

F.C.C. 75-1234

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, D.C. 20554

In the Matter of

INQUIRY INTO SUBSCRIPTION
 AGREEMENTS BETWEEN RADIO BROADCAST
 STATIONS AND MUSICAL FORMAT SERVICE
 COMPANIES

Docket No. 19743

REPORT AND POLICY STATEMENT

(Proceeding Terminated)

(Adopted: November 4, 1975; Released: November 7, 1975)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE
 RESULT; COMMISSIONER REID ABSENT.

1. The Commission considers in this proceeding responses to our *Notice of Inquiry*, adopted May 17, 1973, 38 Fed. Reg. 14124. The purpose of the inquiry was to study contracts between licensees and musical format service companies, and to determine whether provisions of such agreements impinge upon, hinder or inhibit the exercise of licensee discretion and flexibility in matters of the selection and presentation of non-musical programming to meet the continuing needs and interests of the station's service area.

2. The companies in question contract with radio stations to supply taped musical programs over a period of time on a subscription basis. Usually the station plays the tapes over the air as received, and then returns them to the supplier. The programs contain breaks for commercials, news, and other announcements. Some programs are musical only; others include an announcer between musical selections. Some companies additionally provide consulting services to supply stations with programming or format ideas. The programs have apparently been a commercial success for both the station and the supplier, as evidenced by their widespread acceptance and expansion.¹ The provisions in question were brought to our attention in a petition to deny an application to assign a station license which alleged that the assignor and assignee had contracted away some programming responsibilities.² For example, some of the contract provisions appeared to bind the assignor and the assignee to broadcast a certain number of commercials, limited the amount of news broadcast, and determined the nature of nonmusical programming.

3. Specific provisions of the aforementioned contract were attached to the *Notice of Inquiry* to illustrate the area of our concern. They required a station to broadcast a minimum number of hours per day, proscribed SCA programming or FM duplication of AM programming,

¹ One company, for example, has over 60 subscribers.

² See *Memorandum Opinion and Order re Application of WEZY*, 40 F.C.C. 2d 1164 (adopted May 17, 1973) (assignment granted subject to our actions in this proceeding).

required airplay of a fixed number of minutes of supplied music each hour, prohibited announcements of names of musical selections, limited the number of commercials per hour, forbade triple spotting, required all talk programming to be of public affairs or religious nature, required regular news broadcasts from non-network and non-aural sources, required news to consist of a certain percent or less of station air time, and limited the number and duration of newscasts during certain times. A termination clause said that nothing in the contract would prevent a station from modifying its programming in the public interest, but that the music format service company could cancel upon 15 days notice in such event. One other provision allowed the station to substitute or reject programs. These provisions are discussed below.

4. We invited comments on the nature and resolution of problems presented by contracts of this type, specifically directed to the following issues:

- (a) the extent to which subscription agreements of musical program format companies contain restrictive provisions regarding non-musical programming (we asked to receive copies of the standard contracts of companies providing these services);
- (b) the particular industry practices under such agreements, including (but not necessarily limited to) the degree to which licensees have been allowed to deviate from the standard provisions without rescission or threatened rescission of the contract by the format service company (specific instances requested); and
- (c) the extent to which, if any, such restrictive programming provisions and practices thereunder impinge upon, inhibit or hinder the discretion and flexibility of the licensee in matters of the selection and presentation of non-musical programming material.

Comments and/or reply comments were received from the following music format service companies: Drake-Chenault Enterprises, Inc. (parent of American Independent Radio, Inc.); TM Programming, Inc.; International Planned Music Association (Muzak); International Good Music, Inc.; Bonneville Program Services; Stereo Radio Productions, Ltd.; and Wally Neskog and Associates, Inc. (WNA Music and KIXT, Inc.). Comments were also received from the National Association of FM Broadcasters and National Citizens Committee for Broadcasting. Of the seven music format service companies commenting, five attached contracts.

