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SUMMARY CHRONOLOGY: BROADCAST LICENSE RENEWAL

1. 1945: In Ashbacker Radio v. FCC, Supreme Court rules that constitutional due process requires opportunity for all applicants in a license renewal to have a full hearing.

2. 1951: In WBAL case (Hearst Radio, Inc.), FCC reaffirms, in a comparative hearing, its policy that the past performance of a broadcaster is the most reliable indicator of his future performance. A good past record is determative, despite preferences to the newcomer on such factors as integration of ownership and management, local residence and diversification.

3. 1965: FCC policy statement on comparative broadcasting hearings involving application for a new license. Statement stresses importance of factors such as diversification, integration of ownership and management, local residence, etc. Also, past record of performance of a broadcast station by someone with ownership interest in the comparative hearing for a new station would be of interest to the FCC only if it was either unusually good or unusually bad.

4. 1965: Major chink in FCC comparative renewal policy in Seven League Productions case. FCC says the 1965 policy statement should govern the introduction of evidence in proceedings where there is a competitive challenge to a renewal applicant.

5. January 22, 1969: FCC enters order denying application of WHDH (owned by the Boston Herald-Traveler) for Channel 5, Boston, and awarding license to Boston Broadcasters, Inc. Decision reached by vote of 3 to 1. Placing ex parte aside, FCC says its 1965 policy statement to competing new applicants is generally applicable to the comparative renewal case. WHDH receives no credit for past performance because it was not "unusually good".

6. April 29, 1969: Senator Pastore introduced S. 2004 (Pastore License Renewal Bill). Bill provided that FCC could not consider a competing application for a license up for renewal until it first found that it would not be in the public interest to renew the existing license.

7. August 5-7, December 1-5, 1969: Hearings before Senate Communications Subcommittee on S.2004.

8. January 15, 1970: FCC adopts Policy Statement on Comparative Hearings Involving Regular Renewal Applicants. The Policy Statement retained opportunity for competing applications to be filed but provided for renewal of the existing licensee if the licensee's service "during the preceding license term has been substantially attuned to meeting the needs and interests of its area...and not otherwise characterized by serious deficiencies." Full comparison between incumbent and challenger would be permitted only where in an initial stage of the hearing the incumbent could not demonstrate a past record of substantial service without serious deficiencies.

9. November 13, 1970: U.S. Court of Appeals for D.C. affirms FCC's decision in WHDH case.

10. November 20, 1970: House Investigations Subcommittee report labels FCC Policy Statement "a flagrant attempt

to repeal the statutory requirements and to substitute the FCC's own legislative proposal that a hearing is not required when it involves a license renewal proceeding having several competitory applicants." This blistering report accuses the FCC of overstepping its policy making authority to the point that it would grant licenses in perpetuity.

11. February 17, 1971: FCC initiates Notice of Inquiry in Docket No. 19154 to determine whether television programming standards could be developed to spell out what would constitute "substantial service" for purposes of its Policy Statement. Focus was on local programming, news, and public affairs.

12. June 11, 1971: U.S. Court of Appeals for D.C. (Citizens Comm. Center v. FCC) holds FCC's 1970 Policy Statement to be "contrary to law" (Violation Sec. 309 (E) and Ashbacher) and inapplicable to all comparative renewal hearings. The court said any challenger is entitled to a full hearing. However, another sticky point arose when Judge Shelly Wright, writing for the

majority, said that "superior" service should give licensee "a plus of major significance," and listed a variety of elements that should be included in the definition of "superior" service.

13. August 4, 1971: FCC adopts Further Notice of Inquiry in Docket No. 19154 to take court's action in citizens into account. Continues effort to define, through guidelines, the type of television service that would lead to renewal of a broadcast license.

14. August 18, 1971: FCC decides Moline (WQAD-TV) case. Renewal granted to the existing licensee in face of competing application even though (1) the license initially proposed to carry twelve locally originated, live, agricultural, religious, educational, discussion, or talk programs to be televised on a regular weekly basis during prime time. None of those programs were carried by the station during prime time on a regular basis. (2) Many of the licensee's promises to integrate ownership with management of the stations were not carried out. (3) The licensee negotiated for the

sale of the station during the initial license period. Johnson and Bartley issue vigorous dissents. Johnson calls it "a lawless decision" which violates Appeals Court June 1971 decision.

15. December 18, 1972: CTW addresses SDX luncheon in Indianapolis, announces that Administration's renewal bill will be introduced soon, cautions against use of "ideological plugola" and elitist gossip."

16. December 25, 1972: The CTW Indianapolis speech and prepared legislation reprinted by TV Digest.

17. January 11, 1973: OTP memo to Ron Ziegler outlines renewal bill.

18. January 26, 1973: CTW letter to Mark Evans comments on relationships between Indianapolis speech and bill.

19. March 13, 1973: OTP license renewal bill is introduced in Congress.

20. March 14 - September 18, 1973: House Communications Subcommittee begins hearings on license renewal legislation. During course of hearings, Subcommittee members frequently ridicule FCC's Molone decision. CTW and Dean Burch testimony are of interest. Burch traces history of renewal process.

21. November 1973: Henry Goldberg's "A Proposal to Deregulate Broadcast Programming" is published in George Washington Law Review.

22. March 6, 1974: House Commerce Committee reports H.R. 12993 to floor. House ups the term from 3 to 5 years.

23. June 18 - July 31, 1974: Senate Communications Subcommittee begins renewal hearings. Whitehead, Brown and Wiley testimony worth noting.

24. July 3, 1974: During course of Senate hearings, OTP comments to Senator Hart on Citizens' Information Project proposed legislation. The CIP bill provides that a successful challenger must (a) buy out the

depreciated assets of the renewal applicant, or (b) reimburse the unsuccessful renewal applicant for "unrecouped investment." OTP argues: preservation of a licensee's financial position, and economic matters in general, are not the primary problems posed by the renewal process."

25. September 27, 1974: Senate issues its report, completely rewriting House version.

26. October 4, 1974: Goldberg's memo to Arthur Kallen compares House and Senate bill, offers OTP comments on both. While Goldberg's memo says that neither bill deals effectively with renewal problems, the Senate version is roundly roasted. Bills do not deal effectively 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. Goldberg's memo called Senate bill a "do nothing" bill that may cause more problems than it solves. The Administration should withhold its support from the Senate bill, he said.

27. November 15, 1974: OTP and FCC file comments with Staggers at his request. Comments were solicited for benefit of conferees, but Staggers refuses to appoint conferees and legislation dies.

B

PUBLIC NOTICE

Federal Communications Commission ▫ 1919 M Street, NW. ▫ Washington, D.C. 20554

FCC 70-62
40869
January 15, 1970 - B

POLICY STATEMENT ON COMPARATIVE HEARINGS
INVOLVING REGULAR RENEWAL APPLICANTS

In 1965 the Commission issued a policy statement on Comparative Broadcast Hearings which is applicable to hearings to choose among qualified new applicants for the same broadcast facilities. See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393. We believe that we should now issue a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license. 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. E.G., 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. Issuance of this statement will therefore contribute to clarity of our policies in this important area. This will be of assistance to the examiners who initially decide the cases. It will expedite the hearing process and promote consistency of decision. Above all, by informing the broadcast industry and the public of the applicable standards, the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act) will be served.

The statutory scheme calls for a limited license term. This permits Commission review of the broadcaster's stewardship at regular intervals to determine whether the public interest is being served; it also provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest. It is this latter aspect of the statutory scheme with which we deal here. See Sections 307, 308, 309.

The public interest standard is served, we believe, by policies which insure that the needs and interests of the listening and viewing public will be amply served by the community's local broadcast outlets. Promotion of this goal, with respect to competing challenges to renewal applicants, calls for the balancing of two obvious considerations.

The first is 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. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.

We believe that these two considerations call for the following policy -- namely, that 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, 1/ 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.

This is not new policy. It was largely formulated in the leading decision in this field, Hearst Radio, Inc., (WBAL), 15 FCC 1149 (1951), where 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, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of

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1/ We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid", "strong", etc., (see p. 3, supra) performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish between two types of

ownership and management. The WBAL policy was followed in In re Wabash Valley Broadcasting Corp., 35 FCC 677 (1963), and cited with approval in recent actions (see, e.g., In re Application of RKO General, Inc., FCC 69-1335, para. 8).

If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the contrary, if the competing new applicant establishes that he would substantially serve the public interest, 2/ 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 militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest.

We recognize that the foregoing policy does not work with mathematical precision, and that particular factual circumstances will have to be explored in the hearing process. For example, if there are substantial questions as to whether the renewal applicant's operation has been characterized by serious deficiencies -- such as rigged quizzes, violations of the Fairness Doctrine, over-commercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertisers -- the facts as to these matters would have to be established, and any demerits resulting therefrom weighed against the renewal applicant in the public interest judgment which must be made. It is not possible to lay down any more precise standards here, since so much will depend on the particular facts.

Further, we recognize that the terms "substantially" and "minimally" also lack mathematical precision. However, the terms constitute perfectly appropriate standards. Thus, the word "substantially" is defined as "strong; solid; firm; much; considerable; ample; large; of considerable worth or value; important" (Webster's New World Dictionary College Ed., p. 1454); 3/ the word "minimal" carries the pertinent definition, "smallest permissible" (Id. at p. 937). However, application and evolution of the standards would again be left to the hearing process.

(cont'd) situations -- one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

2/ With several such new applicants, the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, would be the basis for decision as among them.

3/ We also note that the term is frequently employed in statutes, e.g., 15 U.S.C. 13 (the Clayton Act); 42 U.S.C. 403(f)(4)(A) (Social Security Act); 26 U.S.C. 382(a)(1)(C) (Internal Revenue Act); indeed, it is used in the Communications Act, 47 U.S.C. 503(b)(1)(A).

The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licenee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainments of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service is also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field.

Two other points deserve stress in this respect. First, unlike the case involving new applicants (see 1 FCC 2d at pp. 397-98), a programming record will be considered even though it is not alleged to be either unusually good or bad. Thus, the renewal applicant will not have to demonstrate that his past service has been "exceptionally" or "unusually" worthy. Were that the criterion, only the exceptional or unusual renewal applicant would win a grant of continued authority to operate, and the great majority of the industry would be told that even though they provide strong, solid service of significant value to their communities, their licenses will be subject to termination. As stated at the outset, such a policy would therefore disserve the public interest. And conversely, a new applicant would not have to allege that the existing licensee's operation had been unusually bad.

Second, the renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he "upgrades" his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then "upgrade" to show substantial service. Therefore, no evidence as to improved service after the filing of the competing application (or a petition to deny directed to programming service) will be deemed admissible in the hearing. This is, of course, a departure from the procedure permitted in the WBAL case.

Further, the renewal applicant, seeking to obtain the benefits of this policy, cannot properly supply minimal service during the first two years of his license term and then "upgrade" during the third year because of the imminence of possible challenge. The Act seeks to promote conscientious and good faith substantial service to the public -- not a triennial flirtation with such service. Therefore, while we recognize that the licensee's programming efforts do and must vary over a license period and hopefully are continually being improved, we could not weight as controlling or determinative a pattern of operation which showed substantial service only in the last year of the license term.

We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. See 1 FCC 2d at pp. 39.-95. We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. E.g., In re Application for Renewal of WTOP-TV, FCC 69-1312. Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings. 4/ Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rule making proceedings. E.g., FCC Dockets Nos. 18110 and 18397. If any rule making proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and "best conduces to the proper dispatch of business and the ends of justice;" Section 4(j)

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4 / Of course, if such a renewal applicant has not rendered substantial service, he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant.

of the Communications Act; WJR v. F.C.C., 337 U.S. 265, 282 (1948). In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged, 5/ the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rule making proceedings rather than ad hoc decisions in renewal hearings.

We believe the issuance of this policy statement will expedite the hearing process in this area. Examiners will be clear as to our general policy. Indeed, it may significantly shorten hearings. If the Examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. However, where the matter is in any way close or in doubt, it would be more appropriate to proceed with the hearing, and thus insure that the record is complete when the matter comes before the Commission.

Most important, as stated above, the policy will markedly serve the public interest by informing the broadcast industry and the public of their responsibilities and rights. And, in doing so, it retains the competitive spur provided in the Communications Act and yet insures predictability and stability of broadcast operations. For the policy says to the broadcaster, "if you do a solid job as a public trustee of this frequency, you will be renewed; your future is thus really in your hands." The policy says to all interested persons, "The Act seeks to promote not just minimal service but solid, substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application and will be afforded the opportunity, in a hearing, to establish your case, If you do so, you will be granted authority to operate on the frequency in place of the renewal applicant who has failed to provide substantial service." 6/

5/ In re Applications of Midwest Television, Inc., FCC 69-261; In re Applications of Chronicle Broadcasting Company, FCC 69-262.

6/ It would be expected that appropriate arrangements could and would be made to purchase facilities owned by the existing station. See, e.g., In re Application of Biscayne Television Corp., 33 FCC 851 (1962).

The policy is thus fair to the broadcaster and to the new contestant, and above all it serves the listening and viewing public. To the argument that the hearing process itself is an unfair burden, the short answer is that such hearings stem directly from the statutory scheme, and particularly from the notion that the broadcaster is a public trustee who can acquire no permanent ownership of the frequency on which he operates. With even-handed administration of the policy, there is unlikely to be any plethora of frivolous challengers, in view of the significant costs involved.7/ And in any event, where frivolous challenges are made, the Examiner may in his discretion, and should, take action to avoid a long drawn out hearing. In the final analysis, the broadcaster has, we believe, the answer within his hands--if he really knows and cares about his area and does a good substantial job of serving it, he will discourage challenges to his renewal applications.

We recognize that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated, there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. We believe that there will still be real incentives for those existing broadcasters willing to provide superior service to do so, since the higher the level of their operations, the less likely that new applicants will file against them at renewal time. And as the Commission spells out, in decided cases, the elements which constitute substantial service, it will serve the private interests of broadcasters to make certain that their operations fall clearly into that class of service. Thus the public interest will be served by the continuing efforts of broadcasters to minimize the chances of the filing of competing applications.

The foregoing policy is limited to comparative hearings between renewal applicants and new applicants for the same facilities in the same community. The restriction to the same community is necessary to exclude from this policy contests between applicants for different communities which are governed by the provisions of section 307(b) of the Act, since this section requires that the grant go to the community most in need of the station, without regard to the comparative qualities of the applicants. In practical effect, this section applies solely to standard broadcasting. 8/ Such AM cases involve considerations quite different from those with which the Commission is concerned here, and are thus not dealt with in this statement.

7/ We wish to stress, with the issuance of this Statement, that barring extraordinary circumstances, the challenger to a renewal cannot be reimbursed in any amount for his expenditures in preparing and prosecuting his application, nor will merger agreements be countenanced.

8/ The policy set forth herein will apply where a new applicant files against a renewal applicant, seeking to use the contested FM or TV channel in a different community under the provisions of Sections 73.203(b) or 73.607(b) of our rules.

As shown by our recent actions (see p. 1, supra), this policy is of course applicable to pending proceedings, and indeed, we stress again that its essential holding reflects long established precedent. The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the WBAL policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

Action by the Commission January 14, 1970. Commissioners Burch (Chairman), Bartley, Robert E. Lee, Cox, H. Rex Lee and Wells, with Commissioner Johnson dissenting and issuing a statement.

Sent to all broadcast licensees.

- FCC -

Comparative Renewals (Petition for Reconsideration)

[In re Petitions for reconsideration of the Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants.]

Dissenting Opinion of Commissioner Nicholas Johnson

I dissent to the denial of these petitions for reconsideration on three grounds: The Commission's January 15, 1970 Policy Statement (1) violates Section 4 of the Administrative Procedure Act (5 U.S.C. Section 553) or, at least, is an abuse of agency discretion; (2) violates Section 309(e) of the 1934 Communications Act; and (3) violates the First Amendment to the United States Constitution.

The Administrative Procedures Act (APA) requires the Commission to follow certain procedures (notification, opportunity to file comments, etc.) in all cases of administrative "rule making." Section 2(c) of the APA defines a "rule" as:

> . . . the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency . . . .

Section 4(a) of the APA, however, exempts from rule making:

> . . . interpretative rules, general statements of policy, rules of agency organization, procedure, or practice . . . .

The majority argues that the January 15, 1970 Policy Statement is an exempted "general statement of policy" under Section 4(a), and not

subject to the safeguards of Section 4. Although the legal precedent, on this question is by no means clear, I believe there are valid reasons for disagreement.

The rule making safeguards of the Administrative Procedure Act were clearly designed to limit the discretion of federal agencies in their legislating function--that is, the adoption of substantive rules or general schemes of administration to affect differing groups or individuals across-the-board. In delegating its legislative authority to non-elected bodies of men not directly responsible to the electorate, I do not believe that Congress intended to cast this and other agencies adrift on the limitless sea of their own unbounded discretion, able to enact substantive rules at will (under the guise of "policy statements") without due consideration of interested parties' views. This, at any rate, appeared to be the position of Attorney General Francis Biddle who gave the following interpretation of "policy statement" in a 1941 Report:

> [A]pproaches to particular types of problems, which as they become established, are generally determinative of decision . . . . As soon as the "policies" of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that may advantageously be brought to public attention by publication in a precise and regularized form.

Report of the Attorney General's Committee on Administrative Procedures, S. Doc. No. 8, 77th Cong., 1st Sess., pp. 26-27 (1941). In other words, certain procedural safeguards exist to protect the public in formal rule making and adjudication; once law has been established

through these procedures, however, the agency may explain it to the public through "policy statements."

Procedurally, at least, this Commission could have addressed the substance of its Policy Statement through adjudicatory or rule making proceedings--both of which contain the safeguards of the adversary process. Arguably, however, it cannot do so without any procedural safeguards at the time of adoption, as it has attempted here. Cf. Moss v. Civil Aeronautics Board, ___F.2d ___ (D. C. Cir., July 9, 1970). There must be some logical and legal distinction between a "rule" and a "policy statement." An administrative agency is apparently not free to characterize its action in any way it sees fit:

> The particular label placed on it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.

Columbia Broadcasting System v. United States, 316 U.S. 407, 416 (1942). The appropriate distinctions may well turn on whether the agency takes action affecting a change in substantive legal rights (through a rule on adjudication), or whether the agency's action merely explains or interprets existing policies or decisions previously enacted through proper legal procedures (a policy statement). Thus, the Commission can issue a "Public Notice" through its Office of Information, explaining or summarizing the import of a particular rule; but it cannot adopt that rule, without procedural safeguards, merely by captioning its

document a "Public Notice" and pretending that no substantive change in the law is involved.

