STATEMENT OF DEAN BURCH, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION
Before the
SUBCOMMITTEE ON COMMUNICATIONS AND POWER
of the
HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
on
BROADCAST LICENSE RENEWALS

March 14, 1973

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to be here today to discuss the Commission's views on amending the Communications Act of 1934, with regard to broadcast license renewal procedures.

The Commission regards this as the most important legislative matter affecting the broadcasting industry at this time. And we strongly believe that there is a need for clarifying legislation. Since this is so, I should like to discuss at some length the issues, the events that have led to the present confused situation, and how we believe it should be clarified by legislation.

There are two distinct aspects of the license renewal process I would like to address and distinguish here: first, the ordinary non-comparative renewal, and, second, the renewal involving a competing challenger. The scheme of the Communications Act is clear. The broadcast licensee is a public trustee, given a limited license which can be renewed by the Commission only if it is in the public interest to do so. The renewal process thus plays a central role in insuring that licensees fulfill their public trustee responsibilities. And the

Congress provided two procedural devices whereby a licensee's performance could be measured at renewal time. I shall discuss first the ordinary renewal process not involving a competing application for the same channel or frequency, and then address the more troublesome issues arising from the comparative renewal hearing process involving a competing applicant.

In the ordinary renewal process, the licensee each three years must show that in its overall operations it has served the public interest. The public in the area of the station can participate in this process, either by filing informal complaints or by filing a formal petition to deny. While the threat of non-renewal implicit in the filing of public objections is a bedrock protection of the public interest, it is important to remember that to gain renewal in this ordinary, non-comparative situation, the licensee does not need to demonstrate that its operation is somehow praiseworthy. Logically and practically, we need only find that the applicant has served the public interest in a manner that is sufficient - but no more - to get a renewal in this non-comparative situation.

This brings me to the second situation -- one in which the renewal applicant can be challenged by a newcomer filing a competing application. It is this possibility of challenge that provides a competitive

spur to the existing licensee. To avoid being challenged by a competitor or to insure that the renewal applicant can prevail if challenged, the broadcaster is given an incentive to provide better than just that level of service that would warrant renewal in a non-comparative situation. The crucial question is, of course, what is the nature of that better service -- how is it to be characterized. Mr. Chairman, I shall devote most of my presentation to that issue, for it is in this area where we believe clarifying legislation is most needed.

The regular (non-comparative) renewal process

With one exception -- the desirability of the five-year license term -- we think there is no need for legislation relating to the regular (non-comparative) renewal process. The law is clear and workable. The public is given notice of pending applications (Section 311(a)) and has the right to participate in the renewal process, either by filing informal comments or a formal petition to deny (Section 309). As provided in the statute, the burden is upon the petitioner to show, through specific allegations of fact supported by affidavit, that there exist substantial and material questions of fact raising the question that a grant of the renewal would be prima facie inconsistent with the public interest. If the petitioner meets that burden, the Commission must designate the application for a hearing; [1/] if it does not, the license is renewed.

1/ The burden of proceeding with the introduction of evidence and the burden of proof in the hearing are on the applicant, except that, as to issues raised in a petition to deny, the Commission can assign either or both burdens to the petitioner.

A leading case involving the handling of petitions to deny under the statute is Renewal of WMAL-TV, 27 FCC 2d 316 (1971). I should like to submit for the record the Court's opinion (Chuck Stone v. FCC.), upholding our WMAL decision since it aptly points up the pertinent law.

I do not mean to indicate that we have no problems with the non-comparative renewal process, but only that we see no need for further legislative refinements. The chief problem is the growing pattern of petitioning groups to wait until just before the renewal date to initiate discussions with a licensee concerning its service to the area. The result all too often is a disorderly renewal process, replete with crisis negotiations and last minute requests for extensions of time for the filing of petitions to deny. We are attempting to deal with these problems in an overall rule making proceeding. Docket No. 19153. 2/

Our goal in that proceeding may be shortly stated: to foster a continuing dialogue between the licensee and its public, so as to avoid this triennial explosion of interest and crisis. Our proposals are focused largely on filing reforms, on periodic station announcements of the licensee's status as a public trustee or its forthcoming renewal, and on annual and revised renewal reporting forms.

2/During FY 1972, 68 petitions to deny were filed against 108 broadcast stations. Most were filed by minority groups and contained allegations concerning ascertainment efforts, minority programming, and employment practices.

The underlying concept was aptly stated by Chief Justice Burger -- to take full "... advantage of the public's 'active interest'..." in broadcasting. It is as a practical matter very difficult for the Commission effectively to judge whether its thousands of broadcast licensees are reasonably and in good faith meeting the needs and interests of their areas. Areas differ markedly in their needs, their problems, their ethnic compositions and in a score of other relevant ways. The scheme of the Act presupposes local outlets serving local needs; the genius of the American system of broadcasting is its pluralism -- thousands of licensees making individual judgments geared to the needs of their particular service areas. To make the judgment whether licensees are ascertaining and seeking to meet the needs and interests of their areas, the Commission must rely upon "feedback" from those areas. To facilitate this "feedback" and to facilitate the local resolution of disputes is the central thrust of our renewal policies and proposals in Docket 19153.

There are other significant studies in this field. For example, we are exploring in Docket No. 19518 what policies are appropriate to prevent abuses in the field of reimbursements to petitioning groups. In the important field of minority employment discrimination, we are seeking ways to deal with emerging problems before the renewal stage --

to effect needed changes removed from the context of a "life or death" situation for the broadcaster. I will not detail these matters further, but I would be glad to give you a report on our progress in these areas. In the 19153 proceeding, I can assure the Subcommittee that we are very close to a final decision.

The proposed five-year broadcast license term

Several of the license renewal bills under consideration by the Subcommittee would amend the Communications Act to provide for a renewal term of not longer than five years.

While various views have been expressed over the years on the appropriate length of the license term, the Commission as early as 1957 commented favorably on three House bills proposing a five-year term, and in October of that year requested similar legislation in its legislative program for 1958. It is our present view that the public interest would be served by extending the license period from three to five years.

(Commissioners Johnson and Hooks disagree and would retain the present three-year term. Commissioner H. Rex Lee questions the advisability of adopting a five-year license renewal term simply to ease administrative burdens. However, he feels that such an extension would be justified if the legislation incorporates adequate competitive incentives similar to those proposed later in this statement.)

We believe that significant benefits would flow from an increase in the license term. The number of renewal applications processed annually would be reduced from approximately 2,700 to 1,600. We would not like to suggest that this reduction would solve our budgetary problems, but it would facilitate a more thorough review of each application filed. This closer look should also result in the resolution of many problems which presently require an application to be placed on deferred status.

As to the argument that increasing the license term might have the effect of lessening licensee responsibility, we believe that the tools presently available to the Commission are adequate to protect the public interest during the longer license term proposed. First, the Commission can continue to review a licensee's past record at renewal time, a process that should be no less effective because conducted every fifth year rather than every third. In addition, as I stated, our renewal policies and procedures have been and are being directed toward insuring a continuing dialogue between the licensee and citizens in order to promote the local resolution of citizens' complaints about broadcast service as they arise.

We do not view the longer license term as in any way diminishing the impact of these policies. Moreover, in the event that a particularly

serious question is raised about a licensee's performance, we could continue to exercise our options to require the filing of an early renewal application, or institute a revocation proceeding.

The comparative renewal process

It is in the area of the comparative renewal process that we have the most serious problems and where clarifying legislation is most urgent. And yet the controlling principles are not, we believe, seriously open to great debate. Let me first state those principles.

Congress wisely provided for a competitive spur to existing licensees-- to promote substantial rather than just minimal service barely meeting the public interest standard. But at the same time the Congress recognized the need for stability in broadcast operations. Broadcasting requires a substantial financial investment. If a broadcaster makes that investment and does render meritorious service, it would be a distinct disservice to the public interest to reward that effort either with a denial of renewal or a serious threat of denial. Indeed, such a policy would serve as an inducement for the opportunist to obtain a license for the sole purpose of maximizing short-term profits, on the theory that the license might well be terminated regardless of the quality of service rendered. So a rational comparative renewal policy must reflect an appropriate balance between maintaining a competitive spur and insuring stability in broadcast operations -- both essential elements of the public interest.

We believe that a number of common sense conclusions flow from these general principles:

(i) The renewal applicant in a comparative renewal situation should be judged on his record, and must run on his record. If this record is meritorious, or substantial, or strong, or solid, or reasonable, or whatever label one uses to designate the quality of service sought -- he should be renewed. Otherwise, there is no stability.

(ii) The renewal applicant's record should not have to be outstanding - that is, even better than meritorious, substantial or whatever - to warrant renewal -- any more than renewal in a comparative hearing context is likely to be awarded on the basis of a minimal record of service in the public interest. For as the Court noted in the Greater Boston case, it would disserve the public interest to adopt policies where only "extraordinary performance" could reasonably expect renewal. Again, stability would be sacrificed by such a policy.

(iii) Further, and of utmost importance, the renewal applicant's record should not be judged against or required to be superior to some industry average. If this were true, a renewal applicant's public service efforts would be judged against an ever-higher standard -- until 40, 50, 60 percent of the broadcast day were taken up with local informational or other public service programming.

This is "competitive spur" with a vengeance, serving neither the needs of the community nor the public interest. There is a substantial audience that watches and is entitled to receive reasonable amounts of public service programming. But this does not mean that such programming should predominate or consume inordinate amounts of the broadcast day -- to the detriment of the entertainment, sports, and other programming that is so popular. Such an attempt to skew viewer preference by Governmental fiat would be wrong and wholly ineffectual.

(iv) Finally, the renewal applicant's past record must be controlling -- not factors such as integration of ownership and management, local residence, or diversification of control of the media of mass communications. Otherwise, again, stability would be sacrificed. Take, for example, the diversification factor. Suppose an applicant receives an initial license after the Commission finds that the proposed operation is perfectly consistent with the Commission's multiple ownership rules. He makes a substantial investment and renders substantial service. Is he to be told that he loses out to a newcomer in a comparative renewal proceeding because he is a multiple owner or owns a newspaper? This is unfair to the applicant, and destroys stability. For in the top 50 markets, 80% of the stations are either multiple owners or have a newspaper affiliation; the figure for the top 100 markets is 73%. 3/

3/ These figures reflect both newspaper and multiple ownership holdings. As to the latter, all such holdings must be consistent with our multiple ownership rules (e.g., a maximum of 7 TV stations, of which no more than 5 may be VHF, and no more than 7 AM and 7 FM stations).

If multiple ownership patterns are to be revised, the only fair and rational way is by rulemaking, not by ad hoc renewal proceedings. Further, to attempt to restructure the industry through hundreds of ad hoc renewal proceedings would be an administrative horror; it would paralyze the Commission.

If these precepts are so clear and so much a matter of common sense -- and we believe they are -- the question naturally arises: How did we get to the present state of confusion and why are we strongly urging the enactment of clarifying legislation? Frankly, we are here because of an egregious error by the Commission and a series of court decisions that have inhibited our efforts to remedy the situation.

Past history, from WBAL to the present

Because the past is so important to an understanding of the issues before you, I should like now to develop that history.

The first important ruling in this field was Hearst Radio, Inc. (WBAL), 15 FCC 1149 (1951). After a comparative hearing, the Commission favored the existing licensee, stating that where a choice must be made between a renewal applicant and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious. The thrust of the decision was that a good past record was determinative, despite preferences to the newcomer on such factors as integration of ownership and management, local residence, and diversification.

The WBAL policy governed this field for almost two decades. It was, for example, followed in In re Wabash Valley Broadcasting Corp., 35 FCC 677 (1963).

In 1965 the Commission issued its Policy Statement on Comparative Broadcasting Hearings. The Statement stressed the importance of factors such as diversification, integration of ownership and management, and local residence. And it further stated that a past record of a broadcast station by someone with an ownership interest in a comparative applicant would be of interest only if it was either unusually good or unusually poor -- and thus indicative of unusual performance in the future. But this Statement was to be applicable only to the comparative hearing involving all newcomers. It was expressly stated that its policy "... does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license".

The first disturbing chink occurred in the Seven League Productions case, 1 FCC 2d 1597, issued in late 1965. The Commission there stated the 1965 Policy Statement should govern the introduction of evidence in proceedings where there is a competitive challenge to a renewal applicant. But this was really a bureaucratic "waffle", (perhaps dictated by the unusual facts of the case that neither the incumbent nor the challengers were considered financially qualified). For the Commission also made clear that all parties in such cases would be given the opportunity to present arguments as to the relative weight to be accorded the various criteria.

That was the situation when the Commission issued its bombshell -- the January 1969 decision in WHDH (16 FCC 2d 1). This 3-1 decision is the egregious error to which I referred. This case had a background of ex parte presentations,[4/] and if it had been determined on that crucial consideration -- whether rightly or wrongly -- it would have been simply one more case in a line of ex parte cases, with no precedential value beyond its own peculiar set of facts.

But the Commission did not rely at all upon the ex parte point in its January 1969 opinion. On the contrary, the opinion made clear that the majority believed it was dealing with the general renewal-new applicant comparative situation, and not some sui generis ex parte case. The opinion plainly concluded that the 1965 Comparative Policy Statement as to competing new applicants is generally applicable to the comparative renewal case, and specifically to that case. (16 FCC 2d at pp. 7-10) Under this policy, WHDH received no credit for its past record -- one with over 21% local live programming -- because it was not "unusually good"; and WHDH lost because it was at a disadvantage on the factors of diversification and integration.

The decision thus struck a devastating blow to the important concept of stability. And the concurring opinion of Commissioner Johnson trumpets this, as the following quotation shows (16 FCC 2d at p. 28):

4/ In this context, an ex parte presentation is one made by a party to an adjudicatory hearing, outside the hearing record and without notice and opportunity for other parties to participate. Section 409(c)(1) of the Act forbids such presentations.

> "Nor is the significance of this case limited to the impact on media ownership in Boston. For the Commission also speaks generally of situations in which a new competitor is seeking the right to broadcast as against a present broadcast license holder. We suggest that the standards at renewal time ought to be the same standards that would prevail if all applicants were new applicants. In doing so the Commission removes an ambiguity in its comparative hearing standards and procedures."
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> "The door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder."

When the Commission reconsidered the decision later in 1969, it did make an effort to improve the situation but only in a belated and somewhat cryptic fashion. In the very last paragraph of its opinion it recited the prior history of the case and noted that WHDH had operated for the most part under various temporary authorizations due to the Commission's concern with the "inroads made by WHDH upon the rules governing fair and orderly adjudication." The majority called the situation "unique." This was sufficient to win affirmance upon appeal. The Commission argued -- and the Court agreed -- that the 1965 Policy was applicable only because the case was unique in light of its ex parte background. It was not the ordinary comparative renewal proceeding where a different result might well have been reached because, as the Court noted, "legitimate renewal expectations [are] implicit in the structure of the Act" (444 F.2d at 854).

The WHDH decision had enormous repercussions. The industry trade press viewed the matter as "$3 Billion in Stations Down the Drain in Broadcasting" (Broadcasting, February 3, 1969 at p. 19). Scholars such as Professor Jaffe at Harvard criticized the decision as wholly unsound and inimical to the public interest. 5/ And it engendered a spate of competing applications to regular renewal applicants. Whereas only one such application had been filed in fiscal year 1968, 24 competing applications were filed in the next two years, including 9 in TV. That many clearly hoped to win on the diversification factor was shown by the KNBC-TV case, 21 FCC 2d 195 (1970), where the competing applicant so stated.

The Senate Communications Subcommittee considered the matter in its hearings on S. 2004 -- the Pastore bill (91st Cong., 1st Sess. (1969)). The bill provided that if the Commission finds the past record of the licensee to be in the public interest, it shall grant a renewal. Competing applicants would be considered only if the incumbent's license is not renewed. In testimony on the bill, a majority of the Commission indicated that the bill's basic objective of promoting predictability and stability of broadcast operations could best be achieved by administrative action. 6/

5/ Jaffe, WHDH: The FCC and Broadcasting License Renewals, 82 Harv. L. Rev. 1693 (1969).

6/ Commissioner Wells, Robert E. Lee, and I dissented. In my statement, I pointed out the need for legislative action to remedy the effect of the WHDH decision and proposed legislation very similar to that recommended today. See Hearings on S. 2004, pp. 393-94.

In January 1970 the Commission took such action, with the issuance of its Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, a copy of which I offer for the record. That Statement was designed to end the confusion created by the WHDH case and to set aside the first WHDH opinion. The 1970 Statement, rather than the 1965 one, was to govern the comparative hearing involving the regular renewal applicant. And it was to do so in accordance with the principles I set out at the start of this discussion:

(i) The renewal applicant was to run on his record; contrary to what was allowed in WBAL he would not be permitted to "upgrade" performance after he had been challenged.

(ii) If the applicant for renewal showed in a hearing that his service during the preceding license term had substantially met the needs and interests of his area (and had not otherwise been characterized by serious deficiencies), he would get a controlling preference. Indeed, the hearing would have been cut off at that point, without regard to the newcomer's claim for preference on other scores. If the renewal applicant could not have shown a record of substantial service, he would have been at a marked disadvantage, barring the case where his competitor was also deficient in one or more important respects. The Commission stressed that it was using the term "substantial" in the sense of "solid", "strong" performance, as contrasted with a service only minimally meeting the needs and interests of the area.

(iii) Where a renewal applicant was initially awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render substantial service to his area, it would be unfair and unsound to oust him on the basis of a comparative demerit because of his media holdings.

In February 1971 the Commission issued a Notice of Inquiry in Docket 19154, a copy of which I again offer for the record. The purpose of this Inquiry is to explore whether it is feasible to supply some general guidance in the television field concerning what constitutes substantial service within the meaning of the 1970 Statement. The Commission stressed that "it had ... no intention, now or at any future time, to try to delineate that X% of time need be devoted to a particular programming area such as agriculture, religious, etc." Rather, it proposed general guidelines in only two areas that are critically important both to the Congressional and Commission allocation scheme -- local programming and programming designed to contribute to an informed electorate. And even in those areas, the Commission pointed out that any guidelines adopted would not constitute requirements that would automatically be definitive, either for or against the renewal applicant, and that the hearing process would necessarily be available for the full exploration of contentions on this crucial aspect.

The next important development was the Court's opinion in Citizens Communications Center v. FCC, in June, 1971, holding invalid the 1970 Policy Statement. The Commission had there provided for a full comparison between the incumbent and challenger only where in an initial stage of the hearing the incumbent could not demonstrate a past record of substantial service without serious deficiencies. The Court, citing Ashbacker Radio Corp. v. FCC 326 U.S. 327 (1945), held that this truncated procedure violated Section 309(e) of the Communications Act, which requires a single full hearing in which the parties may develop evidence and be adjudged on all relevant criteria.

That is the essential holding of the Citizens case. But the opinion also contains troublesome dicta. Thus, the Court states that it " . . . recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service" (n. 35) -- that ". . . superior performance should be a plus of major significance in renewal proceedings ...." The difficulty here is the word, "superior." For in a later opinion issued in May 1972 the Court stated that it ". . . used the word 'superior' in its ordinary dictionary meaning: 'far above the average' ...." (463 F 2d 822 (1972.)) And the Court stated, "Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing."

The Court suggested that the Commission in its rule making proceedings should try to clarify what constitutes "superior" service.[7/] In line with this suggestion, the Commission in August 1971 issued a Further Notice in 19154, to take account of the Court's action in Citizens. The Commission stated that the Court had misread "substantial" service as meaning minimal service just meeting the public interest standard. We also observed that the term "superior" cannot realistically be used in a comparative sense, because it results in ever increasing amounts of public service programming to the detriment of what the public reasonably wants in light of other interests. But the Commission stressed that it was unnecessary to dwell on the label, and that what counts are the guidelines adopted to indicate the type of service which, if achieved, is of such a nature that one ". . . can reasonably expect renewal." Similarly, on the diversification issue, the Commission expressed its belief that the Court was not seeking to have the ownership patterns of the broadcast industry restructured through the renewal process.

7/ In a later decision, the Court made clear that it is within the Commission's discretion to proceed here either by rule or by ad hoc decisions. See Citizens Communications Center, 463 F. 2d 822 (1972).

Need for clarifying legislation

The above history surely points up the desirability of clarifying legislation. We are not saying that in the absence of such legislation the Commission will be unable to protect the public interest. That is the statutory standard, and you have delegated to us broad, expansive powers to follow policies that effectively promote that standard. We perceive nothing in the Act's provisions that would compel us, the expert agency, to adopt policies in this crucial renewal area that would in our judgment frustrate the "larger and more effective use of radio in the public interest" (Section 303(g)). Let me stress that if we are proven wrong on this fundamental premise at some future time, there would be the most compelling need for legislation in order to preserve the public interest. Renewal field up for Sale

But precisely because the area is so important and has become so confused, between the meanderings of the Commission and the Court, we believe that clarifying legislation is now appropriate and necessary. Just consider the present confusion on the crucial question of the weight to be accorded a comparative renewal applicant's past record. Must it be "superior" or "substantial"

to warrant a "plus"? Indeed, the concurring statement of Judge MacKinnon in Citizens asserts that if it is desirable to ". . . substitute a standard of substantial service for the best possible service to the public . . . it must be accomplished by amendment of the statute." The treatment of the diversification issue is similarly in a state of confusion. And while it is clear under Citizens that we must hold a single full hearing exploring all the evidence, that nevertheless still leaves unanswered some perplexing questions: If the incumbent does provide service such that the public interest would suffer if he could not "reasonably expect renewal," why should he not be renewed at that point? And what is the purpose or use of the remainder of the "full" hearing?

This is not a question of construing the Constitution but rather the statute. In this regard, the Commission and the Courts have not served you or the public well. Left alone, we may eventually make our way out of this muddle. But it will entail further litigation, with a consequent further period of uncertainty and with no assurance that what best serves the public interest will prevail. You can give that assurance and end the uncertainty. Because the area is of such critical importance, we urge you to do so.

Recommended legislation

As for the legislative action to be taken, I would reiterate that there is no need to tinker with the present statutory standard or processes in the non-comparative renewal area. The public interest standard is as good a statutory guideline as is feasible in this field. We therefore do not support pending bills which would substitute in the hearing process a new standard such as "good faith effort" to ascertain or meet the area's needs and interests.[8/] It is not at all clear what is meant by "good faith" effort. The term is defined as "a state of mind indicating honesty and lawfulness of purpose . . . " (Webster's Third New International Dictionary, p. 978). Is the test then a subjective one? Does it mean that if a renewal applicant indisputably has acted in the best of faith, but his performance is just not minimally adequate, he must nevertheless be renewed?

8/ While the bills like H.R. 3854 make this new standard of "good faith effort" and absence of "callous disregard" for law or FCC regulation applicable only to the hearing process, obviously the same standard would control how the term "public interest" would be construed in the non-hearing case. It would make no sense to have two different standard in these circumstances.

Similar objections can obviously be raised to the introduction of a new standard such as "callous disregard" for law or Commission regulations. The term might well be applicable to the conduct of a licensee in some particular case, but it is not, we believe, an appropriate statutory guideline. First, it affords the licensee too much leeway to engage in a pattern of violations. And second, the dictionary defines callous as hardened, unfeeling, and insensitive; surely Commission judgment on a licensee pattern of violation of law or rule should not turn on whether it was "unfeeling" or "insensitive."

As we have shown, in addition to the desirability of the five-year license period, clarifying legislation is needed in the comparative renewal area. That legislation, we believe, should be along the lines of our 1970 Comparative Policy Statement. We therefore propose the following addition to Section 307(d):

> "In any comparative hearing for the frequency or channel of an applicant for renewal of a broadcast license, the applicant for renewal shall be awarded the grant if such applicant shows that its program service during the preceding license term has substantially, rather than minimally, met the needs and interests of its service area, and the operation of the station has not otherwise been characterized by serious deficiencies."

For a full discussion of how this would be implemented, I refer you again to the 1970 Policy Statement, a copy of which was offered for the record.

This, we believe, will strike the appropriate balance between the need for a competitive spur and the requirement of industry stability. It is fair to the broadcaster, to the challenger, and above all to the listening and viewing public. We therefore urge its adoption, and as promptly as possible. 9/

That concludes my statement. I shall be glad to answer your questions.

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9/ Pending the outcome of these hearings and hoped for Congressional guidance, we do not plan to take further action in Docket 19154.

A PROPOSAL TO DEREGULATE BROADCAST PROGRAMMING

HENRY GOLDBERG

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A Proposal to Deregulate Broadcast Programming

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The Communications Act and the regulatory scheme it creates present a dilemma. The Communications Act[1] requires the Federal Communications Commission (FCC) to grant applications for renewal of broadcast licenses only if "the public interest, convenience, and necessity will be served" thereby.[2] This requirement means that the Government will pass judgment on the heart of broadcast service, which is programming.[3] On the other hand, section 326 of the Act not only

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THE FOLLOWING AUTHORITIES ARE CITED AS INDICATED BELOW:

Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967) [hereinafter cited as ROBINSON].

Introduction and Appendix to FCC Broadcast License Renewal Reform: Two Comments on Recent Legislative Proposals immediately preceding this article at 42 GEO. WASH. L. REV. 67 (1973) [hereinafter cited as *Introduction and Appendix*].

1. 47 U.S.C. § 151-609 (1970).

2. Section 309 of the Act provides:

> The Commission shall determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application [for a license], and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (1970).

3. The principle that the FCC can, without violating either the first amendment or section 326 of the Communications Act, *see* note 4 *infra*, pass judgment on the programming proposals and performance of broadcast ap-

recognizes that the federal government is without power to interfere with our highly valued rights of free press, free speech, and free expression, but also fosters a journalistic role for broadcasters.[4]

Since this dilemma is inherent in the Communications Act, the FCC and the courts must be careful to preserve a balance between necessary public accountability and desired private control of the media.[5] The need to balance these conflicting interests is nowhere more evident than in the license renewal process. The manner in which renewals are treated is at the core of the Government's relationship to broadcasting. The license renewal process is the pressure point of broadcast regulation.

Four years ago, in *WHDH, Inc.*,[6] the FCC refused to renew the license of a Boston television station and granted a license instead to another applicant. That refusal led to upheaval in the license renewal process. Although a description of the complex congressional, regulatory, and court actions respecting license renewals is not within the scope of this article,[7] these actions have led to serious consideration of proposals to reform current statutory provisions regarding broadcast license renewals. For example, between January 3rd and May 31st, 1973, over 200 bills that proposed changes in the broadcast license

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plicants to ensure that the public interest will be served by a grant of a license is well established. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 395 (1969); NBC v. United States, 319 U.S. 190, 216-17 (1943); Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949); Bay State Beacon, Inc. v. FCC, 171 F.2d 826 (D.C. Cir. 1948); Simmons v. FCC, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948).

4. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1970). *See* CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2092-93 (1973), in which the Court discusses the journalistic role of broadcasters as intended by the Communications Act.

5. The need to chart a "middle course" was referred to by the Supreme Court in CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2095 (1973).

6. 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).

7. The relevant history of the license renewal process is traced by FCC Chairman Dean Burch, in *Hearings on H.R. 3854 and related bills Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess., 32 (March 14, 1973) on file in the Office of the General Counsel of the Office of Telecommunications Policy. *See also* Citizens Comm. Center v. FCC, 447 F.2d 1201, 1206-10 (D.C. Cir. 1971). The impact of the *WHDH* case is discussed in Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Comment, *The Federal Communications Commission and Comparative Broadcast Hearings: WHDH as a Case Study in Changing Standards*, 10 B.C. IND. & COM. L. REV. 943 (1969); Comment, *FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854 (1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?* 118 U. PA. L. REV. 368 (1970). For more general discussions of broadcast license renewals, see Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89; *Symposium—The FCC's License Renewal Policies—A Turn of Events, Some Unanswered Questions, and a Proposal*, 15 ST. LOUIS U.L.J. 1 (1970); Note, *FCC License Renewal Policy and the Right to Broadcast*, 52 B.U.L. REV. 94 (1972); Note, *Television: The Public Interest In License Renewals*, 20 CATHOLIC U.L. REV. 328 (1970); Note, *Public Participation in License Renewals and the Public Interest Standard of the FCC*, 1970 UTAH L. REV. 461.

renewal provisions of the Communications Act were introduced in Congress.[8]

A license renewal bill, H.R. 5546, was submitted by the Office of Telecommunications Policy in March 1973 on behalf of the Administration.[9] H.R. 5546 takes a comprehensive approach to license renewals in an effort to correct flaws in the renewal process that have resulted in an enlargement of government power to influence and control broadcast programming. H.R. 5546 would make changes in the renewal process in an effort to strike a more appropriate balance between the competing goals of private control and government regulation of broadcasting. A discussion of those aspects of the present process that have led to the expansion of government power over broadcast programming will indicate the necessity for the Administration bill.

Broadcast Programming and the License Renewal Process

Thirteen years ago, the FCC, in its "Network Programming Inquiry Report and Statement of Policy,"[10] sought to chart a course between requirements to ensure that broadcast licensees perform in the public interest and the need to minimize government interference with programming decisions. The Commission noted that Congress had refused to impose, or to permit the FCC to impose, affirmative programming requirements or priorities upon broadcast licensees. For example, in the face of "persuasive arguments"[11] that the FCC require licensees to present specific types of programs, the Commission stated that "the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repres-

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8. See *Legislative Calendar of the Sen. Comm. on Commerce*, 93d Cong., 1st Sess., No. 4 (May 31, 1973). The vast majority of these bills fell into two major categories: Bills similar to the Broyhill-Rooney bill, H.R. 3854, 93rd Cong., 1st Sess. (1973); and bills similar to S. 2004, introduced by Senator John Pastore in 1969, S. 2004, 91st Cong., 1st Sess. (1969). Under Senator Pastore's bill, the licensee's past performance would have been judged by the "public interest, convenience and necessity" standard of the present Act. The Broyhill-Rooney bill would extend the current renewal period from three years to five years. It also provides that, in a renewal hearing, the incumbent will prevail if he can show that his past performance has reflected a "good faith effort" to serve the needs and interests of his community and has not demonstrated a "callous disregard for law" or the Commission's regulations. H.R. 3854, 93rd Cong., 1st Sess. (1973). These bills, however, would not apply to unchallenged renewal applications or to those renewals challenged by a petition to deny. They would not change the present requirement that a hearing must be held whenever a mutually exclusive application is filed, nor would they prevent the Government from adopting detailed quotas and categories of programs to which broadcasters must conform if they are to obtain license renewal.

9. The text of the bill is set out in *Introduction and Appendix at* 70.

10. 25 Fed. Reg. 7291 (1960).

11. *Id.* at 7293.

sive of it."[12] The Commission noted that while it may inquire what licensees have done to determine community needs, it cannot impose on broadcasters its own notions of what the public should see and hear.[13] The Commission defined the responsibilities of broadcast licensees to the public as follows:

> The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility.[14]

Despite these strong statements of principle, the FCC has been drawn into a role of exercising greater and greater influence upon the program judgments and practices of television broadcasters. This expansion of influence has resulted, almost inevitably, from the nature of the license renewal process. In this process, the broadcaster has the burden of showing that he has complied with FCC program standards and fulfilled his prior program promises before his license will be renewed.[15] The mere prospect of losing the license, coupled with the lesser, but more realistic, sanction of having to go through a tedious and expensive renewal hearing, makes the broadcaster vulnerable to governmental power to influence program content.

The broadcaster's vulnerability may be obscured by the popular notion that broadcasting is a very profitable business. Some aspects of the business, especially major market television operations, are indeed profitable.[16] Usually, the most profitable elements of the press are the least susceptible to government interference or control. This may be true of newspapers and magazines, but it does not seem to be true in broadcasting because the electronic press is subject to government licensing every three years. Since groups seeking a station's license usually file applications against the most profitable stations, the wealthiest broadcaster is often the most vulnerable to such competing applications. Therefore, the most profitable broadcasters, especially those with newspaper interests or multiple stations, may be the ones

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12. *Id.*
13. *Id.*
14. *Id.* at 7294.
15. *See* ROBINSON 119. While the Act allows the FCC to revoke licenses, 47 U.S.C. § 312(c) (1970), the FCC bears the burden of proving noncompliance with legal requirements or unacceptable performance by the broadcaster, *id.* § 312(d). Therefore, the revocation process is rarely used as a method of assuring general broadcast industry compliance with FCC programming standards. Revocation of a television license has never occurred, and only two revocations of construction permits for TV stations—WSNA (TV), Sharon, Pa., in 1954; and KAKJ (TV), Reno, Nev., in 1959—have taken place. *See* 38 FCC ANN. REP., 173 (1972).
16. For a description of television's near record profitability for 1972, see BROADCASTING, Aug. 27, 1973, at 18; net revenues were $3.18 billion, up 15.6 percent from the prior year, while before tax profits of $552.2 million represented a 41.9 percent increase over 1971.

most susceptible to government influence and control. Although some broadcasters may be willing and able to litigate specific actions, such as adverse rulings under the fairness doctrine,[17] most of them have no choice but to accept the FCC's explicit and implicit program regulation. As a result of this vulnerability, renewal procedures and the factors to be considered by the Government before granting renewal have become the principal means used by the FCC to control broadcast programming and operations.[18] Broadcasters are encouraged to present programming that the FCC has decided will serve the public interest.[19] Such programs are defined to include programs devoted to the discussion of public issues, programs produced and originated by the local station, and a program format that exhibits "balance" among such categories as agriculture, religion, news, politics, children's and minority groups' programs, sports, and entertainment.[20]

The television broadcasters' adherence to these programming criteria is assured by the FCC's requirements for analyzing and reporting past and proposed programming on the license renewal application.[21] The device is relatively simple and effective. Since the broadcaster knows that the FCC believes religious programs are in the public interest, and that he must report to the FCC on the religious programs he is carrying and planning to carry, he presents religious programs, whether or not anyone is watching them, for example, at seven o'clock on Sunday mornings. Indeed, religious programs would

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17. *See Introduction and Appendix* at 68.