5. As to the first issue raised in the *Notice*—the extent to which contracts contain restrictive provisions regarding non-musical programming—two of the five contracts submitted contain no provisions of the type questioned in the *Notice* and three do. One of the parties, although it did not submit a copy of its contract, states that its agreement contains no provisions like those questioned in the *Notice*.

6. Concerning the second issue—industry practices under such agreements—three of the five contracts submitted have no clauses providing for cancellation if a licensee modifies its programming, and the companies using such contracts state that they have never cancelled for programming reasons. Moreover, these companies have addi-

tional contract provisions. One states, among other things, that the agreement is subject to all rules, regulations and orders of the Commission. Another states that the agreement is subject to the terms of the license held by the broadcaster and to all federal laws. Of the two companies which have cancellation provisions, one had cancelled twice for an increase in commercials per hour. The other had not cancelled because of programming deviations but had cancelled for non-payment.

7. The third issue sought information concerning the extent to which restrictive programming provisions and practices thereunder impinge on, inhibit or hinder the discretion and flexibility of the licensee in matters of the selection and presentation of non-musical programming material. Three suppliers whose contracts contain no restrictive provisions state that since they make no demands on broadcasters they cannot restrict program flexibility. One party argues that its provisions merely reflect existing station policy since the station enters into the contract only if its policy is consistent with the contract terms. Another states that its provisions are used to insure continuity and artistic objective. One suggests that contracts of suppliers could inhibit licensee responsibility but that this is true only if the contract contains a cancellation clause for modification of programming. The argument is also made that insofar as the sample provisions mentioned in the *Notice* (see para. 3, *supra*) are concerned, abdication of responsibility would result only from a voluntary act of the licensee, since the broadcaster reserves the right to alter his programming, reject supplied programs, or substitute another program.

8. Several of the comments suggest methods to resolve our inquiry. Some point out that the Commission already has authority to deal with this problem at renewal time. One recommends issuance of a *Public Notice* illustrating improper contract clauses; another asks that we find the contracts in question to be within the discretion of the licensee and announce that they will be reviewed at renewal time, and still another recommends a finding that they do not inhibit licensee programming flexibility. All of the comments suggest that rule making would be unnecessary and improper. A more detailed digest of the comments is attached as an appendix.

CONCLUSIONS

9. The focal issue in this proceeding is whether music format service contracts have the potential to restrict programming flexibility and thereby amount to a contracted abdication by the licensee of its responsibility to the public and to the Commission. It has long been the policy of the Commission to require broadcast licensees to be ultimately responsible for programming, regardless of the source. Thus, we said in our 1960 *Report and Policy Statement on Programming*:³

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.

³ *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 F.C.C. 2303 (1960).

The broadcaster is obligated to make a positive diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interest. This gain is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.⁴

And, more recently, in the *Fairness Report*⁵:

We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee. That responsibility can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments. *Report on Editorializing*, 13 F.C.C. at 1248.⁶

In resolving the issues of this inquiry, we look to our previous actions in dealing with the contracting away of licensee responsibilities.

10. Network contracts with licensees were the subject of our "chain broadcasting" regulations.⁷ Several rules were adopted in the public interest to deal with questionable network practices. To prevent network usurpation of licensee programming discretion, we prohibited the licensing of any station with a network contract which restricted licensee discretion and flexibility. The Supreme Court upheld our power under the Communications Act to adopt such regulations in the public interest, touching both licensees and networks, in *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943). The Court stated:

The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in any case where he cannot sustain the burden of proof that he has a better program. The licensee is obligated to reserve to himself the final decision as to what programs best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than on his own reasonable decision that the programs are satisfactory. . . . If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest.⁸

11. On the other hand, we have refrained from adopting rules controlling terms of citizen-broadcaster agreements on the basis of our policy to encourage affirmative dialogue between licensees and the public. *Proposed Policy Statement and Notice of Proposed Rule Making Re: Agreements Between Broadcast Licensees and the Public*, FCC 75-633 (May 29, 1975). Our proposed rule making in this area would require the contracts to be placed in the station's public file, but would not prohibit any specific clauses. We point out in the proposed policy statement that the Commission is reluctant to become involved in interpretation and negotiation of individual contracts. Whenever possible, we have construed provisions in contracts in a manner favorable to their implementation.⁹ We have generally declined to make parties reform agreements even where terms are ambiguous. We have not

⁴ *Id.* at 2313-14.

