Party in Interest
Petition to Deny, Filing Criteria
Rulemaking, Petition for, Denied

Petition for rulemaking that would require the submission of detailed descriptive data by anyone who files a petition to deny a broadcast application denied. Petitioner failed to show that the proposed rule would serve the public interest. Existing standards for consumer participation are legally proper.

FCC 80-509

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application	RM-2847

MEMORANDUM OPINION AND ORDER

(Adopted: September 10, 1980; Released: October 17, 1980)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS WASHBURN AND JONES CONCURRING AND ISSUING STATEMENTS.

1. The Commission has before it a Petition for Rulemaking filed by the National Association of Broadcasters (NAB) on February 2, 1977. The petition seeks the establishment of a rule that would require the submission of detailed descriptive data by anyone who files a petition to deny a broadcast application on behalf of one or more groups under section 309(d)(1) of the Communications Act. 47 U.S.C. §309(d)(1). Public Notice of this filing was given on March 14, 1977. The time for filing supporting and opposing statements and replies expired on June 28, 1977, after grant of an extension of time. Although some of the statements were untimely filed, all have been fully considered.[1]

I. Introduction

2. The Commission does not presently require parties filing petitions to deny on behalf of one or more groups to provide detailed information about the nature and composition of those groups. Our failure to require such information, NAB contends, has made it

[1] Appendix A contains a list of the parties who have filed comments in this proceeding.

possible for non-local groups to establish standing merely by riding the coattails of one local listener or viewer.[2] NAB also claims that our existing approach permits local groups which form shortly before renewal time and have few members and limited funding to participate as well.[3] The result in either case, NAB asserts, is to allow petitioners that are not truly representative of the local community and who seek only to further private interests to have a voice regarding whether a broadcast application should be granted.[4] According to NAB, allowing such parties to participate is improper under the teachings of *United Church of Christ I* (hereinafter *"UCC I"*)[5] which, NAB contends, holds that only responsible spokesmen for representative groups having significant roots in the listening community may represent broadcast consumers before the Commission.[6] Another problem with the present law of consumer standing according to NAB is that it allows petitioners to mislead the Commission about the constituency and representativeness of the group on whose behalf they are filing, and to claim the support of groups which have not authorized the filing of the petition.[7] Moreover, NAB believes that our standards permit unrepresentative groups to use the threat of a petition to deny to coerce broadcasters to accept their partisan demands.[8]

3. NAB further states that our present practice of determining standing on an *ad hoc* basis has produced inconsistent and unpredictable rulings.[9] It compares, for example, one case in which we refused standing to a group whose pleadings were silent as to the identity of its members and other related facts, with a later case in which those facts were missing but we granted standing because the group's chairman was a resident of the station's service area.[10] If our only requirement for standing is that the petitioner must be a local listener or resident, states NAB, we effectively have read the party in interest criterion out of section 309(d)(1).[11] Moreover, NAB asserts that the courts have never expressly held that individual listeners have standing, and by implication, recommends that we should generally deny standing to such parties.[12]

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[2] NAB Petition for Rulemaking (hereinafter "Petition") at 6.
[3] *Id.* at 7.
[4] *See id.* at 11–12.
[5] *United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir 1966).
[6] Petition at 3; NAB Reply at 3.
[7] Pet. at 11.
[8] *Id.* at 7, 11–12.
[9] *Id.* at 4.
[10] *Id.* at 5.
[11] *Id.* at 10.
[12] NAB Reply at 3.

4. In these circumstances, NAB believes that we should fulfill *UCC I* 's "mandate"[13] and adopt formal standards on consumer standing. Toward this end, NAB asks us to promulgate a rule requiring parties filing petitions to deny on behalf of one or more groups to substantiate their relationship with each cited group and provide details concerning the group's address, the names of its officers, its formation date, purpose, funding structure, the size and location of its membership, and whether the group authorized the filing of the petition to deny.[14] This information, NAB believes, will identify representative local groups, and expose those which are insubstantial or non-local. Thus, we will be able to exclude those groups that desire only to further limited, private interests.

5. Comments supporting the proposal generally echo and amplify NAB's arguments. They concur that unless a formal standard is adopted, broadcasters will be harassed by unfounded petitions.[15] Some supporters also voiced concern that under *Bilingual Bicultural Coalition on Mass Media v. FCC*,[16] such groups will be able to gain access to a broadcaster's nonpublic records simply by filing a petition to deny.[17] Moreover, they stress that a broadcaster's inability to identify citizens groups before renewal time eliminates any chance for amicable negotiations before a petition to deny is filed, or for a continuing dialogue in later years.[18] Finally, two of the commenting parties related generally instances in which citizens groups threatened to file petitions unless broadcasters agreed to make a lump-sum settlement regarding assertedly private demands.[19]

6. Comments opposing the petition contend that current standards are fair, adequate, and have been clearly articulated through case-by-case decisionmaking and a procedural manual designed to facilitate responsible participation before the Commission.[20] They reject the allegations of abuse cited by NAB and others as unsupported and contend that the data the proposal would require are irrelevant to determining the legitimacy of a group or the issues it raises.

7. Information establishing how long the group has been in existence, for example, is not probative, because for groups whose members have limited time and money, license renewal is the only real opportunity to raise broadcast concerns.[21] Thus, the fact that many

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[13] *Id. at 2.*

[14] Petition at 10.

[15] *See, e.g.*, Hubbard Broadcasting at 2.