18. The use of the license renewal process for *in terrorem* control of broadcast operations is discussed fully with ample documentation in ROBINSON 118-27.

19. For a complete discussion of the FCC's general program regulation, see *id.* at 111-18.

20. Programming Inquiry, *supra* note 10, at 1909-10. On program format balance, the following statement from the Programming Inquiry is generally the point of departure for the Commission:

> The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

Id. at 1913.

21. The Commission's current programming forms for television prescribe the following primary categories of programming: Agricultural, entertainment, news, public affairs, religious, instructional, sports, and other. There are also three secondary categories. Editorials, political programs, and educational institution programs. A station maintains logs classifying each program according to the above categories, but is required to show overall amounts of programming only in the following: News, public affairs, and all other programs exclusive of entertainment and sports. *See* P & F RADIO REG., 5 CURRENT SERVICE 98:303-7 (1971).

Both audiences, of course, are important to the broadcaster, but the extent to which he listens to each one depends on the peril he will face if he fails to satisfy them. If the broadcaster ignores his local audience, he may slip in the ratings and lose revenues; if he ignores his bureaucratic audience, he places his license in jeopardy.[28] Satisfying the Government can become of greater importance than satisfying the viewers.

What then is the role of the viewers? There is a requirement that broadcasters must ascertain community needs and interests. The FCC interprets this to mean that the broadcaster must develop information about current problems and issues in the community, instead of information regarding the local audience's program preferences.[29] The broadcaster is required to evaluate community problems and to present programs to deal with them.[30] The FCC then decides whether the

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> indicating the Commission's "concern" over a particular practice of the licensee and asking for the licensee's justification will generally be all that is necessary to bring the licensee around to the Commission's way of thinking. . . .
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> . . . The practice of informal control over or influence on individual licensee practices is also followed on an industry-wide basis through statements of Commission concern over particular practices or announcements of proposed action. This is enhanced by speeches of individual commissioners. . . . While some of these speeches are inconsequential, there can be no doubt that many are valuable as a source of at least one commissioner's thinking on a given subject.

ROBINSON 119-21.

28. The FCC's action in the *Lee Roy McCourry* case, 2 P & F RADIO REG. 2D 895 (1964), is illustrative of the peril faced by applicants who do not conform to the official notions of "balanced" formats and public interest programs. In that case, the sole applicant for a vacant UHF channel in Eugene, Oregon, which had two operating VHF stations, proposed a "specialized" format consisting of 70 percent entertainment, mainly feature films, and 30 percent educational programs directed to the city's university population. The application was set for a hearing, despite the absence of any challenge from the community or any other complaint, primarily because McCourry had not justified his lack of program proposals in the religious, agricultural, and discussion categories, *id.* at 896. The Commission appeared to be concerned that the applicant had not adequately investigated community needs for such a specialized format. Commissioner Lee Loevinger, in dissent, noted that the principal problem seemed to be that McCourry omitted several categories of programs favored by the Commission and its staff:

> The passion to regulate is not satisfied merely by the dedication of an adequate amount of time to public service unless this time also conforms to just the pattern of public service now favored. Thus, the tastes and ideals of the majority of the Commission become enshrined in official requirements. . . . [E]ven if I were convinced that the Commission's views were superior to those of broadcasters or the public with respect to programming, I would still doubt the wisdom of establishing official standards in this field. . . . The Commission is clearly making a choice between competing interests and values. Presumed quality and "balance" of television programming is one choice and preservation of a wider area of freedom of expression for the broadcaster is the other. . . . [I]f the principle is established that the Commission has the right and power to prescribe, either directly or indirectly, the kind and quality of programs that must be carried by broadcast licensees, then the vital interest of society, the nation, and perhaps the world, in the fullest freedom of communications and the expression of ideas, in whatever form, may be compromised.

Id. at 906-07.

29. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 36 Fed. Reg. 4092, 4094 (1971).

30. *Id.* app. B, at 4105.

programming would serve the public interest.[31] Thus, the dialogue as to whether programming is responsive to local needs and interests takes place between the broadcaster and the Commission, rather than between the broadcaster and the communities he undertakes to serve. The FCC's definitions of the kinds of programming and the times and mode of program presentation that will serve the public interest may or may not coincide with the preferences of the viewing public.

The citizen who wants a voice in the programming process must convince the Government that he has a legitimate grievance against the broadcaster's programming. Thus, questions about the merits, quality, and responsiveness of program performance are raised to the level of regulatory questions, and programming decisions are made with the assistance of an arm of the government. This process of centralized decision making in the sensitive area of broadcast programming to some extent insulates the broadcaster from his community. As long as the licensee's program performance satifies the standards of the FCC, he can ignore the complainants. It is only when the nature of local challengers' complaint captures the FCC's attention and the complainants turn the agency's program standards to their ends that the broadcaster's license is jeopardized.[32]

As long as the FCC follows its own standards to measure the licensee's programming performance, both broadcasters and their challengers will seek to conform to those standards. This is hardly what one would expect to be the respective roles of government, the broadcasters or the public in a society that ranks the separation between government and the media as one of its highest values. The argument that the FCC's program influence is exercised in the service of good causes—such as promoting minority group interests, children's programs, news, and increased opportunities for discussion of local issues—is irrelevant for purposes of the first amendment. The FCC's role constitutes government interference with the media that few would abide if it were directed at newspapers and magazines,[33] and even some proponents of broadcast program regulation object when the regulation is used to serve goals they do not favor.[34]

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31. *See* 47 U.S.C. § 309(a) (1970).
32. Martin Mayer describes the techniques, successes, and failures of renewal challengers in Mayer, *The Challengers*, TV GUIDE (pts. 1-3), Feb. 3, 10, and 17, 1973, at 5, 33, and 18.
33. *See, e.g.*, CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2107-08 (Stewart, J., concurring); EMERSON, THE SYSTEM OF FREE EXPRESSION, 670-71 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 786-87 (1972).
34. A classic example of this double standard at work may be found in Commissioner Nicholas Johnson's dissent to the FCC's imposition of a $2,000 forfeiture upon WGLD-FM (Oak Park, Ill.) for broadcast of an "indecent,"

cently told a Congressional committee considering license renewal legislation that he could perceive no real alternative to "the adoption of gross percentages of broadcast time in certain programming categories that, when met or exceeded, will measure a level of performance giving reasonable assurance of license renewal."[42] This proposal, however, creates the risk that renewal applicants will seek safety by rendering the type of program performance that is necessary to assure renewal in the face of a challenge.[43]

Analysis of the Administration Bill

H.R. 5546 is designed to reduce the role of government in the relationship between a broadcaster and the local community which he serves, and to turn the broadcaster towards that community to find what programming will serve the public interest. The provisions of the

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42. Statement by Dean Burch before the *Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, Sept. 18, 1973. The "gross percentages" Chairman Burch referred to are the same type proposed in *The Policy Statement, supra* note 40. But no matter how broad the percentage guidelines, they cannot help but have an adverse effect on the interests of the local viewers. If the guidelines are truly quantitative, the FCC would not be allowed to look beyond the percentage figure and consider, for example, that the 5 percent public affairs programming is made up of documentaries on ballroom dancing. If this is what is meant by quantitative guidelines, then the most profitable of all broadcasters—network affiliates and independent VHF stations—are assured renewal regardless of the inadequacy of their program performance in terms of local needs and interests. This would be a particularly pernicious form of government insulation of broadcasters from their own communities. But it is [much] more likely that the FCC will not stop at the mere quantitative test. In his earlier appearance before the Subcommittee, Chairman Burch stated:

> One of the problems with guidelines, for example, if we say we expect a local licensee to do five percent or X percent of local live news, all we have said is out of 24 hours a day you should do so many minutes of news. It could be the world's worst presentation and still meet the so-called guidelines.
>
> We have no way of knowing whether a person is doing a good job in his programming. Quality is what we are after rather than numbers.

Hearings, supra note 7. Under such a formulation of the FCC's responsibilities, Government would inevitably be making value judgments on program content. This practice would vitiate any effective application of the first amendment to broadcasting and make the FCC, not the local viewer, the principal audience of the television broadcaster.

43. This risk was expressed in the dissenting statement of Commissioner Robert Wells.

> Although many licensees will welcome the short range benefits of having numerical requirements to meet, I feel that in the long run this principle will not benefit either the licensee or the public. I fear that setting quantitative standards will be the impetus for licensees to play this numbers game to satisfy the Commission. If this occurs, the licensee will not be discharging his responsibility to operate the station in the public interest. If this country is to enjoy truly diverse programming, we must leave some measure of flexibility to the licensee. This policy will leave fewer decisions to management.
>
> We are naive if we think that the licensee of a television station that is worth millions of dollars will taken [*sic*] any chances on falling below our numerical floor. If by meeting or exceeding these numbers he is practically assured of license renewal, there can be no doubt as to the course he will follow. By meeting these requirements, he will have precluded the possibility of the public being in a position to have a meaningful impact on his performance.

Notice of Inquiry, *supra* note 40, at 53:437.

Administration bill, which would amend section 307(d) of the Communications Act of 1934, will be described in a section-by-section analysis below.

License Term

Section (d)(1) would lengthen the term of broadcast licenses from three to five years, thereby reducing the frequency with which the Government subjects the licensee's programming performance to detailed examination. In 1927, when the Radio Act[44] was enacted, the requirement that licensee performance be scrutinized every three years[45] was a reasonable way to ensure proper supervision of an infant industry. Since broadcasting is now an established industry, a five-year term is more appropriate. Moreover, the Commission's power to protect the public by use of forfeitures, short-term renewals, and other enforcement mechanisms would be in no way diminished by the extended license term.[46]

Renewal Standards

The bill also seeks to clarify the Communications Act's present broad "public interest" criterion as it applies to renewal applications.[47] The proposed legislation specifies that the renewal applicant must meet the technical, financial, and other criteria of the Communications Act and the rules and regulations of the Commission. According to these criteria, the broadcast applicant's record must be free of serious deficiencies, such as consistent failure to make sponsorship identification announcements,[48] violation of the equal employment opportunity rules,[49] fraudulent practices in keeping entries in logs,[50] or in reporting changes in ownership information.[51]

With the exceptions noted below, only Commission policies that are reduced to rules could be enforced against renewal applicants under H.R. 4456. Commission policies applicable to initial licensing of broadcast stations but not incorporated into FCC rules, such as local ownership, integration of ownership and management, and diversification of media control,[52] would not be applicable to renewal applicants. The proposed legislation, however, would not prevent the Commission from promulgating rules which would make these, or

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44. Ch. 169, 44 Stat. 1162.
45. *Id.* § 9, 44 Stat. 1166.
46. The Commission can (a) suspend a license, 47 U.S.C. § 303 (1970); (b) issue orders to cease and desist, *id.* § 312; and (c) impose fines or forfeitures, *id.* §§ 501-503 and 510. The FCC can also grant short-term renewals where past performance has been questionable, *id.* § 307(d).
47. *See Introduction and Appendix* at 70.
48. *See* 47 C.F.R. §§ 73.119, 73.289, and 73.654 (1972).
49. *See id.* §§ 73.125, 73.301, and 73.680.
50. *See id.* §§ 73.111, 73.281, and 73.699.
51. *See id.* § 1.615.
52. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

radio and television stations, AM and FM radio stations, UHF and VHF television stations, and profitable and unprofitable stations.[65]

Fairness

The "fairness" obligation is a statutory policy relating to the broadcaster's programming performance and is a necessary corollary to the ascertainment standard of subsection (A).[66] Use of the fairness obligation as a standard for license renewal is fully consistent with present law and with established practice of the Commission.[67] Further, inclusion of the fairness obligation in the renewal standards of the proposed legislation would amount to an expression of congressional intent as to the preferred method of fairness obligation enforcement.

The FCC initially enforced the obligation by reviewing, at renewal time, the overall performance of the licensee.[68] In the mid-1960's, however, the Commission began to assess compliance with the fairness obligation on an issue-by-issue basis. It inquired whether various sides of each issue were presented and ordered adjustment or redress when it determined that a particular point of view was inadequately represented by the broadcaster.[69] Increased use of the

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65. The bill's standard would not preclude the FCC from using its present authority under the Communications Act, including the full extent of its experimental authority under section 303(g), to deregulate radio broadcasting. If, however, the FCC and Congress were to decide that total deregulation of radio would be in the public interest, the proposed new legislation, along with many existing provisions of the Communications Act, would have to be amended accordingly.

For a discussion of radio deregulation, see Re-regulation of Radio and Television Broadcasting, 37 Fed. Reg. 23723 (1972). *See also* S.J. Res. 60, 93rd Cong., 1st Sess. (1973) (introduced Feb. 8, 1973, by Senator Howard H. Baker, Jr. (R. Tenn.)).

66. *See* 47 U.S.C. § 315(a) (1970). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968). The Court refers to the licensee's "two-fold duty" under the fairness obligation to give adequate coverage to public issues and to see that the coverage accurately reflects divergent views on those issues. The ascertainment obligation is a necessary corollary to the duty to give adequate coverage to public issues since it requires the broadcaster to ascertain those issues and cover them in his programming. *Id.* at 377.

67. The Supreme Court, in *Red Lion*, specifically stated:

> To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press.

395 U.S. at 394.

68. The 1960 Programming Inquiry stated that:

> This responsibility usually is of the generic kind and thus, in the absence of unusual circumstances, is not exercised with regard to particular situations but rather in terms of operating policies of stations as viewed over a reasonable period of time. This, in the past, has meant a review, usually in terms of filed complaints, in connection with the application made each three year period for renewal of station licenses.

Programming Inquiry, *supra* note 10, at 1910.

69. Misgivings about the "threat of escalation" of Commission fairness doctrine surveillance were voiced as the first effects of case-by-case enforcement were felt, *see* Scalia, *Don't Go Near the Water*, 25 Fed. Com. B.J. 111, 113 (1972) quoting Paul Porter from *Hearings on the Fairness Doctrine Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 153 (1968).

issue-by-issue method has lessened the licensee's responsibility to enforce the fairness obligation. The proposed legislation does not eliminate issue-by-issue enforcement of the fairness obligation. It would, however, be a congressional statement that the appropriate way to evaluate the broadcaster's journalistic responsibility is by renewal application review of his performance under the fairness obligation. Under the proposed legislation, as long as the broadcaster made good faith efforts to cover issues in a balanced manner, and when appropriate, selected responsible spokesmen for conflicting viewpoints and offered them reasonable amounts of time, he would not be jeopardizing his license by occasionally failing to achieve "fairness" and "balance."

The Proviso

In applying subsection (A)'s ascertainment standard, the Administration bill provides that the Commission may not consider any predetermined performance criteria, categories, quotas, percentages, formats, or other such guidelines of general applicability with respect to the licensee's programming. The proposed legislation would establish the local community as the point of reference for evaluation of a broadcaster's performance, and would place the responsibility for superior performance in the hands of the local licensee and the public he undertakes to serve. It would remove the convenient crutch of government specifications regarding the kind of program performance that will satisfy the statutory standard.[70]

The existence of FCC program guidelines changes the character of the broadcast license. The license no longer reflects a public trust safeguarded by an independent, private licensee but resembles a government contract, under which the licensee performs in accordance with government-established specifications regarding the quantity and type of programming. The proviso in the proposed law, by depriving the Commission of authority to create and enforce such specifications, stresses the Government's role as the arbiter in the ascertainment and programming dialogue without injecting its own programming judgments between the broadcaster and the public.

Accordingly, under the proposed legislation, the Commission's review of program performance would be based upon such considerations as the mechanics, quantity, and quality of the applicant's as-

70. The Communications Act provides the Commission with a number of remedies other than denial of a renewal application. The Commission can (a) suspend a license, 47 U.S.C. § 303 (1970); (b) issue orders to cease and desist, *id.* § 312; and (c) impose fines or forfeitures, *id.* §§ 501, 502, 503, 510. Furthermore, the Commission can, under section 307(d) of the Act, grant short-term renewals where past performance has been questionable, *id.* § 307(d).

men who own and operate profitable broadcast stations muted the public outcry that government control of media content usually arouses. Proponents of regulation appeared to believe that the power of broadcasters had to be reduced and that government power over broadcasters had to be expanded to preserve the liberty of the individual.[77]

Recently, however, in *CBS v. Democratic National Committee*,[78] by holding that neither the Communications Act nor the first amendment requires broadcasters to accept paid editorial advertisements, the Supreme Court stressed the same libertarian principles that underlie H.R. 5546 and provided new impetus for attempts to reform the license renewal process in a manner that is consistent with the goals of the first amendment. The Court indicated that since the acceptance or rejection of such advertisements requires editorial judgment, a choice must be made between having either the broadcaster or the Government making such judgments. In making its choice, the Court pointed out that government censorship would be more pervasive, self-serving, and difficult to restrain than would private censorship.[79] If a private broadcaster excludes or suppresses information, another broadcaster can present it. But if government performs this editorial function, administrative fiat, not freedom of choice, carries the day.[80]

Congress may wish to consider other statutory formulations of the deregulatory provisions of H.R. 5546. It is, however, important for Congress to act now to determine the future direction of government regulation of broadcasting. The key issue for the Congress is whether the broadcast press should be ". . . entitled to live under the laissez faire regime which the First Amendment sanctions."[81] In dealing with this issue, Congress will face the possibility that some broadcasters might use increased freedom from detailed, prescriptive regulation to ignore their obligations of responsibility and responsiveness to the public. The Congress and the public should simply take the same chances with broadcast performance that they take with the performance of other private media. As the Court stated in *Columbia Broadcasting System v. Democratic National Committee*, "calculated risks of abuse are taken in order to preserve higher values."[82] The "higher values" in this instance are nothing less than the values of keeping our powerful electronic press free of Government's heavy hand.

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77. *Cf. Government Is the Real Monopoly So Why Trust it More Than Business*, Loevinger, N.Y. TIMES, March 11, 1973, § 3, at 17 col. 1.
78. CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973).
79. *Id.* at 2088.
80. *Id.* at 2111 (Douglas, J., concurring).
81. *Id.* at 2115 (Douglas, J., concurring).
82. *Id.* at 2097.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-961

BROADCAST LICENSE RENEWAL ACT

MARCH 28, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

together with

SEPARATE VIEWS

[To accompany H.R. 12993]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 12993) to amend the Communications Act of 1934 to provide that licenses for the operation of broadcasting stations may be issued and renewed for terms of 4 years, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows (page and line numbers refer to page and line numbers in the reported bill):

On page 6, strike out lines 12 and 13, and insert in lieu thereof the following: "STUDY OF REGULATION OF BROADCASTERS; ACTION ON FCC DOCKET".

On page 7, strike out lines 4 through 19, and insert in lieu thereof the following:

> (b) The Federal Communications Commission shall, not later than six months after the date of the enactment of this Act, complete all proceedings and take such agency action as it deems appropriate in connection with proposed amendments to the Commission's rules (47 C.F.R. 73.35, 73.240, 73.636) relating to multiple ownership of standard, FM, and television broadcast stations (Federal Communications Commission Docket Numbered 18110).

EXPLANATION OF COMMITTEE AMENDMENTS

The first committee amendment changes the section heading of section 6 in order to conform to the amendment made to section 6(b) (see below).

The other committee amendment strikes out provisions which would have required the Federal Communications Commission (FCC) to

undertake a major two-year study of the consequences of the ownership of more than one broadcasting station by one person and the ownership by one person of one or more broadcasting stations and one or more newspapers or other communications media. Much of the information which would have developed from such study is now available to the Commission through filings in its Docket Nos. 18110 and 18891.

The committee amendment requires the FCC to complete action on its Docket No. 18110 within six months after the date of enactment of the legislation. FCC Docket No. 18110 is a rule-making proceeding in which the principal remaining issue is whether rules should be prescribed under which a person who publishes a daily newspaper may not hold a license for a broadcast station in the same market in which the newspaper is published.

Purpose

The purpose of H.R. 12993, as reported, is to improve the performance of broadcast licensees by (1) increasing their responsiveness to their service areas, and (2) promoting stability within the broadcasting industry.

Summary of Legislation

As reported the legislation would—

Increase the term of broadcast licenses from three to four years (sec. 2(b) of the bill, proposed section 307(d)(1) of the Communications Act of 1934 (hereafter "the Act")).

Require the FCC to establish procedures to be followed by broadcast licensees to ascertain the needs, views, and interests of residents of their service area for purposes of their broadcast operations (sec. 2(a) of the bill, proposed section 309(i) of the Act).

Provide that in determining whether a broadcast license should be renewed, the FCC must consider (1) whether the licensee has followed the prescribed ascertainment procedures during the preceding license period, and (2) whether the licensee's broadcast operations during the preceding license period have been substantially responsive to the ascertained needs, views, and interests of residents of its service area (sec. 2(b) of the bill, proposed section 307(d)(2)(A) of the Act).

Prohibit the FCC in a broadcast license renewal proceeding from considering (1) ownership interests or official connections of the licensee in other stations, communications media, or businesses, or (2) the participation of ownership in management of the broadcast station; unless rules thereon have been adopted by the FCC (sec. 2(b) of the bill, proposed section 307(d)(2)(B) of the Act).

Require the FCC to issue and adhere to rules establishing time limits for filing petitions to deny applications under the Act (sec. 3).

Provide that the FCC must prescribe procedures to encourage broadcast licensees and persons raising significant issues regarding the operations of the licensee's broadcast station to conduct good faith negotiations to resolve such issues (sec. 4).

Provide that appeals from certain decisions and orders of the FCC involving a broadcast station are to be taken to the United States Court of Appeals for the circuit in which the station is, or is proposed to be, located (sec. 5).

Require the FCC to conduct a continuing study to determine how it might expedite elimination of regulations applicable to broadcast licensees which are required by the Act but do not serve the public interest, and report annually thereon (together with any recommendations for legislation) to the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee (sec. 6(a)).

Require the FCC to complete action on its Docket No. 18110 within six months after the date of enactment of legislation (sec. 6(b)).

Committee Action

Your committee, acting through its Subcommittee on Communications and Power, held 17 days of hearings from March 14 to September 18, 1973, on over 100 bills relating to broadcast license renewal. The subcommittee received testimony in those hearings from over 60 witnesses including Members of Congress, the Chairman and a member of the Federal Communications Commission, the Director of the Office of Telecommunications Policy, the President of the National Association of Broadcasters, various broadcasters and their representatives, representatives of citizens and public interest groups, and others.

On February 27, 1974, the Subcommittee reported H.R. 12993 with an amendment to the full committee by a vote of 6 to 0.

On March 6, 1974, your committee ordered H.R. 12993, as amended, reported to the House by a unanimous voice vote.

Background

Early radio legislation

The first Federal legislation relating to radio was the Wireless Ship Act of 1910 (36 Stat. 629), which required certain passenger vessels to be equipped with radios and have a radio operator on board.

In 1912, the United States ratified the first international radio treaty (37 Stat., V.2, 1565). So as to fulfill the obligations of the United States under the treaty, the Radio Act of 1912 (37 Stat. 302) was enacted. This legislation required the licensing of radio stations and radio operators.

The first commercial radio stations were licensed in 1921 under the Radio Act of 1912. In the years immediately following, the number of commercial broadcasting stations increased very rapidly. By November 1925 a National Radio Conference met and called upon Congress to enact new radio legislation. At that time there were 600 radio stations in the United States and applications for nearly 175 more were pending. Subsequently it was determined that the Secretary of Commerce had no power under the Radio Act of 1912 to regulate the power, frequency, or hours of operations of radio stations. In July 1926 the Secretary of Commerce issued a statement abandoning efforts

to regulate radio and urging that radio stations undertake self-regulation.

The Radio Act of 1927 (44 Stat. 1162) was enacted in February of that year. It created a Federal Radio Commission of five members and gave the Commission broad licensing and regulatory powers. The "public interest, convenience, and necessity" (hereafter "public interest") was made the basis for granting radio broadcast licenses and the regulation of radio broadcast stations.

THE COMMUNICATIONS ACT OF 1934

In 1933 at the request of President Roosevelt, the Secretary of Commerce appointed an interdepartmental committee to study electrical communications. The committee recommended that Congress establish a single agency to regulate all interstate and foreign communications by wire and radio, including telegraph, telephone, and broadcasting. The Communications Act of 1934 created the Federal Communications Commission to carry out this unified regulation. This is the statute under which the FCC operates and which it enforces. Several of its provisions were taken from the Radio Act of 1927. This is particularly true of the provisions relating to broadcasting.

Part I of title III of the Act provides for the licensing of radio broadcast stations, their relicensing, and their regulation. The broad policies underlying these provisions of the Act have remained substantially unchanged since 1934. Thus, they draw no distinction between standard (AM) radio broadcast stations, FM stations, and television broadcast stations.

As of January 1, 1974, there were 8,468 broadcasting stations in the United States. This number breaks down as follows:

AM radio	4,395	UHF television (commercial)	192
FM radio	2,502	VHF television (commercial)	513
FM radio (educational)	633	UHF television (educational)	142
		VHF television (educational)	91

INITIAL BROADCAST AUTHORIZATIONS

An initial authorization [1] to operate a broadcasting station is granted to a person if he has the requisite legal, technical, financial, and other qualifications (including character and related matters) and the FCC finds that the granting of such authorization would serve the public interest.

If two or more persons seek mutually exclusive broadcast authorizations,[2] section 309(e) of the Act as interpreted by the *Ashbacker* case,[3] requires that a full comparative hearing (with full participation permitted to all parties in interest) be held before determining the party to which the authorization will be granted. The FCC has set out in its *Policy Statement on Comparative Broadcast Hearing* (1 FCC 2d 393) the factors which will determine the award of an initial broadcast authorization in a comparative situation. They are (1)

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[1] The term "authorization" is used here to cover both the construction permit and license for a broadcast station. Under section 319 of the Act a construction permit for a station must be obtained before a license is granted.

[2] If two or more applicants file at about the same time for use of the same broadcast facility or for facilities that would interfere electronically with each other, their applications are said to be mutually exclusive.

[3] *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

diversification of control of the media of mass communications, (2) full-time participation in station operations by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of the frequency, and (6) the character of the applicant. The primary objective towards which the comparative process is directed where an initial broadcast authorization is involved is to provide the best practicable service to the public, and maximum diffusion of control of the media of mass communications. The *Policy Statement* notes that it does not apply where an applicant is contesting with a licensee seeking renewal of a broadcast license.

LICENSE TERM

No broadcast station can be licensed for more than three years although other classes of radio stations, i.e., stations in the aviation, maritime, safety and special, citizens, industrial, and amateur radio services may be and usually are granted for 5-year terms.[4] The maximum three-year term for broadcast licenses has been in effect since enactment of the Federal Radio Act of 1927.

RENEWAL OF BROADCAST LICENSES

As in the case of an initial broadcast license, a renewal may not be granted for longer than three years. In a very few cases the Commission grants a shorter license renewal period of one or two years if there have been major deficiencies in the licensee's broadcast operations such as violations of the Commission's rules and regulations. For broadcast license renewal purposes, the FCC has divided the United States into 18 regions, each consisting of one or more States. All of the full-term broadcast licenses in each region expire on the same date.

Applications for renewal of broadcast licenses are routinely granted by the Commission in almost every case in which there is no contest of the renewal. The test which must be met in order that a broadcast license be renewed is the same as in the case of an application for an initial broadcast authorization, namely, that the public interest will be served thereby.[5] In noncontested broadcast license renewal cases, all that the FCC requires of the licensee/applicant is that it has served the public interest in a manner that is sufficient—but no more.[6]

CONTESTING RENEWALS

There are two means of contesting the renewal of a broadcast license. One, by a *petition to deny* in which the petitioner in effect asserts that the application for renewal of the broadcast license should not be granted even though the petitioner is not seeking to obtain the broadcast license for itself. The other is through a *competing application* for the broadcast authorization where the competing applicant in effect is saying that the public interest would be better served by granting its application for the broadcast authorization rather than by renewing the existing license.

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[4] Section 307(d) of the Act.
[5] Section 309(a) of the Act.
[6] Statement of Chairman Burch of the FCC. Hearings on broadcast license renewal, pt. 1, Serial No. 93–35, p. 58.

PETITIONS TO DENY

Section 309(d) of the Act sets out the procedures which apply to petitions to deny. Under its terms any party in interest may file with the Commission a petition to deny an application for renewal of a broadcast license. The petition must contain specific allegations of facts sufficient to show that a grant of the application for renewal for the broadcast license would be prima facie inconsistent with the public interest. Except for those matters with respect to which the Commission may take official notice, the allegations of fact in the petition must be supported by affidavit of a person or persons with personal knowledge thereof. A copy of the petition must be served by the petitioner on the applicant/licensee. The applicant/licensee is then afforded an opportunity to file a reply in which allegations of fact or denials thereof must be supported by affidavit.

If the FCC finds on the basis of the application for license renewal, the pleadings filed in connection with a petition to deny or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application for renewal of the license would be consistent with the public interest, it must make a grant of the application for renewal, deny the petition to deny, and issue a concise statement of the reasons for denying the petition which statement must dispose of all substantial issues raised by the petition. On the other hand if a substantial and material question of fact is presented, or if the Commission for any reason is unable to find that a grant of the application would be consistent with the public interest, it must designate the application for renewal for a hearing and proceed to carry out such hearing.

There are no hard and fast rules for determining who is a party in interest and, therefore, qualifies to file a petition to deny an application for renewal of a broadcast license. It is accepted that anyone who can show economic injury or radio interference qualifies. And since the *United Church of Christ* case,[7] generally speaking, members of the listening or viewing public in the station's service area have standing to raise public interest questions in a petition to deny.

Denial of a petition to deny the renewal of a broadcast license is, of course, subject to judicial review.

The FCC's rules now provide that petitions to deny renewal of a broadcast license may be filed through the first day of the last full month of the license. However, the Commission treats filings which are petitions to deny in every respect but timeliness as informal objections to renewal of the broadcast license. Under the Commission's rules, such informal objections are referred to the Commission staff. If in the view of the staff, such an informal objection does not raise a substantial public interest question, it will be denied by the staff and the objector informed of such fact.

However, if in the judgment of the staff the objection raises a substantial public interest question, procedures substantially similar to those followed with regard to a petition to deny may be followed. As a result, the licensee's application for renewal could be denied through procedures which avoid the Commission's rules prescribing deadlines for filing petitions to deny.

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[7] *Office of Communication of the United Church of Christ et al* v. *Federal Communications Commission*, 359 F.2d 994 (1966).

COMPARATIVE LICENSE RENEWAL PROCEEDINGS

A comparative renewal proceeding develops when one or more persons file mutually exclusive applications for a broadcast authorization against an application for renewal of a broadcast license which is expiring. In such a situation, as noted above, section 309(e) of the Act as construed by the *Ashbacker* case requires that a full comparative hearing be held to determine which applicant is to be awarded the broadcast authorization so as to best serve the public interest. Making such a determination based as it must be on the complex and variable factors which are present in a comparative broadcast license renewal proceeding is one of the utmost difficulty.

The most important issues in this context are (1) whether the broadcast service of a licensee during its expiring license term will give it an advantage over the other applicants competing for the broadcast authorization if the licensee meets a prescribed standard and (2) if so, what is that standard of broadcast service. There is also the obverse issue, will the licensee's broadcast service during his expiring license term be weighed against him if it fails to measure up to the prescribed standard.

In 1951, in the case of *Hearst Radio, Inc. (WBAL)*,[8] the Commission in favoring the existing licensee stated that where a choice must be made between an existing licensee and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious.

Until 1969 when the *WHDH* case was decided very few renewal applications were challenged by competitors.

THE WHDH CASE

An initial proceeding to select a licensee for Channel 5 in Boston began in 1954 with the consideration of four mutually exclusive applications.

Three years later, the F.C.C. granted the application of WHDH, Inc.[9] Following the commencement of broadcasting by WHDH, certain questions were raised involving attempts to influence the Commission. In 1961 the questions with respect to the construction permit were resolved, but the broadcast license was renewed for only four months and an order was filed specifically directing that new applications for the authorization could be filed.[10] After WHDH filed for renewal of its license in 1963, the F.C.C. designated WHDH's application for renewal and other mutually exclusive applications for the authorization for a hearing. During the period of consideration WHDH was given a temporary license. In 1966 an initial decision of a hearing examiner granted renewal to WHDH based on various criteria laid down in the Commission's *Policy Statement on Comparative Broadcast Hearings*. In January 1969 the Commission reversed the hearing examiner's initial decision, denied the renewal application of WHDH, and granted instead the application of Boston Broadcasters, Inc. (BBI) on grounds that this resulted in greater diversification of control of media of mass communications and BBI was to

[8] 15 F.C.C. 1149 (1951).
[9] 15 F.C.C. 1149 (1951).
[10] 33 F.C.C. 449 (1961).

be preferred because of greater integration of ownership and management.[11] In May 1969, the decision was reconsidered and reaffirmed by the Commission.[12]

The decision was appealed to the United States Court of Appeals for the District of Columbia. The Court, noting that this was not the ordinary renewal proceeding in light of the prior history, sustained the F.C.C. in its denial of renewal to WHDH and in the granting of the authorization to BBI in November 1970.[13]

On April 29, 1969, while the appeal of the *WHDH* case was pending, S. 2004, 91st Congress, was introduced in the Senate. S. 2004 provided that no competing application for a broadcast facility could be filed unless it was first determined that the public interest would not be served by renewing the existing broadcast license.

