requisite additional VHF spectrum space could be diverted from other uses.<sup>100</sup> At the same time, the Commission proposed the addition of VHF drop-ins at less than minimum spacing requirements (sometimes called squeeze-ins) as a new "interim policy,"<sup>101</sup> and a new rule-making proceeding was begun in order to give this proposal formal consideration.<sup>102</sup> In 1961, it became clear that national defense requirements would prevent additional VHF channels from becoming available for television.<sup>103</sup> The FCC announced in August 1961, that VHF squeeze-ins were justifiable "only where there is the most pressing urgency for the addition of a third service in major markets," noting only ten markets in which it was prepared to consider that remedy.<sup>104</sup>

Meanwhile the UHF situation continued to deteriorate. Of the UHF stations that went on the air between 1952 and January 1960, 55.2 per cent were no longer in operation at the end of that period; the comparable figure for VHF stations was a mere 2.3 per cent.<sup>105</sup> The number of UHF stations on the air fell from a high of 127 in 1954 to 91 in June 1961.<sup>106</sup> Whereas the VHF assignments had been taken up in virtually all markets then capable of supporting television service, the bulk of the UHF assignments remained unused.<sup>107</sup>

<sup>100</sup> Doerfer Statement, pp. 16-24, 39-40.

<sup>101</sup> *Id.*, p. 41.

<sup>102</sup> Notice of Proposed Rule Making, Docket No. 13340, 25 Fed. Reg. 286 (1960). ABC strongly supported the squeeze-in plan, which would have provided a third VHF channel in those of the top 100 markets which had fewer than three. This would have given ABC enough clearance in the major markets to become a very strong third network. See American Broadcasting Co., Comments in Support of Proposed Rule Making, Docket No. 13340, Sept. 30, 1960, pp. 6-9, 13-17.

<sup>103</sup> 26 FCC ANN. REP. 144 (1959-60); Interim Policy on VHF TV Channel Assignments, 21 RADIO REG. 1695 (FCC Aug. 3, 1961).

<sup>104</sup> *Id.* at 1696, 1697.

<sup>105</sup> *Hearings on Television Allocations Before the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess., pt. 8, 4641 (1960).

<sup>106</sup> BOWLES REPORT 16, 50; Letter From FCC Chairman Newton N. Minow to the *Harvard Law Review*, Feb. 1, 1962.

<sup>107</sup> See FCC, Expanded Use of UHF 1712; Ford, *Widen Television's Horizons*, TV Guide, Feb. 24, 1962, pp. A-3, A-4. National and regional advertisers still show a preference for VHF stations. Marietta Broadcasting, Inc.—Initial Decision of Hearing Examiner, 22 RADIO REG. 477, 493-507 (FCC Oct. 16, 1961). A recent study by the Economics Division of the FCC's Broadcast Bureau shows that from 1957 to 1960 the UHF stations' average share of the total broadcast revenues in intermixed markets was disproportionately small and became progressively smaller each year. *Id.* at 487-88.

## II. THE FCC'S CURRENT PROPOSALS

It was in this setting that on August 3, 1961, the Commission initiated a rule-making proceeding to consider proposals for revitalizing UHF.<sup>108</sup> The Commission declared its goal to be a "system of competitive nationwide and local television services reaching all parts of the country with the largest possible number of program choices and competing outlets of local expression."<sup>109</sup> In order to accomplish this goal, the Commission continued, more television stations are needed, and the only place for them is in the UHF band. Hence, the proposals are designed "to encourage and facilitate fuller utilization of the UHF channels."<sup>110</sup> Two basic premises underlie the proposals: that more stations would bring about improved television service, and that UHF transmission is of high enough technical quality to warrant its full development.

### A. The Premises

1. *More Stations Needed.*—The television industry as it exists today is oligopolistic.<sup>111</sup> The spectrum space available for television broadcasting is limited, and is even further constricted in practice by economic considerations dictated, in part, by the existing scheme of government regulation. This oligopolistic situation is most easily observable in the fact that there are but three national networks, each with tremendous economic power and control over programming. In sharp contrast to the present pattern, the ideal structure has been expressed by the FCC as "more effective competition among a greater number of stations and among the networks," which will materialize when "the number of stations [in each market] can be determined solely by what the traffic will bear" and without artificial restraint.<sup>112</sup>

Several arguments have been advanced in support of such a competitive system. One stresses the importance of having an abundance of local television stations in order to advance community objectives, such as dissemination of news, discussion of civic affairs, exhibition of local talent, and stimulation of regional business through advertising.<sup>113</sup> A more basic factor favoring competition in television is the public policy,

<sup>108</sup> FCC, Expanded Use of UHF.

<sup>109</sup> *Id.* at 1711.

<sup>110</sup> *Id.* at 1712.

<sup>111</sup> See Jaffe, *The Role of Government*, address delivered at Northwestern University School of Law TV Conference, Chicago, Aug. 3, 1961, reprinted in FREEDOM AND RESPONSIBILITY IN BROADCASTING 35, 38 (Coons ed. 1961) [hereinafter cited as *Jaffe Address*].

<sup>112</sup> Albany-Schenectady-Troy Deintermixture Case, 15 RADIO REG. 1501, 1511 (FCC 1957). See PLOTKIN REPORT 7, 8.