[16] *Bilingual Bicultural Coalition on Mass Media v. FCC*, (D.C. Cir., No. 75–1855, April 20, 1977), *rev'd on reh'g*, 595 F. 2d 621 (D.C. Cir. 1978) *(en banc)*.

[17] Dow, Lohnes & Albertson at 4; NAB Reply at 2.

[18] Dempsey & Koplovitz at 2; Metromedia at 4.

[19] Metromedia at 3; Storer Broadcasting at 2–4.

[20] *See, e.g.*, National Organization for Women (NOW) at 2–4; Herbert A. Terry (Terry) at 2.

[21] NOW at 7.

consumer organizations spring up in response to a particular event, like the filing of a license renewal, does not thereby detract from their legitimacy.[22]

8. The relevance of a group's funding structure is another criterion challenged by the opponents. They question whether NAB is arguing that only wealthy organizations have standing. Opponents also emphasize that a group's financial condition has no bearing on the quality of the issues it raises.[23] Moreover, the opponents note that disclosure of a group's financial resources would allow a broadcaster to determine how strenuously the group could litigate, thereby damaging its petitioning strategy.[24] Some comments stress that disclosure of this information might facilitate harassment of complaining citizens.[25]

9. The opponents urge that the merits of a petition are better measured by the issues raised than by the outward trappings of the petitioning group. Most advocacy before the FCC, they note, is a mixture of private and public interests, involving issues which may incidentally advance a private interest while more importantly advancing the public interest.[26] They additionally observe that just as a single person may raise a public interest issue, a well-established community organization may seek only to further its own selfish ends.[27] In conclusion, the opponents view NAB's proposal to limit standing of citizens groups as abridging the spirit of *UCC I*, which articulated the importance of citizen participation in the licensing process.[28]

II. Discussion

A. Summary

10. At the outset, we wish to point out that NAB and its supporters have relied almost exclusively upon conclusory allegations to support claims that the petitioning process is being abused by consumer representatives.[29] In addition, although NAB cites a pressing need for formal standards to "regulate and limit" intervention, the number of petitions to deny filed annually is quite modest.[30] We

[22] *Id;* United Church of Christ (UCC) at 8.

[23] NOW at 7; UCC at 8–9. *See* Terry at 8.

[24] NOW at 7.

[25] National Federation of Community Broadcasters, Inc. at 2; National Black Media Coalition at 7; National Citizens Committee for Broadcasting at 17.

[26] Terry at 1 and n. 3.

[27] UCC at 3.

[28] *See, e.g.,* Terry at 8; UCC at 6–9.

[29] Other than bald assertions, NAB cites a single newspaper article describing negotiations between a licensee and local citizens, an editorial regarding a speech by former FCC Commissioner Nicholas Johnson, and an incident described by a commenting party to substantiate its charges of abusive practices.

[30] For example, the Commission receives, on the average, over 3,000 license renewal applications annually. The number of petitions to deny these renewals has never exceeded 100 in any given year. Even though these petitions sometimes affect more than one license, the highest number of individual renewals ever affected was in

question, therefore, whether a pressing need for regulation could exist in these circumstances.

11. In the following discussion, we conclude that NAB has not shown that the proposed rule would serve the public interest. Accordingly, we deny the petition for rulemaking. In so determining, we initially find that the Commission's existing standards for consumer participation are legally proper. Under those standards, individual listeners and viewers as well as groups representing them may qualify as parties in interest under section 309(d)(1) of the Communications Act. That section is silent as to the class of persons Congress intended to permit to file petitions to deny. The legislative history demonstrates, however, that the drafters of section 309(d)(1) intended to allow anyone with standing to appeal a licensing decision to qualify as a party in interest. In this regard, the Commission's standards for consumer participation are consistent with prevailing judicial standing requirements enunciated by the Supreme Court. Under these requirements, an individual, a newly formed group or group with non-local members may achieve standing. Thus, to the extent that NAB's petition is designed to bar such parties from qualifying under section 309(d)(1), it is inconsistent with congressional intent.

12. Moreover, NAB has not convincingly made any significant independent arguments to justify adoption of its proposal. The data NAB would have petitioning parties provide are irrelevant to the question of standing. Furthermore, collection of the proposed information from petitioning groups or their representatives would not substantially improve the agency's ability to evaluate the legitimacy of the interests advanced. Finally, with respect to claims regarding petitioners' existing ability to make misrepresentations to the Commission or to engage in coercive practices, if the FCC receives probative evidence of such practices it will take appropriate action on a case-by-case basis.

B. Parties in Interest in General

13. Under section 309(d)(1) of the Act, any party in interest may file a petition to deny a broadcast application.[31] The petition must contain specific factual allegations sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest. Such allegations must

1976, when petitions to deny affected 224 license renewals (or well under 10% of the estimated number of applications filed). Interestingly, the number of petitions filed since that time has never approached that figure. In fiscal year 1979, for instance, the Commission received just 19 petitions affecting 54 renewal applications (*i.e.* just 2% of the estimated number of applications filed). Moreover, these numbers represent petitions filed by those relying on every recognized standing basis, not just those filed by consumers or their representatives.