Hearings were held on S. 2004 in August and December of 1969 but no final action thereon was taken.[14]

POLICY STATEMENT ON RENEWAL OF BROADCAST LICENSES

On January 15, 1970, the FCC issued its *Policy Statement on Comparative Hearings Involving Regular Renewal Applications.*[15]

The nub of the *Policy Statement* was that—

> [I]f the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.[16]

Your committee's Special Subcommittee on Investigations issued a staff study entitled *Analysis of FCC's 1970 Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, in November 1970 in which a number of criticisms of the *Policy Statement* were detailed. The letter to Chairman Harley O. Staggers from Robert W. Lishman, Chief Counsel of the Special Subcommittee concluded at page VI:

> . . . permitting the policy statement to stand amounts to a surrender to the FCC of legislative power vested exclusively in Congress. Permitting an agency to summarily repeal statutory provisions and to refuse to give full force and effect to a Supreme Court decision requiring comparative hearings [*Ashbacker*] really does result in the FCC being a headless fourth branch of government. Condoning such a flagrant

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[11] 16 F.C.C. 2d 1 (1969).
[12] 17 F.C.C. 2d 856 (1969).
[13] *Greater Boston Television Corp.* v. *F.C.C.*, 444 F. 2d 841 (1970), cert. 91 S. Ct. 2229.
[14] Hearings, Communications Subcommittee, Senate Committee on Commerce on S. 2004, U.S. Senate, 91st Cong., 1st Sess., 2 Parts (1969).
[15] 22 FCC 2d 424 (1970).
[16] *Op. cit.*, p. 425.

> breach of responsibility would tend to invite regulated industries to concentrate on influencing administrative agency measures to suit their own special interest at the expense of the public interest, rather than complying with the law.

An appeal was taken on the *Policy Statement* to the United States Court of Appeals for the District of Columbia Circuit. The Court struck down the *Policy Statement* in June 1971 as being contrary to law and ordered that it not be applied to present or future broadcast license renewals.[17]

In its decision the Court (1) held that *Ashbacker* applied and (2) undertook to instruct the Commission on what the public interest required in the development and application of criteria for the selection of the winning applicant. The Committee agrees with the Court in its determination that *Ashbacker* applies where applications for mutually exclusive broadcast authorizations are filed with the FCC and finds unacceptable its actions in instructing the Commission on what the public interest requires in such situations.

With respect to the *Ashbacker* rule, the Committee believes that if a qualified applicant files a competing application, he is entitled to be heard on his proposals before any application is granted. With respect to the development and application of criteria for judgment in comparative cases, your committee believes that it is essential to the concept of administrative law that the FCC, to whom Congress has delegated authority under Congressional oversight, be the body to implement the broad standard of public interest so long as the Commission acts within its statutory and constitutional authority, does not deny due process, and is not arbitrary or capricious.

It was precisely the necessities to develop expertise and to undertake implementing actions, both of which were beyond the practical capacities of the Congress and the Courts, that were the primal motivating forces for the establishment of administrative agencies. The Court itself has often affirmed these seminal circumstances in its deference to the lawful expert judgment of the agency.

In the *Citizens* case, however, the Court ignored the concept of deference to administrative expertise to the extent that it attempted to instruct the Commission as to what comparative hearing criteria, including the order of their importance, were appropriate under the public interest standard of the Act. The Court did not find, as it could not find, that these instructions were based on propositions of law. Rather, they were expressions as to how the Court, if it were the Commission, would exercise its discretion under the statutory standard of the public interest.

The Committee recognizes that expert legal analysis undoubtedly regards the "law" of the *Citizens* case as being *only* that the *Ashbacker* rule was violated and that the Court's comments about comparative hearing criteria were mere *obiter dicta*. The Committee, however, is concerned that such *dicta* will tend to improperly condition or coerce the Commission in its exercise of its sound and expert discretion, contrary to the intent of the regulatory scheme established by the Act and the administrative procedure provisions of title 5, United States Code. Moreover, *obiter dicta* in one case often tends to be the "law"

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[17] *Citizens Communications Center* v. *F.C.C.*, 447 F. 2d 1201 (1971).

in the next case, as was manifested recently in the *TV 9* case,[18] where the Court, citing *Citizens*, on one issue clearly substituted its judgment for that of the Commission in the prescription and the application of public interest criteria in comparative hearing cases. It did not find that the standards for selection which the Commission applied were unlawful or arbitrary and capricious, but merely that the Court had different ideas.

If the Commission is to be corrected in the lawful exercise of its expert judgment, it is for the Congress and not the Courts to make the correction.

The Committee wishes to emphasize its view that the public interest requires the elimination of the application of the issues of so-called cross-ownership and integration of ownership and management from comparative renewal hearings on a case-by-case basis where meritorious renewal applicants are involved. This is not to suggest, in the slightest way, that the Commission should be less vigilant in avoiding undue concentrations of control or less vigorous in effectively promoting diversification of broadcast service. Both charges are given the Commission as matters for active consideration under the Act. The Committee merely emphasizes that licensees who have received broadcast licenses and operated stations in accord with the Commission's rules, regulations and policies should not be obliged to forfeit their businesses and properties on the mere finding in an individual comparative hearing that a competing applicant's receipt of the license would increase diversification of control of media of mass communications or integration of management and ownership. Such worthy objectives, while the responsibility of the Commission, should not be undertaken on a case-by-case basis, but by rulemaking in which the social, economic and political benefits and disadvantages which may flow from such a modification of the industry may fully be considered.

Stability in the industry and consistently good service to the public can only be assured if, when the Commission determines that the public interest requires changes in the media or other business holdings of existing licensees, or other changes in the make-up of their ownerships or managements, that such changes shall be decided upon through deliberate rule-making with a reasonable opportunity thereafter for all licensees to conform, if they can, to the new rules of the Commission. If reforms in ownership and structure are in the public interest they ought to be done uniformly, not haphazardly, and in a manner which is fair, equitable, and just to all licensees and the areas they serve.

The Committee believes that section 2(b) of the bill, along with the exposition of its purpose in this report, adequately removes the destabilizing effects of the *WHDH* and *Citizens* cases.

The following table reflects the effects of the *WHDH* case, the *Policy Statement*, and *Citizens* decision:

Competing Applications Filed for Broadcast Licenses

Fiscal year:	*Number filed*	Fiscal year:	*Number filed*
1962	0	1969	12
1963	1	1970	12
1964	1	1971	1
1965	2	1972	9
1966	2	1973	9
1967	4	1974 to March 8, 1974	6
1968	1		

[18] *TV 9, Inc.* v. *FCC*, D.C. Circ. No. 72–2049, decided Nov. 6, 1973, slip op., pp. 12–18.

ASCERTAINMENT UNDER THE FCC'S RULES

Under the FCC's present rules and regulations, ascertainment is a process which requires a commercial broadcast licensee [19] to consult with a representative range of community leaders and of members of the general public within 6 months of the date on which he files an application for a broadcast authorization.[20] The purpose of this process is to permit the licensee to be informed of the tastes and desires and the significant problems and issues in the community or communities which he serves so that he can respond to them in his programming.

Although ascertainment has only in recent years been made a formal procedure under the Commission's rules and regulations, its rationale was stated with vigor and clarity by the Federal Radio Commission in 1928 as follows:

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. . . . The emphasis should be on the *receiving* of service and the standard of public interest, convenience, or necessity should be construed accordingly. . . . The entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. . . . In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestra and artists, and discussion of its public issues may be broadcast. If . . . the station performs its duty in furnishing a well rounded program service, the rights of the community have been achieved.[21]

Forty-two years later, the Commission began to consider means of formalizing ascertainment with the following statement:

> To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise PART IV of our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to: (1) the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires.
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> Thus we do not intend to guide the licensee along the path of programming; on the contrary the licensee must find his own path with the guidance of those whom his signal is to

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[19] Noncommercial educational radio and television broadcast stations are not presently required to follow formal ascertainment procedures. However, a *Notice of Inquiry and Notice of Proposed Rule Making* (FCC Docket No. 19816) was adopted on September 6, 1973, looking toward requiring such stations to follow ascertainment procedures reflecting their particular purposes and audiences.

[20] Broadcast authorization, as used here, includes a construction permit for a new broadcast station, for certain changes in authorized facilities, for modification of a license to change a station location, or for a satellite television station, and certain authorizations to assign or transfer control of broadcast licenses.

[21] In re Great Lakes Broadcasting Co., F.R.C. Docket No. 4900; cf. 3d Annual Report of the F.R.C., pp. 32–36.

> serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program formal submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor-professional and eleemosynary organizations, and others who bespeak the interests which make up the community.[22]

But even before it changed its broadcast license application forms, the Commission decided that even the sole applicant for a broadcast authorization would be denied that authorization if it failed to acquaint itself with the needs, interests, tastes, and desires of the community it proposed to serve.[23] It was sustained in its decision by the court.[24]

In 1965 the Commission began the process of amending its application forms for broadcast authorizations.[25]

To clarify the ascertainment requirements in its broadcast application forms the FCC began a proceeding [26] which led to its *Primer on Ascertainment of Community Problems and Broadcast Matter to Deal with Those Problems.*[27] The *Primer* consists of thirty-six questions and answers on the various aspects of community ascertainment.

The day before the FCC adopted its *Primer on Ascertainment*, it opened a new docket which was addressed to the formulation of rules and policies relating to the renewal of broadcast licenses.[28]

A *Final Report and Order* was adopted in the docket on October 3, 1973, bringing about many changes in the forms and procedures used in the renewal of broadcast licenses.

Among the more significant changes are the following:

> License applications for radio and television broadcast stations must be filed four months in advance of the expiration date of the license rather than three months as was formerly required.
>
> Commercial broadcast licensees must, twice each month throughout their license terms, broadcast announcements regarding their obligations as licensees.
>
> Licensees of commercial television stations must file an annual report showing the amount of time and the percentage of total broadcast time devoted to the following types of programming: (1) news, (2) local news, (3) public affairs; (4) local public affairs, (5) all other programming exclusive of entertainment and sports, and (6) all other *local* programming exclusive of entertainment and sports. Such data must be provided for specified time

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[22] Federal Communications Commission Report and Statement of Policy re: Commission en banc programming inquiry, 44 FCC pt. 2, 2303, 2316 (1960).
[23] Suburban Broadcasters, 30 F.C.C. 951 (1961).
[24] Affirmed sub nom *Henry* v. *FCC*, 302 F.2d 191 (1962).
[25] 1 F.C.C. 2nd 439 (1965) (AM and FM Broadcast Stations); 5 F.C.C. 2nd 175 (1966) (Television Broadcast Stations).
[26] *Notice of Inquiry* in Docket No. 18774. (20 F.C.C. 2d 880 (1969)).
[27] *Report and Order* in Docket No. 18774 adopted February 18, 1971 (27 F.C.C. 2d 650 (1971)).
[28] Docket No. 19153, adopted February 17, 1971.

periods. For each program included in the categories of "news", "public affairs", and "all other", licensees must provide information concerning the date and time of broadcast, duration, source, and, in the case of "public affairs" and "all other" a brief description of each program. A copy of this report must also be placed in the television station's local files which are open to public inspection.

Licensees of commercial television stations are also required to place in their local files which are open to public inspection an annual listing of no more than 10 significant problems and needs of the area served by their stations during the preceding 12 month period. This listing must also include and briefly describe typical and illustrative programs or program segments (excluding news inserts) broadcast in response to those problems and needs. The source and time of broadcast of each listed program or program segment must also be included.

All broadcast licensees must retain for a period of three years in their local files which are open to public inspection letters and written comments received from the public regarding the operation of the station and the licensee's programming efforts.

Section-by-Section Description of the Bill, as Reported

Section 1. Short title

This section provides that the legislation may be cited as the "Broadcast License Renewal Act".

Section 2. Ascertainment; license period; and renewal procedures

This section (1) requires the FCC to prescribe ascertainment procedures; (2) makes the observance and substantial response to those procedures by a broadcast licensee a central consideration in determining whether the public interest would be served by renewing the broadcaster's license; (3) increases the term of broadcast licenses from three to four years; and (4) prohibits the FCC from considering a broadcast licensee's ownership interests or official connections in other broadcast stations, communications media, or businesses, or its participation in the management of the station in a proceeding for the renewal of the license, unless the Commission has adopted rules thereon. The other provisions in proposed section 307(d) of the Act (as it would be rewritten by section 2(b) of the bill) are a restatement of existing law.

Ascertainment Under the Bill.—Subsection (a) would amend section 309 of the Act by adding a new subsection (i) thereto. This proposed new subsection would require the Commission to establish procedures by rule to be followed by licensees of broadcasting stations to ascertain throughout the terms of their license the needs, views, and interests of the residents of their service area for the purposes of their broadcast operations. Different procedures could be prescribed for different classes of broadcast stations.

The emphasis which the bill places upon licensee ascertainment of, and response to, the needs, views, and interests (as those terms are defined in this report) is not intended to suggest that a licensee's efforts

to meet the demands of his service area for entertainment and sports programming are improper or undesirable. Not only is the satisfaction of these demands an important public-interest goal but it is almost always essential for the establishment of an audience or a following which will listen to or view the non-entertainment and non-sports programming of the licensee.

Continuing ascertainment.—Until the FCC adopted its Final Report *and Order* in its Docket No. 19153, ascertainment was an activity which, in the main, was carried out triennially in the six month period preceding the expiration date of the broadcaster's license. Your committee approves of the manner in which such *Final Report and Order* seeks to stimulate continuous interaction between the broadcast licensee and its audience.

Your committee believes that the existing requirement for consultation with representative community leaders and members of the public in the area being served by the broadcast licensee must likewise be spread out by demographic sample over the whole population of the area served—not just its leaders—with particular attention to any particular audiences the station may serve and over the entire period of broadcaster's license so that the licensee can be aware of shifts in community needs, views, and interests; shifts which can occur with great rapidity due in large part to the effectiveness of the broadcast media. An advantage in spreading such consultation over the entire license term is that it will become a normal part of broadcast operations making for a continuing dialogue between the broadcaster and residents of its service area rather than an arduous triennial obligation the performance of which now seems to be reflected more in the filing of papers than in substance.

However, insofar as any formal or statistical ascertainment procedures are established, the committee sees no objection in permitting stations serving part or all of the same service area to jointly conduct such a survey directly or through a third party.

Needs, views, and interests.—"Needs," as used in the bill, is synonymous with the term "problems, needs, and interests" used by the FCC in its *Primer on Ascertainment.* It can best be translated as issues or problems in the licensee's service area, for example, drug use among high school students, the adequacy or lack thereof of welfare programs, the needs for additional public services for the elderly, police treatment of juvenile offenders, modification of local zoning laws, etc.

"Interests" is intended to be reflective of the widest possible range of interest groups (including among others, agricultural, labor, professional, racial, ethnic, economic, religious, charitable, business, political, social, educational, and cultural groups) within the service area. Consultation with persons representative of the various interest groups in a service area is a necessary component of ascertainment.

"Views" injects a new factor into the ascertainment process. By adding "views" to the matters which must be ascertained by the broadcast licensee in his service area, the committee intends that the licensee ascertain the responsible contrasting positions with regard to ascertained needs so that in its response those contrasting positions can be taken into account. In addition, such ascertainment of views should be a means of increasing the licensee's awareness of public attitudes towards its operations.

The overall purpose of ascertainment, in the committee's view, is to provide a procedure through which each broadcast licensee can, on a continuing basis, be made aware of interests, issues, and attitudes within its service area and the diverse and contrasting positions thereto to which it must be substantially responsive in order to fulfill its obligation to serve the public interest.

The committee affirms the position taken by the FCC that the ascertainment of needs, views, and interests, is not to be regarded as requiring a broadcast licensee to seek out individual or community preference for particular programs or program formats.

Service areas.—The bill requires that ascertainment be carried out by broadcast licensees with respect to their service areas. This reflects a shift of emphasis from the present ascertainment process under which ascertainment is carried out with respect to communities with particular focus on the community to which the license is assigned. Your committee believes that a licensee's broadcast service must be related to the area in which his signal is received and his audience within that area. To emphasize service to a particular political subdivision because the broadcast license happens to be assigned to that subdivision is undesirable. Instead, a broadcast licensee should engage in ascertainment throughout the area within his service contour (but not beyond a reasonable distance as determined by the Commission). The depth and intensity with which ascertainment is carried out within any part of a licensee's service area should, generally speaking, be related to the strength of the licensee's broadcast signal which is received in such part and the relationship of the portion of the population in that part to that in the overall service area.

However, the committee recognizes that there may be areas or audiences within the broadcast licensee's service contour to which the licensee may choose to give less emphasis in his service because the needs, views, and interests of those audiences or of the residents of those areas are being given broadcast service emphasis by other licensees serving the area. In those instances the licensee should in reporting on his observance of the ascertainment requirements indicate with specificity the areas and audiences he chooses to serve, and with what emphasis, together with his reasons therefor.

Broadcast Operations.—Under the FCC's existing rules and regulations ascertainment is carried out to permit the licensee to broadcast matter in response to the problems, needs, and interests which are ascertained. That is similar to the main purpose of ascertainment under the bill. In addition to the more comprehensive "needs, views and interests" in this legislation, as discussed above, ascertainment also has a broader purpose of relating the broadcast licensee's overall broadcast operations to the needs, views, and interests of his service area. This is intended to make matters such as the licensee's hours of service, employment practices, good will and promotional practices, etc., responsive to the ascertained needs, views, and interests of its service area.

The committee recognizes that there are several specific constraints on the degree to which broadcast operations can be responsive to ascertained needs, views and interests. These include but may not be limited to legal and technical restraints imposed by the FCC, economic limits related to the profitability of the station, the availability of talent and

program material, etc. For example, a commercial broadcast station could not modify its broadcast operations so as to cause it to violate the terms of its license or the FCC's rules and regulations; nor would it serve the public interest to expect changes which would threaten the station's economic viability.

Whenever a broadcast licensee's ability to be substantially responsive to the ascertained needs, views, and interests of its service area is hampered by actions or decisions of a person who is not subject to the licensee's control (such as the FCC, a radio or television network, or an equipment manufacturer), it is anticipated that the licensee will notify such person of that fact.

Different Procedures.—The bill specifically provides that different procedures may be prescribed for different categories of broadcasting stations. For example, the procedures prescribed for noncommercial educational broadcast stations may be different than those for commercial broadcast stations. It would also be consonant with these provisions for different procedures to be established for television broadcast stations, standard (AM) radio stations, and FM radio stations, and within those groupings for stations based on their economic strength and the extent of their service area.

In addition, it is appropriate to provide for those broadcast stations whose formats are directed to particular audiences within their broadcast contours by allowing such stations to give special consideration in the ascertainment of the needs, views and interests of their service area to the needs, views and interests of their particular audience and to be especially responsive thereto. Such stations may emphasize a particular kind of programing such as all news, ethnic, a particular type of music, talk, or entertainment formats. In this connection your committee believes that such special format stations, which have become increasingly common in radio, should be permitted in any service area as long as the overall needs, views, and interests of the residents of that area are met by the aggregate of broadcast signals covering that area.

Your committee wants to emphasize that the purpose of ascertainment is to promote the responsiveness of broadcast licensees to the needs, views and interests of their service areas. This should be achieved consistent with the guidelines set out herein without imposing needless economic burdens on licensees. This objective, the committee believes, can be furthered by careful tailoring of ascertainment procedures to different categories of broadcast stations. Thus, for example, we would expect that the ascertainment procedures which would have to be observed by a small radio station would be far less exacting in terms of cost and time than those procedures which would have to be observed by a more profitable television station having a large population in its service area.

Test for Renewal.—Under the bill as under existing law, the ultimate test for renewal of a broadcast license continues to be whether the public interest would be served thereby. The bill, however, makes two factors of paramount importance in determining whether the public interest test would be met in a renewal of a particular broadcast license. They are whether the licensee during the preceding license period (1) has observed applicable ascertainment procedures, and (2) has engaged in broadcast operations substantially responsive to the ascertained needs, views, and interests of residents of his service

area. Thus, there is a retrospective assessment of whether ascertainment has been carried out by a broadcast licensee and whether its broadcast operations have been substantially responsive to the determinations made from the ascertainment process. By contrast, the entire focus of the existing ascertainment process of the FCC is prospective with little evaluation of the results flowing from that process.

The bill's ascertainment provisions further implement the major policy objective underlying the Radio Act of 1927 and the broadcast provisions of the Communications Act of 1934 [29]—the promotion of broadcast service designed to serve the area where the licensee's signal can be received, and thus in the aggregate, the interest of the nation.

In determining whether or not the licensee has been substantially responsive to the needs, views and interests of his service area, it is not the expectation of your committee that the licensee will deal in depth with every identified need, that his operation will respond fully to every interest or that the station will explore every shade of viewpoint. Rather, your committee expects that the licensee will (1) give consideration to the ascertained needs, views, and interests in order to make a determination which are the most important to the service area and any particular audience within that area the licensee serves, (2) assess the capacities and limitations of his own operations and the resources available to him, and (3) respond to the ascertainment in terms of those determinations and assessments in a manner that is sincere and diligent. If such be the case, the committee assumes the FCC will determine, based on the established service of the incumbent licensee, that the public interest will be served by renewal of the license in any noncomparative situation. Of course, it should also be noted that in order to obtain renewal of any broadcast license, the licensee must continue to possess the necessary legal, technical, and financial qualifications to hold the license, and in addition, must not have engaged in acts or practices during its expiring license term which would render it unfit to hold a broadcast license.

A question remains unresolved, even after the above descriptions of the principal considerations which apply in determining whether the public interests would be served by the renewal of a broadcast license. The problem is whether the public interest requires the same standard of performance of a broadcast licensee in a noncomparative situation as in a comparative one. We think not, but we would hope that every licensee would conduct its operations as if it were about to face a comparative hearing at the time of its next renewal.

If a broadcast licensee comes up for renewal in a noncomparative situation, i.e., one involving no challenge or only a petition to deny, we agree that the test should be the one stated by the Chairman of the FCC,[30] namely, whether the applicant has served the public interest in a manner that is sufficient—but no more. Stated another way, in such a situation the applicant/licensee should be granted renewal if it has provided minimal service to its service area, because even minimal service is to be preferred to no service at all.

However, for the Commission to be satisfied with minimal service from an incumbent licensee in a comparative situation when another

[29] See section 307(b) of the Act which requires that there must be a fair, efficient, and equitable distribution of radio service among the several States and communities.
[30] Hearings on Broadcast License Renewal, Part 1, Serial No. 93–35, page 58.

applicant would clearly provide much better service would not only ill serve the public interest, but would make a mockery of the hearing process. We believe that stability in the broadcasting industry is highly desirable, but that it should not be achieved at the cost of imposing barely sufficient service on the public by freezing out competitors who would provide better broadcast service.

To summarize, we would propose that an applicant for renewal of a broadcast license be assured of renewal where overall during the expiring term of its license, it has provided *good* service to its service area and its broadcast operations have not been marked by serious deficiencies, i.e., violations of law or of the Commission's rules or policies. We use the term *good* in its defined sense, to wit: having the right qualities; as it ought to be; right. As we use *good* in this context, it is synonymous with *substantial* as used in the *Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* and with *meritorious* as used by the Commission in the *WBAL* case.

Broadcast License Term.—The bill would increase the term of a broadcast license from three to four years. Early radio licenses were issued for 90 days. Later the term was increased to six months, and then to one year. Finally, the Radio Act of 1927 extended the term to three years where it remains today.

The majority of the FCC and most of the broadcast license renewal bills which were referred to the committee propose a five year broadcast license term. On the other hand there was substantial opposition voiced in the hearings on broadcast license renewal legislation to any increase in the broadcast license term. Opponents argue that increasing the term of broadcast licenses might decrease the broadcaster's responsiveness to his service area.

Your committee believes that a one-third increase in the term of a broadcast license is reasonable and prudent in view of other modifications of the license renewal process contained in the bill. The four-year license period would result in a substantial reduction in the number of renewal applications which the FCC would be required to process each year and would therefore facilitate a more thorough review of each such application. The Commission would retain its powers to levy forfeitures, order early renewals, issue cease and desist orders, and revoke licenses which would permit it to deal with any serious breaches of the public interest.

Crossownership; Integration of Ownership and Management.—The bill would prohibit the Commission in a broadcast license renewal proceeding from considering (1) ownership interests or official connections of the licensee in other stations, communications media, or businesses (hereinafter referred to as "crossownership"), or (2) the participation of ownership in management of the broadcast stations (hereinafter referred to as "integration of ownership and management"), unless the Commission has adopted rules prohibiting such crossownership or prescribing ownership or management structures or their composition and has given the renewal applicant a reasonable opportunity to conform with such rule.

Although the Commission has indicated that it does not intend to apply these factors in future broadcast license renewal proceedings, in the absence of applicable rules, there is nothing which would prevent

it from doing so or to prevent the courts from requiring consideration of the factors on a case-by-case basis. To apply them in broadcast license renewal proceedings would result in restructuring the broadcasting industry in a haphazard, subjective, and oft-times inconsistent manner which the Committee feels would be unfair and undesirable. Furthermore, it is unfair and unsound to oust a broadcast licensee on grounds of crossownership or of integration of ownership and management when the license was granted to it with full awareness of the crossownership or of its intentions with respect to integration of ownership and management.

The committee intends that, if crossownership is to be prohibited or management or ownership structures or their composition are to be prescribed, it must be done by rules adopted by the Commission after compliance with prescribed rule-making procedures where there has been notice and opportunity to comment afforded to interested persons in the industry and the general public.[31]

Some concern has been expressed about the apparently broad prohibitory language in proposed section 307(d)(2)(B). This concern is probably based at least in part on the broad language of paragraph 34 of the Commission's *Further Notice of Proposed Rule Making* in Docket No. 18110 adopted March 25, 1970 which reads as follows:

> 34. The rules which we propose would be aimed at reducing common ownership, operation, or control of daily newspapers and broadcasting stations within the same market. They would require divestiture, within five years, to reduce holdings in any market to one or more daily newspapers, or one television broadcast station, or one AM–FM combination. Under the provisions of the rules, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned there within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market.

Notwithstanding the broad prohibition stated in paragraph 34, the committee is of the view that the Commission, in connection with any rules it may adopt, could take into account, among other things, such factors as the size of the market in question; the other interests of the ownership; the number of broadcast stations in the market; the other communications media, such as newspapers and cable systems, in the market; the extent to which other broadcast signals are received in the market; the circulation of newspapers in the market which are published outside thereof; and the extent to which there is concentration of media control as reflected by various other factors.

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[31] At the present time petitions to deny filed by the Antitrust Division of the Department of Justice are pending against applications for renewal of broadcast licenses for stations KSD–TV—AM, St. Louis, Missouri, filed by the Pulitzer Publishing Company which also publishes the St. Louis *Post-Dispatch* daily newspaper; for station KTVI–TV, St. Louis, Missouri, filed by Newhouse Broadcasting Corporation which controls the St. Louis *Globe-Democrat* daily newspaper; for stations KRNT–AM–FM–TV, Des Moines, Iowa, filed by Cowles Communications Inc., publishers of the Des Moines *Register* daily newspaper and the Des Moines *Tribune* daily newspaper; and for stations WCCO–AM–FM–TV, Minneapolis-St. Paul, Minnesota, filed by Midwest Radio-Television, Inc. which is controlled by the Minneapolis Star and Tribune Company publisher of the Minneapolis' only newspapers and by Northwest Publications, Inc., publisher of St. Paul's only newspapers.

SECTION 3. TIME LIMITATION ON PETITIONS TO DENY

This section requires the Commission to adopt rules prescribing reasonable time periods during which petitions to deny may be filed and requiring it to decide the matter in issue on the basis of petitions filed during the prescribed time period. This section is intended to afford any party in interest a reasonable opportunity to file a petition to deny against the granting of an application, but it is also intended to prevent abuses of this opportunity through use of the dilatory device of filing pleadings out of time which have the effect of delaying decisions for lengthy periods.

The "right to petition" is one which is cherished but as in the case of all rights, if the reasonable and orderly procedures which are designed to effectuate that right are abused, the rights of others may well be placed in jeopardy. The amendments made by section 3 are reasonable corrective measures to prevent abuses of the petition to deny procedure.

SECTION 4. NEGOTIATION

Under this section the FCC is required to prescribe procedures to promote good faith negotiations between licensees of broadcasting stations and persons raising significant issues regarding the operation of such stations in order to resolve such issues. In recent years, attempts have been made to resolve such issues by means of confrontations by complainants and the filing of time consuming and expensive petitions to deny. As the following table indicates, use of the petition to deny against applications for renewal of broadcast licenses has been increasing:

PETITIONS TO DENY FILED AGAINST APPLICATIONS FOR RENEWAL OF BROADCAST LICENSES

Fiscal year	Number of petitions	Number of stations filed against
1967	2	2
1968	3	3
1969	2	2
1970	15	16
1971	38	84
1972	68	108
1973	50	150
1974 to Mar. 8, 1974	25	35

It is in the interest of all to avoid disruptive confrontations and, whenever possible, the time, effort, expense, and acrimony which result from the filing of a petition to deny against a broadcast station if the issue can be more efficiently resolved. To this end section 4 is intended to promote good faith negotiations so that significant issues can, if possible, be resolved as they arise.

The prescribed procedures should, among other things, be addressed to determining what are significant issues for negotiation, how such negotiations should be initiated, who would be appropriate participants in such negotiations, where they should take place, who should preside at them, and what matters are not appropriate for consideration in such negotiations.

In using the term "good faith negotiations" there is no intention to incorporate the body of law and administrative rulings which have developed in the field of labor law in connection with that concept. Rather as indicated above, the intent of this provision is to require the Commission to prescribe procedures by which persons critical of the operation of a broadcast station and representatives of the station would be encouraged to meet in good will and confer in good faith during the term of the station's license in a candid and sincere effort to resolve the issues presented by such criticism. It is not intended by this provision to require any licensee to agree to any particular concession or to reach agreement with any particular group.

Observance of the procedures prescribed by the Commission under this section is voluntary. However, it is your committee's intention to study the operation and effects of these provisions and the procedures prescribed thereunder so as to assess their impact and effectiveness for whatever further applicability may be appropriate.

SECTION 5. APPEAL OF CERTAIN DECISIONS AND ORDERS OF THE FCC TO LOCAL CIRCUIT COURTS

Decisions and orders of the FCC in each of the following instances would have to be appealed to the United States Court of Appeals for the circuit in which the broadcast station involved is, or is proposed to be, located:

(1) Grant or denial of a broadcast authorization (i.e. a construction permit for a broadcast station or a broadcast station license).

(2) Grant or denial of a renewal or modification of a broadcast authorization.

(3) Grant or denial of an authorization to transfer, assign, or dispose of any broadcast authorization (or any rights thereunder).

(4) Modification or revocation of a broadcast authorization by the Commission.

Decisions and orders of the FCC affecting authorizations in services other than broadcasting (for example, the aviation, maritime, safety and special, citizens, industrial, and amateur radio services), cease and desist orders under section 312 of the Act, and suspension of radio operators licenses could, under the amendment made by section 5, be appealed either to the United States Court of Appeals for the circuit in which the person bringing the appeal resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia circuit.

At present under section 402(b) of the Act all appeals referred to above must be taken to the United States Court of Appeals for the District of Columbia circuit.

The processing of most contested broadcast license renewal applications takes a long period of time. For example, WHDH filed its renewal application in 1963, and the Court of Appeals for the District of Columbia Circuit did not render a final decision in that case until November 1970. We note that the median time to dispose of an appeal in the Court of Appeals for the District of Columbia Circuit

is 11.7 months, the longest of any Court of Appeals in the Nation.[32] It is hoped by tranferring these appeals to other circuits that the overall period of time taken to finally decide a contested broadcast license renewal application will be shortened.

Furthermore, since broadcast authorizations usually involve parties residing in the communities to which the authorizations are or are proposed to be assigned, it better meets the convenience of most parties to an appeal involving a broadcast authorization if the appeal is brought in the United States Court of Appeals for the circuit in which such community is located. In this connection your committee notes with approval that the general policy of the FCC is to conduct hearings on renewal and revocation of broadcast licenses in the communities to which the licenses are assigned.

SECTION 6(a). STUDY OF REGULATION OF BROADCASTERS

Under this section the FCC is required to carry out a continuing study to determine how it might eliminate regulations applicable to broadcast licensees which are required by the Act but do not serve the public interest. The Commission must make annual reports on its study (together with any recommendations for legislation) to the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee. The first such report must include the FCC's conclusions with respect to the differences between broadcast licensees on which are or may be based differentiation in their regulation under the Act.

As noted earlier in this report, the framework of the Act insofar as it relates to broadcasting was established by the Radio Act of 1927 long before FM radio or television became actualities. Consequently the Act does not take into account the differences between those two types of broadcasting and standard (AM) radio broadcasting around which the Act was conceived. Nor does the Act reflect the differences between commercial and noncommercial educational broadcasting or between broadcasters operating in large and small markets or between economically large and small broadcasters operating in those markets. Your committee believes that there must be effective regulation of the broadcasting industry in order that the public interest be well served. But that does not mean that the same rules and regulations must apply, or apply to the same extent, to all broadcasters. We look to the Commission to recommend amendments to the Act which will facilitate more fair, efficient, and effective regulation of the broadcasting industry.

The committee is aware that the Commission in 1972 established a task force to undertake a comprehensive study looking toward reregulation of radio and television broadcasting. During 1972 and 1973 a number of Orders were issued based on the activities of the task force. It is not the intention of section 6(a) of the bill to interfere with the activities of the task force. The purpose of the task force is a good one and its operation should continue. Rather, the provisions of

[32] Management statistics for United States courts, 1973, a report . . . from the Director of the Administrative Office of the United States Courts, at DC–0.

section 6(a) should be regarded as complementary of the activities of the task force, and the task force should participate in recommending amendments to the Act where its process of re-regulation is hampered by the Act's provisions.

SECTION 6(b). COMPLETION OF ACTION ON DOCKET NO. 18110

This section requires the FCC to complete all proceedings and take such agency action in its Docket No. 18110 as it deems appropriate within six months after the date of enactment of the legislation.

