

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF TELECOMMUNICATIONS POLICY
WASHINGTON, D.C. 20504

Rechnow - Rahr

Date: February 4, 1971

Subject: Memorandum for Peter Flanigan

To: Bruce Owen

I have a few comments concerning the proposed reply to Peter Flanigan.

First of all, is it wise to extend the scope of the discussion beyond the narrow question asked (the sale of TV and radio licenses) to the much broader and difficult question of market allocation of the entire radio spectrum? I would not want to take a position on the latter unless absolutely compelled to, and I do not think Flanigan's inquiry constitutes such a compulsion.

I do not agree that the principal objection to the institution of a private market mechanism has been the "absence of a legal definition" of the private property right involved. To be sure, no legal definition currently exists, but if it were desired that the commodity be bought and sold it would be relatively easy to create one. The real problem is not the narrow legal one of framing the "property right," but the technological and social one of determining what that right ought to include. For the sale of radio and TV licenses alone, this problem is not very acute, but if you enlarge the discussion to embrace the sale of the entire radio spectrum, the problems are enormous. For example, when a particular segment of the spectrum is sold to a user of a different type (e.g., from a TV broadcaster to a mobile radio user) or when it is split up and resold to several other users, the effects of the use upon other portions of the spectrum can be vastly altered. To prevent disruption through restrictions upon transfer for differing uses would destroy the whole purpose of the exercise--i.e., to let economic forces determine most efficient uses. In other words, it may well be that the very nature of the physical element with which we are dealing makes it impractical (though not legally impossible) to split it up into privately "owned" segments. The use of one segment has too much of an effect upon the usability of the others. If I may be permitted an analogy: It is thoroughly possible (indeed, quite simple) to establish an arrangement whereby the walls in a house are owned by one individual, the windows by another, the plumbing by a third, the floors by a fourth, etc. As far as I know, it has never been done. Not

because it is difficult to do, but because it is not intelligent to do. It seems to me that that is the judgment which has been made with respect to the radio spectrum; it must be "owned" and managed as a whole. Perhaps that judgment is wrong--but we lawyers have very little to do with it.

The other principal problem which I see--and this one applies even more strongly to radio and TV licenses than it does to the rest of the spectrum--is the problem of what I believe you would refer to as "externalities." Even in the period of our history when we were most rigidly individualistic, most highly suspicious of government intervention and most heartily content to let economics determine priorities, the area of communications was regarded as something quite special, charged with a public interest which could not be left to the market. Thus it is that our Constitution explicitly provided for a federal post office, which has, since the early days of the Republic, been insulated from private competition. Or to take another example from the same field, third-class postage has (I believe) never "paid its own way"--and there is little chance that it ever will be forced to do so. There has been, I suggest, an enduring social judgment that the dissemination of knowledge (or, for that matter, ignorance) is too important a matter to be governed entirely by people's willingness and ability to pay for it.

Moreover, a broadcast license confers the power not merely to disseminate, but also to determine the content disseminated. At present that power is subtly restrained, not by explicit federal dictation of content nor even by overt censorship, but by the FCC's consideration of the demands of the "public interest, convenience and necessity" when the license is issued and when it comes up for renewal. This restraint would be eliminated if licenses were to be simply sold. At this point, it seems to me, the "externalities" become overwhelming, in view of the ability of television, in particular, to affect the mores of the entire community. Even if the highest bidder has no political or ideological axe to grind, he may simply find it commercially profitable to push sex (short of the legally obscene, whatever that is) or pot or violence. It would be possible to establish a sale system for licenses, and at the same time avoid placing such massive power in one individual's hands, by either (1) lodging the power in the federal government through the establishment of fairly detailed content requirements, or (2) eliminating the power entirely, by making broadcasters common carriers. I will not go into my views on these alternatives, except to say that the first would be more oppressive than the present system, and that the second should not attract an Administration which rejected the Obscenity Commission report and which is concerned about crime, violence, pot and the general deterioration of that thing known as the "social fabric." In any case, unless and until one of these two alternatives is adopted, there is at least some parallel between selling broadcast licenses and selling the

Presidency to the highest bidder. And I doubt that whoever suggested the idea to Ehrlichman had in mind coupling it with either one of the alternatives.