The issue here, therefore, turns on whether the January 15, 1970 Policy Statement effected a substantive change in our comparative renewal standards. I frankly do not think even the majority can seriously contend that the Commission has not substantially changed its hearing procedures in comparative renewals by its January 15, 1970 Policy Statement. We have designated many cases for comparative hearings since the Hearst case, yet we have never even suggested to the Examiner that he first determine whether the incumbent licensee "has been substantially attuned to meeting the needs and interests" of the community. Indeed, we have recently reimbursed Voice of Los Angeles, Inc., for costs incurred during the initial portions of a comparative challenge to the license of KNBC, Los Angeles, essentially on the ground that our January 15, 1970 Policy Statement came as an unannounced surprise to Voice, and that given the change in policy it would be inequitable not to permit them to withdraw. National Broadcasting Co., Inc. (NBC), FCC 70-691 (Docket No. 18602) (released July 7, 1970). Prior to January 15, 1970, no communications lawyer or even FCC Hearing Examiner would have dreamed that a competing application would not even be considered if the incumbent licensee met certain programming standards. Accordingly, we must conclude that a substantive change in law has been made, and the rule making procedures of the APA should apply.

Even if action by policy statement is a legally available option to the Commission in this case, I believe the Commission has abused its discretion by so acting without clearly articulated reasons. In dismissing petitioners' request for rule making, Petitions by BEST, 21 F.C.C.2 355 (1970), the Commission cited S.E.C. v. Chenery Corp., 332 U.S. 194 (1947), for the proposition that the Commission has the discretion to choose between adjudication and rule making. The Commission, however, does not attempt to explain why the use of a policy statement in this case was preferable to the use of adjudication and rule making. Rather, it simply asserts that it had the power to act without the usual procedural safeguards. Even conceding that the Commission has this power, it must exercise its discretion in a rational way in an opinion explaining its reasoning. Even Chenery recognized that agency discretion was limited by certain fundamental standards of fairness.

The Commission's Policy Statement decision cannot be considered "reasonable" or "fair"--particularly in view of the political events surrounding its adoption. Following the decision in WHDH, Inc., 16 F.C.C.2d 1 (1969), the broadcasting industry sought to obtain from Congress the elimination or drastic revision of the comparative hearing procedure. See, e.g., Hearings on S.2004 [Orderly Renewals] Before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong., 1st Sess. ["The Pastore Bill"] (Dec. 1, 1969). Although more than 100 Congressmen and 23 Senators quickly announced their support, a number of

citizens groups testified that S.2004 was "back door racism" and would exclude minorities from access to media ownership in most large communities (Black Efforts for Soul in Television), would perpetuate excessive concentrations of control (National Citizens Committee for Broadcasting), and would remove "competition" from broadcasting and "freeze out every underrepresented class in American Society" (American Civil Liberties Union). See Hearings on S.2004, supra.

The impact of citizen outrage measurably slowed the progress of S.2004, and many Senate observers began to predict the Bill would never pass. Then, without formal rule making hearings, or even submission of written arguments, the Commission suddenly issued its January 15, 1970 Policy Statement--achieving much of what Congress had been unable or reluctant to adopt.

There were many parties who had invested substantial time and money fighting the threatened diminution of their rights, and who no doubt would have opposed our January 15, 1970 Policy Statement on numerous grounds. In challenging S.2004, many of these parties claimed to represent the interests of important segments of our population: the minorities, the poor, and the disadvantaged. By refusing even to listen to their counsels, this Commission reached a new low in its self-imposed isolation from the people; once again we closed our ears and minds to their pleas. See, e.g., National Broadcasting Co., 20 F.C.C.2d 58 (1969); KSL, Inc., 16 F.C.C.2d 340 (1969); Office of Communication of the United

Church of Christ [WLBT-TV], ___ F.2d ___, No. 19,409 (D.C. Cir., June 20, 1969), and 359 F.2d 994 (D.C. Cir. 1966).

The majority argues for the Policy Statement's validity by contending that it is "only a policy statement" which may be fully reargued in future cases when it is applied. This argument is invalid. For one thing, the mere existence of the Policy Statement will deter groups that otherwise might have entered comparative contests. Between WHDH, Inc. and our Policy Statement, a number of applicants filed competing license challenges with the Commission. To my knowledge, not one TV application has been filed since January 15, 1970--and one major applicant has even withdrawn on the basis of our Policy Statement. See National Broadcasting Co., Inc. (KNBC), FCC 70-691 (Docket No. 18602) (released July 7, 1970). In addition, our Policy Statement will doubtless be applied to future cases without exception. No man is likely to reverse himself once he has announced his decision in public, and no one seriously believes that applicants will be able to reargue the merits of our January 15, 1970 Policy Statement and obtain an impartial and open-minded reception. As in Moss v. Civil Aeronautics Board, ___ F.2d ___, (D.C. Cir., July 9, 1970), the basic decisions have been made ex parte in "closed sessions," and there is little anyone can do to re-open them.

Finally, the Commission's abuse of discretion becomes particularly severe in light of the First Amendment questions discussed

below. Whatever discretion the Commission may have to choose various procedural modes in other cases, that discretion must be narrowly limited where it results in a curtailment of speech freedoms. Our failure to follow normal rule making procedures, therefore, is an abuse of agency discretion and cannot be justified by the principles of Chenery.

The January 15, 1970 Policy Statement also violates, in rather clear fashion, Section 309(e) of the 1934 Communications Act. That Section provides that if the Commission cannot find that the grant of any particular license application will serve the "public interest, convenience, and necessity," it must designate the application for "a full hearing in which the applicant . . . shall be permitted to participate." In other words, the Commission must either grant a license application, or provide the applicant with a full hearing on the merits. Thus, where an incumbent licensee is challenged by an otherwise acceptable new applicant, Section 309(e) bars rejection of the competing application without a hearing. Yet this rejection is precisely what will happen under the Policy Statement when the Examiner finds the incumbent "substantially attuned" to community needs and interests. In Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), the FCC granted one of two mutually exclusive applications and designated the other for hearing. The Supreme Court reversed, saying:

> We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing. We think that is the case here. (326 U.S. at 330.)

As Ashbacker said, "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." Id. at 333. Although Ashbacker involved competing applications for a new facility, its reasoning is equally applicable here. Even Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951), and Wabash Valley Broadcasting Corp., 34 F.C.C. 677 (1963), which the Commission cite to support its January 15, 1970 Policy Statement, granted both applicants a full hearing on all issues involved. I believe Congress intended in Section 309(e) to give new applicants with allegedly improved programming proposals at least a hearing to prove their claims. The Commission's Policy Statement eliminates this right.

Finally, I believe the January 15, 1970 Policy Statement imposes burdens on freedom of speech which are inconsistent with the First Amendment. Freedom of the press, for example, must do more than protect newspaper publishers from government censorship; it must also ensure that access to ownership of the print media is not blocked. Freedom of the press would not exist in this country if the government, while refraining from direct censorship over newspaper content,

made it excessively difficult for people to own, control or publish a newspaper. The Supreme Court has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945). And in Red Lion, the Court said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)(emphasis added).

Although the Commission's Policy Statement is ostensibly grounded in economic considerations, it undeniably impedes access to ownership of the broadcast media, and is therefore deeply imbued with First Amendment considerations. Upon review of agency and Congressional action, the Supreme Court will generally pay great deference to administrative and legislative expertise and experience in matters involving economic regulation, see, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); but it has clearly warned that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . ." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Because the

First Amendment freedoms of speech and the press occupy a "preferred position" in the spectrum of constitutionally guaranteed liberties, Kovacs v. Cooper, 336 U.S. 77, 88 (1949), see Saia v. New York, 334 U.S. 558, 562 (1948); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); United States v. Cruikshank, 92 U.S. (2 Otto) 542, 552-53 (1876), the government must prove that a "compelling," N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963); Sherbert v. Verner, 374 U.S. 398, 403 (1963), or "paramount," Thomas v. Collins, 323 U.S. 516, 530 (1945), governmental interest exists to justify restrictions upon First Amendment freedoms.

I think it is obvious that the Commission has made no "compelling" or "paramount" showing of necessity for the doctrines adopted in its January 15, 1970 Policy Statement. We have taken no hard economic evidence on the issue; we have consulted directly with neither licensees nor the public on this issue; and we have considered no alternatives to this scheme of regulation.

The Supreme Court has also indicated in First Amendment cases that legislative bodies must use "less drastic means" of regulation whenever possible to create the least interference with individual liberties. E.g., United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); see generally, Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969); Wormuth & Merkin, The Doctrine of the Reasonable Alternative, 9 Utah L. Rev. 254, 267-93 (1964). If the Commission is concerned that the scheme of competitive applications established by Congress in 1934 is unduly severe on the broadcasting

industry, and that "stability and predictability in station operation" is needed to safeguard its "financial investments," then there are clearly "less drastic means" for accomplishing this goal than eliminating altogether potential licensees who might better serve their communities. The FCC, for example, might give losing incumbent licensees a tax certificate entitling it to involuntary conversion treatment under Section 1033 of the Internal Revenue Code. Another possibility would be to require the winning applicant to reimburse the losing incumbent for the fixed costs of his investment--or perhaps even his programming investments during the past two or more years. The point, simply, is that there are any number of alternative ways to increase stability in the broadcast industry without substantially impeding the access of various groups to ownership.

The importance of the First Amendment in this proceeding is threefold: First, the restrictions the Commission has placed on entry into the broadcasting field may well violate the standards of the First Amendment; second, the significant involvement of First Amendment issues in the comparative renewal procedure places on this Commission a greater burden of justifying its action than it has met; and third, the First Amendment considerations should limit the discretion of this agency to adopt substantive rules without the safeguards of the Administrative Procedure Act. We may be able to justify purely economic regulations by our alleged fund of "accumulated experience"; but we must do more when we curtail access to media ownership. We must demonstrate a

"compelling" need for these regulations, and that there are no "less drastic means" available to us. This we have clearly failed to do.

Policy Statement on Comparative Hearings
Involving Regular Renewal Applicants

Dissenting Opinion of Commissioner Nicholas Johnson

The issues surrounding citizen participation in the license renewal process are among the most complex and significant before the FCC.

The nature of the American political process is such that any efforts to regulate broadcasting by either Congress or this Commission must constitute a negotiated compromise of sorts. That the broadcasting industry today is perhaps the most powerful Washington lobby in our nation's history is generally acknowledged. Popular reform movements always start with a substantial disadvantage. For none is that more true than for those groups trying to improve the contribution of television to the quality of American life. But, then, the stakes are higher.

There is no question but that the American people have been deprived of substantial rights by our action today. There is also no question that the results could be much worse--given the commitment of the broadcasting industry on this issue, and the introduction of legislation (such as S. 2004) by 22 Senators and 118 Representatives.

The policy statement has been discussed by us calmly and at length. Each Commissioner has endeavored to balance the conflicting interests of broadcasters and public. The language has been revised in a spirit of accommodation; the public interest is better served as a

result. Because of my participation in these drafting efforts I feel considerable inclination to concur. On agonizing balance, however, I find I cannot.

There is a germ of legitimate concern in the broadcasters' position. (1) It is inequitable that a broadcaster who has made an exceptional effort to serve the needs of his community, and whose programming is outstanding by any measure, should be subjected to the expense and burden of lengthy hearings merely because some fly-by-night chooses to take a crack at his license. (2) When evaluating a competing application in a renewal case, a record of outstanding performance by the licensee obviously should be given considerable weight. (3) It is far better to provide consistent national standards for station ownership by general rulemaking (with divestiture if necessary) than to evolve them on the case-by-case happenstance of which stations' licenses happen to be challenged. (4) There <u>are</u> some public benefits from "stability" for those broadcasters who take their responsibilities seriously.

What the public loses by this statement can be summarized in the word "competition." The theory of the 1934 Communications Act was that the public would be served by the best licensees available. No licensee would have a "right" to have his license renewed. Each would be open to the risk that a competing applicant would offer a service preferable in some way, and thereby win the license away. The

FCC was to choose the best from among the applications before it, whether the incumbant's record was "mediocre" or "excellent." This is the principle of the marketplace: the public is assured the best products by opening the market to all sellers, comparing their products, and rewarding the best with the greater sales. The analogy in broadcasting is the competing application. The FCC is the public's proxy. It is we who must make the choice among competitors; it is the public that receives the benefits (or burdens) of our choice.

What we have done in this policy statement is comparable to providing that there could be no new, competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not "substantially" serving the public interest. The affected industry's arguments on behalf of such a policy would be quite similar to those presented by the broadcasters in this instance. But this country has long believed that the public will be better served over the long run by free and open competition. And after lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry.

Given the harsh political reality that the broadcasters have the power to obtain some measure of protection against competing applications, there are at least some possible public benefits from the policy statement we have drafted.

It is impossible, or at least unlikely, that there would ever be a sufficient number of public organizations to contest each of the 7,500 radio

and television station licenses in this country. Any truly effective efforts at reform will have to apply to all stations equally. This FCC policy statement may have some salutary impact industry-wide.

What we have created, in effect, are four levels of performance: (1) Not minimally acceptable. A licensee in this category will not have his license renewed, whether or not it is contested. (2) Minimally acceptable. If it meets this standard, a licensee without a competing application will be renewed by the Commission. If it is challenged, however, it will be set for hearing. (3) Substantial service. If a licensee is challenged at renewal by a competing applicant, the hearing will be terminated if the examiner finds, after initial evaluation, that the licensee has been "substantially attuned to meeting the needs and interests of its area." This amounts to a form of "summary judgment," saving both broadcaster and challenger the burden of a lengthy hearing likely to be futile. (4) Comparative public interest. If a licensee under challenge by a competing applicant cannot meet the "substantial" service standard, a full evidentiary hearing will be held. The licensee must then demonstrate that its renewal will serve the public interest, and would be comparatively preferable to awarding the license to the challenger.

The upshot may very well be an improvement in radio and television programming performance by all licensees.

At the present time many broadcasters know that a minimal performance is all that's required for license renewal. This belief is exascerbated by an FCC majority's willingness to find that no news and public affairs adequately serves the public interest, Herman C.

Hall, 11 F. C. C. 2d 344 (1968), and that a licensee on probation who has bilked advertisers of $6000 through fraud is entitled to another probationary term, Star Stations of Indiana, Inc., 19 F. C. C. 2d 991, 996 (1969). Commissioner Cox and I have tried, so far without success, to urge the application of some standards, however minimal, to the Commission's license renewal process. Renewal of Standard Broadcast and Television Licenses [Oklahoma], 14 F. C. C. 1 (1968); Renewal of Standard Broadcast and Television Licenses [New York-New Jersey], 18 F. C. C. 2d 268, 269, 322, (1969); District of Columbia, Maryland, Virginia, West Virginia Broadcast License Renewals, _____ F. C. C. 2d _____(1969).

The industry's response to the initial WHDH decision, WHDH, Inc., 16 F. C. C. 2d, (1969), and the increased effectiveness of public groups devoted to improving broadcasting has been confused and irrational, and of mixed impact on programming. The policy statement will remove much of this confusion.

The Commission has made it clear that it will not permit chaos to reign, that the better broadcasters have nothing to fear, and that all can get back to the task of programming their stations in ways that serve the awesome needs of the American people for quality entertainment, cultural enrichment, continuing education, and information and analysis about life in the communities and world in which they live. The more responsible broadcasters now know

they will be protected from harrassment from audience or FCC.

On the other hand, the public now clearly understands that a new day has dawned; licenses will not be automatically renewed; those licensees not offering "substantial" service are open to challenge.

The below-average broadcasters should respond to this new state of affairs by upgrading their programming from a "minimal" to a "substantial" performance. They now have a very real incentive to purchase this "renewal insurance" against the possibility of a challenge.

Moreover, the statement only relates to competing license challenges, not petitions to deny license renewals. Such petitions may still be filed and considered against any licensee. Their consideration in the future may very well be more rigorous than at present. No smart licensee will lightly risk walking too close to the cliff of "minimal performance." And, of course, a competing license challenge may also be <u>filed</u> against any licensee in good faith, even though it ultimately may be rejected by an examiner. Only the broadcaster who is confident his performance is well above average can be assured of the outcome.

And, in the last analysis, as the statement concedes, its ultimate impact will only be know <u>after</u> the examiners, FCC and courts have processed some cases. No statements of policy can affect the FCC's will to act (or lack thereof) in deciding whether to deny license renewal in 1/100 of 1%, 1/10 of 1%, 1% or 10% of the renewal

cases coming before it. (With roughly 2500 license renewals a year, these percentages are equivalent to one denial every four years, two or three a year, 25 a year and 250 a year, respectively.) No statement of policy can be the basis for predicting such percentages with any greater precision until the results are in.

There are legal and public relations considerations involved in issuing this statement as fait accompli rather than as proposed rule making for public comment. I will not review the issues here, except to say that I think it would have been wiser, on such a controversial matter, to use the rule making procedure.

I cannot avoid reference, in passing, to the significance of this particular kind of necessary compromise with broadcasting's power. The record of Congress and the Commission over the years shows their relative powerlessness to do anything more than spar with America's "other government," represented by the mass media. Effective reform, more and more, rests with self-help measures taken by the public. Recognizing this, the broadcasters now seek to curtail the procedural remedies of the people themselves. The industry's power is such that it will succeed, one way or another. This is sad, because--unlike the substantive concessions it has obtained from goverment from time to time--there is no turning back a procedural concession of this kind once granted. Not only can the industry win every ball game, it is now in a position to change the rules.

I have considerable sympathy and respect for my colleagues' commendable and good faith effort to resolve this conflict between formidable political power and virtually unrepresented public interest. They have tried. They really have. And it is not at all clear to me that more than they have done would have been politically possible, or could have withstood political appeal. It is not even clear that today's effort is secure.

Thus it is, with no feelings save understanding, frustration and sorrow, that I dissent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 70-738
49674

In the Matter of	)	
	)	
Policy Statement on Comparative Hearings Involving Regular Renewal Applicants	)	
	)	
In re Petitions filed by	)	
	)	
BEST, CCC, and others For Rule Making to Clarify Standards in all Comparative Broadcast Proceedings	)	RM-1551

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1970 ; Released : July 21, 1970

By the Commission: Commissioner Bartley absent; Commissioner Johnson dissenting and issuing a statement.

