In the

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,	No. 76-1471
CHANNEL TWO TELEVISION COMPANY, ET AL.,	No. 76-1521
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION	No. 76-1604
ILLINOIS BROADCASTING COMPANY, INC., ET AL	No. 76-1624
POST COMPANY, et al.,	No. 76-1685
Petitioners,	
--VS--	
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, et al.,	
Respondents.	
NATIONAL ASSOCIATION OF BROADCASTERS,	
Petitioner,	
--VS--	No. 76-1595
FEDERAL COMMUNICATIONS COMMISSION, et al.,	
Respondents.	

Washington, D. C.
January 16, 1978

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POST COMPANY, et al., Petitioners, v. NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, et al., Respondents.	No. 76-1685

Washington, D.C.
Monday, January 16, 1978

The above-entitled consolidated matters came on for argument at 1:03 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, Esq., 1100 Connecticut Avenue, N.W., Washington, D.C. 20036; for all private petitioners.

DANIEL M. ARMSTRONG, III, Associate General Counsel, Federal Communications Commission, Washington, D.C. 20554; for petitioner and respondent F.C.C.

LAWRENCE G. WALLACE, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; for respondent United States.

CHARLES M. FIRESTONE,Esq., c/o Communications Law Program, UCLA School of Law, Los Angeles, California 90024; for respondent National Citizens Committee for Broadcasting.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 1471, Federal Communications Commission against National Citizens Committee for Broadcasting, and consolidated cases.

Mr. Griswold, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF ALL PRIVATE PETITIONERS

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

These cases are here on petition for certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit. There are many parties and several issues. All arise out of the ownership of a newspaper and of a broadcast facility, television or radio, in the same community by the same interests. In the terms of the trade this is known as cross-ownership.

The issues here result from an order of the Federal Communications Commission made in 1975 after five years of hearings. This was a rule-making proceeding, and the result is known as the Commission's Second Report and Order. It occupies most of the first volume of the Appendix from pages 134 to 338. The rule announced by the Commission was that it would not hereafter grant a new broadcast license or transfer

of license where there was cross-ownership. This is known as the prospective rule. But the Commission also determined that it would not apply this rule retroactively; that is, that it would not refuse to renew existing licenses solely on the ground of cross-ownership. This is known as the grandfather provision of the rule.

There was, however, an exception to the grandfather rule. In 16 small market situations where there was no other newspaper and no other comparable broadcast facility, the Commission did apply its new rule to existing licensees. It said that they must divest either the newspaper or the broadcast facility by 1980.

Numerous appeals were taken to the Court of Appeals for the District of Columbia. The Federal Communications Commission naturally defended its order. But the Department of Justice attacked it, the government speaking with many voices, particularly with respect to the grandfather provision.

The Court of Appeals last March affirmed the prospective order. But it found that the grandfather provision was invalid because, it said, it was not rational. It held that because of a compelling presumption--and that is the Court's words--in favor of diversity, and again I quote, "divestiture is required except in those cases where the evidence clearly demonstrates that cross-ownership is in the public interest." Under the judgment of the Court, those

portions of the order that have retroactive effect and those portions dealing with existing combinations are vacated, and the record is remanded to the Commission for adoption of rules not inconsistent with the opinion of the Court of Appeals.

In this Court there are widely divergent interests. I represent the private parties, newspapers and broadcast stations, and the American Newspaper Publishers Association and the National Association of Broadcasters. Some of my clients are concerned with the prospective rule and others are primarily concerned with the grandfather question. I am also appearing for the small market situation and also for some newspaper-radio combinations which seem to be at some risk of being lost in the shuffle.

I now turn to the validity of the prospective rule. There is a serious constitutional question here. The petitioners, newspapers and broadcast stations, are subjected to blanket exclusion from Commission licensing merely because they engage in publishing. The government may not condition the grant of a privilege on the forfeiture of a constitutional right as in effect this Court held in the Simmons case some ten years ago in a different context.

Q Mr. Griswold, suppose a television station had broadcasts which were clearly, for the purposes of my question, clearly enough to pass the hurdles of the obscenity decisions of this Court--that is, we would not sustain a

criminal conviction for what they had shown on the television--would that be a ground to consider denial of the renewal of the license at the end of the three-year period?

MR. GRISWOLD: That would certainly be a ground to be taken into account along with all the other factors in determining whether the license should be renewed.

Q How do you square that with the--I am sure you have a distinction between what you just--

MR. GRISWOLD: Because we are not dealing here with something which says this is merely a ground to be taken into account with all the other factors. We are dealing here with a blanket rule which says that if you are in common ownership with a newspaper, you cannot receive a license. Now, whether you get a renewal or not is the question of the grandfather rule, which is the next part of my argument.

Q Let me change my hypothetical then. The only adverse evidence against the broadcaster is found in a series of broadcasts of the kind I included in my original hypothetical question. And the Commission said any licensee which persists in that kind of broadcasting will not be renewed, period. That is the only ground.

MR. GRISWOLD: That would be precisely this case. That would be announcing a rule that in the case of cross-ownership there cannot be a renewal. And that, I suggest, is contrary to constitutional provision.

Q Say one newspaper in a two-newspaper town wants to merge with the other, and let us suppose that the existing statute that allows that in some circumstances had not been passed. Do antitrust laws validly apply?

MR. GRISWOLD: The antitrust laws clearly apply to newspapers and to television. In any event, where there is a violation of the antitrust laws, as there was in the Lorain Journal case which came to this Court, the Department of Justice can proceed under the--

Q The newspaper says, "The only reason I cannot acquire the other newspaper is because I am a newspaper. Some other company could acquire it."

MR. GRISWOLD: As the Lorain Journal case shows, it is not just that it is another newspaper. It is the actual anticompetitive effect.

Q In the news business.

MR. GRISWOLD: In the news business. In the Lorain Journal case, for example--

Q And the government is entitled to insist that there be dispersion in the publishing business; is that it?

MR. GRISWOLD: Mr. Justice, it is a difference, it seems to me, between the antitrust laws and the influence or weight to be given to anticompetitive effect.

Q I know, but anticompetitive cannot conceal the fact that we are talking about competition in the news

business.

MR. GRISWOLD: And I am perfectly willing to concede that the anticompetitive effect can be taken into account, along with all other factors in determining whether a license should be granted or should be renewed.

Q The government under the antitrust law could validly prevent there being only one paper in the town where there had been two before?

MR. GRISWOLD: I am not sure of that, Mr. Justice.

Q Suppose that otherwise, based on antitrust considerations, you would conclude that the antitrust laws would be violated.

MR. GRISWOLD: No, no, I do not, Mr. Justice. There are many cities of this country which have only one newspaper.

Q I understand that.

MR. GRISWOLD: And I know of nothing to indicate that that violates the antitrust law.

Q I just pose to you though the situation where, under ordinary antitrust principles, merger between two papers would violate the antitrust laws under commonly understood antitrust principles. You would say that if that were true, you could prevent the merger of the two papers without violating the first amendment?

MR. GRISWOLD: Yes, Mr. Justice, without violating

the antitrust laws. And I know of nothing in these cases which indicates that any of these interests has violated the antitrust laws.

Q I know, but then in that case the government is saying there must be two newspaper voices in the city--

MR. GRISWOLD: And that is applying the same law to newspapers that applies to every other kind of business in the country; whereas, this rule applies only to newspapers and applies a rule which is much more stringent.

Q You would not say then that the antitrust laws could validly prevent all the press, all the newspapers, and all the television stations in the city merging?

MR. GRISWOLD: I assume that that would violate the antitrust laws.

Q Even though you had television stations as well as newspapers?

MR. GRISWOLD: I thought you said all the newspapers and all the television stations merging.

Q I did. I did.

MR. GRISWOLD: That under many circumstances would violate the antitrust laws, and I am not contending that the newspapers are not subject to the antitrust laws. I am contending that they cannot validly be made subject to a blanket rule based simply on the fact that there is cross-ownership.

Q Mr. Griswold, let me ask the other side of this same coin. Do you know how many communities in this country have more than two newspapers?

MR. GRISWOLD: No, Mr. Justice, I do not. Not a great many.

Q Not a great many. And hence we do deal with a product of scarcity even on the newspaper side.

MR. GRISWOLD: Even on the newspaper side. Washington at the moment has two newspapers.

In Buckley against Valeo this Court said that--"But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." This is a sort of never-never land, as Justice Stewart pointed out in the Democratic National Committee case. Here the First Amendment designed to protect press freedom is used to restrict the press. And this is done to enhance the First Amendment's value of diversity in broadcasting.

Q Do you think the Commission saw its source of authority to require diversity in the First Amendment?

MR. GRISWOLD: I am not sure that the Commission did it only there. The Court of Appeals certainly did. The Court of Appeals said a presumption was compelled in order to carry out First Amendment values.

