

THE RECOGNITION OF LEGITIMATE RENEWAL EXPECTANCIES IN BROADCAST LICENSING

I. INTRODUCTION

The Communications Act of 1934¹ provides that the Federal Communications Commission (FCC) shall grant a broadcaster's license for a maximum period of three years² to any applicant it deems sufficiently able to serve the "public convenience, interest, or necessity."³ At the expiration of the three year term,⁴ the FCC may renew the license for another three years if the incumbent again meets the "public interest" criteria.⁵ Implicit in the three year limitation is a recognition that the "field of broadcasting is one of free competition"⁶ and that a station license vests in a licensee only so long as it serves the "public interest."⁷

Despite these objectives, the FCC has traditionally favored an in-

1. 47 U.S.C. §§ 301-398 (1976).

2. *Id.* § 307(d). *See, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

3. 47 U.S.C. § 307(a) (1976).

4. Recent legislative proposals would grant broadcasters longer license terms. *See* S. 611, 96th Cong., 1st Sess. § 301(a) (1979); S. 622, 96th Cong., 1st Sess. § 332(a)(b) (1979); H.R. 3333, 96th Cong., 1st Sess. §§ 461, 471 (1979); H.R. 13015, 95th Cong., 2d Sess. § 431 (1978). *See also* note 161 *infra* and accompanying text.

5. 47 U.S.C. § 307(d) (1976) provides:

Upon the expiration of any license, upon application therefore, a renewal of such license may be granted from time to time for a term not to exceed three years in the case of broadcasting licenses . . . if the Commission finds that the public interest, convenience, and necessity would be served thereby.

Although the public interest standard has never been subject to precise legislative definition, it is not unconstitutionally vague. *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) (standard not "too indefinite for fair enforcement"); *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) (public interest determined on case-by-case basis). The Supreme Court in *National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943), recognized that the public interest requires the "fullest and most effective use of the spectrum." *Id.* at 218. The Court further defined public interest as "the interest of the listening public in the larger and more effective use of radio." *Id.* at 216. Commissioner Quello defined the public interest as "what people would do if they thought clearly, decided rationally, and acted disinterestedly." Quello, *Its Time to Rewrite the Communications Act, and Also Time to Set Some Priorities*, TELEVISION/RADIO AGE April 10, 1978, at 114.

6. *FCC v. Sanders Bros. Radio Stations*, 309 U.S. 470, 474 (1939).

7. 47 U.S.C. §§ 301, 307(d), 309(h) (1976). The Act specifically requires a licensee to sign a waiver renouncing any claim to continued use of a frequency. *Id.* at § 304. *See also* *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (dictum); *FCC v. Sanders Bros. Radio Stations*, 309 U.S. 470 (1939) (dictum).

cumbent licensee when faced with a competitive challenger.⁸ The seemingly routine judicial affirmation of the Commission's preference for the incumbent⁹ has led at least one court to label the practice as giving rise to a "renewal expectancy."¹⁰ The Commission's strong preference for the incumbent evolves from its attempt to "secur[e] the maximum benefits of radio [television],"¹¹ yet maintain stability¹² in the broadcast industry.¹³

This Note traces the judicial and self-imposed constraints on the Commission that led to the policy of renewal expectancy. After developing a history of communications licensing, the Note concentrates on

8. See *Cowles Florida Broadcasting*, 60 F.C.C.2d 372 (1976), *aff'd on reconsideration*, 62 F.C.C.2d 953 (1977), *vacated sub nom. Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *In re RKO General, Inc.*, 44 F.C.C.2d 123 (1973), *aff'd sub nom. Fidelity Television v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); *Moline Television Corp.*, 31 F.C.C.2d 263 (1971); *Wabash Valley Broadcasting Corp. (WTHI-TV)*, 35 F.C.C. 677 (1963); *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149, *aff'd on reconsideration*, 16 F.C.C. 141 (1951).

For a criticism of the Commission's renewal policy, see Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968) (statement by Federal Communications Commissioners) [hereinafter cited as Cox & Johnson].

9. See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971); *WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir.), *rev'd on other grounds*, 329 U.S. 223 (1946); *Chicago Fed'n of Labor v. FRC*, 41 F.2d 422 (D.C. Cir. 1930).

10. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 42 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979). See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

11. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943). See *FCC v. Sanders Bros. Radio Stations*, 309 U.S. 470 (1940); *Pottsville Broadcasting Co. v. FCC*, 105 F.2d 36 (D.C. Cir. 1939), *rev'd on other grounds*, 309 U.S. 134 (1940).

12. The Commission's emphasis on stability in the industry stems from the belief that uncertainty of renewal would discourage investment, lead to maximization of short-term profits, and induce substandard performance. *In re Formulation of Policies Relating to the Broadcast Renewal Applicant*, Stemming from the Comparative Hearing Process, 66 F.C.C.2d 419, 420 (1977) [hereinafter cited as *Formulation of Policies*]; *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424, 425 (1970) [hereinafter cited as *1970 Policy Statement*].

The courts recognize that stability might be one method by which to further the "public interest." See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 60 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 858 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

13. The Commission is keenly aware that depriving an incumbent of renewal will result in huge financial losses. See, e.g., *Wabash Valley Broadcasting Corp. (WTHI-TV)*, 35 F.C.C. 677 (1963); *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149, *aff'd on reconsideration*, 16 F.C.C. 141 (1951). The Commission recently denied renewal to three television stations owned by General Tire & Rubber Company. The denied loss attributable to the Commission's decision is estimated at \$300 million. *Wall Street Journal*, Jan. 25, 1980, at 4, col. 1.

the recent landmark case of *Central Florida Enterprises v. FCC*.¹⁴ The last sections discuss the implications of *Central Florida*, congressional attempts to revise renewal procedures, and the need for a policy of renewal expectancy to promote industry stability.

II. LICENSING PROCEDURES

A. *The Comparative Hearing*

The Commission typically conducts two types of licensing procedures. The noncomparative¹⁵ hearing, which simply consists of an application for a broadcast license by a single licensee to operate on an available open channel, is the more inexpensive and easier to administer of the two procedures. The Commission considers three criteria:¹⁶ (1) whether the applicant's proposed programming¹⁷ meets the "needs and interests of the community";¹⁸ (2) whether the proposed license poses economic ramifications to existing licenses;¹⁹ and (3) whether the

14. 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

15. The licensing procedure is a two-step process. The applicant must first apply for and be granted a construction permit, which allows him to build the facility. *See* 47 U.S.C. §§ 153(ee), 319 (1976); 47 C.F.R. §§ 73.3511, 73.3533 (1979). After construction, the Commission generally grants, in a summary fashion, the permit to operate. *See* *Ashbacker Radio Co. v. FCC*, 326 U.S. 327, 328 n.1 (1945); 47 U.S.C. § 319(c) (1976). The applicant in a noncomparative hearing must pay an application fee, *see* 47 C.F.R. § 1.1111 (1979), and probably attorney's fees for preparation of the application. These costs, however, compare favorably with hearing costs, which can be \$3.5 million for the initial hearing stage alone. *See* *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 447 n.34 (1976) (Robinson, Comm'r, dissenting). For a comprehensive discussion of the Commission's licensing procedures, *see* Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 1-61 (1971).

16. All applicants must meet legal, technical, and financial qualifications before the Commission will take evidence on public interest issues. *See* 47 U.S.C. §§ 308(b), 313(a), 319(a) (1976).

17. The Commission is primarily concerned with the licensee's programming. The Commission has been reluctant, however, to move from general to specific standards for appraising programs, relying instead on agency intuition. *See* notes 72, 80 *infra* and accompanying text. *See also* *Central Florida Enterprises v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

18. The Commission requires applicants to make a detailed study of the programming needs of the service area by questioning community leaders. *See* *Programming Inquiry*, 44 F.C.C. 2303 (1960). The "ascertainment" procedure received judicial approval in *Great Lakes Broadcasting Co. v. FCC*, 289 F.2d 754 (D.C. Cir. 1960). In 1961 the Commission denied a license to an applicant who proposed the same type of programming for three stations located in different communities. *See* *Suburban Broadcasters, Inc.*, 30 F.C.C. 1021 (1961), *aff'd*, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962).

19. *See* *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958). *Carroll* is the leading case on the FCC's consideration of economic harm to existing stations in an advertising market when determining whether to license a new station. The Court held that "when an existing

granting of the license will result in undue concentration of the mass media.²⁰

The more difficult situation arises when two or more applicants vie for the right to operate under the same license.²¹ The Communications Act does not explicitly provide the Commission with a procedure to compare competing applicants,²² but the Supreme Court in *Ashbacker Radio Corp. v. FCC*,²³ interpreted what is now section 309(e)²⁴ of the Act to require the FCC to consider mutually exclusive applicants at the same time.²⁵ The District of Columbia Court of Appeals also upheld

licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof, and, if the evidence is substantial . . . , should make a finding or findings." *Id.* at 443. See *FCC v. Sanders Bros. Radio Stations*, 309 U.S. 470 (1940); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

20. In any particular market, a licensee may own only one AM/FM combination and one television station. See 47 C.F.R. § 73.35(b) (1978) (AM); *id.* at § 73.240(a)(2) (FM); *id.* at § 73.636(a)(2) (television). Nationally, one licensee may own seven AM, seven FM, and seven television stations. See 47 C.F.R. §§ 73.35, .240, .636 (1978). The Commission also may consider whether a broadcast license will result in a concentration of all media, including newspapers. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C. Cir. 1951).

21. Competitive applications occur in two situations: (1) at renewal time, when an incumbent is faced with a challenge to its license; and (2) in an original proceeding, when two or more new applicants wish to operate on one available frequency. In both original and renewal cases challenges do not necessarily arise from competing broadcasters. Section 307(d) provides that any "party in interest" may file a petition for denial. See 47 U.S.C. § 309(d)(1) (1976); 47 C.F.R. § 1.580(i) (1978). See also *National Organization for Women v. FCC*, 555 F.2d 1002 (D.C. Cir. 1977) (women's group); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (citizens' group); *Spanish Int'l Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967) (ethnic group); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (religious group).