Proceedings in Docket No. 18110 were commenced by *Notice of Proposed Rule Making* released by the FCC on March 27, 1968. The original purpose of the Docket was to consider amendments to certain of the Commission's rules relating to multiple ownership of broadcast stations. Comments filed by the Antitrust Division of the Justice Department and others urged that the scope of the docket be extended in some form to newspaper-broadcasting combinations and to license renewal proceedings. In its *First Report and Order* [33] released March 25, 1970, the Commission adopted with certain minor changes the proposed one-station-to-a-customer rule. In a *Further Notice of Proposed Rule Making* [34] in such Docket adopted the same day, the Commission proposed an amendment to its rules so as to require divestiture within five years in order to reduce any person's media holdings in any market to one or more daily newspapers, one television station, or one AM–FM combination. It is now four years since the *Further Notice of Proposed Rule Making* was adopted in Docket No. 18110. The committee is aware that the Commission has scheduled oral argument before it on June 18 and 19 of this year on this matter, but it insists that the Commission press on after such oral arguments to a conclusion within the six-month period fixed by the legislation so that the issue be resolved for the sake of those it will affect and so that the Commission may direct its attention to its other responsibilities.

SECTION 7. EFFECTIVE DATES

This section provides when the various provisions of the legislation will take effect.

COST

Enactment of this legislation will not require any increase in expenditures by the Federal Government.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

[33] 22 FCC 2d 306.
[34] Loc. at p. 339.

COMMUNICATIONS ACT OF 1934

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TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

* * * * * * *

ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. (a) * * *

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[(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.]

(d)(1) The term of any license, or the renewal thereof, granted under subsection (a) for operation of a broadcasting station may not exceed four years, and the term of any license, or the renewal thereof, for any other class of station may not exceed five years.

(2)(A) Any license granted under subsection (a) may upon its expiration be renewed, in accordance with section 309, if the Commission finds that the public interest, convenience, and necessity would be served by the renewal of such license. In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (i) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the needs, views, and interests of the residents of its

service area for purposes of its broadcast operations, and (ii) whether the licensee has engaged in broadcast operations during the term of the license which were substantially responsive to those needs, views, and interests.

(B) In considering any application for renewal of a broadcast license granted under subsection (a), the Commission shall not consider—

(i) the ownership interests or official connections of the applicant in other stations or other communications media or other businesses, or

(ii) the participation of ownership in the management of the station for which such application has been filed,

unless the Commission has adopted rules prohibiting such ownership interests or activities or prescribing management structures, as the case may be, and given the renewal applicant a reasonable opportunity to conform with such rules.

(3) Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

(4) In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.

(5) Any license granted or renewed for the operation of any class of station may be revoked as provided in section 312.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

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ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

SEC. 309.(a) * * *

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(d)(1) Any party in interest may file with the Commission, *within such time periods as may be specified by the rules of the Commission,* a petition to deny any application (whether as originally filed or as amended) to which subsection (b) [of this section] applies [at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with

respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing]. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed *by the parties within the time periods specified by the rules of the Commission*, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice

the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.

(i) The Commission shall by rule establish procedures to be followed by licensees of broadcasting stations to ascertain throughout the terms of their licenses the needs, views, and interests of the residents of their service areas for purposes of their broadcast operations. Such rules may prescribe different procedures for different categories of broadcasting stations.

(j) The Commission shall prescribe procedures to encourage licensees of broadcasting stations and persons raising significant issues regarding the operations of such stations to conduct, during the term of the licenses for such stations, good faith negotiations to resolve such issues.

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TITLE IV—PROCEDURAL AND ADMINISTRATIVE PROVISIONS

* * * * * * *

PROCEEDINGS TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ORDERS OF THE COMMISSION

SEC. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decisions and orders of the Commission [to the United States Court of Appeals for the District of Columbia], *as provided in subsection (c)*, in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(c) *An appeal under subsection (b) from an order or decision of the Commission—*

(1) made on an application (other than one under section 325) involving a broadcast facility and described in paragraph (1), (2), (3), or (6) of subsection (b), or

(2) described in paragraph (5) of such subsection modifying or revoking a construction permit or station license of a broadcast facility,

shall be brought in the United States Court of Appeals for the circuit in which such broadcast facility is, or is proposed to be, located; and appeals under such subsection from any other order or decision of the Commission may be brought in the United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the circuit in which the person bringing the appeal resides or has his principal place of business. Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the applicant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

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SEPARATE VIEWS OF CONGRESSMAN JAMES T. BROYHILL

Broadcast License Renewal Act

I wish to express my continued support for a five-year term for broadcast licenses, rather than the four-year term provided in this bill. During the Committee's consideration of this measure, I offered an amendment to provide a five-year term, which the Committee rejected. The bill as originally introduced and co-sponsored by more than 200 members of the House included provision for a five-year license term.

In approving this bill, the Committee has indicated its support for an extension of the present three-year term of broadcast licenses. I feel that extending this period to five years, rather than four years, would be in the public interest. The additional time provided would allow broadcasters to do a better job of program planning, staffing, and providing the expensive equipment necessary to operate a broadcast facility. The stability of operation that the longer-term would give broadcasters would greatly benefit the community as a whole.

Present law provides for continuing oversight of broadcast licensees by the Federal Communications Commission during the entire license period. In addition, this measure provides additional safeguards that broadcast licensees will serve the public interest during the license period. The bill adds to existing law a new ascertainment section (Section 309 (i)) which requires licensees to ascertain throughout the terms of their licenses the needs, views, and interests of the residents of their service areas. Presently, such determination of community needs is required only immediately prior to license renewal. In Section 309 (j), the bill also requires licensees to conduct good faith negotiations during the term of the license to resolve significant issues raised about their operations.

I feel that this new language, coupled with the existing powers of the Federal Communications Commission, provides adequate safeguards that broadcast licensees would not abuse the five year term provided by my amendment. I plan to offer my amendment providing the five-year license term when this bill is considered on the floor of the House.

James T. Broyhill.

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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

ON

BROADCAST LICENSE RENEWAL LEGISLATION

before the

Subcommittee on Communications
Honorable John O. Pastore, Chairman
Committee on Commerce
United States Senate

June 18, 1974

The basic structure for the American system of broadcasting, created in the 1920's and early 1930's, was premised on the twin concepts of private responsibility and public accountability. In that the broadcaster was authorized to use the public airways, a scarce resource, he would be responsible for serving the needs and interests of the people in his local community, and would thus be held accountable to the public for the service he rendered in executing this responsibility. As part of this structure, and clearly distinguishing broadcasting from other media, was the provision that broadcasters would be federally licensed. This fundamental decision was made by the Congress in the Radio Act of 1927 and again in the Communications Act of 1934.

The licensing system, thus, presents the Government with a unique dilemma. On the one hand, the Act requires the Federal Communications Commission (FCC) to grant and renew applications for broadcast licenses if the public interest, convenience, and necessity are served thereby. This necessarily means that the Commission will have to hold the broadcaster accountable for, and pass judgment in some way on, the broadcaster's programming. On the other hand, there is a fundamental Constitutional principle and public policy that the First Amendment should protect from governmental intrusion and interference those who

disseminate news, information and ideas to the public, so that the free flow of information to an informed electorate will be unimpeded.

This dilemma requires a particularly delicate balancing act on the part of the Government with respect to license renewal procedures. The manner in which renewals are treated is basic to the Government's relationship to broadcasting. The procedures and criteria governing the license renewal process inevitably have a profound effect on the daily operations of licensees and the way in which they determine and fulfill their public interest responsibilities. If broadcasters see instability in license renewal, they may seek economic and regulatory safety by rendering the type of program service that will most nearly assure renewal of their license. If the Government sets detailed performance criteria to be applied at renewal time, the result will most likely be that the Government's criteria, instead of the broadcaster's perceptions of his local community's needs and interests, will become the benchmark for measuring his public interest performance. Neither the broadcaster's nor the public's First Amendment interests in the free flow of information would be served in such situation.

Broadcasters should be permitted and encouraged to disseminate ideas and information, whether popular or unpopular, whether consistent or not with the views of any particular government. Broadcasters should be encouraged to serve the actual needs of their communities rather than some arbitrary definition of needs imposed by a federal bureaucracy. Yet, current and proposed license renewal procedures could give the FCC the power to renew licenses of only those broadcasters whose programming meets government-imposed standards or criteria. The price of achieving stability in broadcast licensing should not be the insulation of broadcasters from their local communities by making them more responsive to the Government.

Counterbalancing the goal of reasonable stability in the license renewal process, however, is the prohibition in the Communications Act against anyone acquiring a property right in the broadcast license and the First Amendment goal of promoting a diverse and unfettered flow of information and ideas. The Government has an affirmative duty under the Communications Act and the First Amendment, therefore, to foster competition in broadcasting and to assure that broadcasters are responsive to the needs of their communities. The spur of competition and the threat of non-renewal also are indispensable components of broadcast regulation.

These are lofty and complex considerations. There is room for differing views on the priorities and about the proper balance to be struck. The issues transcend short-run political differences. The decisions the Congress makes on license renewal and on other broadcasting and cable communications matters it will face in the next few years will have a major effect on the flow of information and freedom of expression in our society for the rest of this century.

The Congress can take an important step now by adopting a renewal policy that brings reasonable stability to the renewal process; that insulates the broadcaster from the effects of arbitrary and intrusive governmental influence; that turns a broadcaster toward community standards and away from Government standards; and that protects the public through clarification and enforcement of the broadcasters' public interest obligations.

I would now like to address myself primarily to the provisions of S. 1589, the Administration's renewal bill, and to H.R. 12993, the House bill, and analyze them in terms of the problems and objectives just discussed and needed changes in license renewals that should be made.

There are four essential changes that should be made with respect to present practice and procedures in the license renewal process:

(1) the term of broadcast licenses should be extended from three to five years; (2) there should be no requirement for a mandatory comparative hearing for every competing application filed for the same broadcast service; (3) restructuring of the broadcasting industry through the renewal process should be prohibited; and (4) the FCC should be precluded from using predetermined categories, quotas, formats and guidelines for evaluating the programming performance of the license renewal applicant.

1. Longer License Term

Both S. 1589 and H.R. 12993 would extend broadcast license terms from three to five years. We support this proposal as consistent with the public interest goal of stabilizing the renewal process.

In the early days of radio a three-year license term was a reasonable precaution for dealing with and supervising an infant industry. In keeping with the present maturity and modern complexities of the broadcasting industry, a five-year term for broadcasters would be appropriate and consistent with the terms for all other licenses granted under the Communications Act.

2. Comparative Hearing Procedures

Presently, the law requires an automatic, inevitably lengthy and costly, comparative hearing whenever a competing application is file

for the same broadcast service. Under the Administration bill, S. 1589, the procedures presently applicable to a petition to deny renewal of a license, which are unaffected by our bill, would apply also to a competing application. Thus, the challenger would bear the initial burden of demonstrating that the renewal applicant had not met the renewal criteria of the Act; the FCC would be able to exercise its independent judgment as to whether a comparative hearing was necessary; and a hearing would be required only if the Commission had cause to believe that the broadcaster's performance might not warrant renewal.

It is important to remember that at stake in a comparative hearing is the incumbent licensee's right to operate as a private enterprise medium of expression. In order to insure that such expression is robust, wide open, and unintimidated, this right should be revoked only if clear and sound reasons of public policy demand such action. This change would afford the licensee a measure of stability and some necessary procedural protections. We should not lose sight of the fact that being put through the effort and expense of a five to ten-year comparative hearing is itself a penalty that can be imposed upon a superior broadcaster simply by filing of a competing application.

The expectation of receiving a hearing automatically, with no additional burden of establishing deficiencies in an incumbent's performance, can only encourage the filing of competing applications for bargaining leverage, or harrassment. This undermines the stability of the renewal process, turning it into a forum for inflated promises, and increasing the risk that the process will be abused for ideological or political purposes.

H.R. 12993 lacks procedural safeguards incorporated in S. 1589 and thus fails to afford the broadcaster sufficient procedural protection from these risks.

3. Prohibition Against Restructuring Through the Renewal Process

The third necessary change is to preclude the FCC from any restructuring of the broadcasting industry through application of various policy criteria in individual renewal cases. Under S. 1589, the FCC would be prohibited from using against the renewal applicant any uncodified policies. If the FCC wished to impose or change industry-wide policies affecting broadcast ownership or operation, it would have to use its general rule making procedures. This proposal would prevent arbitrary action against individual broadcasters; would foster the certainty and stability necessary to good broadcast operations; and would

have the additional benefit of assuring that all other interested parties would have opportunity to participate in the proceeding before the rule was adopted.

For that reason, we support that provision of H.R. 12993 prohibiting the utilization of cross or multiple ownership or integration of ownership and management policy principles as criteria in a renewal proceeding unless codified. It should be clear, however, that S. 1589, prohibiting utilization of any policy not reduced to a rule, affords both the broadcaster and the public much greater protection from capricious administrative action than does H.R. 12993, and is thus to be preferred.

4. Clarification of Renewal Standards and Prohibition Against Use of Predetermined Performance Criteria.

The Communications Act of 1934 fails to define what constitutes the "public interest, convenience and necessity," and in the intervening years this standards has come to mean different things to different people. Important and sweeping powers over broadcasting delegated to an administrative agency without any more specific guidelines as to their application than the "public interest," almost invite arbitrary, unpredictable, and ever-increasing regulation. Such vague standards also invite rampant second-guessing of administrative agency action by the courts.

While there is a need to clarify the public interest test used to evaluate the performance of a renewal applicant, we must avoid adopting a test that would risk abridging the First Amendment rights of broadcasters and the public. Such a risk is presented by the current impetus, expressed in the Commission's Docket No. 19154, for example, to establish performance quotas or program percentages as a means to judge a licensee's programming performance.

While such standards would appear to be purely quantitative criteria, it is difficult to conceive of an instance in which the Commission would not look beyond the mere numbers. Since program performance would be what is being measured, it seems reasonable to assume that the Commission would be driven inevitably to making qualitative judgments on program content within quantitative benchmark. If past regulatory history is a reliable indicator of future conduct, we could expect to see such quantitative criteria applied in an increasingly subjective manner and inflated over the years in an elusive game of measure and countermeasure between the regulators and the licensees.

If this should occur, the licensee would not be fulfilling his obligations to operate the station in accordance with the needs and interests of his community, but in response to the requirements of a Federal agency.

S. 1589 would therefore explicitly prohibit the FCC from considering any predetermined performance criteria, categories, quotas, percentages, formats or other such guidelines of general applicability with respect to a licensee's programming.

H.R. 12993 contains no prohibition against such quantification of the public interest and is deficient in that regard.

Both H.R. 12993 and S. 1589 would clarify present license renewal standards, but go about the task in different ways. S. 1589 provides that in addition to compliance with the technical, legal, financial and other requirements of the Communications Act of 1934 and the FCC rules, the FCC could apply only the following two criteria when evaluating a licensee's past or proposed performance under the public interest standard: (1) the ascertainment obligation, by which the broadcaster must be substantially attuned to the needs and interests of its service area and make a good faith effort to respond to those needs and interests in his programming; and (2) the fairness

obligation, by which the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues.

These two criteria represent a distillation of what the public interest standard means in the context of license renewals. First, that the broadcast license is granted in trust for public service to a particular locality, and second, that the licensee, as trustee, is responsible for providing such service. The FCC's role would be limited to review of the licensee's reasonable and good faith efforts in executing these obligations. In the context of FCC review of broadcaster performance, "good faith" is an objective standard of reasonableness and not a subjective standard relating to the broadcaster's intent or state of mind. It makes clear the intent of Congress that the FCC is to focus on the community's definition of its needs and interests in programming rather than imposing on the broadcaster and the community the Commission's own judgments about what is good programming.

H.R. 12993 also would condition the renewal of a broadcast license on the retrospective assessment of a licensee's ascertainment efforts and whether his operations have been responsive to the needs, views, and interests of the public

in his service area as ascertained. This provision is similar, of course, to that of S. 1589. Both bills would turn the broadcaster back to his community to find what programming will serve the public interest, and are thus designed to reduce the role of the government in the relationship between a broadcaster and the local community which he serves. We therefore support this aspect of H.R. 12993.

Although we do not consider the House bill's failure to address specifically in this context the broadcaster's fairness obligation as a serious deficiency, the Congress should not allow the opportunity presented by license renewal legislation to pass without expressing the need for some substantial improvement in enforcement of the fairness obligation under the FCC's Fairness Doctrine.

The broadcaster's fairness obligation to present contrasting views on controversial issues of public importance is a long-standing requirement. It is intended to protect the broad interest of the public in fostering a diverse flow of information and ideas. We support the enforcement of this fairness obligation as long as it is done principally, and as originally intended, on an overall basis at renewal time. What we do not support is the present approach of enforcing this obligation on an

issue-by-issue, case-by-case basis. It is this enforcement process that has come to be known commonly as the Fairness Doctrine and has become so chaotic and confused.

If the Congress decides to make no specific reference to the fairness obligation, then the legislative history of the renewal bill should include a congressional statement that the preferred way to evaluate the broadcaster's journalistic responsibility is by overall review of his performance under the fairness obligation at renewal time rather than on a case-by-case basis throughout the license term. The legislative history of H.R. 12993 is silent in this respect, and that in itself is a deficiency.

H.R. 12993 would add some provisions to the Communications Act that S. 1589 does not cover. These include addition of the word "views" to the usual formulation of the broadcaster's ascertainment obligation; a requirement for FCC procedures governing negotiations between broadcasters and persons raising significant issues about station operations; a requirement for strict adherence to time limits for filing petitions to deny; removal of the exclusive jurisdiction of the U.S. Court of Appeals for the District of Columbia over license renewal matters and other appeals of certain decisions and orders of the FCC; requirement for continuing FCC study of deregulation in the broadcast service; and a requirement that the FCC complete action on Docket No. 18110, regarding cross-ownership matters.

I have no quarrel with most of these provisions. I believe, however, that the addition of the word "views" would inject confusion into the ascertainment process, and I support Senator Scott's bill in its deletion of the word. Moreover, I object to the section dealing with FCC procedures for good faith negotiations with complainants during the course of the license period. Of course, broadcasters should always deal in good faith with persons raising significant complaints. This is an important obligation that most broadcasters have met throughout the years. But I see no need to invite further FCC regulation of the relationship between the broadcaster and the communities he is licensed to serve, nor to cast this relationship in an adversary mold. The license renewal process itself, if improved by the legislation before the Congress, will provide adequate incentives for the broadcaster to cooperate with local public groups and interests, if the license is to be renewed.

* * *

The major concerns with H.R. 12993 are that it does not provide adequate insulation from the harassment that can arise from the present automatic hearing requirement for competing applications and from the increase in Government control of program content that could result from adoption of illusory quantitative program

standards and guidelines. These are serious deficiencies in light of recent broadcast regulatory history which has witnessed an increase in filing of competing applications, and an apparently inexorable accretion in regulatory power, and willingness to apply that power, to force compliance with administratively imposed program requirements. The 1960's, for example, were marked by the administrative and judicial evolution and application of the Fairness Doctrine on a case-by-case basis to specific program and commercial content; the WHDH case; and by the regulatory establishment of licensee obligations to carry specific types of programming. This process has continued into the 1970's, which have been marked by a variety of proposals to force broadcasters to carry counter-advertising, to prescribe how children's programs should be improved, and to set mandatory percentages of various types of TV programming.

Of course, the FCC and the courts have not had this territory entirely to themselves. Executive Branch officials in this and past administrations have also expressed their concerns about broadcast program content. But the Executive Branch has no life and death control over broadcasters, as do the other branches of government, so broadcasters can pay the Executive Branch less heed. But, given the trend of increasing Government controls, it is easy to see why broadcasters might get edgy when any official makes a critical comment.

Whether attempts to influence broadcast programming have come from the FCC, the courts, or the Executive Branch, it is the existence of regulatory mechanisms of program control that gives rise to the potential for abuse, and it is the existence of these mechanisms that the Congress should deal with through enactment of legislation.

I submit that much of the current political turmoil over abuse of FCC processes makes it clear that there is a definite need for increasing the insulation of the broadcaster from governmental intrusions in his First Amendment rights. This could be achieved by enactment of license renewal legislation that contains the essential safeguards of S. 1589 which are missing from H.R. 12993.

S. 1589 is designed to strengthen the First Amendment freedoms of broadcasters. All four changes in our bill promote the cause of less -- rather than more -- Government regulation and substitute, as much as possible, the voluntary exercise of responsibility by broadcasters for the often heavy and arbitrary hand of Government. In short, both S. 1589 and H.R. 12993 turn the broadcaster back to his service area for guidance on his program service, but only S. 1589 achieves this fully by insulating the broadcaster from arbitrary or capricious Federal interference in his First Amendment rights.

Testimony of the Honorable Clarence J. Brown
Ranking Minority Member of the House Subcommittee on
Communications and Power
before the
Senate Commerce Subcommittee on Communications
June 18, 1974

file

Mr. Chairman, members of the Subcommittee, I want to congratulate you for your consideration of one of the most important communication issues now before the Congress -- broadcast license renewals. I also want to express my appreciation for giving me the opportunity to testify on this vitally needed legislation.

We have this issue before us, Mr. Chairman, because over the past few years the renewal process has been marked with confusion, ambiguity and inconsistency, due in large part, to precedent-shattering court decisions, bureaucratic "meanderings" of the FCC and the activism of a number of interest groups. Former FCC Chairman Dean Burch called the present license renewal process a "morass". In fact, broadcasters today do not know by what criteria they will be judged at renewal time. And, members of each audience served remain unclear about how their views may become a part of renewal judgments.

In response to this situation, the House Subcommittee on Communications and Power -- as you are doing -- attempted to clarify renewal standards, while encouraging performance incentives for licensees, stability in the broadcasting industry, and the highest quality service in the public interest. Our Subcommittee held 17 days of hearings on over 100 license renewal bills. We heard over 60 witnesses, representing every facet of the issue. Other House Members and I invested a tremendous amount of time meeting and working with representatives of the industry, the networks, individual stations, communications law firms and a host of other involved groups. We wrote and rewrote countless drafts, and have worked

over a year to develop compromise legislation. The result was H.R. 12993. Our Subcommittee reported it unanimously. The Full Committee supported it unanimously. And, though the House added one amendment to H.R. 12993, the members gave the bill overwhelming support in a 379 to 14 vote of approval.

I am speaking today to urge your consideration of H.R. 12993, the Broadcast License Renewal Act. This legislation clarifies each licensee's responsibility to serve his local broadcast area; it stimulates each broadcaster to remain constantly aware of his listeners' needs, views and interests; it provides for more dialogue with those served; it lends stability to the radio and television industry and predictability to the renewal process; it expedites court review of FCC action and it offers the possibility of less government regulation yet stronger incentives for better performance.

Perhaps most importantly, it brings the operation of American broadcasting more squarely in line with the foundations of the 1934 Communications Act, that is, maximum expansion of broadcast outlets, diffusion of diversity of programming and responsiveness to each unique local service area.

First, the bill specifies upon what criteria a licensee will be judged in the renewal process. The FCC is required to establish ascertainment procedures by which each broadcaster must constantly identify the needs, views and interests of his local service area. Under this legislation, the licensee is renewed only if he follows these procedures, and only if his broadcast operations have been substantially responsive to the locally-ascertained needs, views and interests. Thus,

in determining renewal, the FCC must focus on performance quality and its relation to locally-defined needs, views and interests. With this emphasis, the focus is now on the genius of the American system of broadcasting -- the pluralism created by thousands of stations making individual judgments tailored to the needs of each particular locale served.

At the same time, H.R. 12993 precludes the FCC from considering on a case-by-case basis the issues of media cross-ownership and station-management integration as determinants in comparative renewal judgments. If the FCC feels that changes in media holdings or other business holdings of existing broadcasters, or changes in their management-ownership structure might be in the public interest, the Commission should decide such matters through a general rule-making process where all implications of such action can be heard and studied. As our Committee noted, if reforms in media ownership and structures are in the public interest, they ought to be done uniformly, not haphazardly. Reforming on a case-by-case basis would result in restructuring the broadcast industry in a subjective and oft-times inconsistent manner. The legal chaos that followed the WHDH case well demonstrated the instability that case-by-case rulings could cause.

To balance this provision, the legislation also calls for the FCC to complete its ongoing study of the effects of media cross-ownership, Docket 18110. The Commission began proceedings in this Docket in 1968 and it is imperative that it conclude the study so all of us in Congress, the public, the industry and the Commission can have an integrated body of information on this question to guide our future action.

In addition to clarifying the criteria to be used in the renewal process, H.R. 12993 requires the FCC to develop procedures to promote good

faith negotiations between critics of a station and its representatives. We intended that this provision have four basic effects. First, it can encourage critics and licensees to confer freely and openly throughout the license period about station operations. Second, prescription of discussion procedures can alleviate much of the confrontation, disorder and disruption that have too often marked broadcaster-complainant disputes. Third, the reluctance of either party to confer can be overcome. Finally, we hope such negotiations can obviate the unneeded filing of petitions-to-deny -- so time-consuming and costly to all parties -- by resolving complainant issues fairly through this more informal means. For instance, the number of petitions-to-deny filed went from 2 in 1967 to 68 in 1972.

While we want to afford anyone a reasonable opportunity to file a petition-to-deny a license application, we also wish to prevent abuses of this opportunity by those who may file pleadings out of time which unduly prolong the consideration process, and delay timely decisions. Consequently, Section 3 of the bill asks the FCC to adopt rules to delineate time periods for petitions to be filed and requests the Commission to decide the issue in question on the basis of the petitions so filed.

The license term was increased in the original legislation from three years to four. The House amendment to the bill extended the term to five years. I support the concept of an increased term because this action facilitates a more thorough FCC review of each licensee by reducing the number the Commission must process each year, and the administrative burden especially overwhelming for smaller stations is diminished. As has been demonstrated throughout the years, to produce quality programming, a station must evidence the stability necessary to attract

investment, and to plan operations adequately. An increase in the license term helps broadcasters achieve such stability, yet, in concert with other parts of the bill, does not sacrifice their need to be responsive and competitive.

At present, court appeals relevant to many FCC decisions must be taken to the U. S. Court of Appeals in the District of Columbia. We felt that the time taken to resolve a contested license could be reduced by having decisions and orders appealed to the U. S. Court of Appeals for the circuit in which the involved broadcast station is located. The D. C. Court of Appeals now has the longest median disposal time of any Court of Appeals in the nation. Moreover, moving the appeal to the community of the licensee in question could well be more convenient and less expensive for the parties involved since they usually reside in the area served by the broadcaster.

Finally, H.R. 12993 mandates the FCC to conduct a continuing study to determine how it might eliminate those regulations which do not serve the public interest. For example, the Act does not now fully account for differences between AM radio and television, or significant differences between commercial and noncommercial broadcasters or between those operating in large and small markets. It is our hope that through this required study and continuing recommendations, regulation can diminish where feasible, and have greater relevance in other instances to the differences among media and markets.

In Sum

In summary, H.R. 12993 clarifies the criteria upon which a licensee is judged. In so doing, it reaffirms and pinpoints the broadcaster's responsibility to identify and serve the needs, views, and interests of his local service area.

It encourages more frequent and continuous communication between a broadcaster and all segments of his service area; promotes more accessibility, and provides a means for more orderly, rapid resolution of complainants' disputes.

It adds stability so essential to the development of quality programing and adequate planning in the industry.

Finally, it offers greater opportunity for less government regulation in areas of no need, and for more relevant regulation where changes are necessary among different media and markets.

H.R. 12993 is a well-conceived compromise bill which can bring immeasurable strength, diversity, and responsiveness to our system of broadcasting. I urge you to support and adopt this legislation.

STATEMENT OF RICHARD E. WILEY, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION
Before the
SUBCOMMITTEE ON COMMUNICATIONS
of the
SENATE COMMITTEE ON COMMERCE
on
BROADCAST LICENSE RENEWALS

June 18, 1974

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to meet with you today to discuss the Commission's views with respect to broadcast license renewal standards.

I would like to emphasize at the outset, Mr. Chairman, that the Commission supports legislation in the license renewal area. As indicated by the Commission's previous testimony on this subject, we strongly believe there is a need for clarifying legislation, particularly in the area where a license renewal applicant's performance must be compared with a newcomer.

As you are aware, the Communications Act of 1934, as amended, requires that where two or more applications for permits or licenses are mutually exclusive, the Commission must conduct a full comparative hearing on the applications. Where the contest is between two or more new applicants for the same broadcast facilities, the Commission has stated that the two primary objectives toward which the process of comparison should be directed are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. In determining which of the applicants will

rovide the best service (i.e., the programming best suited to serve the problems, needs and interests of the community), the Commission has accorded decisional significance only to material and substantial differences between applicants' proposed program plans. Rather than attempt to distinguish between paper promises, the Commission has evaluated applicants on the basis of certain other criteria which bear a direct relationship to the degree each applicant's programming service will relate to local community needs. Thus, the Commission has awarded preferences for anticipated participation in station operation by the owners (integration of ownership and management), for local residence of the owners, and for an "unusually good" past broadcast record at another station. (1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393).

In utilizing this approach, the Commission has relied on a presumption: by applying these criteria, there is greater likelihood that the preferred applicant will provide a better programming service. The use of presumptions is necessary because, as the applicants are all new, none of the applicants can rest its case on a programming record. The Commission is forced to predict which applicant will provide the best programming service without having had the opportunity to see any of the applicants attempt to serve that community. In addition, diversification of mass media control has become a "factor of primary significance ... since it constitutes a primary objective in the licensing scheme." In this regard, the Commission has stated that it will consider interests in existing media of mass communications to be more significant to the degree they are substantial, and to the degree the

existing media are in, or proximate to, the community of license being applied for. The Commission has also stated that interests in existing mass communications media are significant in terms of numbers and size, (i.e., the area covered, circulation, size of audience, etc.), in terms of regional or national coverage, and with respect to other media in their respective localities.

As indicated, the foregoing applies to a comparative hearing involving new applicants. Different considerations, however, prevail in a hearing involving an incumbent broadcaster who has filed a license renewal application and any new applicant who has filed a mutually exclusive application for a construction permit for the same facilities. While section 301 of the Communications Act provides that there can be no property right in any frequency or channel, the courts have always recognized that a renewal applicant does not stand in the same position as an initial applicant.

For instance, in its decision in Ashbacker Radio Corp. v. F.C.C. 326 U.S. 327 (1945), the Supreme Court found that the renewal applicant had been placed "in the same position as a newcomer who seeks to displace the established broadcaster"; that the renewal applicant's burden was, therefore, greater: "Legal theory is one thing. But the practicalities are different." The basic practicality is obvious -- in a comparative hearing involving a renewal applicant we have before us a record of broadcast service in that community made by the incumbent during the past license term. By far the most important factor in a renewal hearing is that past record and the Commission has generally recognized that favorable consideration may flow from the inference that demonstrated ability to render a service in the public interest is likely to be carried

over into a subsequent license term. The Commission stated in the Hearst Radio (WBAL) case, for example, that:

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

This approach prevailed until the Commission's decision in WHDH, Inc., 16 FCC 2d 1 (1969). There, the Commission applied the principles of the 1965 Policy Statement, designed for new applicants only, to a comparative proceeding involving an incumbent licensee (WHDH, Inc.) and two competing applicants. Finding that because the incumbent's programming service had been "within the bounds of the average" it was entitled to no preference, and that the incumbent was inferior on the comparative criteria of diversification and integration of ownership and management, the Commission awarded the license to one of the challengers. On reconsideration (WHDH, Inc., 17 FCC 2d 856 (1969)), the Commission stated that this case differed in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license because, despite having been authorized to operate on Channel 5 in Boston for many years, WHDH had never been granted a regular three year license. Accordingly, WHDH was in a substantially different posture from the conventional renewal applicant.

The United States Court of Appeals for the District of Columbia Circuit, in affirming the Commission's decision, was careful to point out that if the Commission had held that the 1965 Policy Statement was applicable to all renewal proceedings, "there would be a question whether the Commission had unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act." Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 854 (1970).

Despite this caveat, the WHDH decision was attacked on the grounds that it represented a radical departure from previous law and threatened the stability of the broadcast industry. In response to this concern, the Commission issued a "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," 22 FCC 2d 424 (1970). In its Statement, the Commission emphasized that, with respect to competing challenges to renewal applicants, two obvious considerations must be balanced -- first, that the public receive the benefits of the statutory spur inherent in the fact that there can be a challenge and, indeed where the public interest so requires, that the new applicant be preferred; and second, that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation. The Commission felt that these two considerations called for the following policy:

> "[I]f the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its

> area, [footnote omitted] and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted.

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that the 1970 Policy Statement violated the Communications Act, as judicially interpreted. Citizens Communications Center v. FCC, 447 F. 2d 1201 (D.C. Circuit 1971). It found that the Policy Statement contravened the full hearing required by the Ashbacker decision since it limited the comparative hearing to a single issue -- whether the incumbent licensee had rendered "substantial" past performance without serious deficiencies. Although the court recognized that an incumbent licensee should be judged on its record of past performance, it also stated that diversification is a factor properly to be weighed and balanced with other important factors at a renewal hearing.

And that, of course, is the major problem we are faced with today. On the one hand, in a comparative proceeding involving all new applicants, we look to certain non-programming comparative criteria set forth in our 1965 Policy Statement which are presumed to demonstrate which of the newcomers will provide a better programming service to meet the problems, needs, and interests of the community. On the other hand, in a comparative proceeding involving a renewal applicant, we have been directed by the court to focus our attention not solely upon the responsiveness

of the incumbent licensee's past programming service, but also upon the same non-programming criteria used in evaluating the newcomer, regardless of the fact that the presumptions underlying these criteria have no validity in evaluating the incumbent's actual performance during its past license term.