⁵ *Fairness Report*, 48 F.C.C. 2d 1 (1974).

⁶ *Id.* at 10.

⁷ Now Sections 73.131-139, F.C.C. Rules. See also Sections 73.231-241 and 73.658.

⁸ 319 U.S. at 205-06, 218.

⁹ "[P]rivate agreements cannot be construed to limit a broadcaster's responsibility and obligations imposed by the Communications Act." *Golden West Broadcasters*, 8 F.C.C. 2d 987 (1967).

found it practical or desirable in citizen-broadcaster agreements to adopt specific rules governing them or certain clauses in them. Balancing government intrusion against freedom of contract and broadcaster-citizen dialogue, we chose to deal with this problem on an *ad hoc* basis under our existing procedures of review upon renewal, transfer, or complaint. We cautioned that to the extent any agreement transfers a broadcaster's programming discretion to others, it cannot be considered by this Commission as having any force or effect before us.¹⁰

12. We have held that time brokerage agreements, involving the sale of excessive amounts of broadcast time to others are against the public interest. *Metropolitan Broadcasting Corp.*, 8 F.C.C. 557 (1941). Because of the lessening of licensee control involved in time brokerage cases, a requirement for the filing of time brokerage agreements was adopted in 1945, along with other filing requirements now contained in Section 1.613(c) of the Commission's rules.¹¹ Our concern was that the broadcaster retain his program responsibility. See *United Broadcasting Co. of New York, Inc.*, 4 R.R. 2d 167 (1965); *Liability of WGOK*, 2 F.C.C. 2d 245 (1965). The filing requirement was extended to "trade-out" arrangements (other parties receiving the right to sell spot announcements in return for goods or services to the licensee) in our *Notice of Apparent Liability to Rand Broadcast Company*, 22 R.R. 2d 155 (1971). Later, however, we exempted "trade-out" or "barter" agreements from filing requirements, when it appeared that they did not amount to a lessening of licensee control. *Filing of Agreements*, 33 F.C.C. 2d 653 (1972).

13. We now reach the question of what, if any, action is warranted with regard to music format service contracts. We must start from the premise that licensees have the duty to enter only those agreements which allow them flexibility to forward the public interest. Some of the agreements we received have clauses which allow the licensee to subsequently modify his programming if he finds that the public interest so demands. Termination of a music format service contract is sometimes a risk of such modification. While the parties apparently deal at arms length, a subtle pressure is presented by those contract clauses providing for cancellation if the broadcaster changes his programming in the interest of the public. The comments suggest that in actual practice this clause is seldom utilized. That is no excuse, however, for if the clause is contrary to the public interest, it must fall. Likewise, the "restrictive provisions," be they suggestions, representations, or selection criteria, are contrary to the public interest if they could potentially inhibit licensee responsibility. If the provisions are mere representations, suggestions, or selection criteria, then the contracts should so state. If they are modifiable without penalty or cancellation, then that should be expressed rather than the opposite. The potential inhibiting effect of the "restrictive provisions" coupled with the subtle pressure of cancellation clauses could result in the abdication of licensee responsibility. We consider such terms to be against the public

¹⁰ See, e.g., Letter to Public Communications, Inc., regarding KCST(TV), San Diego, California (September 30, 1974), FCC 74-10; Letter to Frank Lloyd, Citizens Communications Center, regarding Metromedia-NABB Agreement, FCC 75-1028, 55 F.C.C. 2d — (September 9, 1975).

