

# LOW POWER TELEVISION: A NEW OPPORTUNITY FOR BROADCASTING IN THE PUBLIC INTEREST

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## I. INTRODUCTION

Broadcast<sup>1</sup> television's rapid growth makes it one of American industry's more remarkable success stories. Some doubted that television would survive its initial years,<sup>2</sup> but statistics demonstrate that today it is a healthy medium.<sup>3</sup> The television station operator controls a powerful tool of mass communication. TV brings a lucrative

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1. This Note concerns only broadcast television—electronic signals which transmit television frequencies impressed on electromagnetic waves. By contrast, community antenna television systems take signals off the air and deliver them to receivers via coaxial cable. See R. NOLL, M. PECK, & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 3, 7 (1973).

2. In 1946, NBC predicted that television would lose eight million dollars within four years. Expensive receivers and other equipment, lack of advertising support, and a shortage of manufacturing material discouraged some investors. Others who had made financial commitments withdrew from the industry. *BROADCASTING*, Feb. 2, 1981, at 79.

3. Most households own one or more television receivers. As of January 1, 1980, 98% of the nation's homes had at least one television set. The receivers in most of these households transmit in color. 1980 *BROADCAST Y.B. D-112*. The 1980 census revealed that more than 80 million homes have a television set. *BROADCASTING*, May 11, 1981, at 40. Owners do not ignore their televisions either. The average citizen spends almost half of every waking day, more than seven hours, watching television. *Wall St. J.*, Apr. 3, 1980, at 1, col. 5. See also *BROADCASTING*, June 15, 1981, at 46 (viewers set records each month for number of hours watching television).

commercial market of goods and services into households,<sup>4</sup> and has the complementary ability to transmit non-commercial messages—news, information, and entertainment.

The technology of television has enhanced this power of station operators. The broadcast airwaves can accommodate only a limited number of channels.<sup>5</sup> This scarcity of frequencies has traditionally justified a degree of government control over broadcasters that is unique to first amendment values.<sup>6</sup> Its regulatory policy seeks to localize this limited system in order to accomplish two goals—diversification of license holders, and maximum accessibility to potential

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4. Advertisers recognize the size of television's audience, and spend large sums of money each year to promote goods and services to viewers. In 1980, the top 50 broadcast advertising agencies spent \$750 million more on television than they did in 1979. This increase, however, did not match the one billion dollar gain in 1979 over 1978. *Id.* Jan. 26, 1981, at 30. As a result of these expenditures, the three commercial networks have collected record revenues. Their advertising sales topped five billion dollars in 1980, a 9.5% increase over 1979. *Id.* Feb. 9, 1981, at 7.

5. See NOLL, PECK, & MCGOWAN, *supra* note 1, at 4 for a further explanation of broadcast frequencies.

6. In view of the shortage of frequencies, the law has conferred status on those who control television. The federal government licenses broadcasters as "trustees" of the airwaves for the benefit of the public. See 47 U.S.C. § 301 (1976). Licensees must prove every five years that they deserve another term of operation. *Id.* § 307(d), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241(a)(2), 95 Stat. 357. The Supreme Court has upheld this licensing scheme because of the technological limit on frequencies. See *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367, 390 (1969). See also *Office of Telecommunications of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). For a further discussion of the history of broadcast regulation, see notes 17-52 and accompanying text *infra*.

Congress created the Federal Communications Commission (FCC) to administer broadcast regulations. See note 30 and accompanying text *infra*. Currently, the FCC is challenging the traditional theory of trusteeship. Chairman Mark S. Fowler says he will work to deregulate television and allow "marketplace" forces to control broadcast service. See BROADCASTING, Sept. 28, 1981, at 19; *id.* Sept. 21, 1981, at 23.

While the FCC under Chairman Fowler may take important new approaches to broadcast regulation, see note 106 *infra*, others have long argued that the current system does not work. For example, one scholar believes it unrealistic to classify broadcasters as "public trustees." Professor Jaffe says justice to the licensee, and the reality of the broadcast industry's structure, should and do shape renewal policies. He believes that the FCC must treat licensees fairly, by allowing them to rely on the agency for periodic renewal. Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

This Note agrees with Professor Jaffe that television ownership patterns have made it unrealistic for the FCC, Congress, and the courts to hold licensees to a fiduciary standard. The FCC's tolerance of this situation, however, deserves analysis and criticism.

users.<sup>7</sup>

Government regulation has not, however, achieved its goal of local control. Licensees have accumulated multiple holdings of broadcast properties<sup>8</sup> which in turn rely heavily on the three commercial networks for most of their daily programming.<sup>9</sup> These ownership patterns, which effectively have stripped residents of their ability to operate television stations, have proved especially troublesome in metropolitan areas.<sup>10</sup> Often, owners absent from the cities that their stations serve may not respond to the needs of diverse populations. Instead, television's economic dependence on advertising requires it to present programs suited for mass tastes which deliver large audiences to commercial sponsors.<sup>11</sup>

This Note examines television's failure to achieve its twin regulatory goals of diversified control and maximum access in urban areas. Section II presents an overview of the origin and purpose of broadcast regulation.<sup>12</sup> Section III analyzes the government's failure to use its powerful regulatory tool—the license renewal—to help television achieve the regulatory objectives.<sup>13</sup> This Note concludes that the current system of broadcasting offers no hope for those seeking control over, and access to, television in metropolitan areas. Finally, it presents and analyzes a new broadcast service, low power television (LPTV).<sup>14</sup> LPTV has the potential to open hundreds, and perhaps thousands of new channels on metropolitan television airwaves<sup>15</sup> that

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7. T. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 653 (1970).

8. See notes 154-57 and accompanying text *infra*.

9. See notes 158-60 and accompanying text *infra*.

10. See note 156 and accompanying text *infra*.

11. NOLL, PECK, & MCGOWAN, *supra* note 1, at 112. See also *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 661 (D.C. Cir. 1972), *rev'd on other grounds sub nom.* *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcast system favors status quo and bland commercialism); *Hale v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring) (growth of media conglomerates will likely produce more bland and homogeneous fare).

12. See notes 17-52 and accompanying text *infra*.

13. See notes 53-182 and accompanying text *infra*.

14. See notes 183-222 and accompanying text *infra*.

15. Supporters also expect LPTV to improve television in rural areas that currently have little or no local service. Urban-based groups, however, have inundated the agency with applications and requests for information on LPTV. See note 196 and accompanying text *infra*. This Note focuses on the potential for LPTV to supplement the television service already provided in metropolitan areas.

until now appeared saturated with stations.<sup>16</sup>

## II. ORIGIN AND PURPOSE OF BROADCAST REGULATION

The early years of radio broadcasting in the United States were chaotic. Operators roamed the radio band, transmitting signals that often interfered with another broadcaster using the same frequency.<sup>17</sup> Prolonged studies demonstrated that this situation was depriving the public of clear, dependable service.<sup>18</sup> Congress responded by passing the Federal Radio Act of 1927<sup>19</sup> which dramatically changed the development of the industry.<sup>20</sup> Congress made broadcasting a *privilege*,<sup>21</sup> subordinating an operator's freedom of transmission to the public's *right* to receive uninterrupted radio service.<sup>22</sup> To accomplish

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16. The top 100 markets have no available VHF channels, and the supply of less profitable UHF frequencies is dwindling. B. COMPAINE, WHO OWNS THE MEDIA? CONCENTRATION OF OWNERSHIP IN THE MASS COMMUNICATIONS INDUSTRY 65 (1979). The high value of these stations complicates this shortage because in the rare instance of a licensee selling its facility, the cost is prohibitive for most. See notes 47 and 51 and accompanying text *infra*.

17. Several authors have recounted the turmoil in radio broadcasting prior to federal legislation that regulated the medium. See, e.g., C. DILL, RADIO LAW 68-75 (1938); E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 8-13 (2d ed. 1978); L. SCHMECKEBIER, THE FEDERAL RADIO COMMISSION ITS HISTORY, ACTIVITIES AND ORGANIZATION 9-10 (1932).

18. Congress had struggled for 50 years to control radio. The industry, with judicial blessings, had ignored earlier legislation which regulated frequencies and hours of operation. After a series of national radio conferences in the early 1920's, the frustrated Commerce Secretary, Herbert Hoover, abandoned the idea of federal regulatory control over radio, issuing instead an unheeded plea for self-restraint. See *Red Lion Broadcasting Co. v. United States*, 395 U.S. at 375, n.4.

19. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927).

20. Until Congress acted, radio communication ownership was left to private enterprise. The government did not participate in the allocation, assignment, or use of broadcast frequencies. See KRASNOW & LONGLEY, *supra* note 17, at 9. The new Federal Radio Act created for the federal government a major role in radio communications. Congress stated that its legislative policy would "maintain the control of the United States over all the channels of interstate and foreign radio transmission." The law created a licensing scheme, requiring operators to renew their broadcast permits every three years. Radio Act of 1927, ch. 169, § 9, 44 Stat. 1162, 1166 (1927).

21. Congress stated that a licensed broadcaster would have a significantly diminished interest compared to operators prior to regulation. The statute read: "no such license shall be construed to create any right, beyond the term, conditions, and periods of the license." *Id.* at 1162.

22. The sponsor of the Radio Act said: "(T)he right of the public to service is superior to the right of any individual. . . . (T)he broadcasting privilege will not be a right of selfishness." 67 CONG. REC. 5479 (1926) (remarks of Rep. White).

this goal, the statute created the Federal Radio Commission (FRC),<sup>23</sup> an administrative agency designed to restore peace to the airwaves through a systematic allocation of frequencies.<sup>24</sup> The FRC assigned only as many broadcast licenses as the airwaves could accommodate without service interruptions.<sup>25</sup> This system of limited access forced the FRC to grant licenses based on competing applications for a frequency.<sup>26</sup> The FRC granted licenses to those candidates it believed would best meet the statutory goal of broadcasting in the public interest, convenience, and necessity.<sup>27</sup>

Seven years after passing the Federal Radio Act, Congress rewrote the law, enacting the Communications Act of 1934.<sup>28</sup> The new law extended congressional policymaking and regulatory authority to various forms of communications.<sup>29</sup> It also replaced the FRC with the Federal Communications Commission (FCC),<sup>30</sup> but incorporated virtually all of the old radio legislation.<sup>31</sup> The new law reiterated the broadcaster's privilege to transmit,<sup>32</sup> and the public's right to receive an undisturbed signal.<sup>33</sup> The Act also required the licensee to prove every three years<sup>34</sup> that it deserved another term.<sup>35</sup> In *FCC v. Potts-*

23. Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162, 1163 (1927).

24. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933) (upheld the authority of Congress and its new agency to administer national broadcast policy as a function of interstate commerce).

25. Radio Act of 1927, ch. 169, § 4, 44 Stat. 1162, 1163-64 (1927).

26. *Id.* § 9, at 1166.

27. *Id.* § 4, at 1163.

28. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 151 (1976)).

29. *See generally id.* *See also* KRASNOW & LONGLEY, *supra* note 17.

30. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 151 (1976)).

31. 47 U.S.C. § 301 (1976).

32. *Id.* at § 151.

33. *Id.* at § 301.

34. *Id.* at § 307(d), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241(a)(2), 95 Stat. 357. This amendment extended the license period to five years.

35. *Id.* The renewal requirement effects the statutory policy that specifies that a license grants to an operator use, but not ownership, of the designated frequency. 47 U.S.C. § 301 (1976). *See also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (the policy of the act makes clear that no person has anything in the nature of a property right resulting from the grant of a license).

*ville Broadcasting Co.*,<sup>36</sup> and *FCC v. Sanders Bros. Radio Station*,<sup>37</sup> the Supreme Court upheld this statutory scheme.<sup>38</sup> The Court reaffirmed the power of a federal administrative agency to subordinate the economic interests of licensees to the public's right to the efficient use of the airwaves.<sup>39</sup>

Today, the FCC enjoys broad discretion to regulate broadcasting as Congress intended in the Communications Act of 1934.<sup>40</sup> The agency's flexibility stems in part from the vagueness of the statutory standard—"public interest, convenience, and necessity"—for measuring acceptable broadcast service.<sup>41</sup> The Supreme Court's most important, modern communication law decision firmly supports this regulatory system. In *Red Lion Broadcasting Co. v. United States*,<sup>42</sup>

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36. *Id.* at 134.

