

Coverage, Misrepresentation
Ratings, Distortion of, See also Hypoing

Commission will no longer maintain policies against the misuse of audience ratings data or the use of inaccurate or exaggerated coverage maps or coverage claims by broadcast licensees.

-Broadcast Regulation

FCC 83-339

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Elimination of Unnecessary Broadcast
Regulation

POLICY STATEMENT AND ORDER

(Adopted: July 14, 1983; Released: August 2, 1983)

BY THE COMMISSION:

1. This is the first in a series of Policy Statements that we expect to issue over the course of the coming months eliminating or proposing to eliminate various broadcast policies which our review indicates are no longer warranted or required by the public interest. These policies concern activities in which the Commission does not believe it should continue to expend resources, especially, but not solely, where there exist sufficient private remedies or market forces to deter the activity addressed by the particular policy. Additionally, we will be issuing one or more *Notices of Proposed Rule Making* in cases such as where the conduct is the subject of a Commission rule but contains issues closely related to those involved in policies being dealt with in this umbrella proceeding.¹ We turn now to a discussion of the specific policies addressed by this Policy Statement.

¹ As is apparent, our action here is not being taken pursuant to notice and comment procedures. Section 553(b)(3)(A) of the Administrative Procedure Act [5 U.S.C. §553(b)(3)(A)] does not require the issuance of a notice and an opportunity for comment where, *inter alia* "general statements of policy" are involved. Further, the listing of many of the Commission's policies in Section 73.4000 *et seq.* of the Commission's Rules does not affect the need, or lack thereof, for a notice and comment proceeding. Section 73.4000 clearly states that the policies are listed, and that relevant citations are provided in the Rules, "solely for the purpose of reference and convenience. . ."

Distortion of Ratings

2. In 1963, as a result of information developed both in hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce and through complaints filed with the Commission, the Commission issued a Public Notice (FCC 63-544) cautioning licensees about the improper use of ratings information. That Public Notice informed licensees that they were obliged to act responsibly in the use of such information and to ensure that survey material utilized in advertising campaigns was valid.² However, the Commission indicated that ordinarily it would refer complaints concerning questionable uses of ratings material to the Federal Trade Commission (FTC) for that agency's consideration and would take into account findings or orders to cease and desist entered by the FTC against licensees. Subsequently, the FTC issued guidelines regarding the use of broadcast ratings survey data. Generally, the FTC statement detailed practices that broadcasters should endeavor to avoid. For example, broadcasters were advised that it is improper to quote from an audience survey (or to quote survey data) in such a way as to create a misleading impression of the survey's results. Additionally, broadcasters were advised to refrain from making audience claims based upon data compiled in a survey which the broadcaster knows or has reason to know was not designed, conducted or analyzed in accordance with accepted statistical principles and procedures or where they know the data to be obsolete. In a 1965 Public Notice,³ the FCC brought these guidelines to the attention of its broadcast licensees and stated that, in determining whether a licensee is operating in the public interest, it would take into consideration a licensee's operation within the FTC guidelines. The Commission also restated its existing policy of generally referring complaints involving the use of broadcast ratings to the FTC and reaffirmed its intention to consider any findings or orders to cease and desist issued against a licensee by that agency. Subsequently, the Commission

² The policy being considered here involves the *use* of data by licensees (either, for example, the misleading *use* of accurate data or the *use* of data known to be invalid or inaccurate). It is not to be confused with the Commission's policy against licensee participation in deliberate attempts to alter the outcome of a rating survey by engaging in activities that undermine the validity of the sampling process. *Public Notice*, 65 F.C.C. 2d 413 (1977). In the latter policy, which is not at issue here, the conduct addressed is not the *use* of the data, but an effort to artificially affect the data themselves.

³ "*Commission Calls Attention of Licensees to FTC Statement on Broadcast Ratings*," 1 F.C.C. 2d 1078 (1965).

commenced a rule making proceeding looking toward the adoption of rules prohibiting ratings misuse practices.⁴ Although the Commission determined that the need for such a rule was outweighed by the First Amendment and Section 326 considerations which the rule would raise, it again reiterated its concern with ratings distortion practices.⁵

3. Although the Commission's general policy has been to refer complaints to the FTC, and to take findings and orders to cease and desist issued by that agency into account in assessing a licensee's qualifications to retain its license, it also has independently evaluated complaints regarding the misuse of ratings information by licensees. The Commission has, for example, granted short-term license renewals based upon such conduct even absent any findings by the FTC.⁶ As a result, the Commission continues to receive, and consider, numerous complaints of misuse of ratings information in the first instance. Such complaints typically are filed by competitors alleging that the subject station is promoting itself either to the public or to advertisers and advertising agencies by making misleading claims as to the station's popularity.⁷

4. We no longer are persuaded that the Commission's limited resources are well spent by continuing to investigate and adjudicate complaints of this nature in the first instance. These types of claims are made by businesses every day as to their popularity. However, a principal difference between such claims made by broadcasters and those made by non-broadcasters is that in the broadcasting context these claims are made more to obtain advertising than to influence purchasing decisions made by members of the public at large.⁸ Yet, given the availability of detailed audience rating data for both radio and television, advertisers and advertising agencies are in a particularly good position to verify the accuracy of ratings claims and to decide for themselves the significance that they will attach to claims made by the stations. Moreover, competing stations learning of a station's misuse of ratings data should be able and would likely be inclined to counteract any impact of such claims by notifying the

⁴ *Amendment of Part 73 of the Commission's Rules and Regulations to Prohibit Distortion of Audience Ratings (Docket No. 20501)*, 40 Fed. Reg. 26698 (June 25, 1975).