In the judgment of the Commission, the examination and clarification of broadcast license renewal policy in this complicated area is the most important legislative matter affecting the industry and, thereby, the public which receives its service. The comparative hearing policy in this area must not undermine predictability and stability of broadcast operation. Nor should the policy undermine the competitive spur contemplated by the Communications Act. We have grappled with this policy and related issues for months. We have attempted to resolve the confusion that has existed since the WHDH and Citizen cases. We have not been successful, and agree with many others that the best way to resolve the matter is through the enactment of appropriate legislation. We appreciate, therefore, the extensive attention given this subject by the House Committee on Interstate and Foreign Commerce and its Subcommittee on Communications and Power, and the comparable attention we know it will receive here.

There are, as you know, a number of bills pending before the Subcommittee which relate to license renewal procedures. My comments will be primarily directed to H.R. 12993 as passed by the House of Representatives on May 1, 1974, with a few references to other bills pending before the Subcommittee to the extent that they represent a marked departure from H.R. 12993.

Five (5) Year License Term

Section 307(d) of the Communications Act provides that broadcast licenses may be granted for a term of up to three years. In the past, the Commission has supported an extension of the license term. Today, we reaffirm our view that a lengthening of the maximum license period from three to five years would serve the public interest. Accordingly, we endorse that portion of H.R. 12993 and other pending bills which extends the license term. I should note that Commissioner Hooks disagrees and would retain the present three-year term.

An increase in the maximum license term from three to five years would have a positive effect on the renewal process and would not, in our view, diminish licensee responsibility to the public or accountability to the Commission's rules and policies. A five year license extension would reduce the number of renewal applications to be processed annually from approximately 2,700 to 1,600, or by roughly 40 percent. This would enable the Commission to review more thoroughly each application filed and to give closer and more expeditious consideration to those applications which raise questions relating to the licensee's overall qualifications.

We also believe that there are adequate safeguards and procedures available to the Commission to ensure that licensee responsibility to the public interest will not be diminished during the longer license term. First, a licensee's past record will continue to be the subject of full review at renewal time, and this review process should prove to be no less effective as a stimulus for substantial performance when conducted every fifth rather than every third year. Indeed, the extension of the license term to five years will, as noted, allow for a more thorough review of renewal applications, and this prospect should provide a significant encouragement to licensees to remain committed to their responsibilities throughout their license term. In addition, I should also note that our present renewal policies and procedures, and those proposed by H.R. 12993, are designed to ensure a continuing dialogue between licensees and citizens so that many inadequacies or complaints can be identified and remedied at the local level. These policies and procedures will also serve to protect the public interest during the course of a longer five-year term.

Finally, should any serious deficiency or question be raised as to a licensee's performance during its license term, various administrative remedies and sanctions are available to the Commission, including levy of forfeiture, issuance of cease and desist orders, institution of revocation proceedings, and the calling for early filing of a renewal application.

Time Limitations on Petitions to Deny

H.R. 12993 contains a provision which would require the Commission to adopt rules prescribing reasonable time periods during which petitions to deny could be filed and would also require that only those petitions as had been timely filed in accordance with such rules could be considered in reaching a decision on the particular application involved.

The House Committee Report on the bill indicates that this provision is intended both to allow all interested parties a reasonable opportunity to file petitions to deny against the grant of an application and to prevent dilatory abuses of this procedural right.

In this regard, the Commission would note that as a result of its action in Docket 19153, rules establishing filing periods for petitions to deny in broadcast license renewal proceedings have been promulgated and are considered essentially responsive to the statutory requirements proposed by H.R. 12993. The new rules provide that renewal applications are to be filed four months prior to the expiration date of the license period, and that petitions to deny with respect thereto must be filed by the first day of the last full calendar month of the expiring license. The rules also provide that requests for extension of time to file petitions to deny will not be granted unless all parties concerned, including the renewal applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible. Of course, pursuant to section 1.587 of our Rules, any person may file an informal objection before Commission action on any application.

We fully share the concern expressed in the House Report lest the petition to deny be abused to delay and obstruct the fair and expeditious review of applications, and we intend to strictly enforce these rules to insure the integrity of our application proceedings.

Negotiation

Section 4 would require the Commission to prescribe procedures to encourage licensees and persons raising significant issues regarding the operations of their stations to conduct good faith negotiations to resolve such issues during the course of the license term.

The House Committee Report indicates that in employing the phrase "good faith negotiations", there is no intent to incorporate into this area the body of law and administrative rulings which have developed in the field of labor law in connection with that concept. Moreover, observance of the procedures to be prescribed by the Commission is to be wholly voluntary.

We are in complete agreement with the ultimate aim of the section -- that is, to promote the resolution of problems and citizen complaints at the local level and to avoid, wherever possible, the time, effort, expense and acrimony which so often accompany the filing of a petition to deny. To help effectuate this objective, the Commission has, in its action in Docket 19153, set forth procedures to foster a continuous interaction between licensees and citizens throughout the license term and thereby focus dialogue at the local level and encourage the resolution of disputes before the renewal deadline.

We believe that these procedures provide the needed informational base and impetus for the good faith negotiations contemplated by section 4. We have considerable reservations concerning the practicability and desirability of formulating more specific guidelines and procedures for such negotiations as contemplated by section 4. Such matters as the identification of appropriate and inappropriate issues for negotiations and the designation of the proper parties to initiate and participate in such negotiations would be extremely difficult to prescribe in a general but inclusive set of procedures or guidelines. For example, the Commission cannot envision any satisfactory way to identify who would be an appropriate participant in negotiations and who would not. Should only groups of a specified number of members and established nature be accorded participant status, or should individuals and ad hoc groups also be allowed to participate? Since the Commission is limited to prescribing procedures and section 4 speaks of "persons raising significant issues", does this envision participation by persons outside the station's service area -- with the myriad additional problems which that could encompass? To anticipate in advance the countless issues which could be raised and specify which would be appropriate for such negotiations and which might impinge on licensee discretion is also a task of no small proportion.

Moreover, and more basically, we believe the procedures contemplated by section 4 would inject an undesirable element of formality into discussions between licensees and members of their service areas which could have a tendency to transform "good faith" negotiations into adversary proceedings. Even though observance of such procedures as the Commission might prescribe would be strictly voluntary, any rules devised could end up being so detailed that the result could well be to exalt form over substance and thereby distract the parties from focusing their attention on resolving the substantive problems at issue.

For these reasons, we are of the view that it would be better to allow the structure of dialogue and particular negotiations between licensees and citizens to develop with flexibility and informality, rather than to circumscribe those discussions by the types of specific procedures proposed by the House Committee Report. As indicated, we have encouraged and emphasized such dialogue and will continue to do so.

Judicial Review

H.R. 12993 would amend section 402 of the Communications Act to provide that any appeal from a decision or order of the Commission granting or denying a construction permit or license for a broadcasting station, or any renewal, modification, transfer, assignment, disposition, or revocation thereof, could be taken only to the United States Court of Appeals for the judicial circuit in which the broadcast station involved is, or is proposed to be, located. The bill would also provide that Commission decisions or orders concerning authorizations in services other than broadcast, cease and desist orders issued under section 312 of the Act, and orders suspending radio operators licenses could be appealed to either the Court of Appeals for the judicial circuit in which the appellant resides or has his principal place of business or the Court of Appeals for the District of Columbia Circuit.

Under the existing provisions of section 402(b) of the Act, all of the above appeals are within the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit.

The House Committee Report on H.R. 12993 indicates that the proposed amendment is intended to relieve the District of Columbia Circuit of the burden of hearing all appeals in these cases by spreading the appellate jurisdiction throughout the other ten judicial circuits, and thereby hopefully shortening the period of time required to reach a definitive decision. The Report also expresses

view that since broadcast authorization and renewal proceedings usually involve parties residing in the communities to which the station involved is, or is proposed to be, located, convenience argues for providing that any appeal from such proceedings be brought in the judicial circuit in which such community is located.

Although the Commission recognizes the possible validity of this approach, there are a number of countervailing considerations which should also be noted. Such an amendment will necessitate increased travel on the part of Commission counsel to judicial circuits outside the District of Columbia. In fiscal year 1973, Commission counsel participated in 25 appellate cases which were fully briefed and argued. Of this total number, 11 cases which were heard by the Court of Appeals for the District of Columbia Circuit would have been appealed to other judicial circuits had this provision been in effect, with additional travel expense to the Commission of approximately $5,000. Of course, some additional time would be involved as well. Moreover, the total number of cases would not be likely to give rise to a communications bar throughout the country and it is likely that Washington communications counsel for both licensees and public interest groups would participate in many of these cases with resultant travel expenses and perhaps an association with local counsel thereby increasing the expense to the parties. Also, and perhaps more importantly, this change may result in conflicting interpretations of applicable substantive law among the Circuits requiring review by the United States Supreme Court for resolution. While the Commission has no strong feelings on this issue, the Congress may want to weigh these factors in reaching its policy judgment.

Study of Broadcast Regulations

Section 6(a) of H.R. 12993 would require the Commission to conduct a study to determine how it might expedite the elimination of those regulations of broadcast licensees required by the Communications Act which do not serve the public interest and to make annual reports thereon, including any recommendations for legislation, to the Commerce Committees of the House and Senate. The first annual report pursuant to this provision is to include conclusions with respect to the differences among broadcast licensees which provide, or may provide, basis for differentiation in their regulation under the Act.

As you know, Mr. Chairman, we have had a very active broadcast re-regulation task force under my personal supervision which has produced many significant rule changes during the past two years. We have detailed the work of this group for you in the recent oversight hearings, and I do not believe it necessary to reiterate those details here. Suffice it to say, we remain committed to the objective of this section of the bill. And, hopefully, at some point in the future, we will arrive at the stage where the need for additional changes will become minimal or completely satisfied.

My only reservation with respect to this section is that in specifically providing for annual reports to the Congress, the statute may require the Commission to go on making those reports long after the need for them has passed.

Additionally, we would note that the language of the section speaks of regulations "required" by the Communications Act. A number of the provisions of the Act mandate particular rules and regulations, while other provisions leave the promulgation of certain categories of rules and regulations to the discretion of the Commission. Those rules which are discretionary may be amended or eliminated by the Commission without resort to additional legislation. We would therefore assume, based on this observation and the explanation in the House Committee Report, that the section's reference to regulations "required" by the Act is intended to encompass only those regulations which are mandatory under its provisions and hence would require legislation for their revision or elimination.

C[redacted] Ownership; Integration of Ownership and Management; Docket 18110

H.R. 12993 would also amend section 307 of the Communications Act to preclude from consideration in broadcast license renewal proceedings issues concerning (1) the ownership interests or official connections of the applicant in other stations or other communications media or other businesses; or (2) the participation of ownership in the management of the station, unless the Commission has adopted rules prohibiting such ownership interests or activities or prescribing management structures and has given the renewal applicant a reasonable opportunity to conform with such rules.

As previously noted, the Commission, in evaluating new applicants, considers, among others, factors of integration of ownership and management and [redacted]sification of control of the mass media. 1965 Policy Statement, supra.

These factors are not ends in themselves, but only guidelines leading toward a determination of which of the new applicants will provide the better service; preferences are awarded and certain presumptions flow from those preferences. In a comparative hearing involving new applicants presumptions should prevail because we are comparing untested applicants. Assuming that there are no significant differences in their programming proposals, we should select the applicant with the best qualifications. But in a comparative renewal hearing presumptions are unnecessary to the extent that we have direct evidence of the incumbent licensee's past programming performance. The licensee should be judged on the basis of that actual performance, not on weaker presumptive factors. For example, if the [redacted]mbent licensee's past programming service has been substantially

responsive to ascertained community problems, needs and interests, then integration of ownership with management is an irrelevant factor in the comparative renewal proceeding.

As to diversification of control of media of mass communications, it should initially be noted that our rules and policies do permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. Realistically, those commitments must be made if the public is to be adequately served. Service in the public interest is, in part, dependent upon stability of broadcast operation.

The Commission has stated that it does not intend to re-structure the industry through the renewal process. This decision stems, in part, from the recognition that a renewal applicant with other media interests, who has in the past been awarded a license consistent with our rules and policies and who has thereafter proceeded to render good or substantial service, should not be replaced solely because of those media holdings. To hold otherwise would, we believe, jeopardize the legitimate renewal expectancies of the licensee and the public. As we see it, programming service is the "name of the game" in a renewal hearing. The community is being served by a qualified performer; it should not lose that service unless the performance has not been substantially attuned to community problems, needs and interests.

We, therefore, support the bill's judgment that any Commission action in this field should be taken in the context of formal rule making, rather than on an ad hoc basis at renewal time. Legislative affirmation of this judgment should serve to end any ambiguity on this point which may remain as a result of WHDH and certain dicta of the Court of Appeals in its Citizens Communication Center decision.

The Commission is moving toward completion of the proceeding in Docket 18110 with respect to proposed amendments to the rule governing cross ownership of broadcast stations and other communications media. In fact, we were to have heard oral argument in this proceeding today and tomorrow. However, in light of these hearings, that argument has been rescheduled for July 24, 25 and 26. This timetable might also enable us to have a full complement of Commissioners available for consideration of this most important issue. We fully expect, therefore, to be able to meet the procedural mandate of section 6(b) that we take appropriate action in Docket 18110 not later than six months after the bill's enactment.

The Renewal Standard; Ascertainment; Views; Broadcast Operation; Hearings

Mr. Chairman, having disposed of some of the preliminaries, I turn now to the main event -- the standard -- or, more precisely, the standards -- to be applied at license renewal time. The Commission is in agreement with what we believe to be the ultimate aim of the House-enacted bill.

The thrust of H.R. 12993, as we understand it, is to preserve necessary industry stability and establish clear, workable standards with respect to the license renewal process, while at the same time maintaining that process as an essential stimulus for licensee performance which will meet the needs and interests of the public served. To implement this fundamental policy objective, the bill generally takes the following approach:

(1) The standard for all broadcast renewals remains the public interest -- including all the usual requirements of basic legal, technical, and financial qualifications;

(2) Additionally, to warrant renewal -- as serving the public interest -- the licensee must have complied with certain ascertainment procedures;

(3) There must be an appropriate degree of responsiveness as a result of what the licensee has ascertained;

(4) Although the public interest remains the overall standard, in its application renewal applicants who are challenged by a competing applicant will be held to some higher degree of performance than those who are not; and

(5) In the competing application situation, the renewal applicant who meets that higher degree of performance should be assured of renewal.

The Commission agrees with each one of these premises. To the extent we can agree upon language which will have these results, I believe we will have achieved the objectives that many of us have in supporting this legislation.

As to the first premise -- the public interest standard -- the bill leaves that unchanged and we have no quarrel with this. Service to the public is the basic cornerstone of the requirement exacted from all licensees -- whether or not they are the object of a challenge. Implicitly, however, the bill and the Commission recognize that the public interest standard has sufficient flexibility to require more from a licensee where there is someone standing in the wings ready to take over and provide service to the public.

With regard to the second premise -- the ascertainment process -- again I should emphasize that we have no problem with a statutory requirement mandating ascertainment by all broadcast licensees as a specific component of the public interest.

Consistent with their public interest obligations, the Commission expects its broadcast licensees to make a diligent, positive and continuing effort to discover and meet the problems, needs and interests of their respective service areas. To this end, the licensee must contact members of the general public in the community of license and consult with leaders of the significant groups in the community and in

the surrounding areas the licensee has undertaken to serve. The selection and presentation of public affairs and other informational programming is the responsibility of the licensee. The evaluation of the relative importance and immediacy of the community problems ascertained and the determination of the manner and extent to which its station can present broadcast matter to meet the problems meriting treatment by that station is left to the good faith judgment of the licensee.

A strongly expressed problem or need may not be ignored; however, there is no requirement that a licensee apportion a specific amount of broadcast time to each of the groups and elements that comprise its service area. Indeed, such a requirement would vitiate the flexibility of the licensee to adjust its station's program service to the diverse and ever-changing problems and needs of its service area. Great weight is therefore accorded the licensee's reasonable exercise of judgment in evaluating the results of its ascertainment efforts and in choosing the programs to be broadcast in response to the community problems ascertained. Mindful of the proscriptions of section 326 of the Communications Act, the Commission will not intervene in this sensitive area, absent a clear showing that a licensee has abused its wide discretion or that its station's performance has not been responsive to the problems, needs and interests of the public served by that station.

Within six months of the tendering of its renewal application, the broadcast licensee is required to formally ascertain and evaluate the problems, needs and interests of the public served by its station

and to propose programs responsive thereto. The main areas of concern are the public at large and the leaders that bespeak the group interests that comprise the station's service area. Primary emphasis is directed to the community of license where a premium signal -- a city-grade for radio and a Grade A for television -- is received. Demographic information indicating the minority, racial and ethnic breakdown of the community, its economic, governmental and public service organizations, and any other factors that make the particular community distinctive must be furnished by the licensee. Consultations with representatives of the various significant economic, social, political, racial and other groups shown to exist within the community of license must also be demonstrated. The manner in which the licensee's management-level employees conduct these consultations is largely left to the licensee's devising provided, of course, that the methodology selected -- be it face-to-face conversations, joint consultations or telephone interviews -- elicits expressions of the community's problems and needs from the standpoint of the particular group or organization represented by the leader contacted. It is also incumbent upon the licensee, employing a survey method that will result in a generally random selection, to consult with members of the general public in the community of license.

The licensee also has an ancillary or secondary obligation to ascertain community problems outside the community of license. Since this obligation is secondary in nature, the licensee is expected to be responsive only to major community problems in the outlying service area and, to this end, its ascertainment efforts need not be as inclu-

sive or exhaustive as that required for the community of license. In areas other than its community of license, consultations with community leaders who can be expected to have a broad overview of community problems will suffice. Pursuant to the guidelines which the Commission set forth in its Ascertainment Primer, a licensee is permitted to choose those outlying areas or communities which its station will undertake to serve on a secondary basis. However, if the licensee elects not to serve a major community located within its station's service contours, a showing must be submitted explaining the basis for the licensee's decision. No major community more than 75 miles from the station's transmitter site need be included in the licensee's ascertainment efforts, even if the service contours of the station extend beyond that distance.

H.R. 12993 would provide that the Commission by rule establish procedures for broadcast licensees to ascertain throughout the term of their licenses the needs, views and interests of the residents of their service areas for purposes of their broadcast operations. In determining whether a broadcast license should be renewed, the Commission would, under the bill, consider (1) whether the licensee, during the current license period, followed the ascertainment procedures prescribed by the Commission and (2) whether the licensee has engaged in broadcast operations during the term of the license which were substantially responsive to the ascertained needs, views and interests.

The Commission agrees that the extent to which the renewal applicant has followed the Commission's ascertainment requirements and has programmed to meet the problems and needs of the service area is a crucial element in determining whether the public interest would be served by renewal of the broadcast license. Thus, we support the intent of the bill to emphasize the importance of discovering and meeting the problems of the service area and to make the fulfillment of that requirement the major consideration in evaluating a renewal application.

For the most part, I believe that the Commission's present ascertainment policies and requirements are compatible with the concerns expressed in the report of the Committee on Interstate and Foreign Commerce regarding H.R. 12993. For example, the committee seeks to insure a relationship between a licensee's broadcast service and the area and audience receiving that service. The extensiveness of the licensee's ascertainment efforts within the community of license where the population is generally the largest and where the station's signal intensity is the greatest is in recognition of the desired relationship. Also, both the proposed legislation and our existing ascertainment policies afford the licensee reasonable latitude in choosing the areas and audiences it will serve.

We do,however, depart from the committee's views in several respects. One of our concerns relates to the proposed de-emphasis of the licensee's ascertainment efforts within the community of license. Such a change, we believe, is not consonant with the Committee's announced desire to generally relate the depth and intensity of the licensee's ascertainment efforts to the strength of its station's broadcast signal. Moreover, it is our opinion that a station in a major market would find it virtually impossible to be truly responsive to the community problems of every political subdivision that receives its signal. In the same vein, we believe that a small market broadcaster with limited manpower and financial resources would be hard-pressed to effectively ascertain the problems and needs of the numerous small communities located throughout its service area.

Additionally, as I have indicated, Mr. Chairman, the Commission's current procedures require licensees to ascertain and be responsive to the problems, needs and interests of their communities. As set forth in the House Report, "needs" as used in H.R. 12993 is synonymous with the Commission's interpretation of the phrase "problems, needs and interests", and can best be translated as issues or problems in the licensee's community. Interests, according to the House Report, is intended to be reflective of the widest possible range of interest groups within the licensee's service area. The Commission believes that these terms and their definitions are substantially consistent with our long-standing interpretation of the phrase "problems, needs and interests."

For example, let it be assumed that eighty percent of the viewers in a community favor one side of a controversial issue. Presumably, under H.R. 12993, the licensee would be required to devote roughly eighty percent of its programming to the majority "view". We begin with a fundamental proposition: broadcast licensees have a very large area of discretion in deciding how and to what extent to deal with community problems and issues. As the United States Court of Appeals for the District of Columbia Circuit stated in Chuck Stone v. F.C.C.

> "How a broadcast licensee responds to what may be conflicting and competing needs remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty percent of its broadcast time to meet the need expressed by twenty percent of its viewing public."

Apart from the First Amendment questions which arise, licensees must be left with discretion as to how to be responsive to community problems, needs and interests. It is always possible that a station will not present as much programming on a particular issue as some would desire. However, as we have noted in other decisions, there are a vast number of competing interest groups -- economic, social, political, racial, ethnic, religious, and others -- all of which are concerned with problems deserving attention by the broadcast media. Since broadcast time is limited, licensees must make good faith judgments in determining how and to what extent to deal with community problems they ascertain. Accordingly, there should be no requirement, explicit or implied, that the licensee's programming must be balanced in accordance with the majority "view" expressed in its community.

We are also similarly concerned about the House Report language which implies that a licensee will now be required to ascertain and be reasonably responsive to the "views" expressed by the public with respect to its "broadcast operations". As I have emphasized, historically licensees have been required to ascertain and be responsive to community problems, needs and interests. Indeed, this is and must be the major test in evaluating a renewal application, either in a comparative or non-comparative situation. We believe, however, that it would be a mistake to require licensees to ask members of the public and community leaders to express their views on the station's "broadcast operations" and to make a test of renewal the degree to which tal operation of the station is responsive to the suggestions and comments offered by members of the public.

Rather, we think the requirement should be framed in terms of ascertaining and being responsive to community "problems, needs and interests." This is language which the Commission, the industry and the public has grown accustomed to and which is definable. We would note also that many of the matters intended to be included in this phrase are those very matters which are governed by Commission rules, such as hours of operation, and equal employment opportunity.

The Commission does concur with the House Committee Report that there should be enough flexibility in our procedures to allow a licensee to direct its programming, both entertainment and nonentertainment, to rticular audiences. In serving the needs of its community, a licensee

is not required to program to meet all community problems ascertained. Rather, a licensee may determine in good faith which problems merit treatment by the station. In making this determination, the licensee may consider the particular format of the station, the composition of its audience, and the programming offered by other stations in the community. Thus, we see no problem in allowing a licensee to largely direct its programming to a particular audience, provided that the needs and interests of other particular audiences or segments of the greater community are being adequately served by other stations within the market. However, we hesitate to imply that a licensee may direct all of its nonentertainment programming to a particular group or audience. To allow or encourage licensees to direct their news, public affairs or political programming exclusively to a particular audience of the larger community would, in our judgment, be an error which would negate the fundamental policy embodied in section 315(a) favoring an electorate which is fully informed and capable of deciding questions of national and state, as well as local or parochial, importance.

We would also note with favor that H.R. 12993 specifically provides that the Commission may prescribe different ascertainment procedures for different categories of broadcasting stations. The Commission fully shares the judgment of the Committee Report that we should examine the differences between radio and television, and commercial and non-commercial stations, and consider such factors as market size and

station size in prescribing our ascertainment standards. Indeed, we have recognized that these differences and factors may be of crucial importance in our pending Notice of Inquiry on the ascertainment process (Docket 19175; see also Docket 19816).

Let me turn now to the third and fourth premises as outlined above -- the appropriate degree of responsiveness to ascertained needs. The House Report (p. 17) contains the following language:

> "If a broadcast licensee comes up for renewal in a non-comparative situation, ... we agree that the test should be the one stated by the Chairman of the FCC, namely, whether the applicant has served the public interest in a manner that is sufficient -- but no more. Stated another way, in such a situation the applicant/licensee should be granted renewal if it has provided minimal service to its service area, because even minimal service is to be preferred to no service at all.
>
> However, for the Commission to be satisfied with minimal service from an incumbent licensee in a comparative situation when another applicant would clearly provide much better service would not only ill serve the public interest, but would make a mockery of the hearing process. We believe that stability in the broadcasting industry is highly desirable, but that it should not be achieved at the cost of imposing barely sufficient service on the public by freezing out competitors who would provide better broadcast service.
>
> To summarize, we would propose that an applicant for renewal of a broadcast license be assured of renewal where overall during the expiring term of its license, it has provided good service to its service area and its broadcast operations have not been marked by serious deficiencies, i.e., violations of law or of the Commission's rules or policies. We use the term good in its defined sense, to wit: having the right qualities; as it ought to be; right. As we use good in this context, it is synonymous with substantial as used in the Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants and with meritorious as used by the Commission in the WBAL case."

The amendment made to section 307(d)(2)(A) of the Act does not distinguish between an ordinary renewal situation and a comparative renewal situation. We believe it essential that the statute itself unmistakably spell out in clear language the tests to be applied in both a noncomparative and comparative situation. We also believe that the statute should clearly mandate the results if the tests are met. Otherwise, extensive litigation might result and the certainty we seek will be elusive.

In this respect, we suggest the test should be that the licensee in a noncomparative situation must be reasonably responsive to ascertained needs while the renewal applicant in a comparative case be held to a higher standard of substantially responsive. We believe that service substantially responsive to the ascertained needs is "good" or "substantial" service rather than "barely sufficient" service.

It is this specific area which is undoubtedly the most troublesome for the Congress -- that is what effect is to be given to the renewal applicant's rendition of the required standard of service. It is at this point that a number of the bills pending before the Subcommittee diverge. One speaks of a "rebuttable presumption" (S. 272); others would, upon a "prima facie showing" of meeting the required test, shift the burden of proof to the competing applicant to show that renewal would not be in the public interest (S. 849; S. 1311); another would prefer the renewal applicant who meets the appropriate test unless the new applicant

shows he will provide a "substantially superior program service" (S. 851); and others provide for a two-step hearing procedure in which the renewal applicant would prevail at step one if we can make the required affirmative finding; otherwise in step two we could either deny the renewal applicant or consider it together with any competing applications and grant the one that will best serve the public interest (S. 1589).

We believe the House bill -- as explained in its Report -- contemplates a full Ashbacker-type hearing where a competing application is filed but also intends that the incumbent who has substantially met the ascertained needs of his service area is entitled to the grant rather than a newcomer who simply outpromises him. This type of approach should give the Commission sufficient flexibility and at the same time obtain the sought-for stability. We suggest simply that the statutory standard be made clear in the bill itself and believe the proposed amendment to section 307(d)(2)(A), attached to my statement, will accomplish that result.

Mr. Chairman, that concludes my prepared testimony. I shall be pleased to respond to any questions.

# # # # #

Attachment

Suggested section 307(d)(2)(A)

Any license granted under subsection (a) may upon its expiration be renewed, in accordance with section 309, if the Commission finds that the public interest, convenience, and necessity would be served by the renewal of such license. In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (i) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the problems, needs, and interests of the residents of its service area, and (ii) whether the licensee in its program service during the preceding license term has been reasonably responsive to those problems, needs, and interests. In any comparative hearing for the frequency or channel of an applicant for renewal of a broadcast license, the applicant for renewal shall be awarded the grant if such applicant shows that its program service during the preceding license term has substantially met the needs and interests of its service area, and the operation of the station has not otherwise been characterized by serious deficiencies. *

* If this amendment is adopted, conforming language will be required in section 2 of the bill amending section 309(i) of the Communications Act, i.e., ascertainment of the "problems, needs, and interests of the residents of their service areas."

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

JUL 0 3 1974

DIRECTOR

Honorable Philip A. Hart
United States Senate
Washington, D.C. 20510

Dear Senator Hart:

The legislative proposal of the Citizen's Information Project (CIP) to amend the Communications Act of 1934 is professedly designed to meet the need for stability in the present broadcast license renewal process without extending the license term to five years. To this end, the bill provides that a successful challenger must (a) buy out the depreciated assets of the renewal applicant, or (b) under certain circumstances reimburse the unsuccessful renewal applicant for "unrecouped investment." With respect to the comparative hearing process, the bill purports to have a stabilizing impact through the provision of a comparative preference to an otherwise qualified renewal applicant for service "substantially attuned" to the "needs and interests" of his community.

Unfortunately, the CIP bill misconstrues the nature of the renewal problem. It seeks to provide for the economic or financial stability of broadcast licensees by providing for the compensation, under certain specified conditions, of those whose renewal applications are denied. But preservation of a licensee's financial position, and economic matters in general, are not the primary problems posed by the renewal process.

Stability is needed, not to assure the profitability or fiscal security of broadcasters, but to insure that the dissemination of information and ideas to the public will not be impeded or artificially distorted by direct or indirect governmental influence. If broadcasters see instability in license renewal, they are likely to seek regulatory safety by rendering the type of program service that will most nearly assure renewal of their license. Therefore, there is a serious danger that a broadcaster's performance will reflect the Government's notions of good program service rather than the broadcaster's independent judgments or his perceptions of the needs and interests of the community he serves. Neither the broadcaster's nor the public's First Amendment interests are fostered in this situation. Stability in the renewal process is thus necessary to minimize governmental intrusion into program content. The CIP bill misses this critical issue altogether.

Moreover, even assuming that financial stability should be an important public goal in the renewal process, this bill would not afford it. The "buy out" provisions of the bill would apply only to depreciated physical assets and excludes legitimate intangibles like the value of the "goodwill" the licensee may have built up through years of service to his community. In addition, this provision would require the successor licensee to purchase the facilities of the unsuccessful applicant when he might prefer to use newer or different facilities at a different location. Such intrusiveness in the practical operation of broadcast stations is unwarranted.

The CIP bill also purports to have a stabilizing effect through its clarification of renewal criteria. But the contrary result would obtain from its enactment. The bill, for example, would award a preference to a renewal applicant in a comparative hearing for service "substantially attuned" to meeting his community's "needs and interests." By itself this provision would provide some certainty in the renewal process, and is not dissimilar to the provisions of a number of other bills. The House bill (H.R. 12993), for example, would also award such a preference for superior performance, while under the Administration bill (S. 1589), such performance by an otherwise qualified renewal applicant would obviate the need for a comparative hearing as a procedural rather than substantive matter.

The stability promised by the awarded preference in the CIP bill is illusory, however, because the preference would be nullified when a competing applicant has made program performance promises which are "clearly superior" to those of the renewal applicant, and has demonstrated a "very high probability" of performance on those promises. These provisions would not only nullify the effect of the preference, they would exacerbate one of the problems of the comparative hearing process that has occasioned the need for license renewal reform; namely, the problem of comparing a challenger's promises against an incumbent's licensee's actual past performance. As the FCC long ago discovered, there is no way that promisory performance can be reliably compared with actual performance, because there is inherently greater uncertainty in the probability of execution of the promise of an untried applicant.

The addition of the "high probability" factor in the CIP bill cannot make the promise into something more certain. In any event, the Commission already expects all licensees to fulfill their promises, and thus demands as a matter of policy a high probability that program promises will be implemented.

As my recent testimony on broadcast license renewals indicates, the Administration is convinced that a comparative hearing should be held only upon a finding by the Commission that a challenging applicant has demonstrated that the licensee's performance has failed to meet renewal criteria. Lacking this procedural safeguard, the CIP proposal would likely increase challenger's incentives to "out promise" incumbent licensees, and would thus lead to an increase in comparative hearings.

My testimony further indicated the Administration's opposition to the ad hoc application of uncodified Commission doctrines or policies in individual renewal proceedings. Both the House and Administration bills would afford some protection in this regard. The CIP bill contains no similar prohibition, but on the contrary would permit the ad hoc application of concentration and integration of media ownership policies as a means of preferring one applicant over another in a renewal proceeding. Enactment of this provision would deny the renewal applicant notice of the rules and standards by which he could reasonably expect his application to be judged.

In conclusion, I am convinced that the CIP bill would not deliver on its promises of stabilizing the renewal process. More importantly, that bill is based on erroneous premises, for it is not financial stability that is at issue, but the certainty and confidence with which a medium of expression can operate free of the intimidating threat of non-renewal by a governmental agency. The CIP bill does nothing to alleviate that threat, but instead would continue and reinforce a broadcaster's incentives to promise conformance to administratively imposed program criteria in order to insure renewal, rather than to focus on his community's needs, as the public interest should require. Continuation of this approach to measuring program performance in renewal situations, denies the public the robust and wide-open service it has a right to expect and receive.

Sincerely,

Clay T. Whitehead

Enclosure

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Calendar No. 1133

93D CONGRESS
2d Session

SENATE

REPORT
No. 93-1190

BROADCAST LICENSE RENEWAL ACT

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE

TOGETHER WITH ADDITIONAL VIEWS

ON

H.R. 12993

TO AMEND THE COMMUNICATIONS ACT OF 1934 TO PROVIDE THAT LICENSES FOR THE OPERATION OF BROADCASTING STATIONS MAY BE ISSUED AND RENEWED FOR TERMS OF FOUR YEARS, AND FOR OTHER PURPOSES

SEPTEMBER 27, 1974.—Ordered to be printed
Filed under authority of the order of the Senate of September 26, 1974

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93D CONGRESS
2d Session
SENATE
REPORT
No. 93-1190

BROADCAST LICENSE RENEWAL ACT

SEPTEMBER 27, 1974.—Ordered to be printed
Filed under authority of the order of the Senate of September 26, 1974

Mr. PASTORE, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 12993]

The Committee on Commerce, to which was referred the bill (H.R. 12993), to amend the Communications Act of 1934 to provide that licenses for the operation of broadcasting stations may be issued and renewed for terms of 4 years, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amended title, and recommends that the bill as amended do pass.

