

Standing as Empowering and Limiting: A Rhetorical Analysis of *The Office of Communication of the United Church of Christ v. Federal Communications Commission (1966)*

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This essay examines the United States Court of Appeals for the District of Columbia's decision in Office of Communication for the United Church of Christ v. Federal Communications Commission (1966), arguing that the decision creates a rhetorical space for resistance to corporate-controlled broadcast media, a space that is both empowering and limiting in scope. This case ultimately frames the agency available to citizens in determining what constitutes the public interest. Strengths and weaknesses aside, challenging the renewal of licenses granted to broadcast stations remains a primary strategy employed by citizens and interest groups.

In 2007, advocacy groups such as Voice for New Jersey petitioned the Federal Communications Commission (FCC) to deny the broadcast license renewal of Fox-owned WWOR-TV on grounds that it did not serve the interests of the citizens of New Jersey. Rather than serving the community within which it resides, WWOR, the only commercial VHF station licensed in New Jersey, aligns itself with New York City in its coverage, its nickname, My9 New York, and its use of the New York City skyline on its Web page. Voice for New Jersey noted that the station's own report to the FCC indicated that between 1999 and 2006, fewer than 170 stories a year focused on New Jersey, an average of one news story for every two days. The group also reported that in 2006, only 20% of WWOR's news focused on stories about New Jersey. More than 100 people attended an FCC hearing in November 2007 regarding the station's license renewal, and groups such as The United Church of Christ and Rainbow PUSH Coalition voiced opposition to renewal. Though the groups did not expect the FCC to grant their petition, they "hope[d] the [C]ommission will impose conditions requiring specific and measurable improvements in New Jersey programming" (Larini, 2007, ¶21; see also Dwoskin, 2007). It is important to note that Voice for New Jersey had legal standing to challenge WWOR's broadcast license due in large part to the determination of citizens of Jackson, Mississippi, and the resources and resolve of The United Church of Christ.

The Office of Communication of the United Church of Christ v. Federal Communications Commission (1966) [herein *UCC v. FCC*] was the case that opened up the broadcast licensing renewal process to the public. With the help of two local, black Mississippians, the United Church of Christ brought the case to the United States Court of Appeals for the District of Columbia, arguing that television and radio stations WLBT in Jackson, Mississippi, should be denied the renewal of their broadcasting licenses. The stations refused to broadcast news concerning the coverage of the Civil Rights Movement and to provide or sell air time to local black politicians and failed to provide the predominantly black audience with the proper coverage of issues concerning the local community (Mills, 2004). Prior to this decision, the public had no legal recourse for challenging license renewals.

Studies concerning *UCC v. FCC* have been conducted from historical (Classen, 2004; Mills, 2004), legal (Horwitz, 1997; Horwitz, 1994; Shapiro, 2007), and policy (Garay, 1978; Grundfest, 1977; Rowland, 1997) perspectives. Little research has been conducted from a posture rooted in rhetorical criticism, however. In light of Hasian's (2000) call for legal studies "to broaden its horizons to provide theories and practices that simultaneously deconstruct the rhetoric of the empowered while

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helping to find a space for the marginalized to speak” (p. 197), this paper focuses on the rhetorical impact of the decision from *UCC v. FCC* in providing citizens a means of agency and feedback in determining what constitutes the “public interest.” Arguing that the court’s decision creates a rhetorical space for invention and intervention, this study discusses both the empowering and marginalizing nature of such a space. What lies at the core of this analysis is an examination of pragmatic possibilities citizens have available to resist and respond to corporate-controlled media.

The significance for rhetorical and mass communication scholars alike is how the effects of the case have been extended throughout the history of social and media advocacy and still have an impact. This essay will also help illuminate how the available means for citizens’ recourse has come to its current state of affairs. The legal arena (not to exclude dollars and votes) has come to represent a preferred location for contemporary challenges to communication policy-making. Strengths and weaknesses aside, challenging license renewals is still a primary strategy employed by citizens and interest groups today. Learning from the past will help present and future activists continue to shape the culture and climate of media reform.