<sup>113</sup> STAFF OF SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., 2D SESS., THE PROBLEM OF TELEVISION SERVICE FOR SMALLER COMMUNITIES 5, 6, 9 (Comm. Print 1958) [hereinafter cited as *SMALLER COMMUNITIES*]. The present system allows for at least one local outlet in a market which can support television and where a community antenna system is not widely used. *Id.* at 6, 7, 25. It is not at all apparent why the Commission feels that we need "the largest possible number of . . . competing outlets of local expression." FCC, Expanded Use of UHF 1711. (Emphasis added.)

embodied in the antitrust laws, which looks with disfavor upon excessive concentration of economic power in any industry.<sup>114</sup> One of the reasons for which competition is generally thought to be preferable to monopoly is that it results in the production of superior products. This concept may be applied to television programming in two ways. First, political democracy functions best when information and ideas reach the public from many different sources.<sup>115</sup> To be sure, there are numerous sources of thought and opinion outside the television industry tending to balance concentration within it, but television is so unique and popular a medium as to make a contrariety of voices on it alone a worthy desideratum. Second, it is contended that competition in television will bring better programming. This is, perhaps, speculative. Professor Jaffe has suggested that the profits of monopoly can be used to present "expensive, high-level programs" which "it might not be possible to finance . . . under a system of perfect competition."<sup>116</sup> According to this view monopoly might, with adequate public regulation, produce the best programs. The present state of television programming, however, together with the statutory and constitutional limitations on FCC regulation of program content, do not inspire such confidence. In any event the system is unlikely to become so competitive that extraordinary programs will not continue to attract mass audiences, and not continue to attract necessary financing. Further, there is at least the possibility that a more competitive system will provide more program choice if not necessarily better programs.<sup>117</sup> Currently, the advertiser, interested in attracting the lion's share of the total television audience, caters to the program tastes of the largest possible audience;<sup>118</sup> he does not aim at smaller potential audiences even though minorities of diverse interests might often themselves form substantial markets. Should the number of stations, and perhaps networks, increase, any given program would generally be less capable than at present of capturing the mass audience. The effect need not be solely a fractionalization of the present market; rather the total market should expand if diverse types of programming result. At some point, therefore, it should become more profitable for some stations and networks, and their advertisers, to appeal to one of the substantial minority-interest audiences.<sup>119</sup> It is uncertain what the optimum number of stations and networks is for purposes of program

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<sup>114</sup> See, e.g., Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 550, 553-54, 570 (1957).

<sup>115</sup> See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (dictum); Comment, 66 YALE L.J. 365, 368 (1957).

<sup>116</sup> *Jaffe Address* 39. The networks do have very great profits. Their earnings from TV rose from \$9,900,000 in 1952 to \$95,200,000 in 1960. N.Y. Times, Jan. 24, 1962, p. 1, col. 5 (city ed.).

<sup>117</sup> See Celler, *supra* note 114, at 553; FCC, Expanded Use of UHF 1711. *But see* Gould, *How Many Rivals?*, N.Y. Times, March 11, 1962, §2, p. 23, col. 1 (city ed.), expressing uncertainty as to whether more competition will in fact bring greater variety. At the least, there would be room for additional networks to develop. PLOTKIN REPORT 7, 8. On the importance of networks and network competition, see BOWLES REPORT 93-107.

<sup>118</sup> SIEPMANN, RADIO TELEVISION AND SOCIETY 55 (1950).

<sup>119</sup> Theory suggested tentatively by Prof. Louis Jaffe in the Administrative Law Seminar at the Harvard Law School, 1961.

diversity. But surely that number has not been reached, and given the nation's general policy against monopoly and the stereotyped mediocrity characteristic of the present system's programs, an attempt to make it feasible for more stations to go on the air appears worth the effort.

Any policy which would increase the number of stations by expanding the use of the UHF band would, in addition, aid educational television. Of the 268 channels reserved for educational use as of February 1961, 178 were UHF. Only a small percentage of these UHF assignments have been used and most of those channels on the air have emphasized in-school programming because of the lack of UHF receivers in homes.<sup>120</sup> Thus a program which would result in widespread distribution of all-channel receivers would make it practicable for many educational television stations to go into operation on presently available channel reservations.<sup>121</sup>

2. *Technical Adequacy of UHF.* — Performance has demonstrated that UHF can provide both satisfactory reception and coverage. Successful UHF operations have proved that UHF picture quality can equal that of VHF.<sup>122</sup> It is true that UHF produces spots of low signal strength ("holes") even within areas of strong reception, but that effect can probably be overcome by careful placing of the roof antenna.<sup>123</sup> And UHF reception is in one respect superior to that of VHF in that it is substantially free from various types of interference to which VHF is subject.<sup>124</sup>

Although existing UHF stations generally provide less coverage than VHF stations, the existence and extent of a coverage differential under optimum conditions is a controversial technical issue. The Television Allocations Study Organization (TASO) reported that the critical distance from the transmitter at which service begins to deteriorate rapidly is substantially greater for VHF than for UHF.<sup>125</sup> But Commissioner Lee, skeptical of TASO's critical-distance approach, produced a study indicating that UHF coverage was far greater than TASO's estimate.<sup>126</sup> He pointed out that TASO's figures were based on transmission power and tower height averages for the stations surveyed, and because of UHF's less favorable economic position, UHF transmission plants were not capable of realizing their full coverage potentials.<sup>127</sup> Even by TASO's figures, the twenty-seven lowest-frequency UHF channels have a coverage of more than 5,000 square miles and the high-frequency channels a coverage of almost 3,000 square miles. This area seems substan-

<sup>120</sup> Comments of the Joint Council on Educational Broadcasting, In the Matter of Making VHF Television Channels Available for Non-Commercial Educational Use at New York, N.Y., and Los Angeles, California, FCC Docket No. 14006, June 1, 1961, pp. 8-12.