PURPOSE AND SUMMARY

The purpose of H.R. 12993, as reported by your Committee, is to clarify the broadcast license renewal standards and procedures in order to better inform broadcast licensees and their challengers of what is required under the public interest standard of the Communications Act. It is also intended to better inform the listening and viewing public of what it may rightfully expect from those who are given the privilege of using the air waves.

To accomplish this the bill as amended by your Committee would do the following:

1. Direct the Federal Communications Commission (hereafter referred to as the "FCC" or the "Commission") to establish by rule procedures for broadcast licensees to follow throughout the terms of their licenses to ascertain the problems, needs, and interests of the residents of their service areas for purposes of program service.

These rules could prescribe different procedures for different classes of broadcast stations.

2. Direct the FCC at renewal time, in determining whether the public interest had been served, to consider (1) whether the licensee during the preceding license term followed the applicable ascertainment procedures; (2) whether the licensee in its program service during the preceding license term substantially met the ascertained problems, needs, and interests of the residents in his service area; and (3) whether, during the preceding license term, the operation of the station was not otherwise characterized by serious deficiencies. If the Commission determines that the licensee has satisfied the requirements of clauses (1), (2), and (3), a presumption shall be established that the public interest, convenience, and necessity would be served by such renewal.

3. Require the Commission to conduct a study to determine how it might expedite the elimination of those regulations of broadcast licensees required by the Communications Act which do not serve the public interest, and to make annual reports thereon, including any recommendations for legislation, to the Commerce Committees of the House and Senate.

4. Direct the FCC to complete Docket 18110 (Multiple Ownership) by December 31, 1974.

General Statement

The Communications Act of 1934, as amended, provides that:

> Upon expiration of any [broadcast] license, upon application therefor, a renewal . . . may be granted . . . for a term not to exceed three years.

(47 U.S.C. 307(d)).

Any party in interest may file a petition to deny such application. (47 U.S.C. 309(d)).

The Act also provides that in an application for a broadcast license or renewal thereof where a substantial and material question of fact is presented, or where the Commission for any reason is unable to find the public interest, convenience, and necessity would be served by the issuance of the license or renewal for which application has been made, it shall designate the application for hearing. (47 U.S.C. 309(e)).

There are thus two means of contesting the renewal of a broadcast license.[1] One is by a petition to deny in which the petitioner in effect asserts that the application for renewal of the broadcast license should not be granted even though the petitioner is not seeking to obtain the broadcast license for himself.

A petition to deny is subject to the following statutory requirements (47 U.S.C. 309(d)):

> (1) The petition must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and which, if true, would demonstrate that a grant of the application would be inconsistent with the public interest, convenience and necessity.

[1] In addition to the two means discussed herein, the FCC, of course, could on its own motion designate a renewal application for hearing.

(2) Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

(3) The petitioner must serve a copy of the petition upon the applicant.

(4) The petition must be filed with the Commission within the time prescribed by the rules.

The other means of contesting a broadcast license renewal is through a competing application for the broadcast authorization where the competing applicant says, in effect, that the public interest would be better served by granting its application for the broadcast authorization instead of renewing the incumbents license.

Over the past five years, from 1970 to date, 37 competing applications have been filed "on top" of broadcast license renewal applications; and 247 petitions to deny renewal applications have been filed with the FCC involving 445 stations.

In the comparative renewal cases the incumbent licensee has successfully withstood challenges in 9 cases; been unsuccessful in none; and 28 are still before the Commission.

Regarding the petitions to deny, 67 have been unsuccessful and 48 were withdrawn; one has resulted in the failure of the Commission to renew the license in question; and 131 are still awaiting Commission action.

During this same five year period the question of need for change and/or clarification of the law and the Commission's policies and procedures regarding broadcast license renewals has generated considerable interest in the Congress, the Executive branch, the broadcasting industry, and the public at large.

Views on the matter have ranged from assertions that under existing law and policy the industry was threatened with instability bordering on chaos, to assertions that little or no change is required in existing law and administrative practice. All of these views and arguments have been extensively developed and discussed.[2]

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[2] In addition to the recent hearings concluded by your Committee, see the following: H.R. 12993, 93d Cong., 2d Sess. (1974); H.R. 5546, 93d Cong., 1st Sess. (1973); Goldberg, H., FCC broadcast license renewal reform: two comments on recent legislative proposals, 42 Geo. Wash. L. Rev. 67–114 (1973); Wall, T. H., Section 309 of the Communications Act—the renewal provision—a need for change, 25 Ad. L. Rev. 407–13 (1973); Administrative law—broadcast license renewals—FCC cannot bar voluntary reimbursement for expenses when allowing withdrawal of petition to deny renewal, 51 Tex. L. Rev. 335 (1973); FCC license renewal policy: the broadcasting lobby versus the public interest, 27 Sw. L.J. 325–39 (1973); Botein, M., Comparative broadcast licensing procedures and the rule of law: a fuller investigation, 6 Ga. L. Rev. 743 (1972); FCC license renewal policy and the right to broadcast, 52 B.U. L. Rev. 94 (1972); Communications—FCC renewal hearings—1970 policy statement denying full comparative hearings violates section 309(e) of the communications act of 1934, 25 Vand. L. Rev. 227 (1972); Communications law—license renewals—challenging applicant for a broadcast license is entitled to a full comparative hearing on the merits of his application as against an incumbent licensee under Section 309(e) of the communications act of 1934, 40 Geo. Wash. L. Rev. 571 (1972); Media reform through comparative license renewal procedures—the citizens case, 57 Ia. L. Rev. 912 (1972); *Citizens Communication Center, et al,* v. *FCC,* 463 F. 2d 822 (D.C. Cir. 1971); Stone v. FCC, 27 FCC 2d 316 (1971), 466 F. 2d 316 (D.C. Cir. 1972); Notice of Inquiry and Proposed Rulemaking in Docket No. 19153, 27 FCC 2d 691 (1971); Final Report and Order in Docket No. 19153, 44 FCC 2d 405 (1973); Notice of Inquiry and Proposed Rulemaking in Docket No. 19154, 27 FCC 2d 580 (1971); Further Notice of Inquiry in Docket No. 19154, 31 FCC 2d 443 (1971); Anthony, R. A., Towards simplicity and rationality in comparative broadcast licensing proceedings, 24 Stan. L. Rev. 1 (1971); Fenton, B. S., Federal Communications Commission and the license renewal process, 5 Suffolk U. L. Rev. 389 (1971); Implications

(Continued)

In assessing the need for change or clarification of existing law and the Commission's renewal policies and regulations the main areas of controversy appear to involve the question of whether the renewal applicant needs more definitive guidance as to what kind of past performance will entitle him to reasonably expect renewal if challenged by a newcomer in a comparative hearing.

The statutory scheme attempts to provide a competitive spur to licensees to provide solid, substantial program service, while at the same time assuring stability in the public interest for a licensee who provides such service. Whether the Commission's present policies accomplishes this is a point at issue.

Another area of controversy involves the extent to which the Commission's renewal process in noncomparative situations insures a continuing dialogue between a licensee and the residents of his service area on their problems, needs and interests; and whether, when resort is had to Commission processes, the procedures are orderly and fair to both petitioning parties and to the licensee.

In its recently concluded Docket No. 19153, the Commission has set forth procedures intended to foster a continuous interaction between licensees and citizens throughout the license term, and thereby focus dialogue at the local level and encourage the resolution of disputes before renewal deadline.

And finally, whether issues regarding the concentration of control of communications media and the integration of ownership and management should be considered by the FCC in renewal proceeding if there are no specific rules concerning them.

Committee Amendment

As passed by the House, H.R. 12993 would—

Increase the term of broadcast licenses from three to five years.

Require the FCC to establish procedures to be followed by broadcast licensees to ascertain the needs, views, and interests of residents of their service area for purposes of their broadcast operations.

Provide that in determining whether a broadcast license should be renewed, the FCC must consider (1) whether the licensee has followed

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(Continued)

of *Citizens Communication Center* v. *FCC*, 71 Colum. L .Rev. 1500 (1971); Administrative law—FCC—full comparative hearings mandated for contested broadcast license renewals, 40 Fordham L. Rev. 335 (1971); Administrative law—license renewal hearings—FCC 1970 policy statement on comparative hearings held in violation of full hearing requirement of the federal communications act, 46 N.Y.U. L. Rev. 1012 (1971); *Hale & Wharton* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970); Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970), reconsideration denied, 24 FCC 2d 383 (1970); Analysis of FCC's 1970 Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, Special Subcommittee on Investigations, Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. (1970); Notice of Proposed Rulemaking in Docket No. 18110, 22 FCC 2d 306 (1970); Frontier Broadcasting Co., 21 FCC 2d 570 (1970); Goldin, H. H., "Spare the golden goose"—the aftermath of WHDH in FCC license renewal policy, 83 Harv. L. Rev. 1014 (1970); Aftermath of WHDH: regulation by competition or protection of mediocrity?, 118 U. Pa. L. Rev. 368 (1970); Television: the public interest in license renewals, 20 Catholic U.L. Rev. 328 (1970); Viking Television, 16 FCC 2d 1018 (1969); Greater Boston Television Corp., 16 FCC 2d 1 (1969), 444 F. 2d 841 (D.C. Cir. 1970); S. 2004, 91st Cong., 1st Sess. (1969); Hearings on S. 2004 Before Communications Subcommittee of the Senate Committee on Commerce, 91st Cong., 1st Sess. (1969); Jaffe, L. L., WHDH: the FCC and broadcasting license renewals, 82 Harv. L. Rev. 1693 (1969); Federal Communications Commission and comparative broadcast hearings, WHDH as a case study in changing standards, 10 B.C. Ind. & Com. L. Rev. 943 (1969); FCC and broadcasting license renewals: a perspective on WHDH, 36 U. Chi. L. Rev. 854 (1969).

the prescribed ascertainment procedures during the preceding license period, and (2) whether the licensee's broadcast operations during the preceding license period have been substantially responsive to the ascertained needs, views, and interests, of residents of its service area.

Prohibit the FCC in a broadcast license renewal proceeding from considering (1) ownership interests or official connections of the licensee in other stations, communications media, or businesses, or (2) the participation of ownership in management of the broadcast station, unless rules thereon have been adopted by the FCC.

Require the FCC to issue and adhere to rules establishing time limits for filing petitions to deny applications under the Act.

Provide that the FCC must prescribe procedures to encourage broadcast licensees and persons raising significant issues regarding the operations of the licensee's broadcast station to conduct good faith negotiations to resolve such issues.

Provide that appeals from certain decisions and orders of the FCC involving a broadcast station are to be taken to the United States Court of Appeals for the circuit in which the station is, or is proposed to be, located.

Require the FCC to conduct a continuing study to determine how it might expedite elimination of regulations applicable to broadcast licensees which are required by the Act but do not serve the public interest, and report annually thereon (together with any recommendations for legislation) to the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee.

Require the FCC to complete action on its Docket No. 18110 within six months after the date of enactment of legislation.

Your committee recommends an amendment in the nature of a substitute to the House passed bill, and an amended title to the bill.

Based on the testimony it received and its own deliberations, your Committee believes the amendment it proposes will clarify and stabilize the licensee renewal process in the public interest, while retraining in the law the competitive spur so necessary to ensure that the public receives the kind of quality broadcast service to which it is entitled.

As amended by your Committee H.R. 12993 would provide the following:

Section 1 provides that the Act may be cited as the "Broadcast License Renewal Act."

Section 2(a) directs the FCC to establish by rule procedures to be followed by broadcast licensees to ascertain throughout the terms of their licenses the problems, needs, and interests of the residents of their service areas for purposes of program service.

These rules could prescribe different procedures for different classes of broadcast stations.

The essence of broadcast service in the public interest is programming. Unless a licensee's programming meets the problems, needs, and interests of the residents of the area he is licensed to serve, there is no reason for permitting him to use airwaves that belong to the public. That, at least, is the theory and the requirement of the Communications Act.

Therefore, in order to comply with the Communications Act anyone wishing to hold a license to broadcast must be as fully aware as possi-

ble of the requirements of those he is licensed to serve. Otherwise he cannot be expected to offer programs which meet their requirements.

Moreover, a licensee's ascertainment efforts must be continual. Our society is too dynamic for ascertainment to be a sometime thing. The dialogue between a licensee and those he is licensed to serve must be an ongoing one.

Under its present policies, the Commission expects its broadcast licensees to make a diligent, positive and continuing effort to discover and meet the problems, needs and interests of their respective service area. To this end, the licensee must contact members of the general public in the community of license and consult with leaders of the significant groups in the community and in the surrounding areas the licensee has undertaken to service.

To clarify the ascertainment requirements in its broadcast application forms the Commission has a *Primer on Ascertainment of Community Problems and Broadcast Matter to Deal with Those Problems.*[3] The *Primer* consists of thirty-six questions and answers on the various aspects of community ascertainment.

The Commission has also adopted a *Final Report and Order in Docket No. 19153*, regarding rules and policies relating to the renewal of broadcast licenses. This *Report and Order* effected many changes in the forms and procedures used in the renewal of broadcast licenses.

Taken together your Committee believes these actions of the FCC will do much toward ensuring a continuing dialogue between the broadcaster and his public.

Moreover, if resort to Commission processes is necessary, these actions should also provide more orderly procedures, fair both to petitioning parties and to licensees.

The FCC has said that it would have no problem with a statutory requirement mandating ascertainment for purposes of program service.

To require the Commission to establish ascertainment procedures by rule will, in your Committee's judgment, assure that whatever the requirements are they will be as explicit as the dynamics of broadcasting will allow.

Guidance and assurance will thus be provided to the conscientious broadcaster; at the same time the marginal operator will be put on notice so that he may not complain of surprise or inequity when his license is not renewed.

Equally important, such guidelines will help the public know the standards of service it may legally expect from licensees under the Communications Act and the rules and policies of the Commission.

Your Committee also believes that the Commission's ascertainment procedures should be directed at eliciting information relating to program service, and our amendment so provides. Program service is, after all, at the heart of the matter.

In statutorily mandating the establishment by rule of these procedures your Committee believes the FCC should have flexibility to determine the geographic area within which a licensee's ascertainment efforts should be made, and to prescribe the depth and intensity of those efforts at various points within the geographic area.

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[3] Report and Order in Docket No. 18774, adopted Feb. 18, 1971 (27 F.C.C. 2d 650 (1971)).

Under the guidelines set forth in the Commission's *Ascertainment Primer*, a licensee is permitted to choose outlying areas or communities which its station will undertake to serve on a secondary basis. If the licensee elects not to serve a major community located within its station's service contours, a showing must be submitted explaining the basis for the licensee's decision. No major community more than 75 miles from the station's transmitter site need be included in the licensee's ascertainment efforts, even if the service contours of the station extend beyond that distance.

The Commission's policies appear to afford licensees reasonable latitude in choosing the areas and audiences they will serve. Your Committee wishes to emphasize, however, the FCC's statutory obligation to provide a fair, efficient, and equitable distribution of broadcast service among states and communities. (47 U.S.C. 307(b)).

Finally, section 2(a) provides that the FCC may prescribe different ascertainment procedures for different categories of broadcasting stations. This provision is identical to the one in the House version of H.R. 12993. It is intended to recognize the differences between radio and television, commercial and noncommercial stations, and other factors such as market and station size. These differences and factors may well dictate different ascertainment procedures for different categories of stations if the ascertainment process is to be effective.

Section 2(b) deals with the broadcast license renewal procedure to be followed by the FCC.

In determining whether the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the FCC would consider, in addition to whatever other criteria it deems necessary to make this determination, the following:

1. Whether the licensee, during the preceding term of its license, followed the ascertainment procedures for determining the problems, needs, and interests of the residents of its service area which the FCC would be required to establish by rule;

2. Whether the licensee in its program service during the preceding license term has substantially met those problems, needs, and interests; and

3. Whether the operation of the station has not otherwise been characterized by serious deficiencies.

If the Commission makes these findings in the affirmative, a presumption will attach that the public interest, convenience, and necessity will be served by such renewal.

The section also provides that the Commission shall give expeditious treatment to proceedings involving an application for renewal of a broadcasting license and shall provide that any hearing shall be structured so as to proceed as expeditiously as possible.

Thus, under the amendment as under existing law, the ultimate test for renewal of a broadcast license continues to be whether the public interest would be served thereby.

However, the amendment emphasizes what the FCC has said is now the major test in evaluating a renewal application, either in a comparative or noncomparative situation, viz, whether a licensee has been responsive to the ascertained problems, needs, and interests of the residents of its service area, viz, its past programming.

The Commission's decision in *WHDH* (16 F.C.C. 2d 1 (1969); reaffirmed, 17 F.C.C. 2d 856 (1969)), however, had an unsettling effect on many broadcast licensees.

WHDH was challenged on renewal by three new applicants. The Commission held comparative hearings. In so doing, it disregarded the past broadcast record of WHDH finding it to be no more or less than average and granted the license to Boston Broadcasters, Inc., primarily on the basis of diversification and integration. In its concluding summation the Commission said:

> Because of its superiority under the diversification and integration criteria, we conclude that the public interest, convenience, and necessity will be best served by a grant of the application of Boston Broadcasters, Inc. * * *, and a denial of the application of WHDH, Inc. * * *

Subsequently the Commission issued a *Policy Statement On Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970). In that *Policy Statement* the Commission said:

> We have, of course, set forth our policies in this respect in several cases, and indeed, have done so in designating issues in some very recent cases. For example, *In re Application of RKO General, Inc.*, FCC 69–1335, para. 8; *In re Application of Lamar Life Broadcasting Co.*, FCC 69–1336, para. 2. There has, however, been considerable controversy on this issue, as shown by the hearings on S. 2004 now going forward before the Senate Subcommittee on Communications.

It then proceeded to enunciate its Policy as follows:

> . . . if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the Act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

An appeal was taken on the *Policy Statement* to the United States Court of Appeals for the District of Columbia Circuit. The Court struck down the *Policy Statement* in June 1971 as being contrary to law and ordered that it not be applied to present or future broadcast license renewals.

In its decision the Court (1) held that *Ashbacker* [4] applied and (2) undertook to instruct the Commission on what the public interest required in the development and application of criteria for the selection of the winning applicant.

During the hearings conducted by the Committee on the instant legislation, Senator Philip Hart submitted a series of questions to the

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[4] *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

FCC. One of these questions related to standards. The Commission replied as follows:

> While the Commission clearly has the authority to prescribe standards for renewal proceedings in both comparative and noncomparative cases, it believes that there is uncertainty as to the factors and criteria to be appropriately considered in those proceedings as a result of the decision of the Court of Appeals in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201 (D.C. Cir. 1971), and that this uncertainty can be best removed by legislation. In particular, the Commission is of the view that any action in the area of cross-ownership and integration of control should be taken by way of formal rulemaking, rather than on an *ad hoc* basis at renewal time. This view is predicated on our judgment that where an incumbent licensee with other media holdings has rendered an appropriate level of service to the community, renewal in either the comparative or non-comparative contest should not be denied solely because of those holdings unless the Commission has promulgated applicable rules for the entire industry and allowed a reasonable opportunity for compliance therewith. However, certain *dicta* of the Court of Appeals in its *Citizens* decision strongly indicates that the Commission should consider diversification in individual renewal proceedings and also implies a readiness on the part of the court to define for the Commission other factors and criteria to be applied. Thus, although the Commission has the basic "public interest" grant of authority in this area, it views specific legislation aimed at clarifying the appropriate standards and factors in renewal proceedings as essential to remove these uncertainties in both the comparative and non-comparative situations.

In addition, in response to another question the Commission stated as follows:

> The Commission believes that the problem of preserving necessary industry stability while at the same time maintaining the renewal process as a stimulus for licensee performance in the public interest can be best resolved by specifying the level of performance which should reasonably insure renewal absent any legal, technical, or financial disqualifications. While we do have authority to establish standards in this area, *dicta* of the Court of Appeals in its *Citizens* decision has indicated that the Commission may be limited to acknowledging only "superior" service—service "far above average"—as a plus in comparative renewal proceedings. The Commission has observed that the term "superior" cannot properly be used as a renewal standard, because it would result in ever-increasing promises and amounts of public service programming to the detriment of the public's reasonable expectations for programming meeting other interests. We believe instead that if a licensee's service has been "substantially" attuned to the problems, needs and interests of its community, the licensee should have a reasonable assurance

of renewal in a comparative proceeding. Specific legislation on this point is, in our view, desirable to avoid potential conflict between administrative and judicial interpretations of the renewal criteria mandated by the existing general "public interest" standard. In this regard, we believe that in basing such an expectation of renewal on compliance with specified ascertainment procedures and performance "substantially responsive" to that ascertainment, H.R. 12993 provides an approach which is more practical and reasonable than a test based upon the concept of "superior" service.

Where the FCC must make such a determination in the context of a renewal application the best indicator of what it might expect from the renewal applicant in the future is what that applicant has in fact done during its preceding license term in the area of programming.

In placing major emphasis on a renewal applicant's past programming, your Committee does not mean to suggest that this is the sole criteria for determining whether an applicant's license should be renewed.

Beyond the other two criteria expressly mentioned in the amendment, the Committee intends the FCC to retain flexibility to consider other matters.

For example, in order to obtain renewal of any broadcast license, the licensee must continue to possess the necessary legal, technical and financial qualifications to hold the license, and in addition, must not have engaged in acts or practices during its expiring license term which would render it unfit to hold a broadcast license.

In order to assure necessary industry stability in the public interest however, your Committee does not intend that the flexibility given the FCC be used to re-structure the industry on a case-by-case basis. To the extent the dynamics of the medium and the public interest permit, the FCC should adopt rules and policies of general applicability. In this way, the broadcasters will know what is expected of them, and cannot plead surprise or inequity.

In adopting rules regarding cross-ownership, your Committee would expect the FCC to retain sufficient flexibility, however, to permit it to find undue concentration in indivdual cases where the applicant is in literal compliance with the law.

This, of course, is the kind of flexibility the FCC now has in its multiple ownership rules.

More importantly, clearer and more definite guidelines should assure better service to the public.

Nevertheless, in the final analysis an expert body must have discretion to adapt its rules and policies to meet unique circumstances and situations if the public interest is to be served.

Inasmuch as a licensee's past programming assumes such critical importance in the renewal context it follows that very serious obligations in this regard are placed on licensees and the FCC.

The Committee amendment accordingly provides that the past program service of *all* renewal applicants, whether contested or uncontested, must be judged by one standard (i.e., whether that program service has "*substantially met*" the ascertained problems, needs, and interests of the residents of the licensee's service area).

In your Committee's judgment, the present practice of maintaining dual standards of broadcast service may be contributing to some of the uncertainty and confusion that now exists in the renewal process. The kind of service which may merit an applicant renewal at the expiration of one license term could, in theory at least, be of little or no value to it in a subsequent comparative renewal hearing.

A single standard is, in your Committee's judgment, the first step in fleshing-out and vitalizing criteria for determining whether an applicant's past program service has truly served the public.

The past program service which a license must render in order to merit the presumption that renewal of its license would serve the public must have *substantially* met the problems, needs, and interests of the service area as the licensee has ascertained them.

"*Substantially*," as used in the amendment, is intended to mean, "essentially," "without material qualification."

If, for example, a renewal applicant's actual past programming failed to meet its promised level of programming to a degree which amounted to a material qualification of what it had promised, then under the standard of the amendment the FCC could not find that the applicant's past program service complied with "substantially met" test.

Your Committee wishes to re-emphasize that Congress by law has entrusted regulation of interstate communications by wire and radio to the FCC.

For the Courts to ignore the principle of law that requires them to give deference to the expert judgment of the FCC as long as that agency acts within its statutory and constitutional authority raises grave constitutional questions regarding the separation of powers between the legislative and judicial branches of the Government. Moreover, a judicial body is ill-equipped to act as a regulatory agency.

Nevertheless, when a regulatory agency acts arbitrarily and capriciously, or in a manner otherwise contrary to its statutory mandate or the Constitution, the Courts are legally bound to set aside the agency action on review. In the process the line of demarcation between judicial review and infringement upon the functions given the agency is often blurred, and distinctions meld.

Therefore, the regulatory process is best preserved against judicial encroachment when the regulatory agency enunciates and applies its rules and policies clearly and with definiteness.

By statutorily creating a presumption of service in the public interest if a licensee has substantially met the problems, etc., it has ascertained, your Committee intends to set guidelines to direct the FCC as it makes the required public interest finding.

To the extent your Committee has done so, any previous conflicting judicial or regulatory guidelines must give way to a clear expression of Congressional intent.

If and when the FCC finds additional criteria appropriate for consideration whether it be cross-ownership of other media, integration of broadcast management with ownership of something else, your Committee expects the Commission to move expeditiously in adopting such rules or policy as may serve to put the parties on notice as to what will be considered in renewal proceedings.

It is also expected that licensees will be given reasonable opportunity to come in compliance with changes in the Commission's rules or policies made during the term of license. To this end, the Committee in this legislation is directing the FCC to complete its cross-ownership proceeding in Docket No. 18110 by December 31, 1974.

Licensees who have received broadcast licenses and operated stations in accord with Commission rules, regulations and policies should not find these factors injected into a renewal proceeding unless there has been a change of circumstances or a failure to comply or abuse of the policy and rule.

The third criteria which a renewal applicant must satisfy to be accorded the presumption in the legislation is that the record of its operations during the preceding license term be free of other serious deficiencies. Deficiencies in this context refers to violations of the law or of FCC rules or policies, such as rigged contests, misrepresentations, fraudulent practices as to advertisers or serious technical violations.

When a renewal applicant has satisfied the criteria set out in the legislation a presumption is established that renewal of its license would serve the public interest.

Before explaining what the presumption does, your Committee believes it might explain what it does not do.

In a comparative renewal case it does not guarantee that the incumbent will prevail.

The FCC still has the flexibility to consider a challenger's qualifications, and decide what grant will better serve the public interest. To provide otherwise would in effect greatly weaken the competitive spur in the Communications Act. Your Committee believes that the full hearing provided by Section 309(e) of the Communications Act in these circumstances means that a challenger must have an affirmative opportunity to show that grant of his application would better serve the public interest, and that the possibility for him to prevail however remote is real, not illusory.

Your Committee believes that the full hearing provided by Section 309(e) of the Communications Act affords the incumbent and a challenger an opportunity to submit all relevant data as to all applications and challenge any data that is submitted. After all evidence has been submitted and the hearing is completed the Commission will make a judgment as to whether the incumbent has satisfied the criteria established by this legislation. If the finding is in the affirmative then a presumption is made on behalf of the existing licensee. This is a plus of major significance in the renewal proceeding.

However, the FCC must take into account those factors which have a bearing on the public interest even though they are unrelated to program service or operation and consider them alongside the presumption.

Thus, for example, to the extent the FCC has flexibility to deal with media concentration in an unique case, which is not covered by the Commission rules or policies, such an issue could, if compelling enough have an effect on the presumption.

In any event, in those cases where the presumption does attach, it is the intention of your Committee that it be given great weight short of decisional significance by the FCC. The presumption relates to what

a licensee has in fact done, and it rests mainly on the most critical and important ingredient of the public interest concept, i.e., actual program service to the public.

Questions have been raised as to where the burden of proof lies in contested renewal proceedings.

Section 309(e) of the Communications Act (47 USC 309(e)), applies to all hearings involving broadcast licenses. In part it provides:

> The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be determined by the Commission.

Your Committee does not believe anything in the amendment it is recommending requires a change in those provisions in Section 309(e).

Past programming service is, of course, at the heart of the public interest determination; and the amendment gives a strong preference to an incumbent comparative renewal applicant who has substantially met the problems, etc., of the residents of its service area.

What happens, however, if the hearing record shows that the renewal applicant has not "substantially met" or served the problems, needs and interests of his area? Under the amendment he would obtain no presumption. On the contrary, if the competing new applicant establishes that he would substantially serve the public interest, he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past records of the renewal applicant is still the critical factor, but here it would militate against renewal and in favor of the new applicant, provided that the latter establishes that it would solidly serve the public interest.

This amendment thus recognizes that the most important fact in evaluating competing applications is the incumbent's past programming record. Moreover, an existing licensee knowing that its renewal will be judged on its programming record will be encouraged to present programming that is substantially responsive to community, problems, needs, and interests. Failure to provide such programming will subject the incumbent to the risk of losing its license to a competing applicant whom the Commission believes will render such service. Under this criteria a reasonable amount of stability is maintained within the industry while at the same time substantial programming performance is promoted and competing applicants are able to challenge those broadcasters who do not provide such service.

Section 3(a) directs the FCC to carry out a continuing study to determine how it might eliminate regulations applicable to broadcast licensees which are required by the Act but do not serve the public interest. The Commission must make annual reports on its study (together with any recommendations for legislation) to the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee.

Since 1972 the FCC has had a "broadcast re-regulation" task force which has produced a number of rule changes, and this section is not intended to interfere with the work the task force is now doing.

Rather, the provisions of section 3(a) should be regarded as complementary of the activities of the task force, and the task force should participate in recommending amendments to the Act where its process of re-regulation is hampered by the Act's provisions.

Section 3(b) requires the FCC to complete all proceedings and take such agency action in its Docket No. 18110 as it deems appropriate by December 31, 1974.

Docket No. 18110 involves the issue of common ownership of stations in different broadcast services in the same market, and common ownership of newspapers and broadcast services in the same market.

The theory underlying the Commission's rules that have been adopted dealing with this issue, and those that have been proposed, is that rules are necessary to assure that there will be adequate diversity of programming and less concentration of control of communications mass media.

On March 25, 1970, in a *First Report and Order in Docket No. 18110.* the Commission's rules were amended to proscribe (with some exceptions) common ownership of broadcast facilities in the same market. The new rules are prospective in nature and require no divestiture.

Concurrent with the adoption of the *First Report and Order a Further Notice of Proopsed Rule Making* was issued proposing divestiture within five years, to reduce holdings in any market to one or more daily newspapers, or one TV station, or one AM–FM combination. If a broadcast licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned there within one year or by the time of its next renewal date, whichever is longer. No grants for broadcast station licenses would be made to owners of one or more daily newspapers in the same market.

On February 26, 1971, in a *Memorandum Opinion and Order* dealing with petitions for reconsideration of the *First Report and Order in Docket No. 18110* proceeding the new rules were amended so as not to apply to cross-ownership of AM and FM stations in the same market.

In making this amendment, the Commission stated that it planned further study of the matter of AM–FM combinations. Moreover, although the proscription against common ownership of VHF television stations and radio stations in the same market remained in effect, it was provided that all applications involving UHF television and radio stations in the same market would be handled on a case-by-case basis.

Your Committee wishes to re-emphasize the significance of a renewal applicant's past program performance in license renewal cases.

Nevertheless, there are other unrelated matters which also bear on the public interest determination the FCC must make. Promotion of competitive conditions in the dissemination of news and advertising is one of them.

By directing the FCC to complete Docket No. 18110 by December 31, 1974, your Committee is expressing its belief that, as a general proposition, the FCC should proceed by rule and/or policy in this area rather than on a case-by-case basis. Your Committee accepts and relies on the FCC's oft repeated statement that it does not intend to restructure the industry through a series of *ad hoc* rulings.

The Commission now has rules regarding multiple ownership, and there appears to be no reason why rules regarding cross-ownership would not also be appropriate.

Hearings

Your Committee held nine days of hearings on the following bills dealing with license renewal: S. 16, S. 247, S. 272, S. 613, S. 646, S. 822, S. 844, S. 849, S. 851, S. 1511, S 1589, S. 1870, S. 3637, and H.R. 12993.

The Committee heard over one hundred witnesses, including members of Congress. Director of the Office of Telecommunications Policy, The Department of Justice, the Chairman of the FCC, representatives of several citizens groups, representatives of minority groups, representatives of the broadcasting industry, a representative of the AFL/CIO, representatives of religious groups, and many others.

Testimony ranged from the view that no legislation was necessary, to support of the House passed bill. Everyone, however, supported the principle that the public's interest is paramount, and whatever Congress decides to do should rest on that consideration alone.

It was generally agreed that the broadcast licensee who conscientiously serves the public should have some reasonable assurance his license will be renewed. At the same time a licensee who has not fulfilled his commitment to the public should have his application for license renewal denied.

Your Committee believes the hearing record affirms the necessity for the principle of stability in the public interest. It also believes the record affirms the necessity and desirability of continuing the competitive spur which now exists in the Communications Act.

There was a sharp divergence of opinion on the desirability of increasing the present three year license term.

Broadcasters, especially the small market ones, feel a three year term restricts their ability to serve the public interest because an inordinate amount of their time and resources are taken up with the renewal process.

On the other hand, license renewal time offers the FCC the only real opportunity it has to review the overall performance of the licensees.

On balance your Committee believes the public interest is better served if the length of the license term remains as it is. The necessary stability and freedom to serve the public interest is, in your Committee's judgment, provided by the provisions in the legislation relating to renewal procedures and the direction to the FCC to eliminate superfluous broadcasting regulations.

There also was considerable controversy as to whether, in renewal cases, the FCC should consider issues of media concentration and integration of ownership and management on an *ad hoc* basis or only pursuant to rules and policies which it adopts.

The witnesses who addressed themselves to these questions, including the Department of Justice, generally agreed the FCC should proceed by rule and/or policy. At the same time any such rules or policies the agency adopts should permit it the flexibility to proceed on an *ad hoc* basis where unique circumstances require. The flexibility the Commis-

sion should retain is similar to that which it retained in its multiple ownership rule.

The multiple ownership rule in effect conclusively presumes there would be media concentration inconsistent with the public interest if a party owned more than seven standard broadcast stations. It therefore prohibits ownership of more than seven such stations. At the same time, however, it has flexibility to find that undue concentration would result from ownership of less than seven standard broadcast stations.