22. The Act requires the Commission to hold a hearing only when denying a license or when there are "substantial and material question[s] of fact" on which the Commission is unable to reach a finding. 47 U.S.C. §§ 307(d), 309(e) (1976).

23. 326 U.S. 327 (1945).

24. 47 U.S.C. § 309(e) (1976) (originally § 309(a) (1934)).

25. The Commission considered the applicants mutually exclusive, even though they wished to operate in different cities, because their simultaneous operation would have resulted in signal interference. 326 U.S. 327, 328 (1945). Technically, at least, the Commission complied with the hearing requirement. Noting the exclusivity of the licensees, the FCC granted one application and set a later hearing for the other applicant. The Supreme Court held, however, that the burden of persuasion necessary to dislodge the successful applicant would be difficult to overcome and, therefore, the hearing was an "empty thing." *Id.* at 329-32.

Ashbacker involved two original candidates; the Commission, however, also applies the procedure in cases of mutually exclusive applications for renewal. See cases cited note 8 *supra*. See also *Moline Television Corp.*, 31 F.C.C.2d 263 (1971); *The Tribune Co.*, 19 F.C.C. 100 (1954).

an applicant's right to a comparative hearing,²⁶ despite the Commission's recent insistence that the procedure is unworkable and unnecessary in the renewal context.²⁷

B. *The Development of the Comparative Criteria*

Although the courts require the FCC to hold comparative hearings,²⁸ the Commission retains comprehensive powers²⁹ to determine standards by which to evaluate applicants. The broad requirement of the Act—to select the licensee who will best serve the public interest—allows the Commission to develop extensive comparative criteria.³⁰ These criteria have never been the subject of administrative rulemaking; rather, the criteria evolved on a case-by-case basis³¹ as the Commission “gained new insight into the relevant issues of the comparative proceeding.”³²

The Commission's ad hoc approach led to an exhaustive list of comparative criteria,³³ including local ownership, integration of ownership

26. See *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). See also notes 70-77 *infra* and accompanying text.

27. See Formulation of Policies, *supra* note 12, at 429. See also *Cowles Florida Broadcasting*, 60 F.C.C.2d 372, 430, 435 (1976) (Wiley & Robinson, Comm'rs, dissenting).

For an extensive listing of articles suggesting reform of the comparative hearing, see Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings*, 43 U. CHI. L. REV. 573, 573 n.5 (1976).

28. Several cases hold that no hearing need occur when an application fails to satisfy the Commission's rules or when an applicant does not meet the Commission's basic qualifications. See 47 U.S.C. § 303(a-s) (1976). See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972); *Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963).

29. The Act requires only that the Commission grant a license to the applicant who will best serve the public interest. The Commission's power to derive standards by which to judge an applicant has never been questioned. See *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (“Within these broad confines [of public interest], the Commission is left with the task of particularizing standards to be used in implementing the Act.”).

30. The judiciary requires only that the Commission take evidence on all the relevant characteristics of the applicants. In *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (1949) the court held: “The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. . . . It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases.” *Id.* at 357.

31. The Supreme Court upheld the Commission's power to adapt its comparative criteria to changing circumstances. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

32. Anthony, *supra* note 16, at n.159 (quoting NETWORK BROADCASTING: REPORT OF THE NETWORK STUDY STAFF TO THE NETWORK STUDY COMMISSION, H.R. REP. NO. 1297, 85TH CONG., 2D SESS. 68-72 (1957)).

33. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, COMMITTEE ON LICENSES

and management, control of other broadcast or print media, and proposed programs.³⁴ Application of these criteria, in the Commission's view, would provide broadcast outlets in the best interests of the local service community.³⁵ The Commission presumed that applicants whose owners were members of the community would be closely attuned to the desires and problems of that locality.³⁶ Furthermore, local owners who participated in station management would air locally oriented programs.³⁷ The Commission, therefore, placed a great deal of weight on proposed programming,³⁸ emphasizing that significant amounts of local live programs³⁹ would best demonstrate an applicant's

AND AUTHORIZATIONS, LICENSING OF MAJOR BROADCAST FACILITIES BY THE FEDERAL COMMUNICATIONS COMMISSION 55-64 (1962), *reprinted in Hearings before the Subcomm. No. 6 of House Select Comm. on Small Business*, 89th Cong., 2d Sess. A87-A178 (1962), relevant portions cited in W. JONES, *ELECTRONIC MEDIA* 43-45 (2d ed. 1979) (summary of the 15 most frequently used criteria).

34. The Commission usually places most weight on these four factors. *See, e.g.*, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979) (diversification and integration entitled to weight); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55 (D.C. Cir. 1958), *cert. denied*, 366 U.S. 918 (1961) (newspaper ownership preferred); *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957) (newspaper ownership is basis for denial of license); *Plains Radio Broadcasting Co. v. FCC*, 175 F.2d 359 (D.C. Cir. 1949) (proposed programming important in license application); *The Tribune Co.*, 19 F.C.C. 100, *aff'd on reconsideration*, 19 F.C.C. 650 (1954) (proposed programming of applicant basis for grant of license).

35. The entire thrust of the present regulatory procedure is to provide for stations in as many localities as possible. The present licensing system, according to the Commission, "protects the public residing in smaller cities and rural areas more adequately than any other system." 17 Fed. Reg. 3905, 3906 (1952).

The Act requires the Commission to distribute licenses equitably among the "several States and communities." 47 U.S.C. § 307(b) (1976). The Commission, however, currently supports immediate deregulation of radio, leaving marketplace forces to provide for local broadcast outlets. *See In re Deregulation of Radio*, 73 F.C.C.2d 457 (1979). For a criticism of the Commission's localism policy see R. NOLL, M. PECK & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 97-128 (1973); Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 AD. L. REV. 205 (1979).

36. *See The Tribune Co.*, 19 F.C.C. 100, 151 (1954).

37. *Id.* But see notes 174-83 *infra* and accompanying text.

38. Courts have upheld programming as a basis of comparison between mutually exclusive licensees. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943); *Henry v. FCC*, 302 F.2d 191, 193 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949).

39. This criterion invited applicants to inflate initial live programming proposals far in excess of what they actually provided. In the *Tribune* case, for example, the winning applicant proposed 43% local live programming, but delivered only 16.2%. Between 1952 and 1965, before the Commission abandoned the subjective programming approach and adopted objective criteria, the FCC sampled programming proposals in 35 cases. Successful applicants proposed on the average to devote 31.5% of broadcast time to local live programming, but delivered only 11.8%. *See Moline*

“ability to meet and fulfill community needs.”⁴⁰

After formulating a method of comparing competitive applicants, the Commission ignored the method in the first comparative renewal proceeding. In *Hearst Radio, Inc.*⁴¹ the FCC noted the “overriding requirement” of the Act—protection of the public interest—and placed decisive weight on the past broadcast record of the incumbent in a comparative hearing.⁴² After comparing the applicants, the Commission declared the challenger “superior” in integration of ownership and diversification, but found the incumbent (Hearst) to have provided “acceptable,” though not “outstanding,” service to the community.⁴³ Thus, the Commission concluded that the public interest would be better served by renewing the incumbent rather than by awarding the license to an applicant with an unproven record.⁴⁴

Television Corp., 31 F.C.C.2d 263, 271-73 (1973). See, e.g., *Suburban Broadcasters, Inc.*, 30 F.C.C. 1021 (1961) (denial of license to applicant who had made same proposals for three separate stations). Cf. *KORD, Inc.*, 31 F.C.C. 85 (1961) (stressed importance of licensees fulfilling proposals); *Beaumont Broadcasting Corp.*, 19 F.C.C. 161 (1954) (differences in programming not significant if each applicant proposed meritorious service).

40. *The Tribune Co.*, 19 F.C.C. 100, 152 (1954). The FCC is reluctant to regulate program content directly, but the Supreme Court, at least with respect to the “fairness doctrine,” 47 U.S.C. § 315 (1976), has upheld the Commission’s power to force compliance. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-92 (1969).

41. 15 F.C.C. 1149, 1176 (1951).

42. *Id.* By considering Hearst’s past broadcast record, the Commission sidestepped § 307(d) of the Act, which limited the Commission’s comparison in a renewal hearing to “the same considerations and practices which affect the granting of original applications.” Communications Act of 1934, ch. 652, § 307(d), 48 Stat. 1084 (1934) (current version at 47 U.S.C. § 307(d) (1976)). Because original applicants do not have past broadcast records, a literal interpretation of § 307(d) should have prevented the Commission from including the incumbent’s past record in the comparison. In 1952 Congress amended § 307(d) to delete “the same considerations and practices” language and require all applications to meet the public interest standard. 47 U.S.C. § 307(d) (1976). The Commission concluded that the amendment allowed the FCC complete freedom to delve into an incumbent’s past broadcast record. This amendment is possibly the basis for the Commission’s renewal expectancy policy. See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 41 n.4 (D.C. Cir. 1978), cert. dismissed, 99 S. Ct. 2189 (1979); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206 n.13, 1207 (D.C. Cir. 1971); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 473-75 (1975).

43. 15 F.C.C. at 1174.

44. The Commission held:

Where a finding is justified that the service being rendered is in the public interest, consideration should be given to the desirability of continuing such a proven acceptable service which, in the case of the operating applicant, is indicative of an ability to maintain or improve the acceptable service, and to the risks attendant upon terminating such service and making the facilities available to another applicant without a proven record of past performance and who may not be able to render in actual practice, a service as desirable as the one terminated.