<sup>121</sup> See Statement of Commissioner Robert E. Lee to the Senate Committee on Interstate and Foreign Commerce, submitted July 8, 1959, revised Jan. 19, 1960, p. 22 [hereinafter cited as Lee Statement], reprinted in *Hearings on Television Allocations Before the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess., pt. 8 at 4665 (1960); 1956 REPORT 5.

<sup>122</sup> See TASO REPORT 26.

<sup>123</sup> See *Id.* at 17.

<sup>124</sup> *Id.* at 17, 20-21.

<sup>125</sup> *Id.* at 14-16.

<sup>126</sup> Lee Statement, pp. 7-9, App. I, Figs. A & B.

<sup>127</sup> *Id.*, pp. 6-8.

tial when it is considered that Los Angeles, the country's largest city in area, covers only 454.9 square miles.<sup>128</sup> In addition, recent reports indicate that UHF coverage can be significantly extended by additional technological improvements in UHF receivers,<sup>129</sup> and the signal can be projected to significant pockets of population outside the area of coverage by boosters or translators.<sup>130</sup> In general, five, ten, or even fifteen miles less coverage in fringe areas — where population is sparse — is unlikely to be economically significant to advertisers on UHF stations. UHF coverage is inferior to that of VHF over rough terrain,<sup>131</sup> but the differential may be of less importance than some contend.<sup>132</sup> The Commission is now conducting a study in New York City, using UHF receivers with the most recent improvements, to see whether UHF can satisfactorily cover a large metropolitan area with its tall buildings.<sup>133</sup> Early fears that UHF service was so poor as to make preferable a national VHF service offering much less choice are not justified by the technical evidence. And UHF shows promise of improvement once the incentive for more rapid technological development is supplied.

### B. The Program

Abandoning the attitude that the station allocation problem could be solved by any one simple device, the FCC's August statement<sup>134</sup> showed a predisposition to approach the problem on a number of levels; indeed, the most pronounced characteristic of the program was its variegation. The statement began with a call for an expanded program of deintermixture designed to increase the number of all-UHF communities. The Commission noted that it was simultaneously initiating rule-making proceedings looking toward the deintermixture of eight areas, four of which were areas in which deintermixture previously had been rejected.<sup>135</sup> The statement stressed the importance of legislation requested from Congress which would give the FCC authority to prescribe standards for television receivers shipped in interstate commerce. The Commission suggested an eventual thoroughgoing reallocation of channels which would make dense population areas all-UHF and allow an expanded all-VHF service in areas with rough terrain or sparse population,

<sup>128</sup> TASO REPORT 727 (Comments of the Committee for Competitive Television); WORLD ALMANAC 595 (1962).

<sup>129</sup> TASO REPORT 16; Lee Statement, p. 7, App. III.

<sup>130</sup> A translator receives and amplifies the signals of a television station and retransmits them over a different channel. 47 C.F.R. § 4.701(a) (Supp. 1961).

<sup>131</sup> See TASO REPORT 15.

<sup>132</sup> See Lee Statement, pp. 7-9, App. I, Figs. B & C. Three UHF stations in Scranton and Wilkes Barre, Pa., have provided "practically complete coverage" and good technical performance in an area with very rugged terrain. Broadcasting, March 19, 1962, pp. 70-77.

<sup>133</sup> 26 FCC ANN. REP. 134 (1959-60).

<sup>134</sup> FCC, Expanded Use of UHF.

<sup>135</sup> The areas proposed for deintermixture were Madison, Wis., Rockford, Ill., Hartford, Conn., Erie, Pa., Binghamton, N.Y., Champaign-Urbana-Danville-Springfield-Decatur, Ill., Columbia, S.C., and Montgomery, Ala. *Id.* at 1714. See note 157 *infra* for the FCC's current position.

after the legislation, if enacted, had effectuated widespread distribution of all-channel receivers. The Commission proposed also to allow VHF station owners to operate a UHF station in the same city, possibly without separate programming; a pool of UHF channels, equal to the total number of all VHF channels and unused UHF educational channels assigned to an area would be reserved for a period of three years after the enactment of the requested legislation. Any VHF licensee or applicant for an educational channel could apply for any channel in the local pool; any other applicant could apply for one of the earmarked channels if he could indicate a channel acceptable for substitution in the pool. Additional reservations for educational use would be made if current studies of future requirements prove such reservations warranted. The Commission proposed, further, to eliminate the table of UHF assignments, in part to mitigate the restrictive effect of the proposed pool. Anyone might apply for the lowest locally available UHF channel; any channel which met spacing requirements and was not in the local pool would be considered available. But to avoid excessive concentration of the more desirable lower-frequency UHF channels in the larger communities the statement suggested possible safeguards such as a requirement that an applicant in a given area select a channel from a group of channels designated by the Commission for that area. Comparative hearings for locally available UHF channels would be eliminated as far as possible; instead assignments would be granted in order of application to any qualified applicant. The Commission proposed that certain technical requirements applicable to UHF be relaxed in order to make the construction and operation of UHF stations less expensive. Finally, the Commission would encourage the use of UHF translators to bring service to any areas remaining without any service at all ("white areas").