A brief review of literature surrounding the history and nature of the “public interest” is necessary to appropriately place the significance of the phrase within the context of democratic societies. This review will in no way be exhaustive, but meant only to situate the overall importance of the role of maintaining the “public interest” in order to promote a healthy and informed citizenry necessary for democratic functioning. The issue addressed here is not exclusively the problematic nature of defining just exactly what the “public interest” is, but rather who is allowed to participate in the process of defining.

Situated Within Social Movement

The historical context of *UCC v. FCC* itself is worthy of deeper research. The great social upheaval of the 1960s cannot be overstated, and this court case is one of the many outcomes of the social movements engaged in the struggles of the time. Significant change had been made with the passage of civil rights legislation in both 1964 and 1965, as well as the Civil Rights Movement success in the form of the Mississippi Freedom Ballot in the fall of 1963 and Freedom Summer in 1964 (see Branch, 1988; Branch, 1998; Dittmer, 1995). The court’s ruling came at a time when “consciousness awareness” was a prime motivating factor on the ground of Mississippi. The move to seek equal representation in the local media can be seen as an extension of non-violent, legal tactics employed by the Movement in Mississippi.

In June 1964, the Office of Communication of the United Church of Christ filed what was initially a petition with the FCC requesting that the license of WLBT in Jackson, Mississippi, be reviewed. Everett Parker, director of the Office of Communication for the United Church of Christ, and two Mississippians signed as the petition’s appellants. Aaron Henry, NAACP president for the Mississippi chapters, and Robert L.T. Smith, an officer with the Mississippi Freedom Democratic Party, were the two local Mississippians the United Church of Christ needed to bring specific grievances against the television station. Amongst other violations, both men had been denied airtime in political campaigns and could attest to the station’s historical pattern of segregated practices. The television station, for example, frequently suspended broadcasting whenever national news services would cover events of the Civil Right Movement. By blocking coverage, the station failed to meet the needs and interests of its predominantly black viewing audience. The FCC took almost a year to rule on the petition, and then dismissed it under the reigning standing doctrine; at that time, only parties affected by electrical interference or financial injury were granted standing. The appellants then filed a court appeal which would ultimately rule in their favor, as the court remanded the FCC’s decision, ultimately changing the nature of granting citizens legal standing (see Horwitz, 1997).

Legal standing justifies the notion that citizens have a right to voice their viewpoints before the FCC. The court's decision in *UCC v. FCC* "strongly affirmed the standing rights of the citizens groups and in remand directed the FCC to take their interests and arguments into account" (Horwitz, 1994, p. 143). Accordingly, determining the public interest became a decision-making process involving the representation of parties who hold a viable interest, what Aufederheide (1999) referred to as a "product of relationships" (p. 7). In a way the court's decision encouraged political activism by allowing "the demands of groups left out of the political process" to be heard (Horwitz, 1994, p. 144). In other words, the court acknowledged that citizens have a *right* to participate in the process of determining what constitutes the public interest. And indeed this right has been acted upon as evidenced by the citation of *UCC v. FCC* in more than 900 cases.¹

The Public's Interest in 'The Public Interest'

Since its inception in the Communication Act of 1934, the FCC has been responsible for regulating communication policy in a manner which promotes the "public interest, convenience or necessity" (sec. 309). Napoli (2001) suggested that "the public interest functions as the broad umbrella concept from which all of the other foundation principles in communication policy stem" (p. 63). Issues of diversity, competition, localism, and fostering the marketplace of ideas compete to form the overall "broader framework of political philosophy" that the public interest assesses (p. 64).

The key question that Napoli (2001) raised was, "What exactly constitutes effectively serving the public interest?" (p. 65). He noted that within the concept are varying levels of interpretation which function to promote distinct outcomes. The level of ambiguity contained within the concept is also a noted criticism. Rowland (1997) argued that the public interest standard has "within it the seeds of its own compromise, if not destruction" (p. 312).