37. *Id.* at 470.

38. In *Pottsville*, the Court upheld the FCC's power to review license applications for operating permits. *Id.* at 145. In *Sanders Bros.*, the Court said the limited number of broadcast frequencies required applicants to prove that they could competently and adequately serve the public. The Court cited this scarcity rationale to uphold the policy and procedures involved in broadcast licensing. *Id.* at 475.

39. In *Sanders Bros.*, the Court held that the FCC could ignore the economic consequences that the grant of a new license might have on an existing service. *Id.* at 476. The Court said that Congress wrote the law to protect the public through efficient allocations of frequencies, not to protect licensees from each other. *But see* *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958) (FCC should consider economic consequences of new station if insufficient local revenue to support two stations threatens to eliminate all service).

40. The Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) remains the leading interpretation of the Communications Act. After tracing the history of federal communications policy, Justice White described as a "venerable principle" that an agency Congress creates to administer a law deserves deference "absent compelling indications that it is wrong. . . ." *Id.* at 381. Justice White recognized that government regulation of broadcasting is a delicate matter because it risks intrusion on first amendment values. He stated, "the FCC is free to implement [its policies] by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by . . . the Act." *Id.* at 382.

41. Congress did not define its notion of "public interest, convenience, and necessity." Presumably, the drafters intended that this standard would guide the FCC in effecting the statutory goal of making communications available to all people rapidly and efficiently. *See* 47 U.S.C. § 151 (1976). This goal of making broadcasting universally available pervades the FCC's procedures for allocating television frequencies throughout the country. *See* notes 134-40 and accompanying text *infra*. *See also* *Red Lion Broadcasting Co. v. United States*, 395 U.S. at 385 (the Communications Act is not notable for the precision of its substantive standards).

42. 395 U.S. 367 (1969).

the Court reaffirmed the government's power to restrain broadcasters from monopolizing the airwaves when technology cannot accommodate the demand for communication outlets.<sup>43</sup> Some commentators have argued that *Red Lion* blessed a system<sup>44</sup> that wrongfully intrudes on a first amendment right to broadcast.<sup>45</sup> The Court insisted, however, that the only freedom at issue was the public's right of access to "an uninhibited marketplace of ideas."<sup>46</sup> The Court concluded that Congress could guarantee that right by licensing users of the scarce frequencies.<sup>47</sup>

43. *Id.* at 390.

44. *Red Lion* upheld the FCC's "Fairness Doctrine", which requires broadcasters to present a reasonable amount of balanced discussion on public issues. See Fairness Report, 48 F.C.C.2d 1, 7 (1974). Ten years after the FCC adopted the Fairness Doctrine, Congress incorporated the rule into the Communications Act, Pub. L. No. 86-274, § 1, 73 Stat. 557 (1959) (current version at 47 U.S.C. § 315(a) (1976)). For a history of FCC action and case law on the Fairness Doctrine, see American Sec. Council Ed. Found. v. FCC, 607 F.2d 438, 443-53 (D.C. Cir. 1979).

45. Justice Douglas argued that broadcasting deserves the same freedom from government intrusion that the print media enjoy. He found it intolerable that the FCC could demand licensees to account for their programming:

The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. In 1973—as in other years—there is clamoring to make TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.

The same cry of protest has gone up against the newspapers and magazines. . . . Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.

The same is true, I believe, of TV and radio. At times they have a nauseating mediocrity. At other times they show the dazzling brilliance of a Leonard Bernstein; and they very often bring humanistic influences of far-away people into every home.

Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 154-55 (1973) (Douglas, J., concurring). See also *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973) (dissent of Judge Bazelon).

46. 395 U.S. at 390.

47. *Id.* at 389. Concededly, the composition of the mass media has changed since Congress wrote the Communications Act based on the scarcity theory. Currently, almost 9,000 radio stations and more than 1,000 television stations broadcast in the United States, compared to less than 1,700 newspapers that publish daily. BROADCASTING, Mar. 16, 1981, at 51. See also Geller, *First Amendment and Electronic Media: Raising the Issues*, 5 Black L. J. 353, 364-65 (1977).

Justice Douglas also disagreed that the need for engineering expertise to avoid signal interference justified broadcast regulations. "Who at this time would have the

If "an uninhibited marketplace of ideas" requires access to broadcast outlets for as many voices as possible, the FCC has failed to carry out congressional policy. Despite the Supreme Court's interpretation of the statute in *Pottsville*, *Sanders Bros.*, and *Red Lion*, the FCC has not used its licensing power to diversify control of the scarce channels.<sup>48</sup> The agency's policy instead favors incumbent licensees with a "renewal expectancy" that makes meritorious, competing applications a futile exercise in paperwork.<sup>49</sup>

Most parties that are unable to obtain a license through the FCC's conduct of licensing and renewal hearings are also frustrated if they attempt to purchase an operating broadcast facility in the market. The short supply of available channels in metropolitan areas<sup>50</sup> has inflated the purchase price for facilities so that only the very wealthy can afford to buy into a license.<sup>51</sup> Interested parties that otherwise

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fully to think he could combat the New York Times or Denver Post by building a new plant and becoming a competitor?" *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 159 (Douglas, J., concurring). See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 250 (1974).

The abundance of broadcast stations compared with the number of daily newspapers does not justify the conclusions that channels are plentiful and control is unnecessary. In metropolitan areas, where mass media may inadequately meet the needs of diverse populations, the important statistic is that the number of stations far exceeds the number of operators. EMERSON, *supra* note 7, at 662. See also notes 154-56 and accompanying text *infra*.

48. See notes 131-64 and accompanying text *infra*.

49. See generally notes 53-182 and accompanying text *infra*.

50. Sixty-one VHF channels (2-13) are available nationwide. All are outside the top 100 markets, and only six are in the top 200 markets. The UHF band (14-70) is a bit looser, where potential licensees may choose from 86 channels in the top 100 markets. REPORT AND RECOMMENDATIONS IN THE LOW POWER TELEVISION INQUIRY, Sept. 9, 1980, at 56 [hereinafter cited as REPORT]. UHF emerged only recently as a good investment for broadcast licensees. In 1952, the FCC forced UHF channels to compete with their VHF counterparts, though few television sets at the time received the UHF signal. UHF also requires more power to overcome geographic barriers to its signal. Improving technology, and congressional action requiring television sets to receive UHF, have made the service more competitive. *Id.*

51. Until recently, an urban VHF station sold for between \$50 and \$100 million. Those offers, however, pale next to the record \$220 million that Metromedia, Inc. recently agreed to pay for a single broadcast property—WCVB-TV in Boston. Boston ranks sixth in the nation in market size. BROADCASTING, July 27, 1981, at 27. The licensing and programming history of WCVB, formerly WHDH, are legendary in broadcast law. See notes 89-98 and accompanying text *infra*.

Modern sale prices for urban UHF stations reflect their improved market position. Purchasers have recently paid approximately \$11 million each for UHF facilities in Houston, Cleveland, and Kansas City. *Wall St. J.*, Oct. 13, 1977, p. 6, col. 1. See also *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 112.

qualify under the FCC's relatively simple ownership criteria<sup>52</sup> lack both available outlets and, most likely, the capital to buy out an existing licensee.

In summary, FCC license policies have effectively barred diversity in television ownership. Why did the current system fail, despite Congress' intent to offer the broadcast consumer the maximum possible diversity of programming in a technologically limited situation? The answer requires a closer study of the FCC's treatment of license renewal applications.

### III. LICENSE RENEWALS

#### A. Procedure

##### 1. The Origin of the Comparative Hearing

The FCC derives the power to approve original and renewal broadcast licenses that will serve the standard of "public interest, convenience, and necessity" from two sections<sup>53</sup> of the Communications Act of 1934.<sup>54</sup> If the agency finds that an application raises "a substantial and material question of fact"<sup>55</sup> of compliance with the standard, it must first conduct a hearing.<sup>56</sup>

One such situation occurred in *Ashbacker Radio Corp. v. FCC*,<sup>57</sup> when two companies applied for licenses in a geographical area to operate on the same frequency.<sup>58</sup> Both applicants qualified for the

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52. 47 U.S.C. § 308(b) (1976) requires the applicant to meet minimal requirements of "citizenship, character, financial, technical, and other qualifications" to operate a station. The FCC then grants the license if the award is in the "public interest, convenience, and necessity." *Id.* at § 309(a). The FCC, however, does not necessarily rubber stamp applications. In *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962), the court affirmed the FCC's rejection of the *only* applicant for a new radio station in New Jersey. The candidate made no effort to determine the community's program needs. Instead, it offered the same program plan that it had used at its other stations in two distant states.

53. 47 U.S.C. §§ 308(a), 309(a) (1976).

54. *Id.* at § 151.

55. *Id.* at § 309(e).

56. *Id.* Qualified contestants for the same broadcast frequency present their cases at these hearings. The FCC, however, must subordinate the candidates' interests to the public's. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 137-38.

57. 326 U.S. 327 (1945).

58. One company sought to build a new station to operate on the frequency. While the FCC was reviewing that application, an existing licensee filed an applica-

same permit, making them "actually (mutually) exclusive."<sup>59</sup> After approving the competitor's application, the FCC set Ashbacker's for hearing.<sup>60</sup> The D.C. Circuit<sup>61</sup> dismissed Ashbacker's appeal of the order,<sup>62</sup> but the Supreme Court reversed.<sup>63</sup> The Court emphasized that the statute provides the procedural guarantee of a hearing for mutually exclusive candidates before the FCC may issue a license.<sup>64</sup> When choosing between candidates, the agency must determine which candidate would better serve the public interest, convenience, and necessity.<sup>65</sup> The Court recognized that an applicant must prove a more difficult case to displace an established licensee than when it opposes a newcomer for the same license.<sup>66</sup> Thus, the Court held that if the FCC grants one application and effectively precludes the other, "the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing."<sup>67</sup> The Court also reiterated its holding in *Pottsville* and *Sanders Bros.* that the FCC would violate the statutory intent of the Communications Act by granting to a licensee a "vested interest" in a frequency.<sup>68</sup> Thus, while *Ashbacker* involved competing applications for a new frequency, the Court said the statute required the FCC to apply the same procedures to renewal applications.<sup>69</sup>

The Court's landmark decision in *Ashbacker*<sup>70</sup> forced the FCC to

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tion to change its operation to the same frequency. The FCC said this "would result in intolerable interference to both applicants." *Id.* at 328.

59. Mutually exclusive applicants are parties that qualify for one broadcast channel. The FCC will conduct a hearing to determine which applicant best qualifies to receive the license. *See* notes 78-88 and accompanying text *infra*.

60. 326 U.S. at 328.

61. Aggrieved parties before the FCC have a statutory right to appeal an adverse decision to the D.C. Circuit. 47 U.S.C. § 402(b) (1976). As this Note discusses later, that court plays an important role in shaping broadcast policy.

62. The lower court dismissed Ashbacker's appeal without publishing an opinion. 326 U.S. at 329.

63. *Id.* at 334.

64. *Id.* at 333.

65. *Id.* at 329, *citing* 47 U.S.C. § 309(a) (1940) (current version at 47 U.S.C. § 309(a) (1976)).

66. 326 U.S. at 332.

67. *Id.* at 330.

68. *Id.* at 331.

69. *Id.* at 332.