Q It said about the same thing in Buckley against

Valeo.

MR. GRISWOLD: Yes.

Q It said about the same thing in the Democratic National Committee case.

MR. GRISWOLD: And the Democratic National Committee case.

Q The same court.

MR. GRISWOLD: There is nothing in the amendment about diversity, just freedom. And there is a further paradox. The regulations here were intended to affect more than broadcast media, and they can have no effect on diversity in broadcasting. Looking only at broadcasting, there will be no more diversity after these amendment rules are in effect than there was before. There will be just as many voices.

Q Has not diversity been a factor in the decisions of the Commission for 50 years?

MR. GRISWOLD: Yes, Mr. Chief Justice, and I am quite clear that diversity can continue to be a factor, but not the controlling factor, not the one which makes a controlling presumption in the face of which everything else must yield. The First Amendment--

Q When you have a half a dozen considerations, how do you really determine which is the one that broke the camel's back?

MR. GRISWOLD: Mr. Chief Justice, the closest

analogy I have been able to think of, I suppose based on my past experience, is the problem of the Bakke case. What do you do when you have more applicants than you can handle? You take into account a great many factors, and you come up with your conclusions. And that, it seems to me, is what is involved here. Diversity is an appropriate factor, but it is not appropriate to make it the exclusive factor, which the Court of Appeals did below. The First Amendment is a shield, not a sword to promote diversity.

But the Court need not resolve this constitutional question. Just as in Helbing against Griffiths, it held that in the absence of a clear statement by Congress, it need not decide whether stock dividends are constitutionally subject to income tax. And I may add that Congress has never made that decision, and stock dividends are not subject to income tax. By any analysis, the prospective rule is clearly a legislative action which can only be supported by an adequate delegation from Congress.

It is my contention that Congress has never made any such delegation.

In addition to the constitutional doubt, we have the fact that a ban on cross-ownership is a fundamental exercise of governmental power affecting important aspects of our free society and involving a substantial change in the practice over the past half century. There is room to argue, I think, that

such a fundamental change going beyond radio and television and reaching into the printed press is one which should be made or authorized by representatives of the people in Congress, and that authority to make such a change should not be inferred or surmised.

In our briefs we have discussed the nature of the authorization. All that has ever been given to the Commission was given to it in 1934 when it was given power over communication by wire or radio, not power over newspapers. And it was also given authority to grant licenses if public convenience, interest, or necessity will be served thereby--language obviously taken over from the traditional public utility statutes without any thought of newspapers.

Moreover, we have some legislative history which is pretty good and detailed in the newspapers. In particular, in 1952 the Senate passed a statute affecting the powers of the Communications Commission. The House amended that statute with an explicit provision saying, "You do not have any power over newspapers." The exact language is quoted in the brief. It went to conference. And the conference took out the House amendment. But the conference committee issued a report in which it stated that this was taken out because it was unnecessary, that the Commission did not have any power over newspapers.

Q How much weight can we attribute to what the

1952 Congress thought as to what the 1934 Congress meant?

MR. GRISWOLD: I would suggest, Mr. Justice, that that is not what we are dealing with here. We are dealing with what the 1952 Congress did. The 1952 Congress--many times committee reports have been used to establish the intention or meaning of an act of Congress. And in the hierarchy of committee reports conference committees are the very highest. And here we have a conference committee report clearly dealing with this question, after which both Houses passed the statute and the president signed it. And I would suggest that that is--I agree, it is not language in the statute, but it is the closest to it that you will ever find, and it is not simply a case of subsequent members saying, "Well, we did not mean so and so back there in '34."

Now I must turn to the grandfather question, the action of the Commission making its new rule inapplicable to existing licensees except in certain small market situations.

The court below has held that the Commission could not, in the court's words, "rationally reach the conclusion in favor of grandfathering." And it has held, apparently based on First Amendment value, that there is a, quote, "presumption in favor of divestiture," close quote, which must be give, quote, "controlling weight," close quote, so that, quote, divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is clearly in

the public interest." And the court expressly recognized that its pronouncement was a, quote, "court-approved policy," and it remanded the case to the Commission for adoption of a rule not inconsistent with its opinion.

In doing this, the court violated proper standards of judicial review because it is not its function to tell the Commission what rule to make. For example, if the Commission knew that it could not use the grandfathering technique in this area, it might decide that no rule at all is preferable. That is a matter for the Commission, not the court. But the court below has decided that divestiture is required except on an affirmative showing of public interest.

In essence, this is the question which was decided by this Court six years ago in the Democratic National Committee case. There the court below held that the Commission must make a new rule requiring licensees to accept editorial advertising on the same general ground. This Court held that there was no such constitutional requirement and that courts should not freeze the Commission's necessarily dynamic process into a constitutional holding. But this is precisely what the court below has done here. It has required that a specific rule be adopted because, in the court's view and words, the First Amendment's search for truth will be facilitated by governmental policy that facilitates diversity. There is no basis, I think, upon which this conclusion can be supported.

I am supported with respect to the grandfather argument by counsel for the Federal Communications Commission, and I think that I will leave most of the rest of the argument to Mr. Armstrong. But this court has held in the Idaho Power case that the selection of appropriate policies in carrying out its statutes is an administrative and not a judicial decision.

And in the Board of Trade against the United States a good many years ago, the Court said, "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."

There are two remaining issues to which I can give only brief consideration. In its final order, the Commission listed 16 situations to which it did not apply the grandfather rule. These are seven cases where there was co-ownership of the only newspaper and the only television station in the community even if there were radio stations in the community. There were also nine situations where there was a single newspaper and a single radio station or a combination of AM/FM radio stations. These situations have been called egregious cases. But I think that is too pejorative. They may more accurately be called small market cases. The Court of Appeals set aside this portion of the Commission's decision, and in this respect the court's decision should be sustained.

The Court of Appeals is correct in holding that,

quote, "The record contained no evidence that justified the disparate treatment of the 16 affected combinations." And the Commission itself said that the rules are not in the least premised on the existence of improprieties in the operation of the media holdings.

Q Counsel, if we are talking about rules, why does there need to be any reference to a record? The Commission can make a rule without having any record before it, can it not?

MR. GRISWOLD: That certainly is a nice question. I would suggest that a rule which is applicable to only 16 instances out of hundreds is not really a rule but necessarily involves what amounts to an adjudication with respect to those 16 instances. For example, in some of these cases, there is cable television. In one of the cases, where there is a newspaper and a television station, there are seven radio stations in addition, separately owned in the community. And all of those things, it seems to me, should be taken into account. This question of the small market cases is dealt with more fully in the red covered brief.

Finally, I would say that this dog has a very small tail. There are a few situations of cross-ownership of a newspaper and radio station where there are other broadcasters, television or radio, in the same community. These were not covered by the Commission's order because of the grandfather

clause. However, should the Court uphold the Court of Appeals in saying that the grandfather clause is invalid, then they would be swept in. But the position is made in the blue and the green brief that radio is different from television, that there should be separate considerations of the question whether the rule should apply to radio where there is only radio and television and there are other voices in the community. And my position is that care should be taken to see that these newspaper-radio combinations are not just caught up in the draft and carried away.

Our basic contention is that the Commission had no authority to make any rules in this area either for constitutional or statutory reasons, but that if it did have such authority, it did have power to make the grandfather provision.

MR. CHIEF JUSTICE BURGER: Mr. Armstrong.

ORAL ARGUMENT OF DANIEL M. ARMSTRONG, III, ESQ.,

ON BEHALF OF PETITIONER AND RESPONDENT

FEDERAL COMMUNICATIONS COMMISSION

MR. ARMSTRONG: Mr. Chief Justice, and may it please the Court:

The Commission's fundamental position in these consolidated cases is, first, that our prospective rule is a rational exercise of our rule-making authority grounded in the public interest standard of the 1934 statute; and, secondly, that our refusal to apply the new policy against

additional co-located newspaper-broadcast combinations to existing combinations, except in certain of the small market cases, is rational and was adequately explained in the second report and order.

On the first contention and at the outset, I believe the question came up as to whether the Commission felt that the First Amendment was the source of the prospective rule. I will concede that I think the Court may find some language in the Commission's second report and order in which the Commission said that what we are doing here is consistent with the objective of the First Amendment, to encourage a number of speakers. But I would not stand on the First Amendment constitutionally compelling the Commission to have adopted the prospective rule.

Q Or authorize it?

MR. ARMSTRONG: Or even--well, I think, Mr. Justice White, that it is authorized by the public interest standard in the Communications Act.

Q Which is what, interstate commerce? It has an interstate commerce basis?

MR. ARMSTRONG: It is the standard that, among other considerations, the Commission can take into account in allocating spectrum resources is a policy of diversity. And that is one component of the public interest.