Whether the ambiguity was by design or an interpretive flaw in conception, the public interest standard is still a reality in communications policy-making. Napoli (2001) argued that the public interest concept works primarily "as a rhetorical tool" used to justify decisions and outcomes, rather than as "an analytical tool" used for analysis (p. 94). Despite its obvious ambiguity, the problematic nature of the public interest standard potentially leaves its functionality and defining characteristics open for multiple interpretations only if those grounds of defining are actually open for interpretation. A real problem for the public interest concept is discovered when the spaces intended to create varying perspectives of interpretation are instead stifled and suppressed.

Horwitz (1991) explained how the public interest standard has been shaped by political and economic interests. It is not just that policies and regulation regarding the public interest fail to serve the public interest, but that the public interest has been defined by and protects private interests. The public interest standard comes under sharp criticism not only when it is too ambiguous, but also when it is too refined. When dealing with a concept that ideally encourages and promotes dialogue in determining what the concept is and is supposed to do, those conversations, similar to the nature of the public interest concept itself, should be open and accessible to all parties involved. Excluding a/the public from participating in the debate cuts against the foundational principles of democratic participation (McChesney, 2004).

The public interest standard rests on and is motivated by certain assumptions. First, the public interest standard is necessary because the airwaves are considered a "scarce natural resource" (Rowland, 1997, p. 311). Second, because the spectrum is a "natural resource," it should be "publicly owned" (p. 311). While scarcity may no longer be viewed as a major issue (e.g., Fowler & Brenner, 1982), at the inception of the public interest standard these principles shaped the initial framework within which the concept was to be utilized. Rowland (1997) argued that the public interest standard was so easily

adopted into legislation precisely for “its ability to mask distinct differences of view about the obligations of the regulated industries and the authority of the administrative agency” (p. 315). The public interest standard emerged from a political framework that traditionally allowed private interests to have a voice over the use of broader public resources. For Rowland, the public interest concept functions less to promote and secure ideals about appropriate uses of public resources, and more as a phrase of rhetorical legitimacy affording private interests the right to use precious infrastructures like public airwaves. The definition of public interest then morphs into one of commercial interest. The public interest standard rests between accommodating both private and public interests: a relationship with private economic concerns on one hand and notions of public utility on the other.

Analysis of the Case

Motivating and underpinning the analysis of the case of *UCC v. FCC* is Hasian’s (2000) “critical legal rhetoric.” This perspective assumes that: 1) “Legal formalism hides the constitutive nature of America’s judicial rules and norms” (p. 4); 2) “Empowered elites profit from the denial that law is rhetorical” (p. 4); 3) “If laws are selective, then there have necessarily been many other possible views of justice and equity that have never become dominant” (p. 4); 4) “Critical legal studies should involve more than the study of ‘precedents’”; scholars should also examine the “‘extrajudicial’ factors [that influence] the trajectory of certain legal theories and principles” (p. 198); and 5) “Critical legal rhetoric involves both deconstructive and reconstructive movements” (p. 4). Hasian (2000) notes that “Because critical rhetoricians are concerned with both the structural and material dimensions of both textual and visual material, they try to find perspectives that allow them to trace the recurring forms that circulate in both the legal and public spheres” (p. 14). As such, this essay uses close-textual analysis as a means of interrogating the rhetoric in the case of *UCC v. FCC*.

Close-textual analysis has traditionally been applied as a tool for critiquing speeches and documents (Leff, 1988; Leff, 1986; Lucas, 1990), but here will be stretched to the “speech” within the text of the court’s ruling opinion. Certainly, how the decision is reached is always of importance, but the wording and possible interpretations of the decision are also of rhetorical significance. How citizens can potentially use the case’s granting of “legal standing” in order to address issues concerning the “public interest” is still valuable in the twenty-first century. In order to locate and interpret such textual moments, a close-textual analytical posture is needed. This approach aims to “divert attention away from theoretical constructions and to focus on the rhetorical action embodied in particular discourse” (Leff, 1986, p. 378). Such an analysis allows critics to take note of the details both externally outside of and internally within the text; that is, “*The central task of textual criticism is to understand how rhetorical action effects this negotiation, how the construction of a symbolic event invites a reconstruction of the events to which it refers*” (p. 385; emphasis in original). Media reformists and concerned citizens alike should take an interest in both the limiting and empowering nature of the court’s decision in *UCC v. FCC*.