70. Twenty-five years after *Ashbacker*, the FCC attempted to eliminate comparative hearings in license renewal contests. *See* notes 100-02 and accompanying text

evaluate mutually exclusive license applicants without congressional guidance. The statute does not define the vague "public interest, convenience, and necessity" standard.<sup>71</sup> Thus, the FCC developed criteria for meeting the statutory standard.<sup>72</sup> Despite its efforts to define the standard, the FCC in its early years allowed the applicants to control the tenor of the licensing hearings by accepting the most attractive evidence proffered.<sup>73</sup> In other words, the FCC followed the *Ashbacker* mandate to conduct hearings, but its policy in renewal proceedings rewarded an incumbent for three years of satisfactory performance. Despite the congressional intent in enacting the statute,<sup>74</sup> and the Supreme Court's consistent interpretations,<sup>75</sup> the FCC rejected challengers to renewal applications who fared better in the comparative contest.<sup>76</sup> For incumbent licensees, periodic renewal became a simple exercise in paperwork, despite the specific language of the Communications Act to allow broadcasters "the use of such channels, but not the ownership thereof. . . ."<sup>77</sup>

## 2. Establishment, and Retreat from Meaningful Review

After twenty years of inconsistently applying the comparative

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*infra*. The D.C. Circuit vacated the FCC's alternative proposal to automatically renew licensees that had performed satisfactorily. The court said this plan ignored Congress' intent in enacting the statute and ran contrary to the *Ashbacker* precedent. The court called *Ashbacker* and subsequent consistent holdings "perhaps the most important series of cases in American administrative law." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971).

71. See note 41 and accompanying text *supra*.

72. For a discussion of the FCC's early experience with licensing criteria, see Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479 (1959).

73. *Id.*

74. 47 U.S.C. § 301 (1976).

75. See notes 38-39, 57-69, and accompanying text *supra*.

76. The FCC established its bias for incumbents in two leading renewal decisions. See *Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963); *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951). See also *South Fla. Television Corp. v. FCC*, 349 F.2d 971 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 987 (1965). In the latter case, the court affirmed the FCC's award of a license to a temporary operator who scored below its challenger in a comparative hearing. Judge Wright argued in dissent that this pro-incumbent bias violated the statute's hearing requirement, converted the broadcast license privilege into a private right, and would inflate the price of urban stations. *Id.* at 973 (Wright, J., dissenting). His prophecy on the purchase price of broadcast properties was accurate. See note 51 and accompanying text *supra*.

77. 47 U.S.C. § 301 (1976).

hearing requirement, the FCC adopted its *Policy Statement on Comparative Broadcast Hearings* (1965 Policy Statement).<sup>78</sup> The FCC reviewed the various criteria it had applied in earlier proceedings, and formed a cohesive, dependable hearing procedure for comparing mutually exclusive candidates for new frequencies.<sup>79</sup> The FCC intended that this new hearing would single out the applicant that would (1) provide the best practicable service to the public; and (2) decrease the concentration of media ownership.<sup>80</sup> The FCC said that it would select the applicant that would best achieve these goals by considering six objective factors: (1) whether the applicant owned other communication outlets;<sup>81</sup> (2) whether the ownership would take part in station operation;<sup>82</sup> (3) proposed programming;<sup>83</sup> (4) the applicant's previous broadcast record;<sup>84</sup> (5) whether the station would use

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78. 1 F.C.C.2d 393 (1965).

79. *Id.* at 393, n.1.

80. *Id.* at 394.

81. *Id.* at 394-95. Diversification is "a factor of primary significance" but becomes less important when an applicant's other media holdings are far from the location of the disputed station. The FCC has separate rules for multiple and newspaper holdings that it designed to curb the concentration of ownership. See notes 147-53 and accompanying text *infra*.

82. 1 F.C.C.2d at 395-96. The FCC considers ownership involvement, or "management integration," a factor of substantial importance. The policy presumes that licensees who live in the communities that their stations serve will understand the area's needs and interests and program accordingly. Diversification and integration are complementary policies because spreading control should increase the number of owner-managers. *Id.* at 395.

83. *Id.* at 397. The FCC requires the applicant to show a superior commitment to public service before it will consider taking evidence at the hearing on proposed programming. The proponent must also demonstrate that its programs will serve the community's perceived needs. The FCC adopted this policy to keep hearing records "free of immaterial clutter." Chapman Radio & Television Co., 7 F.C.C.2d 213, 214-15 (1967). Ironically, the FCC has downgraded at least one extraordinary program proposal it thought the applicant could not possibly implement. See notes 97-98 and accompanying text *infra*. See also Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C. Cir. 1949) (programming is the essence of broadcasting in the public interest).

84. 1 F.C.C.2d at 398. The FCC supposedly limits its consideration of past performance to unusually good or bad records. In such cases, the FCC believes past performance most reliably predicts the quality of an applicant's future performance. The FCC claims it ignores average records because it expects at least average performance from all licensees. The FCC has since sought to make satisfactory performance the *only* requirement for license renewal. See notes 100 and 120 and accompanying text *infra*. Some Congressmen support the agency's proposal. See notes 99 and 106 and accompanying text *infra*.

the frequency efficiently;<sup>85</sup> and (6) the applicant's character.<sup>86</sup>

Originally the FCC intended to apply these criteria only in hearings to award *new* licenses.<sup>87</sup> Subsequently, the Commissioners announced they would apply these measures in comparative hearings on renewal applications.<sup>88</sup> The FCC shocked the broadcast industry<sup>89</sup> when it used the comparative criteria to deny an incumbent's<sup>90</sup> renewal application in *WHDH, Inc.*<sup>91</sup>

The D.C. Circuit upheld the FCC's *WHDH, Inc.* holding in *Greater Boston Television Corp. v. FCC*,<sup>92</sup> agreeing that the challenger ranked superior in both the diversification of control<sup>93</sup> and local ownership categories.<sup>94</sup> After finding that the incumbent did not match these *structural* qualifications, the court also agreed that the FCC appropriately did not consider the station's average *past performance*.<sup>95</sup> The court also rejected the incumbent's argument that

85. 1 F.C.C.2d at 398.

86. *Id.* at 399. *See also* 47 U.S.C. § 308(b) (1976).

87. 1 F.C.C.2d at 393, n.1.

88. Seven (7) League Productions, Inc., 1 F.C.C.2d 1597, 1598 (1965).

89. The FCC previously had renewed all licenses, absent a showing of operator misconduct. One commentator predicted the *WHDH* decision would send the broadcasting industry into turmoil, causing serious financial harm to licensees who had relied on renewal expectancies to invest confidently in their stations. He cited a broadcast trade publication that predicted *WHDH* would jeopardize three billion dollars worth of licenses. Jaffe, *supra* note 6. History has since proven these fears groundless. *See* note 104 and accompanying text *infra*.

90. The FCC did not treat the case as a renewal proceeding, though the challengers were contesting an entrenched licensee. The FCC placed the incumbent on probation, pending the outcome of the litigation. Commissioners evaluated the licensee as a new candidate, rather than as a renewal applicant.

91. 16 F.C.C.2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971).

92. 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971).

93. *Id.* at 860. A Boston newspaper publisher held the license. The court said that had different parties controlled the newspaper and television station, a "bothersome" editorial decision would not have developed. The station delayed broadcasting an investigative story published in the newspaper because of the "scoop" value of the report. The court also suggested that the station did not editorialize on matters of public interest, fearing attacks from its competitors. *Id.*

94. *Id.* at 863. Six of the leading challenger's shareholders promised to serve full-time in station management; two had significant television experience. *Id.* at 847.

95. *Id.* at 855. The court conceded that to encourage continued quality, the law would tolerate some renewal expectancies for stations providing "superior" service.

the FCC violated the incumbent's due process rights by stripping its license.<sup>96</sup> Ironically, the successful challenger rated below yet another applicant in the proposed programming category because it failed to prove it could produce an extraordinary amount of original shows.<sup>97</sup> The winner eventually proved its critics wrong.<sup>98</sup>

While the D.C. Circuit was considering *Greater Boston*, Congress responded to the broadcast industry's alarm over the *WHDH, Inc.* decision. Amendments proposed to the licensing procedures in the Communications Act would have rewarded incumbents with automatic renewal for good faith performance.<sup>99</sup> The sponsors withdrew the bill after the FCC adopted similar provisions in revised guidelines for renewal challenges.<sup>100</sup> The D.C. Circuit, however, vacated the new policy and ordered the FCC to return to comparative hearings for renewal challenges. In *Citizens Communications Center v.*

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*Id.* at 854. The court said, however, that the FCC should do more to serve the public interest than passively renew average broadcast licenses. *Id.* at 860.

96. *Id.* at 850.

97. *Id.* at 847. The challenger promised that more than one-third of its weekly programs would be local and originate live. The court called this a "brave generality." *Id.* at 848. At the time, that observation was probably accurate, considering the domination of the networks over total air time. See notes 158-60 and accompanying text *infra*.

98. The successful challenger, Better Boston Broadcasters, Inc., subsequently produced 53 hours of local programs each week, far exceeding its competitors in the commercial television industry. It developed newsmagazine shows, "realistic sitcoms" on current social issues that it followed with discussions on the programs, experimental films, and Spanish-language and black-oriented programming. It produced programs on health and education that are syndicated in more than 40 cities. Many believe that the station's program innovations have helped to improve the overall quality and competition in Boston television. Its manager attributed this unusual record to the station's desire "to do good television." One member of the station's board of directors retorted that the station is not that good—the others are worse. Wall St. J., May 26, 1977, p. 1, col. 1. BBB, Inc., ended any doubts about the profitability of locally originated programs. It recently agreed to sell its facility for the highest price ever paid for a broadcast property. See note 51 and accompanying text *supra*.

99. See, e.g., S. 2004, 91st Cong., 1st Sess. (1969).

100. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), *vacated sub nom*, *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972) [hereinafter cited as 1970 Policy Statement]. The FCC adopted a two-step approach to renewal proceedings. If the incumbent could demonstrate "substantial past performance," the FCC would renew the license without considering the comparative merits of the challenger. *Id.* at 424-26.

FCC,<sup>101</sup> the court declared that *Greater Boston* had repudiated a past performance standard as a measure of future performance.<sup>102</sup>

The tension continues between the FCC and the D.C. Circuit over the appropriate standard of review for license renewal applications. The agency has mostly ignored the structural criteria of the 1965 Policy Statement endorsed by the court in *Greater Boston* and *Citizens Communications Center*. Instead the FCC has applied a performance standard<sup>103</sup> leaving the comparative hearing a dead end for license challenges.<sup>104</sup> The FCC has paid extraordinary deference to incumbent licensees,<sup>105</sup> effectively creating a property right in what Con-

101. 447 F.2d 1201 (D.C. Cir. 1972), *clarified*, 463 F.2d 822 (D.C. Cir. 1972). The court said that limiting license challenges to complaints about performance, and providing a hearing only for serious deficiencies runs against both section 309(e) and *Ashbacker*. *Id.* at 1210.

102. *Id.* at 1208. "The policy violates the clear intent of the Communications Act that the award of a broadcasting license should be a public trust. . . . By whatever name or classification, broadcasters are temporary permittees—fiduciaries—of a great public resource." *Id.* at 1214 & n.39, *quoting* Office of Telecommunications of United Church of Christ v. FCC, 425 F.2d 543, 548 (D.C. Cir. 1969).

103. In 1952, Congress amended § 307(d), eliminating the requirement that the FCC treat a renewal decision like an original application. Communications Act Amendments, 1952, Pub. L. No. 554, ch. 879, § 5, 66 Stat. 711, 714 (*amending* Communications Act of 1934, ch. 652, 48 Stat. 1064, 1084).

The present language requires the FCC to judge all candidates under "the public interest, convenience, and necessity" standard. While the Act still precludes any preference for incumbents (*see, e.g.*, § 301), the courts and the FCC inferred that Congress did not intend to bar incumbents from presenting performance-related evidence. *See* Central Fla. Enterprises, Inc. v. FCC, 598 F.2d 37, 41, n.4, *amended*, 598 F.2d 58 (D.C. Cir. 1978), *cert. dismissed sub nom.* Cowles Broadcasting, Inc. v. Central Fla. Enterprises, Inc., 441 U.S. 957 (1979). *See also* Note, *Communications Law—Communications Act of 1934—In a Comparative Renewal Hearing the FCC May Not Create a Bias in Favor of Renewal, but Must Use Criteria that Afford a Challenger a Full Comparison*, Central Florida Enterprises, Inc. v. FCC, 47 GEO. WASH. L. REV. 1205, 1210 (1979).