¹¹ Adopted in Docket No. 6756, amended in Docket No. 10409, 9 R.R. 1547, 1553-54 (1953).

interest. Furthermore, we find the public interest is impaired by any contract which inflexibly binds a licensee to prior programming decisions by means of provisions such as those set out in the *Notice of Inquiry* (see para. 3, *supra*).

14. We are reluctant to engage in unnecessary rule making. The situation here is unlike the network situation, where the number of networks was few, the effects of the practices under consideration were widespread, and the potential coercive effects to abdicate program responsibility were great, not to mention the anticompetitive effects of the practices and their damping effect on program diversity. Here, the number of format supplier companies is much greater, the coercive effects are apparently limited, and the damping effect on diversity of programming is less. We consider this matter to be more akin to the time brokerage agreements or the citizens' agreements. As with time brokerage agreements, the formal adoption of rules prohibiting musical format service contracts is unnecessary. And like the approach used as to citizen-broadcaster agreements, we have decided that the better solution lies in the issuance of a *Policy Statement*. Since we expect all contracts that restrict licensee responsibility to be reformed in view of this *Policy Statement*, and since the record demonstrates the availability of music format services without restrictive contracts, we consider network-type rules to be unnecessary at the present time.

15. Concerning the filing of written agreements, we require network contracts and time-brokerage contracts to be filed with the Commission. We have proposed that citizen-broadcaster agreements be retained only in the stations' public files, and we no longer require the filing of trade-out agreements. Since we are primarily concerned with the actual practices of licensees in programming, and since there does not appear to be great abuse in this area, we are willing, for the present, to see if the problem can be remedied without imposing a filing requirement on licensees with respect to music format service contracts.

16. We place the duty upon the licensee to be party only to those agreements which do not curtail its programming discretion and flexibility. We do not wish to be over-protective of licensees, or become an intermediary in their private contracts. Licensees are aware that they must answer to the Commission as public trustees. The Commission already has adequate means of dealing with abdication of responsibility by licensees, and we will scrutinize music format service contracts closely in this regard, when brought to our attention upon renewal, transfer, assignment, or complaint. At that time we shall determine whether the contract or the licensee's operation under the contract amounts to an abdication of licensee responsibility in contravention of the public interest. To avoid any vagueness, we hereby set forth a *Policy Statement* with guidelines for licensees contracting with music format service companies, which will be used to determine whether a licensee has abdicated its responsibility.

17. Authority for the actions herein is contained in Sections 4(i) and (j), 303(g) and (r), and 403 of the Communications Act of 1934, as amended.

POLICY STATEMENT RE MUSIC FORMAT SERVICE CONTRACTS

18. Licensees have a non-delegable responsibility as to the programming and operation of their stations. Any agreement entered into by the licensee which unduly fetters the free exercise of independent judgment in programming will be considered an abdication of that responsibility by the licensee and contrary to the public interest. This includes, but is not limited to, any music format service agreement that:

- (a) fixes the number of broadcast hours;
- (b) prohibits AM/FM duplication;
- (c) prohibits sub-carrier authorization;
- (d) requires the exclusive use of any music format service or prohibits other sources;
- (e) fixes the amount of format service company music broadcast;
- (f) prohibits any announcement by the station;
- (g) fixes the number of commercials broadcast;
- (h) limits the content or source of any non-musical programming;
- (i) fixes the amount of air time for news, music, or other programming;
- (j) prohibits automatic gain control of company supplied material; or
- (k) allows termination in the event of program changes by a licensee exercising his responsibility for the public interest.

Those music format service contracts which contain no provisions restricting licensee flexibility; expressly state the licensee's right to reject or substitute programs; and subordinate the contract to FCC rules, regulations, policies and licensee responsibility, do not impair the public interest.