[31] Petitions may be filed to deny any applications to which section 309(b) applies. *See* 47 U.S.C. §309(d)(1) (1976).

be supported by the affidavit of a person or persons with personal knowledge of the facts recited.[32]

14. The Act does not mention the class of persons Congress intended as parties in interest. Resort to section 309(d)'s legislative history, however, sheds considerable light on the matter. Until 1952, there was no statutory provision allowing parties other than the applicant to participate in the licensing process. In that year, Congress amended the Act to allow "parties in interest" to file petitions during a 30-day period after a license grant, and required the Commission to hold a hearing in every instance.[33] The Senate Report reveals that Congress added this section to codify the Supreme Court's decisions in *FCC v. Sanders Bros.* [34] and *NBC v. FCC*,[35] which established, respectively, that parties alleging that a particular license grant would cause economic injury or electrical interference have standing to challenge that action in court. The Report emphasized that by confining the petitioning procedure to those advancing interests identified by the Supreme Court, Congress was protecting the Commission from parties "who have no legitimate interest but solely with the purpose of delaying licensing grants which properly should be made."[36] Thus, under this provision, parties who had a right to appeal a Commission licensing decision would have an opportunity to raise objections with the Commission in the first instance.[37] Neither the House Report nor the Conference Report elaborated further on this matter.

15. Shortly thereafter, Congress amended the section in response to ringing complaints from the Commission and the communications bar that the provision was being routinely used by any party who might be economically harmed by a license grant simply to delay its final issuance. The House Report explained: "In many of these cases the protests are based on grounds which have little or no relationship to the public interest."[38] To remedy the situation, Congress delegated to the Commission discretion to dispose of meritless complaints without a hearing. The purpose of the new provision, as stated by both Houses, was to prevent the misuse of the protest procedure by those interested solely in furthering their own economic interests.[39]

16. The Committees considered, and rejected, the idea of narrowing the class of persons with standing to file petitions.[40] In this regard,

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[32] *Id.*

[33] Communications Act Amendments of 1952, Pub. L. No. 554, §7, 66 Stat. 715.

[34] 309 U.S. 470 (1940).

[35] 319 U.S. 239 (1943).

[36] S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951).

[37] *Id.*

[38] H.R. Rep. No. 1051, 84th Cong., 1st Sess. 3 (1955).

[39] *Id.* 1–2; S. Rep. No. 1231, 84th Cong., 1st Sess. 1 (1955).

[40] H.R. Rep. No. 1051, 84th Cong., 1st Sess. 3 (1955); S. Rep 1231, 84th Cong., 1st Sess. 3 (1955).

Congressman Harris, Chairman of the Subcommittee on Communications, noted during the debates on the House floor:

> While the classes of persons who have standing as "parties in interest" to file protests are very broad, the committee believes that the continuance of abuses of section 309(c) [predecessor to 309(d)] can be curbed without attempting to limit such classes of persons. Even if the committee should try to limit such classes of persons, it would find the task almost insuperable. Rather, therefore, than attempting to limit parties in interest, the committee recommends that section 309(c) be amended to make it perfectly clear that the Commission has the authority to dispose of [meritless] protests . . . [41]

17. The 1956 amendment was ineffective; the present section 309(d) was added in 1960 to stem the tide of continuing tactical delays.[42] To arm the Commission against the relentless stream of petitions, the 1960 amendment made three changes: it required parties to file petitions before a license grant, to verify their contentions by affidavits based on personal knowledge, and to meet a higher standard of proof in order to obtain a hearing.[43] There was a consensus among the bar and the Commission on the substance of this amendment.[44] Nothing, however, was mentioned regarding the notion of restricting the class of eligible parties in interest. In fact, the chairman of the Federal Communications Bar Association's committee responsible for drafting the amendment stated that the committee had made no attempt whatsoever to define the term.[45]

18. Viewed as a whole, the legislative history of section 309(d)(1) makes plain that Congress's unwavering goal has been to ensure that petitions advancing interests legitimately related to the purposes of the Act should be considered by the Commission. Therefore, Congress enacted measures enabling the FCC readily to discard petitions not raising issues material to the public interest determination. Congress intentionally avoided, however, limiting the class of parties entitled to file a petition to deny. Rather, it determined that anyone with a right to appeal a Commission decision should be able to present his claims to the agency before the decision is made.

19. Thus, in determining whether a petitioner qualifies as a "party in interest," we must apply judicial standing principles. To obtain

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[41] *See* 101 Cong.Rec. 9611 (1955) (remarks of Rep. Harri Chairman, House Subcommittee on Communications).

[42] *See, e.g.*, Hearings Before the Subcomm. on Communications & Power of the House Comm. on Interstate & Foreign Commerce, 86th Cong., 2d Sess. 30 (1960) (statement of FCC Chairman Frederick W. Ford); Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate & Foreign Commerce, 86th Cong., 1st Sess. 55–57, 67–68 (1959) (statement of J. Roger Wollenberg on behalf of the Federal Communications Bar ass'n).

[43] Communications Act Amendments of 1960, Pub. L. No. 86–752, §4(a), 74 Stat. 889.

[44] *See, e.g.*, note 42, *supra*.