Q And that is based on Congress's authority over

interstate commerce?

MR. ARMSTRONG: Yes, sir. Yes, sir.

Q And not on the First Amendment.

MR. ARMSTRONG: Not the First Amendment, yes, sir. I understand your question.

In applying that diversity component of the public interest standard, the courts--both the Court of Appeals and this Court's dictum in the 1959 RCA case--have long recognized, and Dean Griswold conceded this, that one of the relevant factors the Commission can take into account in deciding how to allocate spectrum resources is whether the applicant before it has ownership interest not only in other broadcast stations but also in newspapers. So--and I believe, Mr. Chief Justice, you may have alluded to this--as we view this case, the real question in this case raised by the prospective rule is not a First Amendment question. It is whether the Commission has rationally, in applying the public interest standard of the act, reached the position where it is ready to announce that this one relevant factor is now going to be determined.

I might say it is not determined in an exceptional case which might warrant a waiver of the rule. But for purposes of argument, since that is admittedly an exceptional case, we will proceed on the assumption that we have said it is going to be determined. And the Commission would respectfully submit that that is not a case of first impression before

this Court because prior to the adoption of the multiple ownership rules that were before the Court in the Storer Broadcasting case in 1956, if an applicant owned seven AM radio stations, for example, and was applying to the Commission for an eighth AM radio station. Presumably it would have been recognized that in applying the diversity policy and in passing on that application the Commission could certainly take into account the fact that the applicant already owned seven AM stations. But the argument prior to this Court's decision in Storer, which the Court of Appeals in the Storer case had accepted, was that the Commission could not make that one fact determinative and would instead be able to deny that application only after a full hearing in which the applicant could submit all of the so-called other relevant factors the applicant wished to consider.

Q How much weight could the Commission give if an applicant had only four television stations but their market area came into play?

MR. ARMSTRONG: I believe I understand, Mr. Chief Justice, that your question is suppose the Commission was to change the present rule, which says there is a limit of five VHF stations, to try to change it to four. If the Commission were to do that, I think we would argue that kind of line--

Q What I had in mind was four stations in New

York City, Newark, Trenton, and Philadelphia, something like that.

MR. ARMSTRONG: I think the closer the location, the easier a job the Commission would have in convincing the Court that its public interest judgment was rational. Yes, sir. I would not want to say that we could not argue for a different limit, even if they were not close together. But that is clearly relevant, and that was my point in this case, that just as it was a rational public interest judgment in Storer, to finally reach a judgment that seven AM stations is it, subject to a waiver--and this Court said the Commission, once it reached that judgment, could announce its judgment in the form of a rule, and the Court reversed the Court of Appeals in Storer--we are saying to you that the point has now come, and the Commission has rationally explained why, it feels it is now in a position to make the facts that an applicant for a new license or a transfer, the fact that that applicant is a newspaper owner, we are now ready in the application of our licensing experience to say that that is going to be determinative.

Q The case is not over if we agree with you on that, is it?

MR. ARMSTRONG: No, sir. I am saying we have to still defend our grandfather rule, if that--

Q No, I mean--

MR. ARMSTRONG: Oh, the statutory authority point?

Q You cannot win this case without our deciding the constitutional issue, can you? Your position may be a very rational application of the public interest standard and still be barred by the First Amendment.

MR. ARMSTRONG: We read, Mr. Justice White, the NBC case to give us--

Q Anyway, you are going to argue the constitutional issues?

MR. ARMSTRONG: Yes, sir.

Q All right.

MR. ARMSTRONG: If we are acting without our statutory authority--and in a moment I would like to discuss Dean Griswold's reference to the '52 legislation--but if it is within our general rule-making authority under the '34 act and if the public interest judgment is rationally explained and if that leads us to a decision to deny an applicant a license, it is our position that that applicant has not had his First Amendment rights violated anymore than the applicant for the eighth AM radio station would not have his constitutional rights violated if, in applying that rule that was upheld in Storer, we turned his application down.

As to the point of the statutory authority and the reference to the--

Q You mean we can just cite that case as an

authority for the constitutional questions presented here?

MR. ARMSTRONG: We read that case as saying that in applying the public interest standard, if the Commission rationally concludes that an applicant is going to not receive a license, that the applicant cannot complain because of the fact that as a result of not getting a license--

Q So, your answer is yes.

MR. ARMSTRONG: Yes, sir. We are relying on NBC for that point as dispositive. On the statutory--

Q Dean Griswold's argument, at least part of it, was different. And that is that this imposes an administrative inhibition on newspapers.

MR. ARMSTRONG: Mr. Justice Stewart, we--

Q Over which, first of all, the Commission does not have statutory jurisdiction and, secondly, it introduces a new First Amendment argument.

MR. ARMSTRONG: We do not ground this case in any way upon any asserted statutory jurisdiction over newspapers.

Q But that is the impact of what the Commission did.

MR. ARMSTRONG: The ultimate bottom line in the case, as we see it, is whether spectrum resources have to be given to an applicant. And we would say that this Court in the dictum in the 1959 case and the Court of Appeals in the McClatchy and Clarksburg cases have recognized that the

pap

status of an applicant as the owner of a newspaper is relevant for the Commission to consider in deciding whether to give that applicant a broadcast station.

So, we do not--as I tried to say at the beginning--think that there is any new First Amendment issue because of the newspaper status of the applicant injected into this case. It is really just a question of whether the Commission has now reached a point in the application of its licensing experience--to put the point differently, suppose the Commission had not adopted this rule and we had gone through the formalities of the process that Dean Griswold has urged that we should go through case by case for the next 30 years--and it just so happened that when this Court reviewed what had happened after the next 30 years, you would find that in every single case the Commission said, "In applying our cumulative insight and experience, we reached a judgment that the relevant factor of the applicant's newspaper ownership is now going to be determinative; application denied"--really that would be no different a situation than the situation we have now. The only difference is the Commission has announced in advance that its attitude is such as if there would be a denial.

Q But you did single out newspapers.

MR. ARMSTRONG: Mr. Justice Marshall--

Q I mean, for example, supposing the owner can own General Motors, the Atlantic Steamship Line, AMTRAK, four

bars and grilles, the Chase National Bank, and it is okay.

MR. ARMSTRONG: Mr. Justice Marshall--

Q But a newspaper, no.

MR. ARMSTRONG: Excuse me, sir. You are quite correct in your statement of what has happened. Our answer would be that the Commission is evenhandedly and rationally applying a relevant public interest policy of diversity. And I would have to concede to you that by its very nature that is the kind of policy which will have more bite as far as a newspaper or another broadcast station is concerned than as far as the owner of AMTRAK is concerned. There is no question about that, that by its very nature the policy is going to hurt a newspaper applicant's chances more than it will hurt the owner of AMTRAK's chances if he wants to get a license.

Q But then it is just not neutral at all. You are not neutral, are you?

MR. ARMSTRONG: I think that the policy of--if it could be characterized as that, it nevertheless is not a grounds for striking down what we have done because the diversity policy, it would seem to me by the tenor of your question, would fall; and that has been recognized.

Q I still do not see where you get jurisdiction over the newspaper owner.

MR. ARMSTRONG: We do not have jurisdiction over the newspaper owner. We have jurisdiction over the newspaper

owner only when the newspaper owner comes to the Commission and asks for a license, which is what we do have jurisdiction over, the allocation of a radio license.

Q But, I mean, do they have to set out all these other things?

MR. ARMSTRONG: Excuse me, sir?

Q Does the owner, the proposed owner, does he have to set out everything else he owns?

MR. ARMSTRONG: I do not want to get drawn into a detailed discussion of the Commission's ownership reporting requirements, but I think we do require and are moving increasingly to acquire increasing annual reports about other ownership interests they may have. And certainly we could tell from an applicant being before us I think whether or not the applicant was a newspaper owner or the owner of AMTRAK.

Q This is aimed at newspapers.

MR. ARMSTRONG: No, sir, it is--

Q I do not understand how you can get away from it.

MR. ARMSTRONG: The actual wording of this regulation, yes, sir, it is, on its face it is.

Q And does that not violate the specific provision of that committee report?

MR. ARMSTRONG: That was the point I was coming to. We--

Q Oh, good.

Q Before you get to that, we have said I think on a number of occasions here--and other courts have said it--that the First Amendment is not confined to newspapers or publishers. It belongs to everyone. Suppose you had a broadcast license available and one of the bidders was AMTRAK and the other one was a responsible, reputable newspaper. Would not the inquiry give great weight to the newspaper's experience in journalism as distinguished from AMTRAK's lack of experience in that field?

MR. ARMSTRONG: As I understand it, you are saying in that case his newspaper ownership would actually work in his favor.

Q Because it shows their experience.

