

**Broadcast Reform Revisited: Reverend Everett C. Parker and the "Standing" Case (Office of Communication of the United Church of Christ v. Federal Communications Commission)**

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There have been several efforts to reform the media in the United States, but perhaps three historical instances stand out. The first came at the beginnings of broadcasting, when a coalition of educators, elements of organized labor, and non-profit, college, and religious broadcasters battled commercial broadcasters over the nature of the broadcast system. The second was the more elite endeavor of the Commission on Freedom of the Press (the so-called Hutchins Commission) to analyze and revamp the structure and role of mass media in the period following World War II. The third effort was the broadcast reform movement of the 1960s. The first two of these attempts at reform essentially failed. The early broadcast reform movement stumbled for a variety of reasons, many of which were beyond the reformers' control. But at bottom, reformers had little grasp of the political fight necessary to challenge such a powerful group as commercial broadcasters and were unable, or didn't see the need, to coordinate their activities and to generate broad-based popular support. Their essentially elitist cultural sympathies mitigated against organizing a popular base and, moreover, indirectly undermined non-profit broadcast stations as a counter model. The reformers effectively ceded entertainment to commercial broadcasters, hence when the Depression killed the budgets of noncommercial broadcasters, the stations had few popular programs from which to generate new funding schemes (Rosen, 1980; McChesney, 1993).

The Commission on Freedom of the Press, a distinguished group of intellectuals assembled at the behest of publisher Henry Luce by the famed educator Robert Maynard Hutchins in 1943, dallied with ideas of fundamentally revamping the nation's media structure. Though Luce funded the Commission with the hope it would produce a restatement of the importance of a free-press system to the United States, in fact the Commission's deliberations reflected the disquiet many felt at the time about how the concentration of newspaper ownership undermined its perceived role as objective watchdog (Blanchard, 1977). But Commission members could not successfully navigate between the choices of laissez-faire and government regulation. In the end the Commission merely advocated an ethic of professionalism and responsibility among journalists, which was taken up in many journalism schools and laid the foundation for the "social responsibility" theory of the press, but had no impact on broad questions of access and ownership (Siebert, Peterson & Schramm, 1956). The Hutchins Commission's one bold gesture was to recommend the establishment of a citizens' agency to monitor the press -- a recommendation that seemed to offer a convenient middle ground between laissez-faire and government regulation. The report was met with vigorous opposition from the press, and its recommendations went nowhere (Commission on Freedom of the Press, 1947; McIntyre, 1979, 1987; Bates, 1995). A decidedly elite grouping which met in secret, the Hutchins Commission had even less a connection to other groupings in civil society than did the early broadcast reformers, and had essentially no base of popular support.

The third historical effort at media reform, the broadcast reform movement of the 1960s, was arguably much more successful -- though market and technological developments may since have diminished the movement's importance. The broadcast reform movement was successful in opening up aspects of American broadcasting largely because it attached its reform impulse onto a broader social movement, that of Civil Rights. It had both a popular base and a skilled leadership. In many respects the broadcast reform movement of the 1960s represented a resurrection of the old 1930s broadcast reform coalition. But this time the educators, religious people, and intellectuals were part of a

broader tapestry of liberal activist groups in civil society. The dynamic center of the movement for broadcast reform was a particular element of the liberal Protestant church -- the Office of Communication of the United Church of Christ.

Like the Civil Rights movement, broadcast reform cemented in legal change the gains it made in popular agitation. Indeed, the pivotal case of the broadcast reform movement, Office of Communication of the United Church of Christ v. Federal Communications Commission (1966), became a key precedent of the emerging consumer and environmentalist movements.<sup>1</sup> This was the case that began the process of opening the regulatory and judicial processes to everyday citizens by granting legal "standing" to citizens. The expansion of standing enabled regular citizens to be heard before regulatory agencies and to bring actions in court, amplifying the amounts and types of political issues taken up in the public arena. This paper explores these themes through a history of the case, based largely on interviews with the Reverend Everett C. Parker, the director of the Office of Communication of the United Church of Christ (and in the words of former FCC Commissioner Nicholas Johnson, the "father of the broadcast reform movement") and on the extensive paper trail of the case. One set of interviews with Parker was conducted by George E. Korn in June, 1990, as part of his doctoral research in the Department of Speech Communication at Southern Illinois University. Reverend Parker provided me with copies of these taped interviews. The second set of interviews with Parker was conducted by the author in White Plains, New York in September, 1991.

## THE CONTEXT

Martin Luther King, Jr., in his occasional meetings with northern church leaders during the Montgomery bus boycott of 1956-57, complained to leaders of the Congregational Christian

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<sup>1</sup> Office of Communication's contemporaneous "sister" case was Scenic Hudson Preservation Conference v. Federal Power Commission, (1965). Both were pivotal in the expansion of standing.

Board of Home Missions of the terrible treatment blacks were receiving on southern radio and television stations. This meeting included Truman B. Douglass, Executive Vice-President of the missions, Andrew Young, already an major player in the Civil Rights movement, and the Reverend Everett C. Parker, a longtime activist in the leadership of the Congregational church. Though established by northerners, the Congregational Christian churches had a long-standing connection to the American south. Congregationalists had been prominent in the abolitionist movement. After the Civil War the Congregational American Missionary Association established several hundred schools in the South -- secondary and elementary schools, and colleges, including Tougaloo and Talladega Colleges, and Fisk University. (The Congregationalists also founded Harvard and Yale Universities.) Congregational ministers and theologians had become, by the 20th century, the major intellectual pioneers of religious modernism, which placed great emphasis upon individualism, progress, and social activism, stressing God's presence in the world over and against his transcendence. Early on the church became involved in the Civil Rights movement, and white churches in larger cities began to acquire racially mixed membership (Horton, 1962; Gunnemann, 1977; Melton, 1988-94; Reverend Everett C. Parker, interview by George A. Korn, White Plains, New York, June, 1990).

Parker, a member of the Broadcast Pioneers (having started in broadcasting as a high school student in 1931), and director of the Office of Communication of the Congregational Christian churches since that office's founding in 1954, took a fact-finding trip through the South to follow through on Martin Luther King Jr.'s complaints. Parker found that, as expected, blacks were treated badly and unfairly on southern broadcast stations -- when they were covered at all. Stations typically broadcast hard-line segregationist views, and very little attention was paid to civil rights issues, except with extreme disparagement. A high-level discussion took place among church leaders. The National Council of Churches of Christ in the USA and several denominations, including the United Methodist Church, the Presbyterian Church USA, and the United Church of Christ, sent representatives to Le Roy Collins, former governor of Florida and then president of the National Association of

Broadcasters (NAB). The church group, in Parker's recollection, "wanted to bring about change, if possible, in an orderly way and in a friendly way" (Reverend Everett C. Parker, interview by author, tape recording, White Plains, New York, September 28, 1991). Collins, a moderate Democrat and symbol of the "New South" in the 1950s, had championed strengthening the NAB Code of Practices for stations (Baughman, 1985, pp. 118-120). The church leaders suggested to Collins that the NAB send a letter to its member stations pointing out the spirit of the 1957 and 1960 Civil Rights Acts and the requirements of the 1959 Fairness Doctrine, and asking each station to pledge itself to air diverse programming, to use courtesy titles (Mr., Miss, Mrs.) for blacks, to provide blacks the opportunity to present their views on the air, particularly in cases where they felt they'd been attacked or when their views were not represented at all, and to accord blacks equal opportunity to buy air time. According to Parker, Collins thought this a splendid idea. He took the proposal to the NAB board of directors. The board voted it down quickly and unanimously.

At that point Parker and Truman Douglass made the decision to go after a broadcast station for violating its trustee obligations under the public interest provision of the Communications Act. The idea was to establish a process to challenge broadcast licensee power and build in accountability to the public. "We also determined that it was important to hit, wherever we did hit, a powerful group that would feel it because we were hitting them in their pocketbooks" (Parker, interview by Korn, June, 1990; Parker, interview by author, September 28, 1991)

Parker, who had begun to study federal administrative law, went knocking on the doors of the Washington communications bar, including former Federal Communications Commission Chairman James Lawrence Fly, asking for counsel. All refused, saying it could not be done because, among other things, no group of listeners/viewers could get standing. "They [the communications lawyers] said I couldn't do it -- the regulations wouldn't let me in and the Commission would throw me out" (cited in Lobsenz, 1969, p. 31). Fly's argument, in fact, was that this was not a matter for the courts at all. Congress set up the FCC, and if Congress was not satisfied with the enabling rules for standing then that body

should do something about it, not the courts (Parker, interview by author, September 29, 1991).