1. On January 15, 1970 the Commission released a Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 35 F.R. 822, in which we set forth the approach we intend to follow in comparative broadcast hearings where a new applicant challenges a licensee seeking a renewal of license. The next day we released a Memorandum Opinion and Order adopted January 14, 1970 in RM-1551, 21 FCC 2d 355, dismissing a petition for rule making filed by BEST (Black Efforts for Soul in Television), CCC (Citizens Communications Center), William D. Wright, and Albert H. Kramer in which the petitioners proposed a new rule to clarify the standards in all comparative broadcast hearings, including contests on renewal, along the lines of our 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393. We now have before us petitions for reconsideration of the January 15, 1970 policy statement filed by BEST, et al. (BEST), and (jointly) by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc. BEST has also filed a petition "for repeal" of the policy statement and a third petition, to reconsider the dismissal of the BEST petition for rule making; these pleadings are based upon the memorandum submitted with the petition to reconsider the policy statement. The petitions are opposed by several other licensees, and replies have been received.

2. Our January 15, 1970 policy statement set forth our proposed approach to the disposition of broadcast hearings involving contests between new applicants and regular renewal applicants. It followed and supplemented our 1965 policy statement on comparative broadcast hearings between new applicants for the same facilities. Several of the objections raised to the 1970 policy statement were treated in the opinion on BEST's petition for rule making. Thus, as we there made clear, the policy statement was not a rule and did not have the force or effect of a rule; consequently, as we stated, "parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation." (21 FCC 2d at 356.) 1/ Therefore, we must reject the contention that the adoption of the policy statement contravenes the rule making requirements of the Administrative Procedure Act. That statute specifically makes its notice requirements inapplicable to "general statements of policy." 5 U.S.C. §553(b). That the policy statement expresses our views on matters of substance of course does not take it out of the statutory exemption nor, in light of the further exemption for rules of procedure, does the fact that it contains a procedural element. Substantive rules must be preceded by notice and comment. Substantive policy statements need not be. While we understand that the parties seeking reconsideration do not agree with our view that the policy statement contains a unified expression of policies largely formulated in earlier adjudicatory cases, their argument still misses the point that it is only a policy statement -- subject to full reargument in individual cases -- with which we are dealing. Although, in view of these considerations, we do not believe that a petition for reconsideration properly lies under Section 405 of the Communications Act, it nevertheless seems desirable to consider the contentions put before us. 2/

3. It is urged that there is no support in fact for the weight we have given to stability and predictability in station operation. But we think it is amply clear that in an industry requiring substantial investments, often with long periods of financial loss, the public interest is served by a reasonable assurance that good public service will

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1/ Even in the case of a rule, parties are allowed to make a showing why the rule should be waived in a particular case. See U. S. v. Storer Broadcasting Co., 351 U.S. 192, 204-205; Section 1.3 of our rules, 47 CFR 1.3. A fortiori, a party may show why a policy should not be applied in his fact situation. In short, the touchstone for all Commission action remains the public interest, and therefore, the Commission must be alert to a showing that the public interest would be served by action different from that embodied in any general rule or policy.

2/ Taking into consideration that we are not adopting a binding rule and that these matters may be reopened in particular cases, we do not believe that oral argument is either appropriate or required.

constitute a protection against a complete loss of the business. In this connection, we point out that Hampton Roads and Community are incorrect in their assertion that we have required a successful challenging applicant to purchase the facilities of the incumbent licensee. We said that it would be expected that arrangements could and would be made to purchase the facilities of the existing station, but we have not imposed any such requirement. 3/ It is no answer to this problem that many stations are profitable, even highly profitable, for not only do many stations have unprofitable operations for substantial initial periods, but for all stations we can only expect the required initial and continuing investments if there is a reasonable expectation, consistent with the overriding requirements of the public interest, that the station will be treated as a going business. And, certainly, it would make no sense to apply the policy statement only to losing operations and to deny its benefits to any existing station which is operating in the black. This would hardly be an inducement to good operation. In short, a contrary policy would, we believe, result in a chaotic situation wholly at odds with the Congressional purpose in creating this agency and its predecessor.

4. As mentioned above, we have attempted to provide stability only insofar as it is consistent with the paramount public interest, and have given no advantage to any existing licensee who is qualified but only barely so. We have given up the fullest advantages of competition only in favor of continuance of a solid measure of performance without substantial defects. We have, however, maintained the competitive spur of the statutory scheme by not only permitting but encouraging competing challenge to renewal applicants who are believed to have only minimally served the public interest. And to make this policy effective, we have precluded "upgrading," either after the competing application is filed or during the third year of the license term because of the imminence of public challenge. 4/ This, we stress, is a reasonable balancing of two considerations -- the desirability of stability and the competitive spur of challenge -- which best serves the public interest. It is said, nevertheless, that any such balancing is forbidden by the Communications Act as already interpreted by the courts, and that nothing short of a full comparative hearing involving all factors will suffice. We do not so read the statute. The cases

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3/ We note also that purchase of physical facilities will not provide recompense for operating costs.

4/ In this connection, we note that our assignment and transfer forms require a showing as to the programming performance of the assignor or transferor, when an assignment or transfer is sought more than 18 months after the last renewal. This is intended to insure that the transferor has not ignored his renewal commitments in anticipation of sale. Thus, we would not permit transfers during the last 18 months of a license period where the transferor's operation raises a substantial question of basic qualification because of a failure to adhere to promises (or of course for any other public interest reason coming to our attention at any time). This is not new policy, cf. Jefferson Radio Co. v. Federal Communications Commission, 119 U.S. App. D.C. 256, 340 F.2d 781 (1964), but it seems desirable to reiterate it here.

relied upon all deal with initial applications and do not reach the question of whether it is permissible or, as we believe, necessary to give special weight to a solid record of performance in the renewal situation. The question is one of substantive policy, since our instruction to the examiners on the conduct of the hearing is peripheral procedure. If the policy is reasonable, and we have set forth our reasons for adopting it, we see no merit to the contention that it creates a right in the frequency or its use beyond the terms of the license (see Sections 301, 304, 307(d), 309(h), 47 U.S.C. 301, 304, 307(d), 309(h)). The assignment of conclusive weight to a solid record of operation in the public interest is not the grant of a right to future use based upon past occupancy of a channel. As we have made amply clear, past occupancy by itself is irrelevant under our policy statement. But there is nothing in the Communications Act that prohibits the assignment of different weights to different public interest factors in this situation, or the assignment of conclusive weight to a factor we find to be determinative in its relationship to the public's interest in future use of the frequency or channel. While this policy may eliminate a direct comparison between applicants on factors such as integration of ownership with management and diversification of control of the media of mass communications, it does not sanction a grant to any renewal applicant who is disqualified in any respect, or in the face of a competing challenger, who is not substantially serving the public interest. Barring an unusual showing, it eliminates a comparison but does so upon a basis rooted in actual operation of the facilities in question. The Constitution is obviously not affronted by this policy if we are correct in our judgment that it is a policy reasonably calculated to best serve the public's interest. National Broadcasting Co. v. United States, 319 U.S. 190. 5/

5. We have carefully considered the arguments contained in the petitions before us and we are not convinced that our announced policy on comparative renewal proceedings is either illegal or unwise. Of course, those adversely affected may raise any relevant contention in individual proceedings, where they will be examined de novo. However, it should be useful to all parties concerned to have the Commission set forth the overall views to which its experience has led it. Finally, we stress again what we said in concluding our 1970 statement:

> In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are

5/ See also Hale v. Federal Communications Commission, __ U.S. App. D.C. __, __F.2d __ (No. 22,751, February 16, 1970), holding that issues of concentration of control applicable to the industry as a whole and involving an overhaul of multiple ownership policy, may appropriately be reserved for treatment in general rule making.

to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

6. For the foregoing reasons, the petitions before us ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

* See attached Dissenting Statement of Commissioner Nicholas Johnson.

[SUBCOMMITTEE PRINT]

ANALYSIS OF FCC'S 1970 POLICY STATEMENT ON COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS

STAFF STUDY

FOR THE

SPECIAL SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

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NOVEMBER 1970

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., November 20, 1970.

DEAR CHAIRMAN STAGGERS: It is my pleasure to forward to the Subcommittee the study of Mr. Mark J. Raabe, staff attorney, analyzing the "*Policy Statement on Comparative Broadcast Hearings Involving Regular Renewal Applicants*," issued by the Federal Communications Commission on January 15, 1970. The study shows that the FCC policy statement is not *policy* but a flagrant attempt to repeal the statutory requirements and to substitute the FCC's own legislative proposal that a hearing is not required when it involves a license renewal proceeding having several competing applicants.

The law requires that these competing applicants be given the opportunity for a full hearing. The Supreme Court in *Ashbacker Radio Corporation* v. *FCC*, 326 U.S. 327 (1945), has ruled that constitutional due process requires opportunity for all applicants in a license renewal to have a full hearing. For years the agencies have resisted this on the ground that hearings delay renewals and that the agencies do not have sufficient manpower to conduct hearings. But it was not until now that any agency has had the temerity to usurp congressional power and by way of a "policy statement" repeal a constitutional and statutory requirement in the interest of easing Commission workload requirements, and at the same time converting a 3-year license into the permanent property of existing licensees. Instead of providing an opportunity to be heard as required by the Communications Act of 1934, as amended, the FCC has substituted a new *policy*. Comparative hearings on broadcast license renewals involving competing applicants are precluded if the hearing examiner is satisfied that an existing licensee has provided service "substantially attuned" to the needs and interests of its area. By enunciating in its policy statement a position not in consonance with the intent of Congress, the Commission is ignoring the mandate laid down by the Supreme Court in reference to another independent agency that: "It is charged with the enforcement of no policy except the policy of the law."

Congress has provided that licenses should be granted for 3 years only with a carefully circumscribed right to additional 3-year renewals subject to the same considerations which affect the original grant when the Commission found such renewals to be "in the public interest." The new policy statement, however, assures broadcast licensees a right to their license in perpetuity subject to revocation only upon a clear demonstration of ethically and legally reprehensible conduct tantamount to rigging a quiz show or broadcasting a lottery. The economic interest of an existing licensee has been equated with "the public

interest," and concern for the viewing and listening public for quality broadcasting has been relegated to a less than secondary position.

The question of legislative preemption by administrative action is not novel. Congress and the courts are many times presented with instances in which the regulatory and administrative agencies have acted to thwart congressionally created rights and privileges and to ignore delegated responsibilities when they conflict with the interests of the industries they regulate. What is exceptional in the present case is that the FCC has construed its policymaking power as the equivalent of congressional power to legislate in an area where monopoly of vested interests seek not 3-year licenses but licenses in perpetuity. This raises many questions. For instance, the court of appeals has pointed out in *Moss* v. *CAB* (D.C. Cir. No. 23627 (July 9, 1970)) that the issue presented was:

> The recurring question which has plagued the public regulation industry: Whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.

Certain events occurring at the time I was retained as counsel to the House Special Subcommittee on Legislative Oversight in 1958 have a bearing on the matters now involved and although some are of a personal nature I believe I should outline them to you and to the subcommittee. Speaker Rayburn interviewed me twice. He made it plain that the House of Representatives must control its independent agencies. He was emphatic on having a staff which could and would act without fear or favor and not succumb to the blandishments of regulated business. He questioned me closely as to my expenses and sources of income, particularly as to possible tie-ins with federally licensed or regulated companies, so closely that I told him I resented it as being an excessive intrusion into my private affairs. The emphasis of his inquiries was that limited licenses with many millions of dollars were at stake and that Federal regulation of them should insure that the public interest is maintained as the paramount consideration. In view of the then current notorious scandal involving the Miami channel 10 renewal case, Speaker Rayburn insisted that he was going to do everything he could from that moment forward to direct legislative oversight to scrutinize the tendency of regulatory agencies to disregard congressional intent by substituting therefor measures more palatable to the industry or easier for agency regulation.

The Subcommittee, in order to fulfill its legislative oversight responsibilities, should determine whether the FCC's Policy Statement is truly "in the public interest" when a premium is placed upon maintaining the status quo of vested interests and, in effect, is creating a "private club" which discriminatorily excludes nonmembers.

In the long run, exclusion of non-members to the "private club" of the regulators and the regulated must result in injury to the industry which regulation is designed to protect and, therefore, ultimately to "the public interest". Such a policy stifles the economic development and commercial vitality of the regulated industry by excluding innovative and aggressive concepts, introduction of new growth capital,

meaningful and healthy competition, and recommendations for legislative reform intended to assure the fullest participation in such industry by the broadest possible segment of the public. In a society dedicated to the free exchange of ideas, it is imperative that the public not be placed in a position of dependence upon limited sources for its day-to-day information.

By adopting the Policy Statement, the FCC is discouraging public participation in the broadcasting industry. Its action must have a particularly adverse effect upon that group of citizens who have not always had an equal opportunity to compete in the past. For example, at the present time, only ten out of more than 7000 broadcast licenses, none of which are television stations, are held by blacks.

The FCC, in adopting its policy statement has adverted to that hackneyed spectre of unhealthy competition and the need for economic stability in the broadcasting industry. It has espoused this need in the face of the economic realities of the market place. No other single industry in this country enjoys as great a return on invested capital or retains as much of its gross revenues in the form of net earnings. In 1969 profits for all U.S. industrial corporations rose 3.1 percent, but profits for the television broadcasting industry rose 11.9 percent.

One further point to be considered is the one which the Subcommittee made in its *Report on Trafficking in Broadcast Station Licenses and Construction Permits* (H. Rep. No. 91–256) wherein it was pointed out that:

> Licenses are not property rights to be bartered and sold. The Communications Act so provides. But, as the statistics of Commission approved station sales demonstrate, and as the Overmyer transfer compellingly emphasizes, there is, indeed, a serious gap between statutory command and regulatory action.

We should not forget that in establishing the FCC the Congress intended that the award of a broadcasting license constituted the creation of a public trust in favor of the viewing and listening public, not the licensees. As such, broadcast licensees serve as trustees for the benefit of the public and should be subjected to the same fiduciary standards of responsibility as trustees in other areas of endeavor. In other areas involving the public trust, it is axiomatic that the beneficiaries of the trust have standing and a forum to protest against misfeasance or nonfeasance by the trustee. In the broadcasting field, one of the most effective forums for protesting a trustee's misfeasance or nonfeasance is the hearing to evaluate competing applications upon license renewal. It is this forum which the FCC has now arbitrarily closed.

The staff study considers whether the FCC, in adopting the policy statement, has lawfully fulfilled the delegated responsibilities assigned to it by Congress. Specifically, it addresses itself to the questions of whether the FCC, an agency created by Congress to insure the broadest possible public participation in broadcasting, has denied to the public free access to broadcasting media without regard for due process; whether it has acted to protect vested interests without regard for media improvement through the potential introduction of new interests; and whether it has ignored the public interest to the extent it may conflict with the private interests of established broadcasters. The study concludes in each instance that the FCC has ignored its regulatory responsibilities.

I should like to point out in concluding, that 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 really does result in the FCC being a headless fourth branch of government. Condoning such a flagrant breach of responsibility would tend to invite regulated industries to concentrate on influencing administrative agency measures to suit their own special interests at the expense of the public interest, rather than complying with the law.

Respectfully submitted.

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ANALYSIS OF FCC'S 1970 POLICY STATEMENT ON COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS

Preliminary Comment

The policy statement was issued on January 15, 1970, to govern broadcast license renewals involving competing applicants.[1] Briefly, under the new policy, a hearing examiner, once satisfied that an existing licensee has provided service "substantially attuned" to the needs and interests of its area, is required to summarily dismiss competing applications without hearing and renew the license.[2]

In adopting a policy so anticompetitive in design and so geared to preserve industry stability, the Commission has disregarded considerations which are both explicitly and inherently a part of its Congressional mandate to license in the public interest.[3] Specifically, the new policy—

Deprives a qualified new applicant of a statutory right to a hearing recognized by the Supreme Court, thereby denying him due process of law;

Fails to meet the public interest requirement of licensing the best qualified of available applicants;

Unlawfully eliminates diversification of media control as a criterion in license renewals—raising a First Amendment question; and

Creates a stability, in contravention of the three-year statutory licensing limitation, which makes security of the private investment of licensees paramount to the interests of the listening and viewing public and which stifles any opportunity for a newcomer to enter the broadcast business.

The new policy exemplifies both an unwarranted solicitude for the economic well-being of the licensee who enjoys a wealth-producing permit to use the public's precious airwaves and an indifference to the public interest including the right of viewers and listeners to have access to viewpoints and programs from diversified sources.

The repressive competitive effect of the policy statement has already been clearly demonstrated. During the first ten months following release of the statement, no competing applications were filed in television renewal proceedings. By contrast, eight competing applications were accepted for filing in eight television renewal cases during the twelve month period immediately preceding release of the state-

[1] 22 FCC 2d 424 (1970). The 1970 policy statement, hereinafter cited as "policy statement" and referred to as the new policy, is set forth in Appendix A. A reconsideration statement released July 21, 1970, affirming the new policy, is set forth in Appendix B. To facilitate referencing, paragraphs of the statement have been numbered.

[2] Policy statement, par. 5 and 14.

[3] 47 U.S.C. 307(a), (d).

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ment.[4] The expense of preparing and presenting an application is substantial. In the case of a station in a top market area the cost could reach $250,000.[5] A prudent person, no matter how superior his qualifications as a broadcaster may be, would not be inclined to risk such an expenditure in a proceeding where the Commission has denied him a statutory right to a hearing on the merits of his application.

The improbability of a new applicant winning in a renewal proceeding is nothing new because the Commission has a long history of "rubber stamp" renewal approvals of existing licenses. But, even so, there have been a few hardy individuals, capable and desirous of serving the public interest, who have undertaken to run the Commission's "rubber stamp" approval gauntlet. Now, however, the Commission has virtually made certain that the only chance a newcomer has of success is in the case where an incumbent has been proved guilty of rigging a quiz show or of broadcasting lotteries or of some other equally reprehensible offense.[6]

In the face of these insurmountable odds against successful challenge there is unlikely to be any competing applications filed in renewal proceedings unless gross misconduct of the licensee is patently visible. Moreover, in view of the Commission's previous "track record" on routine renewals, it appears that even if a competing application were filed, a "rubber stamp" finding of substantiality would be forthcoming along with a simultaneous dismissal of the competing application.

The resulting effect is an overriding of a Congressionally imposed three-year limitation on broadcast licenses.[7] In essence, the Commission, by administrative fiat issued under the guise of a "policy statement," [8] has transformed licenses of statutorily limited duration into vested interests in perpetuity.