MR. ARMSTRONG: Yes, sir. On the other hand, I would have to concede that, consistent with a long-standing Commission policy, as reflected for example in McClatchy under the diversity policy, it would cut the other way. And how the mix would come out--

Q This was only one newspaper.

MR. ARMSTRONG: --on an individual case--

Q A newspaper that had no other stations and no other--

MR. ARMSTRONG: Under those circumstances, it is quite conceivable that the weight in favor of the experience

factor that you mention would outweigh whatever demerit the applicant would suffer under the diversity criterion.

On the statutory authority point we have two arguments. The first one was suggested by Mr. Justice Rehnquist, and that is we think for the reasons that I have gone through that the '34 act, the public interest, rule-making standard authority given to the Commission in Section 303, as interpreted by this Court in Storer, is sufficient to answer the case and that the Court should not give much, if any, weight to the subsequent legislative history that was relied on by Dean Griswold. But if the Court is disposed to take into account subsequent legislative history, we call the Court's attention to the '74 statute. In '52, as was recognized in the argument, neither House actually--well, the House of representatives had, but in the final analysis it was just a conference committee report and there was no legislation. But in '74 the Congress was fully aware of the Commission's outstanding rule-making proceeding, which is now before this Court. They followed it closely, and there was interchange between the Commission and the Congress concerning the evolution of that procedure. And each House went on record with a legislative bill in 1974 which, we would respectfully submit, simply is inconsistent with the notion that Congress in 1952 had denied our authority in this area. The House of Representatives said, "Whatever it is you are

going to do in your outstanding proceeding on the basis of newspaper-broadcast cross-ownership, do it in a rule-making proceeding and also finish that rule-making proceeding by a date certain."

The Senate took out the first provision but also passed a provision saying, "In this outstanding proceeding you have got proposing a rule to ban future newspaper-broadcast cross-ownership, finish it by a certain date." And all the two Houses, the different versions, were not reconciled and no legislation ever emerged, we do think that the '74 history would remove any possible conclusion that in 1952 our general rule-making authority had been cut down.

To turn to our case before this Court as a petitioner, it is our argument that the distinction between the prospective and retroactive rules is a rational one and was adequately explained in our opinion. In the case of the prospective rule, the Commission, admittedly operating on the presumption that it was more realistic to expect true diversity if you did not have common ownership, decided to give that consideration determinative weight, even though we recognized--and the courts all recognized this--that there was no gusrantee that the more diverse viewpoints would result if we did not have separate ownership. But the Commission said under these circumstances, the prospective rule where you are not talking about other countervailing considerations, we think the one

reason we once had for allowing that is no longer determinative. In other words, we can have approval of other people coming forward. We no longer have to rely upon a newspaper owner to get service started. And so under those circumstances, even though the gain in diversity may be slight, it may be only hoped for in a great many cases; nevertheless, where there is no real cost on the other side of the balance wheel, we are going to give it determinative weight.

Q What happens if a newspaper in Baltimore wants to buy a radio-television station in Washington?

MR. ARMSTRONG: If--it would depend on the contour of the radio station in Washington whether or not it would place a certain contour over the City of Baltimore. I do not think it is by any means compelled from this rule that it could not be done. In fact, a new--let us make this point very clear. This is not a total ban against new newspaper owners coming into broadcasting. Just to take an easier case, if it is Richmond, Virginia, then for sure the Baltimore newspaper would be able to be eligible to apply for a radio station in Richmond.

Q That is why I did not pick Richmond. [Laughter]

MR. ARMSTRONG: You picked a case that would require some detailed application of the standards of the rule, and I would not know right offhand how it might come out.

Q That is through the city signal or some such

thing as that.

MR. ARMSTRONG: Yes, sir. Yes, sir, a specified signal for the whole community of Baltimore. Yes, sir.

The other considerations that were present in the case of a retroactive rule which did not in our judgment outweigh the presumed gain in diversity that would have resulted from applying the rule across the board were, first, that a broader divestiture rule of the sort that was advocated by the respondent National Citizens Committee for Broadcasting would have swept out proven licensees with long records of meritorious service. The Commission pointed out, I think it was, in paragraph 109 of the Second Report and Order that these licensees, many of them, had been there from the time the station was first established, and there was a study in the record that has not been disputed by, I believe, Mr. Robbins, saying that the particular newspaper licensees had shown by their action a much greater long-term commitment to broadcasting than had been true with others. So, the Commission was confronted with the fact that it was going to have to get rid of a class of licensees who included licensees with--

Q Mr. Armstrong, how many of the members of the class that are preserved by the grandfather clause fit that definition?

MR. ARMSTRONG: Mr. Justice Stevens, every member of

that class, it can be said of that member that its record has been before the Commission--at every three years at renewal time--has been passsed upon by the Commission and has been found to be in the public interest. And the Commission characterized, generally speaking, the record of the class as a group as meritorious--

Q And your argument is not that it includes some especially well-qualified stations but that everyone in the class has proven his entitlement to a continued license?

MR. ARMSTRONG: Well, it is true that--

Q I guess that is true about every licensee in the country, is it not?

MR. ARMSTRONG: Yes, sir.

Q With one or two exceptions, every licensee has had his license three years or more.

MR. ARMSTRONG: Yes, sir. In the case of these though it has been passed upon by the Commission at three-year intervals and is found to have been serving the public interest.

Q That is true about every licensee in the country with one or two notable exceptions.

MR. ARMSTRONG: I think in the case of these licensees generally speaking, Mr. Justice Stewart, they have been in there longer. As I said earlier, a lot of them have been in there since the beginning. So, there has been much longer

continuity of service in their case than is the case with a lot of other licensees, although it is true that the great value which the Commission places on continuity of service has clearly been evidenced by the manner in which the Commission has disposed of renewal applications. And nothing I might say in our efforts to preserve our grandfather rule in this case is intended to immunize any licensee from continuing to have to pass the Commission's scrutiny every three years and to be judged on their performance.

Q Was diversity involved in each one of these renewals?

MR. ARMSTRONG: I am not sure.

Q I think most of us have familiarity with renewals and applications; and sometimes renewals are almost perfunctory.

MR. ARMSTRONG: I am not sure--

Q Are they not?

MR. ARMSTRONG: Mr. Justice Marshall--

Q I am not speaking about FCC but in others, is that not possible?

MR. ARMSTRONG: That may be true in other agencies but--

Q It could not be in FCC. [Laughter]

It could not be in FCC.

MR. ARMSTRONG: I would not want to concede that we

have not followed our statutory mandate to make a public interest finding, although it--

Q I mean, I have difficulty with--suppose it happens that in this town there is one radio station, one television station, and one newspaper in a town the size of Washington, and there has been renewal for the last ten times. It automatically has the grandfather clause.

MR. ARMSTRONG: It means that it will not--well, there are certain small market cases which Washington would not include. So, if it is a larger market, it means that that applicant will not be required to divest because of the cross-ownership factor. It does not mean that that applicant three years from now can get a renewal. That applicant will get a renewal only if the Commission upon judging the applicant's record of performance--

Q That is true with or without this rule.

MR. ARMSTRONG: Yes, sir. Yes, sir. All that this rule does is tend to give the applicant a chance to have his future fate as a broadcaster, if he wants to continue, determined on the basis of his record of performance and not on the basis of the fact that he is a cross-owner. That is all it does. And in addition to our justification, which we think was rationally explained in our right to say that continuity outweighs a presumed gain in diversity, we also rely on the doctrine that this result of grandfathering is so

clearly rational in terms of our legal system's bias against retroactive applications and new policies that it really did not require a great deal of explanation, and it is consistent with what the Commission's licensing policy has been over the years. It is consistent with what we have done in past instances when we have adopted rules that are designed to further diversity by limiting multiple ownership, almost without exception.

Q Is it inconceivable that after five years experience or any number of years you want to pick, the Commission might come to substantially the same conclusion that the Court of Appeals came to now in a rule-making proceeding?

MR. ARMSTRONG: It is conceivable, Mr. Chief Justice, that--

Q On the basis of experience.

MR. ARMSTRONG: --the Commission, on the basis of experience, five years from now might reach a judgment that it should order more extensive divestiture and give more weight to diversity than it felt it was able to do on the basis of the record in this proceeding because this record did not establish a strong showing, and the Commission relied on that heavily. And clearly intervening experience might change the nature of the record. That was a very important part of the Commission's balancing process.

Q Mr. Armstrong, could I ask you, what is your view of the relative function of the Department of Justice and of your office in this case? Do you think your relative position is governed by Section 2348 of Title XXVIII?

MR. ARMSTRONG: Yes, sir, I believe that is the division we are relying upon in order for our authority to file--

Q I am sure it certainly looks like you have authority. But what about the Department of Justice?

