

1978

Ashbacker Rites in Administrative Practice: A Case Study of Broadcast Regulation.

Jacob W. Mayer

Michael Botein
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [Courts Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

24 New York Law School Law Review 461–480 (1978)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

ASHBACKER RITES IN ADMINISTRATIVE PRACTICE:
A CASE STUDY OF BROADCAST REGULATION

JACOB W. MAYER*

↳

MICHAEL BOTEIN**

When more than one party applies to a federal administrative agency for an instrument of authorization which cannot be granted to all applicants—*i.e.*, the applications are “mutually exclusive”—each applicant, in order to protect its interests, generally must have an opportunity to participate in any proceedings involving the competing applications.¹ Mutual exclusivity arises most familiarly, of course, in the contexts of broadcast stations and airline routes. The federal courts have, with increasing frequency, set minimum standards of participation in comparative proceedings on mutually exclusive applications in order to assure fair treatment to all applicants.

Judicial review of agency consolidation procedures developed in the wake of *Ashbacker Radio Corp. v. FCC*.² Extensive development of the *Ashbacker* doctrine has occurred in broadcast licensing proceedings before the Federal Communications Commission.³ A survey of the Commission's experience provides some insight into the problems involved in administration of the doc-

* Member, District of Columbia Bar. B.S. 1954, J.D. 1957, University of Kentucky; LL.M. 1958, George Washington University.

** Director, Communications Media Center, New York Law School. B.A. 1966, Wesleyan University; J.D. 1969, Cornell University; LL.M. 1972, Columbia University.

1. These comparative hearings, resulting from some form of mutual exclusivity, naturally are quite distinct from petitions to deny an authorization on the ground that an incumbent licensee has defaulted on its public interest obligations. Petitions to deny renewal applications offer an important tool to groups attempting to gain concessions from broadcasters in regard to programming and employment policies. See Schneyer, *An Overview of Public Interest Law Activity in the Communications Field*, 1977 WIS. L. REV. 619, 623.

2. 326 U.S. 327 (1945).

3. Naturally, other agencies have also had to cope with *Ashbacker*. See, e.g., *Cincinnati Gas & Elec. Co. v. FPC*, 389 F.2d 272 (6th Cir.), cert. denied, 393 U.S. 826 (1968); *Delta Air Lines, Inc. v. CAB*, 228 F.2d 17 (D.C. Cir. 1955). The CAB's experiences in applying *Ashbacker* to route certification proceedings are competently analyzed in Note, *The Ashbacker Rule and the CAB: Cumbersome Procedure v. Public Interest*, 44 VA. L. REV. 1147 (1958).

trine; after all, the Commission has had the longest experience with the doctrine and has experimented with a variety of approaches designed to limit the impact of *Ashbacker* on FCC administrative processes.

I. BIRTH OF THE DOCTRINE

Ashbacker arose as a result of an application, in March 1944, by the Fetzer Broadcasting Company for a new AM station in Grand Rapids, Michigan, on a frequency of 1230 kilohertz. Two months later, Ashbacker Radio Corporation filed an application to change the frequency of its station in nearby Muskegon, Michigan, from 1490 kilohertz to 1230 kilohertz. Operation on this new frequency would have created "intolerable" electrical interference with the proposed Fetzer station, making both stations' signals impossible to receive over a wide area. In June 1944, the Commission, declaring the applications to be "actually exclusive," granted Fetzer's application and designated Ashbacker's for a subsequent hearing. In order to prevail at that hearing, Ashbacker would have been required to show that its proposed operation would better serve the public interest than would Fetzer's, but the Commission nevertheless denied Ashbacker's petition for reconsideration of the grant to Fetzer on the ground that Ashbacker's application had not yet been rejected and would be afforded a full hearing before the Commission.⁴

The Supreme Court reversed the Commission's action. Justice Douglas, writing for the majority, treated the problem as one of reconciling the internally inconsistent provisions of section 309(a) of the Communications Act of 1934⁵ in relation to mutually exclusive

4. 326 U.S. at 328-29.

5 The statute in effect at the time of the *Ashbacker* decision was the original version of section 309(a) of the Communications Act of 1934, Pub. L. No. 73-416, ch. 652, § 309(a), 48 Stat. 1064, 1085 (1934) (current version at 47 U.S.C. § 309(a), (e) (1970)). It provided that:

If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Under current law, when the Commission designates competing applications for a hearing, it acts pursuant to 47 U.S.C. § 309(a), (e) (1970).

applications. The perceived inconsistency arose from the fact that section 309(a) not only gave the Commission authority to grant applications without a hearing, but also gave applicants the right to a hearing before denial of their applications.⁶ Because the granting of one application necessarily precluded the granting of those applications with which it was mutually exclusive, Justice Douglas felt that the statutory hearing on such applications would become an "empty thing."⁷ As the second applicant, Ashbacker would have had to persuade the Commission to revoke the grant to Fetzer before its own application could have been granted. The Court thus concluded that "[b]y the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier."⁸ The Court sought to limit its decision to one procedural issue and held that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."⁹ In attempting to provide the Commission with a means to diminish the impact of the decision, Justice Douglas noted that "[a]pparently no regulation exist[ed] which, for orderly administration, requir[ed] an application for a frequency, previously applied for, . . . to be filed within a certain date."¹⁰

Ashbacker has become a basic tenet of federal administrative procedure but its application has resulted in a rule which is often too broad for broadcast licenses, let alone for other regulatory purposes. First, although the Court attempted to limit its decision to the facts before it, it failed to do so. Fundamentally, the Court confronted a very simple issue: Did the Commission abuse its discretion in failing to consolidate the Fetzer and Ashbacker applications for a hearing before expressing a preference for one over the other? As the Court noted briefly, the Commission had a procedure for discretionary consolidation of mutually exclusive applications;¹¹ indeed, the Commission's use of discretion may have been

6. 326 U.S. at 329-30.

7. *Id.* at 330. Justice Frankfurter, in his dissent, argued that these restrictions rendered the hearing "barren" and a "mere formality." *Id.* at 337, 339 (Frankfurter, J., dissenting).