19. IT IS HEREBY ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

SUMMARY OF COMMENTS

1. Drake-Chenault Enterprises, Inc. ("Drake"), says that its contract contains none of the restrictions illustrated in our *Notice* (see *Report and Policy Statement*, para. 3, *supra*), and furthermore, its contract states:

This agreement is subject to the rules, regulations, and orders of the Federal Communications Commission now or hereafter in force; and neither party hereto shall be required to furnish any performance hereunder which would be a violation of any such rule, regulation, or order. The station shall at all times continue absolute control over its facility and programming broadcast thereof.

Drake says it has never terminated or recommended termination of its station agreements for any reason except default of payment. Drake contends that the Commission already has ample authority to deal with the problem raised by this proceeding, and recommends issuance of a Public Notice illustrating restrictive contract provisions, rather than further rule making.

2. TM Programming, Inc. ("TM"), provides taped musical services and program consulting to radio stations. TM's contract contains provisions similar to those we questioned in the *Notice* (see *Report and Policy Statement*, para. 3, *supra*). TM insists that the limits in these provisions are determined after discussion with the licensee, and only reflect the station's self-imposed policies. If the station's proposed policies are consistent

with TM's goals to provide a successful and competitive service, it will allow the station to subscribe. The contract also gives the station the right to change its policies if the licensee decides that the public interest will be served thereby. However, TM reserves the right to cancel the contract without penalty to the station in such event. TM states that considerable variation of format has been permitted and it has never cancelled or threatened cancellation for changes in programming, though it does not waive the right to do so if necessary to protect its reputation and business. Another clause gives the station the right to reject or refuse any program it considers unsatisfactory, unsuitable, or not in the public interest; and the right to substitute programs of outstanding local or national importance.¹ TM therefore contends that its contracts do not limit a station's programming flexibility.

3. International Good Music, Inc. ("IGM") states that it supplies music for use at the licensee's discretion, but it does not supply format services. Clauses in IGM's contracts do not require broadcast of music programs supplied in IGM, "the broadcaster remaining at all times in control of the program broadcast over its facilities." Other clauses subordinate the agreements to terms in the broadcast license and Commission rules and regulations.

4. Bonneville Program Services ("BPS") says its contract restrictions only assure that its work product is broadcast without unnecessary interruption of continuity to insure the intended artistic objective. It notes that, while the Commission has the power to prohibit licensees from executing contracts inconsistent with the public interest, it has been reluctant to prevent licensees from freely negotiating contracts. The BPS agreement states:

Manner of Use. Station agrees to utilize, to the extent practicable, the format and other recommendations made by BPS in connection with the musical programming supplied hereunder.

BPS claims that this provision is merely suggestive. BPS provides a consulting service, "Format Consideration,"² to subscribers which contain provisions like some of those questioned in our *Notice* (see *Report and Policy Statement*, para. 3, *supra*). BPS states that the contract provisions attached to our *Notice of Inquiry* could bring about an abdication of licensee responsibility, but distinguishes its own contracts by the absence of a termination clause in case of deviation from format suggestions. BPS says that it has not cancelled or threatened cancellation of any subscription for any reason other than nonpayment; therefore, it submits, there is no need for further regulations.

5. National Citizens Committee for Broadcasting ("NCCB") is a non-profit organization, organized to assist local citizens' groups in improving broadcasting. NCCB expresses its concern about the effect Commission action in this area will have on citizen-broadcaster agreements.³ NCCB finds parallels in our policy to allow licensees to place "practical reliance" on networks for the selection and supervision of programming. NCCB also points to our policy of encouraging free negotiation between broadcasters and citizens groups. It comments that rule making or a policy statement barring specific contract terms in this proceeding may be so overbroad as to encompass citizen-broadcaster agreements. NCCB fears the result would be to inhibit public access and diversity of expression. NCCB contends that a broadcaster does not abdicate its responsibility or act contrary to public interest by entering into a contract agreement, as long as it reserves the authority to review and cancel programs. NCCB also points out that the

¹ This provision is patterned after Section 73.125 of the FCC Rules governing network contracts. The same provision appears in the Stereo Radio Productions, Ltd. contract.