This rationale effectively prevented the Commission from comparing an incumbent and challenger because a challenger rarely possesses a past broadcast record that is susceptible to comparison.⁴⁵ The emphasis on past programming effectively precluded attempts to unseat incumbents⁴⁶ and "guaranteed" renewal.⁴⁷

Recognizing the substantial difficulties in its reliance on programming⁴⁸ as a basis for comparing competing applicants, the Commission shifted the comparative criteria from subjective programming standards to objective standards based on the structural characteristics of the applicants. The resulting *Policy Statement on Comparative Broadcast Hearings*⁴⁹—the 1965 Policy Statement—recognized two primary considerations in the hearing process:⁵⁰ (1) the "diversification of con-

Hearst Radio, Inc., 15 F.C.C. 1149, 1176 (1951). By accepting a known versus an unknown entity, the Commission made clear that it places primary emphasis on past "meritorious" performance as the best indicator of future performance and that the comparative criteria serve only as "guideposts." *Id.*

45. The Commission would adduce information on the past broadcast experience of the challenger to corroborate its program proposals, but usually did not grant a preference to any applicant. *See* *Beaumont Broadcasting Corp.*, 19 F.C.C. 161, 168 (1954); *The Tribune Co.*, 19 F.C.C. 100, 155 (1954); *Hearst Radio, Inc.*, 15 F.C.C. 1149, 1182 (1951).

46. The Commission decided only one comparative renewal case in the 17 years after *Hearst*. *See* *Wabash Valley Broadcasting*, 35 F.C.C. 677 (1963), in which both the incumbent and the challenger had past broadcast records. The Commission, however, dismissed the challenger's past record because it had been compiled in a "different medium and city." *Id.* at 678-79.

47. The practical effect of *Hearst* and *Wabash* was to give the incumbent an advantage on the basis of his "past broadcast record per se." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). In addition, the FCC's position placed the challenger in a "catch 22" situation by minimizing any advantage that it might possess under the diversification and integration criteria. In *Hearst*, for example, the Commission held that the usual presumption that proposed programming would be carried out by the applicant with the better integration and diversification proposals would not be considered "where a record is available establishing the capabilities of the management employed by prospective licensees." 15 F.C.C. at 1179.

48. *See* notes 38-42 *supra*.

49. 1 F.C.C.2d 393 (1965) [hereinafter cited as 1965 Policy Statement]. The Commission recognized the various differences between the comparative hearing involving original applicants and that concerning a renewal candidate. In a footnote to its 1965 Policy Statement, the Commission held: "This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking a renewal of a license." 1965 Policy Statement, *supra*, at 393 n.1. In *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597 (1965), however, the Commission held that the policy statement should govern the "introduction of evidence" in renewal proceedings. *Id.* at 1597-98.

50. The Commission has never fully articulated its rationale for its adoption of the 1965 criteria. The adoption of structural criteria seems to reflect the Commission's inability to predict applicant superiority based on programming. The 1965 criteria presumably reflects the qualifications that, if met, would produce the optimal chance for public interest broadcasts. *See* notes 31-44 *supra* and accompanying text. *See also* Hyde, *FCC Policy And Procedures Relating To Hearings*

trol of the media of mass communications" (diversification);⁵¹ and (2) the "best practicable service to the public,"⁵² based on a comparison of the applicants' proposals for owner participation in the day-to-day operation of the station (integration),⁵³ minority ownership,⁵⁴ proposed service,⁵⁵ and past broadcast record.⁵⁶

One justification for the use of diversification as a primary substantive criterion in the licensing process is a recognition that the owner of a few media interests can expend more time, energy, and money on the facility in question.⁵⁷ A second justification is the Commission's belief that the public interest is best served by providing local forums for free expression and by preventing concentration of the mass media in the hands of a few.⁵⁸

On Broadcast Applications In Which A New Applicant Seeks To Displace A Licensee Seeking Renewal, 1975 DUKE L.J. 253, 268-77; Comment, *supra*, note 27 at 582-83 n.62.

51. 1965 Policy Statement, *supra*, note 49 at 394.

52. *Id.* at 395-96.

53. Although the Commission previously used integration in its comparative analysis, the effect was usually diminished in a renewal situation. See notes 44-47 *supra* and accompanying text. The 1965 Policy Statement raised integration to decisional significance. Integration, as a criterion, consisted of three factors: (1) full-time participation by owners in station management; (2) local residence; and (3) broadcast experience. 1965 Policy Statement, *supra* note 49, at 395-96.

The Commission differentiates between previous broadcast experience and past broadcast record.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, *i.e.*, where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

Id. at 396. The Commission will review past broadcast performance in limited circumstances. See note 79 *infra* and accompanying text.

54. See *TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973). The court held that although minority participation should not be awarded an automatic preference, it was a "material factor" that would be awarded "favorable consideration." *Id.* at 941-42.

55. 1965 Policy Statement, *supra* note 49, at 397.

56. *Id.* at 398.

57. Despite the Commission's promulgation of multiownership rules, see note 20 *supra*, it still considers an applicant's outside media interests as a factor in the applicant's ability to service the local community. The Commission, however, mitigates the diversification factor in a renewal situation. See *Central Florida Broadcasting, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). See also notes 89-94, 102-06 *infra* and accompanying text.

58. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER STANDARDS* (1962). Friendly lists the following explicit objectives of diversification:

[p]revention of undue control over thought and opinion, locally, regionally, or nationally; prevention of independent stations from impairment or destruction by the economic power of multi-medium or multi-station operators; prevention of the exercise of undue

The use of integration as a substantial comparative factor reflects the importance that the Commission places on a licensee's ability to serve local needs.⁵⁹ Additionally, the use of integration permits association of "legal responsibilities and day-to-day performance."⁶⁰

The 1965 Policy Statement prohibits the Commission from considering an applicant's past broadcast record unless the record reflects "unusually good" performance or "a failure to meet the public's needs."⁶¹ Proposed programming is not considered unless there are "material and substantial" differences between the applicants.⁶²

In *WHDH, Inc.*⁶³ the Commission first applied the 1965 Policy Statement in a renewal proceeding and refused to renew the license of the incumbent, WHDH. The Commission's primary emphasis on the diversification and integration criteria placed the incumbent at an immediate disadvantage.⁶⁴ The Commission, adhering to the Policy Statement, refused to award any preference to the incumbent, concluding that WHDH's past broadcast record was simply "average."⁶⁵

The broadcast industry severely criticized the Commission's decision

economic power on advertisers or undue preference to the larger advertiser against the small

Id. at 68-69.

59. See note 33 *supra* and accompanying text.

60. 1965 Policy Statement, *supra* note 49, at 396.

61. *Id.* at 398. Ideally, this limitation on the Commission's consideration of past programming would prevent the FCC from placing decisive weight on past service as it did in *Hearst*. In reality, this has not been the case. See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

62. 1965 Policy Statement, *supra* note 49, at 397. Simultaneously, the Commission amended its application forms to eliminate the requirement that an applicant submit a program schedule. Between 1965 and 1971 no preferences were awarded for proposed programming. See *Moline Television Corp.*, 31 F.C.C.2d 263, 272, 273 n.11 (1971); *In re Keith L. Reising*, 1 F.C.C.2d 1082, 1084 (1965).

63. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

64. Normally, challengers are local residents who have few or no outside media interests. Incumbents usually have large outside interests and network affiliation. See 40 *GEO. WASH. L. REV.* 571, 578-79 (1972); *cf. WHDH, Inc.*, 16 F.C.C.2d 1, 25-26 (1969) (R. Lee, Comm'r, dissenting) (major newspaper ownership of WHDH-TV and WHDH-AM-FM radio stations).

65. The Commission agreed with the examiner's "favorable" designation, but held that WHDH's performance was only average. Even though it devoted 21% of its broadcast time to local programming, the station had not "demonstrate[d] unusual attention to the public's needs or interests." *WHDH, Inc.*, 16 F.C.C.2d 1, 10 (1969).

in *WHDH*.⁶⁶ The FCC's emphasis on diversification and integration, rather than on past broadcast record as comparative factors, signaled a retreat from the implicit preference for the incumbent found in *Hearst* and provided incumbent licensees with an increased possibility of challenge.⁶⁷

Reacting to the criticism,⁶⁸ the Commission issued a policy statement in 1970 specifically directed at renewal applications.⁶⁹ The 1970 Policy Statement⁷⁰ attempted to codify the FCC's preference for the incumbent by providing a bifurcated renewal hearing.⁷¹ Initially, the Commission would review only the record of the incumbent. If the incumbent's program service during the preceding year had "been *substantially* attuned to meeting the needs and interests of its area,"⁷² re-

66. See *Three Billion Dollars In Stations Down The Drain*, BROADCASTING, Feb. 3, 1969, at 19. See also Jaffe, *WHDH: The FCC And Broadcasting License Renewals*, 82 HARV. L. REV. 1963 (1969); Note, *The FCC and Broadcast License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854 (1969).

67. In the seven years preceding *WHDH*, only 11 competing applications were filed. In the two years after *WHDH*, 24 competing applications were filed. See Geller, *supra* note 42, at 482 & n.69.

68. The Commission denied reconsideration in *WHDH* but distinguished the case by declaring that *WHDH* had not been a true incumbent because it had operated under a four month temporary license. *WHDH, Inc.*, 17 F.C.C.2d 856, 872-73 (1969). In affirmance the District of Columbia Circuit stated: "On the unique facts presented, *WHDH* was neither a new applicant nor a renewal applicant as those terms are generally construed." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 859 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

69. 1970 Policy Statement, *supra* note 12.

70. The policy was a response by the Commission to the introduction of legislation by Senator Pastore, which would have amended the Communications Act of 1934 to create a presumption of renewal. S. 2004, 91st Cong., 1st Sess. (1969). This presumption also appears in more recent legislative proposals. See note 4 *supra*. See also *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, n.59 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971); Geller, *supra* note 42, at 482-83.

71. The Commission emphasized that the public interest would be served by "preserving predictability and stability" in the broadcast industry. The FCC recognized the large financial investment required for broadcasting, concluding that a license "subject to withdrawal" would be a disincentive to people who wished to enter the industry and that the revocation of the license of a broadcaster who was providing "good service" would be against the public interest. See 1970 Policy Statement, *supra*, note 12, at 425. In *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 60 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979), the Commission again based renewal on the consideration that stability in broadcasting would be one method of serving the public interest. See notes 132-34 *infra* and accompanying text.