[45] Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate & Foreign Commerce, 86th Cong., 1st Sess. 57 (1959) (statement of J. Roger Wollenberg).

judicial review of administrative action, a party must be "aggrieved" or "adversely affected."[46] The constitutional prerequisites (which stem from Article III's case or controversy requirement) have been relaxed considerably over time, thereby substantially broadening access to the federal courts.[47] Presently, to establish standing a litigant must allege a threatened or actual injury to himself,[48] whether economic, aesthetic or otherwise,[49] that is likely to be prevented or redressed by a favorable decision.[50] So long as these requirements are satisfied, persons to whom Congress has granted a right of action may have standing to seek relief on the basis of the legal rights of others, and indeed, may invoke the general public interest in support of their claim.[51] Moreover, the fact that many people suffer the same injury is no reason to deny standing.[52] In any event, the question of standing in no way depends on the merits of plaintiff's contention.[53]

20. There is no question that an association may have standing in its own right to seek judicial relief from injury to itself, and to vindicate its own rights. Even in the absence of injury to itself, however, an association may establish standing as the representative of its members, as long as it alleges that one or more of its members has standing, and the nature of the claim and the relief sought does not make the individual participation of each injured party indispensable to the resolution of the lawsuit.[54]

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[46] *See* 47 U.S.C. §402(b)(6) (1976); 5 U.S.C. §702 (1976).

[47] *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38–39 (1976); Davis, *Administrative Law Treatise* §22.00-1 (Supp. 1970).

[48] *See Warth v. Seldin*, 422 U.S. 490, 499 (1975).

[49] *See Sierra Club v. Morton*, 405 U.S. 727, 737–38 (1972).

[50] *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S.at 38.

The Supreme Court has adverted to another, nonconstitutional standing requirement, *i.e.*, that plaintiff's interest be arguably within the zone of interests sought to be protected by the statutory framework within which the claim arises. *See Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). The Supreme Court's failure to make but fleeting references to this requirement since *Data Processing* has provoked confusion in the courts and criticism from the commentators. *See generally* and Davis, *Administrative Law of the Seventies* §§22.02–11 (1976), Supp. 1978). Criticism notwithstanding, the D.C. Circuit not long ago reaffirmed the continued vitality of this test and its adherence to it. *See Tax Analysts & Advocates v. Blumenthal*, 566 F. 2d 130, 138–40 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). We therefore will address this issue in our standing inquiry.

[51] *See Sierra Club v. Morton, supra*, 405 U.S.at 737; *FCC v. Sanders Brothers, supra*, 309 U.S.at 477. In *Sierra Club*, the Court explained that the fact of injury is what gives a person standing to seek judicial review, but "once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."

[52] *United States v. SCRAP*, 412 U.S. 669, 687–88 (1974).

[53] *See Flast v. Cohen*, 392 U.S. 83, 99 (1968).

[54] *Warth v. Seldin, supra*, 422 U.S.at 511.

C. Broadcast Consumers as Parties in Interest

21. Judicial precedent recognizes that listeners and viewers, or groups representing them, have standing to contest broadcast licensing decisions. The seminal case in the area of broadcast consumer standing, of course, is *UCC I*.[55] The issue there was whether appellants, two church groups with members residing within Station WLBT-TV's service area, and two individuals active in local civil rights, had standing under section 309(d) to contest the station's license renewal. Renewal of the broadcaster's license was contested on the basis of allegations of discriminatory programming, over-commercialization, and fairness doctrine violations. In ruling for appellants, the court held that the Commission must allow "audience participation" in the license renewal process;[56] it then required the FCC to grant standing to one or more of the consumer representatives to present the issues raised in their petition at the court-ordered hearing on WLBT's renewal application.[57]

22. To interpret the scope of section 309(d), the court reviewed previous Supreme Court cases concerning standing to appeal Commission decisions, as well as section 309(d)'s legislative history.[58] Based on that analysis, the court rejected the premise that Congress intended to limit the petitioning process to those asserting economic injury or electrical interference. Rather, in the court's view, Congress left it to the judiciary to identify proper parties in interest.[59]

23. The court recognized the "obvious and acute" concern of the listening public—broadcast consumers—with a licensee's performance, and emphasized the benefits to be derived from consumer participation.[60] Those benefits include assistance by consumers as "private attorney generals" in enforcing the Commission's rules and policies; participation in renewal proceedings by those most familiar with the station's performance; and involvement by the only ones who may be concerned enough to lodge a complaint.[61] Consequently, consumer participation was seen by the court as necessary to assist the Commission in judging whether a licensee is discharging its statutory duty to operate in the public interest.[62]

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[55] *See* note 5, *supra*.

[56] *Id.* at 1005-06.

[57] *Id.* at 1006.

[58] *Id.* at 1000–01.

[59] *Id.* at 1001–02.

[60] *Id.* at 1002.

[61] *Id.* at 1004.

[62] *Id.* at 1005, 1006. Argument by the Commission that allowing such participation would overburden its processes failed to persuade the court. The court noted that the financial burden of participation and difficulty of attracting lawyers to represent public interest groups limit such participation. *Id.* at 1006. The court further observed that the Commission has ample authority to limit the number of parties to a proceeding through its inherent powers or by rulemaking. *Id.* at 1005, 1006. In light of subsequent developments in the law of standing, we do not believe that any such

24. If there was any thought that consumer participation might be limited to spokesmen for representative community groups, the D.C. Circuit Court of Appeals soon after dispelled that view. In *Joseph v. FCC*,[63] the court granted standing to an unaffiliated individual listener to represent a station's local audience.[64] *Hale v. FCC*[65] reinfroced *Joseph's* holding when the court observed that the Commission's failure to contest the standing of two individual residents, despite the broadcaster's objection, "reflects the more prescient reading" of *USS I*.[66]

25. The Commission has established standards by which broadcast consumers or their representatives may qualify as parties in interest under section 309(d)(1) on a case by case basis. Because the legality of listener standing is so well-accepted, we have often discussed the issue in rather summary fashion. As a result, there have been differences in the exact language used or the approach taken on each occasion.[67] Therefore, we take this opportunity to clarify existing standards for consumer participation and to explain why those standards satisfy judicial standing requirements.