8. *Id.* at 332 (opinion of Douglas, J.).

9. *Id.* at 333.

10. *Id.* at 333 n.9. The regulations to which Justice Douglas alluded were subsequently promulgated. The current versions of these "cut-off" regulations are found at 47 C.F.R. §§ 1.227(b)(1), 1.571(c), 1.591(b) (1977). See notes 84 & 85 and accompanying text *infra*.

11. 326 U.S. at 331 n.5. The regulations in effect at the time enabled the Com-

a perfectly reasonable way of resolving the technical inconsistency in the statute's language. In point of fact, the Commission may have viewed Ashbacker's application as a dilatory tactic directed against a potential competitor by an incumbent licensee and attempted to deal with it summarily. This may have been a reasonable approach, but not one which the Commission could argue very forcefully on appeal, having failed to raise the issue below.

Second, the ultimate effect of the Court's decision was to give incumbents an opportunity to "sandbag" potential competitors. After *Ashbacker*, existing broadcasters could simply file applications which would create exclusivity problems. The resulting hearing and appeal could easily consume several years¹²—a possibility which the Court apparently did not anticipate. The *Ashbacker* doctrine may make perfectly good sense as a means of resolving a contest between newcomers, or between incumbents wishing to change facilities, since it would not, under such circumstances, delay the entry of a potential competitor. However, in a contest between an incumbent and a newcomer, the doctrine inherently favors the incumbent by allowing it to remain in operation until the conflict is resolved.¹³

Finally, the Court did not—and reasonably could not—foresee that technological changes would make comparative hearings inappropriate for at least some types of licenses. As will be noted later, however, the last few decades have witnessed some sweeping technological changes within the broadcast media.¹⁴

The *Ashbacker* doctrine thus arose in a context which was not ideal for the Commission's long-range policy decisionmaking. Indeed, the Court may have precipitated quite unintended results by providing a new rationale for restricting entry into, and new technology for, broadcasting. And the lower federal courts may have compounded this effect by being overly enthusiastic in finding instances of mutual exclusivity.

II. PROBLEMS IN ADMINISTRATION OF THE DOCTRINE

The terms of any basic doctrine inevitably raise secondary issues which, in turn, affect the meaning of the doctrine itself.

mission to "consolidate for hearing . . . any applications which . . . present conflicting claims of the same nature" when "such action [would] best conduce to the proper dispatch of business and to the ends of justice." *Id.*

12. *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 758 (D.C. Cir. 1960). See also W. JONES, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION 144-54 (1962).

13. 5 U.S.C. § 558(c) (1976).

14. See text accompanying notes 92-110 *infra*.

Ashbacker has been no exception to this process. Indeed, the Court has given little guidance since its original decision.

A. Bona Fide Applications

The first task confronting an agency is to determine what constitutes a *bona fide* application within the meaning of *Ashbacker*. At least four distinct issues arise: (1) has an application been filed solely for the purpose of preventing the Commission from acting upon another and otherwise unopposed application; (2) is an application timely filed for comparative consideration; (3) if timely filed, does an application sufficiently conform to statutory and administrative processing requirements; and (4) if the application does not conform, what effect should be given to a request for waiver of the standards?

In order to preserve the integrity of its processes, any agency will naturally seek to prevent the filing of applications designed solely to delay the granting of other applications. Whether an application is so intended is, however, essentially a factual question and does not raise significant theoretical issues.¹⁵

The Communications Act sets forth requirements for applications for new broadcast stations;¹⁶ and the Commission has supplemented these statutory requirements with regulations.¹⁷ In order to obtain the information necessary to evaluate an applicant's qualifi-

15. See, e.g., *Greco, Inc.*, 28 F.C.C.2d 166, 21 RAD. REG. 2d (P&F) 560 (1971). In *Greco*, the Commission offered certain guidelines to be utilized in determining whether an application is a "strike" application—one filed with the "motive or purpose . . . to obstruct or delay another application." *Id.* at 167, 21 RAD. REG. 2d (P&F) at 562. The guidelines suggested by the Commission include the timing of the application, the good faith of the applicant, and the "economic and competitive benefit" accruing to the applicant from the application. *Id.*, 21 RAD. REG. 2d (P&F) at 562. In order to comprehend the nature of this inquiry, it is necessary to understand that the problem is one of resolving a factual question and that "each particular set of circumstances must be individually examined since the matter of purpose or motive cannot be scientifically defined." *Id.*, 21 RAD. REG. 2d (P&F) at 562. More recently, however, the District of Columbia Circuit indicated that the Commission should clarify its standards concerning rejection of "strike" applications. See *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 876 (D.C. Cir. 1977).

16. 47 U.S.C. § 308(b) (1970). For factors relevant to the Commission's review of an application, see 47 U.S.C. §§ 309(a), 310, 313 (1970 & Supp. V 1975).

The Commission employs a two-step licensing procedure in which a construction permit is issued initially and a license is issued only after completion of construction in accordance with the terms of the construction permit. See 47 U.S.C. §§ 308(a), 319 (1970). In all but the most unusual circumstances, the station license will be issued. As a result, almost all controversies arise while issuance of the construction permit is under consideration.

17. See, e.g., 47 C.F.R. §§ 73.37, 73.24 (1977).

cations, the Commission requires that such applications be filed on FCC Form 301.¹⁸ To acquire *Ashbacker* rights, it is necessary to file a Form 301; mere notification of an intention to file is insufficient.¹⁹ Indeed, until an application is filed, a prospective applicant lacks standing.²⁰ If the Commission waives its internal procedural rules and grants an earlier application in less time than might reasonably be anticipated, a normally timely application is not entitled to consideration.²¹

Pressure therefore exists to file an application speedily in order to acquire *Ashbacker* rights as soon as possible. This creates the temptation to file a *pro forma* application and later amend it to correct any defects—or even to file a defective application in order to delay a potential competitor. To protect itself from this possibility, the Commission's rules allow it to dismiss a patently defective application either before or after acceptance for filing.²² In practice, the Commission exercises discretion in accepting or rejecting defective applications. While the Commission may reject an application which fails to satisfy its requirements,²³ it may, for example, accept one which does not satisfy the statutory verification requirement.²⁴ This use of discretion seems to protect both the

18. 47 C.F.R. § 1.533(a)(1) (1977).

