

**PART THREE**  
**DEFENDING THE PEOPLE'S RIGHT TO KNOW:**  
**TESTING THE LEGAL RESPONSIBILITY OF**  
**EMERGING TELEVISION STATIONS IN THE SOUTH**  
**TO FAIRLY INFORM THE PUBLIC ABOUT THE**  
**CIVIL RIGHTS MOVEMENT**

When network television stations NBC and CBS were founded in 1941, the average citizen was still also seeing and hearing video news reports at their local movie theater in news segments before the feature presentation. Radio and the print press still dominated local, regional, national, and international news dissemination to the general public. Brown v. Board was front page news in the New York Times newspaper, but for the first time television, a now emerging technology dating back to the 1920's, was being provisioned as a way to bring the average citizen closer to current events. ABC television began to air as a third outlet in 1948.

As the Movement began in Montgomery, the black press and courageous southern newspaper editors gave the public a forthright account of southern resistance to Brown v. Board of Education, and presented at least outside the courtroom local coverage of the trial of Emmett Till's killers, the events at Little Rock's Central High School, and other watershed moments in the early Civil Rights Movement. Dr. King was interviewed by television reporters in 1955, and television inserted itself quite rapidly as a new way of adding images to voice in the coverage of newsworthy events.

Both the print press and early television included courageous black and white advocates of social change who educated the public about the Movement's protests of racial segregation, but both the white-owned print press and early television also included those owners who used newspapers and television broadcast licenses to encourage and empower southern resistance to the Movement. A key factor in this vital aspect of the Movement and the role of the institutions which were gatekeepers of our First Amendment freedoms, was the distinction between the responsibility of a newspaper owner and the responsibility of the owner of a television station owner who held a license to broadcast, awarded to that "station" by the Federal Communications Commission. Cities like Nashville had experienced separate newspapers – one in favor of racial inclusion and the other sympathetic to pro-segregation forces. Early television faced a unique challenge because citizens of a particular community had only one NBC, CBS and/or ABC affiliate as their source of news film footage and narrative.

A seminal case illustrating this aspect of the Movement was Office of Communication of the United Church of Christ v. The Federal Communications Commission and Lamar Life Broadcasting Company, 359 F.2d 994 (D.C. Cir. 1966), the subject of a book by Kay Mills, *Changing Channels: The Civil Rights Case that Transformed Television* (University of Mississippi Press 2004). The case arose from a decision of the Federal Communications Commission granting a one-year renewal of a license to the owners operating television station WLBT in Jackson, Mississippi.

The United Church of Christ, and other parties, filed a petition with the Commission to present evidence and arguments opposing the renewal application. The petitioners alleged that the owner and licensee of WLBT was deliberately using its license to sustain and advance southern white opposition to desegregation and to deny air time to the Movement or those who supported it. The FCC dismissed the petition and, without a hearing, took the unusual step of granting a restricted and conditional renewal of the license for one year from June 1, 1965, with conditions, thus establishing a *de facto* probationary period. Not to be lost in this history is that this renewal was granted to a station that had been the source of news in Jackson since 1953, under the same ownership.

The issue in the case, remarkably described as an issue of first impression under Section 309 of the Federal Communication Act as it existed in 1965, was whether the United Church of Christ, and the other parties challenging the license renewal, had standing as parties in interest regarding the granting or denial of the broadcast license to WLBT. More specifically, the question presented was whether these parties, as representatives of the listening public of a federally licensed television station, could require the FCC to conduct an evidentiary hearing on their claims of racial bias before renewing the station's license.

*As early as 1955, the year of the bus boycott*, members of the listening public of station WLBT had claimed that it had deliberately interrupted the broadcast of a program about race relations issues that included the appearance of Thurgood Marshall in his capacity as General Counsel of the N.A.A.C.P. Legal Defense Fund, Inc. The interruption was effectuated by the display of an image reading "Sorry, Cable Trouble." Subsequent complaints alleged the airing of programs encouraging continued support for segregation, while denying airtime for opposing views. The context of the case was thus typical of southern resistance to desegregation.

The Court's first opinion noted that when WLBT sought renewal of its license in 1958, the FCC at first deferred renewal because of these complaints, but then granted a three-year renewal. The Court recognized the requirement of "fair use" of a broadcast license, but held that, in the opinion of the Commission, WLBT's incidents of noncompliance with the FCA were isolated. In 1962, during the events surrounding Mississippi Governor Ross Barnett's personal involvement in denying the admission of James Meredith to the all-white University of Mississippi, on the basis of Meredith's race, the FCC received additional complaints that WLBT and other Mississippi radio and television stations presented programs promoting resistance to racial integration and denied airtime for any opposing view.