Whenever an administrative agency exceeds its constituted authority and engages in extralegal policy making, as it has in this instance, the dangers of arbitrary government are at hand. From the earliest days, Americans recognized the indispensible need for a government of laws rather than men.[9] This concern is repeatedly evident in the constitutions and other writings of the Founding Fathers. The Massachusetts Constitution of 1780 provides a noteworthy example. It was drafted by John Adams, one of the country's greatest constitutional thinkers, who naturally drew heavily upon the principle of "rule of law." Mindful of the dangers of arbitrary government, particularly the granting of exclusive privileges which would

[4] Data provided by FCC, May 1970; updated November 20, 1970, by Martin Levy, Chief, Broadcast Facilities Division, Broadcast Bureau, FCC. During the year preceding the policy statement six competing applications were filed against AM and FM radio licenses while two were filed in the ten month period following release of the statement. Commissioner Johnson in observing in paragraph 10 of his dissent to the reconsideration statement the absence of competing television applications being filed since issuance of the new policy noted that one major applicant even withdrew because of it. See National Broadcasting Co., Inc. (KNBC), FCC 70-691 (Docket No. 18602) released July 7, 1970.

[5] "Inside the FCC: The Renewal Branch," Television Age, Aug. 25, 1969, at 72. In a *New York Times* article, April 27, 1969 edition, entitled "F.C.C. License Renewals: A Policy Emerges," it was stated that the cost of a sustained license challenge is at least $250,000 in research and legal fees.

[6] Policy statement, par. 8.

[7] 47 U.S.C. 307 (a) (d).

[8] See Commissioner Johnson's dissent to reconsideration statement, paragraphs 1-11, wherein he persuasively argues that issuance of policy statement and resulting failure to follow normal rule making procedures violates Section 4 of the Administrative Procedures Act or, at least, is an abuse of agency discretion.

[9] It is interesting to note that early colonial protestations to the Crown included a charge that its licensing practices created monopolies contrary to the law. On May 8, 1707, the Assembly of the Province of New Jersey submitted a remonstrance to Queen Anne charging that the Governor's action was "directly repugnant to the Magna Carta." In its list of grievances was the following: "5thly, The granting of Patents to cart goods on the Road from Burlington to Amboy, for a certain number of years, and prohibiting others, we think to be a great grievance, that it is contrary to the statutes, 21. Ja. 1. ch. 3. against Monopolies, and being so, we doubt not will easily induce the Governour to assent to an Act, to prevent all such grants for the future, they being destructive of the Freedom, which Trade and Commerce ought to have." N.J. Archives 1 S. 3 Colonial History (Lord Cornbury's Administration), 176.

not be for the public good, Article VI of the Massachusetts Declaration of Rights provides that:

> No man, nor corporation, or association of men, have any title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in the nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawyer, or judge, is absurd and unnatural.

It is equally absurd, and dangerous it seems, for existing broadcasting licensees to be given an exclusive privilege of unlimited duration in contravention of the statute to the sacrifice of all other public interest considerations. Yet, this is the result of the Commission's new policy. It appears that the "rule of law" concept so precious to our heritage was shelved for the sake of expediency.

Background to Issuance of 1970 FCC Policy Statement

1965 policy statement on comparative broadcast hearings.[10]

In the opening paragraph of the 1970 policy statement the Commission calls attention to the fact that in 1965 it issued a policy statement to deal with comparative hearings involving qualified new applicants competing for the same broadcast facility. The Commission then states that the 1970 statement is "a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license."

Both statements deal with broadcast licensing and both are in effect at the present time. The determinative factor controlling which of the two policies will be applied to a particular situation is the presence or absence of an existing licensee. If all parties are new applicants, the 1965 policy applies; however, if a new applicant files against an incumbent licensee seeking renewal, then the 1970 policy applies.

Inasmuch as the Communications Act places a licensee seeking renewal in the same position as a new applicant,[11] it might be expected that the 1965 and 1970 policy statements would be somewhat similar. An examination of them, however, reveals great disparity.

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[10] 1 F.C.C. 2d 393 (1965). The 1965 Policy Statement is set forth in Appendix C.

[11] Compare 47 U.S.C. Section 307(a) with 47 U.S.C. Section 307(d). Prior to amendment in 1952, Section 307(d) required that the granting of an application for renewal of a license "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." This language was deleted in 1952 and the standard of "public interest, convenience and necessity" was inserted (the same as applies for original applications). The purpose of the amendment was to simplify administrative procedures which previously required renewal applicants to submit data which may have already been on file at the Commission. It was not intended to give a licensing advantage to an incumbent seeking renewal. See H.R. Rept. No. 1750, 82nd Cong., 2d Session, 8 (1952).

	1965 policy statement on comparative broadcast hearings	1970 policy statement on comparative hearings involving regular renewal applicants [12]
Policy statement pertains to situation involving.	New applicants	New applicant and incumbent licensee seeking renewal.
Stated licensing goal	(1) Best practicable service to public; (2) Maximum diffusion of ownership.	Ample service to needs and interests of community (through alleged balancing of competitive spur and stability).
Process used to determine licensee.	Comparative hearing used to select best available applicant.	Employs noncomparative process which disregards new applicants' qualifications.[12]
Factors determinative of licensing.	Hearing evaluates all qualified applicants by comparing criteria of: (1) Diversification; (2) Integration; (3) Past performance (to the extent it was notably good or notably bad); and (4) Other factors such as character, etc.	Hearing is only concerned with incumbent's past performance; if it has been "substantially attuned" to meeting needs of area, renewal will be granted (provided licensee has not been guilty of gross misconduct in past).
Intrinsic fairness	All qualified applicants have an opportunity to be heard on basis of their own applications.	Only incumbent's past performance is certain to be heard.
Quality of result	Potentially effective device to license in the public interest. Provides Commission with opportunity to select best of available applicants by making determination on the basis of relative merit; promotes competition; allows Commission to meet statutory responsibility of providing hearings to mutually exclusive applications and of considering aspects of diversification.	Licensing in public interest is left completely to chance. Does not seek best available applicant; denies hearing right and stifles competition; protects private investments to the sacrifice of the listening and viewing public; does not consider factors of diversification.

[12] While the title of the 1970 statement suggests that comparative hearings will be used, the practical effect of the new policy is to virtually eliminate them.

The obvious question is whether the inclusion of an incumbent licensee as a party in a licensing proceeding can justify the radically different approach reflected in the 1970 statement. The Commission apparently feels that such is necessary to provide a shield of protection for existing interests. Perhaps some insight can be gained from looking at the *WHDH* case.

WHDH–TV (Channel 5, Boston)[13]

It is generally agreed that the *WHDH* case, which has been in various stages of litigation for over a dozen years, prompted issuance of the 1970 policy statement.[14] The policy triggering factor in this case was the Commission's January, 1969 decision which awarded the broadcast license to a new applicant rather than renewing the incumbent licensee, WHDH.

Briefly, WHDH was challenged on renewal by three new applicants. The Commission held comparative hearings and applied the 1965 policy statement in reaching its decision.[15] In so doing, it disregarded the past broadcast records of all contesting parties finding them 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

[12] See footnote in above table.
[13] 16 FCC 2d 1 (1969). Appeals docketed No. 23514 D.C. Cir., June 16, 1969; No. 23159, D.C. Cir., June 17, 1969. Affirmed by Court of Appeals, (D.C. Cir), Nov. 13, 1970.
[14] *See*, for example, *Broadcasting*, June 1, 1970, 30, which described WHDH as the "already famous" case that led to the 1970 policy statement.
[15] WHDH at 9. ". . . we determined in 1965 that the issuance of a policy statement on comparative hearings would serve a significant purpose as a distillation of our accumulated experience. As noted earlier herein, the policy statement is applicable to this proceeding."

served by a grant of the application of Boston Broadcasters, Inc. * * *, and a denial of the applications of WHDH, Inc. * * *[16]

The industry, replete with cross-media holdings and feeling vulnerable, viewed the decision with understandable alarm. One trade publication looked upon *WHDH* as a precedent which would jeopardize $3 billion in broadcast stations in the country's major cities.[17] The Commission, which is quick today to speak of *WHDH* as *sui generis*,[18] gave little such comfort to the industry at the time of the decision.[19] One commentator suggested that the Commission's initial failure to differentiate *WHDH* from the ordinary renewal proceeding might have caused a general weakening of its renewal authority.[20] In any event, the industry, fearful of a continuation of the *WHDH* policy by the Commission, looked to Congress for protection.

S. 2004[21]

The industry's arguments concerning the harmful effects that would flow from the alleged instability created by the *WHDH* decision were apparently persuasive and in a little over six months after the decision, the Senate Subcommittee on Communications conducted hearings on S. 2004. Described by the industry as a measure to "alleviate 'strike' application chaos" caused by *WHDH*,[22] the bill is designed to restrict the filing of all competing applications. In this manner, situations such as gave rise to the *WHDH* decision would be avoided.

Briefly, S. 2004 provides that if the Commission finds the past record of the licensee to be in the public interest, it shall grant renewal. Competing applications are permitted to be filed only if the incumbent's license is not renewed. According to one commentator, the effect of the bill would be to render existing licenses virtually unassailable to attack from potential competitors.[23] The extremely protective nature of the bill is not surprising when viewed in the light of a trade journal's report which indicates that the "precise legal language" of the bill was suggested by the National Association of Broadcasters in letters to legislative liaison members.[24]

As might be expected, the bill was bitterly attacked in the Senate hearings. It was criticized as being racist, as providing the industry

[16] *Ibid* 12. WHDH measured up poorly under the diversification criteria because its parent, the Herald Traveler Corporation, publishes daily and Sunday newspapers and owns WHDH–AM–FM.

[17] "$3 Billion in Stations Down the Drain," *Broadcasting*, Feb. 3, 1969, 19.

[18] See for example, Commission brief "Suggestion of Lack of Jurisdiction Made Pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure and Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction", at p. 5, filed January 15, 1970, in Civil Action No. 42-70, where the Commission states, "On reconsideration the Commission made clear that WHDH, Inc. was *sui generis* since for reasons stemming from circumstances surrounding the original grant the existing licensee was 'in a substantially different posture from the conventional applicant for renewal of broadcast license.' 17 F.C.C. 2d at 872-873." The Commission also appears to refer to WHDH in the policy statement (see par. 19) and distinguish it from an ordinary renewal when it states: "The policy statement is inapplicable, however, to those unusual cases, generally involving Court remands, in which the renewal applicant, for *sui generis* reasons, is to be treated as a new applicant."

[19] It is quite possible that the Commission did not view it as *sui generis* at the time of the decision. In this regard, one authority speculating over the meaning of WHDH, shortly after the decision, observed, "But the Commission, or its staff, insists that it is a renewal case and tells us that on renewal the same standards should be applied as in an original grant." Jaffe, "WHDH: The FCC and Broadcast License Renewals," 82 Harv. L. Rev. 1693 (1969).

[20] Goldin, "'Spare the Golden Goose'—The Aftermath of WHDH in FCC License Renewal Policy" 83 Harv. L. Rev. 1014, 1019 (1970).

[21] 91st Cong. 1st Sess. (1969).

[22] *Broadcasting*, December 29, 1969, 5. "Strike" is a misnomer unless the application was filed in bad faith. Blaire, "The Permutable Law of Strike Applications," 23 Federal Communications Bar Journal 24, (1969). There is no apparent indication that competing applications filed after WHDH were filed in bad faith.

[23] See Comment, "The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?" 118 U. of Pa. L. Rev. 368, 392 (1970). The New York Times article, see note 5 supra, comments on S. 2004 stating that an analogous change in the election laws would mean that no one could run for public office until the incumbent had been impeached.

[24] *Broadcasting*, April 21, 1969, 60.

with licenses in perpetuity and as being inimicable to community efforts at improving television programming.[25] The Commission itself was closely divided on the bill (4–3) with the majority in opposition, some of whom were urging that competing applications at renewal be retained as a competitive spur.[26]

While the bill received some support in the Congress, rising[27] opposition moved the Commission to take the initiative to ease the *WHDH* fears and confusion by issuing the 1970 policy statement. The Senate Bill was thereafter deferred in favor of the Commission's compromise measure.[28]

The significance of these events is that they reveal the background leading to issuance of the policy statement which, in practical terms, provides the industry with substantially the protection it initially sought through legislation. Understandably, the industry is pleased with this outcome.[29] Both S. 2004 and the new policy award renewal on a unilateral determination of past performance by the licensee, S. 2004 if such performance has been in the public interest and the new policy if such performance has been substantially attuned to the needs and interests of its area. While the new policy permits the filing of competing applications, they are not considered on their own merits until such time as a licensee's performance is found to be insubstantial. The resulting anti-competitive effect of the new policy is tantamount to the restriction against such filing contained in S. 2004.[30]

In the light of this background, the new policy is examined further.

Policy Deprives a Qualified New Applicant of a Statutory Right to a Hearing Recognized by the Supreme Court, Thereby Denying Him Due Process of Law

Communications Act requires hearing[31]

Under the Commission's 1970 policy statement, a qualified new applicant will have no opportunity to be heard *on the merits of his application* unless the incumbent licensee's performance has not been "substantially attuned" to the needs and interests of its area. Upon a finding of substantiality in the incumbent, all other applicants are dismissed without a hearing on their respective qualifications.[32]

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[25] As reported in *Broadcasting*, December 8, 1969, at 23. See Hearings on S. 2004, Subcommittee on Communications of the Senate Commerce Committee, 91st Cong. 1st Sess., December 1969. For a critical analysis of S. 2004 see Comment, U. of Pa. L. Rev., at 401–402, wherein it is concluded that the bill "in its endeavor to promote security in the broadcasting industry and to avoid irrational decisionmaking, would have the effect of protecting licensees rendering mediocre service and eliminating the most powerful available incentive for better broadcasting."

[26] *Ibid.* 25.

[27] *Broadcasting*, Jan. 19, 1970, 22. It won about 20 co-sponsors in the Senate and about 100 supporters in the House.

[28] *Ibid.* 9. According to *Broadcasting*, Jan. 26, 1970, 47, the adoption of the new policy "virtually assured shelving of the bill [S. 2004], which was introduced . . . in response to the broadcasters, backlash to the WHDH–TV decision, and which would give broadcasters even more protection. It would prevent the Commission from even accepting a new application for an occupied frequency until it found the licensee disqualified to operate a station."

[29] *Broadcasting*, Jan. 26, 1970, 47. In commenting on the new policy, it said, " . . . Chairman Burch has already won broadcasters' respect, and probably their thanks, for the manner in which he managed to bring some order out of the confusion created last year in its WHDH–TV decision."

[30] See Note 4 *supra*, regarding the failure of new applicants to file subsequent to the issuance of the new policy. S. 2004 may be more restrictive in other areas not germane to analysis of the new policy. For instance, one commentator suspects that the language of the bill would also prohibit petitions to deny. See Comment, U. of Pa. L. Rev., at 400.

[31] 47 U.S.C. 309 (a) (e).

[32] Policy statement, par. 5 and 14.

The statutory right of a qualified applicant to have a full hearing before denial of his application is clearly set forth in Section 309 (a) and (e) of the Act. Subsection (a) reads as follows:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 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 the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Pertinent portions of subsection (e) read as follows:

> If, in the case of any application to which subsection (a) of this section applies * * * the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing * * * 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 * * *

In short, the Commission must either grant the license application of a qualified applicant, or provide such applicant with a full hearing on the merits. This hearing right exists whether the applicant is contesting with other new applicants or with an existing licensee seeking renewal and to deny him such right is to deny him due process of law.

Ashbacker case interprets section 309 as requiring hearing whenever mutually exclusive applications are filed

In *Ashbacker*,[33] the Commission had before it two applications, one for authority to construct a broadcasting station, and the other to change an operating frequency. The Commission declared that the two applications were "mutually exclusive," because the result of granting both would be intolerable interference for both applicants. The Commission granted one without a hearing and the same day designated the other for hearing.

The Supreme Court held that the Commission had erred in that the Act requires a comparative hearing when mutually exclusive applications are involved. The Court said:

> It is thus plain that Section 309(a) [34] not only gives the Commission authority to grant licenses without a hearing, *but also gives applicants a right to a hearing before their applications are denied.* We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, *the statutory right to a hearing which Congress has accorded applicants before denials of the applications becomes an empty thing.* We think that is the case here. * * * *We only hold that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.* (Italic supplied.) [35]

It is unmistakably clear that renewing an incumbent's license under the 1970 policy statement without giving a qualified new applicant a comparative hearing on his mutually exclusive application

[33] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

[34] Section 309 was amended in 1952, 1960 and 1964. The Act's Legislative History reveals that the amendments dealt primarily with procedure and did not limit the hearing right of Section 309(a) discussed in Ashbacker. The 1952 amendment moved the hearing provision from subsection (a) to subsection (b). The 1960 amendment moved it to subsection (e). H. Rep. No. 1800, 86th Cong. 2nd Sess. (1960) and H. Rep. No. 1351, 88th Cong. 2nd Sess. (1964).

[35] Ashbacker at 330. Although Ashbacker involved competing applications for new broadcast authority, the Court's reasoning is equally applicable to the policy statement.

is directly contrary to the holding in *Ashbacker*.[36] It is equally clear that depriving such applicant of his statutory right to a hearing and an opportunity *to demonstrate his superior* qualifications is a denial of due process of law. Contrary to the Commission's new policy, the Supreme Court's interpretation of Section 309 in *Ashbacker* continues to be the law of the land.[37]

In this regard, two recent opinions of Chief Justice Burger, written while on the Court of Appeals, are worthy of note in view of pertinent references to *Ashbacker*. In the first case,[38] mutually exclusive applications for a *temporary* grant to construct and operate a television station were involved. The Chief Justice commented on the "spirit of the *Ashbacker* doctrine" and its hearing requirement with respect to a temporary grant.