MR. ARMSTRONG: It is our view that, like the National Citizens Committee for Broadcasting, they were a party with a very strong policy preference as to how the Commission should have weighed the competing considerations which were before it in the case of--

Q So, you would say that under 2348 the Attorney General, for example, could have instituted the entire review proceeding before the Court of Appeals, just disagreeing with--

MR. ARMSTRONG: Initially I might say in this case the Department of Justice did file United States v. FCC. They later withdrew it. I believe the Court of Appeals denied a motion by the National Association of Broadcasters to strike them as a petitioner--

Q So, you do not question at all the authority of the--I am sure you disagree with them in result--but you do not question their authority to take a position contrary to

yours with respect to divestiture.

MR. ARMSTRONG: We do not question their authority to tell us that they wished we had given more weight to the presumed gain--

Q Or to appear in this Court.

MR. ARMSTRONG: Or to appear in this Court.

Q What if the Federal Communications Commission had turned down the United States motion to intervene? Do you think they would still have any standing to challenge anything in the Court of Appeals other than the Commission's denial of the motion to intervene?

MR. ARMSTRONG: Your Honor's question is a good question, and I must say I have not focused on that question. And we, from our point of view, from time to time have considered whether it was appropriate for them to be opposing the Commission on a broad scale in the courts, and I would like to reserve my opportunity at some future occasion to make that argument. But I must say I cannot be very enlightening to Your Honor on that point right now.

Q Your position, I take it, in response to Mr. Justice White, is that since the Commission allowed them to intervene, just like they allowed a number of private groups to intervene, they have at least the standing of private intervenors.

MR. ARMSTRONG: Yes, sir. And we would go so far as

to say that under the circumstances where they were a party with a strong policy pitch before the Commission, either as a statutory respondent or as a petitioner, they probably should be allowed to make that argument.

Q Mr. Armstrong, but regardless of all of that, you recognize their right to intervene in this Court at any time, do you not?

MR. ARMSTRONG: Yes, sir. Yes, sir.

Q You do more than recognize it; you insist on it, do you not, Mr. Armstrong? You would assert it affirmatively?

MR. ARMSTRONG: Certainly. In many instances we would have to rely upon it.

Q I do not see where you have said that at all.

Q Why do you concede that? A suit between two private parties--why is there a right on the part--

MR. ARMSTRONG: Well, I did not understand the--I misunderstood Mr. Justice Marshall's question to be in that context. I was thinking of it more in terms of the case where a governmental agency was involved; and there is some authority--it may not be correct--but we have been led to believe that in some of our cases--for example, Section 402(b) of our act, as opposed to Section 402(a), which is governed by the Judicial Review Act, and that is the case we are here on now--but in the licensing case we have been led to believe that if we do not get proper treatment--and I argue from the Court

of Appeals--we have to have the Solicitor General signing our petition for cert.

Q That is a different subject.

MR. ARMSTRONG: Yes, sir.

Q Where do you find that?

MR. ARMSTRONG: The question was--

Q The statute says the Attorney General is responsible for and has control of the interests of the government in all court proceedings under this chapter. Then it goes on to say the agency has a right to be represented by--

MR. ARMSTRONG: Mr. Justice White, as I understand it--

Q You do not think that includes the power to make the decision it takes here?

MR. ARMSTRONG: In a form 2-A case, under our statute, that is specifically governed by Title XXVIII. And the section you have read clearly gives us the right to come here, as we have done in this case, without the department.

Q Even to bring the petition for cert here?

MR. ARMSTRONG: Yes, sir.

Q But you did, you filed it.

MR. ARMSTRONG: Yes, sir. But there is another case in our statute, 47 USC, Section 402(b), which does not appear to be governed by Title XXVIII, in just a classic

licensing case as opposed to rule-making, and there we have been given an opinion by the department that they must file.

Q Just a minute, counsel. It is one thing, is it not, to say that you may come here only with the promotion of the Solicitor General, and it is quite another thing to say that the Solicitor General may come here regardless of any statutory authorization just because he feels like coming.

MR. ARMSTRONG: I would qualify the answer I gave to Mr. Justice Marshall to say that we are thinking of the case that I just described to you where they would be coming here advocating the position that we had advocated in the Court of Appeals.

Q And could come as amicus curiae without the consent of anybody.

MR. ARMSTRONG: I believe the federal rules do allow for that; yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF RESPONDENT UNITED STATES

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

I am here representing the United States, which is a statutory party in these proceedings--[laughter]--and probably would have a right to intervene because the constitutionality of an act of Congress as applied has been

challenged. However, there is no need to exercise such a right in this case. Under section--

Q Mr. Wallace, are you not ordinarily expected to uphold the act of Congress that is challenged under that section?

MR. WALLACE: We are not attacking the constitutionality of any act of Congress in our submission to this Court.

Q But I thought you said that was one of the authorities by which you were here.

MR. WALLACE: We could have--well, we did not have to seek to intervene for that purpose. We are a statutory party.

Under Section 307 of the Communications Act, the Federal Communications Commission is to grant application for broadcast licenses if the public convenience, interest, or necessity will be served thereby. And for more than 30 years in both rule-making and licensing proceedings the Commission has recognized that this standard requires it to take into account in issuing licenses the interests of the public in diversity of ownership of the media of communication. Among the factors that it has historically considered for this purpose in comparative proceedings over the years has been an applicant's ownership of a daily newspaper in the locality to be served by the broadcasting license. In this respect, the

Commission is charged not to be neutral but to make an inquiry as to what will serve the public interest under the statutory standard. And one of the components of the public interest is diversity of ownership of the media of communications and divergent voices to be heard.

The present rule before this Court is an effort to deal with the newspaper broadcast co-ownership question in a more systematic way. This is not a rule that disqualifies newspaper owners from being licensees of broadcast stations. The rule applies only to co-ownership of a newspaper and a broadcast facility in the same community. Newspaper owners are not disqualified under this rule from ownership of broadcast stations, from licensing broadcast stations--no one owns the particular airways--butt from being licensees of broadcast stations in other communities. And that is an important distinction to keep in mind here. It is illustrated very well by the recent exchange between the Detroit News and the Washington Post television stations in those two cities, which will result in dissolution of two of the co-ownership situations that were before the Commission when it was considering this rule by means of the kind of swapping that the Commission anticipated could occur without in any way making newspaper owners as such ineligible to be licensees of broadcasting stations. But by applying the public interest standard in the licensing of broadcasting stations so as to

increase or at least protect against diminishing the diversity of voices to be heard in that community, based on a finding of the Commission, based on its experience and much evidence that was before it, the public looks primarily to these two sources, to its daily newspapers and its local broadcasting stations and particularly its local television stations, for its news and for its information on public affairs. And this is accentuated with respect to local news affairs.

The handling of this matter by the adoption of a rule rather than case by case, as it has been handled over the years, is entirely appropriate to facilitate business planning and to enable the Commission to bring about required changes as a result of reconsiderations of its earlier policies in which it has granted some co-ownership of co-located stations, cross-ownerships, by means of what has been referred to in these proceedings as divestiture rather than what has been referred to as forfeiture of licenses. And it is important that any retrospective application that the Commission was considering here was not to be achieved by means of simply forfeiting the value of the license and the goodwill at the time a renewal would come up two or three years hence by holding a comparative proceeding and simply awarding the license to another applicant so that the licensee would be be able to realize only the physical value of its assets as

a result. The Commission was concerned with protecting licensees against this result by providing a means whereby they would have a reasonable period to swap stations or otherwise to realize the market value of their licenses, all with a view toward what the Commission has over the years we think legitimately recognized to be a component of the public interest standard; but it should provide incentives for superior public service, incentives to get people to devote their financial resources and their professional endeavors, providing a superior service without the risk of having to start from scratch when they have provided such a service every three years in a comparative proceeding against others, if the public is to be well served.

The Commission undertook to protect this interest by proceeding in a rule-making proceeding rather than merely applying from case to case the new insights and the further insights that it has developed into the problem of concentration of ownership of the media and the problems that it has presented that have come to its attention over the years. And it further sought to protect these interests by specifying that it would certify transfers that resulted from the divestiture provisions that it would adopt and it did adopt from, as the Court has been informed, for favorable tax treatment under Section 1071 of the Internal Revenue Code in order to further protect those interests because the transfers

were being ordered in the public interest, and a waiver provision was also adopted under which claims of particular hardship could be heard with a view toward possibly extending the time in individual cases and the like.