26. Any individual may qualify as a party in interest if he alleges that he is a listener or viewer of the station in question or that he resides[68] within the station's service area.[69] The petitioner must, of course, provide factual allegations to support his contention that it

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limitation would be proper under section 309. As noted above, section 309(d)'s legislative history demonstrates that Congress intended to allow all those entitled to appeal a Commission decision to qualify as petitioners to deny. Consequently, in our view any group or individual able to fulfill the requirements set forth *supra* at paras. 19–20 would be entitled to party in interest status. *Cf. National Welfare Rights Org. v.Finch*, 429 F. 2d 725, 738–39 (D.C. Cir. 1970). This is not to suggest, however, that the Commission or the courts may not prescribe standards by which parties must demonstrate standing, or that the FCC lacks authority to impose regulations to further orderly and efficient proceedings. In any event, as pointed out earlier, the number of petitions filed is relatively small. Thus, the administrative burden generated by such petitions is insufficient to justify a rulemaking in this regard, and NAB's allegations have not convinced us otherwise.

[63] 404 F. 2d 207 (D.C. Cir. 1968).

[64] In *Joseph*, an assignment challenge, the protest was made by motion after the Commission acted, rather than in a timely petition to deny. That procedural quirk was immaterial to the court's ruling on the merits, as well as to its holding on party standing.

[65] 425 F. 2d 556 (D.C. Cir. 1970).

[66] *Id.* at 558 n. 2. *See also Stone v. FCC*, 466 F. 2d 316, 320 (D.C. Cir. 1972) (accepting without discussion the right of 16 local residents individually to challenge a television license renewal).

[67] Nevertheless, we believe that any inconsistency among the cases is more apparent than real.

[68] It is reasonable to presume that a local resident who petitions to deny a broadcast application is a listener or viewer of the station. Otherwise, it is highly unlikely that he would become involved in a time consuming and costly regulatory proceeding. (In some cases, petitioning local residents may no longer listen to the station in question because of the shortcomings alleged as to a licensee's performance. *See Plough Broadcasting Co.*, 70 FCC 2d 683 (1978). These individuals have standing as well, because their injury still may be traced to the broadcaster's conduct.) For ease of

would not serve the public interest to grant the application in question.[70] These allegations, when made by a recipient of the licensee's broadcast service, supply the predicate for finding injury in fact.[71] An organization may establish standing to represent the interests of local listeners or viewers. To do so, it must provide the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf.[72]

27. We have shied away from requiring extensive information about consumer groups, in part, because of an underlying sensitivity to associational and privacy rights.[73] But there is also an important practical reason why we have not spent a great deal of time probing the particulars of these groups. Members of the listening audience, regardless of whether they express their views individually, in small groups or en masse, provide a fresh and vital perspective. They also can bring to light information about a licensee's performance that we do

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reference, we shall use the terms listener, viewer and resident interchangeably hereinafter.

[69] *Compare National Broadcasting Co.*, 56 FCC 2d 411 (1975) (individual viewer) and *Effingham Broadcasting Co.*, 51 FCC 2d 453 (1975) (individual listener) *with The Evening Star Broadcasting Co.*, 68 FCC 2d 129, 136) (non-resident; no standing), *modified on other grounds*, 68 FCC 2d 158 (1978) and *Dena Pictures, Inc.*, 66 FCC 2d 91, 92 (1977) (same) *and WGAL Television, Inc.*, 34 FCC 2d 296 (1972) (same).

[70] *See* 47 U.S.C. §309(d)(1).

[71] Of course, the petitioner must provide an affidavit to support hi contentions. *See id.*

[72] *See Carolina Radio of Durham, Inc.*, 74 FCC 2d 571, 572 (1979); *North Alabama Broadcasters, Inc.*, 74 FCC 2d 347 (1979); *Plough Broadcasting Co.*, 70 FCC 2d 683, 685 (1978). *Cf. Mississippi License Renewals*, 59 FCC 2d 1335, 1336 (1976). The Commission has not always clearly articulated these requirements. In some cases, we simply noted that the petitioning groups numbered local listeners among its members. *See, e.g., KSAY Broadcasting Corp.*, 45 FCC 2d 348, *recon. denied*, 47 FCC 2d 584 (1974). In still others, extended discussion of the standard for group participation was unnecessary because individuals with standing filed on their own behalf as well as on behalf of a group and thus achieved party status in their own right. *See Los Angeles Television Renewals*, 69 FCC 2d 451 (1978), *recon. denied*, 72 FCC 2d 273 (1979); *Sonderling Broadcasting Corp.*, 62 FCC 2d 303, *recon. denied*, 64 FCC 2d 731 (1977). We have not, in contrast, allowed party status to a group that asserts standing simply by describing itself as "a national organization . . . formed to operate as a public interest watchdog." *See Corinthian Broadcasting Corp.*, 28 FCC 2d 736 (1971); *Henry P. Becton*, 25 FCC 2d 398 (1970).