> The basic teaching of the *Ashbacker* case is that comparative consideration by the Commission and competition between the applicants is the process most likely to serve the public. While the *Ashbacker* case dealt with grants for regular operations, rather than temporary, the reasoning of the Court has much force as applied to "temporary" authorizations which last for 2½ to 3 years. A "temporary" grant for such a period so closely approximates a statutory three year license, in which renewal is subject to the same considerations which affect the original grant, that the device of a temporary authority was rightly characterized by the Commission as an "extraordinary procedure".[39]

In the second case,[40] a 1968 decision involving an essentially similar fact situation, Chief Justice Burger specifically cited *Ashbacker* as authority for requiring comparative hearings when mutually exclusive applications for broadcast authority are filed. In speaking of "Ashbacker rights" to a comparative hearing he recognized that those rights include "a full and fair Ashbacker hearing." [41]

On same date policy statement was issued overruling Ashbacker, Commission cited Ashbacker as requiring comparative hearings

The policy statement overruling the *Ashbacker* doctrine was issued on January 15, 1970. On the same date, the Commission filed a brief in U.S. District Court for the District of Columbia citing *Ashbacker* as authority for the very proposition it had overruled with the policy statement. It is particularly ironic that the brief pertained to the issuance of the policy statement.

In this connection, when notice of the impending release of the policy statement appeared in the trade press,[42] Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST), two public interest groups concerned with promoting public participation in radio and television broadcasting, filed a motion to enjoin issuance of the statement. In the Commission's inexplicable answer, filed on January 15, 1970, it affirmed the *Ashbacker* right to a comparative hearing:

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[36] The Commission maintains that the statement does not reflect new policy since it is merely adopting policy formulated in Hearst Radio, Inc., 6 RR 994 (1951) and followed in Wabash Valley Broadcasting Corp., 35 FCC 677 (1963). (Presumably because of the emphasis on past broadcast record—see policy statement, par. 6). But in both Hearst and Wabash full comparative hearings were held. Under the new policy, such would have been prohibited.

[37] Professor Davis observes that the "Ashbacker doctrine," with its requirement of comparative hearings, has grown widely and spread far beyond the communications field where it originated. Davis, *Administrative Law Treatise*, Vol. 1, Sec. 8.12, p. 574 (1958). As an illustration, Ashbacker was the impetus for a Proposed Amendment of Sec. 401(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1371) requested by the Civil Aeronautics Board (CAB) in December, 1968. The bill was designed to bring order to CAB's comparative hearing procedures which frequently involve many parties with overlapping, yet diverse, interests in air routes.

[38] Community Broadcasting Co. v. FCC, 274 F 2d 753 (D.C. Cir. 1960).

[39] Ibid. 759.

[40] Consolidated Nine, Inc. et al v. FCC, 403 F 2d 585 (D.C. Cir. 1968).

[41] Ibid. 589.

[42] "Broadcasting," Dec. 29, 1969, 5.

When two or more otherwise qualified entities apply for the same facilities, a comparative hearing must be held to determine which applicant should be awarded the license. See *Ashbacker* v. *FCC* 326 U.S. 327 (1945). *The comparative hearing requirement applies* not only to multiple applicants for a vacant facility but also *to situations where one or more applications are filed on top of a renewal application.* (Italic supplied.) [43]

Thus, the Commission appears to be arguing against the validity of its new policy on the very day it released it.[44]

Policy Fails To Meet the Public Interest Requirement of Licensing the Best Qualified of Available Applicants

New policy is not directed toward licensing best qualified applicant

By eliminating Ashbacker's comparative hearings and substituting a unilateral determination based solely on the incumbent licensee's past performance, the Commission's new policy is not directed toward licensing the applicant best qualified to serve in the public interest.[45] The broadcast qualifications of competing applicants, no matter how superior they may be, will not even be given a cursory glance if the incumbent's past performance has been found to have been "substantially attuned" to the needs and interests of its area.

This could lead to highly unfortunate results. For example, under the new policy, an incumbent could be granted renewal on past performance at a time when his technical equipment is becoming obsolete and on the verge of collapse. He may have no intention of modernizing his set-up. Moreover, such renewal could occur in the face of a challenge by a vibrant, well-financed, newly-equipped, public-spirited organization. A limited unilateral determination under those circumstances, which would in effect reward obsolescence, completely ignores the public interest. Yet, this and other equally untoward consequences could occur under the new policy.

It is of little consequence that the Commission attempts to inject a degree of quality into its whimsical policy by defining "substantially" as performance which has been "ample," "solid," etc., i.e., more than minimal.[46] The inescapable fact remains that, under this policy devoid of a design to license the best available applicant, a licensee may possess significantly inferior qualifications to those of a competing applicant and still be granted renewal merely by virtue of his incumbency.[47]

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[43] "Suggestion of Lack of Jurisdiction Made Pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure and Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction", at page 3, filed by Commission January 15, 1970, in Civil Action No. 42-70. Contrast the Commission's language in its Memorandum Opinion and Order in In re Application of WPIX, Docket No. 18711, released May 5, 1970, where at page 6 it commented on the effect of the new policy stating that the "comparative issue will be decided *only* if that showing [of being 'substantially attuned'] has not been made." (Italic supplied.)

[44] The Court denied the motion to enjoin on January 23, 1970. It is interesting to note the Commission's argument that the Court did not have jurisdiction to grant the motion because the matter was "too remote and abstract for proper exercise of the judicial function," and moreover, "Plaintiffs are merely speculating about some future action the Commission might take if they take any action at all." *Ibid.* at 8. The remote and abstract "future action" (issuance of the policy statement) took place the very day the brief was filed.

[45] See policy statement para. 17, where the Commission recognizes that under the new policy an applicant willing to provide superior service may not supplant an incumbent who performs substantial but less impressive service. Instead, the Commission suggests the public interest will be served by eliminating the "obvious risks" involved in accepting promises of new applicants over the proven performance of incumbents. This overlooks the fact that incumbents were at some time in the past new applicants also making promises and, moreover, that comparative hearings afford an opportunity to evaluate such promises as well as other areas capable of substantive evaluation.

[46] Policy statement, footnote 1 and par. 9.

[47] While it would not correct this basic defect, one writer observed that the Commission's failure to fill out "substantially" with specific standards is the most serious deficiency in the new policy. He believes the critical obstacle to improving broadcast license and license renewal procedures for forty years has been the failure of the Commission to develop criteria to judge public interest performance. Goldin, Harv. L. Rev. at 1026.

Licensing policy should be directed toward determining which applicant is best qualified to serve in the public interest—this calls for comparative considerations

There are many imponderables involved in broadcast licensing and it is doubtful whether a procedure could ever be devised which would unerringly lead to the licensing of the best qualified applicant. This does not mean, however, that such an objective should not be pursued. Indeed, in carrying out its statutory mandate to license in the public interest,[48] the Commission must focus on determining which applicant is best qualified to serve in the public interest.[49] Commissioner Johnson referred to this obligation of the Commission in his dissent to the policy statement when he said:

> The theory of the 1934 Communications Act was that the public would be served by the best licensees available.[50]

Implicit in a determination of "best" is the need to make comparative evaluations [51] and, prior to overturning *Ashbacker* with the new policy, the Commission carried out this function through comparative hearings.[52] The Supreme Court, in *NBC* v. *FCC*, recognized the comparative process as a means of selecting the applicant capable of rendering the best service to the public. Mr. Justice Frankfurter, in delivering the opinion, said that the Commission's licensing function is not limited to just determining that there are no technical objections to the granting of a license:

> If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity".[53]

Further insight into the nature and purpose of comparative hearings can be gained from the following statement contained in a report of the House Interstate and Foreign Commerce Committee:

> It is in the comparative hearing context that the Commission is afforded an appropriate forum for an exploration of the full range of factors which may contribute to or detract from the ability of a given applicant to serve the public interest. This proceeding permits the Commission to consider in the fullest degree the qualitative elements entering into service to the public. The comparative hearing arises out of a situation wherein there are a number of competing applicants for a single authorization and the Commission must select the one it considers best qualified to serve the public interest. In the initial stages of the proceeding those applicants not meeting the minimum statutory requirements or who may be barred by the multiple ownership rules are excluded. Hence, the remaining applicants will have all established their ability to serve the public interest *and the function of the Commission is to determine which of the applicants is best qualified to do so.*[54] (Italic supplied.)

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[48] 47 U.S.C.307(a)(d).

[49] In McClatchy Broadcasting Co. v. F C, 239 F 2d 15, 18 (D.C. Cir. 1956), the Court said the Commission "has the duty, in choosing between competing applicants, to decide which would better serve the public interest." It is somewhat surprising that the Commission recognizes this statutory requirement in the very document it announces the new policy overturning the requirement. See policy statement, par. 2 where the Commission states that "The statutory scheme calls for * * * an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest."

[50] Johnson, dissent to policy statement, par. 6.

[51] This fact has long been recognized. "[T]he test [of] 'public interest' * * * becomes a matter of comparative and not absolute standard when applied to broadcast stations * * * the Commission must determine from among the applicants before it which of them will, if licensed, best serve the public." 2 Fed. Radio Comm. Ann. Rep. 169-170 (1928).

[52] The Commission continues, under its 1965 policy statement, to use comparative hearings to determine best qualified applicant when licensing is limited to *new* applicants.

[53] 319 U.S. 190, 216-17 (1943).

[54] "Network Broadcasting" H. Rept. No. 1297, Committee on Interstate and Foreign Commerce, 85th Congress, 2d Sess., 59 (1958).

In 1956, then Chairman McConnaughey commented on the Commission's responsibility to formulate criteria pertinent to the selection of the best qualified applicant and thereafter set forth a list of various criteria evaluated in comparative hearings:

> Congress in the Communications Act of 1934 or its several amendments refrained from laying down definitive criteria *to guide the Commission in selecting the best qualified applicant* among several competing for a particular channel or facility. Instead, it left that task to the Commission to work out under the applicable standard, the public interest, convenience, and necessity.
>
> A list of the comparative criteria which have evolved and been employed by the Commission in comparative television cases, would include * * * proposed programming and policies, local ownership, integration of ownership and management, participation in civic acitivities, record of past broadcast performance, broadcast experience, relative likelihood of effectuation of proposals as shown by contacts made by local groups and similar efforts, carefulness of operational planning for television, staffing, diversification of the background of persons controlling, diversification of control of the mediums of mass communications.[55] (Italic supplied.)

It is apparent that such a list only establishes a useful point of reference in enabling the Commission to develop the comparative hearing on a rational basis. The enumerated factors do not constitute a final and complete list of all the criteria which may be usefully employed in making a determination. But it is equally clear that a comparative selection must be made on the basis of all pertinent criteria to enable the licensing of the best qualified applicant:

> A choice between two applicants involves more than the bare qualifications of each applicant. It involves comparison of characteristics. Both A and B may be qualified but if a choice must be made, the question is which is better qualified. Both might be ready, able and willing to serve the public interest. But in choosing between them, the inquiry must reveal which would better serve that interest.
>
> * * * The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. * * * It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors conflicting in many cases.[56]

Unfortunately, the comparative process is not based on an exact science which inevitably selects that applicant who would best serve in the public interest. The criteria, which are varied and broadly defined, have been described by the Court of Appeals as "guiding standards" which the Commission must translate into the statutory public interest standard.[57] Some insight into the nature of the Commission's task of rendering comparative judgments can be gained from looking at the Court's comments in *Pinellas Broadcasting:*

> The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes.[58]

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[55] Letter dated August 30, 1956 from FCC 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).

[56] Johnston Broadcasting Co. v. FCC, 175 F 2d 351, 356–7 (D.C. Cir. 1949). See reconsideration statement, par. 4, and contrast with the language of the Court. The Commission assigns "conclusive weight" to past substantial service thereby eliminating a comparison on other material characteristics such as integration of ownership with management and diversification of control of the media of mass communications.

[57] Scripps-Howard v. FCC, 189 F 2d 677, 680 (D.C. Cir. 1951).

[58] 230 F 2d 204, 206 (D.C. Cir. 1956).

While acknowledging the elusive quality of the relative importance of the various comparative criteria, a House Committee report notes that the Commission itself has nevertheless suggested that it is through the forum of the comparative proceeding that the ultimate refinement of the public interest standard is achieved.[59]

In a concluding comment the Committee report articulates the value of comparative hearings:

> It cannot be too strongly emphasized that the comparative hearing is the one means by which the Commission is enabled to render a judgment which results in the selection of the best qualified licensee and not simply in the licensing of an applicant who meets the minimum statutory requirements. * * *
>
> Loss of the comparative hearing forum [would] deprive[s] the Commission of one of its most effective regulatory devices, despite the inherent weaknesses of any such flexible multivariable system of decisionmaking. Since the comparative proceeding enables the Commission to make a determination on the basis of relative merit, it, at least, provides an opportunity for selecting the best qualified of available applicants. This procedure further provides the Commission with an opportunity for redefining, periodically, the public interest goals of the broadcasting industry and thereby tends to keep the industry sensitive to public needs and desires.[60]

The foregoing discussion of the comparative process is not an apologia for the decisions the Commission has reached in employing it in the past.[61] But it does reflect a recurrent theme, i.e., the Congress, the Courts, and the Commission have continually recognized that the public interest requires licensing of the best qualified of competing applicants, and moreover, that meeting this requirement necessarily involves comparative considerations.

Under the new policy, renewals are granted without weighing the relative merits of competing applicants, and therefore, without taking into consideration which of the competing applicants is best qualified to provide service in the public interest. This adds up to a failure to meet the public interest licensing requirement of the Communications Act.

Policy Unlawfully Eliminates Diversification of Media Control as a Criterion in License Renewals—Raising a First Amendment Question

Diversification no longer considered in renewal proceedings

In *Bamberger Broadcasting Service, Inc.*, a case involving competing applicants for a new facility, the Commission made a statement of general principle which is fundamental to a diversification of ownership policy:

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[59] H. Rept. No. 1297, Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 63 (1958). Even in Hearst Radio, Inc. at 1027, cited as precedent for the new policy, the Commission recognized the value of comparative procedures: "It should be understood that the * * * [comparative hearings] criteria are not ends in themselves, but are primarily guideposts in leading toward a determination of which * * * applicant will better serve the public interest * * *"

[60] *Ibid.* 169.

[61] Much learned comment and criticism has been directed at the Commission for the manner in which it has employed the comparative process. Inconsistency, "rubber stamp" renewals and the failure to develop standards for evaluating criteria are examples of repeated criticisms. For comments pro and con regarding the comparative process, see among others: Grunewald, "Should the Comparative Hearing Process be Retained in Television Licensing?" 13 American U. L. Rev. 164 (1963); Schwartz, "Comparative Television and the Chancellor's Foot," 47 Georgetown L. J. 655 (1959); Irion, "FCC Criteria for Evaluating Competing Applicants," 43 Minn. L. Rev. 479 (1959); Friendly, "The Federal Administrative Agencies: The Need For Better Definition of Standards," 75 Harvard L. Rev. 1055 (1962); Comment, "Diversification and the Public Interest," 66 Yale L. J., 365 (1957); Note "The Criteria Employed by the FCC in Granting Mutually-Exclusive Applications for Television Facilities," 45 Georgetown L. J. 265 (1957); Comment, "The FCC and Broadcasting License Renewals: Perspectives on WHDH," 36 U. of Chicago L. Rev. 854 (1969); Jaffe, "WHDH: The FCC and Broadcasting License Renewals," 82 Harvard L. Rev. 1693 (1969).

The Commission is of the opinion that where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer other factors being substantially equal rather than to the person already having a television station. Under this policy, it is possible for the maximum number of qualified people to participate in television and not have it restricted to a few large interests.[62]

While the Commission has fallen short in the application of this well-intentioned principle in the past,[63] it has now precluded any chance of its application under the new policy in those instances when an incumbent's past performance has been found to have been substantial and his license is accordingly renewed.[64]

Communications Act and the First Amendment call for consideration of diversification of media control

In charging the Commission with the responsibility of licensing in the "public interest," the Congress refrained from laying down definitive licensing criteria. An examination of the Communications Act reveals, however, that this mandate places an obligation upon the Commission to consider diversification of ownership in licensing matters.

With the enactment of the Radio Act of 1927,[65] the Federal Government launched the first comprehensive scheme of regulation over radio communication. Chaotic conditions of interference had existed prior to that time largely because of virtually unrestricted use of the limited broadcast spectrum. This brought about the need for an orderly allocation of frequencies. As the Supreme Court stated in *NBC* v. *U.S.*:

> Regulation of radio was therefore so vital to its development as traffic control was to the development of the automobile.[66]

The system of regulation established by the Congress was designed to preserve nationwide competitive broadcasting. This was discussed by the Supreme Court in *Sanders Brothers Radio Station:*

> The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.
>
> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the act recognizes that the field of broadcasting is one of free competition.[67]

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[62] 3 R.R. 914, 925 (1946).

[63] See for example Hearst Radio *supra*, where the Commission renewed an incumbent with a mediocre past programming record, and with controlling interests in one television, 3 AM and 2 FM stations, plus newspaper interests. It did so in the face of a challenge by an apparently highly qualified applicant with no broadcast affiliations.

[64] Policy statement, para. 13.

[65] 44 Stat. 1162 (1927). The Radio Act of 1927 with its several amendments was later included under Title III of the Communications Act of 1934. S. Rept. No. 781, 73rd Cong., 2nd Sess. 6 (1934). The objectives of governmental regulation have remained substantially the same since 1927. *FCC* v. *Pottsville Broadcasting Co.* 309 U.S. 134, 137 (1940).

[66] 319 U.S. 190, 213 (1943).

[67] 309 U.S. 470, 474 (1940).

An industry with limited access, such as the broadcasting industry, is particularly vulnerable to anticompetitive practices and, indeed, the Communications Act, was enacted "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field." [68]

But Congressional apprehension was deeper than a concern for undue concentrations of economic control because the exclusiveness of broadcasting brought with it perhaps the most persuasive as well as pervasive method of communications ever known to man A foreboding awareness of the power of this media was already evident pr or to enactment of the Radio Act.