104. In the year after the FCC stripped WHDH of its license, opponents filed only eight challenges to 250 renewals. During the short-lived term of the pro-renewal 1970 Policy Statement, no incumbents faced opposition. Citizens Communications Center, v. FCC, 447 F.2d at 1214, n.37. In its history, the FCC has revoked or failed to renew only 150 licenses, mostly those of small radio stations, for reasons unrelated to performance. B. COLE & M. OETTINGER, *RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE* 200 (1978).

105. *See* note 104 and accompanying text *supra*. *See also* note 120 and accompanying text *infra*.

The Supreme Court has authorized the FCC to make the initial decision on what policies serve the public interest. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 810 (1978). Presumably, this gives the FCC discretion when consider-

gress originally intended to be a privilege.<sup>106</sup>

Several factors may explain the FCC's reluctance to disturb broadcast ownership in comparative renewal hearings. First, many Commissioners join the agency after enjoying successful careers in the industry.<sup>107</sup> Thus, they may sympathize more with the incumbent's

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ing a broadcaster's record. It also makes the FCC the best judge of when it is in the public interest to dismiss a challenger in favor of renewal expectancy.

106. See 47 U.S.C. §§ 301, 307(d) (1976); *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 60, n.18, *amended*, 598 F.2d 58 (D.C. Cir. 1978), *cert. dismissed sub nom. Cowles Broadcasting, Inc. v. Central Fla. Enters., Inc.*, 441 U.S. 957 (1979) (Communications Act disfavors vested license rights to encourage diverse and antagonistic sources of information); *Brandywine-Main Line Radio, Inc., v. FCC*, 473 F.2d 16, 61 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (FCC measures licensee's performance at renewal time, but should give prime consideration to its effectiveness as a public trustee of the airwaves).

The FCC has asked Congress to settle the conflict between its view of regulatory policies and the D.C. Circuit's interpretation of the Communications Act. The FCC under Chairman Fowler has prepared a legislative package for Congress that substantially rewrites the Communications Act of 1934. The new proposal would change the law's emphasis on broadcaster accountability, making the availability of broadcast services to the public dependent on "relevant marketplace forces." This marketplace theory would apply on both large and small scales. First, the FCC would no longer distribute service equitably to all areas, but would let public demand dictate the location of the station. Thus, the new law would undercut the primary goal of the original broadcast legislation that has survived to this day. See notes 137-38 and accompanying text *infra*. Second, the legislation proposes to eliminate the structural comparative hearing for renewal licenses in favor of automatic renewal for those who met certain standards of performance during their license terms. Fowler says the scarcity theory—which has always justified government allocation of licensing to regulate broadcasting in the public interest—has lost its validity in view of the new technologies that have opened new channels. Commissioner Fogarty dissented, saying most of the technologies "are on the horizon. . . . Today there is still scarcity and I am regulating for today." BROADCASTING, Sept. 21, 1981, at 23.

The FCC initiative will receive some sympathetic reaction in Congress. A bill authored primarily by Senators Cannon (D-Nev.) and Packwood (R-Ore.) contains provisions similar to the FCC's proposals for a "pro-competitive" attitude in broadcast regulation, and automatic renewal for licensees with satisfactory performance records. Telephone interview with Jack Lee, Director of Legislative Affairs, Office of the General Counsel, Federal Communications Commission, in Washington, D.C., (Oct. 26, 1981). See also BROADCASTING, Sept. 21, 1981, at 24.

107. According to information gathered by a House of Representatives subcommittee between 1960 and 1976, more than half of the newly appointed FCC Commissioners came from business or law practices devoted to furthering the interests of the broadcast industry. Another study found that two-thirds of the Commissioners who left the FCC went to work for companies in agency-regulated industries, or practiced before the agency as attorneys or engineers. Four of the nine Commissioners who left the FCC between January 1970, and June, 1977, went into broadcasting. *Conflict of Interest in Regulatory Agencies, Hearings Before the Subcommittee on Oversight and*

position than with the challenger's proposal in a license hearing. Second, the FCC is a political agency that interacts daily with broadcasters and their lobbyists on a variety of issues. This continuing relationship may make the FCC more amenable to the interests of incumbent licensees.<sup>108</sup> Third, the FCC believes that renewal expectancies for satisfactory service stabilize the broadcast industry.<sup>109</sup> Licensees must be assured of renewal to invest confidently in their facilities and programming. Finally, the comparative hearing can be a long, expensive procedure,<sup>110</sup> requiring the challenger to make a serious commitment of resources.<sup>111</sup> *WHDH, Inc.* remains the only FCC decision that ousted an incumbent licensee in a comparative hearing.<sup>112</sup> The administrative and judicial litigation lasted fifteen

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*Investigations of the Committee on Interstate and Foreign Commerce, 95th Cong. 1st Sess. (1977).* See COLE & OETTINGER, *supra* note 104, at 5, 8. The authors noted that with potential employment waiting in the industry, "[C]ommissioners naturally avoid fouling the nest to which they may fly. Nor are industry representatives reluctant to remind them." *Id.* at 8.

108. KRASNOW & LONGLEY, *supra* note 17, at 14, 38-39. Mr. Krasnow represents the National Association of Broadcasters, the powerful trade organization of the industry. He suggests that the industry, not the FCC, determines broadcast regulatory policy. Mr. Krasnow says the agency and its staff cannot realistically insulate themselves from the industry, because they interact on a daily basis through consultants, joint committees, a powerful trade press, the Federal Communications Bar Association, social contacts, frequent office visits, trade associations, submission of pleadings, and oral arguments. The FCC, consequently, views broadcast policy in industry terms. *Id.*

109. 1970 Policy Statement, *supra* note 100, at 424-25. This argument suggests that renewing the licensee who has a proven record, rather than risking the license on an applicant with uncertain ability, best serves the public interest. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 806-07 (1978). See also 47 U.S.C. § 151 (1976). Others see no reason to fear disruption of quality service, because eager applicants usually emerge for the right to operate the facility. COLE & OETTINGER, *supra* note 104, at 200-01.

110. Attorneys for incumbent licensees understand the use of stall tactics which help to contribute to oppressively large and expensive hearing records. For example, early in the *WHDH* proceeding, "one attorney went so far as to question an applicant about the absence of noise insulation in the toilet facilities in that applicant's proposed studio." Grunewald, *Should the Comparative Hearing Process be Retained in Television Licensing?*, 13 AM. U.L. REV. 164, 165-66 (1963).

111. *Id.*

112. While the FCC has not held another hearing like the *WHDH* proceeding, the case stirred action in Congress. Supporters of renewal expectancy introduced 178 bills in the 94th Congress to make broadcasters' status in the Communications Act more secure. See Krasnow & Robb, *Telecommunications and the 94th Congress: An Overview of Major Congressional Actions*, 29 FED. COM. B. J. 117, 139 (1976). For the text of two of these proposals, see *FCC Broadcast License Renewal Reform: Two Com-*

years.<sup>113</sup>

After reflecting on the *WHDH* story, one critic attacked the statute, rather than the FCC's procedures.<sup>114</sup> He opined that a regulatory agency cannot develop an acceptable method to establish standards for judging broadcast performance.<sup>115</sup> For example, in *Cowles Florida Broadcasting, Inc.*,<sup>116</sup> former FCC Chairman Richard Wiley believed the incumbent deserved another license term on the basis of a satisfactory record of performance.<sup>117</sup> After a bitter comparative hearing, however, Wiley voted against renewal because the challenger had superior structural qualifications.<sup>118</sup> Wiley said the case demonstrates that the FCC cannot possibly apply objective standards in a subjective decision as to which applicant would better serve the public interest in quality broadcasting.<sup>119</sup> Wiley stated he would rather concede automatic renewal to licensees who faithfully performed during their previous term.<sup>120</sup> At least one other former FCC Commissioner shares Wiley's concerns about the agency's com-

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*ments on Recent Legislative Proposals*, 42 GEO. WASH. L. REV. 67, 69-72 (1973). Many of these former bills resemble the Cannon-Packwood proposal to end the comparative hearing process and allow for automatic license renewal in most cases. See note 106 and accompanying text *supra*.

113. For a summary of the amazing case history of *WHDH*, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-46 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971).

114. See Jaffe, *supra* note 6.

115. *Id.* at 1700.

116. 60 F.C.C.2d 372 (1976), *reconsideration denied*, 62 F.C.C.2d 953 (1977), *reconsideration denied*, 40 Rad. Reg. 2d (P & F 1627 (1977)), *vacated sub nom.*, *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, *amended*, 598 F.2d 58 (D.C. Cir. 1978), *cert. dismissed sub nom.* *Cowles Broadcasting, Inc. v. Central Fla. Enters., Inc.*, 441 U.S. 957 (1979), *license granted*, *Cowles Fla. Broadcasting, Inc.*, 86 F.C.C.2d 993 (1981).

117. *Cowles Fla. Broadcasting, Inc.*, 60 F.C.C.2d at 430 (dissenting statement of Chairman Wiley).

118. *Id.*

119. *Id.* at 431.

120. *Id.* at 432-33. The D.C. Circuit vacated the FCC's renewal order, finding it "embarrassingly clear" that FCC policies presumed a renewal expectancy for incumbents. The court said this philosophy contradicted the congressional intent expressed in § 309(e) of the Communications Act, and the FCC's renewal criteria outlined in its 1965 Policy Statement. The court found that the FCC conducted a "noncomparative assessment" when it renewed the incumbent's license despite the superior structural qualifications of the challenger. *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed sub nom.* *Cowles Broadcasting, Inc. v. Central Fla. Enters., Inc.*, 441 U.S. 957 (1978), *license granted*, *Cowles Fla. Broadcasting, Inc.*, 86 F.C.C.2d 993 (1981). The court also thought that Chairman Wiley's dissent typified the FCC's

mitment to meaningful license accountability.<sup>121</sup>

### 3. Summary

This overview of FCC licensing procedures demonstrates that the agency has not committed itself to achieving the goals it established in the 1965 Policy Statement. The FCC's failure to use its licensing power in a renewal contest to achieve its principal goal—diversification in broadcast ownership<sup>122</sup>—has resulted in unsatisfactory ownership patterns. The next section of this Note examines a major

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hostility toward comparative renewal contests, but warned that such an attitude "is plainly mistaken." *Id.* at 57.

The court's remand of the proceedings to the agency assured the continuation of the 12 year litigation over this application. Recently, the FCC again granted Cowles a license renewal in an opinion that demonstrated its philosophical disagreement with the D.C. Circuit. The agency affirmed the decision of an Administrative Law Judge in *Cowles Fla. Broadcasting, Inc.*, 82 F.C.C.2d 500 (1980). First, the FCC repeated its belief that the 1965 Policy Statement distinguishes the approach it takes toward new license applicants from renewal proposals. *Cowles Broadcasting, Inc.*, 86 F.C.C.2d 993, 1006, n.65 (1981). Second, the FCC conceded the challenger's comparative superiority over the incumbent under the diversification and integration criteria. The agency held, however, that such findings deserve less weight when the licensee has provided substantial service. *Id.* at 1012, 1015. Third, the FCC restated the three traditional justifications for conceding a renewal expectancy to the incumbent: 1) a challenger cannot guarantee that its paper proposals will match the licensee's proven performance, and possibly expose the community to inferior service; 2) renewal expectancies encourage licensees to invest in their facilities; 3) using renewal hearings to compare incumbents and challengers could result in "haphazard restructuring" of the group ownership which controls two-thirds of commercial television stations. *Id.* at 1013, 1013, n.1. The FCC concluded that "such a restructuring" would not serve the public interest, especially when it would "arbitrarily [destroy] a proven and acceptable service." *Id.* at 1013, 1017. The unsuccessful challenger says it will appeal the ruling. *BROADCASTING*, June 22, 1981, at 25.