⁵ *Report and Order (Docket No. 20501)*, 58 F.C.C. 2d 513 (1976). For the application of this policy to a licensee's conduct see, *Coastal Telecommunications Corp.*, 66 F.C.C. 2d 941 (1977).

⁶ *KPIK*, 14 F.C.C. 2d 267 (1968); *Marsh Media, Ltd.*, 38 F.C.C. 2d 457 (1972).

⁷ Such complaints often allege that a station is informing the public or advertisers that, for example, "W is Central City's number one country music station," whereas the complainant disputes that assertion.

⁸ We feel it is unlikely that viewers or listeners would be appreciably influenced in their choice of stations merely because a broadcast station claimed to have superior ratings. Rather, it is more likely that such decisions are based upon the programming fare offered by each station.

advertisers and agencies that they dispute the claims being made. Furthermore, in all business relationships such as those involved in the purchasing of broadcast advertisements, the commercial entities have a strong incentive to deal candidly with each other. In instances where this incentive proves inadequate to deter fraudulent behavior, legal recourse against the offending station by the defrauded party is available.

5. Given these non-regulatory methods of dealing with ratings abuse problems, and the commercial nature of the conduct involved, we believe that continued Commission oversight in this area in the first instance is not warranted. Accordingly, all future complaints in this area should be directed to the FTC. In addition, all pending requests for Commission action involving licensees' alleged misuse of ratings information will be forwarded to the FTC.⁹ However, as in other areas where adverse determinations concerning licensee conduct are made, we will continue to consider FTC findings and orders to cease and desist relating to licensee abuse of ratings information in determining whether a licensee is acting in the public interest.¹⁰

Coverage Maps and Statements Regarding Stations' Coverage

6. The Commission's policy concerning misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees was set forth in a letter to Radio Station WARO.¹¹ In that letter the Commission stated that it expected licensees to deal candidly with the public and with advertisers. It condemned the use of inaccurate and exaggerated coverage maps or any practice intended to deceive or mislead advertisers or the public. Licensees were warned that care should be exercised to assure that advertisers were not misled and that full disclosure of station coverage was essential in exercising this responsibility.

7. We do not condone the use of inaccurate or exaggerated coverage maps or other misleading material regarding a station's coverage in connection with the sale of broadcast air time. The same considerations, however, which led us to conclude that continuing Commission involvement in the area of ratings abuse is no longer warranted, suggest the same conclusion with respect to the use of misleading coverage maps or coverage information by broadcast licensees. Here, as there, a business relationship between a broadcaster and its advertisers is primarily at issue;¹² the same capacity

⁹ Complainants in individual cases will be formally notified of this change in policy prior to our forwarding the complaints.

¹⁰ See *Violation of Laws of USA by Station Applicants*, 42 F.C.C. 2d 399 (1951).

¹¹ *Universal Communications of Pittsburgh, Inc.*, 74 F.C.C. 2d 617 (1969).

¹² Indeed, coverage maps and information are utilized almost exclusively as an aid in selling commercial time to advertisers. There is little, if any, likelihood that

for independent verification by advertisers of a broadcaster's claims exists; and, the same forceful incentive for candid dealing obtains, as does the availability of private legal remedies should this incentive fail to prevent abusive conduct. We note, moreover, that should a licensee file a misleading coverage map with the Commission, the licensee could be found to have misrepresented facts to the Commission, thus placing its license at risk, and possibly to have violated 18 U.S.C. § 1001, thus subjecting itself to criminal penalties. In view of the foregoing, we are changing our policy and, therefore, we no longer plan to investigate or adjudicate complaints involving misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees.¹³

8. In conclusion, therefore, this *Order* implements the following determination by the Commission: (1) that allegations of ratings distortions and misleading coverage claims are more appropriately explored and decided in other forums and will be so directed in the future: and (2) that, notwithstanding this determination, we will continue to consider the effect of adverse findings on the licensee's character qualifications. We have not determined in this *Order* what weight should attach to other outcomes; *e.g.*, a proceeding terminated for failure to prosecute, or by plea of *nolo contendere* or by a consent order. The relevance of these situations to licensee character evaluation, and indeed the more general question of whether the Commission should continue to consider even adverse findings where, as here, the activities are primarily business-related rather than broadcast-related, will be resolved in the pending proceedings in Gen. Docket No. 81-500, Policy Regarding Character Qualifications in Broadcast Licensing, 87 FCC 2d 836, 848 (1981).

9. Accordingly, IT IS ORDERED, That Sections 73.4035 and 73.4090 of the Commission's Rules ARE DELETED as set forth in the attached Appendix, effective September 2, 1983.

10. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

1. 47 C.F.R., Section 73.4035, Audience ratings: Hypoing and survey misuse, is removed in its entirety.

information derived from exaggerated coverage maps or misleading coverage claims would be addressed directly to the listening or viewing public, or in any significant way would be relied upon by them. See n. 8, *supra*.

¹³ To the extent, of course, that a licensee's use of exaggerated or inaccurate coverage maps or other materials concerning coverage results in judicial or agency findings of a violation of law, we will continue to consider such findings. See n. 10, *supra*.

2. 47 C.F.R., Section 73.4090, Coverage maps, Use by licensees, is removed in its entirety.