To further the rhetorical criticism of this essay, it is necessary to apply another level of analysis. This analytical framework is borrowed from Phillips’ (1996) investigation of the “public sphere.” Habermas (1989) stated that, “By ‘public sphere’ we mean first of all a domain of our social life in which such a thing as public opinion can be formed. Access to the public sphere is open in principle to all citizens” (p. 231). Habermas (1989) described what he called the “political public sphere” where the public discussion focuses on issues associated with the actions of the state. Without access to a diversity of viewpoints, it is difficult for citizens to make informed political decisions and take part in rigorous political discourse, which, if one agrees that democracy should include citizen participation and deliberative decision-making, is detrimental in a

democratic society. These assumptions underlie Habermasian notions of the public sphere. It is the medium in which this discussion is carried out, however, where Phillips has concern.

In “The Spaces of Public Dissension: Reconsidering the Public Sphere,” Phillips (1996) revealed the limiting nature of public spheres such as the one provided in the *UCC v. FCC* decision. Phillips (1996) discussed the role of dissent within the public sphere, depicting “the limitations of social rhetoric” (p. 237). He does this by engaging six aspects of public spheres: openness, boundary maintenance, impartiality, intersubjectivity, rationality, and “consensus as cure.”

Phillips’ (1996) aspects of engagement function as thematic guides of analysis to the court’s decision. “Openness” is straightforward: “The public sphere is open to all” (p. 237). Openness has come under criticism due to its lack of historical reality and its romantic idealism; however, openness is a fundamental concept in relation to how the public sphere should function. The notion of “boundary maintenance” means to highlight that “attempts to draw lines demarcating public, private, and technical discourse have both critical and practical effects” (p. 239). Impartiality and intersubjectivity both deal with the politics of difference. Phillips (1996) noted that, “the public sphere serves to subjugate the interests and values of participants to some other system of interests and values,” and that, “the underlying assumption is that individuals, by virtue of their understanding of role behavior, are capable of coming to intersubjective agreement” (p. 241). Borrowing from Foucault, Phillips (1996) understood rationality to be “a product of particular historical power/knowledge relations” (p. 243). These relations produce and position certain logic and reasoning as privileged in status. “Consensus as cure” suggests that even though some sort of agreed upon action, in this case a legal proceeding, has been undertaken and a decision has been reached, the underlying problem or issue has not been completely dealt with or “cured” (p. 243).

Phillips’ typology is used to examine the rhetorical impact of the *UCC v. FCC* decision. Even though the legal arena of the United States justice system is not a true public sphere in the Habermasian definition, it does constitute one of the fragmented public spheres of societal interaction. Phillips’ concepts of engagement are not stretched beyond their utility; rather, they function as the critical lens of analysis.

By examining the decision in *UCC v. FCC* in the method described above, this analysis engages and critiques the outcome of the case in light of what Rowland (1982) referred to as “countervailing trends” (p. 3). The critical bent of this essay parallels that of Rowland’s objective by highlighting the dialectical nature of creating a space for resistance. Rowland (1982) stated:

A further purpose of this work is to draw attention to the usefulness of examining media policy issues in light of a jointly critical and symbolic approach—that is, to review official, public policy developments in communication in relationship to problems of pragmatic compromise with industrial and political forces and to underlying structures of myth about the nature and meaning of media in modern society. (p. 4)

According to Rowland, these “problems of pragmatic compromise” create a symbolic paradox for citizens’ rights of resistance.