[73] As the Supreme Court observed in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly when a group espouses dissident beliefs." The Court there struck down a state's attempt to compel disclosure that might inhibit the group from advocating their unpopular viewpoints. *Id.* at 462–63, 466. Much of this same reasoning supports our reluctance to probe membership information in *Central States Broadcasting, Inc.*, 37 FCC 2d 500 (1972), in which we conferred standing on the Black Identity Education Association even though its president would not release members' names. *See id.* at 501–02. In retrospect, however, we should have required BIEA to satisfy the modest requirements set forth in paras. 19–20 *supra*, before ruling that the party in interest criterion had been met. The inhibiting effect of that minimal showing, if any, would be slight.

not have or might otherwise overlook. Therefore, we have granted standing to petitioning parties upon finding that the interests of one or more local listeners were before us.

28. In our view, the preceding approach to consumer standing satisfies the constitutional standing requirements outlined *supra* at paras. 19–20. For example, petitions to deny filed by individual members of the listening audience frequently raise issues concerning the station's programming performance, be it programming responsiveness in general, compliance with the fairness doctrine or a station's ascertainment efforts.[74] In such cases, the petitioner is basically alleging that a license renewal would disserve the public interest because the station has not met its obligations under the Communications Act or Commission rules or policies. The listener sustains injury because he has not received the service he is entitled to receive as a beneficiary of the licensee's public trusteeship. If the Commission agrees with the charges made and grants a conditional renewal, or denies renewal altogether, it is likely that a positive change will occur in the quality of programming available to that listener. Any such change obviously inures to that listener's benefit.

29. A similar standing analysis can be applied to petitions charging a broadcaster with inadequate employment of minorities and women. This agency's equal employment policies were conceived as a way to foster programming diversity with lesser government intrusion. By requiring licensees to meet certain minimum employment guidelines, it is our belief that the views of all segments of society will be more effectively conveyed on the broadcast medium at a lesser cost to journalistic freedom.[75] The Supreme Court has approved this rationale for imposing affirmative action obligations on licensees.[76] A listener who charges a local station with EEO deficiencies satisfies the injury in fact requirement because the broadcaster's shortcomings are depriving him of the viewpoints of a significant segment of the community. To the extent that we take positive action on the petition, we create a substantial likelihood that the listener's injury will be redressed.

30. The foregoing examples are representative of a large number of the rule and policy violations raised by members of the listening audience; however, they are hardly an exhaustive listing. Nevertheless, we believe that this constitutional analysis would apply with equal force to other broadcast practices generally challenged by listeners. These claims, moreover, are within the zone of interests sought to be protected by the Communications Act. A broadcaster is a public trustee

[74] *See e.g., Los Angeles Renewals*, 68 FCC 2d 75 (1978); *Effingham Broadcasting Co.*, 51 FCC 2d 453 (1975).

[75] *See Nondiscrimination in Employment Policies & Practices of Broadcast Licensees*, 60 FCC 2d 226, 229–30 (1976).

[76] *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 n, 7 (1976).

who has a fiduciary duty to operate its station in conformity with Commission rules and policies. The prime beneficiaries of this trusteeship are members of the listening audience. They are the ones most intimately affected by a licensee's performance of its statutory obligation to operate in the public interest. That much has been widely recognized in the case law.[77] A listener's claim that a licensee is not adhering to applicable broadcast regulations, therefore, is well within the zone of interests protected by the Act.

31. The standard by which citizens groups may qualify as parties in interest similarly satisfies established standing principles: the *sine qua non* of every ruling is the presence of local residents who support the petition. The group's local members thus supply the predicate for injury in fact and redressability. Moreover, the participation of other members of the group is unnecessary to provide the relief requested.

D. NAB's Rulemaking Proposal

32. As the prior discussion makes clear, the Commission's standards for consumer participation are legally proper. Contrary to NAB's position, nothing in the Act or the applicable case law requires the FCC to allow only spokesmen for representative groups with significant community roots to qualify as parties in interest. Indeed, as noted, rules flatly excluding all but such parties would be improper under section 309(d)(1). Moreover, the data NAB would have consumer groups or their representatives provide are largely irrelevant to the group's representational standing. Standing essentially centers on injury in fact to members of the group. Information as to the group's size, officers, location, and funding add nothing to that determination. Furthermore, NAB has not shown that the proposed rule is necessary to further any important administrative policies.[78]

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[77] For instance, in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court traced listeners' broadcasting rights not only to the public interest standard but to the First Amendment as well. The Court there spoke of a listener's right to diverse "social, political, esthetic, moral, and other ideas and experience . . . ." *Id.* at 390. Moreover, within the framework of our public trustee system, viewers and listeners retain "their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Id. Red Lion* endorsed the fairness doctrine—by which members of the public may lodge complaints for a broadcaster's failure to provide balanced discussion on controversial issues of public importance—as one way for listeners to enforce their rights under the Act and the First Amendment. *See id.* at 377–80.

