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I would like to have been a fly on the wall in the Capitol Building when the Communications Act of 1934 was passed. Better yet, I would like that 1934 fly's-eye observation to have been a follow-up to a similar observation when the Radio Act of 1927 was passed. I would like to have heard the off-the-record comments made by members of Congress as they tried to diminish the chaos of all those new-fangled radio stations that were cluttering up the airwaves and making it impossible for anyone to be heard. Since Congress was trying to solve a problem that seemed similar to the "natural monopoly" problem of the electric utilities, it seemed natural to charge the newly created Federal Communications Commission (the Federal Radio Commission, as it was known in the 1927 Act) with responsibility for regulating in "the public interest, convenience, or necessity."[1]

When I look at how hard the industry rails against many of the current regulatory efforts, it is difficult to believe that in 1927, the industry and its conservative leaders were asking a conservative administration and Congress to adopt the broadest of regulatory standards. Indeed, the Commission, in one of its earliest decisions, said that broadcasting stations were "licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience or necessity means nothing if it does not mean this."[2] The universal enthusiasm for broad regulation of the broadcast industry had many forces driving it. I am sure that one of the strongest forces was the total disorder that existed prior to the 1927 Act.

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1. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

2. *In re* Application of Great Lakes Brdcst. Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

The new industry was about to choke on the plethora of stations that were jumping onto the airwaves without regard for those already trying to be heard. But another force that drove the broad regulation engine had to be the universal certainty that the opportunity to be heard was very limited. Scarcity of the broadcast spectrum was uppermost in the policymakers' minds. As Justice Frankfurter said in his seminal opinion in *NBC v. United States*, "The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; . . . the radio spectrum simply is not large enough to accommodate everybody."[3]

The laws of physics have not changed in the sixty or more years since Congress first acted, but the ways in which humans have applied those laws to produce widespread electronic communication are wondrous. I cannot imagine anyone bold enough today to predict an absolute limit on the different ways in which the spectrum can be used to accommodate still more users in still more ways. Television, cable, satellites, cellular, transponders—these are only a few of the new ways that communications are made under the general auspices of the Federal Radio Act of 1927 and the administrative agency that the Act spawned.

Not everyone loves the FCC as much as its congressional sponsors anticipated. Even sixty years ago, not everybody loved the regulators. Congressman Beck of Pennsylvania, a former Solicitor General of the United States, expressed his opposition to the Commission having such broad powers as follows:

> [L]et us not extend something that diminishes the prestige of the courts, that robs them of what is a judicial function, and that turns over to a bureau such absolute power over property and property rights, a power exercised too often in the spirit with which the great poet said:
>
> But man, proud man!
> Drest in a little brief authority,—
> Most ignorant of what he's most assured,
> His glassy essence—like an angry ape,
> Plays such fantastic tricks before high heaven
> As make angels weep.[4]

The Congressional Record of February 10, 1932 shows that Congressman Beck sat down to applause for his poetic opposition.[5] Congressman Beck would be much in demand today to speak to various parts of the communications industry—assuming he were willing to complain about the

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3. NBC v. United States, 319 U.S. 190, 213 (1942).

4. 75 CONG. REC. 3680, 3685 (1932); *see* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 788 (Max. D. Paglin ed., 1989).

5. 75 CONG. REC. 3680, 3685 (1932).

unnecessary regulation of those who invited him and about the need for continued regulation of those who competed with his invitors. Most of the fights on the Hill today deal with internecine strife between those who benefit from regulation and those who want to loosen the strings. The "must-carry" controversy, which pits the small cable operators against the broadcast networks (and many of the large cable operators), is a case in point. The cable opponents see no reason why they should be required to carry the local and network television stations, usually without charge, when there are all sorts of other money-making opportunities available. The television broadcasters think that the "must-carry" regulations are completely in the public interest, very convenient for the consumers, and absolutely necessary to the broadcasters' financial well-being. The FCC must swim among those sharks and survive.

The fight between the Baby Bells and Ma Bell is another case in point. In any given situation, these protagonists will find themselves very much favoring regulation or very much opposing it. The Commission's charge is to find where the public interest lies. As if matters aren't complicated enough, the stakes in all of these battles are very high—high enough to get the best lawyers, the best lobbyists, and the best public relations experts to make the case for or against a particular regulatory policy at issue before the Commission, Congress, or the courts. It should not surprise us, then, that a career as an FCC commissioner is not a good stepping stone for elective office (the few who tried to move in that direction failed), nor is it given to longevity and a popular following. Those Commissioners who survive for any length of time usually have learned to keep their heads down, and aspire to as much anonymity as possible.

So on its sixtieth birthday, at least if you start counting from 1934, I offer my regards and felicitations to the Federal Communications Commission. It has not had an easy life, and it has matured with some grace. Compared to its peers, like the Interstate Commerce Commission, the much younger agencies, like the Nuclear Regulatory Commission and the Federal Trade Commission, and all of those alphabet soup agencies that are now only history, the FCC looks pretty good. Whatever those congressional sires thought that they were creating, their handiwork has done a pretty good job of furthering the public interest, convenience, and necessity.