Towards the Textual Material

The text of the opinion itself began by framing the questions at stake in this case:

- (a) whether Appellants, or any of them, have standing before the Federal Communications Commission as parties in interest under Section 309(d) of the Federal Communications Act to contest the renewal of a broadcast license; and
- (b) whether the Commission was required by Section 309(e) to conduct an evidentiary hearing on the claims of the Appellants prior to acting on renewal of the license. (*UCC v. FCC*, 1966, p. 997)

Upon determining the questions at hand, the opinion established the background of the case by essentially following the paper trail regarding how the case had come before the court (see Horwitz, 1997). The NAACP and individual citizens had filed complaints, dating back to 1955, about the pro-segregationist programming and the lack of equal representation. The opinion noted that, “Appellants filed a petition in the Commission urging denial of WLBT’s application and asking to intervene in their own behalf and as representatives of ‘all television viewers in the State of Mississippi’” (UCC v. FCC, 1966, p. 998). The first notions of access, or openness in Phillips’ typology, are laid out in the terms of the Appellants themselves, depicting and influencing the court’s perspective on granting legal standing. The opinion stated:

The petition claimed that WLBT failed to serve the general public because it provided a disproportionate amount of commercials and entertainment and did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes, who comprise almost forty-five per cent of the total population within its prime service area; it also claimed discrimination against local activities of the Catholic Church. (p. 998)

With this statement the court invoked an aspect of the “Fairness Doctrine,” specifically highlighting the legal precedent. The Fairness Doctrine was a policy that “required broadcasters to provide contrasting viewpoints on controversial issues of public importance” (Napoli, 2001, p. 14).² It was through this theoretical fit with the Fairness Doctrine of 1949 by which the Appellants sought access to the decision-making process.

Examining the Claim for Standing

The opinion outlined three reasons employed by the Appellants as grounds for their case: 1) The Appellants were denied “a reasonable opportunity” to respond to their critics, 2) they represented almost half of WLBT’s listening audience, and 3) the Appellants also “represent[ed] the total audience” and asserted the rights of all listeners to insure that the station was operated in accordance with public interest standards (pp. 998-999). Of particular interest here is the inclusive wording of the “total audience” and how it functions to empower the Appellants to seek the rights of all listeners. This inclusive labeling can be problematic in that it establishes a pattern of logic whereby individuals and organizations are allowed to speak for others, functioning as advocates. Issues of openness and rationality immediately become problematic, begging several questions: Who gets to speak for the total audience? What is the total audience? Who gets to define the total audience, and by whose standards of reason?

The court’s opinion addressed the Commission’s handling of the petition, noting that the FCC denied the Appellants “to intervene on the ground that standing is predicated upon the invasion of a legally protected interest or an injury which is direct and substantial” (p. 999). The Commission therefore granted no hearing and granted WLBT a one-year probationary license to consider the Appellants’ grievances. Justice Burger, in the written opinion, seemed to note that the FCC had granted WLBT more than a “benefit of the doubt”:

The Commission’s denial of standing to Appellants was based on the theory that, absent a potential direct, substantial injury or adverse effect from the administrative action under consideration, a petitioner has no standing before the Commission and that the only types of effects sufficient to support standing are economic injury and electrical interference. It asserted its traditional position that members of the listening public do not suffer any injury peculiar to them and that allowing them standing would pose great administrative burdens. (p. 1000)

The opinion cited two previous cases in which the Commission in fact *ignored* electrical interference and economic injury arguments. Noting *NBC v. FCC (KOA)* and *FCC v. Sanders Bros. Radio Station* respectively in relation to the former and latter arguments, the court revealed that the history of these concepts has not been “static” (p. 1000). That is, the FCC had been inconsistent in its arguments as to who is granted standing. The court noted that, “It is important to remember that cases

allowing standing to those falling within either of the two established categories have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest” (p. 1001). The FCC’s inconsistency demonstrates Phillips’ (1996) argument that impartiality is unattainable, both practically and theoretically.