### C. Evaluation

1. *More Selective Deintermixture.*—The Commission stated that deintermixture should proceed in markets where only one VHF station is in competition with one or more UHF stations, where the public has "considerable numbers" of UHF receivers, and where there is freedom from outside VHF signals. These criteria may be somewhat more liberal than those of the Second Report. The requirement that there be "considerable numbers" of receivers in the area capable of receiving UHF is perhaps less strict than the former "reasonably high proportion" requirement.<sup>136</sup> The statement says nothing about terrain, whereas under the Second Report the terrain had to be "reasonably favorable" for UHF broadcasting;<sup>137</sup> it is unlikely, however, that terrain will be entirely disregarded. Finally, nothing is said about the creation of white areas in connection with selective deintermixture. The Commission's comment that it was relying on UHF translators to supplement service from originating UHF stations may indicate that fear of creating small white

<sup>136</sup> See Second Report, para. 31.

<sup>137</sup> *Ibid.*

areas will no longer operate to block deintermixture.<sup>138</sup> It seems doubtful, however, that the Commission has the power to take away all service from even a small group of people.<sup>139</sup> The Commission's first allocation priority—to provide at least one service to all parts of the United States—may well have a statutory basis.<sup>140</sup> The District of Columbia Circuit, reversing an FCC decision to allow a transmitter to be moved closer to a more densely populated area, thought that “deprivation of service to any group was undesirable and to be justified only by offsetting factors.”<sup>141</sup> It is possible that a selective deintermixture policy, in the context of a broad plan to stimulate the growth of UHF television, would be such an “offsetting factor.” In any event, since it is important to maintain service to the rural audience, the Commission would do well to require, not merely encourage, the use of UHF translators to fill in any white areas which would otherwise be created by deintermixture. Since in most instances such white areas would be neither very large nor very numerous, such a requirement would be economically feasible.

Significantly, the stated goal of selective deintermixture is no longer “to improve the opportunities for effective competition among a greater number of stations,”<sup>142</sup> but rather to increase the number of all-UHF areas.<sup>143</sup> This means that no more all-VHF areas will be created where UHF stations are operating, for the avowed purpose of getting more stations on the air quickly.<sup>144</sup> The fact that deintermixture rule-making proceedings were instituted for markets where deintermixture was rejected before may mean that the criteria are indeed new; on the other hand it may mean only that the present FCC majority thinks those cases incorrect under the old criteria. What can be said with assurance is that at least the Commission's attitude, if not its set of standards, is more liberal.

Selective deintermixture is not without shortcomings which should be noted. First, there are not enough markets suitable for such deintermixture—even under a more liberal approach—for the program to have any appreciable effect on the UHF problem for the nation as a whole.<sup>145</sup> Second, the Commission has failed to relate its long-range goal of total

<sup>138</sup> This view is supported by the fact that Commissioner Cross' dissent, 21 RADIO REG. at 1720, from the initiation of the eight new deintermixture rule-makings is based on opposition to the creation of white areas which deintermixture of these eight markets would entail.

<sup>139</sup> See *Television Corp. of Mich. v. FCC*, 294 F.2d 730 (D.C. Cir. 1961).

<sup>140</sup> See *ibid.* One of the purposes of the Communications Act is to make radio service “available so far as possible, to all the people of the United States.” Communications Act of 1934 § 1, 48 Stat. 1064, 47 U.S.C. § 151 (1958).

<sup>141</sup> *Television Corp. of Mich. v. FCC*, 294 F.2d 730, 732 (D.C. Cir. 1961) explaining *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956). In the *Television Corp. of Michigan* case, giving 100,000 people a third service was held insufficient justification for creating a white area of 900 people.

<sup>142</sup> Second Report, para. 31.

<sup>143</sup> FCC, Expanded Use of UHF 1714.

<sup>144</sup> As was done in Albany-Schenectady-Troy Channel Assignments, 15 RADIO REG. 1514a (FCC 1957).

<sup>145</sup> See conclusions reached in a study by Professor Steiner, of the University of Wisconsin, summarized in *Broadcasting*, Feb. 26, 1962, p. 109, pointing out that over 80% of the markets are all-VHF already and that “this is true in one- and two-station areas where the need for more service and more competition is most urgent.”

deintermixture to its immediate program of selective deintermixture; cities surrounded by sparsely populated countryside should be made all-VHF under the former, yet they may be suitable for all-UHF under the latter. Although this may create no serious harm, it is disturbing to find that the Commission has continued its practice of failing to think through possibly inconsistent implications of its different policies.

Third, selective deintermixture might take a long time to effectuate. VHF licensees to be switched to UHF would have the right to an adjudicatory hearing under sections 303(f) and 316 of the Communications Act,<sup>146</sup> in which the Commission would have the burden of proof. On what issues must such a hearing be accorded? This question was raised in *Marietta Broadcasting, Inc.*<sup>147</sup> In all cases prior to *Marietta* in which the Commission had decided in a rule-making proceeding to deintermix, the issue which it framed for the adjudicatory proceeding was the same one which had been decided in the rule-making proceeding: "whether the public interest, convenience and necessity would be promoted by the proposed modification . . .,"<sup>148</sup> or in essence whether or not to deintermix. Because of the breadth of the question and the requisite formalities of adjudication, such hearings in the past have not been notable for their brevity. For example, with respect to *Evansville* the rule-making proceeding was concluded in 1957. But the hearing before an FCC examiner lasted four years in itself<sup>149</sup> and the Commission's decision on the examiner's report has not yet been made. In *Marietta*, the FCC tried a different approach in order to prevent prolonged delay in effectuating the deintermixture decided on in its rule-making proceeding. Over the licensee's opposition, it refused to grant a hearing on the ultimate merits of the deintermixture. Instead, it limited the hearing to the issue of whether the station's present license should be modified to require operation on the UHF channel, and announced that any subsequent license would specify operation on the UHF channel, regardless of the outcome of the adjudicatory proceeding.<sup>150</sup> It is not clear that the Commission's interpretation of the statute will be sustained by the courts. The stations have the strong argument that section 303(f), unlike section 316, is not explicitly limited to the license term, and therefore means that a change in frequency cannot be made at any time without either