#### BRIEF EXCURSUS ON STANDING

Standing is a curious, even arcane, legal issue. Linked to the "case and controversy" provisions in Article III of the U.S. Constitution, standing determines the circumstances under which a party can bring a legal action in court, and, as applied to administrative law, the circumstances under which a party can make arguments before regulatory agencies. Particularly in administrative law, standing doctrine is traditionally enveloped within the reigning notion of how the regulatory process is supposed to work. At the center of this discussion is the notion of the "expert" agency.

By the time of the New Deal, the courts accepted that regulatory agencies would adjudicate issues and formulate policies in which private interests would be subordinated to an asserted public interest. In the courts' eyes, the impartial expertise of agency personnel put the agencies in the position of determining the public interest. The regulatory agency itself was seen as the embodiment of the public interest. This notion was consonant with the standard Whig or heroic interpretation of regulatory agencies as the victory of the people over the vested interests. If regulatory agencies represented the institutionalization of the spirit of democratic reform, they themselves were the public interest. To a large extent because of this ideology, standing before regulatory agencies was restricted to those parties with a "substantial" (read, property) interest affected by government action. In a private cause of action, a party has standing if she is advancing a personal, legally protected interest, and if the injury is peculiar, not equally shared by the other members of the community. The right to bring an action primarily to vindicate the public interest in the enforcement of public obligations is delegated to a representative public official, such as an attorney general (Tennessee Power Co. v. TVA, 1939; Jaffe, 1965). In broadcasting the only types of effects

sufficient to support standing were economic injury and electrical interference.<sup>2</sup> The interests of those without property interests, without standing, by definition were considered protected by the regulatory agency itself (FCC v. NBC, 1943; Scripps-Howard Radio, Inc. v. FCC, 1942). The oft-stated rationale for this restriction was that it preserved administrative efficiency and prevented abuse of the protest procedure (Philco Corp. v. FCC, 1958).

The courts held to an "arbitrary and capricious" standard in judicial review of regulatory decisions (Administrative Procedure Act, 1946). This standard of review refers to the kind of analysis and degree of deference applied by a court when reviewing a regulatory action. In the New Deal administrative law tradition, the arbitrary and capricious standard was fairly narrow, requiring only that agency actions have a rational basis in law. Under the so-called "minimum rationality" or "rational basis" test, formal agency policy choices would be upheld as long as they were not wholly without such a basis. And with regard to informal agency actions, as long as administrative procedures had been proper, were not irrational, and did not entail the abuse of discretion, reviewing courts would generally uphold the agency's decisions (Pacific States Box & Basket Co. v. White, 1935; Administrative Procedure Act, 1982; Garland, 1985). The standards were built on a fundamental acceptance of the agency as the arbiter of an objective, value-free technical rationality. Judicial review was simply to protect the autonomy of regulated parties by requiring that agencies act with general fidelity to congressional purpose, and in accordance with general due process (see Horwitz, 1994). This was the view held by former FCC Chairman James Lawrence Fly and the rest of the Washington communications bar. Groups like Parker's were simply not part of this picture.

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<sup>2</sup> Interestingly, both these exceptions were granted by the courts; these expansions of standing were opposed by the FCC (FCC v. Sanders Brothers Radio Station, 1940; FCC v. NBC, 1943). It is important to note that the Court claimed Sanders did not represent an expansion of the substantive law of standing. Instead the Court found justification for its novel approach in the review provision of the Communications Act of 1934, which allowed suits by parties aggrieved by agency action.

## THE MOVE AGAINST THE JACKSON STATIONS

Undaunted, Parker led the group against two television stations in Jackson, Mississippi. One station, WJTV, was operated under the corporate moniker of Capitol Broadcasting Co. and owned by the Hederman family, one of the most powerful publishing groups in the South. The other station, WLBT, was thought to be owned by the Murchison brothers of Texas, even though there were two levels of cover, first through the Lamar Life Insurance Company and then through the Lamar Life Broadcasting Corporation. In fact, the Murchisons owned 85% of Lamar undercover. Lamar Life Insurance Co. was informed in 1953 of a legal disability that prevented its ownership of the station. Lamar Life then transferred ownership of the station to five of its officers and employees, put up the money for construction (although Lamar advised the FCC that the financing would come from a bank), and received an option to take over the station for \$10,000 (a wholly inappropriate figure for one of two VHF stations in Jackson). This violated FCC rules (Lamar Life Broadcasting Co. et al, 1965, dissenting statement of Chairman E. William Henry and Commissioner Kenneth A. Cox, pp. 1165-1166). Parker and his team followed that paper trail and decided that WLBT and WJTV would be the stations on which to focus.

With \$17,000 from the Board for Homeland Ministries (and later another \$10,000 from the Committee for Racial Justice Now -- both United Church of Christ organizations), Parker approached Orrin Judd, a prominent Baptist layman and an attorney who had represented one of the parties in the legal controversies at the founding of the United Church of Christ. A respected and able member of the New York bar, Judd knew nothing of communications law, but he had worked with Parker previously, and agreed to become counsel. Between Parker's knowledge of administrative law and the Communications Act, and Judd's knowledge of lawyering, the two devised a strategy to get past the huge first hurdle of the Office of Communication's lack of standing.

If a citizen had a problem with a broadcast station, the FCC's normal procedure was to have the individual file a complaint with the Commission against the station. The citizen, because s/he had no standing, technically could not argue before the Commission. The

Commission in effect facilitated an interchange between the citizen and the station in question. The Commission would forward the complaint to the station. The station typically would reply that the citizen's allegations were untrue (or untrue now) and the whole thing would be buried in a file that might be examined at station renewal time. The Commission had never acted on a complaint from the public at license renewal time, so the complaint system was essentially a way of smothering problems via bureaucratic procedure. The operative presumption was that unless a station violated FCC rules in a repeated and egregious manner, its license would be renewed.

Parker and Judd's gambit was to devise a strategy to catch the station in a direct lie. WLBT was coming up for license renewal, and Lamar Life filed its application with the FCC on March 3, 1964. Parker and Judd had met with FCC Chairman E. William Henry to get his sense of things and to alert him as to what might be coming down the line. Henry encouraged them to file against the stations (Parker, interview by author, September 29, 1991). Instead of filing a complaint, Parker and Judd submitted a petition in the form of a "bill of particulars," in which they challenged the station's license renewal application on the basis of evidence the station had failed to serve the public interest, convenience, and necessity. Though it was a petition, the document was presented in the form one would present if one entered an application for a suit in a district court, asking the Commission to hold a hearing on the basis of evidence that the petitioners would present at that hearing. Parker maintained that federal regulatory agencies stood in the same legal position as did a federal district court. Judd, though a bit dubious, admitted his ignorance of regulatory law and deferred to Parker. In Parker's retelling, Judd said, "Everyone would like to make new law. Let's try it" (Parker, telephone interview by author, August 31, 1995). No one had ever filed a petition to deny a license without asking for the station. Asking for the station established a property right claim and hence gave one standing. But the petitioners did not want the station; they wanted the FCC to hold a hearing and find a new licensee.

Formally called a "Petition to Intervene and to Deny Application for Renewal," the document charged that WLBT had discriminated against Negroes in the presentation of

news and announcements and the selection of program material. The station had failed to serve the interests of the substantial Negro community in its viewing area (which represented approximately 45% of the total population within the station's prime service area), and had further failed to give a fair presentation of controversial issues, especially in the field of race relations. In addition, WLBT provided a disproportionate amount of commercials and entertainment, with very little attention devoted to public affairs, education, or information. Because the station's performance violated the public interest provisions of the Communications Act, the petitioners asked that they be permitted to intervene and be heard in the license renewal proceeding and that the matter be set down for an early hearing (Petition to Intervene and to Deny Application for Renewal, April 8, 1964).