19. *Federal Broadcasting Sys., Inc. v. FCC*, 225 F.2d 560, 566-68 (D.C. Cir.), *cert. denied*, 350 U.S. 923 (1955). *Cf. Telegraph Herald Co. v. Federal Radio Comm'n*, 66 F.2d 220, 222 (D.C. Cir. 1933) (failure to formally apply for a permit will deprive a party of an appealable interest with respect to an FRC order; mere intention to apply is insufficient).

20. *Telegraph Herald Co. v. Federal Radio Comm'n*, 66 F.2d 220, 222 (D.C. Cir. 1933).

21. *Federal Broadcasting Sys., Inc. v. FCC*, 225 F.2d 560, 567 (D.C. Cir.), *cert. denied*, 350 U.S. 923 (1955).

22. 47 C.F.R. § 1.566(a) (1977). In Commission practice, an application is first "tendered" for filing. If acceptable, the application is later accepted as of the date of tender. This procedure results in public notice of the filing of new applications prior to examination for patent defects and thus expedites action on applications found to be acceptable. *See* 47 C.F.R. § 1.564 (1977).

23. For example, in *UMSJ, Inc.*, 8 F.C.C.2d 533, 10 RAD. REG. 2d (P&F) 404 (1967), the Commission refused to consider an application which it deemed to be unacceptable. The Commission reasoned that before an applicant could acquire any rights entitling it to consideration, its application "must be acceptable for filing." *Id.*, 10 RAD. REG. 2d (P&F) at 405. Failure to maintain the distinction between acceptable and unacceptable applications would tend to encourage "strike" applications. *Id.*, 10 RAD. REG. 2d (P&F) at 405. *See* note 15 *supra*.

24. *Johnson Broadcasting Co. v. FCC*, 175 F.2d 351, 356 (D.C. Cir. 1949). In *Johnson*, the court noted that although an unverified document could not be acted upon, it could nevertheless be accepted, and the "initial failure to verify [could] be cured by later verification." *Id.*

Commission's processes and the interests of applicants who suffer inadvertent mishaps after making reasonable attempts to comply with the Commission's requirements.²⁵

A more difficult problem is created by a patently defective application coupled with a request for waiver based upon a claim of "good cause." In order to preserve the rights of parties who are willing to speculate on this type of approach, the Commission's rules permit acceptance of a patently defective application if it is accompanied by a showing in support of waiver.²⁶ The Commission can then dispose of the waiver request and application in at least three ways: (1) grant the waiver and keep the application on file; (2) order a hearing as to whether the waiver should be granted; or (3) deny the waiver and dismiss the application. No matter how the Commission disposes of the waiver request, its exercise of discretion normally cannot be challenged; after all, it need not conduct a useless hearing.²⁷ When a defective application requires a waiver, it does not acquire *Ashbacker* rights unless the waiver is granted.²⁸ Similarly, a hearing on a waiver request gives a party only provisional *Ashbacker* rights pending the waiver decision.²⁹

The status of "contingent" applications presents an interesting example of waiver problems, even though *Ashbacker* rights may not always be involved. The typical case arises when A files an application to modify its station license for operation on a new frequency, resulting in abandonment of its old frequency if the application is granted; B then files an application for A's original frequency, contingent upon a grant of A's application.³⁰ B can acquire no rights against A's initial operation,³¹ and pending satisfaction of

25. See B.J. Hart, 20 RAD. REG. (P&F) 301 (1960), where applicant's attorney was permitted to file *nunc pro tunc* in order to supply essential material inadvertently left on a desk when the application was tendered.

26. 47 C.F.R. § 1.566(a) (1977).

27. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), the Court stated that "[we] do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing."

28. See *Petersburg Television Corp.*, No. 61-800 (F.C.C. 1961).

29. E.g., *St. Louis Telecast, Inc.*, 22 F.C.C. 625, 626-27 n.2, 710, 12 RAD. REG. (P&F) 1289, 1294-95 n.2, 1366 (1955).

30. By filing a contingent application, an applicant may shorten the time that action on its application is delayed once the frequency becomes available since applications are normally processed by file number in order of filing. See 47 C.F.R. § 1.571(c) (1977). The Commission sometimes tolerates this procedure in order to protect the public from the loss of service which might otherwise result.

31. It should be noted that *Ashbacker* rights can be acquired by filing a competing application against an application for renewal of a license. E.g., *Hearst Radio, Inc.*, 15 F.C.C. 1149, 6 RAD. REG. (P&F) 994 (1951); 47 C.F.R. § 1.227(b)(6) (1977).

the contingency, *B*'s application does not receive *Ashbacker* rights as against the applications of third parties.³² Even if the contingency is ultimately resolved, *B* does not acquire a preferred status *vis-à-vis* later-filed applications.³³

B. *Matters of Definition*

When two applications are filed for the same frequency and location, they are obviously exclusive. However, few cases present such clear-cut facts. More typically, applications propose stations at some distance from each other, so that a grant of competing applications would not physically preclude both operations, although each station might be required to operate at less than maximum efficiency. (As normally used in *Ashbacker* situations, "mutual exclusivity" and "preclusion" are conclusions of law³⁴ that a grant of one application would bar a grant of another.)

Since an agency's finding of mutual exclusivity amounts to a conclusion of law, the reasons supporting such a finding vary in different types of administrative practice.³⁵ In the broadcast field, three types of situations, other than electrical interference, often lead to a finding of actual exclusivity: (1) mutual economic exclusivity resulting from the limited size of the station's market; (2) exclusivity due to circumstances beyond the Commission's control; and (3) exclusivity arising through the operation of the Commission's rules.

Broadcasters have recently been concerned with the possibility of losing a broadcast license through such a procedure. From the standpoint of this discussion, challenges at renewal time do not warrant separate consideration. A full history of the subject is available in E. KRASNOW & L. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 112 (1973).