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<sup>146</sup> § 303(f) provides "that changes in the frequencies . . . of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with." 48 Stat. 1082 (1934), 47 U.S.C. § 303(f) (1958). § 316 provides that no order modifying a license shall become final until the licensee has had a reasonable opportunity "to show cause by public hearing" why the order should not issue. 66 Stat. 718 (1952), 47 U.S.C. § 316 (1958).

<sup>147</sup> *Marietta Broadcasting, Inc.*, 21 RADIO REG. 787 (FCC July 11, 1961) (declining 4-3, to vacate the order or change the issue specified for hearing in *Marietta Broadcasting, Inc.*, 21 RADIO REG. 460 (FCC 1961)).

<sup>148</sup> See, e.g., *Evansville Deintermixture Case*, 15 RADIO REG. 1573, 1586h (FCC 1957).

<sup>149</sup> From 1957 to 1961. See *Marietta Broadcasting, Inc.*—Initial Decision of Hearing Examiner, 22 RADIO REG. 477 (FCC Oct. 16, 1961).

<sup>150</sup> A license term can last no longer than three years. Communications Act of 1934, § 307(d), 66 Stat. 714 (1952), 47 U.S.C. § 307(d) (1958).

the consent of the station or a hearing. The Commission's answer in *Marietta* was that section 303(f) must be construed in conjunction with section 309(h)<sup>151</sup> which provides that "the station license shall not vest in the licensee . . . any right in the use of the frequencies designated in the license beyond the term thereof." It maintained that its power to deintermix by rule-making means that no adjudicatory hearing is necessary before changing a frequency from VHF to UHF on renewal of a license. But all cases in which this rule-making power has been upheld by the courts involved an FCC order that an adjudicatory hearing determine whether the change in frequency should be made.<sup>152</sup> Weight must be given to the Commission's contention that the adjudicatory hearing on the merits has proved so productive of delay that it intolerably hampers the effectuation of the Commission's policy. Nevertheless, selective deintermixture proceeds one market at a time primarily on the basis of considerations pertaining to the local situation, and has an adjudicatory flavor which the courts may be ill-disposed to ignore once a subsequent hearing on the same issue is denied. Possibly one of the relevant decisional factors will be whether the economic and technical evidence presented in deintermixture cases requires development through oral testimony and cross-examination in order fully to bring out the facts or whether the written submissions of the rule-making proceedings are sufficient. Should *Marietta* not stand — and the vote in the Commission itself was 4-3 — then the delays in effecting selective deintermixtures may continue to be enormous. Because of its limited applicability, selective deintermixture seems far from being a national solution to the problem of station scarcity, and in view of the delay which it involves and its possible conflict with a future nationwide deintermixture, it may not be worth the trouble to proceed with it at all.

2. *All-Channel Receiver Legislation.* — The proposed legislation to require, or to authorize the FCC to require, that all television sets shipped in interstate commerce be capable of receiving UHF, would, by the time existing all-VHF sets became obsolete, eliminate UHF's biggest competitive handicap: the lack of access to a sizeable audience. Even before the end of the obsolescence period the existence of such a statute should create optimism about UHF's future, and concomitantly, increased activity in UHF broadcasting. Since the Commission is not committing itself either to an all-UHF system or to total deintermixture — programs which would in themselves be sufficient to effect appropriate distribution of UHF receivers<sup>153</sup> — this legislation is essential to the success of the Commission's new program. Such a law would result in an increase of about twenty-five dollars in the cost of television receivers,<sup>154</sup>

<sup>151</sup> Communications Act of 1934, § 309(h), 74 Stat. 891 (1960), 47 U.S.C. § 309(h) (Supp. II, 1961).

<sup>152</sup> See *WIRL Television Corp. v. United States*, 253 F.2d 863, 866 (D.C. Cir. 1958), *judgment vacated on other grounds*, 358 U.S. 51 (1958); *Owensboro on the Air, Inc. v. United States*, 262 F.2d 702 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959).

<sup>153</sup> See p. 1591 *supra*.

<sup>154</sup> Gould, *Room For More TV*, N.Y. Times, Jan. 28, 1962, § 2, p. 15, col. 1 (city ed.), apparently attributing this figure to Minow. Commissioner Ford has

but it should mean more choice of service eventually for every part of the country. Moreover, if the legislation is not forthcoming and if the Commission does not proceed with total deintermixture, many communities, in order to obtain choice of service, will be forced to turn to a community antenna system (CATV). This would cost the viewer much more and would not provide programs concerning the affairs and interests of his local area;<sup>155</sup> it seems probable that expansion of CATV would make establishment of local stations even more difficult and in some cases impossible. Since the all-channel bill seems a less disruptive and expensive solution than total deintermixture and more acceptable politically than either selective or total deintermixture,<sup>156</sup> it should perhaps be tried first. Similar legislation has been urged repeatedly since 1954 without results. Now, however, there seems to be general agreement that something must be done to utilize UHF more fully, and, since the strong VHF interests prefer an all-channel bill over deintermixture, the bill has a strong chance of passing.<sup>157</sup> The all-channel bill does not seem to raise serious constitutional problems: congressional power to regulate interstate commerce extends to the prohibition of the interstate shipment of goods which are in themselves harmless, and substantive due process seems satisfied by the regulation's rational basis in the national policy to promote full use of the television broadcast spectrum.<sup>158</sup>

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indicated that the extra cost might be \$15 to \$25. Ford, *Widen Television's Horizons!*, TV Guide, Feb. 24, 1962, pp. A-3, A-5. The Electronic Industries Association has put the figure at \$30. See Broadcasting, Feb. 26, 1962, p. 101.