Everett Parker signed the petition as director of the Office of Communication of the United Church of Christ. But the Office needed local citizens for the petition to be credible. This was a problem in Mississippi in the early 1960s. The risk of violence against persons who took on the white power structure was very real. The record of southern violence against Civil Rights workers is replete with incidents of intimidation, beatings, bombings, and murders (see Garrow, 1986). The United Church of Christ had a congregation on the nearby campus of Tougaloo College, and Parker expected the Reverend Dr. Edwin King, the (white) minister of that church (and a longtime Civil Rights activist) to be a petitioner. But at the last minute the trustees of Tougaloo got cold feet and ordered the church not to be a party. Tougaloo had already been under intense attack from white politicians for a few years because of its position as a locus of Civil Rights activity in Mississippi, and the Tougaloo trustees evidently did not see a need to raise its activist profile further. Indeed, according to Parker, the Tougaloo trustees were afraid the campus would be physically attacked and leveled. Tougaloo, called "Cancer College" by the mayor of Jackson, had been frequently attacked by public officials and the Jackson media as "teeming" with Communists (reported in Lamar Life Broadcasting Co., 1970).

Parker then went to Charles Evers, brother of slain Civil Rights activist Medgar Evers and the new NAACP executive in Jackson. Evers refused to sign the petition, but suggested

to Parker that he approach Aaron Henry, President of the Mississippi NAACP. An officer of the Mississippi Freedom Democratic Party, Aaron Henry was a principal in the momentous and contentious challenge to the Mississippi delegation's legitimacy to sit at the 1964 Democratic convention (McDowell & Loventhal, 1971). Henry consulted with the NAACP in-house attorney, who admonished Henry for his inclination to sign on. According to Parker, the NAACP lawyer took one look at the petition and said, "You're not going to sign that! In the first place it wouldn't do any good and in the second place it'd be dangerous." Parker argued with the attorney a little and Aaron Henry argued with him a little and finally the attorney said, "Aaron, you try to take these people on, you're liable to get killed. You're trying to really take on people that we can't fight." And Henry said, "Well, I'm allowed to get killed for a lot of the things I do. Give me the petition. I'll sign it" (Parker, interview by author, September 29, 1991).

Aaron Henry arranged for Parker to approach Robert L.T. Smith, perhaps the only other potential signer. Smith was an ordained Methodist minister and owner of a local grocery store. An officer of the Mississippi Freedom Democratic Party, he had earlier had the temerity to run as a black man for the House of Representatives for the Fourth Congressional District. Smith had his own brush with Jackson media and the white power structure. He had sought to buy time on the local stations during his campaign and was rebuffed. Indeed, Smith filed complaints with the FCC against WLBT because the station consistently refused to sell him air time during the Democratic primary campaign of 1962 (In re Complaint Concerning Requirements for Political Broadcasts: Station WLBT-TV, 1970). After getting little satisfaction from the FCC, Smith appealed to the Justice Department, and, after some intervention and negotiation (including a call to FCC Chairman Newton Minow from Eleanor Roosevelt protesting the station's actions) WLBT permitted Smith to record a campaign program (Ashmore, 1973, pp. 77-78). After the recording session, station manager Fred Beard walked Smith out of the station to the edge of the Pearl River (which ran in front of the WLBT property), put his arm around Smith and said, in Smith's words, that "my home and my place of business would likely be blown up and that

my body would likely be found floating in the Pearl River..." (cited in Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, Attachment F, Exhibit #3, p. 1).

Getting to Robert Smith was a bit of an ordeal, due to security precautions. Smith's house was protected by flood lights and armed guards. In Parker's recollection,

Now the way that you called Robert Smith -- he owned a grocery store, a small supermarket -- you would call the grocery store and ask to talk to him, and they would give you a telephone number, which was a public booth some place in town, and a time. You would, of course, always call from a public booth. So then you would talk to him at the public booth at the time that he specified, and he told us to come to the house, and what we should do when we came to his house that night. So at 11 o'clock at night, which was the time he told us to come, we drove the car up past his house, which was flood lighted, and the guards could see us and see what kind of car it was, that it was really Dr. Henderson's car, and then we drove down the road a ways and turned around and took the light out of the inside of the car so that when we opened the doors we wouldn't be targets, turned off our headlights, drove back, drove into the yard. As we drove into the yard, they turned off the floodlights and we jumped out of the car and rushed into the house. Then we had our meeting and he [Smith] signed the petition. We repeated the act getting out. So, you can see that it really wasn't fun and games to do this work (Parker, interview by Korn, June, 1990).

Once the petition was filed with the FCC, the Commission did not seem to know quite what to do with it, as it was the first of its kind. FCC staff treated it like a complaint, and forwarded the petition to the station (Parker, interview by author, September 29, 1991). Because the petition was filed by a lawyer, the station took it more seriously. WLBT of course denied the allegations in its Opposition to Petition to Intervene and to Deny Application for Renewal, and moreover countered that the petitioners weren't proper "parties in interest." Indeed, wrote the station, "no specific allegations of fact are made to show that petitioners are parties in interest." The United Church of Christ was effectively disparaged as being a New York organization with no local, not even Mississippi, affiliate churches -- hinting at the tried and true segregationist argument that such trouble was being brought by outside agitators (Opposition to Petition to Intervene and to Deny Application for Renewal, May 15, 1964). Yet, the station evidently took the petition seriously. Even as it portrayed petitioners' allegations as "vague and generally stated," WLBT countered with positive statements from several local leaders, including black educators and ministers, on the

broadcast coverage and general cooperation they had received from WLBT. The station's written response also attacked the petitioners' program analysis as "at variance with virtually every Commission guide, definition, program category, program time segment or other aid to the meaningful analysis of the programming of any broadcast station." Without a trace of embarrassment, the station claimed it had covered black issues and had presented controversial NBC network programs on civil rights "over the objections of many people in the area because it [the station] feels that such programs are also in the public interest." The station claimed its programming decisions had been "the result of an honest and sincere judgment of how best to serve the public interest," to which the Commission should -- and was legally obligated to give -- very great weight (Id.).

In many respects WLBT's response was well-argued. And the backup statements by local black leaders were certainly noteworthy. If one hadn't known that WLBT was a racist station, the station's brief might have been convincing. From the distance of FCC offices in Washington, WLBT could easily be seen as a perfectly acceptable station that had managed to upset some vocal, but otherwise inconsequential audience segment. In fact, however, apart from the actual programming (to be discussed below), WLBT's long-time station manager was a member of the local White Citizens' Council, and a right-wing, anti-civil rights bookstore operated on the station premises. Over the years the station broadcast thousands of promotional announcements for the bookstore without opportunity for reply. Two of the black institutions writing in support of WLBT, Jackson State College and the Alcorn Agricultural and Mechanical College, were dependent for their entire financial support on the Mississippi Legislature -- which had directed a Resolution to the FCC supporting WLBT shortly after the Office of Communication filed the original petition. Others of the black leaders whose statements appeared in the WLBT brief turned out to have very little constituent support. For example, when Percy Greene, the black publisher of the Jackson Advocate, attempted to speak at a conference with Jackson city officials in the spring of 1963, the entire black delegation walked out (Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, Attachment E, Exhibit #2).

This was essentially invisible to the FCC, though it shouldn't have been. Numerous complaints about WLBT had been lodged over the years, and the FCC even once required the station to respond to the charge that it had acted to whip up violence in the white community following the admission of James Meredith to the University of Mississippi in the fall of 1962 (reported in Lamar Life Broadcasting Co., 1970). In 1957, WLBT presented a program in which elected Mississippi officials discussed "the Little Rock crisis," and stressed the maintenance of segregation. Medgar Evers, then field secretary of the NAACP in Mississippi, requested time to present the Negro viewpoint, and was denied. Evers filed a complaint with the FCC (Lamar Life Broadcasting Co. et al., 1965, p. 1145). Earlier still, the NAACP complained to the FCC that WLBT deliberately cut off a 1955 NBC broadcast of Home, in which Thurgood Marshall, then General Counsel of NAACP, appeared. The station inserted a "Sorry, cable trouble" slide during the network broadcast (Id., p. 1144). The Jackson State Times reported in its October 17, 1955 edition that Fred Beard, the White Citizen's Council member who was station manager of WLBT from 1953 to 1965, had publicly boasted of using the cable trouble ploy to keep Thurgood Marshall off the air (In re Application of Lamar Life Broadcasting Company, 1968, Dissenting Opinion of Commissioners Kenneth A. Cox and Nicholas Johnson, pp. 457-458). And, as noted earlier, the FCC was a party to the negotiations to secure Robert Smith airtime during the 1962 primary campaign in the aftermath of WLBT's improper refusal. As usual, however, nothing much came of these complaints. WLBT was routinely awarded license renewals, as were the vast majority of stations during this period of FCC oversight.