> There is no agency so fraught with possibilities for service of good or evil to the American people as the radio. As a means of entertainment, education, information and communication, it has limitless possibilities * * * [it] can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership * * * American thought and American politics will be largely at the mercy of those who operate these stations.[69]

Certainly, monopoly in broadcasting would negate the principle embodied in the First Amendment and fundamental to communication in a democratic society, that "* * * the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *" [70]

Thus, when Congress adopted the Communications Act, it took steps to prevent any form of monopoly. It proceeded on the theory that maximum private enterprise competition would best promote the public interest by providing a wide diversity of program sources; a market place for the interplay of ideas and opinions; and a means for community self-expression.[71]

Congress specifically focused on diversification of ownership as a public interest factor to be considered in licensing when in Section 314 of the Act, "Preservation of Competition in Commerce," it proscribed an authorization if "the purpose is and/or the effect thereof may be to substantially lessen competition or restrain commerce." Moreover, Section 313 of the Act makes the antitrust laws specifically and fully applicable to broadcasting:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to * * * interstate and foreign radio communications.[72]

The antimonoply policy evidenced in these sections bears upon the mandate of Section 307 to license in the public interest, for it is a well established canon of statutory construction that a statute must be read as a whole.[73] The Supreme Court recognized this fact in *Pottsville Broadcasting Co.* when it observed that a prime purpose of Congress in setting up a system of regulation over broadcasting was the pre-

[68] FCC v. Pottsville Broadcasting Co. 309 U.S. 134, 137 (1940).
[69] Comments of Representative Luther A. Johnson prior to passage of the 1927 Radio Act. 67 Cong. Rec. 5558 (1927).
[70] Associated Press v. U.S. 326 U.S. 1, 20 (1945).
[71] "The Television Industry" H. Rept. No. 607, Antitrust Subcommittee of the Committee on the Judiciary, 85th Cong., 1st Sess. 2 (1957).
[72] Although the Commission does not have primary jurisdiction to enforce the antitrust laws, it acknowledged in its Report on Chain Broadcasting (1941), cited in NBC, that "* * * [it] should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve." 319 U.S. 190, 223.
[73] "The Communications Act must be read as a whole * * *", U.S. v. Storer Broadcasting Co., 351 U.S. 192, 203. (1956).

vention of overconcentration in the communications field. The court said, "To avoid this [monopolistic domination] Congress provided for a system of permits and licenses." [74]

In this regard, it is interesting to note a recent argument of the Department of Justice wherein it commented that the Commission's renewal licensing responsibility requires the weighing of competitive factors in making public interest determinations.

> Before the Commission may grant *or renew* a broadcast license, it must find that such an action will serve the public interest, convenience and necessity. The courts have held that one important element in determining the effect on the public interest of a broadcast license renewal is whether such a grant or renewal will have any adverse effect upon competition. [75] (Italic supplied.)

Congress has continued to express the view that it is incumbent upon the Commission to consider competitive factors in licensing matters,[76] and the Commission itself has weighed such factors in the past.[77] It is not suggested that the weight assigned to diversification by the Commission has always been consistent or wholly responsive to the needs of the public,[78] but at least it was acknowledged as a critical consideration in licensing.[79]

The 1965 policy statement provides a good example of an earlier, contrasting, Commission pronouncement on diversification. It highlighted First Amendment considerations and listed diversification as one of the principal comparative factors. The Commission said:

> Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities and
>
> Diversification is a factor of primary significance since * * * it constitutes a primary objective in the licensing scheme.[80]

In a society dedicated to the free exchange of ideas, it is imperative that the public not be placed in a position of dependence upon limited sources for its day-to-day information, if alternatives in the public interest are available. Justice Learned Hand observed that the interest protected by the First Amendment presupposes "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [81]

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[74] 309 U.S. 134, 137.

[75] Brief of Department of Justice as Amicus Curiae, p. 24, dated June 10, 1970, filed in FCC Dockets No. 16679 and 16680, In re Applications of RKO General, Inc. et al. And in FCC v. RCA, 346, U.S. 86, 94 (1953), the Supreme Court said, "There can be no doubt that competition is a relevant factor in weighing public interest"; and in Mansfield Journal Co. v. FCC, 180 F 2d 28, 33 (D.C. Cir 1950), the Court of Appeals said: "Monopoly in the mass communication * * * is contrary to the public interest * * *".

[76] H. Rept. No. 607, 2.

[77] H. Rept. No. 1297, 115.

[78] See Comment "Diversification and the Public Interest; Administrative Responsibility of the FCC", 66 Yale L.J. 365, 369 (1957) wherein it was pointed out that despite contrary administrative and judicial pronouncements, the FCC generally fails to give proper weight to diversification as an affirmative element in establishing a public interest standard.

[79] Diversification is significant for several reasons. Friendly, in "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 Harvard L. Rev. 1055, 1068 (1962), said a diversification policy in licensing might have four objectives: (1) prevent undue control over thought and opinion; (2) preserve independent stations from destructive economic power of multi-medium or multi-station operators; (3) prevent exercise of undue economic power on advertisers or undue preference to the large advertiser, and (4) maximizing largest number of people in the industry. See also Note, "Diversification in Communication: The FCC and its Failing Standards," 1969 Utah L. Rev. 494, 495, for view that of the functions delegated to the Commission the most important in providing an impartial forum is its licensing power.

[80] 1965 policy statement, par. 5 and numbered par. 1. See footnote reference to *Associated Press* v. *U.S. supra*, to the effect that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Also cited are *U.S.* v. *Storer Broadcasting Co.*, and *Scripps-Howard Radio, Inc. supra*, for the proposition that it is important in a free society to prevent concentration of control of the sources of news and opinion and, that it is equally apparent and well established, that government should not create such a concentration.

[81] *U.S.* v. *A.P.* 52 Fed. Supp. 362, 372 (S.D.N.Y. 1943). According to Levin, *Broadcast Regulation and Joint Ownership of Media* (1960), 29, the First Amendment is increasingly coming to be defined in terms of the community's right to hear all views rather than the media's right to be free from governmental influences.

In *Red Lion*, the Supreme Court recently expressed it as follows:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.[82]

By eliminating diversification as a licensing criterion, the Commission has radically departed from the philosophy of its 1965 statement where it declared diversification a public good. In so doing, it has not only overridden its statutory directive but it has raised a serious First Amendment question. If a primary purpose of diffusion of mass media control is the protection of the public's right to receive the widest possible dissemination of information from diverse and antagonistic sources,[83] then that principle should be considered in all licensing situations, regardless of whether or not incumbent licensees are involved. To do otherwise, is to subordinate First Amendment rights to the private interests of existing station holders.

Commission fails to justify elimination of diversification as a factor in license renewals

In view of statutory and First Amendment considerations, it seems highly unlikely that elimination of the diversification factor could be justified. In its attempt to do so, however, the Commission declares that "* * * the renewal process is not an appropriate way to restructure the broadcast industry." [84] But is this justification for eliminating diversification? Is there no standard which could be applied in renewals giving a balanced consideration to diversification in furtherance of the public interest? Certainly, instances will arise when judicious application of diversification criteria in license renewals would work for the public good even though restructuring would occur. The policy statement precludes this possibility.

The Commission proposes, as an alternative, that questions of diversification be handled under rule-making procedures such as its multiple ownership rules, e.g., its "one-to-a-customer" proceeding (Docket No. 18110) which is a proposed revision of existing rules. The Commission observes that if restructuring should occur under these rules, it can do so with proper safeguards "including most importantly an appropriate period for divestment." [85] But what prevents the development of similar safeguards for use in license renewals employing application of diversification criteria if such would result in a restructuring of the industry?

Clearly, multiple ownership rules provide diversification in the industry. They do not, however, reach all situations where diversification is a legitimate and necessary consideration.[86] Licensing proceedings, whether new or renewals, afford this opportunity.[87]

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[82] *Red Lion Broadcasting Co.* v. *FCC*, *395 U.S. 367, 390 (1969)*.
[83] Associated Press, 20.
[84] Policy statement, par. 13.
[85] *Ibid.*
[86] See Comment, 66 Yale L. J. at 372, for view that multiple ownership rules have been more of a hindrance than a help in the development of an affirmative diversification policy. Admitting that these rules rigidly proscribe the number of ownerships, they do not sanction diversification as an end in itself. In short, the Commission has been willing to license any applicant whose mass media holdings do not exceed the limits set by the rules.
[87] In acknowledging the importance of diversification in comparative hearings involving new applicants under the 1965 statement and rejecting it as a factor in renewals, the Commission has taken the position that once a party successfully overcomes the diversification hurdle as a new applicant and is awarded a license, he is henceforth immune from comparison on this point regardless of the number of interests he may subsequently acquire (limited, of course, by existing multiple ownership rules), and regardless of how comparatively inferior he may be with respect to the diversification issue upon renewal.

Even if proceedings such as "one-to-a-customer" are eventually adopted and the multiple ownership rules are thereby extended, there will still be the need to weigh diversification in comparative hearings involving competing applicants who are not excluded by such rules.[88] In short, while multiple ownership rules proscribe effective limitations upon concentration insofar as they extend, they do not provide a rationale for eliminating diversification as a criterion in licensing matters.

NEW POLICY CREATES A STABILITY, IN CONTRAVENTION OF THE THREE-YEAR STATUTORY LICENSE LIMITATION, WHICH MAKES SECURITY OF THE PRIVATE INVESTMENT OF LICENSEES PARAMOUNT TO THE INTERESTS OF THE LISTENING AND VIEWING PUBLIC AND WHICH STIFLES ANY OPPORTUNITY FOR A NEWCOMER TO ENTER THE BROADCAST BUSINESS

Stability created by new policy is contrary to the Communications Act

The untenable nature of the stability created by the new policy is readily apparent in the Commission's ill-founded pronouncement that the public interest will be served by a balancing of two factors embodied in the new policy; namely (1) the spur of potential challenge and (2) the maintenance of "predictability and stability" with respect to broadcast operations.[89] Since the new policy insulates industry members from the challenge of competitors,[90] the spur is illusory and there is no balancing. It is contended that such a policy, which awards renewal solely on the basis of substantial past performance, creates interests in perpetuity which are not only contrary to the spirit but also the letter of the Act.

The express terms of the Act, as well as the statutory history of its predecessor Act,[91] establish beyond question the temporary nature of the broadcast license. The license term is limited to three years and, although the licensee may renew,[92] he expressly waives any claim to the use of a frequency predicated on prior use.[93] To remove all doubt, the Act states as its purpose the provision of broadcast channels for the use, "but not the ownership thereof" by licensees.[94]

The Supreme Court has been unequivocal in its interpretation of these provisions of the Act. The Court cited them in *Ashbacker* and concluded that "No licensee obtains any vested interest in any frequency."[95] Similarly, in *Sanders Brothers Radio Station*, the Court said:

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[88] According to *Television Digest*, March 30, 1970, 1, "one-to-a-customer" has little chance of becoming final. It stated that the 4-3 decision to issue the proposed rule will be affected by the expiration of Commissioner Cox' term in July, 1970. *Broadcasting*, June 22, 1970, 79, notes that the industry is making every effort to reverse the proposed rule and has requested an extension of six months to file comments which, if accepted, will permit filing through 1970.

[89] Policy statement, para. 3.

[90] See Note 4, *supra*, pointing to absence of competing applications being filed in television license renewals since release of policy statement.

[91] 68 Cong. Rec. 3027 (1927). Senator Dill, one of the primary supporters of the first law to regulate broadcasting, argued that the basic principle of frequency allocations, the public interest, convenience and necessity, precluded licensee contentions of vested rights.

[92] 47 U.S.C. 307(d).

[93] 47 U.S.C. 304 provides: "No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

[94] 47 U.S.C. 301 provides in part: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

[95] 326 U.S. 327, 331.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.[96]

Commission fails to justify stability imposed by new policy

The Commission states that "The broadcast field thus must have [the] stability [provided by the new policy], not only for those who engage in it but, even more important, from the standpoint of service to the public." [97] The Commission suggests that unless greater protection is afforded to the economic investments of broadcasters, "it will simply not be possible to induce people to enter the field." [98] No evidence has been advanced in support of this speculation and events seem to reveal a contrary effect. In the year following *WHDH*, the period of alleged instability, eight television licenses were challenged on renewal by competing applications [99] while in the ten month period, following issuance of the new policy, a period of intensified stability, none were so challenged.[100] This seems to indicate that there is a greater inducement for applicants to attempt to enter the field when there is opportunity for challenge on a competitive basis. The new policy does not afford this opportunity and has already had the profound effect of discouraging potential applicants from filing in renewal situations.

But what about applicants filing and competing for a new or vacant facility? Would there be a dearth of such applicants, as the Commission seems to suggest, if the degree of stability that existed prior to the new policy were maintained? Had industry instability become so great that potential new applicants refused to invest in broadcast facilities for fear of losing the station three years hence at time of renewal? [101] There has been no indication that such was the case and here, too, the Commission's supposition appears to be based more upon conjecture and unjustified fears.[102]

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[96] 309 U.S. 470, 475.

[97] Policy statement, para. 4.

[98] *Ibid.*

[99] The Commission may be referring to some of these competing applicants as "opportunists" (see policy statement, para. 4) although there is no indication that any of their applications were filed in bad faith. If strike applications are an industry problem they should be dealt with in a manner consistent with the public interest and not with an anticompetitive licensing policy. For example, legislation might provide that once the Commission determined a bad faith application had been filed, it be required to forward the information to the proper law enforcement agency for prosecution. Appropriate statutory penalties might discourage continuation of such practices. It should be noted that the renewal process itself affords some protection against strike applications. See interview of former Chief Evelyn Eppley of the Commission's Renewal Branch reported in *Television Age*, August 25, 1969, 72, for comment that only bona fide applicants whose qualifications are checked out by the Broadcast Facilities Branch are allowed to file on top of a license renewal, and that these should not be regarded as harrassing or strike contestants. In observing that frivolous challenges will be few, the Chief is quoted as saying: "It takes from $100,000 to $250,000 to make a serious effort to challenge the license of a major broadcast facility. I don't think many people are going to risk this kind of money."

[100] See Note 4, *supra*.

[101] An industry, in which 8 out of approximately 250 television license renewals (3%) were challenged with competing applications, during the year preceding the policy statement, can hardly be described as unstable. One study, critical of the increased stability under the new policy concluded, after examining pre-policy statement stability "that the Commission's past decisions [*including WHDH*], made in the comparative context, evince a stability, which belies the Commission's fears and there is no need to take further steps to 'stablize' the industry [through the new policy]." Report of the Mass Media Law Study Group, Ch. II., 45 Georgetown U. Law Center (1969-1970). Pre-WHDH stability was the subject of comment by Stapleton, "Intangible Assets and the Television Industry," 45 Taxes 685, 686 (1967). He observed that due to the scarcity of renewal denials, the Commissioner of IRS had ruled television licenses as assets of indeterminate duration. (Rev. Rul. 56-520, 1956-2 CB 170). This ruling was upheld in KWTX Broadcasting Co., Inc. v. Commissioner, 272 F. 2d 406 (D.C. Cir, 1959). The lower court noted that the FCC had never denied an application for renewal of a television license to that date and in the preceding 30 years had only denied 19 applications for renewal of radio licenses.

[102] By suggesting that it would be difficult to lure people into the broadcasting business if pre-policy statement conditions continued to exist, the Commission raised the threat of loss of service. While the public need for continuity of service is great, it is doubtful whether such a need could justify a policy which is otherwise contrary to the public interest. See for example Clarksburg Publishing Co. v. F.C.C. 225 F 2d 511, 522-23 (D.C. Cir. 1955) where the Court said ". . . we think Congress did not intend that the Commission should abandon consideration of long range public interests in order to further short and perhaps doubtful ones * * * [U]nless the Commission is properly assured that its action will serve the public interest, it should not make any grant.

We recognize that compliance with the procedural and substantive requirements of the Act may have the effect of * * * depriving the people of Clarksburg of immediate local TV service. But that consideration does not, we think, justify a grant which the Commission * * * may determine is contrary to the public nterest."

Even assuming *arguendo* that the industry is in need of greater stability than existed prior to issuance of the 1970 statement, the immutable stability imposed by the new policy is unwarranted. In its concern over a lack of inducement for motivated people to enter broadcasting, the Commission has overlooked the highly lucrative aspects of the industry. It is not unreasonable to expect that licensees and prospective licensees, who are capable and desirous of providing high standard broadcasting, will assume a considerable degree of risk to be involved in this financially attractive business where investment costs are recouped early and profits are sure and swift.

Indicative of the lush profits generated by some stations in major markets is the fact that "FCC licensees, particularly owners of multiple television stations * * * [have been provided with] the extra capital with which to buy the New York Yankees (CBS), Random House (RCA), or Northeast Airlines (Storer)." [103] Commissioners Cox and Johnson commented on this aspect of broadcasting in a recent statement:

> Broadcasters receive from the Government a license which constitutes, especially in the case of television, a grant of great power and wealth, 'a license to print money' * * * The television industry averages about 100 percent return on depreciated tangible investment and about 40 percent on gross revenues * * * The Government does not grant or preserve this profitable monopoly just in order to indulge the private interests of its licensees.[104]

Almost all broadcasters are engaged in a profitable enterprise; some reap monetary harvests. For example, WCBS–TV in New York recovered 2,290 percent of its total investment in tangible broadcast property in 1955 alone.[105] In 1968, three networks and 488 VHF stations reported revenues of $2,430 million and before tax profits of $524 million. Moreover, revenues from television broadcasting have expanded steadily. In the past 20 years, they have never failed to exceed the previous year's level; between 1958 and 1968 they increased from $1,030 million to $2,521 million, a gain of over 140 percent.[106] In 1969, television broadcasting revenues rose 10.9% above 1968 to $2,796 million, an increase in profits of 11.9%. [107]

Thus, in a short period of time, a licensee will normally have been the recipient of substantial profits. Naturally, if he is defeated upon renewal, the opportunity to continue the windfall would be lost.[108] But then, Congress never intended that an unequivocal right to a perpetuitous proliferation of profits should accompany the awarding of a broadcast license.

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[103] Johnson, "The Media Barons and the Public Interest—An FCC Commissioner's Warning," *Atlantic*, June 1968, 43, 48.

[104] "Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study" (A statement of Commissioners Cox and Johnson on the occasion of the FCC's renewal of licenses of Oklahoma broadcasters for a three year term beginning June 1, 1968) 14 FCC 2d 1, 8, 9 (1968). (Hereinafter cited as Oklahoma Study.)

[105] "Hearing on Monopoly Problems in Regulated Industries Before the Anti-trust Subcommittee of the House Committee on the Judiciary," 84th Cong., 2d Sess., 3352 (1957).

[106] "Television Broadcast Financial Data" (1968) *FCC News*, August 6, 1969, Tables 15 and 1–B.

[107] "Television Broadcast Financial Data" (1969) *FCC News*, July 24, 1970, Tables 1 and 2. Contrast this with a profitability growth of 3.1% for all industrial corporations in 1969. *Fortune*, May, 1970. Television broadcasting licensees are more profitable per dollar of sales than any major segment of the U.S. manufacturing industry. See Table 5 of "Television Broadcast Financial Data" (1969) and p. 8 of "Quarterly Financial Report for Manufacturing Corporations" First Quarter, 1970, prepared by the Federal Trade Commission and Securities and Exchange Commission.