Linking the Public Interest to Standing

Is the public interest itself a right or is it a right for citizens to intervene? The opinion argued that the purpose of the Communication Act of 1934 was not to create private rights, “But *these private litigants have standing only as representatives of the public interest*” (UCC v. FCC, 1966, p. 1001; emphasis in original). This places Phillips’ notions of openness and intersubjectivity at philosophical and political odds with each other. *Who* is granted the standing to represent others is still confined within the institutional framework of the legal system. The citizens’ rationality is therefore objectified by submitting and translating their logic into the rationality of the legal system. The question then becomes does this have an impact on the passion or motivation that encourages citizens to protest? That is, are available means of agency stripped of their intimacy and presence? As a voice, the public never speaks, but rather is spoken for within the boundaries of the legal system, which values specific, privileged forms of rationality and argumentation, including precedent.

In order to bolster the court’s argument, the opinion stated, “Congressional reports seem to recognize that the issue of standing was to be left to the courts” (p. 1002). Here is where much of the boundary maintenance done by the court’s ruling is problematic. Standing ought to be a matter determined by the people, but the legal impartiality of the court’s decrees became the reasoning and basis for framing the question of legal standing. Matters of openness in determining the public interest standards are further clogged by the wording of the court’s opinion:

Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist. (p. 1002)

Defining exactly what “a genuine and legitimate interest” is again removes the public from the discourse. To establish such an interest, some level of expert knowledge must be applied to establish some sort of a criterion, reinforcing the privileged and preferred rationality of the legal system. The establishment of specific “genuine and legitimate interest” would strip the dialogical process away.

The opinion stated that granting standing was nothing new, citing the *Ickes* decision and the ruling in *Scenic Hudson Preservation Conference v. FPC* as grounds for interpreting the “language of granting standing to persons ‘affected’ or ‘aggrieved’” (UCC v. FCC, 1966, p. 1002).³ The court suggested that consumers of radio and television have a right to intervene as broadcasters were given free licenses with the obligation to serve the public interest: “After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty” (p. 1003). Perhaps the industry was not “grasping the simple fact,” but it may have been the case that the industry learned after nearly 50 years that traditionally the FCC had little to no power in its ability to enforce breaches of duty due in large part to the politics of regulation (see Krasnow et al, 1982).

Moving through its argument to grant legal standing to citizens in individual communities, the court referenced an FCC report. Citing the *Television Network Program Procurement* of 1963, the court asserted that the listening public as consumers

of broadcast programming have an interest in the programming; “hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service” (p. 1003; emphasis in original).

The court asserted that traditionally it had allowed the FCC discretion in determining how consumers could raise issues concerning “scope and quality.” In *UCC v. FCC*, the court found a situation in which the faith bestowed upon the FCC needed reexamination. The court attested that it never implied in previous decisions that the FCC limit citizens’ participation to letter writing, inspecting records, or “to the Commission’s grace in considering listener claims” (p. 1004). The court wanted to make it clear that in cases involving the renewal of licenses, sometimes the only objectors may be “public spokespersons.”

Yet the court specifically defined and therefore confined citizen access and participation when it labeled public spokespersons as “attorneys general.” The opinion took an interesting position when it quoted Edmond Cahn, saying, “Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people’s needs more significant than administrative convenience” (*UCC v. FCC*, 1966, p. 1005). The court continued, “Some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates” (p. 1005; emphasis in original). In attempting to define who is granted standing and how, the court both opens up the legal process to those previously denied access and limits that access to those who understand the rationality of legal discourse.

Establishing the Mechanism for Access

It is the mechanism itself which the court established in this ruling. The court attested that consumer interests are the best indicators for constituting the public interest. This of course assumes that the public ever had an initial say in whatever is being consumed (Meehan, 2005; Smythe, 1954). The court found that, “In order to safeguard the public interest in broadcasting, therefore, we hold that some ‘audience participation’ must be allowed in license renewal proceedings” (*UCC v. FCC*, 1966, p. 1005). The court acknowledged that this suggestion may be problematic for the FCC due to the agency’s lack of staff and funding in order to process all of the potential “audience participation.” The court’s opinion stated that “the fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out” (p. 1005). Rowland (1982) noted, however, that between 1971 and 1973, petitions were filed against 342 stations. Empirical evidence seemed to run contrary to the court’s predictive and deliberative logic; advocacy groups and citizens took advantage of the opportunity to finally be heard.