The Commission requested reports from licensees, and during an ongoing investigation that extended into the spring of 1964, WLBT submitted an application for another three-year renewal. The Office of Communications of UCC filed a petition before the FCC, arguing for denial of WLBT's application for renewal. Specifically, they sought to intervene in their own behalf and as representatives of viewers in the State of Mississippi, and particularly UCC's members within WLBT's prime service area.

The petition specifically alleged the failure of WLBT to serve the general public, emphasizing its failure to provide a fair and balanced presentation of controversial public issues, especially those issues concerning black citizens who comprised almost forty-five per cent of the total population within the station's prime service area. The Commission denied the petition to intervene, asserting that only those who had a direct interest, as distinguished from the interest of the general public, in the alleged violations that influenced the licensee's renewal application, could claim standing.

Summarily deciding this central standing issue, *i.e.*, the question whether WLBT met the "public interest" standard, the Commission held no hearing, and approved another three-year license. Arguably begging the central question raised by the parties opposed to license renewal, the Commission observed that broadcast stations like WLBT were in a unique position to contribute to the resolution of race relations issues in their broadcast area. Thus, after almost ten years of complaints, the Commission allowed WLBT yet another opportunity, absent any hearing, to demonstrate its willingness and ability to resolve the issue of fair and balanced programming related to the Civil Rights Movement.

The Commission did describe its renewal as "probationary" and did order WLBT to initiate discussions with community leaders, including the petitioners in the case and other representatives of the Civil Rights Movement. It also ordered WLBT to terminate any racially biased programming. Noting the legitimacy of the petitioner's allegations, the FCC nevertheless justified its action by seeing the issue presented as requiring a political decision entrusted to the Commission. The Commission also justified its holding by seeing the case as one of first impression and without precedent, observing that prior challenges to license renewals had been based on economic injury and electrical interference [Citing NBC v. FCC (KOA), 132 F.2d 545 (1942), *affirmed*, 319 U.S. 239 (1943), and FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940)]. However, the very cases cited by the Commission, holding that economic injury and electrical interference could be the basis for objection to license renewal, had expanded the Commission's own prior denials of such standing arguments.

This obviously became the central issue on appeal, and the federal Circuit Court observed that standing had never been a static issue. The Court noted, for example, that in NBC v. FCC, it held that if standing were restricted only to persons with an economic interest, educational and non-profit radio stations, both of which were prime sources of public-interest broadcasting, would be denied standing in the license renewal process. Moreover, in the cases allowing standing based on economic interest or electrical interference, the rationale had been that standing is extended to parties not on the basis of their private interest, but to protect the public interest served by broadcasting, the purpose of §402 of The Communications Act, which was in effect at the time of those cases.

Thus, the Court reasoned, standing is afforded, under these and similar cases, to private petitioners as representatives of the general public. In fact, the Circuit Court observed, Congressional Reports emphasized that the principal concern in limiting standing is not an undifferentiated fear of the number of parties given access to the

process. Instead, standing requirements could and should be applied so as to insure that parties to the process have a legitimate interest in the matter of license renewal, and not merely a desire to delay the process for private benefit, unrelated to the public interest. So viewed, the Circuit Court reasoned that there is no more genuine interest in the matter of a broadcaster's license renewal than the interest of the broadcast public served by the station, citing the analogy of the Interstate Commerce Commission's consideration of complaints of racial discrimination in railroad dining cars, in Henderson v. United States, 339 U.S. 816 (1950).

The Court's recognition of the legitimacy of the rights of a radio or television station's listeners or viewers distinguished the special responsibility of a broadcaster, as compared to the responsibility of the publisher of a newspaper. The Court saw newspapers and broadcasters as having common traits, but emphasized that, unlike the newspaper owner, the broadcaster is the beneficiary of a franchise that gives it unique access to its listening or viewing area, and that such a special franchise is in the nature of a public trust, subject to a responsibility for fair and balanced programming. (Keep in mind that at the time of these seminal cases, a station like WLBT was the earliest network affiliate in its viewing area, being connected to one of only three national television companies, The National Broadcasting Company).

Finally, the Court held, while the Commission itself is the agency responsible for protecting the public's interest, it cannot itself directly monitor compliance of individual broadcasters, and thus cannot legitimately assert that a broadcaster's listening public cannot or should not assist in the process of agency regulation through licensing. It is here that the Court seemed most critical of the Commission's denial of standing in the UCC case, writing that the promotion of the public interest is at the very heart of the role of the broadcaster, *e.g.*, WLBT, and cannot be separated from the station's economic interests. The Court explained that, rather than interfering with the broadcaster's private business affairs, the public's participation in the integrity of the broadcast licensing process fulfills a duty to monitor the integrity of the television programming that directly affects the listening community.