72. 1970 Policy Statement, *supra*, note 12, at 425 (emphasis added). Initially, the Commission did not articulate standards by which to judge "substantial" service. The FCC did, however, attempt to distinguish "substantial service," which would warrant prompt renewal, from "minimal service," which would not justify immediate renewal. "Substantial" service meant that the applicant served the public interest in an "ample solid fashion." *Id.* at 425 n.1. The public interest was

newal would be automatically granted.⁷³ If not, a comparison of the applicants under the 1965 Policy Statement standards would guide the selection of a licensee. The Commission, in effect, resurrected the policy formulated in *Hearst*⁷⁴ by theorizing that "public needs and interests" could be served not only by providing for competition in license hearings, but also by balancing the inherent benefits of competition against those derived from predictable and stable broadcast operation.⁷⁵

In *Citizens Communications Center v. FCC*⁷⁶ the Court of Appeals for the District of Columbia held that the Commission's bifurcated procedure violated the Supreme Court's mandate in *Ashbacker* that the FCC conduct comparative hearings.⁷⁷ In denying the Commission the right to review an incumbent's past record wholly apart from the comparative hearing, however, the Court recognized that an incumbent's past record is "necessarily at issue" and that the public would suffer "if [an] incumbent . . . cannot reasonably expect renewal";⁷⁸ thus, past *superior*⁷⁹ performance by an incumbent should be awarded with a "plus of major significance."⁸⁰ The distinction between the court's holding and

"minimally" served when the applicant performed in the "least permissible fashion still sufficient to get renewal in the absence of competing applications." *Id.* In 1971 the Commission proposed that "substantial" service should be determined by quantitative guidelines. *See Broadcast Renewal Applicant*, 27 F.C.C.2d 580 (1971) (Notice of Inquiry). The Commission later abandoned the attempt to adopt percentage guidelines, fearing artificially increased local programming and remaining unconvinced that the government should impose a national standard instead of independent programming. *See Formulation of Policies*, *supra* note 12, at 429. There has been renewed interest in percentage guidelines as a basis for determining the service of a broadcaster. Advocates have suggested the adoption of percentage guidelines in two "bedrock" areas—local and informational programming—and have proposed 15% as the standard to determine "meritorious service." BROADCASTING, Jan. 22, 1979, at 50-52.

73. The Court of Appeals for the District of Columbia labelled the 1970 Policy Statement as an attempt to "administratively enact" the Pastore bill. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971). The two situations can be distinguished: the Pastore bill required the renewal applicant to meet only a minimal public interest standard, but the policy statement required substantial service. *See 1970 Policy Statement*, *supra* note 12.

74. *See* notes 41-47 *supra* and accompanying text.

75. 1970 Policy Statement, *supra* note 12, at 425.

76. 447 F.2d 1201 (D.C. Cir. 1971).

77. Petitioners also claimed that the Commission had overstepped its rulemaking bounds in violation of the Administrative Procedure Act (5 U.S.C. § 533 (1970)). The District of Columbia Circuit never reached this issue and decided the case on the basis of *Ashbacker*. 447 F.2d at 1204 n.5.

78. *See* 447 F.2d at 1213 n.35.

79. *Id.* at 1213. Substantial past service presumably would "preclude renewal." *Id.*

80. *Id.* The court expressed concern over the substantive qualities of its "superior" standard

the Commission's policy statement, therefore, is in the role of an incumbent's past broadcast record in a renewal proceeding. In the Commission's view, an incumbent's "substantial" record alone would preclude further comparison. The court, however, held that the Commission could not review an incumbent's record wholly apart from a comparative hearing. Although a "superior" record might weigh heavily in favor of renewal,⁸¹ the Commission must afford the challenger an opportunity to show that it could provide better service.⁸²

After the *Citizens* decision, the Commission has great latitude to determine what type of performance is "superior"⁸³ and how much weight to accord this factor in its comparative analysis of an incumbent and a prospective licensee.⁸⁴ In addition, an expectancy of renewal should attach when an incumbent possesses a "superior" past broadcast record. These two factors, when coupled with the Commission's natural preference for the incumbent, seem to insure renewal.

C. *Manipulation of the 1965 Criteria to Create a Renewal Expectancy*

Citizens permitted the Commission to use "superior" past performance as a factor in comparative hearings. If the past record was less

and urged the Commission to delineate such standards in a clear manner. The court also suggested criteria for determining "superior service": (1) elimination of loud and excessive advertising; (2) delivery of quality programs; and (3) percentage of profits reinvested in service to the public. *Id.* at 1213 n.35. The court, however, did not compel the Commission to adopt these suggestions. See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 687 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). A panel suggested two more criteria: (1) diversification of ownership of mass media; and (2) independence from governmental influence. Commissioner Fogarty selected three more objectives:

- (1) the amount of time devoted to news, public affairs, children's programs and local programming that is "responsive to ascertained community problems, needs and interests;"
- (2) the amount of time devoted to programs directed to racial and cultural minorities;
- (3) the amount of time devoted to covering "controversial issues of public importance," editorial programming and public announcements.

BROADCASTING, Oct. 30, 1978, at 26.

81. The Commission opined that the court, although disposing of the 1970 Policy Statement, still believed that a policy should govern renewal expectancy. "We believe that while the court disapproved the procedure set up in the Renewal Policy Statement . . . it did not intend to overturn the policy that 'a plus of major significance' should be awarded to a renewal applicant whose past record warrants it. . . ." Formulation of Policies, *supra* note 12, at 444.

82. 447 F.2d 1201, 1213.

83. The term "superior," without further elaboration, seems to be a mere substitute for the Commission's own "substantial service" criteria. See *Cowles Florida Broadcasting*, 60 F.C.C.2d 372, 421-22 (1976), *reconsidered in* 62 F.C.C.2d 953, 955 (1977).

84. See note 80 *supra*.

than "superior," the renewal applicant would be subject to comparison only under the 1965 criteria. The Commission, however, was able to manipulate those criteria to recreate its informal presumption of renewal.

In *Fidelity Television v. FCC*⁸⁵ the District of Columbia Court of Appeals affirmed an FCC decision⁸⁶ awarding renewal to an incumbent despite its "average"⁸⁷ broadcast record and the challenger's superiority in integration and diversification.⁸⁸ The Commission reached this result by misapplying the 1965 Policy Statement's structural criteria. Instead of judging both applicants strictly on their integration and diversification proposals, the Commission looked solely at the traditional objectives of those criteria.⁸⁹ The Commission held that the incumbent could achieve these goals if its structure provided the functional equivalent of local ownership and media diversification.⁹⁰ Although RKO General, Inc., a large communications concern, owned the incumbent,⁹¹ the Commission reasoned that the large number of media interests in the area would offset the evils of concentration.⁹² The Commission also found that the autonomy granted by RKO to its local station managers served as the equivalent of direct owner involvement.⁹³ The Commission could thus declare that neither licensee mer-

85. 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

86. *See* RKO General, Inc., 44 F.C.C.2d 123 (1973), *aff'd sub nom.* Fidelity Television v. FCC, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). The Commission recently denied renewal of the same station, KHJ in Los Angeles. *See* note 13 *supra*.

87. KHJ's performance consisted of 86.5% entertainment, 3.375% news, 3.375% religious, agricultural, and discussion programming, and 7.13% local live programming, 5% of which occurred in prime time. 44 F.C.C.2d at 130. Although KHJ's performance had met initial proposals, its heavy emphasis on entertainment and, in particular, on old movies, warranted neither a plus nor a demerit. *Id.* at 133. *See* 1965 Policy Statement, *supra* note 49.

88. Fidelity stockholders possessed insignificant interests in a local cable television station and a small suburban newspaper. The incumbent held 18 additional licenses, owned AM and FM stations in Los Angeles and elsewhere, and had extensive cable television holdings. 44 F.C.C.2d at 153-54. Fidelity also proposed a program schedule more attuned to local needs—22.55% local programming with 25.71% in prime time. *Id.* at 130.

89. *See* notes 50-62 *supra* and accompanying text.

90. 44 F.C.C.2d at 134-36.

91. The court, like the Commission, disregarded allegations that RKO's parent, General Tire and Rubber Co., had engaged in reciprocal commercial agreements. 515 F.2d at 690.

92. 44 F.C.C.2d at 136. The court upheld the Commission on this point, noting that the FCC's approach to diversification was not "unreasonable or unlawful." 515 F.2d at 702.

93. 44 F.C.C.2d at 135. The Commission reached this conclusion despite community complaints about the incumbent's broadcasting of extremely violent films. *Id.* at 221. The court again supported the Commission, stating that RKO's policy of "station independence and . . . requiring

ited a preference under the 1965 criteria and, therefore, renew the incumbent's license.⁹⁴ The court of appeals upheld the license renewal, concluding that when applicants are essentially equal under the 1965 criteria⁹⁵ the Commission can renew the incumbent's license to provide "greater security to licensees and greater stability to the industry."⁹⁶

The Commission's manipulation of the structural criteria in *Fidelity Television* prevented effective comparison of Fidelity Television and RKO General, Inc. Once the FCC determined that the incumbent's record was average, the *Citizens* decision required the Commission to compare the applicants under the 1965 Policy Statement criteria, which would have favored Fidelity. The Commission, however, relied on its policy of incumbent preference⁹⁷ and awarded renewal. In essence, the Commission disregarded both the holding of *Citizens* and the comparative criteria of its policy statement to grant renewal to the incumbent solely on the basis of its being a "broadcaster in the past—and nothing else."⁹⁸

III. CENTRAL FLORIDA ENTERPRISES V. FCC

In September 1978 the District of Columbia Court of Appeals attempted to circumvent the Commission's ad hoc policy and continuing practice of weighing comparative criteria to the renewal applicant's benefit. In *Central Florida Enterprises, Inc. v. FCC*⁹⁹ the court reversed

active participation in community affairs by station employees" had served the public interest. 515 F.2d at 693.

94. 44 F.C.C.2d at 136.

95. 515 F.2d at 702-04. The court held that Fidelity did not show itself a "superior or preferable applicant but rather a poor challenger who offers little more and is likely in fact to provide somewhat less than the incumbent." *Id.* at 702.

96. *Id.* at 702, 704.