The ace up the Office of Communication's sleeve was its monitoring of a week of WLBT's programming prior to its filing of the petition, its rigorous use of earlier complaints against the station, and its checking of the station's logs. This piece of the story is also an interesting footnote to the history of scholarship in the field of communication research. FCC policy required every broadcast station to fill out an annual log of a composite week of programming, a sequence of days randomly chosen by the Commission. Programs were to be classified according to categories delineated in a section of the form, but the actual

classifications were at the sufferance of the broadcaster and the FCC categories were essentially undefined. The Commission typically would accept without question the station's log and its representations of the week's programming, and renew the license more or less automatically. To be fair, the FCC did not have the staff to check the logs and representations of every broadcaster. However, neither the station nor the Commission counted on the possibility that someone would scrutinize the logs. Parker and his colleagues examined WLBT's composite-week log to find out, among other things, what programs the network offered on those days and which of them the station carried or rejected. The station had claimed that the NBC programs it presented constituted sufficient coverage of the views of persons agreeing with the petitioners. However, as Parker was able to document, the station had a conspicuous habit of "blacking out" such coverage. The Huntley-Brinkley news was repeatedly blacked out by local political broadcasts. Once, even, a WLBT news crew filmed one of the Woolworth lunch counter conflicts in Jackson for NBC network news, but the station itself refused to broadcast the segment. The Today show was interrupted with local news when it contained items of interest to blacks (Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, Attachment G; Attachment F, Exhibits #7 and #9; Attachment E, Exhibit #4). There was also the practice of preparing audiences for national shows by hostile comment, such as, "What you are about to see is an example of biased, managed, northern news. Be sure to stay tuned at 7:25 to hear your local newscast" (Id., Attachment E, Exhibit #4).

In its license renewal application, WLBT listed some 287 organizations on behalf of which it broadcast public service announcements during the previous three years. Parker and his colleagues exposed the fact that of the actual 276 organizations, 32 were in the governmental and welfare classifications where service to the black community could be determined only by examination of texts of the announcements. Of the remaining 244 organizations serviced, only three could be clearly identified as black. In 11 other cases, blacks may have been aided by the announcements. The station flatly refused to make announcements for the NAACP or for Tougaloo College.

The Office of Communication team monitored the week of March 1 through March 7, 1964 -- about a month prior to the filing date of the original petition. They conducted detailed checks of both stations, WLBT and WJTV. The audio signals were tape-recorded and trained monitors kept a written, minute-by-minute log of every program, commercial, and announcement. Each program sheet indicated whether blacks participated. If they did participate, or if there was any discussion of race relations, the monitor described how the person or the topic was treated (Lobsenz, 1969). The team found that the total time used by WLBT for public affairs, information, religion, education, and public service announcements on any typical day, other than Sunday, was less than 10% of its total broadcasting programs. The amount of time devoted to commercials was more than 15% of the total program time on weekdays. In the course of over four hours of its Sunday program devoted to religion, the station did not include any material originating in a black church, or any black clergyman or choir, except a fifteen minute program of spirituals at 6:45 am, even though black churches made up almost half of the total number of churches and church members in the area served by the station. The portion of programming devoted to live local material was performed almost entirely by white participants. More than two-thirds of all program time was devoted to entertainment, but no black entertainer, singer, or orchestra was included in the programming, except on a few network-originated programs. WLBT's only local children's program, Romper Room, did not permit participation by black children. Teen Tempos, an hour-long dance program for teenagers each week (which WLBT's renewal application claimed to have provided participation for some 19,000 teenagers) did not include any blacks (Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, p. 16). In the brief time devoted to local news and public service announcements each day, WLBT mentioned affairs of interest to the white community, but did not announce events occurring among the black community or the efforts of blacks to end segregation. The news and public affairs programs of the station aired information about official attempts by the State of Mississippi to maintain patterns of segregation, but did not include an equally effective statement of black activities to obtain

freedom, nor any fair presentation of the basis of their grievances (Petition to Intervene and to Deny Application for Renewal, April 8, 1964). Contrary to the station's claims, it did not follow the practice of using courtesy titles for blacks during the monitored week.

WLBT had attacked the Office of Communication's allegations in its Opposition brief. This gave Parker an opening, notwithstanding the petitioners' formal lack of standing. The Office of Communication promptly filed a Reply brief (formally called "Reply to Opposition to Petition to Intervene and to Deny Application for Renewal"), that included the monitoring study and a memorandum from Parker explaining the monitoring team's methodology, a copy of the instructions to monitors, and copies of the monitoring sheets themselves (Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, Attachment B, Exhibit #1 [a] and [c]). In addition, attached to the Reply was an affidavit from Dallas W. Smythe, in the words of the brief, "a recognized expert in the field of program content analysis" (and, moreover, a former chief economist at the FCC and principal author of the Commission's 1946 reform-minded Public Service Responsibility of Broadcast Licensees (FCC, 1946), colloquially known as the "Blue Book"). Smythe declared that the program content analysis performed under Parker's direction was, in fact, "obviously more reliable than the results of the studies of the 'composite week' prescribed by the Commission" (Reply to Opposition to Petition to Intervene and to Deny Application for Renewal, June 13, 1964, p. 6).

As it happened, Parker and Smythe had collaborated years earlier in studies of television programming in New Haven. Smythe subsequently directed additional studies in New York City, Los Angeles, and Chicago. These studies were published in a series by the National Association of Educational Broadcasters, as part of the difficult struggle to secure broadcast frequencies for educational television (Smythe & Campbell, 1951; Smythe, 1952, 1953a, 1953b). Underwritten with Carnegie Corporation grant money, the purpose of the studies was to provide empirical evidence that existing commercial television -- contrary to the claims of the networks -- was not providing adequate educational programming. Parker, in fact, had been asked by Frieda Hennock, the only FCC Commissioner genuinely

supportive of educational broadcasting, to petition the Commission on behalf of dilatory educational broadcasters. The FCC had made no provision for educational channels when it authorized television in 1941. And when attempting to lift the suspension of television licensing in 1949 (the so-called freeze), the Commission's new allocation table again made no provisions for educational stations. Educators had been specially invited to request reservations at hearings in 1948, but they did not appear. Under pressure from Commissioner Hennock (supported by Parker's petition), the Commission scheduled final hearings before lifting the freeze. At these hearings, held between December, 1950 and January, 1951, a newly formed Ad Hoc Joint Committee on Educational Television (JCET) presented the monitoring study of New York City television. The Smythe-Parker monitoring survey was offered in evidence -- and was accepted by the Commission as a valid technique of sampling program content (Blakely, 1979, pp. 21-25).

Thus the monitoring methodology used by Parker in Jackson was already presumptively valid before the FCC. This would be the first time a complaint against a broadcast station would be backed up with a defensible social science content analysis or monitoring system. And even though the FCC did not request to examine the monitoring study, the Office of Communication caught the station in a series of lies and put the Commission in a quandary. The group had no standing, but it had finagled a way to offer prima facie evidence that WLBT had misrepresented its performance.

The actual monitoring was a rather cloak and dagger affair. Parker and Judd decided that they had better have the monitoring done by white persons,

so that the Commission couldn't say that blacks were doing something to (sic) their own interest and not telling the truth. Now how were we going to get white people to do the monitoring? Well, it turned out that we had some very concerned people in Jackson, especially at Millsaps College, a Methodist school in Jackson. --Not the president of Millsaps, who later became the bishop for the area, but the faculty members, and one faculty member in particular, Dr. Gordon Henderson (and his wife, Mary Ann Henderson), was a senior professor in the Political Science Department, and Mary Ann had worked for Nielsen [the A.C. Nielsen broadcast rating service]. They were very much interested. They recruited others. Before I knew it, I had a whole crew of people meeting regularly to be trained to be monitors. I trained them myself with Mary Ann's help, got to be very friendly with them, but never once learned the last name of any one of them, so that in case I was put in a position of having to reveal who did the monitoring, I could honestly say

that I did not know the names of the monitors. This anonymity, of course, was to protect them from reprisals by the power structure of Jackson. Don't forget that this was almost immediately after the murder of Medgar Evers (Parker, interview by Korn, June, 1990).