Your Committee does not wish to impede in any way the present renewal proceedings before the FCC involving petitions to deny filed by the Department of Justice. Nor does it wish to encourage or discourage any such proceedings *in futuro*. Your Committee simply reiterates the two principles it believes should be controlling.

First, the industry should not be re-structured on an *ad hoc* basis, and to that end it is better for the FCC to proceed by rule and/or policy. Secondly, the FCC should have the flexibility to consider unusual circumstances in individual cases.

Finally, the bulk of the testimony concerned the standards to be applied at license renewal time to determine whether renewal would serve the public interest.

In the context of comparative renewal proceedings most of the testimony was concerned with questions of what kind of broadcast service of a licensee during its expiring license term will give it an advantage over the other applicants competing for the broadcast authorization; and what kind of advantage should be given.

There was also the obverse issue of whether the licensee's broadcast service during his expiring license term be weighed against him if it fails to measure up to the prescribed standard.

Regarding uncontested renewals, the question was whether the FCC should use the same standard to evaluate past program service, as it should use in comparative renewals.

There was general agreement that past program service is the best single indicator both to guide the Commission in making its required public interest finding, and in evaluating the merits of an incumbent's renewal application vis-a-vis a challenger's.

There was, however, disagreement over what standard of past program service would support grant of an uncontested renewal application, and which would give an advantage to an incumbent in a comparative renewal proceeding. Part of this general issue was whether there should be one standard of past program service which would merit renewal in a noncomparative situation, and a stricter one in comparative ones.

The FCC and others urged that in noncomparative renewal situations the Commission's standard should remain unchanged. That is, an applicant merits renewal if it has served the public interest in a manner that is sufficient—but no more.

They asserted that in these cases minimal service is better than no service. The FCC also maintained that a more stringent standard will cause an additional backlog in processing renewal applications.

Others argued the contrary that to maintain a dual standard would make a mockery of the public interest concept. And, in any event, inasmuch as there are vastly more applicants for broadcast licenses

than there are frequencies, the contention that minimal service is better than no service is at best a weak one.

As to the standard to be applied to past program service in comparative renewal cases, the FCC and many witnesses felt it should be whether the incumbent has "substantially met" the ascertained problems, needs, and interests of the residents of its service area.

The word "substantially," it was urged, had been used in the FCC 1970 *Policy Statement*, and has a history of agency interpretation.

Other witnesses opted for another word to prescribe the stand precisely for the same reason—this history of FCC interpretation of "substantially met." As applied by the FCC in a specific case they maintain it has no meaning of any consequence. Therefore, the legislative standard should be one that has not been tainted.

Finally and perhaps the most elusive issue, was the question of the advantage to be given an incumbent in a comparative renewal proceeding if its past program service meets whatever standard is prescribed.

Views on this issue mainly centered on whether a renewal applicant who has met the proscribed standard should have its application granted without any chance for a challenger to show it could offer service which would better serve the public interest; or whether a challenger should still have an opportunity to put on an affirmative case for his application.

Proponents of the former position maintain that the best assurance the FCC has that future service will be in the public interest is a proven track record, i.e., past program service. They also urge that the conscientious licensee who provides solid programming must have this kind of assurance if it is to invest the time, money, and effort necessary for high quality service.

Their opponents feel that such a position would amount to a license in perpetuity, especially in view of the FCC's track record. To give an incumbent this advantage would therefore greatly weaken the competitive spur in the Communications Act.

The air waves belong to the people, and the Communications Act provides that a broadcast license confers no property right or any other right beyond the terms of the license.

Moreover, many minority groups point out that until now it was beyond the economic ability of most of their members to own and operate broadcast stations.

To provide existing licensees with an absolute guarantee of renewal based on past program service, they say, would be to continue to deny them the ability to acquire broadcast stations.

Your Committee believes giving a renewal applicant who satisfies the criteria in the amendment a plus of major significance without guaranteeing renewal is the best method of achieving stability in the public interest without removing the statutory spur.

Section-by-Section Analysis

Section 1 provides that the Act may be cited as the "Broadcast License Renewal Act."

Section 2(a) directs the FCC to establish by rule procedures for broadcast licensees to follow throughout the terms of their licenses to

ascertain the problems, needs, and interests of the residents of their service areas for purposes of program service.

These rules could prescribe different procedures for different classes of broadcast stations.

Section 2(b) directs the FCC at renewal time in determining whether the public interest had been served to consider (i) whether the licensee during the preceding license term followed the applicable ascertainment procedures; (ii) whether the licensee in its program service during the preceding license term substantially met the ascertained problems, needs, and interests of his service area; and, (iii) whether during the preceding license term the operation of the station was not otherwise characterized by serious deficiencies.

If the Commission finds the licensee has satisfied the foregoing requirements a presumption shall be established that grant of the renewal will serve the public interest, convenience, and necessity.

The Commission is also directed to give expeditious treatment to all proceedings involving an application for renewal of a broadcasting license and to provide that any hearing shall be structured so as to proceed as expeditiously as possible.

Section 3(a) directs the FCC to undertake a study to determine how it might expedite elimination of exacting broadcast regulations which are unnecessary to the public interest.

The Commission would make annual reports of the results of such study (including legislative recommendations) to the Committee on Commerce of the United States Senate, and the Committee on Interstate and Foreign Commerce of the House of Representatives.

Section 3(b) directs the Commission to complete Docket No. 18110 (Multiple Ownership) not later than December 31, 1974, and take what actions it deems appropriate in connection with the proceedings.

Conclusion

The Communications Act of 1934, as amended, provides for a limited broadcast license term. This enables the FCC to review a broadcaster's stewardship of the public's property—the air waves—at regular intervals to determine whether the public interest is being served. In addition, it provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest. Finally, it also provides an opportunity for parties in interest to demonstrate why renewal of an applicant's license would not be in the public interest. The legislation your Committee recommends herein reaffirms these concepts.

It also attempts to clarify the standards and procedures used at renewal time, and provide reasonable assurance for the licensee who is rendering substantial service to those he is licensed to serve. Your Committee recognizes that such assurance is necessary if a licensee is to be expected to devote the necessary time, efforts, and money to render quality service.

In the final analysis, however, whether any statutory guidelines Congress furnishes will be effective or not depends on how the FCC applies them.

Your Committee has deliberately explained itself at great length in order to give the FCC as much guidance and insight into Congressional intent as possible.

Your Committee therefore expects the FCC to act with clarity, definiteness, and precision in the renewal areas so that licensees, potential licensees, and the public will know their respective rights, expectations, obligations, and remedies.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

§ 309. Application for license—Considerations in granting application.

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. *In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (1) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the problems, needs, and interests of the residents of its service area, (2) whether the licensee in its program service during the preceding license term has substantially met those problems, needs, and interests, and (3) whether the operation of the station has otherwise been characterized by serious deficiencies. If the Commission determines that the licensee has satisfied the requirements of clauses (1), (2), and (3), a presumption shall be established that the public interest, convenience, and necessity would be served by such renewal. The Commission shall give expeditious treatment to proceedings involving an application for renewal of a broadcasting license and shall provide that any hearing shall be structured so as to proceed as expeditiously as possible.*

* * * * * * *

(i) *The Commission shall by rule establish procedures to be followed by licensees of broadcasting stations to ascertain throughout the terms of their licenses the problems, needs, and interests of the residents of their service areas for purposes of their program service. Such rules may prescribe different procedures for different categories of broadcasting stations.*

Record of Votes in Committee

Pursuant to sections 133 (b) and (d) of the Legislative Reorganization Act of 1946, as amended by Public Law 91–510, the following is a tabulation of votes in Committee:

1. Amendment offered by Senator Tunney to the proposed amendment of Senator Hollings. Senator Tunney's amendment could have

expressly provided that the presumption which would be created under Senator Holling's amendment would be a rebuttable one.

Rejected: 3 Yeas; 12 Nays:

YEAS—3

Hart	Stevenson
Tunney	

NAYS—12

Magnuson	Moss	Griffin
Pastore	Hollings	Baker
Hartke	Inouye	Cook
Cannon	Cotton	
Long	Pearson	

2. Amendment offered by Senator Hollings to the proposed Pastore/Baker Amendment to provide as follows: "In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (1) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the problems, needs, and interests of the residents of its service area, (2) whether the licensee in its program service during the preceding license term has substantially met those problems, needs, and interests, and (3) whether the operation of the station has otherwise been characterized by serious deficiencies. If the Commission determines that the licensee has satisfied the requirements of clauses (1), (2), and (3), a presumption shall be established that the public interest, convenience, and necessity would be served by such renewal."

Adopted: 16 Yeas; No Nays:

YEAS—16

Magnuson	Moss	Pearson
Pastore	Hollings	Griffin
Hartke	Inouye	Baker
Hart	Tunney	Cook
Cannon	Stevenson	
Long	Cotton	

3. The Pastore/Baker Amendment as amended in the nature of a substitute for the House passed H.R. 12993.

Adopted 15 Yeas; No Nays:

YEAS—15

Magnuson	Long	Cotton
Pastore	Moss	Pearson
Hartke	Hollings	Griffin
Hart	Inouye	Baker
Cannon	Tunney	Stevens

Cost Estimates Pursuant to Section 252 of the Legislative Reorganization Act of 1970

In accordance with Section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91–510, 91st Congress), the enactment of the legislation will result in no additional cost to the Government.

Text of H.R. 12993, as Reported

AN ACT To amend the Communications Act of 1934 with respect to the renewal of licenses for the operation of broadcasting stations

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act may be cited as the "Broadcast License Renewal Act".

CONSIDERATION OF PUBLIC PROBLEMS, NEEDS, AND INTERESTS

SEC. 2. (a) Section 309 of the Communications Act of 1934 is amended by adding at the end thereof the following new subsection:

"(i) The Commission shall by rule establish procedures to be followed by licensees of broadcasting stations to ascertain throughout the terms of their licenses the problems, needs, and interests of the residents of their service areas for purposes of their program service. Such rules may prescribe different procedures for different categories of broadcasting stations.".

(b) Section 309(a) of such Act is amended by adding at the end thereof the following: "In determining if the public interest, convenience, and necessity would be served by the renewal of a broadcast license, the Commission shall consider (1) whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under section 309(i) for the ascertainment of the problems, needs, and interests of the residents of its service area, (2) whether the licensee in its program service during the preceding license term has substantially met those problems, needs, and interests, and (3) whether the operation of the station has not otherwise been characterized by serious deficiencies. If the Commission determines that the licensee has satisfied the requirements of clauses (1), (2), and (3), a presumption shall be established that the public interest, convenience, and necessity would be served by such renewal. The Commission shall give expeditious treatment to proceedings involving an application for renewal of a broadcasting license and shall provide that any hearing shall be structured so as to proceed as expeditiously as possible.".

STUDY OF REGULATION OF BROADCASTERS: ACTION ON FEDERAL COMMUNICATIONS COMMISSION DOCKET

SEC. 3. (a) The Federal Communications Commission shall conduct a study to determine how it might expedite the elimination of those regulations of broadcast licensees required by the Communications Act of 1934 which do not serve the public interest and shall make annual

reports of the results of such study (including any recommendations for legislation) to the Committee on Commerce of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives. The Commission shall include in its first annual report under this section its conclusions with respect to the differences among broadcast licenses on which are or may be based differentiation in their regulation under such Act.

(b) The Federal Communications Commission shall, not later than December 31, 1974, complete all proceedings and take such agency action as it deems appropriate in connection with proposed amendments to the Commission's rules (47 C.F.R. 73.35, 73.240, 73.636) relating to multiple ownership of standard, frequency modulation, and television broadcast stations (Federal Communications Docket Numbered 18110).

ADDITIONAL VIEWS OF MESSRS. HART, HARTKE, AND TUNNEY

Statement in Support of Legislation

We support the Broadcast License Renewal bill and the majority report accompanying it. The purpose of this supporting statement is to set forth in a concise and clear way what, in part, this legislation accomplishes.

As Senator Pastore stated in his opening remarks at the Committee's Executive Session of September 12, 1974:

> Whatever stability is necessary in the industry is necessary to assure that the public receives the best broadcast service possible. In my view of the renewal process therefore the concept of a competitive spur inherent in the Communications Act is also important. After all the airwaves belong to the people.

The primary purpose of this legislation is to clarify the standards to be applied by the Commission in achieving Senator Pastore's goal. Although the Commission has not denied renewal of any license for failure to render adequate service to the community, there has been growing concern from all quarters that the standards to be applied in license renewal proceedings are confusing and inconsistent.[1] To clarify Congress' intent with regard to the criteria to be applied by the FCC in assessing renewal application is desirable.

There are three criteria in section 2(b) of the bill which, if met by the license renewal applicant, would create a presumption that the license should be renewed. A brief discussion of those criteria, and the nature of the presumption, will be helpful at this point.

> 2(b)(i). Whether the licensee, during the preceding term of its license, followed applicable procedures prescribed by the Commission under Section 309(i) for the ascertainment of the problems, needs, and interests of the residents of its service area.

It is a fundamental precept of the Communications Act, which allocates and assigns licenses to local communities, that "programming service will be rooted in the people whom the station is obligated to serve. . . ." [2] To this end, we agree with the Committee in encouraging licensees to engage in a continuous dialogue with members of their community, and requiring licensees to engage in a continuous ascertainment of community problems, needs and interests throughout the period of the license.

We further agree with the Committee that a licensee, as well as the public, should have some guidelines defining the nature of these continuing contacts. The rules which the Commission adopts pursuant to new Section 309(i) should encourage a constant exchange between the licensee and its audience. They should encourage discussion and agree-

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[1] The *WHDH* case, 16 F.C.C. 2d 1 (1969), was of course unique, as the Commission has itself emphasized (17 F.C.C. 2d 856).

[2] *Ascertainment of Community Needs by Broadcast Applicants*, F.C.C. 68-847, L# Pike and Fischer Radio Reg. 2d 1093, 33 Fed. Reg. 1211 (1968).

ment with citizen and community groups on significant matters regarding the nature of the service to be rendered to the public, so as to better serve area residents.

This, as the Committee has stated, is the primary purpose of the renewal process.

> 2(b)(iii). Whether the licensee in its program service during the preceding license term has substantially met those problems, needs and interests.

We agree with the Committee that neither law nor policy affords any basis for applying different criteria to a renewal application on the basis of whether it is contested or not contested, or the nature of the challenge launched against it. It is the purpose of the Communications Act to secure the best practicable broadcast service to the people of the United States. The Act mandates that the Commission must affirmatively find that granting a renewal application will serve the public interest. It does not differentiate between challenged and unchallenged renewal applications nor between applications challenged in one manner as opposed to another.

Congress,[3] the courts,[4] and the Commission [5] have adhered to the principle that regulatory policies must be oriented toward assuring the best possible service.

To this end, the Committee has wisely chosen a high standard against which the program performance of a license renewal applicant must be measured. This standard requires that each broadcaster "substantially" meet the problems, needs, and interests of its service area, and is to be applied in all license renewal applications, whether in an uncontested or contested case.

We agree with the Committee's sound conclusion that in using the term "substantially", we expressly do *not* intend to adopt the regulatory or adjudicatory history surrounding that term,[6] and we do not endorse the results reached in cases which have construed that term or kindred tests.[7] Our purpose here is to define and to clarify the congressional intent with regard to the standard of performance a licensee must meet and to which the Commission is to hold all renewal applicants. By "substantially met", our Committee correctly points out that the program service must be strong enough to be "without material qualification." To paraphrase Chairman Pastore's description of this standard, there cannot be "any room for rubber stamping" of licensee performance under this test.

> 2(b)(iii). Whether the operation of the station has otherwise been characterized by serious deficiencies.

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[3] *E. G. Network Broadcasting*, H. Rept. No. 1297, Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 54–169 (1958).

[4] *N.B.C.* v. *F.C.C.*, 319 U.S. 190, 216–17 (1943); *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351, 356–357 (D.C. Cir. 1949); *Pinellas Broadcasting Co.* v. *F.C.C.*, 230 F. 2d 204, 206 (D.C. Cir. 1956).

[5] *National Broadcasting Co.*, Pike Fischer Radio Reg. 67 (1963); Letter dated August 30, 1956 from F.C.C. Chairman McConnaughey to Chairman Magnuson of the Senate Interstate and Foreign Commerce Committee. Hearings on S. Res. 13 and 163, Senate Interstate and Foreign Commerce Committee, 84th Cong., Second Sess., 979–81 (1956).

[6] See, *e.g.*, *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970), *rev'd sub nom. Citizens Communications Center* v. *F.C.C.*, 447 F. 2d 1201 (D.C. Cir. 1971).

[7] See, *e.g.*, *RKO General Inc.* (*KHJ–TV*), 44 F.C.C. 2d 123 (1973); *Moline Television Corp.* (*WQAD–TV*), 31 F.C.C. 2d 263 (1971).

While doubtful, it is possible that a licensee could meet the first two criteria and still have other serious operating deficiencies. For example, a licensee could discriminate in employment, or engage in violations of the fairness doctrine, or be less than candid in its dealing with the public or the Commission, or violate Commission policies or overcommercialization, or fail properly to comply with Commission rules regarding public access to certain licensee records, or violate Commission rules governing hours of operation. The foregoing enumeration is by no means intended to be exhaustive, but rather illustrative. The Commission must have authority to and must consider any disregard or violation of its rules or policies in assessing a licensee's performance.

The Presumption

We agree with the Committee that the Commission should afford a preference to a licensee satisfying these three requirements when it scrutinizes the licensee's renewal application or in the event of a challenge to the licensee's renewal application. Section 2(b) provides for this preference. It establishes a "presumption" that the public interest will be served by granting the renewal application of a licensee that meets the three requirements.

That the licensee has satisfied the three criteria giving rise to the presumption must, as the Committee points out, be established in a full and open hearing in which all parties are allowed to participate. As is the case under existing law, the incumbent licensee would bear the burden of establishing its fitness for renewal.

Moreover, while Section 2(b) directs the Commission to give expeditious treatment to proceedings involving renewal applications and authorizes the Commission to structure the hearing so as to resolve license renewal proceedings expeditiously, this amendment to Section 307(d) does nothing to affect or abrogate the full hearing requirement of Section 309(e) of the Act.

As the Committee states in the report, in any hearing that is held, evidence will be received on all relevant matters, including the presence of other factors that might warrant denial of the renewal application, or in the comparative hearing context, a grant to the competing applicant, even if the three criteria of Section 2(b) are met. Thus with regard to the latter, nothing in the legislation would overrule the fundamental principle of administrative due process established in *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945), that each competiting applicant for a license is entitled to have his or her application considered on its own merits.

As the Committee agrees, this presumption may be rebutted by a competiting applicant or a petitioner who shows that the three criteria have not been met or, on the basis of other relevant criteria, that the renewal would not serve the public interest. Evidence may be received on issues that might warrant denial of the renewal application even though the licensee had met the presumption. A challenger—either a competing applicant or a petitioner to deny—may, for example, overcome the presumption by showing that there is an undue concentration of power in the mass communications media or that he can better serve the public interest.

In connection with the concentration of control issue, we agree with the majority that while a licensee who is in compliance with Commission rules regarding the ownership of broadcast properties would ordinarily not enjoy an undue concentration of control over the mass media, nothing in this legislation would preclude the Commission from applying a rule of reason in individual cases. There are ownership patterns not now covered by numerical limitation imposed by Commission rule and may not be in the future. It cannot be assumed that compliance with the Commission's rules assures that no undue concentration of control over the mass media would result from grant of a particular application. The Commission's present rules [8] recognize that while there are absolute numerical limitations on the number of facilities a particular licensee may hold, it is still necessary in cases within the numerical limitation to determine whether

> . . . the grant of such license would result in a concentration of control . . . inconsistent with the public interest. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to the areas in question.

In conclusion, the Committee is to be credited for focusing on the basic goal of broadcast license renewal legislation; the desire for a clear standard of performance for broadcasters that the FCC, the broadcasters, and the public can understand and that is designed to serve the public interest. We are satisfied that this legislation is a material step in reaching that goal.

PHILIP A. HART.
VANCE HARTKE.
JOHN V. TUNNEY.

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[8] 47 C.F.R. §§ 73.35, 73.240, 73.636.

SEPARATE VIEWS OF MR. TUNNEY

The wide dissemination of ideas is crucial to the proper functioning of a democracy society. The Federal Communication Commission with its oversight and licensing powers over the airwaves plays a critical role in this process and must be vigilant in assuring the excellence and public service of the broadcast media.

I believe the license renewal legislation approved by the Senate Commerce Committee has gone far in clarifying the Federal Communication Commissions responsibilities in this area.

With a tightened definition of the F.C.C.'s regulatory role, there should also be consideration of developing more orderly procedures for license renewals.

Since first entering Congress 10 years ago, I have felt that the short three year license renewal period for broadcasting should be extended to five years. As a Congressman, I introduced legislation in 1968 which would have provided for this longer period. A five year renewal period, I believe, would allow the FCC to more carefully scrutinize and review broadcast licenses.

The license renewal process, which at one time was a fairly simple and straightforward procedure, has become extremely complex and time consuming. Enormous amounts of information and filings are now required by the F.C.C. This burden weighs particularily heavily on the many small broadcast stations on which millions of Americans depend for news and public service broadcasting throughout our Nation.

Also, the mountains of paperwork generated by this process have tended to clog the functioning of the FCC. Right now, there are close to one-hundred, thirty contested cases backlogged in the FCC. Some of these cases will take months and possibly years to decide.

A five year renewal period would immediately ease the FCC's burden. It has been estimated that it would reduce the number of applications which the Commission must review from approximately 2,800 a year to about 1,700. This extensive but more limited number of renewals would allow the FCC to focus its efforts on a more thorough and expedited review of each applicant.

Additionally, it will permit stations to eliminate frequent submittals and concentrate more on public service and on plans for capital expenditures and growth to meet community needs.

The House already has voted overwhelmingly for the five year renewal period and it is my hope that the Senate will concur in this decision.

Tight entry and renewal procedures plus a reasonable renewal period are the right way to assure the best possible programming for the American public.

JOHN V. TUNNEY.

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Cal Stapleton

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

October 4, 1974

GENERAL COUNSEL

MEMORANDUM FOR ARTHUR KALLEN

FROM: Henry Goldberg H.G.

SUBJECT: License Renewal Legislation

Attached are our comments on the renewal legislation being considered by the Senate. As you requested, the comments compare the House bill and the Senate substitute and provide OTP's comments from the perspective of the Administration's renewal bill.

By way of summary, while both the House bill and the Senate bill are modeled roughly on the Administration bill, neither would offer as comprehensive a solution to the license renewal problem. This is especially true of the Senate bill, which does not deal adequately with: (1) the problems of mandating a comparative hearing of all competing license renewal applications; (2) the danger of ad hoc restructuring of broadcast industry ownership through the renewal process; or (3) the First Amendment problems posed by FCC-dictated program performance guidelines. All of these matters were treated in the Administration's bill, but the Congress chose to go through the motions of enacting renewal legislation instead of facing up to some real problems and resolving them. In short, as a "do nothing" bill that may cause more problems than it solves, the Administration should withhold its support from the Senate bill.

RENEWAL CRITERIA

SUMMARY OF PROVISION OF H.R. 12993

1. Section 2(b) further amends §307(d).

2. It conditions license renewal on FCC finding of public interest, convenience and necessity.

3. In making this finding, the FCC shall consider:

   (a) whether the licensee has followed FCC rules and procedures re ascertainment of the needs, views and interests of the residents of its service area, and

   (b) whether the licensee has engaged in broadcast operations during his license term which were "substantially responsive" to those needs, views and interests.

4. The FCC may not consider (in making its public interest finding):

   (a) ownership interests or connections of the applicant (multiple and cross-ownership relations), or

   (b) integration of ownership and management, unless

   (c) These policies have been codified by FCC rules and applicant has been given opportunity to conform.

SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993

1. Section 2(b) further amends §307(d).

2. It continues the present language in the act that conditions renewal on a finding of service in the public interest, convenience and necessity.

3. But would now provide that in making this finding, FCC shall consider:

   (a) whether the licensee has followed FCC rules and procedures re ascertainment of the problems, needs, and interests of the residents of its service area, and

   (b) whether the licensee has engaged in broadcast operations during his license term which "substantially met" those needs, views and interests, and

   (c) that the operation of the station has not otherwise been characterized by service deficiencies. This provision is not included in the House version.

   (d) An affirmative finding with respect to these three criteria would create a presumption that the public interest, convenience and necessity would be served by renewal. Similar language is absent from the House version.

OTP COMMENTS

1. The Administration bill also conditioned renewal of a broadcast license on the retrospective assessment of the licensee's ascertainment efforts and his responsiveness in operating to meet the needs of his community. It required a "good faith effort" by the licensee with respect to his ascertainment obligations. The significant point about the Administration bill, however, was that it eliminated the automatic necessity of a comparative hearing on substantive performance issues presently required by §309(e) and the Ashbacker case and instead imposed an initial procedural burden on a prospective challanger to demonstrate that the incumbant had failed to meet the renewal criteria. Only after meeting this initial burden, would he be afforded an opportunity to hearing. This provision offered hope for stability in the renewal process afforded by neither the House or Senate bills.

The House version requires adherence to Commission ascertainment rules and

RENEWAL CRITERIA - CONTINUED

SUMMARY OF PROVISION OF H.R. 12993	SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993	OTP COMMENTS
	4. There is no mention in the Senate version of any limitations on FCC consideration of multiple, cross or integrated ownership relations or conditions.	"substantially responsive" programming efforts by the licensee. The House report indicated that "substantially responsive" in an uncontested renewal would mean "sincere and diligent" taking into consideration the licensee's determination of program priorities and his resources, capacities and limitations. "Minimal" or "sufficient" service would merit renewal in such case as being preferred to no service at all (unanswered was the question: why not deny renewal of a minimum performer and solicit applications for new licensees?). In a comparative situation, renewal could be assured only if "substantially responsive" meant that his program service had been "good" or "meritorious". A dual standard was thus created, and unresolved was the Ashbacker issue and the right of a contestant to an automatic hearing.

RENEWAL CRITERIA - CONTINUED

SUMMARY OF PROVISION OF H.R. 12993	SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993	OTP COMMENTS
		The Senate version requires the licensee to "substantially meet" the ascertained needs of the community, but this standard would apply to all renewal applicants, whether contested or not. "Substantially" here is intended to mean "essentially", "without material qualification." An affirmative finding that the licensee has "substantially met" the renewal criteria would result in a "presumption" that renewal would be warranted. However, that presumption, according to the report, does not guarantee an incumbent will prevail (p. 12)! A hearing is still required (§309(e) and Ashbacker doctrine) and the challanger must be given an opportunity to demonstrate a grant of his application would better serve the public interest. The Commission then must decide if the incumbent has satisfied the renewal criteria If he has, the presumption is operative and he gets a "plus of major significance." However, this presumption can be "affected" by "other factors affecting the public interest" (p. 12), such as

ENEWAL CRITERIA - CONTINUED

SUMMARY OF PROVISION OF H.R. 12993	SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993	OTP COMMENTS
		concentration of ownership (see below). Thus the Senate bill also fails to resolve the conflict between the need for automatic renewal for some kind of superior or substantial performance and the right of a challenger to a hearing. What the Senate report appears to give with one hand, it takes back with the other.
		CONCENTRATION OF OWNERSHIP
		There is no specific mention of the diversification of ownership or integration of ownership and management issues as renewal criteria. in the Senate version other than the requirement that Docket No. 18110 be completed by December 31, 1974. Thus, the destabliizing possibility that the FCC can restructure the broadcast industry remains. The Senate report acknowledges the problem. It does nothing to resolve it, however. On the one hand it states that the FCC should not restructure the broadcast industry on a case-by-case basis (p. 10)

RENEWAL CRITERIA - CONTINUED

SUMMARY OF PROVISION OF H.R. 12993	SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993	OTP COMMENTS
		and that its directive to complete Docket No. 18110 was intended to reinforce this concern (p. 14), but then it affirms that the FCC should retain sufficient flexibility to find undue concentration of ownership in individual cases (p. 10), and even if not covered by Commission rules such finding could overturn the "presumption" which compliance with the renewal criteria would otherwise create (p. 12). Thus, the WHDH case lives on. Both the House and Administration bills met this problem by forbidding consideration of multiple or cross-ownership issues as renewal criteria in a comparative hearing unless pursuant to codified rules, and then only if the incumbent had been afforded a reasonable opportunity to conform. The lack of a similar provision is a serious deficiency in the Senate version. Conclusion: Neither House nor Senate bill adequately meets the need for regularizing the renewal proceedings. In addition, both bills lack the additional stabilizing safeguards against the effects of undue governmental influence in the renewal process that characterized the Administration's bill. That bill, specifically forbid the utilization of program percentages or other predetermined performance criteria to

RENEWAL CRITERIA - CONTINUED

SUMMARY OF PROVISION OF H.R. 12993	SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993	OTP COMMENTS
		measure licensees' "substantial performance" because it was felt that such explicit standards would inevitably intrude the government into programming content and would substitute Federally imposed standards for ascertained community standards. In order to secure renewal of his profitable license, the licensee would likely seek compliance with the Federal standards in lieu of analyzing and responding to his community's interests. This would constitute a serious and unfortunate derrogation of the public's, as well as broadcasters', First Amendment interests.

E-REGULATION AND DOCKET NO. 18110

UMMARY OF PROVISION OF
.R. 12993

. Section 6(a) of the bill would require the FCC to conduct a de-regulation study and report annually to Congress.

. Section 6(b) of the bill would require a final decision by the FCC in Docket No. 18110 (the multiple ownership proceeding) within 6 months of enactment of the bill.

SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993

1. Section 3(a) of the Senate version is the same as 6(a) of the House bill and would require the FCC to conduct a de-regulation study and report annually to Congress.

2. Section 3(b) of the Senate version is similar to 6(b) of the House bill, but would require final decision in Docket No. 18110 by December 31, 1974.

OTP COMMENTS

Although there is no comparable section in the Administration bill, this provision is consistent with OTP's general policy thrust for de-regulation and specific suggestion for an experiment in de-regulation of the AM-FM commercial broadcast services.

PETITIONS TO DENY AND NEGOTIATIONS

SUMMARY OF PROVISION OF H.R. 12993

1. Sections 3 and 7 would amend §309(d)(1) by authorizing the filing of petition to deny by any party in interest within time periods specified by FCC.

2. Section 4 of the bill adds subsection (j) to §309 requiring the FCC to establish procedures to "encourage" licensees and complainants of station operations to conduct good faith netogiations during license term, to resolve disputes.

SUMMARY OF PROVISIONS OF SENATE AMENDMENT TO H.R. 12993

1. **There are no comparable provisions in the Senate bill.**

OTP COMMENTS

OTP opposes any additional regulation that would require licensees and representatives of interest groups to negotiate, as provided for in the House bill. The licensee, as trustee of a public resource, already is under an obligation to serve and be responsive to his public. There is no need to cast this relationship into an adversary relationship.

LICENSE TERM

SUMMARY OF PROVISION OF H.R. 12993

1. Section 2(b) of the bill amends §307(d) to increase the license term to 5 year term.

2. To prescribe by rule license periods for particular classes of stations and authority to grant short term renewals.

3. Authorizes revocation of license per §312 of the Act.

SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993

1. There is no license term provision in the Senate version, and it would thus remain at 3 years

OTP COMMENTS

OTP originally supported an increase to a five-year license term as one means of providing stability in the renewal process, and because that term was more appropriate given the maturity and complexity of the industry. The five-year term was not the principal focus of the Administration renewal bill, however, which rather relied on procedural safeguards with respect to petitions to deny and competing applications and on prohibitions of an ad hoc restructuring of the industry through uncodified renewal criteria. In the absence of these safeguards from both the House and Senate bills, there is no reason to extend the renewal period to five years.
However, there will be a strong effort made to amend the bill on the Senate - floor to add a five-year term. The broadcasters believe they will win on the floor.

ASCERTAINMENT

SUMMARY OF PROVISION OF H.R. 12993

1. Section 2(a) amends §309 of the Act by adding new subsection (i) requiring the FCC to establish by rule procedures for licensee ascertainment throughout his license term of the needs, views, and interests of the residents of the station's service area. It also authorizes different procedures for different categories of stations.

SUMMARY OF PROVISION OF SENATE AMENDMENT TO H.R. 12993

1. The Senate version is identical with the exception that licensees must ascertain the problems, needs and interests of residents vice needs, views, and interests.

OTP COMMENTS

In different language, the Administration bill also provided by statute for the ascertainment of community needs and interests by the licensee and required the broadcast licensee to make a good faith effort to then operate in a manner responsive to those needs and interests. OTP supports the overall thrust of both bills which through the ascertainment requirement focuses the licensee's attention on his community, where it belongs.

Ascertainment of "problems" was apparently substituted for "views" by the Senate because of fears expressed that broadcasters would be required to cover the "views" of individuals or specific groups in regards to important public issues and interests. This would have been a change from their traditional and general responsibility to broadcast all responsible viewpoints on such issues under which the broadcasters retained discretion to select appropriate spokesmen. The Senate version is also the traditional version as applied under the FCC's present ascertainment policy. There is thus some familiarity and certainty as to the meaning and application of the words. OTP supports the Senate version.

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

November 15, 1974

DEPUTY DIRECTOR

Honorable Harley O. Staggers
Chairman
House of Representatives
Committee on Interstate and
Foreign Commerce
Room 2125 Rayburn House
Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

You recently asked for the views of the Office of Telecommunications Policy (OTP) on H.R. 12993, as passed by the House, and on the Senate amendment to H.R. 12993, which is in the nature of a substitute for the House bill. You also asked us to provide you with the considerations which underlie our views on the House and Senate renewal bills. I am pleased to respond to your request by enclosing a comparative analysis of the most important features of both bills.