<sup>155</sup> Such a system consists of a receiving antenna at a high point which picks up TV signals from distant cities, amplifies them and carries them by wire, cable or microwave relay to a central point in the community to be served, from which they are sent to subscribers' homes by means of cables attached to power or telephone poles. As of 1958, subscribers usually had to pay \$100 to \$175 to have their sets wired into the system and \$2.75 to \$10 per month thereafter in service charges. SMALLER COMMUNITIES 6, 7. Some systems have done so well that they have been able either to eliminate the installation fee or to reduce it to a nominal amount (such as \$10), but even so the cost to the viewer over the lifetime of his TV set is much greater than the price differential between VHF-only and all-channel receivers. Moreover, CATV may force existing local stations off the air or force assigned but as yet unused local channels to lie fallow because of the competition they would face from CATV if they were used. This would hurt the less wealthy viewers, for whom CATV might be too expensive. Except for some minor technical aspects, the FCC has not chosen to regulate CATV. *Id.* at 24-26, 34, 40-41. See 47 C.F.R. §§ 15.161-15.166 (1958 and Supp. 1961).

<sup>156</sup> See Broadcasting, Feb. 26, 1962, pp. 100-101; Broadcasting, March 5, 1962, p. 74.

<sup>157</sup> For past suggestions for such legislation, see PLOTKIN REPORT 12; Second Report 1580; Doerfer Statement, p. 38. In response to strong congressional opposition to selective deintermixture (see Broadcasting, March 12, 1962, pp. 42, 44), the FCC has agreed to an indefinite moratorium on deintermixture of Madison, Wis., Champaign-Urbana, Ill., Montgomery, Ala., Columbia, S.C., Hartford, Conn., Binghamton, N.Y., Erie, Pa., and Rockford, Ill., if the all-channel bill is passed. Broadcasting, March 19, 1962, p. 9. This concession has eliminated most of the significant opposition to the bill in Congress. See Broadcasting, March 26, 1962, pp. 52, 54. As this Note went to press, the bill had been passed by the House and sent to the Senate. N.Y. Times, May 3, 1962, p. 55M, col. 1 (city ed.). The moratorium would not, however, halt pending deintermixture proceedings concerning Springfield, Ill., Evansville, Ind., Peoria, Ill., and Bakersfield, Cal. Broadcasting, March 19, 1962, p. 9.

<sup>158</sup> Cf. *Carolene Prods. Co. v. United States*, 323 U.S. 18 (1944).

Whether ensuring that all sets will be able to receive UHF would be enough to make UHF stations competitive in intermixed markets is a difficult question. The UHF stations would still have to overcome higher transmitter operating costs<sup>159</sup> and advertisers' preference for VHF which may continue in those areas in which area-coverage differentials remain. Whether the cost disadvantage can be overcome would depend largely upon the relative importance of transmitter operating costs in the total cost of station operation; whether coverage will prove to be a problem when UHF receivers are widely distributed and the quality of reception is improved is uncertain. Therefore, if the all-channel legislation is enacted, it would seem advisable, in view of the large cost of converting stations from VHF to UHF,<sup>160</sup> to give UHF a trial period under intermixture, absent the receiver-incompatibility handicap, before embarking on a full-scale deintermixture program.

3. *Total Deintermixture.*— Apart from the question of cost, the FCC's long-range plan for a national television system completely deintermixed on the basis of population density and terrain is an ideal solution to the allocation problem. If the Commission were to proceed with this solution, all-channel receivers would be produced in quantity even without legislation because of the demand which would be created in the densely populated areas made all-UHF. These areas would be better served by UHF because they need and can support the larger number of stations for which the UHF band has room. On the other hand, in order to make multiple service at all economically feasible, sparsely settled areas need a signal that travels further, and complete deintermixture would seemingly free enough VHF channels from assignments to large population centers to afford the less populated areas as much multiple service as they could support. The rough terrain, which VHF signals cover more thoroughly, is generally found in these less densely settled areas. Any white areas created in the all-UHF areas could be filled in by high-channel UHF translators, the effectiveness of which has been proven<sup>161</sup> and the cost of which should be recoverable in these areas of relatively high population. Nevertheless, the costs of station conversion are so great that total deintermixture should be attempted only if the all-channel legislation, after an ample trial period, proves inadequate to solve UHF's difficulties or if no all-channel bill is enacted. On either of these contingencies the Commission should press forward with total deintermixture. Although conversion would be expensive, its cost would have to be borne only once. The VHF stations generally have sufficient economic strength to absorb it, and UHF stations in sparsely settled areas would no doubt be happy to convert to VHF despite the cost. VHF licensees have invested large sums of money

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<sup>159</sup> See TASO REPORT 28-29, 67-72.