32. *Northside Broadcasting Corp.*, 14 F.C.C. 57, 58, 4 RAD. REG. (P&F) 411, 412-13 (1949). A discussion of similar treatment of contingent applications at the Civil Aeronautics Board is contained in Note, *The Ashbacker Rule and the CAB: Cumbersome Procedure v. Public Interest*, 44 VA. L. REV. 1147, 1151 (1958).

33. *Jack Gross Broadcasting Co.*, 12 F.C.C. 80, 81, 3 RAD. REG. (P&F) 1340, 1342 (1947). The Commission noted that its practice is not to consider these contingent applications until the contingency has been resolved. "The purpose of this practice . . . is to avoid giving any particular applicant, or applicants, an undue advantage over other applicants who may wish to apply for the frequency to be vacated." *Id.*

34. These findings are referred to as conclusions of law in the sense that determinations regarding acceptable levels of interference are reached by application of the Commission's rules.

35. For example, the most significant possibility for mutual exclusivity which has developed in the field of aeronautics arises from economic factors. See Duggan, *The Ashbacker Doctrine and Proceedings Before the Civil Aeronautics Board*, 46 GEO. L.J. 282, 294 (1957); Note, *The Ashbacker Rule and the CAB: Cumbersome Procedure v. Public Interest*, 44 VA. L. REV. 1147, 1150 (1958).

Mutual economic exclusivity is relatively rare in broadcasting. It deserves mention, however, to avoid confusion with the somewhat similar and far more common *Carroll*³⁶ situation in which an existing station seeks protection from the adverse economic impact of a new station in its market. Although similar to *Ashbacker*, *Carroll* problems involve petitions to deny the granting of a license rather than those involving competing applications; only the new application may be granted or denied and there is generally no claim that both stations cannot survive even though one will be injured.³⁷ Mutual economic exclusivity arises when there are two applications for different frequencies in the same location—both of which could be granted from an engineering standpoint—but where consolidation is requested on the ground that an area lacks sufficient revenue to support both stations.³⁸ In practical terms, this situation rarely arises because a second applicant would likely consider a venture too risky if there were any indication that a market might not be able to support two stations. Tactical considerations may lead the second applicant to propose an operation which would generate electrical interference with the first station in order to guarantee a comparative hearing.³⁹ This stance also may have the attraction of shortening the delay before the second application is considered.⁴⁰

A second and rare type of mutual exclusivity arises when circumstances beyond the Commission's control militate against granting more than one application. For example, in *Chronicle Publish-*

36. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

37. *Id.* at 442. It should be noted that the critical factor in *Carroll* situations is the totality of service in the area and not economic harm to the broadcaster. *Id.* at 443. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473-76 (1940). For further discussion of *Carroll*, see Mayer, *Sanders Brothers Revisited: Protection of Broadcasters from the Consequences of Economic Competition*, 49 KY. L.J. 370 (1961); Givens, *Refusal of Radio and Television Licenses on Economic Grounds*, 46 VA. L. REV. 1391 (1960).

38. This problem may also involve *Carroll* considerations in some situations, such as those which would arise between an application for renewal of a license and an application for a construction permit for a new broadcast station. *E.g.*, *K-Six Television, Inc.*, 2 F.C.C.2d 1021, 7 RAD. REG. 2d (P&F) 128 (1966). It is also desirable to distinguish the recurring situations in which competing technologies (for example, cable television versus over-the-air television) are involved; traditional *Ashbacker* doctrine presupposes the same technology.

39. The criteria applied in comparative hearings are not directly relevant to *Ashbacker* problems. See Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971).

40. Compare the discussion in note 30 *supra*.

ing Co.,⁴¹ airspace approval was available for only one of the two towers proposed by each applicant.⁴² Even if the Commission granted both applications, the distinct possibility existed that only one of the two stations could actually be constructed.⁴³ Recognizing the mutual exclusivity inherent in airspace considerations, the FCC denied one of the applications and thus effectively permitted its decision to be controlled by the actions of a third party.

The Commission's own rules create the third and most significant type of mutual exclusivity. To be sure, the Commission's rulemaking powers⁴⁴ allow it to avoid *Ashbacker* problems in some services by employing devices such as assigning frequencies on a non-exclusive basis.⁴⁵ But this approach is of little practical help in broadcasting⁴⁶ because stations must be on the air for many hours with maximum power. The Commission thus approaches broadcast interference problems by determining tolerable interference limits and authorizing stations to operate within them.⁴⁷ The two most important determinants of a station's signal strength are the frequency on which it operates and the amount of power with which it transmits. An additional factor which complicates the problem of placing stations is that signals interfere with those on adjacent frequencies and even with those on harmonic frequencies⁴⁸—*i.e.*, frequencies which are multiples of a station's frequency. An allocations system thus must limit a station's power and maintain minimum mileage separations between stations on the same fre-

41. No. 59-407 (F.C.C. 1959).

42. 47 U.S.C. § 303(q) (1970) gives the Commission authority to deny applications which propose to use towers which constitute a hazard to air navigation. *E.g.*, *Simmons v. FCC*, 145 F.2d 578 (D.C. Cir. 1944). The Commission has established procedures for coordinating its jurisdiction in this area with the various aeronautical interests. 47 C.F.R. §§ 17.4, 17.7, 17.8, 17.10, 17.48, 17.49 (1977).

43. Of course, an applicant is entitled to a hearing on the issue of whether its proposed tower would constitute a hazard to air navigation. *See, e.g.*, *Maine Radio and Television Co.*, No. 61-68 (F.C.C. 1961).

44. *See, e.g.*, 47 U.S.C. §§ 154(i), 303(f), 303(r) (1970).

45. For example, 47 C.F.R. § 74.402(e) (1977) provides, in pertinent part, that "[r]emote pickup broadcast stations or systems will not be granted exclusive frequency assignments. The same frequency or frequencies may be assigned to other licensees in the same area."

46. 47 U.S.C. § 153(o) (1970) defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." The principal broadcast services are standard (AM), frequency modulation (FM), and television broadcast (TV).