As you know, the manner in which broadcast licenses are renewed goes to the heart of the relationship between Government and broadcasting, as a medium of expression and as a local outlet for the communities that broadcast stations are licensed to serve. Because of the importance of the renewal process, OTP, on behalf of the Administration, prepared and submitted to the Congress its own license renewal bill (S. 1589). Mr. Whitehead, the former Director of OTP, was privileged to discuss with your Subcommittee on Communications and Power, and with its counterpart subcommittee in the Senate, the relative merits of the Administration bill and the other license renewal bills under consideration by the Congress. I have attached for your information a copy of Mr. Whitehead's statement to the Senate's Subcommittee on Communications, since it deals with H.R. 12993, as passed by the House. Those views are summarized in the attached analysis to the extent they are relevant to the House bill and the Senate substitute.

As discussed in OTP's analysis of the pending legislation, there are two major goals to be achieved by reform of present license renewal procedures. The first, and most important goal, is to insulate broadcasting as a medium of expression from undue Government control or influence. The second goal, which is related to the first, is to provide the agency charged with regulating broadcasting with a clear expression of congressional policy and criteria regarding the decisional factors to be considered in license renewal proceedings. It is only in this way that Government can avoid arbitrary actions and that broadcasters and the public can determine their respective rights and responsibilities regarding use of the public airwaves.

OTP has evaluated the pending license renewal bills and has determined that the bills only partially achieve these goals. OTP believes, however, that the House-Senate Conference Committee has an opportunity to deal with the problems inherent in the present license renewal process, which have not been clearly resolved in the House and Senate versions of H.R. 12993.

OTP hopes that the analysis we have prepared will serve to aid the Conference Committee in the task that lies before it. If we can be of further assistance, please address further questions to us, and I assure you a prompt response.

Sincerely,

John Eger
Acting Director

Enclosures

November 15, 1974

OTP ANALYSIS OF HOUSE AND SENATE VERSIONS OF H.R. 12993

OTP believes there are two fundamental and related goals to be achieved by license renewal reform: first, to insulate the broadcast medium of expression from undue governmental control or influence; and, second, to provide the FCC with a clear expression of Congressional policy and criteria regarding the decisional factors to be considered in license renewal proceedings. OTP has analyzed the two pending renewal bills in light of these goals.

I.

Insulation From Government

It appears that license renewal legislation has not been fully perceived as a way to achieve the goal of insulating the broadcast media from the Government. For example, during the Senate floor debate on H.R. 12993, the point was made that the economic conditions of the broadcast industry do not suggest the need for any legislation to increase the stability of broadcast operations. Senator Hart stated that "this record [of broadcast profits] establishes no clear economic need for legislation at this time..." (Congressional Record, October 8, 1974, p. S-18514). But preservation of a licensee's financial position, and the economic instability posed by license renewal challengers, are not the primary goals to be achieved by reform of the renewal process. OTP in a letter to Senator Hart in July, 1974, stated that:

> "Stability is needed, not to assure the profitability or fiscal security of broadcasters, but to insure that the dissemination of information and ideas to the public will not be impeded or artifically distorted by direct or indirect governmental influence. If broadcasters see instability in license renewal, they are likely to seek regulatory safety by rendering the type of program service that will most nearly assure renewal of their license. Therefore, there is a serious danger that a broadcaster's performance will reflect the Government's notions of good program service rather than the broadcaster's independent judgments or his perceptions of the needs and interests of the community he serves. Neither the broadcaster's nor the public's First Amendment interests are fostered in this situation. Stability in the renewal process is thus necessary to minimize governmental intrusion into program content."

To achieve this goal of insulating broadcasting from undue Government controls, license renewal legislation should make four essential changes in the present practices and procedures: (1) there should be no requirement for a mandatory comparative hearing for every competing application filed for the same broadcast service; (2) restructuring of the broadcasting industry through the renewal process should be prohibited; (3) the FCC should be precluded from using predetermined categories, quotas, formats and guidelines for evaluating the programming performance of the license renewal applicant; and (4) the term of broadcast licenses should be extended to five years.

The Administration bill (S. 1589) would have made each of these changes, and is, therefore, the reform measure to be preferred over either the House or Senate bill. Neither the House nor the Senate sought to resolve the problems inherent in the requirement for a mandatory comparative hearing on competing license applications or to preclude specifically the FCC from using programming quotas to judge the performance of broadcasters. The importance of these changes is discussed adequately in the attached statement of the former Director of OTP, Clay T. Whitehead, to the Senate Communications Subcommittee, and will not be repeated here.

The Congress, however, has attempted to reform the renewal process with respect to extending the license term and precluding ad hoc restructuring. Both the House and Senate bills would provide for a five-year license term and thus both make an important change recommended by OTP.1/

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1. It should be noted, however, that this reform may be of most significance to radio broadcasters, since the FCC has recently adopted rules that require television broadcasters to make annual filings at the Commission regarding their ascertainment and programming efforts over the past year (FCC Report and Order, Docket No. 19153, 44 FCC 2d 405 (1973)). Therefore, the five-year license term probably will not in itself lead to a significant increase in insulation between television programming and the regulatory process. However, the expanded dialogue between the television broadcaster and his community, which is encouraged by this new FCC requirement, should be quite beneficial.

The House bill deals specifically with the need for avoiding ad hoc restructuring of the broadcast industry through the license renewal process, and, thus, it is to be preferred over the Senate bill, which contains no comparable provision. This aspect of the license renewal bills is discussed more fully below, as are other changes that should be made that would serve the goal of insulating the broadcast media from the Government.

II.

Clarification of Renewal Policy and Criteria

As noted above, a second fundamental goal to be served by license renewal reform is to identify and clarify the policy and decisional criteria that the Congress wishes the FCC to use in the license renewal process. There is not so much a need for the FCC to guide the broadcasters in their performance as there is a need for the Congress to guide the FCC in determining what factors ought to be considered by the Commission in granting or denying broadcast licenses. In this way, both the broadcasters and the communities they are licensed to serve will have a better understanding of their respective rights and responsibilities regarding use of the public airwaves.

The balance of OTP's comments addresses the question of whether either the House or Senate bill meets the second goal of clarifying the renewal policy and criteria and how various changes could be made in the pending bills to stress more clearly the related insulation goal. The following discussion is in the form of a comparative analysis of the House and Senate bills with respect to the major provisions regarding, (a) renewal standards, (b) treatment of ownership and concentration issues in the renewal process, and (c) the presumption or preference to which a meritorious, incumbent licensee should be entitled.

A. Renewal Standards

1. Single or dual standard?

OTP prefers the single standard for license renewal incorporated in the Senate substitute for H.R. 12993, rather than the dual standard intended by the House bill. As explained in

the House Report, the House bill would provide a lesser standard of renewal -- one of "minimal" service -- when a license renewal is unchallenged, and a higher standard of "substantial" responsiveness when a license is challenged. (See H. Rep. No. 93-961, p. 17, and S. Rep. No. 93-1190, p. 11, hereafter House Report and Senate Report, respectively.) Minimal service by any broadcast licensee raises questions regarding the continued operation of the station by that licensee. The public is entitled to the best possible service from every licensee and the single renewal standard provided by the Senate bill would encourage such performance.

2. Type and substance of ascertainment.

Both the House and Senate bills make ascertainment the principal license renewal standard. The House version would require the licensee to ascertain the "needs, views and interests" of his community, while the Senate requires that the "problems, needs, and interests" be ascertained. We favor the Senate version because it is the traditional formulation of the FCC's present ascertainment requirement, and thus has the advantage of familiarity and administrative certainty.

Additionally, there is some question whether use of the word "views" in the House bill would undermine broadcasters' programming and journalistic discretion. The House Report (p. 14) makes clear, that use of the word "views" is intended to inject two new factors into the ascertainment process. The Report states that:

> "the committee intends that the licensee ascertain the responsible contrasting positions with regard to ascertained needs so that in its response those contrasting positions can be taken into account. In addition, such ascertainment of views should be a means of increasing the licensee's awareness of public attitudes towards its operations."

This would seem to inject the Fairness Doctrine into ascertainment. Broadcasters, however, must have substantial journalistic discretion both in presenting contrasting points of view and in responding to ascertained needs and interests. This discretion should not be limited by potentially mechanistic reliance on the ascertainment process to enforce licensee performance of Fairness Doctrine responsibilities.

The second suggestion of the House Report is that the ascertainment of "views" is necessary to increase the broadcaster's awareness of public attitudes towards its broadcast operations or program service.2/ Traditionally, however, the FCC has held that ascertainment should be used only to determine the substantive problems, issues, needs and interests of the community and not to elicit information on the programming preferences of the public. The FCC's formulation of the ascertainment requirement is appropriate and should be stressed unambiguously in the legislative history of the renewal bill.

3. "Broadcast operations" or "program service"?

The House and Senate bills differ in describing the relevant response the broadcaster must make to the ascertainment information. The House bill states that the licensee's "broadcast operations" must be responsive to ascertainment, while the Senate bill limits the relevant response to the broadcaster's program service. OTP prefers the "broadcast operations" language to the "program service" language. As explained persuasively in the House Report (p. 15), use of the term "broadcast operations" is intended to make matters such as hours of service, employment practices, "good will" or community involvement, and other non-programming matters responsive to ascertainment. There are important matters and should not be lost in the Senate bill's stress on program service.

4. "Substantially responsive" or "substantially met"?

The House and Senate bills differ in a very important respect in setting out the core criterion which the FCC is to use to measure a broadcaster's performance at renewal time. The House bill phrases the test as "whether the licensee

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2. This is similar to the description of ascertainment in the Senate Report. The Report (p. 6) states that "this committee...believes that the Commission's ascertainment procedures should be directed at eliciting information relating to program service, and our amendment so provides."

has engaged in broadcast operations during the term of the license which were substantially responsive to those needs, views, and interests." (Emphasis added) The Senate bill phrases the issues as "whether the licensee in its program service during the preceding license term has substantially met those problems, needs, and interests..." (Emphasis added) Use of the "substantially met" test of the Senate bill could have an adverse impact on the journalistic discretion of broadcast licensees.

In evaluating the effect of the "substantially met" criterion, one should realize that most broadcasters respond to ascertained community problems and issues with news, public affairs and other informational programming -- in short, the entire journalistic output of the station. Thus, the "substantially met" standard could invite detailed content analysis of broadcast journalism by the FCC in a hearing or other proceeding in order to determine whether the programming in fact "substantially met" the ascertained problems, needs and interests. The House formulation of the criterion as "substantially responsive" is much more general and provides sufficient leeway for the exercise of the broadcaster's independent journalistic judgment, and is, therefore, to be preferred.

There is, however, some confusion as to whether the Senate actually intended the "substantially met" test to be controlling, since the legislative history seems to blur the distinction between this standard and the House's "substantially responsive" standard. In summarizing the effect of the Senate amendment to the House bill, the Senate Report (p. 13) states that:

> "This amendment thus recognizes that the most important fact in evaluating competing applications is the incumbent's past programming record. Moreover, an existing licensee knowing that its renewal will be judged on its programming record will be encouraged to present programming that is substantially responsive to community, problems, needs, and interests." (Emphasis added)

OTP recommends that, if the House-Senate Conference Committee decides not to adopt the House language, it should at least resolve the ambiguity created by the Senate Report.

One further point should be noted with respect to the legislative history of the Senate's use of the word "substantially." By way of definition, the Senate Report (p. 11) points out that:

> "If a renewal applicant's actual past programming failed to meet its promised level of programming to a degree which amounted to a material qualification of what it had promised, then under the standard of the amendment the FCC could not find that the applicant's past program service complied with 'substantially met' test."

Particularly with an extended license term, the broadcaster's five-year old promised level of programming will be less important than his continuing ascertainment and his response to that ascertainment. Therefore, while "promise versus performance" is a useful measure of broadcaster performance, it is encompassed within the "substantially responsive" or "substantially met" test and should not be used as a definition of "substantially."

B. Ownership and Concentration

The House and Senate have taken different approaches to the problems that would be raised by an ad hoc restructuring of the broadcast industry by applying policies regarding ownership and media concentration against a license renewal application. The Senate Report (p. 4) accurately states the issue as:

> "...whether issues regarding the concentration of control of communications media and the integration of ownership and management should be considered by the FCC in renewal proceeding (sic) if there are no specific rules concerning them."

The legislative history of the Senate bill indicates that these policies should not be applied unless reduced to specific rules, but the legislative intent is not entirely clear. For example, the Senate Report (p. 14) states that:

> "By directing the FCC to complete Docket No. 18110 by December 31, 1974, your Committee is expressing its belief that, as a general proposition, the FCC should proceed by rule and/or policy in this area rather than on a case-by-case basis." (Emphasis added)

Senator Pastore, however, stated during the floor debate, that:

> "The point is that we are mandating that on the matter of cross-ownership, a rule will be promulgated by December 31." (Congressional Record, p. S-18513) (Emphasis added)

Moreover, under the Senate bill, as interpreted in its legislative history, the FCC would be free to consider any factor or allegation relating to broadcast ownership or media concentration, even after the Commission adopted a rule or policy on such matters (see Senate Report, p. 12, Congressional Record, October 8, 1974, p. S-18513). This gives little guidance concerning Congressional intent to the FCC, the broadcasters, or the public. All that is clear is that the Senate did not chose to follow the approach taken by the House in specifically prohibiting the FCC from ad hoc restructuring of the broadcast industry.

The Senate bill simply requires that the FCC complete its rulemaking proceeding on this matter by the end of 1974. It does not require the FCC to adopt rules, although there are apparently informal assurances from the FCC that rules will be adopted (see Congressional Record, October 8, 1974, p. S-18503). The FCC, however, in the exercise of its independent regulatory judgment, could decide either to adopt no policy or rule, or to proceed by way of policy rather than by rule, thereby allowing an ad hoc restructuring that the Senate Report and the floor debate imply would be undesirable. There should, therefore, be no objection to following the approach of the House bill, which would not exclude issues of concentration or monopoly from renewal hearings, but merely require that specific rules be adopted before ownership and concentration policies are applied against broadcasters in such hearings. Naturally, those rules could retain sufficient flexibility for the FCC to consider specific abuses arising from media concentration in certain renewal cases, but such exceptions could be spelled out in the rules.

C. "Presumption" created by Senate bill

The Senate bill purports to create a "presumption" in favor of renewal, if the statutory criteria have been found to be met after full comparative hearing.

There is little dispute that, as a matter of equity and sound public policy, the incumbent licensee who has performed well should be favored, to some degree, over a challenger for the broadcast license. The "presumption" referred to in the legislative history of the Senate bill is one way of implementing such a policy. Indeed, clarification of a presumption or preference for renewal is the barely minimum reform that should be made in the current renewal process.

It does not appear, however, that the present legislation would make such a reform. The House bill is silent on the existence of a presumption; apparently leaving the matter to the FCC. The legislative history of the Senate bill shows that the intent is to leave the problem of defining and clarifying the nature of the presumption to the FCC and the courts. As Senator Baker, one of the floor managers of the bill, stated:

> "It is not a mere presumption and it is not a conclusive presumption. Beyond that, it is up to the courts and the Commission to decide, and I do not think we ought to spend our time on it." (Congressional Record, October 8, 1974, p. S-18508).

Senator Tunney pointed out that:

> "I recognize the fact that the English language cannot very well express in these matters what is in our mind.
>
> "But we rely so much upon the regulatory agency adjudicating these matters to use their best judgment. I suppose it does not make any difference what language we use, that they would bend it to fit what they consider the right outcome." (Congressional Record, October 8, 1974, pp. S-18516-17)

This lack of clarity undercuts the stated goal of the Congress in considering renewal legislation. As expressed in the Senate Report (p. 18); "In the final analysis... whether any statutory guidelines Congress furnishes will be effective or not depends on how the FCC applies them." Therefore, the Report (p. 18) went on to state that it is imperative that the FCC be given "as much guidance and insight in to Congressional intent as possible." But, the requisite guidance and insight has not been provided to the FCC. Rather the Commission has been given the responsibility to define the nature and extent of a presumption in favor of renewal.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

NOV. 14 1974

IN REPLY REFER TO:

Honorable Harley O. Staggers
Chairman, Committee on Interstate
and Foreign Commerce
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the Commission's analysis, views, and recommendations concerning the differences between the House and Senate versions of H.R. 12993.

There are, of course, several provisions of the House bill which were not included in the bill reported by the Senate. Our position with respect to these provisions remains as outlined in my prepared written statement submitted to the Senate Subcommittee and may be briefly summarized as follows (references are to the Section-by-Section Description of the Bill contained in the House Committee Report):

Section 3 - Time Limitations on Petitions to Deny - As indicated in my testimony (page 100 of the Senate hearings) we share the concerns expressed in the House Committee Report and fully intend to apply the new deadlines adopted in Docket 19153 strictly. Informal objections, however, might still be filed any time, pursuant to Section 1.587 of our Rules.

Section 4 - Negotiation - We believe this Section should be eliminated for the reasons cited in our prepared statement (pages 100-101 of the Senate hearings).

Section 5 - Appeal of Certain Decisions and Orders of the FCC to Local Circuit Courts - While we have no strong feelings on this matter, there are various factors that Congress may wish to consider before reaching its final decision. These factors were cited in our written statement (pages 101-102 of the Senate hearings).

Sections 6(a) and 6(b) of the House bill are incorporated as Sections 3(a) and 3(b) of the bill passed by the Senate. I should note that we would interpret the provisions regarding a continuing study of regulation (Section 6(a)) in the manner described in our written statement to the Senate Subcommittee (page 102 of the Senate hearings). In regard to Section 6(b), we emphasized before both Subcommittees, that we do not intend to re-structure the industry through the renewal process, and we agree that action in the area of cross-ownership of media should be undertaken within the context of rulemaking rather than on an ad hoc basis at renewal time. We welcome legislative affirmation of this judgment in order to resolve any ambiguity on this point which may remain as a result of WHDH and certain dicta of the Court of Appeals in its Citizens Communication Center decision. We should note, however, that as the Senate Committee Report has recognized (pages 15-16) we have retained in our current multiple ownership rules and presumably would retain in any rules ultimately adopted in Docket 18110 limited flexibility to enable us to deal with undue media concentration in unique circumstances where the public interest might require it (as, for example, in Frontier Broadcasting Co., 21 FCC 2d 570 (1970)).

Our major concerns relate to Section 2 of the bill regarding ascertainment and renewal procedures. */ These concerns are outlined below in three major categories: (1) What is to be ascertained; (2) What is to be the applicable test or standard; and (3) What happens if that test or standard is met or is not met.

I. What is to be Ascertained

A. - Deletion of "views" - We support the Senate's decision to frame the statutory requirement in terms of ascertaining and being responsive to community "problems, needs and interests" rather than to community "needs, views, and interests" as in the House version. Our reasons for favoring the elimination of the word "views" were outlined in our written statement to the Senate Subcommittee (page 106 of the Senate hearings). In this regard, we share the same concerns expressed during the Senate hearings with respect to the meaning and application of the term "views" (pages 72-76 of the Senate hearings), and should the Conference Committee decide to retain "views" in the statutory language ultimately adopted, we hope that its Report will address these concerns and eliminate as much of the uncertainty as possible.

*/ We have testified before both the House and Senate Subcommittees in general support of the provision in Section 2 of the bill extending the license term to five years. Commissioner Hooks, however, has testified that he favors retaining the present 3-year license term.

B. - Deletion of "broadcast operations" - We would prefer that ascertainment be required for all broadcast licensees "for purposes of their program service" (the Senate language) rather than "for purposes of broadcast operations" (the House language). As we indicated in our written statement for the Senate Subcommittee (pages 106-107 of the Senate hearings), some of the matters intended to be included in the phrase "broadcast operations" (e.g., hours of operation and equal employment opportunity) are matters governed by our Rules. We believe it would be a mistake to make as a test for renewal, the degree to which total operation of the station is responsive to the suggestions and comments offered by members of the public with respect to such matters, rather than the degree to which the station complied with our Rules. We are also troubled by the suggestion at pages 15 and 16 of the House Committee Report that limitations of finances and personnel would determine the degree to which stations should be expected to comply with those aspects of "broadcast operations" specified in our Rules.

C. - Inclusion of Entertainment Programming - Regardless of whether "program service" or "broadcast operations" is included in the new law, it is hoped that the Conference Committee will clarify whether entertainment programming is to be included in the ascertainment/responsiveness to ascertainment test. As you know, our current ascertainment requirements emphasize ascertaining the problems and needs of the community and meeting those problems and needs through non-entertainment programming (i.e., news, public affairs, and other similar programming). Matters of entertainment programming and programming format are left almost entirely to the discretion of the licensee. The House Committee Report seems to support this concept in that page 15 states that licensees should not be required to seek out community preferences for particular program formats. Moreover, the definition of "broadcast operations" in the House Committee Report does not specifically refer to entertainment programming. On the other hand, the House Report does not directly address the question of whether entertainment programming is to be included in the ascertainment/responsiveness to ascertainment test.

The Senate Committee Report does not take issue with the Commission's current policy of excluding entertainment programming in the ascertainment process, nor with the House Report's apparent endorsement of that policy. The Senate Committee Report does, however, (page 6) indicate ascertainment procedures should be directed at eliciting information relating to programming.

In view of the recent WEFM decision (United States Court of Appeals for the District of Columbia Circuit, No. 73-1057, decided October 4, 1974) which seems to suggest that the Commission should, at least in

some instances, concern itself with entertainment program formats and not leave such matters to licensee discretion or the market place, it would be extremely helpful for us to receive guidance from the Conference Committee regarding the wishes of Congress in this area. **/

In our judgment, it would be preferable to retain the established interpretation that a licensee's formal ascertainment is to be directed primarily to his selection of news, public affairs, and other non-entertainment programming. While a licensee may choose to present certain entertainment programming in response to the problems, needs, and interests of his community, we believe that such decisions should be left to the licensee's discretion rather than mandated by rule or statute.

D. - Service Area Versus City of License - The Senate Committee Report (page 7) cites the Commission's statutory obligation under Section 307(b) to provide a fair, efficient and equitable distribution of broadcast service among states and communities and seems to endorse our current "Suburban Policy" which emphasizes (particularly with respect to radio) the licensee's primary obligation to its city of license. An exchange on the Senate floor during debate on the Senate Bill, however, (page S18505 of the Congressional Record of October 8, 1974) suggests that there is some support in the Senate for the view that television stations should have a primary obligation to the entire metropolitan area, rather than just the city of license. Moreover, the House Committee Report seems to mandate the abandonment of the "Suburban Policy" for both radio and television when it states that it is undesirable for licensees to emphasize service to a particular political subdivision simply because the licensee happens to be assigned to that subdivision.

We recognize that in the case of television, problems result from a strict application of the "Suburban Policy" due to the fact that few television stations are licensed to suburban areas and large populations in metropolitan areas are dependent on a relatively few television signals. With regard to radio, however, as I indicated in my testimony before the Senate Subcommittee (pages 92-95 and 107 of the Senate hearings

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**/ It should be noted that if entertainment programming is included in the ascertainment/responsiveness to ascertainment test, the licensee would presumably be forced to provide the entertainment program format desired by a majority of those people questioned in the ascertainment, and would have to retain that format until a larger number of people desired otherwise. This matter is discussed later under heading II. B.

we are troubled by the proposed de-emphasis in the House Committee Report of the licensee's responsibility to its city of license and the effect such a policy reversal would have upon our existing system of frequency allocations. Many AM and FM radio licenses are assigned to suburban communities for purposes of providing local-oriented service to those communities. In such instances the Suburban Policy ensures that those licensees will primarily serve their suburban communities rather than duplicate service to adjacent or neighboring major cities which already have adequate primary services.

If, however, the Conference Committee decides to adopt the House concept and thereby totally overturn our "Suburban Policy", we hope we will receive further guidance regarding what our new policy should be. For example, the House Report (page 15) indicates that the depth and intensity of ascertainment should "generally speaking" be related to the strength of the licensee's broadcast signal as received throughout the licensee's service area. Does this mean the scope of ascertainment in the various portions of the service area is pre-determined by the station's signal strength? If so, is it the intention of Congress that the Commission become involved in signal strength measurement or is the licensee's own measure of the strength of the broadcast signal to be determinative?

E. - Emphasis to be given the Station's own Audience - The House Committee Report seems to give licensees the option to devote particular attention in both their ascertainment and their programming to a portion of the public served by their respective stations, provided other stations are ascertaining and serving other portions of that same public. The House Committee Report (page 15) requires that the licensee, in describing its ascertainment efforts to the Commission, indicate with specificity the areas and audience it chooses to serve and with what emphasis. The Senate Committee Report, on the other hand, is silent on the whole question of permitting stations to give particular attention in their ascertainment and programming to a particular audience.

Our position on this matter was outlined in my written statement for the Senate Subcommittee (page 107 of the Senate hearings). While we see no problem in allowing a licensee to direct its programming largely to a particular audience when other stations are adequately serving the other audiences in the community, we do not believe that a licensee should be able to direct all of its non-entertainment programming to a particular group or audience. The fundamental purpose of the ascertainment process is the licensee's recognition of the problems

and needs of the community served by its station and its responsiveness to those community problems as evaluated through the station's non-entertainment programming. To allow a licensee to exclude initially all but a preselected segment of the community from its ascertainment efforts and to direct all of its station's non-entertainment programming to that particular group or audience would not serve the greater public interest in promoting a fully informed electorate, cognizant of the pressing problems and needs confronting the community as a whole and capable of deciding questions of national and state, as well as local or parochial, importance. Such a predetermined program service also ignores the licensee's individual responsibility to evaluate the relative importance and immediacy of the many and varied problems facing its entire community and to determine the manner and extent to which its station can present broadcast matter to meet the problems meriting treatment by the station. To allow a licensee to delegate this responsibility to another licensee assumes that all licensees' ascertainment efforts are uniform and that all licensees analyze the same community problems in an identical manner. We do not believe that this is the case. Nor do we believe it would be prudent for the Commission with its limited resources to attempt to determine whether all audiences in a particular service area are, in fact, being served by the area's stations or whether an audience other than that selected by the licensee should have a program service specifically and exclusively directed to their interests. In addition, the House Committee Report does not address itself to the problem of which station or stations should be held accountable where a petition to deny the renewals of all stations in a given area is submitted by a local group or audience which claims it is not being served by any of the stations in the area.

II. The Applicable Test or Standard

The Commission supports the general thrust of each version of the bill to the effect that the test or standard for renewal should be the degree to which the licensee's performance has met or been responsive to his ascertainment. However, we do find problems of definition, interpretation, and application inherent in both the House and Senate versions of the test and in the explanations of the respective tests contained in the Committee Reports.

A. - The Definition and Application of "Substantial" - While both versions of H.R. 12993 indicate that the licensee should be "substantially" responsive to his ascertainment of the community, the Committee Reports support at least three different interpretations of the word "substantial". The House Committee Report (pages 17-18) states that

the application of the "substantial" test should differ in the comparative and non-comparative situations. The Report states that in a non-comparative situation a licensee need only provide minimal service, while in a comparative situation good service is required to assure renewal. The Senate Committee Report (on pages 10-11) criticizes this distinction and states that "all renewal applicants, whether contested or uncontested, must be judged by one standard." The Senate Committee Report defines "substantial" as "essentially", "without material qualification" but gives only the example of a promise versus performance deviation to illustrate how that definition should be applied. Furthermore, the additional views of Senators Hart, Hartke, and Tunney cite statements made in the Commerce Committee's public mark-up session (but not contained in the Committee's Report) to identify a Senate Committee definition of "substantial" in terms of a refutation of prior Commission precedent.

Since there is this extreme conflict in the Committee Reports (and thus in the legislative history existing to date) regarding the meaning of the term "substantial", it is crucial that the Conference Committee attempt to clarify how Congress wishes this word to be interpreted and applied.

As the Commission has previously emphasized in testimony before both the House and Senate Subcommittees, we believe that the application of the substantial performance criterion to non-comparative renewal applications would be unrealistic and unreasonable, and hence undesirable in terms of both the administrative process and the public interest. There is a practical limitation on the amount of information which the Commission can obtain from renewal applicants and properly process in making its public interest determination. To apply a substantial performance test across the board to all renewal applications -- whether they come up in a comparative or non-comparative context -- would require an increase in the amount of information to be filed in each of the 8,500 applications received by the Commission each renewal cycle and a concomitant increase in the administrative burdens which licensees must bear. More importantly, it appears clear to us that in the non-comparative renewal context, where there is no competing applicant ready and able to take over the licensee's facility and provide service to the community, the public interest would not be served by applying a test of substantial performance designed primarily to decide between an incumbent and such a competing applicant. If an incumbent licensee in a non-comparative renewal proceeding has been reasonably responsive to the problems, needs, and interests of his community, renewal should be granted since in such case the public stands to lose more than it would gain from offering the facility to unknown applicants or allowing the facility to lie fallow should

qualified applicants fail to appear. In this regard, it bears emphasizing that there is ultimately but one standard for renewal: the public interest. And, while the Commission has submitted that different degrees of compliance with that standard should be required for renewal in the comparative and non-comparative contexts, the degree of compliance contemplated for renewal in non-comparative cases is "minimal" only in the sense that licensee performance "reasonably responsive" to the needs of the community is the minimum performance which will justify renewal as being in the public interest absent a viable competing applicant.

For these reasons we would urge that any legislation adopted by the Congress apply a substantial performance test only to the comparative renewal process and leave the non-comparative renewal area to Commission administration pursuant to the general public interest standard. In this regard, the Commission is presently contemplating a review of our renewal requirements and procedures designed to clarify guidelines for licensees and to assure the public of a satisfactory level of service regardless of whether renewal arises in a comparative or non-comparative context. Any guidance which the Congress might offer in this area would of course be welcome; however, we cannot emphasize too strongly the desirability of allowing the flexibility of the administrative process to govern non-comparative renewals, taking into account the class and type of station involved, the size of the market, and all other relevant factors bearing on the public interest determination.

B. - Effect on Licensee Discretion - One interpretation of a reading of the House and Senate Committee Reports is that the ascertainment/responsiveness to ascertainment test automatically locks all of a station's programming, including entertainment programming, into the results of its ascertainment. If the ascertainment results change, so must the programming; if the ascertainment results remain the same, so must all the programming -- regardless of the judgments of the licensee and/or low ratings and low revenues. If this interpretation is agreed to and extended to entertainment programming, the Commission's basic tenet of licensee discretion would be destroyed. It is extremely important, therefore, for the Conference Committee to indicate whether this is the intention of Congress and whether a licensee should hereafter expect the Commission to look favorably upon a petition to deny based on the petitioner's documented evidence that the licensee's programming did not reflect the programming preferences (including those relating to entertainment programming) expressed during the ascertainment process.

III. What Happens if the Test is Met or is Not Met?

A. - If the Test is Met - The House Committee Report indicates that if a licensee is "substantially responsive" to his ascertainment, renewal is assured. On the other hand, the Senate bill merely gives a licensee a "presumption" if its program service has "substantially met" the problems, needs and interests as identified in the ascertainment. This "presumption" is defined in the Senate Committee Report (on page 25) as of "great weight short of decisional significance". In this regard, Senators Hart, Hartke and Tunney in their separate statement (page 25 of the Senate Committee Report) say "the Committee agrees" with their contention that a challenger may overcome this presumption by either showing that there is an undue concentration of media power or that the challenger can better serve the public interest. The Senate Committee Report is not, however, so explicit in indicating how a presumption can be overcome. The Report on one occasion (page 7) states the Commission may consider "whatever other matters it deems necessary" and later (page 10) indicates the Committee's desire to permit the Commission to retain flexibility to consider "other matters". The same report, however, (on page 10) refers to the "critical importance" past programming must assume in a renewal context.

The Conference Committee must, of course, decide whether "substantial" performance by the incumbent, (however defined) "assures" renewal of its license or merely raises a "presumption" in favor of renewal. As we indicated in our Senate testimony (pages 107-108 of the Senate hearings), we believe that the statute should clearly mandate the results if the test to be applied in renewal is met. Otherwise extensive litigation might result and the certainty we seek may be elusive. In this regard, we have consistently stated (see, for example, page 103 of the Senate hearings) that programming service is "the name of the game" in a renewal hearing. Thus we support the House view that while the filing of a competing application necessitates a full Ashbacker hearing, if the incumbent has substantially met the ascertained needs of its service area, it should be entitled renewal. If, however, the Conference Committee decides to adopt the Senate approach, we hope the Committee will provide further guidance as to the type of factors and considerations which could be raised by a challenger to overcome a presumption awarded to the incumbent for substantial service, and the weight to be given the presumption in light thereof.

B. - If the Test is Not Met - The Senate Committee Report stresses the importance of using a single standard in judging all license renewal applications (whether comparative or non-comparative) but is silent as to whether a renewal applicant in a non-comparative situation can still

be renewed even if its performance has not been "substantial." Even with respect to comparative situations, the Senate Committee Report does not state that a "non-substantial" incumbent automatically loses its license. Such action seems only to be mandated if the challenger established it would solidly serve the public interest (see page 13 of the Senate Committee Report). On the other hand, the House Committee Report says only "minimal" service is required of a renewal applicant in a non-comparative situation, while in a comparative situation, "good" service is required to assure renewal. While the House Committee Report (page 18) indicates the Commission must prefer a challenger who would "clearly provide much better service" over an incumbent who has provided less than good service, the Report is silent as to whether in a comparative situation, minimal service would be sufficient so long as the challenger does not demonstrate it would provide "clearly better service."

The Commission's views on the need for distinguishing the comparative and non-comparative renewal contexts for purposes of applying the "substantial" performance test have been stated above under heading II. A. Should the Congress nevertheless decide that the "substantial" test is to be applied in both contexts, it is imperative for any Conference Report to indicate how that test is to operate in non-comparative renewal proceedings.

These are our major concerns with respect to the House and Senate versions of H.R. 12993, and in particular with regard to Section 2 of the bill. Should you have any questions concerning these matters and desire any additional analysis, views, or other information with respect to this critical legislation, please do not hesitate to call on me.

Sincerely,

Richard E. Wiley
Chairman