So, the rule that has been adopted in so far as it applies prospectively seems to us to be a valid and reasonable way to apply the public interest standard that the Commission long has been applying under the act, based on the commerce power of Congress. And the divestitures that were ordered under that rule we also think were valid, regardless of how one views the refusal to order the further divestitures. In that respect we disagree with the Court of Appeals. We think the Commission did have authority, based on the considerations that were before it, to recognize that especially severe problems existed in communities in which there were, for example, only one daily newspaper and one television station where there would be a mutual inhibition on cross-criticism between the two major media in the community, which in itself would leave the community without any independent voice to criticize the impact that those media have on the community and the effect on its affairs. We think that this is an egregious consideration that the Commission properly did recognize. We disagree with the Court of Appeals that there was no rational basis for singling out those particular examples.

We do not believe, however, that the grandfathering that the Commission has adopted with respect to the other existing cross-ownerships was rationally justified by the consideration that the Commission itself chose to rely on. On the Commission's own terms, we do not think the lines that it has drawn, the basic differentiation it has introduced, between the existing cross-ownerships and the future license questions, including transfers, has been rationally justified. And before turning to the reasons why the Commission's justifications do not stand up, it is important I think to recognize that very important interests are at stake here in what the Commission has decided. There is not only the public interests that this Court has recognized in the Associated Press case and in other cases dealing with the First Amendment aspects of regulation in the area of news media--the public interests in the widest possible dissemination of information from diverse and antagonistic sources, as it was put there--but there were a number of examples before the Commission of disadvantages flowing from cross-ownership or safeguards from having an independent voice to which the Commission was surely entitled to give way.

Without going into great detail about them, examples were cited to the Commission, a joint operating agreement being--

Q Mr. Wallace, may I interrupt you for a moment?

You are now arguing against the Commission's grandfathering provision?

MR. WALLACE: Yes.

Q And you are saying that there were examples before it to which it was entitled to give weight.

MR. WALLACE: That is correct.

Q That does not make sense to me. It seems to me you have to make a stronger case than that.

MR. WALLACE: I am about to. I am using this as an introduction to the deficiencies because I think it is important to recognize what was at stake before the Commission.

Q If it was entitled to give weight, it was entitled not to give weight.

MR. WALLACE: It obviously gave some weight to these, or it would not have adopted the prospective rule and order the divestitures that it did. One of the constraints upon an administrative agency is consistency in its treatment of various parties subject to its jurisdiction, Mr. Justice, and that is one of the problems with which we are presented here, and I want to highlight that in just a moment.

Q But the consistency concept does not prevent a regulatory agency from having a change of mind or heart over a period of time, does it?

MR. WALLACE: Not at all.

Q Such as the Internal Revenue Service.

MR. WALLACE: But it does have to base the way it applies that change on rational grounds that do not treat individuals arbitrarily, based on factors that are unrelated rationally to the basis on which the agency has changed its position.

I want to just mention one or two examples that were before the Commission and to which it obviously gave some weight in adopting the prospective rule of the divestiture requirement that it did. One was an example of joint operating agreements that were the subject of negotiation between the daily newspapers in a city and which were being opposed by labor unions and others in the community and where allegations were made that the television station owned by one of those newspapers presented no news concerning those agreements and negotiation until they were consummated, and that to have done so would have been against the economic interests of the newspaper that owned the television station.

Another example was editorial support in the local newspapers for a particular location for a museum to be built in the city, which location was close to where the newspapers were being published, where there is considerable sentiment for the museum to be located elsewhere, which was brought out only in an independently operated television station in that community and was not allegedly covered in the particular papers involved there.

These are examples, and the idea is not whether the particular examples were accurate, but they were the kinds of dangers that the Commission had before it and obviously had in mind in its concern about cross-ownerships here.

The other factor to keep in mind is that the prospective rule that the Commission did adopt does have an effect on existing combinations. This is not a bright line between a prospective rule and a retrospective rule. It has an effect on existing combinations by a procees of gradual attrition of existing cross-ownerships at the time they are transferred for value. For example, when the Washington Star in this city was sold within recent years, the transfer policy was applied to it, and the co-owned television station could not be transferred to the same owner. The result was a dissolution of that ownership where the competitive daily newspaper, the Washington Post, was allowed to continue to have its locally owned co-located, commonly owned television station. This introduces a disparity between newspapers in the same community, which is a serious matter. I do not say that it is an unconstitutional disparity, that it is not something that Congress could have adopted, but it is a disparity in treatment in a constitutionally sensitive area which impels us to take a careful look at the reasons given by the Commission--

Q That disparity would be fully correctable within a maximum of three years if the Commission thought that that

disparity was a controlling reason for not granting a renewal of the application.

MR. WALLACE: It could be--

Q It would not be a permanent disparity in any--

MR. WALLACE: --but the Commission felt considerable inhibition at renewal time to engage in what it considers to be a forfeiture of the applicant's license when the applicant is providing his service.

Q Your argument now is that the Commission was compelled not to have a grandfather clause?

MR. WALLACE: There are particularly strong reasons to see whether the Commission's grandfather clause was rationally based, whether the grounds that it gave for adopting the grandfather clause stand up on the Commission's own premises. That is all I am arguing, not that the Commission was compelled to have a grandfather clause.

Q If it had this prospective rule, it was compelled to have a grandfather clause. That is what I thought your argument was.

MR. WALLACE: We have said that--

Q Am I mistaken?

MR. WALLACE: I believe you are, Mr. Justice. We have taken the position in our brief that the Court of Appeals went too far--

Q Oh, in their requiring a rule.

MR. WALLACE: In their requiring a rule.

Q Yes, I understand.

MR. WALLACE: And that the Commission, if it can rationally justify grandfathering, is entitled to adopt a grandfathering provision. We are saying a remand is needed here because the explanations which the Commission offered do not rationally justify the grandfathering that it adopted and--

Q Mr. Wallace, what about the local ownership point, which is the first one they make? Why is that irrational: Is it that it is so improbable that it will have an impact on local ownership or, in the alternative, are you arguing that it is irrational to have local ownership be a factor to consider? Which are you arguing?

MR. WALLACE: We are arguing several points in response to that. One is that the Commission has not repudiated its long-standing policy of not giving very heavy weight to local ownership as such.

Q Has it ever said it was totally zero factor?

MR. WALLACE: It has never said it was totally zero.

Number two is that one-quarter of the co-ownerships that it is grandfathering are not locally owned. It does not really support the grandfathering of those particular ones.

A third point is--

Q Do you consider it is rational as to the three-quarters?

MR. WALLACE: A third point is that there is nothing before the Commission--

Q What about--

MR. WALLACE: --that shows--they were not really relying on it.

A third point is--

Q Please answer my question, if you would. They did set it as a reason. They said they were relying on it. We have to assume they wrote that opinion in good faith. And you say it does apply to three-quarters of existing licensees. Is it irrational, as applied to those three-quarters?

MR. WALLACE: Yes, because there was nothing before the Commission to show that local ownership would be diminished by--

Q Was it irrational to consider to conclude that it might be? And that is all they held. You gave an example earlier in your argument of the Washington-Detroit swap where it took place. How can you say that it is irrational to assume that it might take place?

MR. WALLACE: The Commission has approved many transfers over the years which resulted in diminution of local ownership, as I expect they will approve the Washington-Detroit transfer. And there was no evidence before the Commissioner that local ownership--that there were not eligible local owners to come forward to be transferees of these

licenses if the Commission were to require that they be transferred to locally-owned interests or if the Commission wanted to give particular weight to that fact. The Commission certainly did not give any weight to a requirement that local owners be found in the instances in which it was requiring divestiture.

Q You do not need any sort of evidence in a rule-making proceeding, do you?

MR. WALLACE: No, but you need a rational ground for belief that what you are worried about will be diminished by the particular course of action.

Q Is not the Commission presumed to have some competence and expertise which can supply that rational ground unless it is just patently fallacious?

MR. WALLACE: It does have some expertise in this area, but there is nothing on the face of either Commission practice or what the Commission purported to rely on or what was before it to indicate that local ownership would be preserved by the grandfathering or was of sufficient concern to the Commission that they were taking any steps to assure transfers to local owners where they were requiring divesti-ture. In other words, as we said in our brief, that particular element was a makeway. I think Mr. Firestone will deal with the other grounds relied upon by the Commission and why we do not think they rationally justify the order that is adopted.

And I do believe the Court should keep in mind that in 1943 at the time the Commission adopted the rule against co-located AM stations, it did not grandfather; it did not introduce the kind of disparities that it is introducing here in the example that I gave between two different newspapers in the same community.

MR. CHIEF JUSTICE BURGER: Mr. Firestone, somewhere in the course of your discussion, if you find it convenient and if you think it is relevant, would you relate what the Commission has done here to its situation that has been mentioned requiring a divestiture by the Star of its broadcast license and permitting, even though it is true that any other licensee is up for renewal--but one was mandatory and one is still open.