97. The Commission's preference for the incumbent is apparent in the following short history of comparative radio and television renewal hearings. From 1961 to 1978, 17 television and 31 radio comparative hearings occurred. Although the Commission denied renewal to two television stations and eight radio stations, none of the denials were based on failure to meet the comparative criteria. See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61 & n.23 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979) ("incumbents can 'expect' in a statistical sense that their license will be renewed."). See also *Las Vegas Broadcasting Co. v. FCC*, 589 F.2d 594 (D.C. Cir. 1978) (applicant's fraudulent conduct causes disqualification); *Gerico Inv. Co.*, 31 F.C.C. 625 (1961) (applicant fails to seek renewal).

98. *Farragat Television Corp.*, 8 F.C.C.2d 279 (1967) (Johnson, Comm'r, dissenting). See *Fidelity Television Co. v. FCC*, 515 F.2d 684, 705 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 423 U.S. 926 (1975).

99. 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979). The case comprehensively discusses renewal expectancy and remarkably resembles the *Fidelity* case.

a Commission decision granting renewal to Cowles Broadcasting, reasoning that the Commission's actions created a presumption of "renewal expectancy" that was incompatible with the full-hearing requirement of section 309(e) and *Ashbacker*.¹⁰⁰

The Commission admitted that the challenger, Central Florida Broadcasting, had a "clear" advantage on the diversification criteria. Central possessed no outside broadcast or mass media interests;¹⁰¹ Cowles' parent corporation, Cowles Communications, Inc. (CCI), had significant broadcast and newspaper interests, although CCI did not directly control these interests.¹⁰² The Commission, however, using the *Fidelity* rationale,¹⁰³ minimized Central's advantage by arguing that CCI's other broadcast and media interests were remote and not dominant in their markets.¹⁰⁴

The Commission next compared the applicants under the "best practicable service" criterion. The Commission refused to reward Central's stronger integration proposals¹⁰⁵ because of Cowles' established use of

100. *Id.* at 41. In addition to applying the standard comparative criteria issued in the 1965 Policy Statement, *see* note 54 *supra*, the Commission took evidence on specific designated questions concerning the licensee's character and violation of Commission rules. Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976), *vacated sub nom.* Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

The first designated issue was whether Cowles' moving of its main studio from Daytona Beach to Orlando violated 47 C.F.R. § 73.613 (1977). Unlike the rules concerning the main studios of FM stations, *id.* § 73.210, and AM stations, *id.* § 73.30, the rules regarding television studios do not list mandatory numbers of programs that must originate to be declared "main." The Administrative Law Judge noted the lack of specificity in the rules, but found on the basis of common usage that Cowles had moved its "main" studio.

The second issue concerned allegations of mail fraud by Cowles' parent company, CCI, and whether they supported adverse character inferences sufficient to deny Cowles renewal. 60 F.C.C.2d at 398-400.

101. *Id.* at 395, 407-09. On reconsideration the Commission clarified the decisional weight given to Central's diversity advantage. *See* Cowles Florida Broadcasting, Inc., 62 F.C.C.2d 953, 955-57 (1977); notes 116-18 *infra* and accompanying text.

102. CCI owned an AM-FM-TV combination in Des Moines, Iowa, a radio station in Memphis, and 24.6% stock ownership of the New York Times Co. 60 F.C.C.2d at 393.

103. 62 F.C.C.2d at 957.

104. Presumably, the Commission believed that CCI's noncontrolling interests prevented the media concerned from speaking with a common voice. 60 F.C.C.2d at 394. Central argued that superiority in diversification was *per se* decisive and rendered everything else irrelevant. *Id.* at 407. *See* Associated Press v. United States, 326 U.S. 1 (1944) (media diversification is clear first amendment objective).

105. Three of Central's shareholders, who controlled 10.5% of the stock, were to occupy managerial positions for a limited period. The Commission, citing the full time integration requirement of the 1965 Policy Statement, concluded that such participation did not merit decisional consideration. Central also proposed a 5.2% ownership by two black men. The Commission

local resident managerial personnel and because of noninterference with station management autonomy.¹⁰⁶ In addition, the Commission found that the incumbent's past broadcast record¹⁰⁷ was superior and thus constituted a "plus of major significance."¹⁰⁸ Cowles' legitimate renewal expectancy under the *Hearst* doctrine, its "superior" performance under *Citizens*, and the Commission's general disinclination to use the license process to "restructure the industry"¹⁰⁹ gave the incumbent a distinct preference on the "best practicable service" issue. The Commission thus concluded that this preference outweighed Central's "clear" advantage under the integration criteria.¹¹⁰

The Commission's analysis in *Central Florida*, although parallel to *Fidelity*, differs in an important respect.¹¹¹ The *Fidelity* decision never reached the issue of "superior performance" outlined in *Citizens*.¹¹² In *Central Florida* the Commission applied the "superior" criteria to give the incumbent a "plus of major significance" that overrode Central's comparative advantage, but only after dismissing the criteria normally used to measure the differences between applicants because one appli-

awarded Central a merit in light of the District of Columbia Court of Appeals' decision in *TV-9*, see note 54 *supra*, but did not consider it sufficient to outweigh Cowles' integration proposals. 60 F.C.C.2d at 415, 416. See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48, 56 (D.C. Cir. 1978), cert. dismissed, 99 S. Ct. 2189 (1979). See also *Garrett v. FCC*, 513 F.2d 1056, 1062-63 & n.39 (D.C. Cir. 1975) (interpreting *TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974)).

106. 60 F.C.C.2d at 416. The Commission then concluded that neither Central nor Cowles deserved a preference. *Id.*

107. The Commission cited numerous examples of public praise by various local officials and concluded that Cowles had been "solidly" involved in local issues, despite the Administrative Law Judge's characterization in the preliminary hearing of Cowles' performance as only acceptable. *Id.* at 417-20.

108. *Id.* at 421.

109. The Commission opposes the restructuring of the broadcast industry via diversification:

In connection with both any policy that may be developed and with comparative renewal proceedings that may occur before the development of such policy, we do not believe the Court in *Citizens Communications Center* is seeking to have ownership patterns of the broadcast industry restructured through the renewal process; that, rather, any overall restructuring should be done in a rulemaking proceeding. And what we consider to be the necessary overall restructuring has been done today.

Id. at 410 (emphasis in original).

110. *Id.* at 418-23.

111. The Commission noted the similarities between *Central Florida* and *Fidelity* and concluded that the same analysis would be proper. *Id.* at 415.

112. The court did not need to consider the incumbent's past programming because the FCC deemed minimal service by the incumbent sufficient for renewal when the applicants were otherwise essentially equivalent. *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 702 (D.C. Cir. 1975).

cant was a renewal candidate.¹¹³ The court, like its predecessor,¹¹⁴ never delineated precise enforcement standards for determining "superior" performance; thus, the FCC selected its own criteria and concluded that Cowles met the standards.¹¹⁵

The Commission issued a clarification to describe clearly the significance of Cowles' past broadcast record and the limited weight given to Central's diversity superiority.¹¹⁶ The Commission on reconsideration¹¹⁷ abandoned the word "superior," finding instead that Cowles' performance was "solid, favorable and substantially above level of mediocre service which might just minimally warrant renewal."¹¹⁸ The FCC thus concluded that the legitimate renewal expectancy implicit in the Act¹¹⁹ entitled a broadcaster with a solid record to special consideration.¹²⁰

The court's reversal and remand of the decision to renew Cowles

113. The Commission in effect disregarded the 1965 Policy Statement and the "full hearing" requirement upheld in *Citizens*. By inequitably balancing the advantages awarded in each comparative category, the Commission effectively lessened the decisional significance of the criteria and awarded renewal solely on the incumbent's past broadcast record. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 49-50 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

114. See notes 76-84 *supra* and accompanying text.

115. The Commission appraised Cowles on the basis of its community involvement, criticism by local leaders, complaints against the station, and Cowles' performance vis-à-vis other stations in the area. *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372 (1976).

116. *Cowles Florida Broadcasting, Inc.*, 62 F.C.C.2d 953 (1977).

117. The Commission's original classification of Cowles' record as superior was based on two factors. The FCC was aware that *Citizens* required superior performance before a renewal expectancy vested. In addition, a labelling of Cowles' performance as anything less than superior would promote a "substantial danger [that] incumbents [would] be tempted to lapse into mediocre performance." 60 F.C.C.2d at 422. Chairman Wiley, dissented in the original opinion's classification of Cowles' performance as superior, but concurred in the reclassification to "substantial."

As indicated, I did not—and do not now—find Cowles' service to be superior (in the sense of exceptional). However, I did—and do now—find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal. Accordingly, given the majority's clarification of intent, I find myself able to concur in this matter.

62 F.C.C.2d at 959 (Wiley, Comm'r, concurring).

118. 62 F.C.C.2d at 955. The Commission felt that the term "superior" would imply that Cowles' performance "had been exceptional when compared to other broadcast stations." *Id.* at 956. See *Broadcast Renewal Applicant*, 31 F.C.C.2d 443, 444 & nn.1 & 2 (1971) (further notice of inquiry).

119. See cases at note 9 *supra*.

120. As to Central's diversification superiority, the Commission simply reiterated its belief that the remoteness of Cowles' other media interests proportionally diminished Central's advantages. The Commission described the dangers of concentration as "any national or other uniform expression of political, economic, or social opinion." 62 F.C.C.2d at 957.

signals an abandonment of its "tacit" approval of FCC decisions.¹²¹ Judge Wilky held that the Commission acted "unreasonably and without substantial record," inadequately demonstrated how it had balanced the comparative factors, and seemingly decided the case only on "administrative intuition."¹²² The court was primarily disturbed at the Commission's undermining of *Citizens* by a discretionary weighing of Central's clear superiority in integration and diversification.¹²³ The court found that the Commission rendered idle these comparative criteria and used Cowles' record as the only basis for decision.¹²⁴ The Commission's "reconstructed" 1965 criteria thus created a "de facto presumption" of renewal.¹²⁵

The court, however, did not eliminate the concept of renewal expectancy, although Judge Wilky emphasized that the Commission's recasting of Cowles' performance from "superior" to "substantial" prevented the award of a "plus of major significance."¹²⁶ The court instead adopted the language of an earlier Supreme Court decision¹²⁷ that found renewal expectancies derived from "meritorious" service to be

121. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979). The Court's decision alarmed both the Commission and the broadcast industry. BROADCASTING, Jan. 22, 1979, at 50-52; BROADCASTING, Oct. 2, 1978, at 28-30. The president of the National Association of Broadcasters concluded that the *Central Florida* opinion was "the most disturbing from industry stability standpoint in a long time, more than WHDH-TV." *Id.* at 28.

122. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 49-50 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979). The court was aware that some licensing decisions are based on "agency intuition." In *Star Television, Inc. v. FCC*, 416 F.2d 1086 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), Judge Leventhal, commenting on an agency's selection of one applicant from among many qualified applicants, stated that when an agency has "no meaningful way of choosing on principle between [applicants]; all [it] can really do is speculate who will do the best job in the public interest [and conclude that the] best possible hunch is X." *Id.* at 1094. The *Citizens* court concluded, however, that the Commission's rationale fell "somewhere on the distant side of arbitrary." *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

123. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 51-58 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979). The court noted that the Commission had technically complied with the hearing requirement, but stated that the Commission's policy substantially departed from "established law and statutory and judicial precedent . . ." *Id.* at 50.

124. The Commission actually returned to its 1970 Policy Statement, granting renewal to a licensee who demonstrated adequate but average service. *Central Florida* reflected the Commission's displeasure with the confines of the 1965 Policy Statement, the comparative process, and the *Citizens* holding. See Formulation of Policies, *supra* note 12, at 429; Cowles Florida Broadcasting, 60 F.C.C.2d 372, 431 (Wiley, Comm'r, dissenting); *id.* at 442 (Robinson, Comm'r, dissenting).

125. 598 F.2d at 50-51.

126. *Id.* at 57.

127. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 805-06 (1978).

consistent with the public interest inquiry of the Act.¹²⁸

The real significance of the opinion, however, is not the abandonment of the "superior" standard, but rather the court's different view of the incumbent's past performance. In *Citizens* an incumbent's superior past performance was relevant only as a predictor of future performance.¹²⁹ Past performance was only evidence, albeit the "best evidence,"¹³⁰ of an applicant's merit, which when combined with comparisons of integration and diversification supported the Commission's determination of which candidate would best serve the public interest.¹³¹ *Central Florida* adopts the Commission's argument that the stabilizing effect in the industry attributable to a renewal expectancy is a distinct method of serving the public interest.¹³² In this context, renewal of an incumbent with a "meritorious" record would be certain. The FCC would rather not upset the stability of the industry by awarding a challenger the license, even if the predictive values of integration and diversification show it to be the better candidate.¹³³ The court, by adopting this construction of public interest, in effect permits the Commission to use a noncomparative factor in a renewal proceeding, which if given sufficient weight, would override any comparative advantage of a challenger and guarantee renewal to an incumbent.¹³⁴

Whether the opinion overrules *Citizens* and reinstates the 1970 Policy Statement is questionable. Certainly, the opinion grants the Commission enormous discretion in assigning importance to industry

128. The Supreme Court held that the public interest would be served by rewarding renewal to those broadcasters who had "invested [the] money and effort necessary to produce quality performance." *Id.* at 805. The Court stated that these renewal interests were "legitimate" and "should not be destroyed absent good cause." *Id.* See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979); *Fidelity Television, Inc. v. FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

129. *Citizens Communication Center v. FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 55, 59 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

130. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 59 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979).

131. *Id.* at 55, 59.

132. *Id.* at 43, 60.

133. The court admitted that the "stability" theory appeared to be a "plausible construction of 'public interest.'" *Id.* at 60.

134. *Id.*

stability,¹³⁵ but the court did not discuss the implications of *Central Florida* on *Citizens* or on the two tier analysis of the 1970 Policy Statement. Presumably, *Ashbacker* and the Act still require a comparative hearing. Therefore, industry stability would be only one element in the Commission's determination of the best applicant.¹³⁶ The great leeway granted the Commission, however, preordains renewal, despite the predictive factors,¹³⁷ whenever the FCC finds "meritorious" service.

The District of Columbia Circuit has shifted radically on the issue of renewal expectancies in broadcast licensing.¹³⁸ In recognizing that the public interest can be served by promoting industry stability, the court permits the Commission to circumvent *Ashbacker*. The challenger must now prove not only that its broadcasting services will be superior to those provided by the incumbent, but also that denial of renewal to the incumbent will not upset the delicate stability of the broadcast industry. Certainly, any possibility of nonrenewal will constrict an established licensee's desire to expand and improve his facility. The weight of the challenger's burden will make the comparative hearing the "empty thing"¹³⁹ that *Ashbacker* seeks to prevent.

IV. REGULATORY REFORM

The Commission's dissatisfaction¹⁴⁰ with the comparative hearing

135. The court expressed concern that the Commission had not specifically argued the industry stability factor: "there were few intimations that this was the Commission's inchoate rationale." *Id.*

136. The court realized that the Commission's use of industry stability as a factor must be subject to judicial review.

This would seem to require that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria. Although mathematical precision is, of course, impossible, something more than the Commission's customary recitals, "completely opaque to judicial review," must be provided.

Id. at 60-61.

137. The court stated: "The weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *Id.* at 44.

138. *Compare* *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1207-09 & nn.17, 23 (D.C. Cir. 1971) (recognition of court's bias in favor of incumbent), *with* *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 42 (D.C. Cir. 1978), *cert. dismissed*, 99 S. Ct. 2189 (1979) (court's affirmation of FCC's renewal decisions creates renewal expectancy in violation of Act).

139. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

140. *See* *Formulation of Policies*, *supra* note 12. Chairman Ferris called the present system of licensing an "anachronism" with costs that have not equalled the "public interest benefits." *Hearings before the Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce on H.R. 13015*, 95th Cong., 2d Sess. 116, 117 (1978) [hereinafter cited as *1978 Hearings*].

process and its inability to apply consistently the 1965 criteria indicate that the current licensing system is an administrative nightmare and that reform¹⁴¹ is needed. One commentator suggests that a licensee receive a vested property right upon the granting of a license.¹⁴² The best solution, however, seems to be the abandonment of the comparative hearing procedure in both original and renewal license applications.

A. *Legislative Response*

In 1978 and 1979 the House and the Senate Subcommittees on Communications considered legislation that would significantly overhaul¹⁴³ the broadcast provisions¹⁴⁴ of the 1934 Act. The bills¹⁴⁵ reflect congressional apprehension of the present regulatory scheme and propose several fundamental changes in policy.¹⁴⁶

Each bill would eliminate the comparative hearing for original appli-

141. Commentators have suggested numerous methods to reform the current licensing system, including the development of precise quantitative percentage program guidelines, a ranking system based on an applicant's compliance with priority programming categories, and comparison oriented towards technical qualifications. Other suggestions include the granting of an indefinite license term, a lottery among applicants, or an auction of available frequencies. See Anthony, *supra* note 15 (ranking system); Geller, *supra* note 42 (percentage guidelines); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978) (lottery and auction); Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings*, 43 U. CHI. L. REV. 573 (1976) (technical qualifications). See also De Vany, Eckert, Meyers, O'Hara, & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Mayer & Botein, *Ashbacker Rites in Administrative Practice: A Case Study of Broadcast Regulation*, 24 N.Y.L.S. L. REV. 461 (1978).

142. See Cowles Florida Broadcasting, 60 F.C.C.2d 372, 435 (1976) (Robinson, Comm'r, dissenting).

143. Representative Lionel Van Deerlin, Chairman of the House Subcommittee, pledged that the proposed legislation would amend the current Act from "basement to attic." BROADCASTING, June 12, 1978, at 29.

144. 47 U.S.C. §§ 301-30 (1976).

145. The House and the Senate legislation involve comprehensive amendments pertaining to common carriers, public telecommunications, cable television, and satellites, as well as to over-the-air broadcasting. For the limited focus of this discussion, only portions of the following bills are relevant: S. 622, 96th Cong., 1st Sess. §§ 331-34 (1979); H.R. 3333, 96th Cong., 1st Sess. §§ 411-13, 415, 417-18, 461-62, 471 (1979); H.R. 13015, 95th Cong., 2nd Sess. §§ 411-12, 414, 416-17, 431, 434 (1978).

146. The House versions eliminate the "public interest" standard as the basis for Commission licensing procedures. These proposals provide for governmental regulation of the broadcast industry when "marketplace forces are deficient." H.R. 3333, 96th Cong., 1st Sess. § 101(a) (1979); H.R. 13015, 95th Cong., 2nd Sess. § 101 (1978). See S. 622, 96th Cong., 1st Sess. § 2(a) (2) (1979) (recognizing marketplace competition, but retaining a limited public interest standard for renewals).

cants.¹⁴⁷ Instead, after the applicants meet certain technical qualifications,¹⁴⁸ the Commission would grant the license on the basis of random selection.¹⁴⁹ One Senate proposal would adopt a modified 1970 Policy Statement approach to renewal applications.¹⁵⁰ A presumption of renewal arises if the Commission determines that the incumbent has "substantially met the problems, needs and interests of its service area," and the operation has not been "seriously deficient."¹⁵¹ The Commission can then renew the license without a hearing. The most revolutionary changes appear in the House rewrites, which call for the elimination of renewal procedures and the infusion of indefinite licenses for television subject to revocation by the Commission.¹⁵²

147. See S. 622, 96th Cong., 1st Sess. § 331 (1979); H.R. 3333, 96th Cong., 1st Sess. § 415(d)(1)(A) (1979); H.R. 13015, 95th Cong., 2nd Sess. § 414(c) (1978). A second Senate bill retains the hearing requirement of § 309(e), but specifically prohibits the FCC from considering the diversification and integration proposals of the applicants. See S. 611, 96th Cong., 1st Sess. §§ 301(a), 302(i) (1979).