121. On a typical day when the FCC rubber-stamped renewals for about 200 unchallenged station licenses of Missouri and Iowa incumbents, FCC Commissioner Nicholas Johnson dissented. The FCC staff had processed the applications, and sent memoranda to the Commissioners for "nods" of approval. Johnson said the agency paid virtually no attention to the licensees' performance or programs to determine if they had honored their public trust. "For this Commission to sanction such cynical squandering of the valuable largess it dispenses is a shameful fraud on the public." *Renewal of Standard Broadcast and Television Licenses*, 11 F.C.C.2d 809, 810-11 (1968) (dissenting statement of Commissioner Johnson).

122. 1 F.C.C.2d at 394. The FCC made diversification of ownership both a policy goal and a criterion for comparing mutually exclusive license applicants. The agency believed that the public benefited from such diversity in a free society that simultaneously tolerates government control over access to broadcasting outlets. *Id.* For discussion of the unsatisfactory pattern of ownership, see notes 124-82 and accompanying text *infra*.

problem of concentrated ownership—the general failure of urban-based broadcasters to meet the special needs and interests of diverse populations. At the end of this discussion, the reader will better understand that FCC policies have eliminated access to many who are seeking an interest in a broadcast outlet, and why the LPTV system present a realistic alternative.<sup>123</sup>

## B. *Concentration of Broadcast Ownership*

### 1. Introduction

The Supreme Court has declared that the first amendment<sup>124</sup> creates a better-informed public because it stimulates “the widest possible dissemination of information from diverse and antagonistic sources.”<sup>125</sup> Within the broadcasting field, the FCC and the courts have consistently stated that the industry would reach this optimum constitutional goal if it granted one license per applicant.<sup>126</sup> The first

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123. During its years of battling the D.C. Circuit over the merits of favoring incumbent licensees with renewal expectancy, the FCC may have occasionally wondered what it was fighting for. For example, former Chairman Burch probably surprised his audience when he told the International Radio and Television Society on September 14, 1973, “If I were to pose the question, what are the FCC’s renewal policies and what are the controlling guidelines, everyone in this room would be on equal footing. You couldn’t tell me, I couldn’t tell you—and no one else at the Commission could do any better.” *Quoted in COLE & OETTINGER, supra* note 104, at 133.

124. U.S. CONST. amend. I, § 1.

125. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The Supreme Court held that the government could prosecute petitioner for alleged violations of antitrust laws in its news gathering and dissemination operations without abridging freedom of the press. *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 193, 222-23 (1943), where the Supreme Court held that the FCC may apply antitrust laws to curb network power. The FCC had ordered NBC to divest one of its two networks, and to limit its ownership of radio stations to one per community.

126. *National Citizens Comm. for Broadcasting v. FCC*, 436 U.S. 775, 797 (1978) (FCC may conclude that diversification of ownership will enhance the possibility of achieving greater diversity of viewpoints); *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367, 390 (1969) (first amendment seeks to preserve an uninhibited marketplace of ideas, not to countenance monopolization of the marketplace); *National Broadcasting Co. v. United States*, 319 U.S. 190, 218 (1943) (community is deprived of good radio service if one qualified operator presents a single service over two stations); *Sanders Bros. Radio Station v. FCC*, 309 U.S. 470, 476 (1940) (Communications Act protects the public, but does not protect broadcasters from competition); *Second Report and Order in Matter of Rules on Multiple Ownership*, 50 F.C.C.2d 1046, 1050 (1970) (public policy requires regulators to place control of broadcasting into many hands); *First Report and Order in Matter of Rules on Multiple Ownership*, 22 F.C.C.2d 306, 311 (1964) (“... 60 different licensees are more desirable than 50, and even 51 are more desirable than 50”).

amendment's policy of encouraging diversity in communications explains the law's tolerance for the allocation of outlets; this attitude is unique to broadcasting.<sup>127</sup> Thus, the FCC made diversification of media ownership a separate, independent licensing objective,<sup>128</sup> believing that the variety of programming would increase with the number of licensees.<sup>129</sup> Stated differently, concentrated ownership in a system of scarce channels especially offends traditional first amendment values.<sup>130</sup>

## 2. FCC Policies Toward Diversification

The FCC has attempted to limit the multiple ownership of broadcast properties since the beginning of television.<sup>131</sup> When television developed<sup>132</sup> as a new form of broadcast service, the FCC sought to avoid a repeat of the anarchy that characterized the early history of radio.<sup>133</sup> In 1948, the FCC declared a moratorium<sup>134</sup> on the processing of television license applications, and spent the next four years studying the problems inherent in a system of limited channels.<sup>135</sup> In

127. EMERSON, *supra* note 7, at 665. For a discussion of the peculiar aspects of broadcasting that distinguish it from other communication media, see *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367 (1969).

128. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965). See also *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *aff'd*, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied sub nom.* *Sacramento Telecasters, Inc. v. McClatchy Broadcasting Co.*, 353 U.S. 918 (1957) (diversification of media control is a relevant factor to consider in licensing, and FCC may determine its significance).

129. See generally *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding rules limiting multiple ownership).

130. The Communications Act gives the FCC power to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g) (1976). The FCC may also "make special regulations applicable to radio stations engaged in chain broadcasting." *Id.* § 303(i). The Supreme Court said that these provisions allow the FCC broad discretion to enact policies that best utilize radio's vast potential within a system of limited resources. *National Broadcasting Co. v. United States*, 319 U.S. at 219.

131. For an overview of the FCC's early positions on multiple ownership, see Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 GEO. L. J. 378, 379-89 (1954).

132. In the late 1940's, 16 television stations were broadcasting programs. Television networks, however, were already in existence. COMPAINE, *supra* note 16, at 65, 80.

133. See notes 17-18 and accompanying text *supra*.

134. Report and Order, FCC 48-2182 (Sept. 30, 1948).

135. For the history of the FCC's study, see Sixth Report and Order, Rules Gov-

1952, it announced a master plan of license allocations.<sup>136</sup> The FCC's first priority was to distribute television service to all parts of the country.<sup>137</sup> After achieving that objective, the agency's next goal was to offer at least one channel to each state and community.<sup>138</sup> The D.C. Circuit quickly upheld the FCC's power to draft the plan,<sup>139</sup> and to enforce it<sup>140</sup> as a means of providing maximum service with a minimum of interference.

Significantly, when the FCC froze<sup>141</sup> the processing of television applications, most license proposals were uncontested. Investors in television were mostly parties with communications backgrounds—radio broadcasters and newspaper publishers—who also had the necessary capital to risk on television's survival.<sup>142</sup> By the time the FCC lifted the freeze and announced its allocation plan, television was ready for a rapid growth phase.<sup>143</sup> The FCC successfully distributed broadcast service geographically. In doing so, however, the FCC continued to license new frequencies to operators already controlling other communication properties. Such owners accelerated their ac-

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erning Television Broadcast Stations, 17 Fed. Reg. 3905-06 (1952). During the freeze, 716 applications for television licenses were pending before the FCC. *See* COLE & OETTINGER, *supra* note 104, at 24.

136. Sixth Report and Order, Rules Governing Television Broadcast Stations, 17 Fed. Reg. 3905 (1952).

137. *Id.* at 3912.

138. *Id.* The FCC used population to determine distribution of channels to each community. Cities with at least one million residents received between six and ten, while progressively smaller communities received disproportionately fewer frequencies. *Id.*

139. *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 287 (D.C. Cir. 1953). *See also* 47 U.S.C. § 151 (1976) (Congress created FCC to regulate radio and make it available to all people rapidly and efficiently).

140. *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 25 (D.C. Cir. 1954). *See also* *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955) (FCC may allocate licenses to distribute radio service fairly among communities); *Television Corp. of Michigan v. FCC*, 294 F.2d 730, 733 (D.C. Cir. 1961) (FCC must justify permission it granted to television station to move its facility and deprive town of service).

141. Report and Order, FCC 48-2182 (Sept. 30, 1948).

142. LPTV should not pose the same economic entry barriers that faced the pioneers of full service television. *See* notes 189-95 and accompanying text *infra*.

143. In 1953, the year after the FCC lifted the freeze, television grew dynamically. The FCC authorized 567 licensees to begin operation, more than twice the number it had approved before the start of the year. Sales of televisions rose 36% in 1953, as consumers spent almost \$385 million on receivers. BROADCASTING, March 23, 1981, at 101.

quisitions in the bigger, profitable markets.<sup>144</sup> Some observers questioned the wisdom of licensing television channels to publishers in the same market,<sup>145</sup> but the FCC attempted to curb concentrated ownership only after group owners had established their multiple holdings.<sup>146</sup>

The FCC designed its current rules on multiple ownership to control both national and regional monopolies.<sup>147</sup> A licensee may not own more than seven of each type of broadcast property.<sup>148</sup> Thus, it may control seven AM and seven FM radio stations, and seven television stations. Only five of the television properties may be VHF television stations.<sup>149</sup> The FCC's other ownership rules, "one-to-a-market" and "duopoly", forbid a licensee from acquiring additional stations in an area it currently serves.<sup>150</sup> The FCC has also extended the "duopoly" rule to refuse a license to a newspaper publisher serv-

144. *See* Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951) (FCC properly refused license to a local publisher in mutually exclusive proceeding in favor of party with no ties to the media in the affected area); Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950) (affirmed FCC decision to deny license to newspaper that had sought to suppress competition in advertising and news dissemination).

145. When the FCC started its 1970 rulemaking on broadcast and newspaper affiliations, it had to confront 94 television combinations. Thirty-four of these cross-holdings were in the top 50 markets, and 52 were in the top 100 markets. By 1975, the number of newspaper licensees in the top 100 markets had increased to 79. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 945, n.11 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978).

146. Much of the buying, selling, and trading of commercial TV stations took place in the late 1950's and early 1960's. The profitability of lucrative, metropolitan stations encouraged "trading up" for properties in the larger markets, so that from 1956 to 1966, group-owned stations in the top 100 markets increased by nearly 50%. COMPAGNE, *supra* note 16, at 82-83.

147. 47 C.F.R. §§ 73.35, 73.240, and 73.636 (1980).

148. *Id.*

149. *Id.* at § 73.636.

150. *Id.* The duopoly rule prohibits a licensee from owning more than one type of broadcast service in the same area. The FCC adopted the rule in the 1940's when AM radio was the only broadcast service. *See* National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 944 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978). The FCC adopted its "one-to-a-market" rule after FM radio and television became profitable investments. The rule forbids licensees from owning more than one broadcast property in a market area. The rule against such multiple holdings applies only to future ownership, and does not require licensees of existing AM-FM-TV combinations to divest. 22 F.C.C.2d at 307. *See also* notes 162-78 and accompanying text *infra*.

ing the proposed broadcast area.<sup>151</sup> The rule also forbids existing "cross-owners" of newspaper and broadcast properties in the same area from transferring all of their holdings to the same party except through inheritance.<sup>152</sup> Finally, a broadcast licensee that purchases a daily newspaper has one day to divest itself of the station.<sup>153</sup>

Despite these restrictions on multiple holdings, the concentration of media ownership has increased in the past twenty-five years and the trend apparently will continue.<sup>154</sup> In 1976, multiple license holders owned or controlled fifty-eight percent of the commercial television stations.<sup>155</sup> This does not, however, accurately reflect the power of group owners. In the nation's ten largest metropolitan areas, groups own more than eighty percent of the stations; in the top fifty population centers, where almost three-fourths of the television audience lives, groups own or control seventy-three percent of the television properties.<sup>156</sup> The three commercial television networks are the elite of these group owners. Each owns a profitable VHF television station in five of the country's largest and most lucrative markets. They are the only group owners (and consequently the only television programmers) with holdings that reach more than twenty percent of the total television audience.<sup>157</sup> The networks are most dominant in their control of programming. Together, they originate eighty-five

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151. Second Report and Order in Matter of Amendment of Rules on Multiple Ownership, 50 F.C.C.2d 1046 (1975), *reconsidered*, 53 F.C.C.2d 589 (1975). The broadcast duopoly rule does not disqualify a licensee from acquiring stations in other areas (provided it does not own the maximum number of properties). Similarly, publishers also may qualify for broadcast licenses in areas that their newspapers do not serve. 50 F.C.C.2d at 1075. *See also* note 173 and accompanying text *infra*.