I suspect that the notion of going to a market mechanism is born principally of despair at the FCC's attempts to separate two applicants between whom there is not a dime's worth of difference (to coin a phrase). Perhaps the FCC's procedures are absurd. Perhaps they should instead establish broad grades of desirability, and distinguish between two applicants within the same grade on the basis of a lottery--or, if you wish, on the basis of who will pay the most. But as bad as they are, the FCC's procedures do represent an attempt to take account of factors which I am not prepared to say can safely be ignored--and which the marketplace would ignore.

Antonin Scalia

AS

bcc: Mr. Whitehead ✓
Dr. Mansur

Letter, Amateur Radio

December 7, 1970

MEMORANDUM FOR

Honorable George P. Shultz
Director
Office of Management and Budget

This is in response to a legislative referral memorandum to this office dated November 23, 1970 and received November 30 from Mr. C. William Fischer requesting our views on S. 1466.

S. 1466, introduced March 11, 1969 by Senator Goldwater, would amend the Communications Act of 1934 to provide that certain aliens admitted to the United States for permanent residence shall be eligible to operate amateur radio stations in the United States and to hold licenses for their stations. S. 1466 would broaden existing authority of the Federal Communications Commission to issue "authorisations" to aliens licensed by their government provided there is a bilateral, reciprocal, agreement between the United States and the alien's government for such operation.

Enactment of S. 1466 not only should have no adverse impact on the United States but could assist in the international projection of other policies in the national interest. It is our view that S. 1466 is consistent with the Administration's current programs. Therefore, I recommend a favorable report by your office on this legislation.


Clay T. Whitehead

WEP/tw
Reading File
Subject File
cc: Mr. Whitehead ✓
Mansur
Doyle
Dean

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 23, 1970

LEGISLATIVE REFERRAL MEMORANDUM

To: Legislative Liaison Officer
Office Telecommunications Policy

Subject: S. 1466 an Act "To amend the Communications Act of 1934 to provide that certain aliens admitted to the United States for permanent residence shall be eligible to operate amateur radio stations in the United States and to hold licenses for their stations."

The Office of Management and Budget would appreciate receiving the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Budget Circular A-19.

- () To permit expeditious handling, it is requested that your reply be made within 30 days.
- (X) Special circumstances require priority treatment and accordingly your views are requested by December 7, 1970.

Questions should be referred to Martin Faigin (103 X 3641) or to Jay Paul Brenneman the legislative analyst in this office.

(103 X4874),

C. William Fischer
C. William Fischer, for
Assistant Director for
Legislative Reference

Enclosures

March 19, 1969

MEMORANDUM FOR

Mr. Charles H. Kendall

Subject: S. 1466, 91st Congress, 1st Session

We have reviewed S. 1466 which would amend the Communications Act of 1934 to provide that resident aliens in the United States who have declared an intention of becoming U.S. citizens would be eligible to operate amateur radio stations and to hold a license for an amateur radio station.

We have no objection to passage of this bill because broadening the licensing provisions of the Communications Act in this way would have no adverse impact on the functions and responsibilities of the Director of Telecommunications Management.

J. D. O'Connell

JJ0'Malley:lmc

cc: ✓ Subject file
Reading file
DTM (2).

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EXECUTIVE OFFICE THE PRESIDENT
OFFICE OF EMERGENCY PLANNING

ROUTING SLIP

TO	BLDG AND ROOM	INITIALS	DATE
1. General O'Connell			
2.			
3.			
4.			
5.			