148. The Commission will take evidence on the citizenship, character, and financial qualifications of the applicant; ownership of the proposed station; frequencies and power; hours of operation; and the purposes of the station. H.R. 3333, 96th Cong., 1st Sess. §§ 417(a)(1)-(5), (b) (1979); H.R. 13015, 95th Cong., 2nd Sess. § 416(a)(1)-(5) (1978). See S. 622, 96th Cong., 1st Sess. § 331 (1979) (retaining technical requirements of 47 U.S.C. § 308(b) (1976)).

149. See note 147 *supra*. H.R. 3333, 96th Cong., 1st Sess. § 415(d)(1)(B) (1979) further provides that the Commission must represent minority applicants twice in the lottery pool for a new frequency. Section 415 is intended to promote diversity of ownership in broadcasting by providing easy access for minorities. In *TV-9* the court held that minority interests would be in the public interest because they would provide programming diversity. *TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). In a dissenting opinion, Judge Leventhal concluded that when the Commission faces two or more "reasonably qualified" applicants, a lottery system would be permissible. "Perhaps a lottery could be used, for luck is not an inadmissible means of deciding the undecidable, provided the ground rules are known in advance." *Star Television, Inc. v. FCC*, 416 F.2d 1086, 1095 (D.C. Cir.) (Leventhal, J., dissenting), *cert. denied*, 396 U.S. 888 (1969).

150. S. 622, 96th Cong., 1st Sess. §§ 332(c), (d) (1979). A second Senate bill introduced in 1979 would retain the present comparative hearing system, but would not permit the Commission to consider diversity of media interests or integration of management. See S. 611, 96th Cong., 1st Sess. § 302 (1979).

151. S. 622, 96th Cong., 1st Sess. §§ 322(c), (d) (1979).

152. H.R. 3333, 96th Cong., 1st Sess. §§ 461, 464 (1979); H.R. 13015, 95th Cong., 2nd Sess. §§ 431, 437 (1978). H.R. 3333 provides for revocation of an indefinite license only by motion of the Commission. The bills provide, however, that the licensee must broadcast non entertainment programs, devote time to controversial issues, and provide for conflicting views. H.R. 3333, 96th Cong., 1st Sess. § 462 (1979); H.R. 13015, 95th Cong., 2nd Sess. § 434 (1978). A lack of compliance presumably would constitute a ground for revocation. H.R. 3333, 96th Cong., 1st Sess. § 418 (1979); H.R. 13015, 95th Cong., 2nd Sess. § 417 (1978).

B. *Is Regulation Necessary?*¹⁵³

Opponents of the congressional attempts to deregulate the broadcast industry cite two theoretical reasons for their position: (1) the electromagnetic spectrum is a scarce commodity that inherently requires governmental regulation;¹⁵⁴ and (2) the broadcast media exert such enormous control over public thought and opinion that regulation—licensing applicants who would serve the public interest—is necessary to protect the public from potential abuse.¹⁵⁵

153. Certainly, the Commission should regulate the industry to prevent interference. Government assignment of frequency, power, and geographics are necessary or else broadcasting would return to the days of "confusion and chaos." *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 212 (1943). See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); *Deregulation of Radio*, 73 F.C.C.2d 457, 498 (1979).

Regulation, as described in this Note, refers to indirect "conduct-related" rules that regulate broadcasters through the comparative hearing. Such regulation attempts to promote specific types of programming by compelling a licensee to follow the guidelines or be denied a license. The Commission recognizes that governmental regulation of programming, though "indirect and content neutral," must balance the first amendment right to freedom of expression with the first amendment right to the widest possible dissemination of information. The present licensing scheme effectively supplants the Commission's view on desirable programming for the views of the broadcaster and of the listening and viewing public. See *Deregulation of Radio*, 73 F.C.C.2d 457, 482-83 (1979); Goldberg & Couzens, "Peculiar Characteristics": *An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1, 12-19 (1978); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 118-19 (1967) (referring to present renewal scheme as licensing "in terrorem").

154. See 1978 Hearings, *supra* note 140, at 341 (statement of Commissioner Fogarty); *id.* at 150 (statement of Commissioner Washburn); *id.* 535 (statement of Rev. Everett C. Parker). The scarcity theory is the subject of much commentary. See, e.g., B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1965); Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Tele-Communications*, 31 FED. COM. L.J. 201 (1979); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Goldberg & Couzens, *supra* note 153; Parkman, *supra* note 35; Robinson, *supra* note 153; Sullivan, *Editorials and Controversy: The Broadcasters' Dilemma*, 32 GEO. WASH. L. REV. 719 (1964); Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976); Note, *The Proposed Communications Act Rewrite: Potomac Deregulatory Fever v. The Public Interest*, 48 U. CIN. L. REV. 476 (1979).

155. See 1978 Hearings, *supra* note 140, at 674 (statement of Nicholas Johnson). The Supreme Court probably would not permit regulation that would abridge first amendment rights solely on the basis of the "influence of the speaker." Robinson, *supra* note 162, at 156. See *Superior Films v. Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., dissenting). Governmental regulation of broadcasting is supported on a number of additional grounds: (1) the airways are in the public domain and broadcasters use them as trustees; (2) a broadcaster, as a public trustee, also constitutes a public forum for providing diverse viewpoints; and (3) the public as an "involuntary recipient" of broadcast programs is a "captive audience" that requires protection. See Goldberg & Couzens, *supra* note 153, at 30-39; Robinson, *supra* note 153, at 150-54.

1. *Regulation to Preserve Scarce Commodity*

The Supreme Court has continually upheld scarcity of frequencies as the basis for governmental regulation of broadcasting.¹⁵⁶ As the Court stated in *Red Lion Broadcasting, Inc. v. FCC*,¹⁵⁷ the finite number of broadcast frequencies “justifies the Government’s choice of those who would best”¹⁵⁸ serve the public; scarcity exists when there are “substantially more individuals who want to broadcast than there are frequencies to allocate.”¹⁵⁹ Under this rationale governmental regulation is, in effect, a *quid pro quo* for the use of a limited resource.¹⁶⁰

Under the present allocation of radio frequencies, however, the potential exists for twenty-seven AM and 100 FM channels per market.¹⁶¹ In the television spectrum, VHF will support thirteen channels, with seven as the typical maximum per market. UHF has a seventy channel capacity.¹⁶² Cable television, although not considered “over the air” broadcasting, provides additional media outlets.¹⁶³ Furthermore, the Commission argues that changes in its allocation scheme can increase the number of broadcast frequencies. The Commission can expand the amount of spectrum space currently assigned to commercial broadcasting.¹⁶⁴ Technological advances also can provide for more broadcast

156. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1974); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

157. 395 U.S. 367 (1969). In *Red Lion* the Supreme Court upheld the fairness doctrine against first amendment challenges. The Court has stricken similar statutes relating to newspapers. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); note 177 *infra*.

158. 395 U.S. 367, 396 (1969). The petitioners argued that scarcity no longer existed. *Id.* See notes 161-65 *infra* and accompanying text.

159. 395 U.S. at 388.

160. The requirement that a broadcaster air less profitable public interest programs is the *quid pro quo*, a valuable license.

161. Parkman, *supra* note 37, at 211 n.24.

162. *Id.*

163. In 1979 more than 4,000 operating cable systems served 14 million subscribers, representing 19.1% of the present television audience. Cable systems have a capacity of over 20 channels. In 1978 the majority of cable systems provided between 6 and 12 channels. See W. JONES, *supra* note 35, at 383. See generally LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25 (1973); Moss, *Cable Television: A Technology for Citizens*, 55 U. DET. J. URB. L. 699 (1978); Note, *Unleashing Cable T.V., Leashing the FCC: Constitutional Limitations on Government Regulation of Pay Television*, 6 FORDHAM URB. L.J. 647 (1978); Note, *FCC Regulation of Cable T.V.*, 54 N.Y.U.L. REV. 204 (1979); Note, *The FCC’s Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718 (1978).

164. The expansion of the commercial broadcast spectrum by “extensive” means is not without costs. Present users of those frequencies would have to relocate to another part of the spec-

stations under the current allocation by permitting a reduction of channel spacing without increasing interference.¹⁶⁵

Thus, the actual limitations of broadcasting do not, despite the Supreme Court's assumption,¹⁶⁶ stem from the lack of available broadcast frequencies.¹⁶⁷ Potential economic¹⁶⁸ restrictions certainly inhere in the broadcast media, but these limitations should not form the current rationale for regulation.¹⁶⁹ The present method of licensing—the

trum. Additionally, radio and television sets would have to be adapted to receive the new impulses. See *Deregulation of Radio*, 73 F.C.C.2d 457, 499 (1979); Coase, *The Federal Communications Commission*, 2 J. LAW ECON. 1 (1959); Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563, 575 (1976).

165. "Intensive" spectrum utilization involves a reduction of the band width currently allocated to each station. For example, AM stations operate at 10K2 intervals; by improvement in receivers and transmitters it is possible to reduce those intervals and thus provide additional channels. See *Deregulation of Radio*, 73 F.C.C.2d 457, 499 (1979) (statement of policy); *Clear Channel Broadcasting in the AM Broadcast Band*, 70 F.C.C.2d 1077 (1979) (notice of proposed rule making); *9KH2 Channel Spacings for All Broadcasting*, 44 Fed. Reg. 39550 (1979) (notice of inquiry); Note, *supra* note 164, at 575.

166. See *Red Lion Broadcasting, Inc. v. FCC*, 395 U.S. 367 (1969).

167. Within the available frequencies, 8654 radio stations and approximately 1000 television stations exist. See *Deregulation of Radio*, 73 F.C.C.2d 457, 481 (1973); Note, *The Proposed Communications Act Rewrite: Potomac Deregulatory Fever v. The Public Interest*, 48 U. CIN. L. REV. 476, 478 n.9 (1978).