47. For a discussion of the technical aspects of broadcast interference problems, see H. HEAD, *WAVE PROPAGATION AND INTERFERENCE EFFECTS IN THE TELEVISION BROADCAST BANDS* (1961).

48. 47 C.F.R. § 73.698, Table IV (1977).

quency and/or related frequencies. Problems of mutual exclusivity are thus not confined to stations which operate on the same frequency; they also may involve stations on different but electrically related frequencies.

The Commission has employed two basic approaches in placing stations: first, it establishes the areas in which frequencies may be used; and second, it creates standards for sites from which to operate. The Commission has selected the option of predetermining allocations in the television and FM services with apparently satisfactory results.⁴⁹ The "you find it/we grant it" system has been utilized in AM broadcasting, largely for the historical reason that there were already 732 stations in operation when the Federal Radio Commission was established.⁵⁰ The existence of so many stations persuaded the Commission not to attempt to regroup existing stations.⁵¹

The present television allocation scheme is based upon a "Table of Assignments"⁵² which specifies the available television channels⁵³ in each market.⁵⁴ An applicant must be able to locate a proposed station in order to provide its principal community with a signal of at least a minimum intensity.⁵⁵ Other stations on electrically related frequencies generally are prohibited from locating transmitters at less than specified distances from this site.⁵⁶ If no co-channel station has been proposed—*i.e.*, no specific transmitter site exists to determine distances—the Commission fixes "reference

49. See Sixth Report on Television Allocations, 1 RAD. REG. (P&F), Part 3, at 91:601 (1952). The Sixth Report concluded a four-year rulemaking proceeding by establishing the present system of television allocations.

50. FRC ANN. REP. 2 (1927). The Federal Radio Commission was established by the Radio Act of 1927, Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (1927), and was the predecessor to the FCC. See 47 U.S.C. §§ 603, 604 (1970).

51. The Federal Radio Commission did, however, reassign frequencies at the existing station sites in order to lessen interference. FRC ANN. REP. 8 (1927).

52. *E.g.*, 47 C.F.R. § 73.606 (1977). FM allocation employs a similar approach which, in the interest of brevity, will not be discussed herein.

53. These are frequency bands defined in 47 C.F.R. § 73.603(a) (1977).

54. A certain amount of flexibility is added by permitting the selection of a principal community within 15 miles of the community listed in the Table. 47 C.F.R. § 73.607(b) (1977).

55. 47 C.F.R. § 73.685(a) (1977).

56. *Id.* § 73.610 (1977). It should be noted that two applications which both comply with these rules may still be filed for sites which fail to meet the required separation and thus result in mutual exclusivity. Of course, in unusual circumstances, the Commission may conduct a hearing in order to determine whether a minor waiver of the separation requirement should be granted. See Nathan Frank, 20 RAD. REG. (P&F) 806, 808 (1960).

points" which prevent location of a new station unreasonably close to any vacant assignments.⁵⁷ These mileage separations and the power and antenna height limitations are a station's only protection against interference from other stations;⁵⁸ a certain amount of negligible interference is built into the system.

An example illustrates the relatively limited potential for *Ashbacker* problems under the television or FM allocations system. Assume that channels 3 and 6 are assigned to a community in the Table of Assignments. Since, under present rules, television and FM applicants cannot propose their own frequencies and are also limited to one facility per market, A and B could file applications for channel 3, while C and D could file applications for channel 6;⁵⁹ A and B would be mutually exclusive, while C and D would be mutually exclusive.⁶⁰ As a result, two relatively simple comparative proceedings would allow the Commission to award both channels.⁶¹

The electrical propagation characteristics of AM signals involve a number of factors which are not present in television broadcasting.⁶² In essence, the AM allocation system seeks to ensure that a station has a normally protected contour against electrical interfer-

57. 47 C.F.R. § 73.611 (1977).

58. *Id.* § 73.612(a) (1977).

59. The Commission's procedural rules prevent a party from filing applications for more than one television channel in a particular community. 47 C.F.R. § 1.516(a) (1977). In the past, the Commission's procedures allowed applications for more than one channel to be filed, with the practical result that comparative television hearings were more complex. *See, e.g.,* KFAB Broadcasting Co. v. FCC, 177 F.2d 40 (D.C. Cir. 1949).

60. 47 C.F.R. § 1.572(d) (1977). Nonetheless, any of the applicants could allege the existence of economic mutual exclusivity as a basis for consolidation of the two proceedings. *Cf. Delta Air Lines, Inc. v. CAB*, 228 F.2d 17 (D.C. Cir. 1955) (*per curiam*) (allegation of mutual exclusivity by one applicant entitles it to a preliminary hearing on the issue of exclusivity or a comparative hearing).

61. This conclusion is based upon the assumption that two two-party proceedings would be easier to conclude than one four-party proceeding. Of course, to the extent that comparative hearings are expected to produce the best qualified applicants, it would seem more sensible to combine the proceedings in order to be sure of selecting the two best qualified applicants of the four. *Cf. Azalea Corp.*, 31 F.C.C.2d 561, 563, 22 RAD. REG. 2d (P&F) 909, 911-12 (1971) (public interest best served by having as many qualified applicants as possible compete for each broadcast facility). *Compare* note 59 *supra*.

62. For example, standard broadcast signals depend on "sky waves," which are reflected by the ionized layers of the stratosphere to areas not directly served by a station. Since the degree of ionization depends on sunlight, the characteristics of the signals broadcast may vary according to the time of day or night. This, in turn, requires that stations be divided into categories in a manner not necessary to television broadcast. (The reader interested in a clearer picture of the outline of standard broadcast allocation may consult 47 C.F.R. § 73.183-190 (1977).)

ence from other stations.⁶³ In selecting a site and frequency for an AM station, an applicant thus must use a site from which its frequency will not interfere with stations on the same or adjacent frequencies and which will not receive an unreasonable amount of interference within its own proposed service area.⁶⁴

As a result of this allocation system, two problems exist in AM broadcasting. First, section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."⁶⁵ This statutory directive rarely creates difficulties in television or FM regulation since the rulemaking mechanism underlying the Table of Assignments generally satisfies the requirements of section 307(b).⁶⁶ However, since AM site allocation is not covered by the Table of Assignments,⁶⁷ individual applicants make the first proposal for service in a given area. Under these circumstances, section 307(b) considerations may result in the threshold disqualification of an applicant without a comparative hearing if it fails to propose appropriate service.⁶⁸ However, in cases where noncompliance with section 307(b) requirements is less apparent, such considerations may

63. This statement is subject to technical qualifications beyond the scope of this Article.

64. *E.g.*, 47 C.F.R. § 73.37 (1977).