[78] Retention of the present standard will not subject broadcasters to an avalanche of discovery requests because of the *Bilingual* ruling. *See* note 16 *supra*. Since the close of the comment period in this proceeding, th D.C. Circuit *en banc* reheard the panel decision cited by NAB and held that we can allow discovery to petitioning parties in the exercise of our discretion, but are not obliged to do so. *See* 595 F. 2d 621, 634 (D.C. Cir. 1978) *(en banc)*. Broadcasters' apprehensions appear unjustified in view of the fact that we generally have rejected such discovery requests as unnecessary. *See Employment Practices of North Carolina Broadcasters*, 71 FCC 2d 166, 170 (1979);

33. NAB suggests that adoption of its proposal will enable us to identify petitions filed by "insubstantial" or non-local groups and thereby eliminate frivolous petitions. At the outset, NAB has furnished no standard by which a group's representativeness could be measured. For example, how many members must a group have before it qualifies as a bona fide group? How old must it be? More important, NAB has not substantiated its assertion that there is a close correlation between the exact nature of a petitioning group and the merits of the petition, nor do we believe a meaningful correlation can be made. Complaints lacking mass support can and often do raise legitimate public interest concerns. Conversely, the fact that a petition is filed by or on behalf of a populous local group does not guarantee that it is not spurious. In addition, we are inclined to agree with some commenting parties that the fact that a group may be organized specifically to challenge a renewal or transfer application simply demonstrates that local concern about a particular issue often intensifies as the time for regulatory action draws near. Therefore, the length of the group's existence is not indicative of the merits of the group's contentions. Similarly, we reject the suggestion that a petitioning group's financial resources necessarily reveal its ability to advance legitimate public concerns. Indeed, it can also be said that a deep pocket sometimes may serve to delay consideration of such matters. In any event, the Commission presently has adequate tools to dispose of frivolous petitions.[79]

34. NAB urges us to adopt its proposal even if we decide to retain our present standards so that misrepresentations made by petitioners advancing consumer interests can be eliminated. Once again, NAB has not made an adequate evidentiary showing in this connection. In the absence of persuasive evidence to the contrary, the representations of petitioning parties are entitled to a presumption of regularity. However, probative evidence that a petitioner has intentionally misrepresented facts regarding matters like a group's existence, constituency or support for the petition would receive our close attention. At that point, the ordinary presumption of regularity would disappear, and the petition would be viewed with caution.

35. Two commenting broadcasters, Metromedia and Storer Broadcasting, have described practices by citizens groups which merit separate discussion. In one variation, they allege that they have been approached by a group asking for a large contribution and that, when the request was turned down, the group filed a petition to deny the station's renewal application. Storer Broadcasting described another

WSM, Inc., 66 FCC 2d 994, 1007-08 (1977). It is somewhat ironic that broadcasters were so fearful of discovery when that is precisely what NAB's proposal would require of citizens groups.

[79] For example, a petitioner must provide specific factual allegations sufficient to make a *prima facie* showing that grant of the application would be contrary to the public interest. Both the FCC and the courts have strictly interpreted those requirements. *See, e.g., Harrea Broadcasters, Inc.*, 52 FCC 2d 998 (1975); *Stone v. FCC*, 466 F. 2d 316 (D.C. Cir. 1972).

practice whereby a group first files a petition to deny and then offers to withdraw it if it receives a substantial sum of money—apparently unrelated to expenses incurred by the group in opposing the application. Commenters assert that adoption of NAB's proposal will prevent such practices. Invocation of the petitioning process for reasons primarily unrelated to the merits of a licensee's application is highly improper and constitutes an abuse of process. Resolution of any such allegations will turn on the facts surrounding the prosecution of the petition, however, not on the petitioner's identity.[80] Thus a rule establishing reporting requirements for citizens groups would be ill-suited to eliminate or detect such practices. As with charges of licensee abuse of process, we believe that the public interest would best be served by considering specific allegations of abuse on a case by case basis. When substantial and material questions are raised as to a petitioner's conduct in filing and prosecuting a petition to deny, the Commission will not hesitate to take appropriate and immediate action.[81]

36. While we wish to leave no doubt concerning our condemnation of abusive practices, we also reiterate our support for voluntary negotiations by broadcasters and citizens groups on proper areas of concern. Negotiations on matters such as employment of minorities and women or programming responsiveness have produced desirable results in a number of cases.[82] Although we encourage citizens groups to attempt to resolve differences before filing a petition to deny, if a group believes that only such a filing will prompt a licensee to consider legitimate suggestions seriously, we will not preclude it from doing so.

37. In sum, NAB and its supporters have not shown that the institution of the proposed rulemaking would be in the public interest.

Accordingly, IT IS ORDERED, that NAB's Petition for Rulemaking IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

DISSENTING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

IN RE: ESTABLISHMENT OF STANDARDS FOR STANDING AS PETITIONERS TO DENY

The Commission majority continues to refuse to establish any criteria for determining the legal standing of a petitioner to deny. It has reduced the "test" of legal standing to "residence in the station's

[80] As we have seen, licensees are also capable of abusing the Commission's processes. *See Radio Carrollton*, 69 FCC 2d 1139, *clarified*, 69 FCC 2d 425 (1978), *recon. denied*, 72 FCC 2d 264 (1979).

[81] *See Patrick Henry*, 69 FCC 2d 1305, 1311 (1978). *See also Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42, 53 (1975).

[82] *See generally Agreements Between Broadcast Licensees and the Public, supra.*

service area." Thus, for practical purposes, there is no test at all. The Court of Appeals in *Office of Communications of United Church of Christ* v. *FCC*, 359 F 2d 994 (1966) recognized the danger of "spurious petitions from private interests not concerned with quality of broadcast programming" who "may sometimes cloak themselves with a semblance of public interest advocates" (p. 1006), and it suggested that the Commission use broad discretion to formulate rules to avoid this danger. Not only has the Commission failed to take the initiative, it has now formally denied a petition for rulemaking to establish reasonable criteria for determining the legal standing of a petitioner to deny. Accordingly, I dissent.