168. In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), Justice Frankfurter gave the following reason for regulation of broadcasting: "unlike other modes of expression radio inherently is not available to all . . . and that is why, unlike other modes of expression, it is subject to governmental regulations." *Id.* at 226. There are, however, 386 vacant FM frequencies for which there are no applications. See *Deregulation of Radio*, 73 F.C.C.2d 457, 499 n.147A (1979). Although these assignments exist in smaller markets, the vacancies occur because there is a limited demand for advertising in any market. *Id.* at 499-500. The television industry is similar. Although the present VHF system can provide up to 70 channels in a market, about only 400 stations operate. See *1978 Hearings, supra* note 140, at 158 (statement of Margita White). Former FCC Chairman Newton Minow argues that overall technological scarcity does not motivate regulation; rather, the cause is a real shortage of frequencies in major UHF television markets. Former Chief Judge David Bazelon disagrees; the "shortage" is not technological, but caused by the "market power gained by VHF licensees through FCC policies on allocation of frequencies and relative development of alternative" broadcast methods. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L. J. 213, 225-26 n.40.

169. The scarcity argument weakens further in light of the current state of the newspaper industry. As of March 30, 1978, there were 1,753 daily and 668 Sunday newspapers. See *Deregulation of Radio*, 73 F.C.C.2d 457, 482 n.118 (1979). Broadcast media outnumber print media almost four to one. Many cities have at least three television stations and numerous radio stations but only one newspaper. More than 200 communities receive at least four AM radio stations. In the largest markets an average of 31 AM stations alone operate. See Owen, *Structural Approaches to the Problem of Television Network Economic Dominance*, 1979 DUKE L.J. 191, 204 n.77. Newspapers, however, are not subject to as much regulation as broadcasters. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court recognized the numerical superiority of broadcasting and noted that "effective competition" exists in only four percent of the major

comparative hearing—is not necessary to protect scarce radio and television frequencies.

2. *Regulation to Protect the Public Interest*

The present scheme of broadcast regulation reflects the belief that local stations are necessary “to ensure that broadcasting would be attentive to the specific needs and interests of each local community” and that local groups “would have an adequate opportunity for expression.”¹⁷⁰ The comparative licensing procedure, it is argued, promotes these goals by awarding a license to the applicant that best meets the diversification-of-mass-media and integration criteria.¹⁷¹

Despite the theoretical objectives of the comparative procedure the structural and economic realities of radio¹⁷² and television broadcasting dictate the type of programming available to the public.¹⁷³ Eighty-eight percent of all television stations are affiliated with a network.¹⁷⁴ Although FCC rules permit an affiliate to reject network programs,¹⁷⁵ ninety-five percent of these programs are cleared for broadcast by the licensee.¹⁷⁶ Network programming thus represents eighty-two percent of total broadcast time and local stations can produce programs only

metropolitan areas. *Id.* at 249 n.13. Despite these statistics the Court refused to invoke the scarcity doctrine and held unconstitutional a Florida right-to-reply statute. *Id.* at 258. An additional argument considers the finite amount of paper, presses, and delivery trucks as a basis for concluding that access to the newspaper industry is as difficult as access to broadcasting. *See Note, supra* note 164 at 563, 575.

170. Cox & Johnson, *supra* note 8, at 8. *See also* notes 35-40 *supra* and accompanying text.

171. *See* 1965 Policy Statement, *supra* note 49; *see also* notes 50-62 *supra* and accompanying text.

172. The FCC contends that competition in major radio markets led to increased specialization of radio formats. Small stations present less specialized programming to stay economically viable. Additionally, radio production costs are smaller than television programming costs; therefore, radio stations can better afford to target programs to specific groups. *See Deregulation of Radio*, 73 F.C.C.2d 457, 485-87 (1979).

173. The effect of economics and the profit motive on television programming and federal regulation is the subject of much commentary. *See, e.g.*, R. NOLL, M. PECK & J. MCGOWAN, *supra* note 35; B. OWEN, J. BEEBE & W. MANNING, *TELEVISION ECONOMICS* (1974); Owen, *supra* note 177; Parkman, *supra* note 35; Schuesler, *FCC Regulation of the Network Television Procurement Process: An Attempt to Regulate the Laws of Economics?*, 73 Nw. U.L. REV. 227 (1978).

174. *See* Parkman, *supra* note 35, at 216.

175. 47 C.F.R. § 73.658(e) (1978) provides that no license shall be granted to an affiliated station if its affiliation would “prevent or hinder the station from” (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable, or contrary to the public interest, or (2) substituting a program which, in the station’s opinion, is of greater local or national importance.

176. *See* W. JONES, *supra* note 33, at 147.

during the small remaining time.¹⁷⁷

The Commission recognizes that local stations prefer affiliation with networks because networks can fulfill the demand for "mass audience" programming at a small "per-viewer" cost.¹⁷⁸ Affiliation also produces economic benefits by enhancing the value of advertising time sold to local advertisers for network programs, and provides a carryover audience to increase the value of its nonnetwork advertising.¹⁷⁹

FCC efforts through its Prime Time Access Rules (PTAR)¹⁸⁰ to control directly the amount of network programming that a local station can broadcast have been largely unsuccessful. The purpose of PTAR was to create a profitable time slot for local public interest programs and programs produced by independent syndicators, but most local stations filled this time with game shows and similar inexpensive mass-appeal programs.¹⁸¹ Local stations are hesitant to schedule unprofitable, public interest programming. One study¹⁸² indicates that an incentive to produce specialty programming—ballet and opera, for instance—exists only after mass appeal programming reaches a saturation point. As more popular program stations enter the market, the number of popular program viewers per station declines until opera and ballet supporters attain a comparable market share of viewers.

177. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 35, at 108-09; Parkman, *supra* note 35, at 216. See also Cox & Johnson, *supra* note 8.

Most local stations use this time to air news, sports, and weather, which are popular with local viewers. A high proportion of the remaining time, however, is devoted to nonnetwork films or locally originated game shows. See Prime Time Access Rule, 50 F.C.C.2d 829, 836 (1975).

178. Deregulation of Radio, 73 F.C.C.2d 457, 486-87 (1979). The Commission concedes that the fixed costs of television production are so great that stations seek to diffuse them by providing "common-denominator" programming." *Id.* at 486.

179. See W. JONES, *supra* note 33, at 147; R. NOLL, M. PECK & J. MCGOWAN, *supra* note 35, at 58-87.

180. See 47 C.F.R. § 73.658(k) (1978). The present PTAR is actually the culmination of a series of rules initiated by the Commission in 1970. See Prime Time Access Rule, 50 F.C.C.2d 829 (1975); Prime Time Access Rule, 44 F.C.C.2d 1081 (1974); Network Television Broadcasting, 23 F.C.C.2d 382 (1970). The present version of the PTAR reserves one hour between 7 and 11 P.M. (eastern time) for nonnetwork programming. The rule provides numerous exceptions for children's programs, network overruns of sporting events, and fast-breaking news events. See 47 C.F.R. §§ 43.658(k)(1)-(6) (1978). Courts have upheld all three PTAR's against first amendment challenges. See National Ass'n of Independent Television Producers & Distribs. v. FCC, 516 F.2d 526 (2d Cir. 1975); National Ass'n of Independent Television Producers & Distribs. v. FCC, 502 F.2d 249 (2d Cir. 1974); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). See also Goldberg & Couzens, *supra* note 153, at 19-25; Owen, *supra* note 169, at 205-07.

181. See Prime Time Access Rule, 50 F.C.C.2d 829, 836 (1975).

182. See R. NOLL, M. PECK & J. MCGOWAN, *supra* note 35, at 50-54; Parkman, *supra* note 35, at 50-54.

Only at this point do specialty programs become profitable for advertisers and viable for specialty programming operators.¹⁸³ The market place, therefore, not the Commission, dictates the timing and the quantity of local programming.

V. CONCLUSION

The courts and the FCC have had limited success in adequately implementing the comparative licensing process.¹⁸⁴ Although *Central Florida* demonstrates a renewed interest in assuring that the licensing system is equitably administered, the District of Columbia Circuit's acquiescence to the FCC's use of industry stability in the comparative hearing indicates that the procedure will remain arbitrary¹⁸⁵ and inefficient.¹⁸⁶

The Commission's reliance on the structural criteria of integration and diversification as predictors of future performance apparently has not produced an increase in locally oriented "public interest" programming.¹⁸⁷ Indeed, the "quality" of service that a licensee provides depends not on the Commission's regulatory whims but on the likes and dislikes of the audience. The comparative hearing, therefore, although fostering competition in Commission proceedings, does not insure that the "winner" will be the applicant more likely to produce "public interest" programming.

Without competition, however, broadcasters would be induced to maximize profits. Theoretically, the comparative licensing process spurs broadcasters to better serve the public, but, in actuality, the hear-

183. The volume of over-the-air broadcasting is so great that it is difficult to predict how many additional stations are necessary before the saturation point is reached. From 1964 to 1977 the number of UHF stations increased from 84 to 368, but without a corresponding increase in specialty programming. The most successful UHF stations produce little local programming, except professional sports and network type programming. See M. Stoller, *The Economics of UHF Television: Effects of Governmental Policy* (1977) (unpublished thesis in Washington University Olin Library). In the VHF spectrum, independent stations also follow network practices by airing syndicated talk shows, network reruns, and movies. See R. NOLL, M. PECK & J. MCGOWEN, *supra* note 35, at 109.

184. See notes 8-9 *supra* and accompanying text.

185. See notes 132-34 *supra* and accompanying text.

186. One example of the inefficiency of the current license procedure is WFTV in Orlando, Florida. The first application was made in 1952, but the station is presently operated by five competing applicants while the Commission determines who will be awarded the three-year license. *Wall Street Journal*, Dec. 26, 1979, at 1, col. 4.

187. See notes 174-83 *supra* and accompanying text.

ing results are predetermined.¹⁸⁸ The “competitive spur” in broadcasting could best be provided directly by the viewing public. Congress apparently agrees. Recent legislative proposals would codify the Commission’s policy of “renewal expectancy” and award licenses in perpetuity. Rather than make the Commission the arbiter of the public interest, these proposals would place that responsibility where it belongs—on the public.

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188. One observer comments that the comparative renewal process can be likened to a professional wrestling match in which “the outcome is known from the start, but some grunts and groans are needed to make it exciting for the spectators.” *Wall Street Journal*, Dec. 26, 1979, at 1, col. 4.