There were twenty-eight monitors altogether, all white, none of them members of the United Church of Christ. The monitors rented television sets and checked out recording equipment from the Millsaps College Music Department. But where to conduct the study?

We couldn't do it at Millsaps because the President [of the college] would have found out. We couldn't do it at Tougaloo because you couldn't have that number of white people going to Tougaloo. That would have been very suspicious...having all those television sets delivered there (Parker, interview by author, September 28, 1991).

Indeed, Parker believed that his cover may have been blown. The Office of Communication had hired a professor of sociology at Tougaloo to spearhead the information gathering and the selection of monitors, but this professor instead went to the stations and told them what was afoot. Fortunately, according to Parker, this was at a relatively early stage and the professor "didn't know exactly what we were going to do" (Parker, interview by author, September 28, 1991). The owner of a local engineering firm offered his family's house both for the training of monitors and the monitoring itself. But the group protected itself through forced anonymity.

Parker: I never learned the names of any of these people.

Horwitz: Even the people who offered the house?

P: No.

H: To this day you don't know their name?

P: I don't. I really don't.

H: So, you guys were practicing a kind of cell politics...

P: Yes. And Judd felt that that was smart because if anything happened, if I were arrested and tortured, which could well have happened down there, if I didn't know their names, they couldn't get it out of me.

H: And Judd, a Rockefeller Republican, suggested that?

P: He agreed to it. That that would be all right when the time came for testimony.

H: Did he think you guys were being a little bit overzealous?

P: No.

H: So he knew the score...

P: You see, if I'd had to testify, as the Hearing Examiner tried to make me, if I'd had to testify to the names, bad things might have happened. The wife of one of the leading doctors at the hospital, the university hospital, was a monitor. But I don't know the name. So, what I'm leading up to is that when we had the hearings and it became a public thing down there, people put two and two together and they figured out that that house had been where the monitoring was done. And they put so much pressure on those folks that they moved out of Jackson (Parker, interview by author, September 28, 1991).

## THE FCC REACTS

By the time of the filing of the "Reply to Opposition to Petition to Intervene and to Deny Application for Renewal" on June 13, 1964, Orrin Judd had taken temporary leave of the case. The case was passed along to Earle K. (Dick) Moore, a partner in Judd's law firm. The United Church of Christ church at Tougaloo was added as a signatory to the petition. The Mississippi AFL-CIO filed an amicus brief petitioning the FCC to deny license renewal to Lamar Life, arguing that the station's programming was heavily weighted "in opposition to organized labor, its leadership, and its objectives" (Lamar Life Broadcasting Co. et. al., 1965). The Office of Communication filings caught the FCC off guard, and it took nearly a year for the Commission to rule on the license renewals. The delay was due in part to the conflicts within the FCC over the case. Some on the FCC staff apparently felt the evidence against the stations was overwhelming. Henry Geller, the FCC General Counsel at the time, strongly urged that the evidence be admitted as a consideration for denying the licenses, though even Geller did not support granting a right of standing to the petitioners (Henry Geller, telephone interview by author, August 22, 1996; Brotman, March 31, 1986). Despite the length of time of the Commission's deliberations, it did not hold an evidentiary hearing. The Commission did not request the results of the Office of Communication's monitoring study or tape recordings. The Commission did send Bill Ray, Chief of Complaints and Compliance, down to Jackson to conduct an investigation of the Office of Communication's allegations. According to Henry Geller, Ray's report -- which was presented to the

commissioners but never released publicly -- confirmed all the allegations and then some. In view of the evidence, the Commission staff recommended revocation of the license (Henry Geller, telephone interview by author, August 22, 1996).

However, in its May 20, 1965 Opinion and Order, a four to two Commission majority dismissed the Office of Communication's petitions under the reigning standing doctrine. Petitioners were not legitimate parties in interest. But what would it do about the prima facie evidence of WLBT's misrepresentations raised in the petitions? The Commission majority did its usual -- write gravely of the provisions of the Communications Act and the Commission's policy pronouncements, but not rule adversely against the stations (FCC, Report on Editorializing by Broadcast Licensees, 1949; FCC, Report and Statement of Policy re: Commission En Banc Programming Inquiry, 1960). The majority (Commissioner Wadsworth did not participate) dismissed the Office of Communication's petitions, but said it considered petitioners' evidence in the proceeding. Indeed, none of the allegations was controverted in the decision. And after weighing in about the importance of a licensee's responsibilities as a public trustee, the Commission majority offered what it evidently felt was a neat compromise: WJTV received a full (three-year) renewal, whereas WLBT was given just a one-year renewal -- a kind of probation, but one without significance. The difference in the terms of renewal was that WJTV promised to reform; WLBT was steadfast in its denial of any wrongdoing or the legitimacy of any of the allegations brought by the Office of Communication (Capitol Broadcasting Co., (1965); Lamar Life Broadcasting Co. et. al., 1965). Commissioners E. William Henry (the Chairman) and Kenneth A. Cox filed a vigorous dissent, which allegedly enraged the leader of the majority, Lee Loevinger (Friendly, 1975, p. 97).

The Commission majority's decision was inexcusable, but in retrospect may be in some ways understandable. A standard criticism of independent regulatory agencies is that they are "captured" by the industries they regulate, and hence enact policies to those industries' benefit (see Kolko, 1963; Stigler, 1971). This looks like a reasonable explanation of the FCC's actions in the WLBT case. But the apparent industry bias of the FCC, or any

regulatory agency for that matter, stems not so much from the agency's capture as from the fact that the agency is the least powerful entity in the interconnected, multi-ring power circus of agency, Congress, President, courts, and industry. A president's appointments, the Congressional purse and ex parte contacts, the bureaucratic roadblocks set up by legislation such as the Administrative Procedure Act, as well as the in-place economic structure and the lobbying might of the regulated industry, constrains a regulatory agency in powerful ways. The FCC in particular had been purposefully weakened by Congress both by way of small budget outlays (responsible for a chronic understaffing problem in the 1950s and 1960s) and the 1952 McFarland amendments to the Communications Act. The McFarland amendments not only created an additional bureaucratic layer within the Commission, but also narrowed the scope of FCC discretion and further broadened the due process rights of regulated parties. A heavily lopsided House vote killed a 1961 measure strongly backed by President Kennedy and designed to unravel the procedural maze Congress had imposed on the independent regulatory agencies.

Hence there was reason for the Commission to be conservative on the issue of license revocation. The courts had ruled early on that while a broadcast license did not confer a property right, it did confer certain rights or equities to the station owner (Chicago Federation of Labor v. Federal Radio Commission, 1930). The McFarland amendments further weakened the FCC's ability to resist perfunctory renewal of licenses (Krasnow, Longley & Terry, 1982; Baughman, 1985). Finally, during the brief period of New Frontier regulatory activism typified by the initiatives of FCC Chairman Newton Minow -- the period just before the WLBT case surfaced -- the Commission consistently got its fingers burned. Notwithstanding Minow's highly touted "vast wasteland" speech, his regulatory initiatives had been largely and unceremoniously rebuffed. By the mid-1960s, most of the vestiges of the Minow years had been consciously swept away with President Johnson's reappointment of the conservative block of commissioners who typically stood for weak regulation and who consistently voted against the two sole remaining New Frontier commissioners, Chairman E. William Henry and Kenneth Cox (Baughman, pp. 77-152). That said, the

result of all these pressures and constraints looks pretty similar to what plain old capture theory simply posits a priori -- a bias in favor of the broadcaster.<sup>3</sup>

Outraged by the FCC's decision, the Office of Communication quickly turned around and filed an appeal of the Commission's Memorandum Opinion and Order to the US Court of Appeals for the District of Columbia Circuit. Parker, in a 1986 interview, reflected

In effect, the representatives of the public were being told they had nothing to say about the allocation of a national resource -- a public communications channel -- which was supposed to serve the public... [The FCC] slapped the stations on the wrist, kissed us off on the standing issue, and figured they had given us 'do gooders' our day in the sun by accepting our monitoring system (Brotman, March 31, 1986).

By this time the Office of Communication was receiving money from the Ford Foundation, and legal research help from interested law students. But other help was unexpectedly withheld. Parker hoped the National Council of Churches would come in with an amicus brief, but this was scuttled by the opposition of prominent Presbyterians in the broadcast business, including a former FCC Commissioner (Parker, interview by Korn, June, 1990).