[108] The licensee continues to operate the facility while his renewal is contested. Thus he will continue to profit during that period, which on occasion may be of protracted length, e.g., WHDH. The following statistics compiled from Television Factbook (Stations Volume) 1968–1969, were set forth in the Comment U. of Pa. L. Rev. Footnote 121, to show that the chances of a challenge to a station which has not been able to recover its full price are small. 43 VHF stations, out of 157 in the 50 largest markets, have been purchased by the present owners since 1957. Of these only 8 will have had less than 6 years to recover the purchase price when they are next vulnerable to challenge. Two of the 8 stations will have had 4 years, and the other 6 will have had 5 years. This does not include the period of operation during the comparative hearings and the court appeals.

In the light of these earnings figures, and in the absence of substantiating data, it is difficult to accept the Commission's proposition that the industry had become so unstable that it would be impossible to induce people to enter it and render public service broadcasting. At the same time, however, it is acknowledged that a meaningful degree of stability is needed for effective functioning of the industry. Stability, therefore, just as diversification and other factors inherently involved in public interest determinations should be given careful consideration in licensing matters. Obviously, the Commission's arbitrary elevation of stability as the controlling philosophy in license renewals is not reflective of such a balanced consideration.

In adopting a policy with industry stability as the primary objective, the Commission evidences an undue concern for the economic well-being of broadcasters, contrary to the landmark *Sanders* case which held that anticipated financial injury to broadcasters from new competition is not in and of itself a relevant public interest consideration.[109] In *Sanders*, the Supreme Court said:

> Plainly, it is not the purpose of the Act to protect a licensee against competition but to protect the public . . .
> . . . If such economic loss [resulting from competition] were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives . . .[110]

Even when *substantial* broadcast investments are subject to license renewal,[111] the public interest and not industry stability must remain the Commission's paramount consideration.[112] In *Pottsville Broadcasting Co.*, the Court said:

> Thus it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license just as in deciding whether to issue it in the first place, the Commission must judge by the standard of 'public convenience, interest or necessity.'[113]

The Commission acknowledges that in preserving industry stability under the new policy, some applicants willing to provide a superior service may be denied broadcast licenses.[114] This is clearly in derogation of the public interest.[115] Under a policy evincing such a degree of stability the Commission treats broadcast licenses as property rights, and in so doing, it has lost sight of the fact that a broadcast license is a "public trust" and that ". . . broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the

[109] 309 U.S. 470. The Court of Appeals in Carroll Broadcasting Co. v. FCC, 258 F 2d 440, 444 (D.C. Cir. 1958) stated that the broadcaster has the "heavy burden" of showing that competition will produce a diminution or destruction of service to the public before it becomes a factor to consider in the overall public interest determination.

[110] *Ibid.* 475, 476.

[111] Policy statement, para. 4.

[112] Problems associated with industry instability should be approached in a manner consistent with the public interest. For instance, rather than installing a level of stability virtually precluding chance of loss of license as the Commission has done under the new policy, an equitable disposition plan could be devised aimed at reducing the licensee's economic loss accruing from successful challenge. Licensee redress could take various forms. A successful challenger might be required to reimburse the incumbent in an amount equal to his investment in tangible broadcasting assets and his costs and expenses in prosecuting his unsuccessful application. He might also be required to assume some, if not all, of the licensee's long-term obligations. See for example Comment, U. of Pa. L. R. at 396.

[113] 309 U.S. 134, 138.

[114] Policy statement, par. 17. "We recognize that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated there are obvious risks in accepting promises over proven performance at a substantial level, and *we see no way, other than the one we have taken, adequately to preserve the stability and predictability* which are important aspects of the overall public interest." (Italic supplied.) See Note 45, *supra*.

[115] See section "Policy Fails To Meet The Public Interest Requirement of Licensing The Best Qualified of Available Applicants," *supra*, p. 9.

highest standards which are embraced in the public interest concept." [116]

Stability may contribute to lower quality broadcasting

The stability imposed by the new policy will tend to diminish, if not destroy, any competitive element that previously existed in renewal situations [117] and the loss of this important factor may contribute to a lowering of broadcast service and program quality. Once a licensee maintains substantial service under the new policy and thereby gains immunity from comparative challenge, he no longer has an economic incentive to upgrade services and quality or to innovate new public interest programming. Unfortunately, human nature being what it is, some licensees will undoubtedly "aim" for the minimum requirements of "substantiality," thereby receiving both an escape from challenge and also the highest ratio of economic return.[118] The obvious victim in all this is the listening and viewing public.

Under a more competitive system, a licensee would have more reason to believe that his grant may be subject to successful challenge if he neglected public interest considerations. A greater possibility of competitive challenge increases motivation to provide improved service and higher quality programming. This concept is basic to our economic philosophy. Generally, free competition tends to produce more quality, or more variety, or more ingenuity, whatever the need may be. The substantiality concept is an anathema to this philosophy because it stifles competition and fosters a contrary effect.[119]

Moreover, under the new policy a licensee is entitled to renewal on the basis of less than past substantial service, i.e., minimal service, provided no competing applications are filed.[120] Since the new policy has the effect of suppressing competition, it appears that minimal service will generally be sufficient for renewal.[121]

Loss of competition under the new policy is also likely to produce less sensitivity to community needs. The recent report of the U.S.

[116] Office of Communications of the United Church of Christ v. FCC, 16 RR 2d 2095, 2103 (D.C. Cir. 1969). The Commission has shown a proclivity in the past to treat broadcast licenses as well as construction permits as property rights. Statistics of Commission approved station sales as well as the Overmyer transfers demonstrate this fact. See "Trafficking in Broadcast Station Licenses and Construction Permits," H. Rept. No. 91-256, Committee on Interstate and Foreign Commerce, 91st Congress, 1st Session, 17 (1969). In F. L. Crowder v. FCC, 130 U.S. App. D.C. 198, 200 (1968) the Court said, "a broadcast frequency is not a homestead which after five years belongs to the settler for whatever use he desires. Rather, it belongs to the public, who through the Commission, award its use to a licensee to operate consistent with the public interest."

[117] Johnson Dissent to Policy Statement, par. 6: "What the public loses by this statement can be summarized in the word: 'competition.' "

[118] The tone of the new policy is consistent with mediocrity. See for example par. 10: "Thus, the renewal applicant will not have to demonstrate that his past service has been 'exceptionally' or 'unusually' worthy."

[119] In Docket No. 18811, released March 16, 1970, the Commission said, "A constantly improving service to the public requires *that all competitive elements within the industry should be preserved.*" (Quoting from its Report on Chain Broadcasting, Docket No. 5060, 48).

[120] See Policy Statement, Footnote 1, where the Commission defines a situation involving minimal service as "one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications * * *"

[121] A recent indication of the Commission's insensitive measure of minimal is reflected in In re Application of Star Stations of Indiana, Docket No. 16612 (1969) where it concluded that a licensee had "minimally met the public interest standard." In so doing, it overturned the decision of a hearing examiner who had denied renewal on the basis of a record he found "so offensive to the public interest that there appears to be no reasonable alternative to the action [denial] * * *" (See Conclusions of Hearing Examiner Thomas H. Donahue). Joined in dissent by Commissioner Cox, Commissioner Johnson commented as follows on the Commission's decision: "The result reached here is truly shocking. In an astonishing opinion, the majority has concluded that, although the licensee of WIFE (AM) in Indianapolis, Indiana fraudulently deceived its clients with respect to certain promotional contests and bilked its advertisers of more than $6,000 in advertising revenues (all during a one-year probationary license renewal period), the licensee's operation has nevertheless 'minimally met the public interest standard' (majority opinion, para. 8) and its licenses should be renewed. If fraud and deception of more than $6,000 are 'minimally' in accordance with the public interest, then I think it must be apparent to all that the FCC's attempts at 'serving the public interest, are themselves without even minimal standards." (See pars. 1 and 2 of Dissent.)

Commission on Civil Rights commented on this aspect of the new policy. It pointed out that competitive proceedings can be an effective mechanism in bringing about greater racial and ethnic sensitivity in programming, nondiscriminatory employment practices, and other changes which otherwise might not take place. In short, the report said it "is precisely the threat of competitive applications [eliminated under the new policy] which will stimulate broadcasting stations to be more responsive to the community." [122] The Commission implies that community needs will be met under the new policy which provides that a broadcaster's license will be renewed only if its past service has been "substantially attuned to meeting the needs and interests of its area." The Commission does not disclose, however, the manner in which these "needs and interests" will be determined. Previously employed criteria in renewal proceedings such as integration of management and ownership which tended to safeguard community interests [123] have been discarded under the new policy.

Comment made with reference to S. 2004 indicates that broadcast quality may deteriorate under the new policy for another reason. It was suggested that in the absence of a comparative process under S. 2004 the Commission would not know whether anyone could provide better services than the licensee and that under such circumstances it would be difficult for the Commission not to accept mediocre programming as in the public interest.[124] This theory applied to the new policy, which has virtually eliminated the comparative process, suggests that mediocrity would become acceptable under the "substantiality" concept.[125]

Commission's pledge to maintain quality, i.e., "truly substantial service," must be viewed in light of past "rubber stamp" renewal policy

The Commission pledges that it will administer the new policy with consistency and determination and, in so doing, will develop and hold to a solid concept of substantiality.[126] The Commission's past record on routine renewals, however, developed in the face of similar high-sounding pronouncements, does not inspire confidence in this pledge.

In this regard, the Commission has delegated authority to its Broadcast Bureau to carry out its renewal function. The Bureau's authority extends to granting renewals for the normal 3-year license term if, among other things, the renewal applications accord with Commission policy and are not mutually exclusive with other applications.[127] The Renewal Branch, a subdivision within the Bureau, has the specific responsibility of passing judgment on the 7,599 broadcast

[122] "Federal Civil Rights Enforcement Effect," A Report of the U.S. Commission on Civil Rights 1970, hereinafter referred to as Civil Rights Report, at 861.

[123] See for example, 1965 Policy Statement numbered para. 2, where the Commission states that "there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station."

[124] See Comment, U. of Pa. L. Rev., at 401.

[125] The new policy may contribute to lower broadcast quality in yet another manner. As the policy perpetuates existing interests and asset values grow, economic pressures will undoubtedly build to protect them. This could bring about a detrimental trimming of operational costs and an excessive increase in commercialization resulting in a diminution of broadcast quality. (Asset values will also increase as a result of recent FCC action to increase broadcasting fees $20 million over previous fees of $4.5 million. Reported in *Broadcasting*, 17, July 6, 1970.)

[126] Policy statement, par. 20.

[127] Statement on Organization, Delegation of Authority 47 CFR 281(a)(1).

licenses [128] that come up for renewal on a geographically staggered basis during every three year period.[129]

The Commission's role in the renewal process is to approve or disapprove the actions of the staff. Commissioners Cox and Johnson, who have become increasingly critical of the obvious inadequacy of this procedure, have described it as a "rubber stamp" operation.[130] They commented as follows on the Commission's renewal procedure in connection with group renewals granted to Oklahoma stations in 1968:

> The process of review remains. But it is a ritual in which no actual review takes place. Every 2 months a geographical block of broadcast license renewal applications are presented to the Commission's staff. Each batch of renewals contains all the licenses within an area up to three states. The licensees file their answers to lengthy forms * * * This entire ritual * * * is a sham. The Commission staff acting on delegated authority, routinely grants all renewal applications except for the few whose draftsmen were inexperienced and hence made technical mistakes in filling them out * * * But programming deficiencies, even the most flagrant indifference to the local service obligations imposed by the Communications Act, raise no eyebrows.
>
> The Commissioners themselves play almost literally no role at all. We simply note that the staff has completed its processing of the applications, doing little more than nod to the sketchy memoranda as they pass our desks.[131]

Commissioner Johnson castigated the renewal process in like fashion in a dissent to group renewals granted to broadcasters in Iowa and Missouri, also in 1968:

> These (renewal) submissions are "processed" in a physical sense. But scant attention is paid to their content * * * The Commission has solemnly found all to be serving in the public interest and is renewing their licenses * * * For this Commission to sanction such cynical squandering of the valuable largess it dispenses is a shameful fraud on the public.[132]

These particular statements were prompted in part by the poor performance of some stations whose licenses had been routinely renewed. For instance, the following statistics pertain to the 10 commercial TV licenses renewed in the State of Oklahoma: two stations devoted no time to public affairs programming; three carried less than 8 hours of news per week; only one devoted as much as two hours per week to public affairs programming; no single regularly scheduled prime-time program devoted to presentation, analysis or discussion of controversial issues of public importance was broadcast in the entire state; and not one hour per week of locally originated programming in prime time, other than news, weather and sports, appeared in the entire state. Other than news, radio provided no public affairs programming.[133]

A similar finding was noted in connection with the Iowa-Missouri renewals. Of the 165 standard broadcast and 29 television licenses

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[128] 1970 Broadcasting Yearbook.

[129] Former Chairman Ford described the staff operation as follows: "We have about six employees who process these renewal applications at the rate of about nine a day so that about 5½ hours is spent appraising the past 3 years' operation and reviewing the proposals for the next 3 years, examining the file for complaints, etc. You can, therefore, see that no real examination is made unless this review discloses discrepancies and even then the broadcaster may be unaware of the discrepancies until they are called to his attention." H. Rept. No. 1258, Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. 15 (1960). The staff has more recently been described as consisting of six lawyers, five broadcast analysts, two accountants and three engineers, *Television Age*, August 25, 1969, 72.

[130] Statement of Commissioners Cox and Johnson made in connection with group renewals granted to D.C., Md., Va., and W. Va. licenses in October, 1969.

[131] Oklahoma Study, 8.

[132] 11 FCC 2d 810, 811 (1968). Commissioner Johnson's dissent to Iowa-Missouri renewal

[133] Oklahoma Study, 12–13.

renewed were three standard stations and two TV stations which proposed to devote less than 5% of their time to news; 11 of the radio broadcasters and three of the TV broadcasters proposed less than 1% to public affairs programming; and 10 radio and two TV stations proposed less than 5% of time to public affairs and "other" (agriculture, instructional and religious) programming.[134]

The "rubber stamp" renewing of such low quality broadcasting is particularly disturbing when viewed in the light of Commission statements concerning the obligations of licensees to provide public service broadcasting. In other words, the Commission has not required of licensees the high caliber performance that it publicly espouses. Commissioners Cox and Johnson pointed this out in commenting on the poor quality Oklahoma licenses that had been renewed and, in so doing,[135] referred to the Commission's 1960 statement on programming wherein it reaffirmed the obligation of licensees:

> * * * to take the necessary steps to inform themselves of the real needs and interests of the areas they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.[136]

Thus, in view of the Commission's record on routine renewals, it is difficult to place confidence in its policy statement pledge to insure truly substantial service to the public. It appears much more likely that the Commission will extend its "rubber stamp" policy to renewals arising under the new policy with automatic findings of "substantiality."

Opportunity for newcomer to enter broadcast business is stifled

Quite obviously, the stability engendered by the new policy will make it virtually impossible to successfully challenge an incumbent licensee unless, of course, the licensee has been guilty of some improper conduct such as rigging a quiz show or broadcasting lotteries.[137] The argument that *new* facilities are still available on a comparative basis is little consolation. The profitable as well as influential markets, especially with respect to television broadcasting, have already been allocated. For instance, Commission figures reflect that there are no available VHF channels in the top 100 market areas. Moreover, the availability of UHF channels is greatly limited: 1 in the top 10 market areas; 27 in the top 50 market areas; and 84 in the top 100 market areas.[138]

By refusing to license parties best able to serve the public interest and thereby stifling opportunity, the Commission has failed in its responsibility to all Americans. The Commission's action will have a particularly adverse effect upon that group of citizens who have not always had an equal opportunity to compete in the past. For

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[134] Iowa-Missouri Renewals, 809.

[135] Oklahoma Study, 4.

[136] 1960 Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, 20 R.R. 1901.

[137] Policy Statement, par. 8. Even illegal activity, however, may not preclude renewal. See for example Note 118 *supra*, and Civil Rights Report at 863 for listing of six additional stations whose licenses were recently renewed even though they were apparently violating the Communications Act of 1934.

[138] 1968 FCC Annual Report 132-5. Levin, *Broadcast Regulation and Ownership of Media*, 186, observes that since the choicest broadcast channels are occupied and technical limitations restrict further limitations into lucrative markets, the future pattern of station ownership will depend increasingly upon license renewals. In Red Lion, the Court made the following comment: "Comparative Hearings between competing applicants for broadcast spectrum are by no means a thing of the past. The radio spectrum space has become so congested that at times it has become necessary to suspend applications. [Footnote omitted.] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television, which is a relatively recent development as a commercially viable alternative, has not been completely filled [footnote omitted]. 395 U.S. 367, 398.

example, only ten of more than 7,000 radio broadcast licenses are owned by racial minorities, all of whom are blacks. No television broadcast licenses are owned by minorities.[139]

The recent Report of the U.S. Commission on Civil Rights observes that the impact of this almost total absence of minorities from ownership of broadcast stations lies not only in the lost opportunities for minority enterpreneurship, but also in the significance of radio and television in shaping attitudes toward problems of racial injustice.[140]

In concluding that the new policy "tends to preserve the *status quo* and continue the exclusion of minority groups from ownership of communication media outlets",[141] the Report notes that it does so at a time when minority groups are demonstrating an increasing interest in entering the broadcasting industry. This interest is spurred as the economic and educational levels of minority groups increase and they have further possibilities and opportunities to compete for broadcast licenses. The report states that "[u]nless the FCC modifies its procedures to facilitate minority group participation in ownership of radio and television stations, however, [through rescinding new policy] such opportunities will be largely foreclosed." [142]

Another study described the effects of the new policy as follows:

> Today, large segments of society, once powerless and voiceless, are searching for ways in which they may make their presence felt * * * These people, as citizens of the United States, have a property interest in the airwaves. For the F. C. C. to adopt a policy that will prohibit these citizens from competing for a voice if they can demonstrate assignment of a frequency to them would best serve the community's needs is a travesty of fair play as well as a violation of their Constitutional First Amendment and equal protection rights.[143]

CONCLUSION

In a recent decision, Judge J. Skelly Wright, speaking for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit, began his landmark decision in *Moss v. CAB* [144] with this incisive statement of the issue:

> This appeal presents the recurring question which has plagued public regulation of the industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.