² BPS's "Format Considerations" are as follows:

To maximize the effectiveness of material and service which we provide, we suggest the following basic policies:

1. Broadcast at least 45 minutes of Bonneville music during each hour the station is on the air.
2. Broadcast a minimum of 19 1/2 hours per day (5:30 a.m. to 1 a.m.). If in a competitive market, operation should be 24 hours per day.
3. Talk breaks limited to 4 per hour (except during 5:30 a.m. to 9 a.m.) with maximum limit of 8-spot availabilities per hour, if using Programme-I; 12 hours if using Programme-II.
4. All news to be locally originated (no duplication of sister facilities). Non-music commitment should be approximately 5%. We will advise best implementation and distribution.

You will note that these are policies under your control. To meet individual market needs, deviations may be necessary—a routine situation which is handled within the basic format concepts on a station-by-station basis.

³ See *Proposed Policy Statement and Notice of Proposed Rule Making re: Agreements Between Broadcast Licensees and the Public*, FCC 75-633, 40 Fed. Reg. 25689 (adopted May 29, 1975). NCCB has filed comments in that proceeding also.

Commission has adequate tools to prevent individual abuses in contractual agreements, namely review on renewal. Therefore, it recommends an announcement that actual operation of all contractual agreements regarding programming would be closely examined at renewal time⁴, and that such agreements are within the discretion of the licensee to adopt.

6. The Stereo Radio Productions, Ltd. ("SRP") contract contains the same provisions as attached to our *Notice of Inquiry* (see *Report and Policy Statement*, para. 3, *supra*).⁵ SRP states that its contract is not intended to inhibit broadcasters in the selection of non-musical programming. SRP contends that it does not dictate programming to its subscribers, but rather uses the criteria in its selection process to determine who its subscribers will be. SRP also asserts that agreement does not bind the subscriber to any policy, but merely recites those representations which the subscriber has already determined to be its operating policies with variances taken into account in the negotiation stages. The right to terminate is reserved by SRP if the subscriber changes programming policy in the public interest. SRP says that it has terminated on two occasions, both involving an increase in the number of commercials broadcast. SRP also filed reply comments pointing out the lack of initial comments by broadcasters, and the fact that no one has suggested undue influence on a broadcast licensee in the comments that were filed. SRP states that agreements could result in abdication of responsibility only if the licensee voluntarily abdicates its responsibility. Therefore, SRP recommends termination of this proceeding, and asks that the Commission find music format service agreements do not impinge upon licensee discretion and flexibility in programming. (See Appendix n. 1, *supra*.)

7. Wally Neskog and Associates, Inc. ("WNA") provides taped music to subscribing stations. WNA contends that it does not specify when or how to use the tapes and makes no non-musical programming demands. WNA commented as both a licensee and a music format supplier.

8. International Planned Music Association ("IPMA"), a non-profit corporation with more than 130 Muzak franchise operators, provides background music to subscribers. IPMA's only recommendation, that all FM stations should limit modulation of main carriers to 90%, and the comments received in reply from the National Association of FM Broadcasters, are beyond the scope of this inquiry.

⁴ Broadcasters are not now required to file musical format service contracts or citizen-broadcaster agreements with the Commission, nor are they required to keep them in their public files. Proposed rule making would require citizen-broadcaster agreements to be kept in the station's public files. Appendix, n. 3, *supra*. See also *Report and Policy Statement*, para. 15, *supra*.

⁵ We are informed that the provisions are in the process of being revised to eliminate ambiguities, and should be interpreted to mean that the subscriber will broadcast SRP tapes at all times that it is not broadcasting other programs. Thus, the agreement means that the subscriber plans to broadcast 50 minutes or more of SRP music an hour, *except* insofar as time is required for news, commercials, and other programming.