ORAL ARGUMENT OF CHARLES M. FIRESTONE, ESQ.,
ON BEHALF OF RESPONDENT NATIONAL
CITIZENS COMMITTEE FOR BROADCASTING

MR. FIRESTONE: Yes, sir, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court:

I am Charles Firestone from the National Citizens Committee for Broadcasting, which of course seeks affirmance of the Court's decision. I have three points I want to make, and during the course of that time, I do hope to address that point.

First, I would like to follow through on the Solicitor General's arguments about why it was arbitrary and

capricious and to answer Mr. Justice Rehnquist's question about the need for a record. The point is here I think that the Congress ordered the agencies, under the Administrative Procedure Act, not to be arbitrary and capricious, and that is really the basis of this court reversal, that simply the Commission was arbitrary and capricious in the way that they treated the various issues before them.

Q That is quite different from saying it is not supported by substantial evidence.

MR. FIRESTONE: Yes.

Q A rule can survive the arbitrary-and-capricious test without an iota of evidence having been introduced for the Commission, may it not?

MR. FIRESTONE: We believe that if there is absolutely no record support and no basis for coming to suppositions, that it could rise to a level of being arbitrary and capricious.

Q Is it not difficult to find arbitrary and capricious on a five-year period of time?

MR. FIRESTONE: Your Honor, the place where it was arbitrary and capricious was the Commission's failure to order divestiture. It is a failure to apply its prospective rule. They set a standard here--

Q But it was five years they worked on it.

MR. FIRESTONE: The five-year standard.

Q So, how can you say it is arbitrary and

capricious?

MR. FIRESTONE: The five-year standard--

Q It might be arbitrary, but it sure is hard to say it is capricious. [Laughter]

MR. FIRESTONE: The five-year standard is not what we say is arbitrary and capricious. What happened here is that the Commission used totally unsupported conjectures. They applied standards which were inconsistent with past Commission practices and which are inconsistent with the Communications Act.

A second point I hope to make in my argument is the issue of discretion, that the Court remanded the case to the Commission, contemplating that the Commission would have discretion when the case was remanded. Of course, the agency has great discretion in this area. And in fact the Court restored discretion to the Commission in the very important area of renewals. The Commission took away its own discretion by its ad hoc standard in considering allegations, structural allegations, of concentration of control. This the Commission said--concentration of control is a primary licensing factor and yet--

Q The Court did seem, at least in its words, to require that the Commission issue a rule in this area.

MR. FIRESTONE: To the extent that that alters the rule, I think we would concede that, that the Commission does

have authority--

Q Not to have any rule at all.

MR. FIRESTONE: --to have no rule at all.

Q Is there a difference when they go part way down the road and not all the way?

MR. FIRESTONE: Yes, Your Honor, there is a difference there.

Q That the Court of Appeals was pointing to?

MR. FIRESTONE: They pointed to it, but I suppose if the Commission acted rationally--the Court of Appeals pointed out many errors. This decision was riddled with error at the agency level. The Court of Appeals pointed out many of the errors. And I would not presume to be able to figure out how the Commission is going to treat it. They do have discretion. But it seems to me conceivable that as long as they are not arbitrary on remand, that they may adopt no rule. That might mean no prospective rule as well. I am not sure. If they do adopt a prospective rule, as they did here, and in their discretion found that nothing can be more important than ensuring that there is a free flow of information, the public's right to know, it derives from but not just the First Amendment. It also derives from Section 303(g) of the Communications Act, which is at page A-29 of the Joint Appendix, where it says Congress mandated the Commission to promote the effective--the larger and more effective use of radio. The Court in NBC said

that this included a concern about monopolization of the media. But the Commission did come out with a standard. They said that it is unrealistic to expect true diversity from newspaper-broadcast station combinations. And, therefore, in looking only to the broadcasting stations--and they are not trying to regulate newspapers--they treat newspapers the same as they treat television stations to the extent that you cannot own two television stations in the same market. And they look to the equality, more or less, in terms of where people get most of their news and information.

But when it came time to apply this to renewal, the Commission--even though there is a three-year limit on a renewal set by Congress and even though the Communications Act requires them to or mandates them to have a larger and more effective use of radio--the Commission moved to immunize existing licensees from structural challenge on the basis of concentration of control. And on these three points that the Commission used to override this strong factor of diversity, the Commission itself has said that diversity is the primary licensing factor. And yet they looked to these three over-riding factors, to this diversity criterion.

And the first, Mr. Justice Stevens, with regard to local ownership, the first thing that the Commission did was ban local ownership in the prospective rule. If a local newspaper wants to acquire a local television station, they

cannot do it. The factor of diversity overrode.

Secondly--

Q That did not bar local ownership. That just barred local ownership by a newspaper.

MR. FIRESTONE: Right. But certainly here what it showed is that they preferred the criterion of diversity over local ownership for the prospective rule but turned around and used this criterion to override diversity for existing licensees when 25 percent of them were not even local owners.

Secondly, the Commission only looks to local ownership traditionally andnd in the 1965 policy statement on renewals. They only looked at to the extent that there is integration of ownership into management. And here the broadcasters claim that the newspaper owners were not integrated into the management of the stations, and the Commission relied on that. They said where they are not separately run, they would require--

Q Does not the Commission's reliance here supersede whatever they said in 1965?

MR. FIRESTONE: Except that they have not disavowed--they have not--perhaps they could supersede it, but they did not do it here. They did not really explain what they were doing here.

Q If an agency, when it changes its mind, had to get out all of its other inconsistent statements that have been

made over the last 40 years, we would never adjourn for the summer. [Laughter]

MR. FIRESTONE: That is true. But there are internal inconsistencies here. And also they really did not treat this issue of integration. What they are talking about, they are saying local owners--and they did not really go into this. But when you look at other Commission law over the years, they did not intend to overrule this issue of integration. They just did not deal with it. And it just goes to the arbitrariness of the Commission's decision here.

Q Mr. Firestone, I know the newspapers argued that they were not involved in the management of stations much. Did the Commission so find?

MR. FIRESTONE: The Commission stated that were it not that case--were there not separate ownership, they would require far many more divestitures. They did not actually make a finding that--they did not look into it anymore. They basically relied on these representations.

Q Are you saying it would be irrational to attach any weight at all to the requirement of local ownership unless the local owner were actively involved in management?

MR. FIRESTONE: Under existing Commission law, unless the Commission had changed it--

Q Let us follow Mr. Justice Rehnquist's suggestion. Maybe all the past Commission law has been irrational. The

question is whether this particular ruling was rational, is it not? And would it be irrational for the Commission to attach some weight to a factor of local ownership, even though the local owner were not actively involved in management? Is that not the question?

MR. FIRESTONE: I do not think it is the question, but if it were--

Q Unless you mean different things by irrationality then.

MR. FIRESTONE: No.

Q There are different kinds of irrationality.

MR. FIRESTONE: No, I think that the question here is, Has the Commission been internally inconsistent? Have they been inconsistent with prior policies without explaining their departure--

Q In other words, whenever you find inconsistency, do you necessarily find irrationality? Is that your view?

MR. FIRESTONE: I think inconsistency raises a question of irrationality. But here, if they had some reason for the inconsistency, it would be one thing. But they did not explain any reason for that. And they just mentioned it. In fact, in this case they actually purported to be following past policy. They alluded to the 1965 policy statement. And I do not think it was their intention to retreat from that integration of ownership into management factor.

Second, the issue of local economic dislocations was another example. First of all--

Q Let me just ask one other question, Mr. Firestone. On remand, I take it, it would not be open to the Commission to rewrite its opinion entirely and say we reviewed the entire matter from a new angle; we overruled a lot of prior decisions; we now conclude upon fresh review that the grandfather clause is proper and the prospective rule was proper, both. Could they write a better opinion and still sustain that rule under the Court of Appeals mandate?

MR. FIRESTONE: Under the Court of Appeals mandate they--the quick answer to your question is I do think the Commission could rewrite the opinion and--

Q And reach the same result?

MR. FIRESTONE: --and reach the same result. It is very hard to determine. I cannot really determine that.

Q If you assume they could have written a better opinion and reached the same result, you must be assuming it is not totally irrational.

MR. FIRESTONE: Right. I think that that is the Chenery idea--

Q Is not the Chenery remand--it is not a remand that to say go ahead and restate your reasons; you reasons do not adequately support the conclusion. As I understand it, the remand is to carry out the direction of the Court of Appeals as

to what the rule should be.

MR. FIRESTONE: We do not read that decision. We read the decision, for instance, in footnote 53 to contemplate that there might be a totally different rule, totally different even prospective rule, in terms of a 30 percent criterion, as was suggested by some people, including some of the parties here.