☐ APPROVAL

☐ PREPARE REPLY

☐ APPROPRIATE ACTION

☐ NOTE AND FILE

☐ RECOMMENDATION

☐ NOTE AND RETURN

☐ RECOMMEND SIGNATURE

☐ INFORMATION

REMARKS:

The attached bill is similar to S.J.
Res. 27, 91st Congress, upon which
you previously commented.

May we have your reaction to this bill
or is it your wish that comments sub-
mitted on February 7, 1969 on the
Resolution will also apply to S. 1466?

FROM	<i>CH</i> C. H. Kendall	DATE	3/18/69
	(NAME AND ORGANIZATION)	PHONE	
	(BUILDING AND ROOM NUMBER)		

91st CONGRESS
1st Session

S. 1466

IN THE SENATE OF THE UNITED STATES

MARCH 11 (legislative day, MARCH 7), 1969

Mr. GOLDWATER introduced the following bill; which was read twice and referred
to the Committee on Commerce

A BILL

To amend the Communications Act of 1934 to provide that certain aliens admitted to the United States for permanent residence shall be eligible to operate amateur radio stations in the United States and to hold licenses for their stations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 303 (1) of the Communications Act of 1934
4 (47 U.S.C. 303 (1)) is amended by inserting at the end
5 thereof a new paragraph as follows:

6 “(3) Notwithstanding paragraph (1) of this subsection,
7 the Commission may issue licenses for the operation of
8 amateur radio stations to aliens admitted to the United
9 States for permanent residence who have filed under section

1 334 (f) of the Immigration and Nationality Act a declara-
2 tion of intention to become a citizen of the United States."

3 SEC. 2. Section 310 (a) of the Communications Act of
4 1934 (47 U.S.C. 310 (a)) is amended by adding at the
5 end thereof the following new paragraph:

6 "Notwithstanding paragraph -(1) of this subsection,
7 a license for an amateur radio station may be granted to and
8 held by an alien admitted to the United States for permanent
9 residence who has filed under section 334 (f) of the Immi-
10 gration and Nationality Act a declaration of intention to be-
11 come a citizen of the United States."

JAN 21 1969

Honorable Warren C. Magnuson
Chairman
Committee on Commerce
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in reply to your request for an expression of the views of this Agency concerning S. 1466, 91st Congress, a bill entitled:

"To amend the Communications Act of 1934 to provide that certain aliens admitted to the United States for permanent residence shall be eligible to operate amateur radio stations in the United States and to hold licenses for their stations."

This bill is similar to S. J. Res. 27, 91st Congress. S. 1466 would amend the Communications Act of 1934 to provide that resident aliens in the United States who have declared an intention of becoming citizens of the United States would be eligible to operate amateur radio stations and to hold a license for an amateur radio station.

As part of this Agency's emergency preparedness planning responsibilities, it is charged with the duty of assuring that this nation has all the resources needed to meet any emergency that may confront the country. We consider an effective telecommunications system to be one of our most essential resources, and recognize that there is an ever present need for strengthening that system.

However, we are unable to advise you as to whether the provisions of this bill would accomplish that objective. In carrying out our responsibilities for overall mobilization readiness of economic resources, we rely on the various federal agencies to provide their technical talents and capabilities. Accordingly, we defer to the views of the Federal Communications Commission and other agencies which would be charged with administering this legislation.

Inasmuch as it appears that S. 1466 is a substitute for S. J. Res. 27 and inasmuch as Senator Goldwater introduced both, we assume that you are no longer interested in receiving a report on S. J. Res. 27.

From the standpoint of the Administration's program, the Bureau of the Budget advises that it has no objection to the submission of this report.

Sincerely,

[Signature]

G. A. Lincoln
Director

cc:D

DD

A-AD/Marker

L/C/115

✓ DTM

CC

GC/MPWilliams/hh/3/26/69

TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS ⁴⁰

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

GENERAL POWERS OF THE COMMISSION

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(1) (1) Have the authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals ⁴² of the United States or citizens of the Trust Territory of the Pacific Islands presenting valid identity certificates issued by the high Commissioner of such Territory, ^{42a} as the Commission finds qualified, except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments; ^{42b}

⁴⁰ This heading was amended to read as above by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937; 50 Stat. 192.