Revealing the flaw in the Commission's argument, both logically and experientially, the Circuit Court rejected the proposition that the Commission could protect the interests of its listeners or viewers on its own, while denying them formal standing to participate in proceedings which raised questions regarding unfair or imbalanced programming on public issues such as civil rights. The strongest factual evidence of the need for direct participation was revealed by the lack of any significant action of the Commission regarding WLBT's license, *in spite of a decade of complaints on behalf of its viewing public*. The Court concluded on these facts that viewer participation must be recognized in the license renewal process before the Commission.

The threshold issue having been determined, the Circuit Court held that responsible and representative community organizations, professional societies, churches, and educational institutions are usually close to community issues, and motivated by public interests rather than private commercial interests. Such groups should therefore be

allowed formal standing in these cases with discretion afforded the Commission as to the number of groups necessary for the adequate presentation of the public's concerns or complaints. Thus, under Section 309 of the FCA, the Commission would be required to hold a hearing on a renewal application where there are genuine disputes of material facts related to the public interest at stake, *or* where the Commission is unable to make the necessary finding absent factual evidence from such representative parties.

That had not been done in the instant case. In spite of the fact that the Commission recognized the petitioners' ongoing complaints as sufficient to raise questions about WLBT's future performance, the Commission, by a divided vote, granted a one-year renewal of the license *sua sponte*, absent any specific affirmative findings that renewal would serve the public's interest. The Commission in fact granted the renewal to allow WLBT to somehow demonstrate that it was willing to fairly serve the public's interest, ignoring, the Court held, alleged issues of racial bias, supported by disputed facts that should have been considered in an evidentiary hearing. The Court thus concluded that where the issues at stake might call for the nonrenewal of WLBT's license and the consideration of other ownership applications, the Commission's renewal of the license was erroneous.

On remand, in Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969), the Circuit Court considered the hearing mandated by the decision in the first appeal. In that proceeding, the Hearing Examiner afforded WLBT the benefit of the one-year renewal decision, and then held that the petitioners had been given every opportunity to sustain their allegations of racial bias and had failed to do so. In the second appeal, the Circuit Court immediately questioned the Examiner's perspective of the evidence, noting that the Commission had already determined that the petitioner's evidence had been sufficient to deny a traditional three-year renewal. More specifically, from a procedural standpoint, the Examiner cast the petitioners as plaintiffs, and the licensee as the defendant. The resulting burden of proof consequences imposed on the petitioners apparently replaced the Commission's responsibility, on remand, to conduct its own *de novo* investigation of all the facts and determine if there were grounds for denial of the licensee's application for renewal of its traditional license.

The Court questioned the Examiner's fundamental view of the kind and scope of evidence presented at the hearing on remand. Despite the Court's admonition in the first appeal that the Commission could not effectively self-monitor licensees, the Examiner completely disregarded the petitioners' play-back of seven days of monitoring, and ignored its explicit evidence that during that time at least one broadcast showing lunch-counter sit-ins in protest of racially segregated facilities was cut-off, so that the picture disappeared from the television screens of viewers. The Court also found that the Examiner ignored or belittled explicit evidence of the use of racial slurs by WLBT commentators, on the ground that such evidence was indefinite as to dates or circumstances. The violation of process, the Circuit Court explained, was not a question of whether such evidence, in the end, would justify nonrenewal of WLBT's license, but rather the issue at stake was that the Examiner improperly placed the entire burden of proof on the petitioners as it would be placed on a plaintiff in a civil trial, and that the

Examiner treated testimonial evidence as mere allegations. This, the Court held, was a violation of the Commission's affirmative duty to develop the pertinent record in a manner that sustains the principle that a broadcast licensee is *entrusted* with a public resource.

The Court rejected the Commission's acceptance of the Examiner's perspective of the case, and vacated its summary ruling that WLBT had afforded a reasonable opportunity for the use of its facilities by the community groups to which it was accountable. The Court of Appeals held that the issue, which had been misstated throughout the case on remand, was that WLBT had, at all times, the responsibility of proving itself qualified for the renewal of its three-year broadcast license. Finally, the Court held that WLBT had no entitlement to operate the station while additional hearings were held, and that applications should be entertained for the license under which WLBT was operating, without any interruption in service to the viewing public.

[Having completed the text of Part Three, the reader should refer to the Oral Histories section of the web site's Home Page and view Professor Bickel's interview with Martin Firestone.

Martin Firestone was a central figure in Office of Communication of the United Church of Christ v. The Federal Communications Commission, a case that is the subject of Kay Mills' book, *Changing Channels: The Civil Rights Case That Transformed Television*. Martin Firestone's legal career included service as a member of the FCC's legal staff – and that experience gave him a unique perspective as he later assumed the legal representation of Civic Communications Corporation, a group which not only opposed the renewal of the FCC license held by WLBT television in Jackson, Mississippi, but challenged WLBT for the license. The case would become the most important test of the "Fairness Doctrine" and the right of citizens to participate in the process that required television stations licensed by the FCC to honestly represent the public interest – during the campaign for civil rights in the 1960's].