The court also suggested that the FCC not worry about an impending flood of petitions because within these proceedings lawyers and attorneys would not be rewarded by “lucrative contingent fees” (p. 1007), which seemingly implies that lawyers would not rush to arms because such cases would not yield significant monetary settlements. Throughout the opinion, the court reprimanded the behaviors and policies of the FCC only to time and time again leave the final analysis to the very agency it was lambasting. Perhaps this is in part due to the court’s notion that the FCC was more than a traffic cop (*National Broadcast Co., Inc. v. United States*, 1943). In one of the more (in)famous statements made in the court’s opinion, an interesting metaphor was used:

We recognize that the Commission was confronted with a difficult problem and difficult choices, but it would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity and willingness to change, for WLBT had stoutly denied Appellant’s charges of programming misconduct and violations. In these circumstances a pious hope on the

Commission's part for better things from WLBT is not a substitute for evidence and findings. (*UCC v. FCC*, 1966, p. 1008)

Was it the case then that the Shepard and the Shepard's dog were asleep or otherwise unable to tend to the flock themselves? The court argued that these issues could only be resolved in the context of an evidentiary hearing. That is, only the privileged rationality operating within the boundaries of legal discourse will render an impartial decision or consensus.

Consensus as Cure?

The final paragraph of the opinion reversed and remanded the FCC's proceedings in the case. The court found that the issue of a probationary license was erroneous and that since the FCC had already acknowledged the Appellants as "responsible representatives," it should have already granted them standing.

An avenue for resistance appeared to open up, one which was secured by situating it within the framework of legally guaranteed rights. Smith (1994) stated, "To say that people have a right is to require them to be treated in a certain way, to get something to which they are entitled or at least raise this expectation" (p. 35). A right is an obligation and expectation which operates between individuals within certain social and political contexts. As Young (1990) stated:

Rights are not fruitfully conceived as possessions. Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action. (p. 25)

Speaking in terms of resistance and dissent, then, rights become the manner through which individuals can seek recourse and redress. Proust (2000) urged that resistance be contemporarily viewed as "a fact, not an obligation" (p. 19). He understood resistance to be "an experience of subjectivization; it is the experimentation of freedom," a sort of freedom directed at empowerment through acknowledgement (p. 21). The role of resistance is to make clear "chances and new possibilities which might previously have been unthinkable and impossible" (p. 21).

The court's decision in *UCC v. FCC* placed the right of resistance for citizens within the public interest standard in a codified, legal form. It afforded citizens a place in direct confrontation with the other forces of power and influence involved in the process. Citizens' voices were permitted to join the chorus already formed by the FCC, the industry, Congress, and the President, but within the court's space. This space becomes a location granted by legal right, and within this space resistance is supposed to operate to open up points of perspective. As Phillips (1996) highlights in terms of consensus as cure, this space of resistance has rules, meaning "All (who are willing to comply) are welcome" (p. 243).

The role of dissent and right to resistance available to citizens in determining the "public interest" is at the front and center of this critique. The criticism here is meant to highlight power relationships and promote empowerment by better understanding the relations involved in *UCC v. FCC*. The status of "legal standing" granted by this case is best understood as double-edged; both edges do work at the same time--one is empowering and the other is limiting.⁴

Legal and Extra-Legal Means

Streeter (1990) noted that the term "public interest" is naturally shot through and through with what is referred to as "subjectivity." He added that, "the phrase will always only be spoken or written by actual, unique, and varied human beings with concrete, contingent historical motivations, motivations that will inevitably vary from person to person and from time to time" (p. 49). The issue then is that the public interest, regardless of how it is understood, will always be bound by context. In other words, it is problematic to use determinate means on indeterminate ideals and objects. Would a strict definition of the

public interest solve the problems surrounding the concept? Considering the stakeholders involved, including broadcasters, their competition, politicians, the FCC, and citizens, such a process would be daunting.