<sup>160</sup> In Bakersfield, the hearing examiner found that conversion to UHF would cost the VHF station \$428,085 to get 1,000 kilowatts of effective radiated power and \$381,853 to get 480 kilowatts of effective radiated power. Even with used equipment and sale or salvage of some of the present equipment, the cost could not be reduced below \$300,000. Marietta Broadcasting, Inc.— Initial Decision of Hearing Examiner, 22 RADIO REG. 477, 522-23 (FCC Oct. 16, 1961).

<sup>161</sup> TASO REPORT 29.

in reliance on the Sixth Report; it might seem unfair to upset their expectations and force them to incur the substantial expense of conversion. But an answer given in another context appears apropos: broadcasters "are business people who undertake calculated business risks in making their expenditures. And while such expenditures should not be treated lightly, the fact is that the Commission has never hesitated to wipe out such investments when a change of the rules was otherwise in the public interest."<sup>162</sup> The alternative to imposing these costs on broadcasters is the further growth of CATV, which means the imposition of perpetual added costs on viewers, attrition of local service, and the artificial limitation of the number of networks. Considering the possibility that total deintermixture will bring with it substantially more program diversity, the public interest seems to warrant putting this financial burden on the industry.

There is little chance that such a thoroughgoing reallocation would be struck down as unlawful by the courts, for if the Commission has the power to establish a national allocation table,<sup>163</sup> it should also have the power to change that table when it has a rational justification for doing so. And, in contrast to selective deintermixture, total deintermixture seems clearly legislative in character, for the whole country would come under its sweep. It would be almost impossible to hold hearings for all stations required by such a plan to change frequencies, and because of its universal nature, probably no adjudicatory hearings would have to be held to implement the decision. Thus, though it would be a more radical solution than selective deintermixture, it would be easier to accomplish administratively.

4. *Elimination of the Table of UHF Channel Assignments.*—The Commission's proposal that any qualified applicant should be allowed to receive a construction permit for any locally available UHF channel has two virtues. It eliminates the expense and delay of the comparative hearing in many cases and it allows applicants to use the lower-frequency UHF channels (which are technically somewhat more desirable) without going through a rule-making proceeding to reallocate the UHF channels in the area.<sup>164</sup> The great danger of this type of station assignment is that some richer markets will garner more than their fair share of the lower UHF frequencies or, conceivably, of all the UHF frequencies, preempting nearby markets where broadcasters are a bit slower in coming forward. The Commission claims it can guard against this possibility by arranging the UHF channels in groups for certain markets and specifying the manner in which channels could be selected from these groups. But if there are only a certain number of selections from each

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<sup>162</sup> PLOTKIN REPORT II-12. Judge Friendly, while arguing that administrative agencies ought to encourage the security of transactions, nevertheless concludes that "recognition of that need ought not preclude the overruling of a policy when changed conditions or further reflection demand . . ." Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 879 (1962).

<sup>163</sup> *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954).

<sup>164</sup> FCC, Expanded Use of UHF 1717-19.

group which an applicant in an area may choose, this system is not much more flexible than a table of assignments. The only gain made is that an applicant in an area which now has no low UHF channels assigned might be assigned one without having to go through a rule-making proceeding, and this should induce more rapid construction of UHF stations. If the lower UHF channels are inequitably distributed in the current table, however, it would seem preferable to hold a general rule-making proceeding and reassign them on a national basis. On the other hand, if they are equitably distributed now, they should not be redistributed according to a criterion which has no relation to equitable distribution of channels, especially when independent and more effective steps are being taken to make UHF channels economically desirable.

5. *Operation of Two Local Stations by One Party.*— The proposal to allow VHF licensees to operate a UHF station in the same city creates even more problems. The Commission states that the operation of another station in the same city will lead to economies in the operation of the UHF station through the use of common facilities.<sup>165</sup> But these very economies may place owners of only one television station at a serious competitive disadvantage.<sup>166</sup> If UHF channels are made economically equivalent to VHF, this proposal would result in extending the power of existing VHF broadcasters rather than in achieving the Commission's stated goal of a competitive television system.<sup>167</sup> The FCC has previously said that it is necessary to limit multiple ownership of television in order "to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."<sup>168</sup> Accordingly, its rules prevent a party from owning more than one television station in the same area and more than seven television stations anywhere, of which no more than five may be VHF.<sup>169</sup> In awarding licenses for television stations in comparative hearings, one of the Commission's guiding considerations has been to provide for diversification of control of the media of mass communications.<sup>170</sup> No compelling reasons appear for departing from these policies now.

To make matters worse, the Commission is considering allowing pro-

<sup>165</sup> *Id.* at 1716.

<sup>166</sup> Compare Comment, 66 *YALE L.J.* 365, 367 (1957).

<sup>167</sup> See FCC, Expanded Use of UHF 1711, for statement of the goal.

<sup>168</sup> 18 Fed. Reg. 7796, 7797 (1953) (amendment of Rules on Multiple Ownership of Stations).

<sup>169</sup> 47 C.F.R. § 3.636(a) (1958).