152. 50 F.C.C.2d at 1076.

153. *Id.*

154. In 1956, media groups held fewer than 40% of the commercial television station licenses. That number increased to about 50% in 1960, and to over 55% in 1966. COMPAINÉ, *supra* note 16, at 80. From 1957 to 1975, the 15 largest group owners increased their holdings from 63 to 80 stations. The proportion of group-owned stations in the top 100 markets leveled off in the mid-1970's because improvements in UHF technology and receivers attracted new licensees. Holdings remained heavily concentrated, however, on the more lucrative VHF band. *Id.* at 83. Newspaper ownership of broadcast stations did decrease over the same period of time. Daily newspapers now control about 30% of these stations. *Id.* at 94.

155. *Id.*

156. *Id.* at 81. *See also* NOLL, PECK, & MCGOWAN, *supra* note 1, at 16.

157. COMPAINÉ, *supra* note 16, at 81.

percent of the shows in "prime time",<sup>158</sup> when audiences and advertising revenues are the largest.<sup>159</sup> They also produce more than half of the programs that their affiliated stations present in local time periods.<sup>160</sup>

As mentioned earlier,<sup>161</sup> many of these multiple holding situations developed early in the history of television. While the FCC often warns against the dangers of concentrated ownership,<sup>162</sup> it has simultaneously adopted a curious policy toward these multiple holdings. In 1975, it voted to apply its ownership rules to a licensee's future purchases rather than to decentralize broadcast ownership by applying them to existing combinations.<sup>163</sup> The FCC's reason for not di-

158. "Prime time" is the four hour period of evening television that runs from 6:00 p.m. to 10:00 p.m. in the midwest. *See also* note 159 *infra*.

159. NOLL, PECK, & MCGOWAN, *supra* note 1, at 15. A network realizes approximately \$2.8 million per rating point for every hour of its prime time television programming that a viewer watches. Thus, the networks strive to present the "least objectionable programming", hoping to hold the attention of as many people as possible. One New York advertising executive says television is the best medium for selling high volume, low price merchandise. A former NBC vice president says that network executives consider television a medium to market goods, not information, entertainment, or enlightenment. The former program chief at NBC says the networks plan to give the audience a bit of melancholy fake realism. "Then you overlay that with what I call trash. . . . It's the ideal content to fit the nature of 'waste time,' which is what people use the medium for." For a further discussion of the networks' philosophy toward prime time programming and audiences, see Andrews, *Peddling Prime Time*, SAT. REV., June, 1980, at 64.

160. NOLL, PECK, & MCGOWAN, *supra* note 1, at 15.

161. *See* notes 141-43 and accompanying text *supra*.

162. *See* note 126 *supra*.

163. Second Report and Order, In the Matters of Amendment etc., 50 F.C.C.2d 1046, 1076 (1975). The FCC said divestiture for the sake of diversity would hamper a station's commitment to serve its community. Commissioners believed that licensees who acquired properties in other areas would not understand local needs and provide poorer service. The FCC also feared that mass divestiture would create a shortage of equity capital that licensees needed for purchases, causing increases in station prices and interest rates. Finally, the FCC deemed blanket divestiture unfair to many group licensees with proven records of broadcast service and who bought and sold stations for reasons other than profit. *Id.* at 1078.

The FCC did order divestiture in the most "egregious cases" of cross-ownership (newspaper-broadcasting). These 16 combinations involved owners of both the only daily newspaper and broadcast station serving a community. The FCC ordered divestiture of these groups within five years, but left 90 newspaper licensees in control of stations in the communities where they published. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d at 944-46, n.18.

Recently, one publisher announced plans to divest its local broadcast property despite not qualifying as the owner of an "egregious" combination. Pulitzer Publishing

vesting media groups at license renewal complements its rationale for favoring incumbent licensees in comparative hearings. The FCC believes that "grandfathering", or leaving existing media conglomerates in place, stabilizes the industry and its ownership.<sup>164</sup>

The Supreme Court recently approved the FCC policy opposing divestiture of media groups. In *FCC v. National Citizens Committee for Broadcasting*,<sup>165</sup> the Court reversed that portion of the D.C. Circuit's opinion vacating the FCC rule as it applied to existing combinations.<sup>166</sup> In reinstating the provision against forced divestitures,<sup>167</sup> the Court held that the statute<sup>168</sup> authorizes the FCC to codify its policy on licensing procedures, including procedures designed to diversify ownership.<sup>169</sup> The Court believed that the FCC had rational reasons for not using its licensing power and ownership rules to dismantle ownership of the broadcast industry.<sup>170</sup> The Court noted that some media groups had a proven record of serving the public interest,<sup>171</sup> and new ownership could not guarantee that it could match

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Co. of St. Louis traded its St. Louis VHF television station to Multimedia, Inc. of Greenville, S.C. in return for two of the latter's southern VHF stations and \$8.25 million. Multimedia owns six AM and six FM radio stations, six television stations, and publishes 35 newspapers. Pulitzer owns four television stations and an AM-FM combination. By acquiring Multimedia's two VHF stations, Pulitzer would own six such services. Thus, it must divest itself of one of those properties to comply with FCC limits on VHF ownership. BROADCASTING, March 23, 1981, at 32. See also note 149 and accompanying text *supra*; note 173 *infra*.

164. See note 120 and accompanying text *supra*.

165. 436 U.S. 775 (1978).

166. See *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 951 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978). The D.C. Circuit held that previous decisions of the Supreme Court provided the FCC with authority to prospectively ban media combinations. *Id.* at 951. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholds ban on cross-cable ownership); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956) (upheld numerical limits on station ownership in the public interest). The court also declared that the FCC could move against these combinations without first proving they were harmful. It said that the three-year renewable license does not create a vested property right in a licensee that insulates it from agency accountability. The court noted that divestiture would increase the likelihood that different viewpoints would serve the public. 555 F.2d at 962-63.

167. 436 U.S. at 805.

168. 47 U.S.C. § 303(r) (1976).

169. 436 U.S. at 793-94.

170. *Id.* at 806-08.

171. *Id.* at 806. See also *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974) (petition to challenge renewal denied for failing to submit facts that

that performance in short- and long-term commitments.<sup>172</sup> The Court also suggested that divesting newspaper publishers of their licenses might decrease the quality of local programming.<sup>173</sup> The Court said publishers would trade their broadcast properties to maintain their interests in lucrative stations, resulting in licensees that were less familiar with their new broadcast markets.<sup>174</sup> Finally, the Court rebuked the foundation of both *Greater Boston*<sup>175</sup> and *Citizens*

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show specific abuses of multiple ownership). In *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970), the court upheld the FCC's denial of a hearing to Salt Lake City residents who opposed the renewal of an AM radio station license. The station was part of an AM-FM-TV combination. The corporation that owned the station was a subsidiary of the Mormon Church, which published one of the city's two daily newspapers. The Church also owns Brigham Young University, which in turn owns a license for a TV-FM complex in Provo, Utah. The court said that the opponents of media concentration must do more than generalize. They must also prove specific injury in order to warrant a hearing. *Id.* at 558-59.

Challengers in a license contest have a tactical disadvantage when the FCC accepts evidence of incumbent performance. These opponents have no record of their own to offer in rebuttal. Others doubt the reliability of program records as an accurate measure of competency. The FCC gathers its own data on broadcaster performance by selecting a "composite week" of seven days from the three year license period. Commissioners evaluate the programs the licensee presents in this period, which often provides a misleading indication of actual performance. See COLE & OETTINGER, *supra* note 104, at 134-35.

172. 436 U.S. at 806-07. See also *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956) (TV license awarded to newspaper publisher for program proposal deemed a more reliable guide to fulfillment of future performance based on communications record). Multi-station licensees in large markets may also have an advantage over single station owners. They can bargain for better prices against networks, national advertising salespeople, and independent program supplies. Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282, 287, n.20.

173. 436 U.S. at 808.

174. *Id.* at 813-14. In other words, if newspapers can hold broadcast licenses, the law prefers that these combinations exist in one geographic area, as most now operate. See note 119 *supra*. The companies that recently announced they would swap stations apparently believed it safer to divest of local holdings. See note 164 *supra*.

Earlier, when publishers could not anticipate the policy toward local cross-ownership, two such licensees conducted a similar trade. The parent corporation of the Detroit Evening News traded the license of its local television station to the Washington Post Corp. in return for that company's local station license and two million dollars in cash. The two stations were worth an estimated \$50-100 million each, and the companies said that they wanted to plan their future TV operations "more surely and securely." Wall St. J., Dec. 7, 1977, p. 19, col. 1. The FCC approved the exchange without comment. *Assignments and Transfers*, 67 F.C.C.2d 1609 (1978).

175. See notes 92-98 and accompanying text *supra*.

*Communications Center*,<sup>176</sup> holding that the FCC may properly distinguish the license *renewal* contest from a hearing involving mutually exclusive applicants for a *new* frequency.<sup>177</sup> Thus, the Court concluded that the FCC could downplay the significance of diversification when considering a renewal candidate.<sup>178</sup>

This discussion demonstrates that both the FCC and the Supreme Court accept group ownership of the scarce broadcast channels. One researcher of media ownership patterns found no tangible proof of harm resulting from multiple ownership.<sup>179</sup> Supporters of curbing concentration reply that the *potential* for restricted competition in advertising and programming requires prophylactic action.<sup>180</sup> As Judge Tamm of the D.C. Circuit stated, "[T]his creeping growth of media cartels and conglomerates is likely to produce even more bland and homogeneous intellectual fare . . ." than broadcasting currently offers.<sup>181</sup>

This Note cannot resolve the debate over the effect of multiple ownership on television programming. It does suggest that group holdings frustrate the congressional intent to diversify control of television. To the extent that the FCC's regulatory policies have encouraged these ownership patterns, the agency bears the responsibility for shutting off the access of newcomers to television ownership. The decision of the agency, with the Supreme Court's approval, not to disturb existing ownership patterns has left a small number of licensees in control of the vast number of stations, particularly in metropolitan areas.

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176. See notes 92-102 and accompanying text *supra*.

177. 436 U.S. at 810-11.

178. *Id.* at 810. The Court said the FCC's policy toward multiple ownership never intended to disrupt local service. The Court opined that the agency's concentration of control rules in the 1940's, those affirmed in *Storer*, and the 1972 duopoly and one-to-a-market rules, all discouraged divestiture of existing combinations. *Id.*

179. *COMPAINÉ*, *supra* note 16, at 86-87. The author also cites a Rand Corp. study that concluded that the effect of media concentration is not yet proven. *Id.* at 100.

180. Commission to Designate for Hearing Applications to Acquire Interests in a Second VHF Station in Major Markets, 45 F.C.C. 1851 (1964). The title of the Notice reflects the FCC's concern about such holdings. The agency believed it necessary to hold hearings on applications that would increase a licensee's existing holdings in the top 50 markets. Specifically, the FCC ordered a hearing if the applicant either had a station and wanted a license for a second facility, or if it owned no properties but was seeking two or more licenses. See also *NOLL, PECK, & MCGOWAN*, *supra* note 1, at 107.

181. *Hall v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring).

The inescapable conclusion is that broadcast television today is not the "uninhibited marketplace of ideas" that the first amendment supposedly fosters in our communication systems. The current system locks out public interest organizations, neighborhood groups, minorities, and others whose interests television ownership would serve. For these and other similar groups, access to broadcast television ownership and control depends on government policies that open the airwaves to new outlets for a reasonable price.<sup>182</sup> The FCC's new low power television service may offer those opportunities.