This case, for the first time, opened space for citizens and public advocacy groups to help define the public's interests. At the same time, the space that was opened by the decision is restrictive. First, if citizens are even aware that a broadcast license is being considered for renewal, as it is not in broadcasters' best interest to inform the public of the process, to challenge a license takes resources such as time and money, which viewers and listeners often do not have. Second, the Telecommunications Act of 1996 solidified the concept of renewal expectancy—that is, broadcasters can expect to have their license renewals rubber-stamped unless there is undeniable evidence that their station has not served the public interest. Thus, the burden of proof is on the challengers rather than those being challenged. Third, history has shown that when proof is provided, it is still rare for a broadcaster's license renewal to be denied. As with the case of *Voice of New Jersey*, advocacy groups are aware of this and hope that their petitions result in either self-regulation by the broadcaster or FCC conditions on the license renewal. Finally, in terms of standing and its relationship to determining what constitutes the public interest, an interesting trend emerges from a brief historical examination of the use of the decision from *UCC v. FCC*: in general, as evidenced by *Pittsburgh & L.E.R. Co. v. U.S.* (1968), *Koniag, Inc., Village of Uyak v. Andrus* (1978), and *Black Citizens for a Fair Media v. FCC* (1984) and hundreds of other cases, the decision in *UCC v. FCC* has allowed access for citizens and advocacy groups into the arena of legal proceedings. However, a few contemporary cases, particularly *Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n* (1999), *KERM, Inc. v. FCC* (2004), and *Rainbow/PUSH Coalition v. FCC* (2005), reveal that in some cases courts have actually narrowed and refined how standing is granted, illuminating the double-edged nature of the original decision in *UCC v. FCC*.

While this current essay is ultimately critical of the public sphere and space provided in the *UCC v. FCC* ruling, there is also some room to support future tactical means of resistance available for social movements and citizens. Phillips (2002) referred to this room for potential resistance as “gaps within the lines of intelligibility,” and it is to these gaps where attention should be given in order to understand how resistance emerges from them (p. 331). By looking closely at these “spaces of invention,” the role and importance of resistance can be better understood and possible implications for future resistance can be encouraged.

The court's ruling in *UCC v. FCC* placed legitimate resistance within legal spaces and frameworks, a decision which limits citizens' participation to the realm of politics. The court placed the logic of the legal system in a more privileged position than alternative means of resistance. It is time for social and reform movements to begin tactical innovations in everyday cultural practices aimed toward more immediate, responsive, and pragmatic outcomes as well. It took nineteen years for the license of WLBT to finally fall into the hands of ownership who could, through the legal process, litigate their legitimate claim to the public interest. The rhetorical space provided by the court's decision is one where money, time, and other highly valued yet scarce resources are mobilized by groups and individuals with the wherewithal to maneuver through the intricacies of the legal system.

Notes

- ¹ Using Westlaw to “keycite” the *UCC v. FCC* decision generates a citation list of 964 cases or proceedings in which the decision played a significant role in the outcome.
- ² The Fairness Doctrine was upheld in *Red Lion Broadcasting Co., Inc. v. FCC* (1969) but abolished in 1987.
- ³ See *Associated Industries of New York State, Inc. v. Ikes*, 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943), *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).
- ⁴ This result has some similarities to Jean-Francois Lyotard’s idea of the differend. In *The Differend: Phrases of Dispute*, Lyotard (1988) explored how the power of language can be used to silence or keep silent the voices of victims. He argued, “Reality is not what is ‘given’ to this or that ‘subject,’ it is a state of the referent (that about which one speaks) which results from the effectuation of establishment procedures defined by a unanimously agreed-upon protocol, and from the possibility offered to anyone to recommence this effectuation as often as he or she wants” (p. 4). Those who are outside of or not a part of the “unanimously agreed-upon protocol” do not understand the rules of the language game, and those who were already silent remain silenced.

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