But getting on to the local economic dislocation criterion, the Commission says, "We are afraid that"--in fact, they do not make it clear. Again, we are not sure what they said except that counsel explains that they say that they are concerned about reinvestment, of having enough money through increased interest rate. They were concerned that interest rates would increase if there was a widespread divestiture, and they were concerned that there would be enough money to invest in the programming. And yet the Commission specifically has refused to look at this question in licensing cases. And the Alianza case which we cite is an example where the Court of Appeals has affirmed the Commission's refusal to look into this criterion in the public interest. Now they are using that criterion to override their strong interest in diversity of communications sources. Similarly with continuity of ownership. And there of course the licensee just minimally served the public interest over the years. Mr. Armstrong says the longevity of their service is the factor that really matters. But if

their service has not been good, it may be that the new licensee would do a much better job.

In the WHDH case, the one time when a newspaper-television broadcaster cross-owner was replaced with a new applicant, that new applicant or that new licensee has performed excellently, superior service, and it is recognized throughout the country to that effect.

Of course broadcasters do take their license subject to renewal at the time the--subject to the rules in effect at the time of renewal. A license can last no longer than three years. They run on their record. You cannot have the record go on for--say that because they did a great job 20 years ago but they have not done a good job the last three years, that does not mean anything. It has not in the past in Commission decisions. But the key fact here is the Commission did not really come to a systematic evaluation of the record. They did not really look at their own past precedent. They did not look at--and there are internal inconsistencies in the order.

With respect to the issue of discretion--in answer to Mr. Chief Justice's question with respect to the Washington Star--of course there they applied--the Commission's rule applies to transfers. The Washington Star was in bad shape, according to their allegations. And they needed an influx of money, and it amounted to a transfer of control. The licensee basically would have continued with the Washington Star and

WMAL, the radio and television station. Yet the Commission's rule prospectively said that this is a sale, and the public interest is not served by the acquisition of a TV and a newspaper or a broadcast--

Q If that basic principle is true, why does it not apply to the existing situations of any others?

MR. FIRESTONE: That is exactly our contention, that it should. And in fact what it does--what they have done is applied a public interest standard to transfers which they refused to apply to renewals. And yet it is the same public interest standard. Maybe there are factors that can override this diversity criterion with respect to renewal applicants. The Commission did not really and rationally deal with that. And they threw out some reasons. But really the Commission had a goal here, and they have stated the goal as diversifying the media, of promoting diversification. Yet what it has done is turn around and protected existing licensees against challenge and again the application of this public interest standard at renewal time. And I would like to give an example, what I consider a better example in terms of this issue. And that is in Lancaster, Pennsylvania there was in 1975 a newspaper monopoly owned by one family. The only newspapers in town, the only VHF station in town, two of five radio stations, a cable television system, of which--it was co-owned. They owned 60 percent. The 40 percent owner owned two of the remaining three

radio stations in town. It was grandfathered because there was an incoming signal from a station assigned to Lebanon-and-Lancaster--it is hyphenated--market. And this was a UHF signal. In a consideration on that renewal of that Lancaster station, the Commission would not allow a showing that the one incoming signal was not a significant signal, that 15,000 people could not really obtain that signal. They would not allow a showing as to the inapplicability of any of these criteria such as local ownership, such as continuity or local economic dislocations. They were not even going to allow a showing as to the Sherman Act violation, allegation of Sherman Act violation, which the Commission said was a standard. They would not allow a showing because they said they are not equipped to administer the antitrust laws. There was a catch 22 there. And finally under their reconsideration order, under the Commission standards, if that UHF signal went dark tomorrow--of course the situation has since changed--but if that signal went dark, the Commission said in reconsideration that it would not require divestiture even in that event, even though it met this standard of egregiousness that they required divestiture for the sixteen because they said they are concerned about uncertainty. They did not want the licensees to feel uncertain.

Your Honor, if I can just sum up, I think that the basis here is the First Amendment interest in diversity of

information sources. As Judge Learned Hand said, "To some it may be folly, but we have staked upon it our all." Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Griswold, you had some observations right at the outset of your argument about the unconstitutionality of saying a newspaper cannot have the same rights as anyone else. How would you apply that proposition to what I have just been discussing with Mr. Firestone on the Star? The Federal Communications Commission, it appears, said to the Star, the new owners of the Star, "You cannot have this television station." Under your theory, as you outlined it at the outset that would be unconstitutional, would it not?

REBUTTAL ARGUMENT BY ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF ALL PRIVATE PETITIONERS

MR. GRISWOLD: If done by a blanket rule which prevents the consideration of all of the facts and circumstances with respect to that particular case.

Q It was a blanket rule.

MR. GRISWOLD: In this case, it is a blanket rule.

Q In the Star case.

MR. GRISWOLD: I am sorry, I am afraid I do not understand the case that you are--

Q When the new owner bought the Star, he had to divest the television license ultimately.

MR. GRISWOLD: When--I am sorry.

Q When the new owner bought the Star--

MR. GRISWOLD: Oh, the Washington Star.

Q --and WMAL together.

MR. GRISWOLD: That of course, as far as I know, is the only case or at least the only prominent case which actually exists under this rule. And I think it shows, among other things, that this rule does not promote diversity. What has happened by taking the ownership by newspaper into account in a particular case with respect to the Boston Herald has been to destroy the Boston Herald. And what may happen with respect to the rule as applied to the Washington Star may be to destroy the Washington Star. And my contention is that the Commission not only has no authority under its existing statute to make a rule applicable only to newspapers but that it may well be unconstitutional in doing so. And in particular in dealing with the final case to which Mr. Firestone referred, I would like to suggest that there is nothing about that in the record of this case. And if the Commission was in error in that case, it should come up in that case on that record.

Q Are you suggesting that constitutionally the prospective rule might survive but the divestiture rule might not?

MR. GRISWOLD: No, Mr. Justice. I think that constitutionally the prospective rule should not--

Q Oh, I understand. I understand. But could you conceive of the one surviving and not the other?

MR. GRISWOLD: Oh, I can conceive it, yes. But I--my position is that the prospective rule is not constitutional. There is no previous case which applies any statute or any rule of the Commission to newspapers, to all newspapers, and only to newspapers. Reference has been made to the NBC case. That involved the question of affiliation of a station with a network completely broadcast. The Storer case involved multiple ownership of broadcast stations, only broadcast.

Q Why should the owner of a broadcast station be forbidden from acquiring another just because he is a broadcaster?

MR. GRISWOLD: Mr. Justice, I think that that was probably settled as long ago as the Federal Radio Commission case in 1930, the--

Q It may be settled, but was it right? Was it settled right?

MR. GRISWOLD: --the Pottsville case in 1940--yes, I think so.

Q Why then? I ask you why?

MR. GRISWOLD: And the Red Lion case in which I appeared seven or eight years ago. For better or for worse the Court has taken the role--I am inclined to think for the better, though it is an awful close question--that there is something about broadcasting involving the limitation of the spectrum which makes it appropriate for the government to

introduce regulation. There is no such rule with respect to the press. And that is the position we take here.

Q That goes back to my inquiry long ago about the scarcity of newspaper--

MR. GRISWOLD: Yes, there is a greater scarcity of newspapers now, and there may be more. The next step here will be barring all newspapers everywhere. They talk about swapping. But if you can do this, you can make a rule which says that no newspaper can own a television station. We think that this was in effect covered by the Grosjean case.

Q Mr. Griswold, supposing we had a situation in which Congress repealed the Sherman Act, then passed a new statute and said that it shall be unlawful for newspapers to enter into agreement in restraint of trade. Would that be constitutional?

MR. GRISWOLD: Yes, Mr. Justice, I am--

Q It would be all directed at newspapers and no one else.

MR. GRISWOLD: I am quite sure it would. That, it seems to me, is exactly what the Court decided in the Grosjean case where it held that a tax applicable only to newspapers was invalid. And, as this Court has said with respect to that, in the Oklahoma Press case, the singling out of the press for different treatment from that accorded other businesses in general is invalid.

Q You mean the statute would be unconstitutional.

MR. GRISWOLD: The statute would be unconstitutional. That is what I thought I said.

Q In other words, you say if there were a statute--we repeal the Sherman Act and we pass a new statute and say that monopolies and restraints of trade in the newspaper business are hereby forbidden. You say that is unconstitutional?

MR. GRISWOLD: Mr. Justice, I think that any legislation by Congress which is applicable only to newspapers would almost inevitably be a violation of the First Amendment unless maybe it gives them something.

Q Yes, I was just going to say--[laughter]--I was just going to call your attention to the Newspaper Preservation Act which permitted antitrust violations.

MR. GRISWOLD: I have always been troubled by the Newspaper Preservation Act, and that of course is a step in the direction of easing the antitrust laws, giving them something. And as long as the antitrust laws are applicable to newspapers--and the labor relations laws have also been held to be applicable to newspapers--I would suppose that Congress can minimize the situations in which those statutes apply.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

[The case was submitted at 2:46 o'clock p.m.]