#### IV. LOW POWER TELEVISION

##### A. Introduction

LPTV is a new television service<sup>183</sup> that has the capability to open

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182. Existing, qualified broadcasters may contest the efforts of newcomers to bid for available licenses. Cable television's ability to provide its subscribers with dozens of channels has posed a competitive threat to the three broadcasting networks and their local affiliates. A top official at ABC Television says cable has made the current multiple ownership rules obsolete, and burdensome on this industry. "If cable operators are free to program up to 78 channels in as many outlets as they wish, then surely broadcasters should not be limited to one channel in seven markets." Address by Leonard H. Goldenson, Chairman of the Board and Chief Executive Officer, American Broadcasting Co., Nat'l Press Club (Sept. 17, 1980), *reprinted in* 1980 VITAL SPEECHES OF THE DAY 57, 59. Goldenson offered a six-point program to amend FCC rules, including the abolition of multiple ownership rules and restrictions on newspaper holdings.

183. On August 8, 1978, the FCC initiated its study of Low Power Television in Notice of Inquiry, 68 F.C.C.2d 1525 (1978). In its order, the FCC said its goal was to increase "diversity of programming to both rural and urban areas." *Id.* Following a two-year study, the agency's staff determined that technological advances, the shortage of television channels (particularly in metropolitan areas), and the public's desire for more program choices justified the creation of LPTV. *See generally* REPORT, *supra* note 50. The FCC relied on the staff report to quickly initiate a rulemaking procedure on the new LPTV service. Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, Notice of Proposed Rule Making, 45 Fed. Reg. 69178 (1980) [hereinafter cited as Notice of Proposed Rule Making]. The FCC completed its Report and Order on March 4, 1982, voting to establish the LPTV service effective June 17, 1982. In its final rulemaking, the Commission set three goals for LPTV: (1) to achieve a fuller utilization of the broadcast spectrum; (2) to make broadcasting more responsive to consumers; and (3) to "open the regulatory doors to purveyors of alternate technologies." Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Final Rule, 47 Fed. Reg. 21468 (1982) [hereinafter cited as Final Rule]. *See also* News Release of Federal Communication Commission, in Washington, D.C. (March 4, 1982) [hereinafter cited as Release].

new broadcasting outlets to persons inadequately served by the present structure of the television industry. The FCC will provide for LPTV by amending its current rules on broadcast translators.<sup>184</sup> Translators historically have offered television service to geographically isolated or sparsely populated areas that could not support local television.<sup>185</sup> The translator plays a passive role, receiving the signal of one station and transmitting it locally on another channel.<sup>186</sup>

LPTV will operate on VHF and UHF frequencies at a fraction of the power that full-service stations use to transmit.<sup>187</sup> The "low power" that the new mini-stations require for signal transmission will enable them to broadcast on channels that television sets are capable of receiving, without interfering with signals that present stations send.<sup>188</sup> In fact, the FCC now believes that technological advances<sup>189</sup> have made it feasible to expand translator service into net-

184. 47 C.F.R. §§ 74.701-801 (1980). See also Notice of Proposed Rule Making, *supra* note 183, at 69178.

185. See In the Matter of the Rules Governing Television Broadcast Translator Stations, 13 F.C.C.2d 305 (1968). For the history of the development of the television translator, see REPORT, *supra* note 50, at 5-22.

186. Translators may broadcast limited material, only in exceptional situations such as emergencies, and for a maximum of 30 seconds per hour of photographs, slides, and recorded appeals for operating funds. 47 C.F.R. § 74.731(f) (1980).

187. LPTV stations and translators will broadcast at 100 watts of power on VHF, and 1,000 watts on UHF. Release, *supra* note 183. By comparison, a full power UHF station transmits at up to five million watts. Wall St. J., May 28, 1980, p. 14, col. 2. A 100,000 watt VHF station, the maximum for that type of service, can cover a radius of 60 miles; a VHF LPTV signal will travel 10 to 15 miles. *Id.* Sept. 10, 1980, p. 2, col. 2.

188. The FCC has assigned LPTV stations "secondary" status. Final Rule, *supra* note 183, at 21471. Secondary status, by definition, makes the rights of existing and new full-service stations superior to LPTV. The consequences, therefore, are: (1) if an LPTV station interferes with a full-service station's signal, it must correct the problem or leave the air; (2) if a new full-service station interferes with an existing LPTV signal, the LPTV station must yield the airspace. *Id.*

The FCC staff says translator interference has not posed a problem for broadcasters. The agency has received only two complaints about the 2,400 licensed VHF translators. The staff believes low power licensees can easily avoid interference problems by carefully selecting their antenna sites and channel locations. Most LPTV stations will probably broadcast on UHF, where fewer operating stations will decrease the chance of interference. See REPORT, *supra* note 50, at 125-26. See also notes 28-33 and accompanying text *supra*.

189. New low-cost videotape players, improved circuitry, and advances in satellite technology should make equipment more manageable in size and cost, while providing reliable, inexpensive program services. Notice of Proposed Rule Making, *supra* note 183, at 69181. Equipment manufacturers expect to reap a bonanza from their products in the next three years, especially in the design of 1,000-watt UHF stations

work,<sup>190</sup> regional, and local LPTV systems.<sup>191</sup> If LPTV can successfully convert passive translators into original programming television stations, it will open the saturated broadcast frequencies to new facilities and help the FCC fulfill the congressional goal of efficient utilization of the limited broadcast airwaves.<sup>192</sup>

## B. *The Potential of LPTV*

### 1. A Chance to Diversify Control of Mass Media

As this Note has discussed, the FCC steadfastly refuses to restructure television ownership through license proceedings, its only available mechanism.<sup>193</sup> The new LPTV service would not displace the media conglomerates that now control so many television stations, particularly in the cities. The technology would, however, force these group owners to share the television airwaves with new and creative station owners and managers.<sup>194</sup> Current licensees may face new competition for their viewers' attention. The FCC says, however,

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that will dominate LPTV service in metropolitan areas. See BROADCASTING, Oct. 13, 1980, at 62.

190. FCC Chairman Fowler hopes LPTV will lead to a fourth network. See Wall St. J., Mar. 5, 1982, at p. 8, col. 3.

191. REPORT, *supra* note 50, at 34.

192. The paramount issue before the FCC, as it reviewed its lengthy administrative record on LPTV, was whether it should create the new broadcast service. The record convinced the Commissioners that they should proceed. Generally, the federal government, broadcast and cable industries, and scores of private and public interest organizations overwhelmingly endorsed the idea of low power facilities. The FCC remarked, "What is most noteworthy is the paucity of direct opposition to the concept of a lower power television service." Final Rule, *supra* note 183, at 21470. Former FCC Chairman Charles Ferris, who ran the agency when the LPTV study began, believed that LPTV's potential for new programs, relatively low startup and operational costs, and ability to program to a targeted audience offers new opportunities to those who cannot afford access to full service television. Notice of Proposed Rule Making, *supra* note 183, at 69191.

193. See notes 17-182 and accompanying text *supra*. For a summary of the FCC's current philosophy on license renewal policy, see note 120 *supra*.

194. For example, the Missouri Public Interest Research Group (MOPIRG) has applied for a UHF low power facility in St. Louis, Missouri. MOPIRG is one member of "Media Access Group," a coalition of 47 community and public interest organizations in the metropolitan area dedicated to the discussion of public issues. Other members of "Media Access Group" include the Gray Panthers, American Friends Service Committee, Common Cause, The St. Louis Tenants Union, Solar Energy Association, and the Archdiocese of the St. Louis Human Rights Office. MOPIRG proposes to use its LPTV station to provide its audience with information on community issues, to offer interested persons access to the stations, and to provide a variety of

that it will not allow LPTV to harm the stability of the broadcast industry or the investments of its licensees.<sup>195</sup>

Clearly, LPTV has generated excitement for those who have sought access to a television outlet but experienced frustration in trying to acquire a broadcast license or station. Interested parties have flooded the FCC with applications for LPTV operating permits.<sup>196</sup> Three factors help to explain the interest of potential licensees. First, the agency has undoubtedly encouraged such a response with proposed rules that make financing and operating a mini-station relatively easy.<sup>197</sup> An operator will decide the type and amount of

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services such as college speaker series, debates, and to trade programs with other LPTV stations. Application of MOPIRG for LPTV Service, at 12-13.

195. REPORT, *supra* note 50, at 3. BROADCASTING, the influential trade journal, has attacked LPTV in editorials since the FCC announced it would propose rules for the service. The magazine aimed its attack primarily at former Chairman Ferris' "laissez-faire" attitude toward the industry. BROADCASTING, Sept. 29, 1980, at 90 (FCC undertaking pays less attention to broadcast engineering than to social engineering, "with no more than an academic knowledge of the marketplace"); *id.* Sept. 8, 1980, at 78 ("motives of the manipulators of LPTV are utterly transparent"—they are political).

These new channels, however, might eventually benefit full-service broadcasters. With additional outlets, unpopular regulations such as the Fairness Doctrine may become obsolete. The FCC would probably find any rules based on the scarcity rationale difficult to justify. Lively & Leahy, *Government and the Media: Regulating a First Amendment Value System*, 31 FLA. L. REV. 913, 930 (1979).

Regardless of the benefit of LPTV, these new outlets should not threaten broadcasters. LPTV's secondary status and its limited audiences should not cause much economic unsettling for the powerful signals of full service, commercial stations. See note 188 and accompanying text *supra*.

196. In September, 1980, the FCC established interim procedures to process translator applications until it could complete the rulemaking process. Notice of Proposed Rule Making, *supra* note 183, at 69190. The FCC imposed a series of deadlines for applications, allowing interested parties to apply for channels, but automatically rejecting those who filed after the time limit expired. *Id.* Within months, this procedure proved inadequate as more than 5,000 applicants filed for low power translator service. In response to this overwhelming demand, the FCC voted to freeze the application process to allow its staff time to separate for processing and approving the uncontested applications. FCC Order 81-173 (Apr. 9, 1981). With more than 6,500 applications now awaiting processing, and possibly 12,000 additional applicants awaiting removal of the freeze, the FCC has decided not to lift the moratorium until it can reduce the backlog. Final Rule, *supra* note 183, at 21469, 21472. See Wall St. J., Mar. 5, 1981, at p. 8, col. 3. The FCC will attempt to reduce the backlog by grouping the applications in three tiers, and processing each tier in order, beginning with the most rural applications. Final Rule, *supra* note 183, at 21472.

197. See generally Final Rule, *supra* note 183. See also Notice of Proposed Rule Making, *supra* note 183, at 69181. The agency believes it can relax operating standards because the new service will not harm existing television stations. *Id.* at 69182.

programming it would provide,<sup>198</sup> and the manner in which it will generate financial support.<sup>199</sup> Second, LPTV licensees will risk less by investing in the new service than did the full-service television pioneers.<sup>200</sup> Third, television has succeeded as an industry<sup>201</sup> and

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*See also* note 188 *supra*. The FCC, however, would break from current translator rules by requiring a qualified translator engineer to supervise LPTV-originated programming. *See* Notice of Proposed Rule Making, *supra* note 183, at 69181, n.16. The FCC would hold LPTV stations to statutory obligations such as prohibitions on broadcasting obscenities and lottery information. Licensees, however, would comply with only minimal demands under the Fairness Doctrine, equal time provisions, and access rules for federal electoral candidates. Release, *supra* note 183. *See* 47 U.S.C. § 315 (1976).

198. Final Rule, *supra* note 183, at 21470-71. The basis of this "hands-off" policy is the FCC's belief that LPTV is well-suited to target programs to local interests. The Commission believes that these interests form a "marketplace" of service goals. The Commission believes that the public can receive maximum service from LPTV by keeping regulation of programming to a minimum. *Id.* The agency staff also believes that sufficient programming exists to supplement locally originated material. In 1978, the available supply of programming included 5,000 series, 18 special non-broadcast satellite services such as movie and sports channels, and religious and family programming. REPORT, *supra* note 50, at 173.