65. 47 U.S.C. § 307(b) (1970).

66. *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954). *See also* *Coastal Bend Television Co. v. FCC*, 234 F.2d 686 (D.C. Cir. 1956). In any case, the Commission is free to avoid the section 307(b) issue at the rulemaking stage and defer it for subsequent adjudication. *E.g.*, *New Orleans Deintermixture Case*, 22 F.C.C. 396, 403, 15 RAD. REG. (P&F) 1603, 1611 (1957).

67. *See* text accompanying notes 50-51 *supra*.

68. *Cf. FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955) (decision in favor of one applicant over the other on the basis of community need, where each applicant sought to serve a different community, is proper even in the absence of a preliminary finding that both are equally able to serve their respective communities).

The Commission has experienced difficulty in insuring that AM service is both "efficient" and "equitable," as is apparently required by section 307(b). This type of conflict may arise where the most efficient allocation of frequencies, motivated by the purpose of providing service to the greatest area and population possible, is incompatible with the "equitable" goal of providing a local radio station to each separate and distinct community. When such a conflict arises in a proceeding involving competing applications for the same frequency, the Commission is likely to give greater weight to the goal of equitable allocation of frequencies. *See* *Cohen & Russo, The Anomaly in Section 307(b) of the Communications Act of 1934*, 11 SYRACUSE L. REV. 202, 202-03 (1960).

not permit the denial of a comparative hearing.⁶⁹

A second and administratively more troublesome problem involves the "linking" of competing applications. An example of linking would arise if two applicants proposed new stations in the same community on frequencies of 1200 kilohertz and 1260 kilohertz, and a third applicant then filed for 1230 kilohertz—which is adjacent to both 1200 kilohertz and 1260 kilohertz. The third application would link the two other applications since each would be mutually exclusive with the proposed operation on 1230 kilohertz. The Commission thus would need to designate all three applications for a hearing in order to determine which one to grant. At one time, linking created serious administrative difficulties since the filing of only a few applications could create a linking problem and require hearings for several different parties.⁷⁰ The problems would be more complicated if the links were filed after the other applications had already been processed.⁷¹ As discussed below, however, the "cut-off" rules now limit problems of linking.⁷²

III. ATTEMPTS TO CONTAIN *ASHBACKER*

The Commission has developed a variety of procedural devices to limit *Ashbacker's* impact on its processes. Several approaches merit brief discussion even though they cannot be adapted to all situations. First, the Commission is sometimes able to assign frequencies on a non-exclusive basis, thereby authorizing their use by all who wish to share them.⁷³

Second, in order to facilitate new service to the public despite delays in reaching a final decision, the Commission may issue a "Special Temporary Authorization" (STA) during the pendency of a comparative hearing to allow one or more of the parties to conduct an interim operation on the contested frequency.⁷⁴ STAs are usually subject to the express condition that the interim operator's investment and performance be irrelevant to the Commission's later comparative evaluation of the applications. At first, this procedure

69. *Id.* at 206, 209-10.

70. FCC ANN. REP. 64 (1959).

71. AM Processing Procedure, 26 F.C.C. 369, 370, 18 RAD. REG. (P&F) 1565, 1566 (1959).

72. See text accompanying notes 84 & 85 *infra*.

73. See note 45 *supra*.

74. See *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 758 (D.C. Cir. 1960); *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 288 (D.C. Cir. 1953).

was approved as being consistent with *Ashbacker*,⁷⁵ but was later limited in *Community Broadcasting Co. v. FCC*.⁷⁶ In tones reminiscent of *Ashbacker*, then-Judge Burger stated that “the grant of temporary authority to one of several competing applicants before there has been [a comparative] hearing” is an “extraordinary procedure” which is “pregnant with danger to truly comparative consideration.”⁷⁷ He emphasized that the interim operator, if not ultimately chosen, could lose a substantial amount of money. Burger thus feared that a Commission of “mortal men” would be tempted—albeit unwillingly—to favor the interim operator in its final decision.⁷⁸ The court distinguished *Community Broadcasting* from prior cases on the ground that the public had already received service from another station⁷⁹ and therefore had less need for an interim operation. The court suggested that the grant of an STA was held to be an appropriate procedure in prior cases only where “the public interest . . . overbalance[d] the possible disadvantages”⁸⁰

After this setback, the Commission amended its rules to allow joint interim operations provided all of the applicants for a facility are afforded an opportunity to participate.⁸¹ But this approach also has inherent problems; it may provide an incentive to file applications merely to share an interim operation’s profits, or it may encourage parties to stall in order to continue receiving revenues from an interim operation if they are not confident of winning.

Two other approaches to the *Ashbacker* problem deserve brief mention, even though they are of limited utility. First, where frequencies are freely available and the grant of an application will not preclude a subsequent applicant from receiving a comparable facility, it may be feasible to grant the first qualified application without having an *Ashbacker* hearing.⁸² Second, the Commission will, with the consent of all parties and on the basis of the applications,

75. See *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 288 (D.C. Cir. 1953).

76. 274 F.2d 753 (D.C. Cir. 1960).

77. *Id.* at 758-59.

78. *Id.* at 759.

79. *Id.* at 761 n.6.

80. *Id.* at 758. See also *Peoples Broadcasting Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953), where the grant of an STA was approved because it was “designed to preserve the only existing service” in the area. *Id.* at 288.

81. See 47 C.F.R. § 1.592(b) (1977).

82. *Fostering Expanded Use of UHF Television Channels*, No. 61-993 (F.C.C. 1961).

make its decision without a hearing.⁸³ Unfortunately, the use of this procedure is apt to be inversely proportionate to the anticipated value of the facilities at issue.