Prior to filing the court appeal, Judd and Parker paid a courtesy call to WLBT's new counsel, Paul Porter. Porter, titular partner of the notable liberal Washington law firm, Arnold and Porter, had been Chairman of the FCC between 1945 and 1946, and a prominent New Dealer. Judd, always the gentleman, insisted on paying a visit to Porter, hoping there might be some way they might, in Parker's words, "come to an agreement that the station would do some of the things that we wanted them to do, and that there might not have to be the expense of the appeal." Instead, Porter displayed considerable anger about the possibility of an appeal and was adamant that the Commission had done the right thing. In Porter's view, "[Parker] had no right to second guess the FCC; the FCC was the authority in

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<sup>3</sup> Henry Geller, the FCC General Counsel during the WLBT affair, argues somewhat more subtly that the bias was in favor of the big broadcaster. The Commission was more than willing, on select occasions, to bludgeon a small radio station that had violated FCC rules. Geller called this the "three outhouse rule." If a station had more than three outhouses it was approaching a size that made it dangerous for the FCC to mess with (Henry Geller, telephone interview by author, August 22, 1996).

this field." Porter threatened to keep the case going for years and bankrupt the United Church of Christ (Parker, interview by Korn, June, 1990). Parker continues,

Well, we went ahead with the appeal, and Judd argued it. On the morning of the argument, we were in the lawyers' and clients' room and Porter came bursting [in] laughing. He said, "Well, I told you you shouldn't get yourself involved in this." He said, "I don't know how it's happened" -- and I'll bet he didn't [Parker with great sarcasm here] -- "but we have the most conservative panel on this circuit and one that will uphold whatever the Commission has to say." He [Porter] said, "You know, we really don't have to worry about arguing this, not with this panel," and walked out (Parker, interview by Korn, June, 1990).

In Parker's recollection, Judd was dejected after the oral arguments were complete. He thought Porter had been right and that the law probably supported the Commission (Parker, telephone interview by author, August 31, 1995).

#### THE FIRST COURT OF APPEALS DECISION

Porter and Judd were wrong. Writing for what was indeed a quite conservative appellate panel of Warren Burger, Carl McGowan, and Edward Tamm, Chief Judge Burger issued a powerful opinion that not only cast doubt on the FCC's actions and reasoning, but served to open standing to parties without property interest. Borrowing liberally from the Office of Communications' Brief for Appellants, Burger reviewed earlier standing cases before the FCC and other administrative agencies. He pointed out that the cases allowing standing to those showing economic injury (Sanders Brothers, 1940) and electrical interference (FCC v. NBC, 1943) "emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest." Quoting the Sanders Brothers case,

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By para. 402(b) (2), Congress gave the right of appeal to persons 'aggrieved or whose interest are adversely affected' by Commission action....But these private litigants have standing only as representatives of the public interest (Office of Communication of the United Church of Christ v. FCC, 1966, p. 1001 [emphasis in original]).

As to the expert agency effectively representing the people, the opinion artfully suggested this was a theory that time and experience had worn thin. The protection of the public interest in broadcasting would be served by permitting the participation of "legitimate

listener representatives fulfilling the role of private attorneys general" (Id., pp. 1003-1005). This particular argument resurrected Judge Jerome Frank's reasoning in the 1943 case, Associated Industries, Inc. v. Ickes (1943). Parker and the Office of Communication's legal team repeatedly emphasized the Ickes case in its briefs. Burger's use of Ickes essentially elevated citizen groups to the level of private attorneys general who could bring actions before regulatory agencies and courts.

The court went to the unusual degree of stating its dissatisfaction with the FCC's reasoning and decision to renew WLBT's license, and ordered the Commission to conduct hearings on WLBT's renewal application. "After nearly five decades of operation," Burger wrote, "the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty" Office of Communication of United Church of Christ v. FCC, 1966, p. 1003). The court's metaphoric illustration was telling.

We recognize that the Commission was confronted with a difficult problem and difficult choices, but it would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in its hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity and willingness to change, for WLBT had stoutly denied Appellants' charges of programming misconduct and violations. In these circumstances a pious hope on the Commission's part for better things from WLBT is not a substitute for evidence and findings (Id., p. 1008).

The court had accepted the Appellant's arguments in toto (United States Court of Appeals, August, 1965; November 3, 1965). And, importantly, the court also retained jurisdiction of the case.

One of the surprising aspects of the case was that Warren Burger, a prominent and notably conservative judge (after all, he became President Richard Nixon's nominee as Chief Justice of the United States just a couple of years after this case), wrote what has to be read as an opinion consonant with liberal judicial activism. And there is evidence Burger himself believed this was one of his better opinions. As Earle K. Moore, the attorney for the Office of Communication, explains,

There was a time some years later -- the Bicentennial celebration of the United States -- when each state...including the District of Columbia...was supposed to pick out some kind of (at least one, maybe more) development on examples of progress. [It] was rumored that Burger wanted the 'LBT decision to be the example chosen for the District of Columbia.... But the thing that prevented it was that the Second Circuit beat him to the punch.... The station, in its revised form after we succeeded in getting an interim license, became the example for the State of Mississippi (Earle K. Moore, interview by author, New York City, October 1, 1991).

## THE HEARING

Following the court's ruling, the Commission issued an Order for an evidentiary hearing to be held on WLBT's application for license renewal. But things quickly got complicated and ugly. The Commission's Hearing Order placed the burden of proof on the Office of Communication and its allies to show whether, one, WLBT had afforded reasonable opportunity for the discussion of conflicting views on issues of public importance, and two, whether WLBT had afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area (FCC, Order, May 26, 1966). But the assignment to the Office of Communication (now known as the "Intervenors") of the burden of proof seemed to contradict the spirit and implied letter of the court opinion. "When past performance is in conflict with the public interest," Burger wrote, "a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest" (Office of Communication of United Church of Christ v. FCC, 1966, p. 1007). This quotation was picked up by Commissioner Kenneth Cox, who filed a partial dissenting opinion to the Commission's Order. Orrin Judd immediately went back to the Court of Appeals and asked that the court reverse the Commission's Hearing Order, a request for which there was no precedent. Courts normally do not intrude in the middle of a regulatory proceeding, but the Court of Appeals did so in this instance.

Then there was the matter of the hearing arrangements themselves. WLBT wanted the hearings to be held in Washington, DC. Knowing that its witnesses would be unable to afford to leave Jackson to testify in Washington over a period that could last several weeks, the Office of Communication argued -- successfully -- that the hearing be held in Jackson

(Opposition to Motion to Designate Place of Hearing, December 22, 1966). But this minor victory created other problems. The hearings a federal regulatory agency holds in any community are usually held in a district courtroom. The district court judge in Jackson refused to allow this hearing to be held in his courtroom. The Commission had to find another venue. It rented a room from the Post Office. The day before the hearing was to start, the district judge ordered that no court stenographer in Jackson was to take employment to cover this hearing. This meant the Commission had to bring down court stenographers from Washington. Parker was not able to rent a copying machine in Jackson although he had made a deposit to reserve one. In Parker's words,

that was the way the thing went -- every roadblock that anybody could put in our way was put in our way. We got the worst rooms at the hotel, but we sure had the friendship of the elevator operators and chambermaids, and we certainly did get service from them because they were black (Parker, interview by Korn, June, 1990).

One of the Arnold and Porter attorneys went to Jackson prior to the hearing to establish contact with white liberal groups. He solicited their opinions about what could be done with the station and convinced the station to put their representatives on WLBT programs. In Moore's view, this was a desperation move to clean up the station as a way to show that things were now on the up and up. Desperation or not, in a very short time, according to Moore, the Arnold and Porter attorney built up a fair amount of support for the station. He persuaded some very prominent white liberals to testify for WLBT, effectively splitting the allegiance of the white liberal community. This community was quite small and normally had little power in Jackson, but the politics of this particular situation meant that the stance of Jackson liberals took on unusual importance. The station's attorneys were likely laying the groundwork for a positive FCC decision on the basis of improved present station performance and future promises. Since receiving its one-year license renewal, WLBT had adopted, in Paul Porter's words, "a new policy that reflects a type of operation that certain commissioners are beginning to emphasize" (cited in "FCC Revisits WLBT [TV] Renewal Case," June 10, 1968). This included an apprenticeship program for black college

graduates, more integrated local and network programming, and the airing of religious services that rotated among Negro and white ministers, and representatives of Protestant, Catholic, and Jewish faiths (Friendly, 1975, p. 99). This tactic had proved successful in other instances where the FCC had contemplated the dreaded step of revoking a broadcast license.