<sup>170</sup> 1956 *Hearings* 979. Though seemingly departed from at times, this policy has been recently reaffirmed. See *WIBC, Inc.*, 22 RADIO REG. 425 (FCC Oct. 27, 1961), reversing *Indianapolis Broadcasting, Inc.*, 12 RADIO REG. 883 (FCC 1957); *McClatchy Broadcasting Co.*, 9 RADIO REG. 1190 (FCC 1953); *Bamberger Broadcasting Serv., Inc.*, 3 RADIO REG. 914 (FCC 1946). But see *WHDH, Inc.*, 13 RADIO REG. 507 (FCC 1957), grant voided for improper ex parte contacts with Commission members, *WHDH, Inc.*, 20 RADIO REG. 395 (FCC 1960); *Biscayne Television Corp.*, 11 RADIO REG. 1113 (FCC 1956), *rev'd sub nom.* *Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (D.C. Cir.), grant reaffirmed, 15 RADIO REG. 317 (FCC 1957) (license awarded to applicant, two of whose leading stockholders had interests in two AM stations, two FM stations and the two daily newspapers in the city of license plus newspaper and broadcasting interests elsewhere, as against three applicants with no interests in mass communications media).

gram duplication on the stations owned in common.<sup>171</sup> Such duplication might take away the main advantage of having more television stations — the availability of a greater variety of programs. In view of the deleterious effects which allowing program duplication over FM had on the development of that medium,<sup>172</sup> it is surprising that the Commission would consider repeating the experiment with UHF. It is all the more so because implementation of the other elements in the proposed program would be sufficient in itself to get more UHF stations on the air and, more importantly, to make UHF a healthy, vital stimulus to competition and new ideas in the television industry.

### III. CONCLUSION

It is disappointing that the FCC has taken so long to come up with a program offering some promise of solving the television allocation problem. It has been suggested that the defect was in the Commission's membership, and could be remedied by instituting life tenure, increasing compensation, and selecting members by the same criteria used to appoint the federal judiciary.<sup>173</sup> It has always been difficult to find outstanding men to serve as public officials, and no method of selection will ever solve this problem completely. Moreover, life tenure for the commissioners might bring with it increased rigidity. The recent appointment of a strong chairman closely tied to the White House illustrates the effectiveness of political appointment in accelerating change where old policies have failed; it also indicates that presidential support can infuse an independent agency with the political strength it needs to withstand congressional and industry pressure and to introduce controversial policy changes which might hurt those with vested interests in the status quo.

The task of developing an efficient and equitable system of television channel assignments for the United States is monumental enough to perplex the best of commissions, and it would be presumptuous to suggest with the benefit of hindsight that there might have been an easy and sure way to accomplish it. Yet this brief history does reveal a rather disturbing pattern. In the Sixth Report, the Commission manifested awareness of the competitive problems that UHF would face, but stated that these "immediate considerations" should not be allowed to interfere with the long-range goal of a competitive 82-channel VHF-UHF system.<sup>174</sup> UHF's competitive problems could have been largely avoided at the outset by the assignment of UHF and VHF exclusively in separate areas. But rather than doing this, a course of action not popular with the pre-freeze VHF stations, the Commission adopted intermixture, trusting to fate that UHF's competitive handicap might somehow be overcome.

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<sup>171</sup> FCC, *Expanded Use of UHF* 1716.

<sup>172</sup> SIEPMANN, *RADIO TELEVISION AND SOCIETY* 57-58 (1950).

<sup>173</sup> AD HOC ADVISORY COMM. ON ALLOCATIONS TO THE SENATE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., 2D SESS., *ALLOCATION OF TV CHANNELS* 13-14 (Comm. Print 1958); see EMERY, *BROADCASTING AND GOVERNMENT* 292-94 (1961).

<sup>174</sup> Sixth Report, para. 200.

In the Second Report on Deintermixture, the Commission recognized that only in the spacious UHF band would there be room for all the multiple service that the American people wanted. It therefore set up a long-range goal of an all-UHF system, but rather than put such a controversial system into effect, it adopted an interim policy of selective deintermixture which was so limited that it could not have been expected materially to expand the use of the UHF band. In 1959, the Commission recognized the failure of selective deintermixture and adopted a new long-range goal—a fifty-channel all-VHF system. While unrealistic even at the time,<sup>175</sup> this goal had the appeal of not provoking strong opposition from the industry or Congress. The new interim policy of VHF squeeze-ins would have removed the strongest pressures for Commission action, while making an ultimate UHF solution even harder to impose, should fifty-channel VHF prove impossible. Thus, the Commission has repeatedly shown itself to be aware of the nature of the problem. However, it has responded with relatively noncontroversial “interim policies” designed to placate those having the most pressing immediate concerns, and with meritorious long-range goals which it did little or nothing to effectuate. The television allocations experience teaches that if a satisfactory solution of an administrative problem will inevitably arouse strong and influential opposition, nothing is gained by deferring a final decision to the indefinite future. The Commission’s present proposals are a major advance over their predecessors, for they contemplate effective action, not only consistent with, but conducive to, the goal of a competitive television system.

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## THE CASTRO GOVERNMENT IN AMERICAN COURTS: SOVEREIGN IMMUNITY AND THE ACT OF STATE DOCTRINE

The broad property reforms undertaken in Cuba by the Castro revolutionary government, largely at the expense of United States nationals, have spawned in the American courts considerable litigation concerning the validity of the Cuban nationalization measures. Victims of foreign expropriations have in the past been effectively denied judicial relief by application of the principles of sovereign immunity and the act of state doctrine. But faced with the present Cuban situation, several American courts have shown a willingness to modify these rules.

### I. THE TRADITIONAL DOCTRINES

#### A. *Sovereign Immunity*

The defense of sovereign immunity prevents courts from entertaining jurisdiction over a foreign state or its property. The doctrine, applied throughout the world, is generally thought justified by the desirability of avoiding adjudication which might affront the sovereignty of a

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<sup>175</sup> Lee Statement, p. A.