The most effective limitation on *Ashbacker* problems is the "cut-off" rule.⁸⁴ This provides that the Commission give notice of pending applications and the time within which competing applications may be filed. No new applications are accepted during the course of the comparative proceeding. This procedure is responsive to Justice Douglas' comment in *Ashbacker* regarding "orderly administration."⁸⁵ It obviously does not solve all problems, but it reduces the delays which can confront competing applications.⁸⁶

If an application is procedurally complete, the Commission has little capacity to prevent it from being used to harass potential competitors.⁸⁷ Precisely because the Commission's hands are tied, relief ultimately may come from the Sherman Act⁸⁸ rather than the Communications Act. To be sure, traditional learning taught that a section 2 action would not lie against a party's use of agency processes to delay a competitor's entry.⁸⁹ But more recent cases indi-

83. 47 C.F.R. § 1.603 (1977). A variation on this theme—as suggested in numerous proposals—would be to grant licenses by an auction or a lottery. *E.g.*, Botein, *Comparative Broadcast Licensing and the Rule of Law: A Fuller Investigation*, 6 GA. L. REV. 743 (1972).

84. See 47 C.F.R. §§ 1.227(b)(1), 1.571(c), 1.591(b) (1977).

85. 326 U.S. at 333 n.9. See note 10 *supra*.

86. See *Century Broadcasting Corp. v. FCC*, 310 F.2d 864, 866 (D.C. Cir. 1962); *Ranger v. FCC*, 294 F.2d 240, 243 (D.C. Cir. 1961); *Ridge Radio Corp. v. FCC*, 292 F.2d 770, 772 (D.C. Cir. 1961).

87. See note 15 and accompanying text *supra*.

88. 15 U.S.C. §§ 1-7 (1976).

89. In *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961), the Supreme Court reversed a judgment granting damages and injunctive relief to a trucking firm. The complaint alleged that railroad companies had conspired to destroy competition in the long-distance freight business by advocating that the Pennsylvania Governor exercise his veto power over a legislative enactment that would have increased truck weight limits. Justice Black, writing for a unanimous Court, stated that:

[T]he starting point for our consideration of the case . . . [is] that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws . . . [I]t has been held that where a restraint upon trade or monopolization is the result of a valid governmental action, . . . no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

Id. at 135-36 (footnotes omitted). See also *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 560 (1939). Thus, filing

cate that an abuse of agency process to prevent new entry is actionable.⁹⁰ Under section 1, a plaintiff presumably would be required to show that other broadcasters agreed to oppose its application for frivolous reasons; under section 2, that a single competitor possessed dominant market power. If these preconditions are satisfied, it may be possible to recover against a sham applicant for treble damages.

IV. THE IMPACT OF *ASHBACKER* ON NEW TECHNOLOGIES

Ashbacker creates problems not only in the regulation of conventional broadcast media, but also in the Commission's treatment of new technologies. The doctrine creates a procedural strait jacket for any type of "broadcasting" under Title III of the Communications Act; if mutual exclusivity exists, the Commission has no choice but to hold a lengthy and expensive hearing.⁹¹ In its regulation of subscription television (STV), the Commission seems to have locked itself precisely into this bind.

STV is one of several methods of transmitting programs to home viewers on a "pay" basis. Under the existing regulations, stations operating on frequencies listed in the television Table of Assignments are permitted to allocate a portion of their time to non-STV broadcasting.⁹² Although the technology for STV has existed

an application for the purpose of harassing a potential competitor would not constitute an actionable restraint of trade inasmuch as the hearing process is a "valid governmental action" for the purpose of enforcing the Communications Act.

90. In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court exempted from the *Noerr* holding antitrust claims alleging conspiracy to "bar . . . competitors from meaningful access to adjudicatory tribunals . . . so [as] to usurp [the] decisionmaking process." *Id.* at 512. If a litigant could show a pattern of baseless claims which had the effect of barring access to an agency or court, then a valid antitrust action could be made out. *Id.*

91. See, e.g., *Digital Paging Sys., Inc.*, ___ F.C.C.2d ___ (Aug. 29, 1978), where the Commission considered mutually exclusive applications for the right to construct a Multipoint Distribution Service facility. Board Member Kessler, in a concurring opinion, suggested that the requirements of section 309 and *Ashbacker* ought to be relaxed when "fledgling industr[ies]" are involved and proposed less formal hearings or a lottery as alternative methods of resolving such conflicts. In her closing remarks, after noting that more than thirty years had elapsed since *Ashbacker*, she stated that "it is now . . . a new era where on the basis of criticisms of the comparative hearing process in broadcast cases by some members of the judiciary, it cannot be said that it would be impossible for them to revisit *Ashbacker* on the basis (a) of a newly developing industry, (b) of the Commission's past experience with the comparative formal hearing process, and (c) of their own experience." *Id.* at ___ (Kessler, Board Member, concurring).

92. 47 C.F.R. § 73.643(e) (1977). STV thus differs from "pay" cable television in

since the early 1960's, the Commission, at the urging of Congress, delayed its authorization until 1968.⁹³ In adopting final rules, the Commission attempted to ensure that STV would supplement rather than supplant non-STV programming.⁹⁴ An applicant for an STV authorization thus must show that at least five other television broadcast stations operate in its market, that there is no other station carrying STV in operation, and that the applicant will meet the Commission's standards for minimum amounts of programming.⁹⁵ Only recently has the Commission even proposed the adoption of STV cut-off rules.⁹⁶

The Commission, with the approval of the District of Columbia Circuit,⁹⁷ was quick to classify STV as a form of broadcasting,⁹⁸ and gave little thought to the procedural consequences under *Ashbacker*. This classification of conventional television and STV as the same type of broadcast television would seem to generate the need for a hearing in at least three distinct situations. First, a hearing appears to be necessary on two or more applications for stations with STV proposals for the same frequency and location.⁹⁹ Since neither party is an incumbent, procedural fairness would demand that they have an opportunity to test each other's claims.