⁴¹ Public Law 57-445, approved April 27, 1962, 76 Stat. 64, amended subsection (1) by adding the words or nationals after the word citizens.

⁴² The clause dealing with citizens of the Trust Territory of the Pacific Islands was added by Public Law 58-457, approved August 22, 1964, 76 Stat. 61.

^{42a} Section 303(1)(1) was amended to read as above by Public Law 55-217, approved August 28, 1958, 72 Stat. 951. It formerly read as follows:

(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified.

(2) Notwithstanding section 301 of this Act and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a bilateral agreement between the United States and the alien's government for such operation on a reciprocal basis by United States amateur radio operators: *Provided*, That when an application for an authorization is received by the Commission, it shall notify the appropriate agencies of the Government of such fact, and such agencies shall forthwith furnish to the Commission such information in their possession as bears upon the compatibility of the request with the national security: *And provided further*, That the requested authorization may then be granted unless the Commission shall determine that information received from such agencies necessitates denial of the request. Other provisions of this Act and of the Administrative Procedure Act shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.^{42c}

"(3) Notwithstanding paragraph (1) of this subsection, the Commission may issue licenses for the operation of amateur radio stations to aliens admitted to the United States for permanent residence who have filed under section 334(f) of the Immigration and Nationality Act a declaration of intention to become a citizen of the United States."

(m)⁴³ (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) Has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

^{42c} Paragraph 2 was added by Public Law 88-313, approved May 28, 1964, 78 Stat. 202.
⁴³ This subsection was amended to read as above by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress approved and effective May 20, 1937: 50 Stat. 190. Section 303(m) formerly read as follows:

(m) Have authority to suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy the Commission that the licensee (1) has violated any provision of any Act or treaty binding on the United States which the Commission is authorized by this Act to administer or any regulation made by the Commission under any such Act or treaty; or (2) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (3) has willfully damaged or permitted radio apparatus to be damaged; or (4) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (5) has willfully or maliciously interfered with any other radio communications or signals.

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

- (1) Any alien or the representative of any alien;
- (2) Any foreign government or the representative thereof;
- (3) Any corporation organized under the laws of any foreign government;
- (4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted after June 1, 1935, by aliens, their representative, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

Notwithstanding paragraph (1) of this subsection, a license for a radio station on an aircraft may be granted to and held by a person who is an alien or a representative of an alien if such person holds a United States pilot certificate or a foreign aircraft pilot certificate which is valid in the United States on the basis of reciprocal agreements entered into with foreign governments.⁵⁴

Notwithstanding section 301 of this Act and paragraphs (1) and (2) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a bilateral agreement between the United States and the alien's government for such operation on a reciprocal basis by United States amateur radio operators: Provided, That when an application for an authorization is received by the Commission, it shall notify the appropriate agencies of the Government of such fact, and such agencies shall forthwith furnish to the Commission such information in their possession as bears upon the compatibility of the request with the national security: And provided further, That the requested authorization may then be granted unless the Commission shall determine that information received from such agencies necessitates denial of the request. Other provisions of this Act and of the

⁵⁴ The penultimate paragraph of Section 310(a) was added by Public Law 85-517, approved August 23, 1958, 72 Stat. 931.

Administrative Procedure Act shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.^{50a} *

(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment,

^{50a} The last paragraph of section 310 (a) was added by Public Law 88-313, approved May 28, 1964, 78 Stat. 202.

Pkt. 3, Dec. 1964

* "Notwithstanding paragraph (1) of this subsection, a license for an amateur radio station may be granted to and held by an alien admitted to the United States for permanent residence who has filed under section 334(f) of the Immigration and Nationality Act a declaration of intention to become a citizen of the United States."