The hearing took place in Jackson in May, 1967. The climate of the hearing was rather charged. The room was overflowing with Confederate flags. Office of Communication lead attorney Earle K. Moore remembers that the local black people were particularly nervous. At the beginning of the hearing, Moore could convince only one black person, Robert L.T. Smith, to sit at the counsel's table. Moore also had a hard time lining up witnesses. Later, as it became clear that the case was really moving, witnesses came forward.

...[N]obody wanted to be involved with this thing until they saw that it was for real and what happened is that sort of one day I had like one witness and on day two I'd pick up a couple of more [laughter]. And on day three another one. You know, they gradually kind of started filtering in when they saw what was going on (Earle K. Moore, interview by author, October 1, 1991).

Aaron Henry always had a bodyguard. Parker was convinced the hotel rooms contained listening devices, and always turned on the radio when conferring with Moore. Charles Evers made himself particularly scarce during the period of the hearing, and had to be cajoled by associate counsel, Ann Aldrich, to appear. Moore wanted Evers to testify about the NAACP complaints against WLBT. Eerily, the WLBT lawyers were very happy when Evers finally made his appearance. One WLBT attorney smirked to Moore about what a big mistake he made when Moore called Evers to the stand. The assumption was that Evers had cut a deal with WLBT either to avoid testifying or to testify in the station's favor in exchange for promises that he would appear regularly on the station's informational programs. There was some reason to believe this. Evers had never offered the Office of Communication any assistance in the WLBT affair. In Parker's perhaps jaundiced view, Evers essentially had just cashed in on his brother Medgar's name. But while on the stand, Charles Evers unexpectedly began talking about how he blamed the station for the death of

his brother (Earle K. Moore, interview by author, October 1, 1991; Parker, telephone interview by author, August 31, 1995).

Parker was convinced that Jay Kyle, the Hearing Examiner, "had his orders."

According to Parker, the Hearing Examiner showed his bias in many ways, overruling Office of Communication attorney Moore's objections and almost always upholding the objections of the Arnold & Porter attorneys. Parker recalls that

At one point when Moore quoted from the order of the Circuit Court in the first WLBT decision, the Hearing Examiner said in about these terms, "That is not relevant here. My responsibilities are to the Federal Communications Commission, not to that court.... To give you some examples of how he operated, everyday, or nearly everyday, he went to lunch with the executives of WLBT and their wives and the WLBT attorneys. The room that he had rented in the Post Office seated about forty people. It wasn't very large. He had his secretary reserve two rows on the one side, the first two rows, for WLBT executives and their wives and the friends of the wives.... [O]n one day when they all went out to lunch together, when they came back they found every single seat in the room taken by a black person, by some coincidence, and the Examiner went down the hall and brought a chair for the wife of the station manager. And Dick Moore said let the record show that Mr. -- I've forgotten the name of the Examiner -- provided a chair for Mrs. --- the wife of the station manager. And, of course, he overruled that immediately [laughter] (Parker, interview by Korn, June, 1990).

The Hearing Examiner paid no heed to the Court of Appeals' order on the burden of proof issue, and continued to apply that burden to the Office of Communication. This dialogue reveals the situation in the hearing:

Mr. Moore: I just want to state for the record that as I understand the burden of proof, the burden of proof on all issues is on the station and the only burden on the applicant [the Church] and the Bureau [FCC Broadcast Bureau] is the burden of going forward. That is my understanding of the interpretation which has been placed on the Commission's order by the Court of Appeals.

Presiding Examiner: No, that is not my interpretation. My interpretation is, by the Commission action, that the burden of proof is primarily upon the intervenors [the Church] on issues A and B [fairness and access],...and you can't by waving the magic wand, shift the burden of proof to this applicant [the station] or to the Bureau. If you will look at that last order of what the Commission said, I think it's very, very clear, and I have certainly gone under that impression, and if I am wrong, I am wrong on that one, because I had extra copies of the issues made up if anyone wanted to see them (cited in *In re Application of Lamar Life Broadcasting Company*, 1968, Dissenting Opinion of Commissioners Kenneth A. Cox and Nicholas Johnson, p. 448).

One presumes the phrase, "waving the magic wand," refers to the Court.

This defiance of the Court had a profound impact on the conduct and outcome of the hearing. The Hearing Examiner's solicitude for the station's witnesses and animosity toward the Intervenors were marked and egregious. Among many examples, he refused to allow the Reverend Dr. Edwin King's testimony about his telephone conversation with an employee of WLBT following the station's blacking out of part of a 1963 NBC special, The American Revolution '63. The program dealt with civil rights. The station cut out the network signal when the program showed footage of Tougaloo College students sitting in at the Jackson Woolworth lunch counter. The ostensible grounds for disallowing Reverend King's testimony was that the WLBT employee had failed to identify himself by name to Reverend King, therefore the admission of blacking out was "sheer hearsay" (Initial Decision of Hearing Examiner Jay A Kyle, October 17, 1967, pp. 44-45). After receiving conflicting testimony over whether station manager Fred Beard had received an award from the White Citizens Council, the Hearing Examiner wrote in his decision, "The Hearing Examiner, after having observed the demeanor on the witness stand of both witnesses, finds that the testimony of Fred Beard is to be preferred over that of Reverend King" (Id., p. 43). The lengthy decision stands as a monument of favoritism toward the station and its witnesses, time after time accepting station witness testimony (without backing by tapes, scripts, logs, or transcripts) in preference to the contrary testimony of Office of Communication witnesses. The Hearing Examiner did not clearly differentiate between programming before, during, or after the license renewal period (1961-1964). As for the monitoring study, the Hearing Examiner (referring to it as a "so-called" monitoring study) rejected it as "worthless" (Id., pp. 11-14, 74). Parker recalls,

Our most important piece of evidence, of course, was the monitoring study. Mary Ann Henderson was the person who was chosen to put it into the record. It was a big surprise to the Examiner and to the WLBT lawyers when he asked her what expertise she had to be conducting a study of this sort, and she recited her experience as an employee of Nielsen. That was one of the best things that we got into the record. As to the actual monitoring study, he rejected it, said that it had no relevance, and furthermore, he insisted upon having the names of the monitors. We refused them. He called me to the stand. I had not expected to testify, had no reason to testify. He called me to the stand and demanded that I reveal the names just so that he could use the fact that I wouldn't as an indication that there was

something flawed about the study. On the basis of that, he rejected the study in toto (Parker, interview by Korn, June, 1990).

Moore's recollection was that "the Hearing Examiner really just didn't understand the whole thing and he seemed to treat us as just a bunch of bomb-throwers that were causing an awful lot of trouble and inconvenience" (Earle K. Moore, interview by author, October 1, 1991) In his decision the Hearing Examiner charged that the Office of Communication "woefully failed...to come forward and sustain their serious allegations" against WLBT (Initial Decision of Hearing Examiner Jay A Kyle, October 17, 1967, p. 82). He recommended that the Commission renew the license for the full three year term. As the case went back to the FCC for final determination, WLBT attorney Paul Porter said the Commission should not only adopt the Hearing Examiner's conclusions but should take the opportunity to notify other citizens groups interested in pressing complaints against stations, to do so "reasonably." Porter accused the complainants of having abused the Commission's processes and having committed a "fraud" on the Commission and the US Court of Appeals ("FCC Revisits WLBT [TV] Revnewal Case," June 10, 1968).<sup>4</sup> The FCC, in a 5-2 decision, upheld the Hearing Examiner's recommendation and approved the license renewal (In re Application of Lamar Life Broadcasting Company, 1968). The Commission majority denied the vast majority of the Office of Communication's large number of what are called "Exceptions," that is, reasoned objections to specific rulings or admissions of evidence by the Hearing Examiner (Brief of Office of Communication of the United Church of Christ, et al., November 16, 1967).