The rules also seem to require a hearing between an applicant for a station with STV and an applicant for a station without STV.¹⁰⁰ At first glance, this approach seems to have some validity

that the latter does not use broadcast frequencies to reach home viewers. 47 C.F.R. § 76.5 (1977).

93. See Subscription Television, Fourth Report and Order, 15 F.C.C.2d 466, 469-72, 14 RAD. REG. 2d (P&F) 1601, 1605-09 (1968).

94. 43 Fed. Reg. 1516, 1517 (1978) (to be codified in 47 C.F.R., Part 73). The Commission has concluded that STV may provide "a beneficial supplement to the conventional television programming and that, as an alternative medium, it might well provide a wholesome stimulus to free television which could lead to an improvement in overall programming available to the public." *Id.*

95. 47 C.F.R. § 73.642 (1977).

96. See 43 Fed. Reg. 1516, 1518 (1978) (to be codified in 47 C.F.R., Part 73).

97. National Ass'n of Theater Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

98. See Subscription Television, Fourth Report and Order, 15 F.C.C.2d 466, 472, 14 RAD. REG. 2d (P&F) 1601, 1609 (1968).

99. See 47 C.F.R. § 73.642(a) (1977). *Ashbacker* problems arise because this regulation permits only one STV authorization per community. Therefore, if several STV applications are filed for any one community, they are necessarily mutually exclusive. See 43 Fed. Reg. 1516, 1518 (1978) (to be codified in 47 C.F.R., Part 73). The Commission has also acknowledged that, as yet, there are no criteria for comparing mutually exclusive STV applications, but has given notice of its intention to propose regulations. *Id.* at 1519.

100. Additional complications arise because an applicant for an STV license is

since both applications would be requesting the same—and a mutually exclusive—frequency and location. But in this situation, the Commission's rules could effectively give a preference to the application for a non-STV station. The rules require an applicant for an STV station to show that it will have the same minimum amounts of "public service" programming as an applicant for a non-STV station.¹⁰¹ This places an STV applicant in the classic "Catch 22" situation. It cannot possibly promise as much "public service" programming as an applicant for a non-STV station since, by definition, it proposes to reserve a substantial amount of its broadcast day for pay programs. Unless the Commission retreats from its traditional consideration of "proposed programming" in comparative hearings¹⁰²—which it has shown no inclination to do—an STV applicant operates under an inherent disadvantage.

Finally, *Ashbacker* may require a hearing between two STV applications for different frequencies and locations if they arguably create mutual economic exclusivity. Although the Commission initially authorized only one STV station in an area, it later interpreted the rules to allow two or more stations in the same "market" if located in different "communities" within that market.¹⁰³ In the past, the Commission generally has dealt with mutual economic exclusivity in the context of petitions to deny rather than in the context of comparative hearings.¹⁰⁴ However, there seems to be at least some impetus toward considering economic exclusivity in the comparative context.¹⁰⁵

required either to hold a broadcasting license or a construction permit or to be an applicant for a construction permit. 47 C.F.R. § 73.642(a) (1977). As the FCC has recognized, this regulation "can confuse matters in a comparative situation." 43 Fed. Reg. 1516, 1519 (1978). The Commission is aware that, under the current regulations, unless all of the related applications are consolidated, undesirable results may occur—e.g., an applicant may be granted one application and not the other, thereby receiving a license he does not want or cannot use. At the same time, an application for a non-STV station which would ordinarily have been granted would be denied because it had conflicted with the application which was granted. *Id.* If, however, an applicant makes it "unmistakably clear" that it is only applying for a conventional station because of its desire to obtain an STV license, the Commission will consolidate the applications. *Midwest St. Louis, Inc.*, 61 F.C.C.2d 203, 205, 38 RAD. REG. 2d (P&F) 569, 572 (1976).

101. 47 C.F.R. § 73.642(b) (1977).

102. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397, 5 RAD. REG. 2d (P&F) 1901, 1911 (1965).

103. Subscription Television Authorizations, 55 F.C.C.2d 187, 192, 34 RAD. REG. 2d (P&F) 1145, 1152 (1975).

104. See text accompanying note 37 *supra*.

105. *Midwest St. Louis, Inc.*, 61 F.C.C.2d 203, 38 RAD. REG. 2d (P&F) 569 (1976).

The Commission's application of *Ashbacker* to STV may thus raise a number of problems since it will, at best, serve to complicate an already complex decisionmaking process. The Commission could, of course, escape from its own procedural pitfall by designating STV as a separate type of broadcast service. Hearings still would be necessary on STV applications which were either technically or economically mutually exclusive with other STV applications.

V. CONCLUSION

The FCC's experience thus bears out Professor Davis' prediction of two decades ago that "the *Ashbacker* doctrine has a large and complex future."¹⁰⁶ With that future now upon us, *Ashbacker* does not seem to have enhanced the administrative process. The Court formulated the doctrine to protect a party's right to participate in agency decisionmaking. Unfortunately, *Ashbacker* has too often become a smokescreen for dilatory tactics and procedural abuses.

An obvious corrective measure would be to limit tactics such as linking.¹⁰⁷ But this approach would still leave substantial room for other abuses. As noted before, under *Ashbacker* an agency has virtually no way of dismissing an application which is filed for the purpose of harassing a potential competitor.¹⁰⁸

In point of fact, *Ashbacker* and its progeny place the shoe on the wrong foot in terms of ensuring fair agency procedures—that is, with the agency rather than with the parties. Although applicants obviously need fair procedures, an agency cannot operate effectively while under an absolute duty to consolidate.

Instead, agencies should be free to use one of their most basic tools: discretion. The prospect of unbridled discretion is hardly attractive since it is obviously prone to abuse. But modern theories concerning the administrative process have demonstrated that structural control¹⁰⁹ and judicial review¹¹⁰ can effectively control administrative discretion. Thus, the time is ripe to reevaluate and perhaps remove *Ashbacker's* rigid constraints.

106. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.12, at 576 (1958).

107. See text accompanying note 70 *supra*.

108. See text accompanying note 12 *supra*.

109. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

110. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).