In its petition for rulemaking, NAB stated succinctly that "the establishment of a formal standard for standing to file a petition to deny would regulate and limit intervention by petition to those spokespersons or groups that legitimately represent local interests and concerns, would discourage the filing of such petitions by parties who only seek to further their private interests rather than to further the goals and desires of the local populace, and would provide broadcasters and the Commission with information necessary to make a determination concerning a petitioning group's legitimate interest." Certainly, no legitimate, broadly-based public interest group has anything to fear from the reasonable requests of the NAB petition. Clearly the establishment of effective rules to weed out the professional troublemakers and opportunists could only serve to enhance the position of legitimate parties in interest. For the life of me I cannot understand why the majority refuses to accept such a common sense proposal!

NAB has made crystal clear its concern that the result of the Commission's present lax policy on standards for standing is that broadcasters will continue to defend themselves before the Commission against petitions to deny prepared by non-local groups which need only enlist the support and assistance of one local resident to serve as a front in order to achieve standing. Such groups are anything but representative of the *community* and there is no way of determining whether the "straw man" with local residence is representative of community interests or merely pressing his personal views. See my concurring statements in *McCormick Communications, Inc.*, 68 FCC 2d 507, 510.

The majority notes that nothing in the Act or the applicable case law requires the FCC to allow only spokesmen for representative groups with significant community roots to qualify as parties in interest, and rules flatly excluding all but such parties would be improper under Section 309(d)1. NAB does not seek to *exclude* any class of parties, but rather proposes that any party petitioning deny an application supply simple factual information sufficient to establish the party's qualifications as a party in interest. This does not exclude any party seeking to qualify as a party in interest. I agree with NAB's position that parties who seek standing to file petitions to deny,

alleging they also represent *local* organizations, should be required by rules to substantiate their relationship with each cited group. NAB suggests an affidavit setting forth the group's address, names of its officers, date of formation, its purpose, how it is funded (not the extent of its funding as the majority suggests), the size and location of its membership, and whether (if so, how) the group authorized the filing of a petition to deny. The majority refuses to require any of these informational elements. Apparently the majority is not concerned with whether a petitioning party in fact represents any identifiable segment of the general public in the listening/viewing community.

Metromedia, Inc., in its supporting comments in this proceeding suggested (and I fully agree) that rulemaking should include a proposal that petitioners be required to describe in their petition the effort they made to resolve their differences with the licensee before resorting to the Commission's formal processes. Metromedia notes that our "Public and Broadcasting" Manual specifically encourages citizens to bring their complaints to the attention of the local broadcaster before considering the filing of papers with the Commission. However, the majority dilutes this "encouragement" by stating that "although we encourage citizen groups to attempt to resolve differences before filing a petition to deny, if a group believes that only such a filing will prompt a licensee to consider legitimate suggestions seriously, we will not preclude it from doing so." Thus, the majority encourages the initial resolution of matters of local concern at the federal level rather than through local discussion and negotiation.

My dissent to the action of the majority goes not to the dismissal of the specifics of the NAB rulemaking petition, but rather to the continuing refusal to consider the desirability of more efficient and equitable regulations governing standing. Particularly in the light of repeated construction and mis-construction of the *United Church of Christ* case and the legislative history of Section 309(d)1 of the Act, (epitomized in this document), I think this Commission should institute an inquiry to clarify the confusion and determine the actual need for appropriate regulation. My position in no way denigrates the participation of bona fide public interest groups in any legitimate petition to deny process.

CONCURRING STATEMENT OF COMMISSIONER ABBOTT WASHBURN

RE: PETITION FOR RULEMAKING TO ESTABLISH STANDARDS FOR DETERMINING THE STANDING OF A PARTY TO PETITION TO DENY A BROADCAST APPLICATION

This Petition for Rulemaking filed by the NAB was useful in focusing Commission attention on our current standard for standing and the surrounding case law. While rejecting the specific criteria proposed by the NAB, I agree that there is a need for a more efficient, equitable standard. I would favor putting out a general inquiry which

did not endorse any specific set of criteria but which would seek public comment on an appropriate solution to the standing problem.

CONCURRING STATEMENT OF COMMISSIONER ANNE P. JONES

IN RE: PETITION BY NATIONAL ASSOCIATION OF BROADCASTERS FOR RULEMAKING TO ESTABLISH STANDARDS FOR DETERMINING STANDING OF PARTIES WHO MAY PETITION TO DENY A BROADCAST APPLICATION.

As I understand the NAB's rulemaking petition, the principal argument advanced for the rule change which it contemplates is that the present liberal rule for standing under §309 of the Communications Act "encourages the filing of frivolous petitions to deny" under that provision. Since, as pointed out in the Commission's Memorandum Opinion and Order, relatively few petitions to deny are presently being filed (only 19 were filed in fiscal 1979), I concur in denial of this rulemaking petition as unneeded at this time.

It seems to me, however, that there is some force to the NAB's argument that the power of individuals and "consumer groups" to challenge applications under §309 is subject to abuse in furtherance of private interests and "pet" causes. In this regard I believe we should bear in mind that, because a petition to deny or, indeed, even an indication that a petition to deny may be filed, represents a possibly mortal threat to a broadcaster's business, the impact on a licensee of such petitions or possible petitions may sometimes be disproportionate to their merit.

If petitions to deny proliferate in the future, and especially if it appears that the filing or threat of filing such petitions is being abusively used to "blackmail" broadcasters, I trust that the Commission will revisit this matter. Based on the record before us now, however, I agree that the NAB's petition should be dismissed.