Commissioners Kenneth Cox and Nicholas Johnson filed an extensive, closely argued dissent that was more than seven times as long as the majority opinion. After going through

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<sup>4</sup> Perhaps the only way to explain the anomaly of Paul Porter, liberal New Deal lawyer, arguing vociferously on behalf of a racist broadcaster against black civil rights and liberal church complainants (apart from, or in addition to, the fact that he was doing what he had to do to represent a client), is to recognize how thoroughly Porter was committed to the idea of the New Deal expert agency and how out of step he was with the emerging politics of participatory democracy.

most of the evidence and disputing the majority's reasoning point by point, the dissenters exhibited their frustration with their colleagues with a memorable conclusion.

[The majority] has sanctioned obstruction and procedural harassment which can only discourage and defeat citizen intruders so bold as to venture to exercise rights guaranteed them by law. Indeed, it would appear that the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of the station's studio in the dead of night, or hope that the courts will do more than merely review and remand cases to the FCC with instructions that may be ignored (In re Application of Lamar Life Broadcasting Company, 1968, dissenting opinion of Commissioners Kenneth A. Cox and Nicholas Johnson).

The Cox-Johnson dissent provoked a bitter row at the FCC, and an unusual majority response to the minority' opinion. Three signers of the majority opinion, Commissioners Wadsworth, Lee, and Chairman Hyde, charged that the dissent misunderstood the facts and did not withstand reasoned analysis. Commissioner Bartley issued a separate statement calling the dissenting opinion vituperative and self-serving ("Cleavage Widens at the FCC," July 15, 1968). The Office of Communication went back to the Court of Appeals (Motion For Leave to File a Brief and For Oral Argument on the Court's Review of Remand, July 26, 1968). Before filing, however, it was necessary to have Aaron Henry and Robert Smith reaffirm their status as appellants. Parker went back down to Mississippi to get their notarized signatures. This turned out to be a scary trip in which Parker and his wife Geneva were tailed and threatened by Jackson police. Parker describes the atmosphere during the period he spent in Jackson during and after the hearing.

Oh, it was terrible down there, you know. You got so frightened. I still don't like to fly Delta [Airlines], though I know it's all new, because when you went down to Jackson, Delta gave the passenger lists to the local police. A cop was there when you got off the plane. Unless they knew you, and even when they knew you, when you were an intermittent like me, he demanded your name, where you were going and what your business was in Jackson. They didn't have any right to do that, but supposing you said, 'You don't have any right to question me,' and you start to walk away? You know, here [New York] I am a total civil rights, First Amendment freak, but I knew better than to walk away from that cop (Parker, interview by author, September 29, 1991).

The harassment was not confined to Mississippi. Parker believed his home telephone in White Plains, New York was tapped. After the first appellate court decision he began to get

"hollowness" on the line. One of his friends who worked for AT&T -- and, naturally, a member of the local UCC church with Parker -- facilitated a line search. Tapping equipment was found as the line went into the woods. Parker believed the tap was the work of the Mississippi Sovereignty Commission, a prominent white supremacist group (Parker, interview by author, September 29, 1991).

## THE SECOND COURT OF APPEALS DECISION

Earle K. Moore remembered being surprised to learn that the second appeal was to be held in the ceremonial, not the workaday, courtroom of the Court of Appeals. Also unusual was the fact that Judge Burger's law clerk told Moore it would be OK if he wanted to take more time than was usually allotted in oral argument. In actions involving regulatory commissions, the agency usually gets most of the time for argument. Evidently there was something unusual about how the case was being treated (Earle K. Moore, interview by author, October 1, 1991).

There was. In a blistering opinion, the Court of Appeals reversed and remanded the Commission's decision on the license renewal. Burger excoriated both the Hearing Examiner and the Commission majority.

To borrow a phrase from the Examiner, his response manifests a 'glaring weakness' in his grasp of the function and purpose of the hearing and the public duties of the Commission....The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair (Office of Communication of the United Church of Christ v. FCC, 1969, pp. 549, 550).

Because of its lack of confidence in the Commission, the Court did something highly unusual. It ordered the FCC to vacate its grant of the license and open a process of inviting applications to be filed for the license. In short, the Court placed itself in the position of a regulatory agency, something no court had done previously. The Court refrained from

holding that Lamar Life would be disqualified from filing a new application, but directed the Commission to consider a plan for interim operation pending completion of its hearings.

The license was hotly contested by various parties, including Lamar Life. There were fights over who should be the interim operator; battles over whether applicants were just fronting black faces to look acceptable to the Commission; struggles to find blacks with the necessary capital and skills. There was even a distant Watergate connection with one of the several wealthy Mississippi Republicans who were vying for the license. Parker and the Office of Communication were at the center of all these battles (FCC, Memorandum Opinion and Order, December 3, 1979). They helped organize a local integrated group, called Communications Improvement, Inc., as the interim local operator -- securing a \$300,000 loan from the Methodist Board of Missions to satisfy the FCC that the operator was adequately capitalized. They forged a unique arrangement such that station profits would go half to public broadcasting in Mississippi and half to Tougaloo College, where it would be used to teach black students in communications skills and management. Parker was able to induce Tom Murphy and Dan Burke of Capital Cities Broadcasting to send skilled people to Jackson to train the new black employees. According to Parker, this training was essential. The takeover by the public group made the station the leading station in the central South. Yet it was not until 1983 that the station was finally permanently licensed to a group that was 98 percent black-owned.

## CONCLUSION

This paper has traced the history of an important case and a particularly successful moment of broadcast reform. Office of Communication of the United Church of Christ v. FCC (1966), in opening up standing to regular citizens, embodied and set in further motion a process of citizen activism in which broadcasters were forced to adapt to local, especially minority group, demands. The extension of standing to an increased range of affected interests reflected a judicial reaction to regulatory agencies' perceived failure to represent these interests fairly (Stewart, 1975). Once the avenue was opened, a large number of new

participants in the political arena brought a great many new issues to the public sphere. In broadcasting, any number of groups fought to improve broadcast programming through intervention in the license renewal regulatory process. These actions were especially successful in opening up stations to minorities and women with regard to employment (see Grundfest, 1976; "Proceedings of the Mass Communications Law Section, Association of American Law Schools," 1978; Rowland, Jr., 1982). Indeed, shortly after the second Appeals Court decision on the WLBT case, the Office of Communication petitioned the FCC to issue Equal Employment Opportunity rules that would require all stations to implement affirmative action programs and to hire and train women and minorities. The Commission issued a Report and Order on Equal Employment Opportunity in 1971. Other citizens groups brought actions in other arenas, such as the environment and consumer protection. Parker sought to take this development "upstream" in the world of broadcasting. Drawing on his moral authority and incredible perseverance, he induced some large broadcast group owners to put in real money to train minority youth in broadcasting, and received commitments to hire these youths.

The success of this incarnation of broadcast reform stemmed largely from its connection to the broader social movement of Civil Rights, and the connection of both to the moral leadership made available within the liberal Protestant church. Of course, its importance has clearly dimmed in the wake of the development of new technologies and the ascendance of market ideology in communications. For all the high drama and real sense of achievement in Office of Communication and the activism that accompanied and followed the case, it is difficult not to conclude that without altering structure, media reform will usually be short-lived (Rowland, Jr., 1982; Horwitz, 1989). Moreover, when thinking about making the regulatory system work for regular people, it is sobering to remember that it took nineteen litigious years to strip a public frequency from a duplicitous and racist owner and finally award WLBT to black owners. But this is perhaps too harsh a view. Parker sees the opening up of broadcasting to minorities as the most lasting benefit of the broadcast reform movement, even as he recognizes that the movement has had little impact on the overall

structure of US broadcasting (Parker, interview by author, September 29, 1991). The really sobering thought is that the old broadcast reform coalition has clearly collapsed, and a new social movement seems to have emerged. The new movement -- conservative and bent on reversing the gains of the 1960s under the banner of a new federalism -- seeks to limit standing, curtail the ability of citizens to bring legal actions, and diminish public (especially federal government) intervention in general.<sup>5</sup> In such an environment, it has become extremely difficult to assert a non-market-based conception of the public interest in today's communication world.

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<sup>5</sup> At the judicial level, a "neoclassical revival" in administrative law has been taking place in the Supreme Court under the leadership of Justice Scalia. Several decisions of the early 1990s tighten access to the judiciary, making it harder for parties other than those directly regulated by an agency to challenge the agency's action. For an overview, see, among others, Werhan (1992). As a social movement, the action is probably hottest in the environmental area. See Echeverria & Eby (1995).

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