199. *Id.* at 29-31. An operator could tap a variety of financial resources: local contributions from civic-minded organizations; advertising sales; a government-created television tax district; and subscription sales. For example, MOPIRG has budgeted just under \$50,000 for startup and temporary operating costs. It has secured a bank loan for part of the cost, and other members of "Media Access Group" have pledged assistance. MOPIRG hopes to institute some subscription service to defray special program costs. Application of MOPIRG for LPTV Service, at 15-16.

200. Ironically, the FCC defends its questionable rules on network and multiple ownership of LPTV stations as a way to bring industry expertise into the new system. Final Rule, *supra* note 183, at 21489. In an editorial attack on LPTV, BROADCASTING predicted that "hundreds, even thousands of venturers will rally" to Ferris' "exploitation of the new service, without any guarantee of survival." BROADCASTING, Sept. 15, 1980, at 114. The industry deserves credit for expressing concern over those who gamble on an LPTV station. It might calm its fears by remembering the experience of the first investors in its field. As discussed earlier, these individuals risked entering a business of which they were ignorant, in a climate of cynicism about television's ability to survive. *See* notes 2, 141-42, and accompanying text *supra*. Investors entering LPTV also do not know whether the new service will succeed, but they have an advantage over their television predecessors: they know the public trusts and desires more television service. *See* notes 3-4 and accompanying text *supra*.

During his term as FCC Chairman, Ferris advocated as much freedom for broadcasting as the limited systems would tolerate. "If a company has the money to invest in a telecommunications source, let it, and leave it to the public to determine whether the service will survive." BROADCASTING, Jan. 19, 1981, at 37. Ferris developed his market philosophy while adhering to the traditional concept that broadcasters in a system of scarce frequencies serve as the trustees of the public's airwaves. As discussed earlier, current Chairman Fowler advocates abandoning this traditional approach to broadcasting. Fowler also recognizes the entrepreneur's role in

has become an important part of life.<sup>202</sup> A carefully planned and managed metropolitan LPTV station that offers specialized program alternatives to meet the needs of diverse audiences should succeed. If it does, it will help broadcasting achieve the important first amendment goal of offering the public a variety of program choices.<sup>203</sup>

## 2. Providing the Best Practicable Service

If LPTV succeeds in diversifying control of television, it may also achieve the second regulatory goal of offering the best practicable television service. Those who seek mini-stations to serve particular community needs presumably would dedicate themselves to their specialized audience, and program accordingly. Management that understands a particular community would also respond more sensitively to the viewers' changing needs than to the absentee licensees of many full-service television stations.<sup>204</sup>

A survey of the parties who participated in the FCC study of LPTV demonstrates the potential that mini-stations have for offering unique programming. Many respondents believe LPTV can offer a variety of services to urban residents: rental assistance; education for bedridden elderly; adult counseling; public discussions; amateur theater; musical performances; local government proceedings; high school drama and athletic events; and general access to the broadcast facility.<sup>205</sup> One might reasonably conclude that interested parties who look to television as a source of programming for these various proposals now lament television's current catering to bland, mass audi-

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broadcasting, but he supports replacing government allocations of frequencies under the "trustee" model with a total market approach to access. See note 106 and accompanying text *supra*. Fowler recognizes the potential of LPTV, see note 190 *supra*, and the FCC expects market forces to dictate the operational and structural composition of LPTV. Release, *supra* note 183.

201. See notes 3-4, 51, 159, and accompanying text *supra*.

202. See note 3 and accompanying text *supra*.

203. See 1965 Policy Statement, 1 F.C.C.2d at 396. See also *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 949 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978) (FCC acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 42 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (because radio and television consume massive portions of America's time, we must assure that the public has access to varied information so that it may remain an intelligent group).

204. See Final Rule, *supra* note 183, at 21470.

205. See REPORT, *supra* note 50, Attachment A, at 7-10.

ence tastes.<sup>206</sup>

### C. Ownership Criteria

The FCC's final rules on LPTV ownership<sup>207</sup> reflect the agency's interest in diversification. Commendably, the FCC will not subject LPTV applicants to the time-consuming and expensive comparative hearing process that mutually exclusive applicants for new broadcast licenses have faced.<sup>208</sup> Instead, the applicants will proceed to a "paper hearing," with applicants submitting written evidence of their qualifications.<sup>209</sup> The Administrative Law Judge will have discretion

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206. Former FCC Chairman Newton Minow gained instant notoriety in his first public address as agency chief when he attacked the quality of television. Minow chose as his audience the National Association of Broadcasters, the industry's trade organization and chief lobbyist in Washington. Minow's famous line, labelling television programming "a vast wasteland," overshadowed his plea for a more diversified programming mix:

There are many people in this great country and you must serve all of us. You will get no argument from me if you say that, given a choice between a western and a symphony, more people will watch the western. . . . We all know that people would more often prefer to be entertained than stimulated or informed. But your obligations are not satisfied if you look only to popularity as a test of what to broadcast.

Address by Chairman Minow, Nat'l Ass'n of Broadcasters Convention (1961), *reprinted in* 27 *Vital Speeches of the Day* 533, 535 (1961). *See also* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 200 (1973) (Brennan, J., dissenting) (any person wanting to market a product has direct, personal, and instantaneous audience to the electronic media, but not so for one seeking to discuss a social issue); NOLL, PECK, & MCGOWAN, *supra* note 1, at 48 (the present system tends to produce programming for a mass audience, neglecting the demands of viewers with special tastes).

207. The FCC considered three criteria for comparing mutually exclusive LPTV applicants. It would have given preference to 1) the applicant that filed first; 2) an applicant with at least 50% minority control; and 3) noncommercial applicants. Notice of Proposed Rule Making, *supra* note 183, at 69189-90. Commendably, it has abandoned the "firstness" and noncommercial preference criteria. Final Rule, *supra* note 183, at 21485. Neither criterion furthered the FCC's goal of program and ownership diversification, and the bias against commercial applicants may have eliminated important sources of finance.

208. *Id.* at 21484-85. The staff believes that the comparative hearing would waste time and money for a limited service such as LPTV. The staff compared the idea to "a requirement that the U.S. Supreme court grant certiorari in all cases involving parking tickets." REPORT, *supra* note 50, at 251. Congress recently amended the Communications Act to replace the comparative hearing with a lottery system for awarding new, full-service licenses. 47 U.S.C. § 309 (1976), *as amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242(a)(i)(1), 95 Stat. 357.

209. Final Rule, *supra* note 183, at 21485.

to order pre-hearing discovery, or oral testimony.<sup>210</sup> The hearing will evaluate the merits of the applicants based on two comparative criteria. A brief discussion of each requirement follows.

### 1. Diversification of Media Control

In a license contest between mutually exclusive applicants, the FCC will accord a preference to the party that will best further the goal of diversifying "control of the media of mass communications."<sup>211</sup> While the definitions of the terms and the mechanics of applying the preference are not yet defined,<sup>212</sup> presumably the applicant controlling the fewest number of communication outlets will receive the LPTV license.

This diversification-oriented preference may help to offset a separate, distressing rule for LPTV ownership. The agency will not restrict the number of LPTV licenses that a party may hold.<sup>213</sup> The FCC justifies this position based on the nature of LPTV. As operators of secondary facilities, LPTV licensees will likely operate on low-profit margins.<sup>214</sup> Additionally, mini-stations supposedly do not raise the same concerns about monopolization that full-service stations do.<sup>215</sup> Commissioner Washburn correctly argued, however, that ownership limitations would encourage more diversity of control and viewpoints.<sup>216</sup> In addition, multiple LPTV holdings pose the same

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210. *Id.*

211. *Id.* at 21486.

212. *See* note 183 *supra*.

213. Final Rule, *supra* note 183, at 21488-89. It also will not forbid current broadcast licensees, cable operators, and newspaper publishers from owning the stations. Finally, the three commercial networks may own low power stations. *Id.* The FCC accepted the contention of local broadcasters and the networks that their expertise would benefit the fledgling low power industry. The Commission also believed that multiple ownership would facilitate the production of better programming. The Commission thought that the diversification of ownership criterion for awarding LPTV licenses would adequately protect newcomers to the industry in contests against current broadcasters. Finally, the FCC felt assured by the variety of applicants in the 7,000 license requests that concentrated ownership was not "considered a serious or dangerous enough possibility to warrant structural restraints in ownership." *Id.* at 21488.

214. *See* note 199 *supra*. The FCC is warning applicants that "a low-power license may not be a license to print money." Final Rule, *supra* note 183, at 21493.

215. *See* notes 147-60 and accompanying text *supra*.

216. Notice of Proposed Rule Making, *supra* note 183, at 69191-92 (concurring statement of Commissioner Washburn).

problems that group ownership of full-service stations present.<sup>217</sup>

## 2. Preference for Minorities

Under the second evaluative criterion, the FCC will grant preference at the "paper hearing" stage to an applicant having at least fifty percent minority control.<sup>218</sup> The agency deserves credit for encouraging such participation in view of the disproportionate lack of minority ownership of full-service broadcasting.<sup>219</sup> Mass media in urban areas has not done all it can to meet the special needs of minority groups, particularly blacks and native Americans.<sup>220</sup>

The FCC certainly should consider minority participation in its evaluation of mutually exclusive candidates, but making minority participation one of two equal criteria may arbitrarily and unfairly eliminate others with legitimate needs for a station.<sup>221</sup> Rather than structuring LPTV ownership and service on a quota system, the FCC should consider the structural qualifications outlined in its 1965 Policy Statement.<sup>222</sup> In cities with large minority populations, the representatives of these groups would probably qualify under these

217. See generally notes 131-82 and accompanying text *supra*.

218. Final Rule, *supra* note 183, at 21486.

219. Minorities comprise 20% of the nation's population but control less than one percent of the broadcast properties. *COMPAINÉ*, *supra* note 16, at 78.

220. The United States Commission on Civil Rights blames a lack of capital and FCC procedures that deny minority groups access to license applications for the low percentage of black television control. See United States Comm'n on Civil Rights, Federal Civil Rights Enforcement Effort 278 (1971). See also *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (black ownership and participation would likely result in responsive programming to black citizens); *TV-9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied sub nom. Mid-Florida Television Corp. v. TV-9, Inc.*, 419 U.S. 986 (1974) (law does not foreclose consideration of black ownership in comparative license hearing).

In some cities, television and other media may not adequately serve substantial native American populations. See *Nat'l Geographic*, Nov. 1980, at 674-77 (discussion of the problems of 20,000 native Americans living in Minneapolis and St. Paul, Minnesota).

221. Commissioner Fogarty imagined such a situation in the following hypothetical: blacks controlling two LPTV stations in Detroit apply for a third new facility. An applicant from the nearby city of Hamtramack, which has a large Polish population, also seeks the license. If the FCC applies its two proposed paper hearing criteria, the blacks would win the license. The result probably would not further the public interest in LPTV service in the general area. Notice of Proposed Rule Making, *supra* note 183, at 69193 (concurring statement of Commissioner Fogarty).

222. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d at 393. See also notes 78-86 and accompanying text *supra*.

structural criteria without unfairly eliminating others from consideration through a quota system.

#### V. CONCLUSION

Broadcast television represents a powerful tool of mass communication that serves important societal interests. The technological limitations of the broadcast airwaves, and the FCC's failure to carry out congressional intent in regulating the industry, have combined to severely limit access to this medium. Thus, most persons play a passive role of watching programming that others produce elsewhere to serve mass tastes. Low power television has the potential, as an alternative to the current industry, to create hundreds, and perhaps thousands of new facilities that could meet the specialized needs of a diverse population. The FCC designed its LPTV ownership rules to further the diversification of control over broadcast communication, and to encourage minority group ownership. These rules have the potential for creative development of the service despite the FCC's questionable decision not to restrict multiple LPTV holdings. As the FCC begins to administer this exciting new broadcast service, it must recognize its forty-eight year old responsibility of ensuring that broadcasting serves the *public* interest, convenience, and necessity.