Answering this question in the affirmative in *Moss*, the Court found that CAB, in granting the airline industry rate increases without following the proper hearing requirements, had demonstrated that it was unduly oriented toward the regulated industry and insensitive to the airline-riding public. A similar conclusion has been reached in the analysis of the 1970 policy statement which is unreasonably weighted in favor of the broadcast industry to the great detriment of the listening and viewing public.[145]

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[139] Civil Rights Report at 854, citing interview with Robert Cahill, Secretary to the FCC, Nov. 6, 1969.
[140] *Ibid.*, 854.
[141] *Ibid.*, 856.
[142] *Ibid.*, 860.
[143] Report of the Mass Media Study Group, Chapt II., 60.
[144] D.C. Cir. No. 23627 (July 9, 1970).
[145] It is interesting to note that similar to Moss v. CAB a procedural question has also been raised with respect to the Policy Statement. See argument of Commissioner Johnson (pars. 1–11 of Dissent to Reconsideration Statement), that issuance of the policy statement and resulting failure to follow normal rule making procedures violates Section 4 of the Administrative Procedures Act or, at least, is an abuse of agency discretion.

More specifically, the new policy violates the Communications Act of 1934, as amended. It denies qualified applicants their right to a full hearing as provided by Section 309(e), a right recognized by the Supreme Court in the *Ashbacker* case, and required under due process of law. It establishes vested broadcast interests in violation of Section 301 et. seq. rather than licensing the best qualified of available applicants. And, it rejects diversification as a licensing criterion in contravention of the public interest standard of the Act a criterion founded, at least in part, upon First Amendment considerations.

By rendering existing licenses virtually unassailable to challenge, the value of competition has been lost and potential challengers who may be better able to serve the public interest are arbitrarily barred from the profitable privilege of using the public's precious air waves. Those unjustly deprived of this opportunity may properly ask that "Equal Justice Under Law" as it is chiseled over the portals of the Supreme Court building also become symbolic of the administrative actions of the Federal Communications Commission.

The Commission observes that its 1970 statement will provide clarity of policy, expedite the hearing process and promote consistency of decision.[146] While these are admirable objectives, they cannot justify a policy so directly contrary to the statute and the public interest it is designed to protect.

In making stability of the broadcast industry the controlling philosophy in renewals, the Commission has transformed broadcast licenses into property rights. In so doing, it has lost sight of the fact that the broadcast license is a "public trust" [147] to be used for the benefit of the American people, the owners of the airwaves.[148] Thus, the grant of a broadcast license in perpetuity is inconsistent with the inalienable right of the people, acting through their Government—Congress, the courts, and the Commission—to be assured that these stations are operated consistent with the public interest.

The policy statement, as it stands, is a usurpation of legislative power, vested exclusively in Congress, by an agency which has ignored the public interest to the extent it may conflict with private broadcasting interests. Accordingly, the 1970 policy statement should be rescinded. In reconsidering its position on renewals, the Commission should, in accordance with its statutory mandate, proceed with a keen sensitivity for the public interest and mindful of its great responsibility to all Americans.

CASES CITED

Ashbacker Radio Corp. v. *FCC*, 326 U.S. 327 (1945).
Associated Press v. *U.S.*, 326 U.S. 1 (1945).
Bamberger Broadcasting Service, Inc., 3 R.R. 914 (1946).
Carroll Broadcasting Co. v. *FCC*, 258 F 2d 440 (D.C. Cir. 1958).
Clarksburg Publishing Co. v. *FCC*, 225 F 2d 511 (D.C. Cir. 1955).
Community Broadcasting Co. v. *FCC*, 274 F 2d 753 (D.C. Cir. 1960).
Consolidated Nine, Inc. et al. v. *FCC*, 403 F 2d 585 (D.C. Cir. 1968).
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).
FCC v. *RCA*, 346 U.S. 86 (1953).
FCC v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).
F. L. Crowder v. *FCC*, 130 U.S. App. D.C. 198, (1968).
Hearst Radio, Inc., 6 R.R. 944 (1951).
In re Applications of RKO General, Inc., et al, Dockets Nos. 16679 and 16680 (1970).
In re Application of Star Stations of Indiana, Docket No. 16612 (1969).
In re Application of WPIX, Docket No. 18711 (1970).

[146] Policy statement, par. 1.
[147] Office of Communications of the United Church of Christ v. FCC, 359 F 2d 994, 1003 (D.C. Cir. 1966).
[148] *Ibid.* "They [the people] are the owners of channels of television—indeed of all broadcasting," quoting from "FCC, Television Network Program Procurement," H. Rep. No. 281, 88th Cong., 1st Sess. 50 (1963).

In re Wabash Valley Broadcasting Corp., 35 FCC 677 (1963).
Johnston Broadcasting v. *FCC*, 175 F 2d 351 (D.C. Cir. 1949).
KWIX Broadcasting Co., Inc. v. *Commissioner*, 272 F 2d 406 (D.C. Cir. 1959).
Mansfield Journal Co. v. *FCC*, 180 F 2d 28 (D.C. Cir. 1950).
McClatchy Broadcasting Co. v. *FCC*, 239 F 2d 15 (D.C. Cir. 1956).
Moss v. *CAB*, D.C. Cir. No. 23627 (July 9, 1970).
NBC v. *U.S.*, 319 U.S. 190 (1943).
National Broadcasting Inc. (KNBC) FCC 70–691 (Docket No. 18602 released July 7, 1970)
Office of Communications of the United Church of Christ v. *FCC*, 16 RR 2d 2095, 2103 (D.C. Cir. 1969); 359 F 2d 994 (D.C. Cir 1966).
Pinellas Broadcasting Co. v. *FCC*, 230 F 2d 204 (D.C. Cir. 1956).
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969).
Scripps-Howard Radio, Inc. v. *FCC*, 189 F 2d 677 (D.C. Cir. 1951).
U.S. v. *A.P.*, 52 Fed. Supp. 362 (S.D.N.Y. 1943).
U.S. v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).
WHDH, Inc., 16 FCC 2d 1(1969).

APPENDIXES

Appendix A

Policy Statement on Comparative Hearings Involving Regular Renewal Applicants

1. In 1965 the Commission issued a policy statement on Comparative Broadcast Hearings which is applicable to hearings to choose among qualified new applicants for the same broadcast facilities. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. We believe that we should now issue a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license. 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. E.G., *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. Issuance of this statement will therefore contribute to clarity of our policies in this important area. This will be of assistance to the examiners who initially decide the cases. It will expedite the hearing process and promote consistency of decision. Above all, by informing the broadcast industry and the public of the applicable standards, the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act) will be served.

2. The statutory scheme calls for a limited license term. This permits Commission review of the broadcaster's stewardship at regular intervals to determine whether the public interest is being served; it also provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest. It is this latter aspect of the statutory scheme with which we deal here. See Sections 307, 308, 309.

3. The public interest standard is served, we believe, by policies which insure that the needs and interests of the listening and viewing public will be amply served by the community's local broadcast outlets. Promotions of this goal, with respect to competing challenges to renewal applicants, call for the balancing of two obvious considerations.

The first is 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. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

4. The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it, but, even more important, from the standpoint of service to the public.

5. We believe that these two considerations call for the following policy—namely, that 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,[1] 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.

6. This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc., (WBAL)*, 15 FCC 1149 (1951), where 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, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of ownership and management. The *WBAL* policy was followed in *In re Wabash Valley Broadcasting Corp.*, 35 FCC 677 (1963), and cited with approval in recent actions (see e.g., *In re Application of RKO General, Inc.*, FCC 69–1335, para. 8).

7. If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the contrary, if the competing new applicant establishes that he would substantially serve the public interest,[2] 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 record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest.

8. We recognize that the foregoing policy does not work with mathematical precision, and that particular factual circumstances will have to be explored in the hearing process. For example, if there are substantial questions as to whether the renewal applicant's operation has been characterized by serious deficiencies—such as rigged quizzes, violations of the Fairness Doctrine, over-commercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertisers—the facts as to these matters would have to be established, and any demerits resulting therefrom weighed against the renewal applicant in the public interest judgment which must be made. It is not possible to lay down any more precise standards here, since so much will depend on the particular facts.

9. Further, we recognize that the terms "substantially" and "minimally" also lack mathematical precision. However, the terms constitute perfectly appropriate standards. Thus, the word "substantially" is defined as "strong; solid; firm; much; considerable; ample; large; of considerable worth or value; important" (Webster's New World Dictionary College Ed., p. 1454);[3] the word "minimal" carries the pertinent definition, "smallest permissible" (Id. at p. 937). However, application and evolution of the standards would again be left to the hearing process.

The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his ascertainments of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether sub-

[1] We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid", "strong", etc., (see p. 3, *supra*) performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish between two types of situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

[2] With several such new applicants, the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, would be the basis for decision as among them.

[3] We also note that the term is frequently employed in statutes, e.g., 15 U.S.C. 13 (the Clayton Act); 42 U.S.C. 403(l)(4)(A) (Social Security Act); 26 U.S.C. 382(a)(1)(C) (Internal Revenue Act); indeed, it is used in the Communications Act, 47 U.S.C. 503(b)(1)(A).

stantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service are also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field.

10. Two other points deserve stress in this respect. First, unlike the case involving new applicants (see 1 FCC 2d at pp. 397–98), a programming record will be considered even though it is not alleged to be either unusually good or bad. Thus, the renewal applicant will not have to demonstrate that his past service has been "exceptionally" or "unusually" worthy. Were that the criterion, only the exceptional or unusual renewal applicant would win a grant of continued authority to operate, and the great majority of the industry would be told that even though they provide strong, solid service of significant value to their communities, their licenses will be subject to termination. As stated at the outset, such a policy would disserve the public interest. And conversely, a new applicant would not have to allege that the existing licensee's operation had been unusually bad.

11. Second, the renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he "upgrades" his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then "upgrade" to show substantial service. Therefore, no evidence as to improved service after the filing of the competing application (or a petition to deny directed to programming service) will be deemed admissible in the hearing. This is, of course, a departure from the procedure permitted in the *WBAL* case.

12. Further, the renewal applicant, seeking to obtain the benefits of this policy, cannot properly supply minimal service during the first two years of his license term and then "upgrade" during the third year because of the imminence of possible challenge. The Act seeks to promote conscientious and good faith substantial service to the public—not a triennial flirtation with such service. Therefore, while we recognize that the licensee's programming efforts do and must vary over a license period and hopefully are continually being improved, we could not weigh as controlling or determinative a pattern of operation which showed substantial service only in the last year of the license term.

13. We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. See 1 FCC 2d at pp. 394–95. We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. E.g., *In re Application for Renewal of WTOP-TV*, FCC 69–1312. Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media holdings.[4] Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rule making proceedings. E.g., FCC Dockets Nos. 18110 and 18397. If any rule making proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and "best conduces to the proper dispatch of business and the ends of justice;" Section 4(j) of the Communications Act; *WJR* v. *F.C.C.*, 337 U.S. 265, 282 (1948). In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged,[5] the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rule making proceedings rather than *ad hoc* decisions in renewal hearings.

[4] Of course, if such a renewal applicant has not rendered substantial service, he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant.

[5] *In re Applications of Midwest Television, Inc.*, FCC 69–261; *In re Applications of Chronicle Broadcasting Company*, FCC 69–262.

14. We believe the issuance of this policy statement will expedite the hearing process in this area. Examiners will be clear as to our general policy. Indeed, it may significantly shorten hearings. If the Examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. However, where the matter is in any way close or in doubt, it would be more appropriate to proceed with the hearing, and thus insure that the record is complete when the matter comes before the Commission.

15. Most important, as stated above, the policy will markedly serve the public interest by informing the broadcast industry and the public of their responsibilities and rights. And, in doing so, it retains the competitive spur provided in the Communications Act and yet insures predictability and stability of broadcast operations. For the policy says to the broadcaster, "if you do a solid job as a public trustee of this frequency, you will be renewed; your future is thus really in your hands." The policy says to all interested persons, "The Act seeks to promote not just minimal service but solid, substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application and will be afforded the opportunity, in a hearing, to establish your case. If you do so, you will be granted authority to operate on the frequency in place of the renewal applicant who has failed to provide substantial service." [6]

16. The policy is thus fair to the broadcaster and to the new contestant, and above all it serves the listening and viewing public. To the argument that the hearing process itself is an unfair burden, the short answer is that such hearings stem directly from the statutory scheme, and particularly from the notion that the broadcaster is a public trustee who can acquire no permanent ownership of the frequency on which he operates. With even-handed administration of the policy, there is unlikely to be any plethora of frivolous challengers, in view of the significant costs involved.[7] And in any event, where frivolous challenges are made, the Examiner may in his discretion, and should, take action to avoid a long drawn out hearing. In the final analysis, the broadcaster has, we believe, the answer within his hands—if he really knows and cares about his area and does a good substantial job of serving it, he will discourage challenges to his renewal applications.

17. We recognize that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated, there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. We believe that there will still be real incentives for those existing broadcasters willing to provide superior service to do so, since the higher the level of their operations, the less likely that new applicants will file against them at renewal time. And as the Commission spells out, in decided cases, the elements which constitute substantial service, it will serve the private interests of broadcasters to make certain that their operations fall clearly into that class of service. Thus the public interest will be served by the continuing efforts of broadcasters to minimize the chances of the filing of competing applications.

18. The foregoing policy is limited to comparative hearings between renewal applicants and new applicants for the same facilities in the same community. The restriction to the same community is necessary to exclude from this policy contests between applicants for different communities which are governed by the provisions of section 307(b) of the Act, since this section requires that the grant go to the community most in need of the station, without regard to the comparative qualities of the applicants. In practical effect, this section applies solely to standard broadcasting.[8] Such AM cases involve considerations quite different from those with which the Commission is concerned here, and are thus not dealt with in this statement.

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[6] It would be expected that appropriate arrangements could and would be made to purchase facilities owned by the existing station. See, e.g., *In re Application of Biscayne Television Corp.*, 33 FCC 851 (1962).

[7] We wish to stress, with the issuance of this Statement, that barring extraordinary circumstances, the challenger to a renewal cannot be reimbursed in any amount for his expenditures in preparing and prosecuting his application, nor will merger agreements be countenanced.

[8] The policy set forth herein *will* apply where a new applicant files against a renewal applicant, seeking to use the contested FM or TV channel in a different community under the provisions of Sections 73.203(b) or 73.607(b) of our rules.

19. As shown by our recent actions (see p. 1, *supra*), this policy is of course applicable to pending proceedings, and indeed, we stress again that its essential holding reflects long established precedent. The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for *sui generis* reasons, is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the *WBAL* policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

20. In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

Action by the Commission January 14, 1970. Commissioners Burch (Chairman), Bartley, Robert E. Lee, Cox, H. Rex Lee and Wells, with Commissioner Johnson dissenting and issuing a statement.

Sent to all broadcast licensees.

Policy Statement on Comparative Hearings Involving Regular Renewal Applicants

dissenting opinion of commissioner nicholas johnson

The issues surrounding citizen participation in the license renewal process are among the most complex and significant before the FCC.

The nature of the American political process is such that any efforts to regulate broadcasting by either Congress or this Commission must constitute a negotiated compromise of sorts. That the broadcasting industry today is perhaps the most powerful Washington lobby in our nation's history is generally acknowledged. Popular reform movements always start with a substantial disadvantage. For none is that more true than for those groups trying to improve the contribution of television to the quality of American life. But, then, the stakes are higher.

There is no question but that the American people have been deprived of substantial rights by our action today. There is also no question that the results could be much worse—given the commitment of the broadcasting industry on this issue, and the introduction of legislation (such as S. 2004) by 22 Senators and 118 Representatives.

The policy statement has been discussed by us calmly and at length. Each Commissioner has endeavored to balance the conflicting interests of broadcasters and public. The language has been revised in a spirit of accommodation; the public interest is better served as a result. Because of my participation in these drafting efforts I feel considerable inclination to concur. On agonizing balance, however, I find I cannot.

There is a germ of legitimate concern in the broadcasters' position. (1) It is inequitable that a broadcaster who has made an exceptional effort to serve the needs of his community, and whose programming is outstanding by any measure, should be subjected to the expense and burden of lengthy hearings merely because some fly-by-night chooses to take a crack at his license. (2) When evaluating a competing application in a renewal case, a record of outstanding performance by the licensee obviously should be given considerable weight. (3) It is far better to provide consistent national standards for station ownership by general rulemaking (with divestiture if necessary) than to evolve them on the case-by-case happenstance of which stations' licenses happen to be challenged. (4) There *are* some public benefits from "stability" for those broadcasters who take their responsibilities seriously.

What the public loses by this statement can be summarized in the word "competition." The theory of the 1934 Communications Act was that the public would be served by the best licensees available. No licensee would have a "right" to have his license renewed. Each would be open to the risk that a competing applicant would offer a service preferable in some way, and thereby win the license away. The FCC was to choose the best from among the applications before it, whether the incumbent's record was "mediocre" or "excellent." This is the principle of the

marketplace: the public is assured the best products by opening the market to all sellers, comparing their products, and rewarding the best with the greater sales. The analogy in broadcasting is the competing application. The FCC is the public's proxy. It is we who must make the choice among competitors; it is the public that receives the benefits (or burdens) of our choice.

What we have done in this policy statement is comparable to providing that there could be no new, competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not "substantially" serving the public interest. The affected industry's arguments on behalf of such a policy would be quite similar to those presented by the broadcasters in this instance. But this country has long believed that the public will be better served over the long run by free and open competition. And after lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry.

Given the harsh political reality that the broadcasters have the power to obtain some measure of protection against competing applications, there are at least some possible public benefits from the policy statement we have drafted.

It is impossible, or at least unlikely, that there would ever be a sufficient number of public organizations to contest each of the 7,500 radio and television station licenses in this country. Any truly effective efforts at reform will have to apply to all stations equally. This FCC policy statement may have some salutary impact industry-wide.

What we have created, in effect, are four levels of performance: (1) Not minimally acceptable. A licensee in this category will not have his license renewed, whether or not it is contested. (2) Minimally acceptable. If it meets this standard, a licensee without a competing application will be renewed by the Commission. If it is challenged, however, it will be set for hearing. (3) Substantial service. If a licensee is challenged at renewal by a competing applicant, the hearing will be terminated if the examiner finds, after initial evaluation, that the licensee has been "substantially attuned to meeting the needs and interests of its area." This amounts to a form of "summary judgment," saving both broadcaster and challenger the burden of a lengthy hearing likely to be futile. (4) Comparative public interest. If a licensee under challenge by a competing applicant cannot meet the "substantial" service standard, a full evidentiary hearing will be held. The licensee must then demonstrate that its renewal will serve the public interest, and would be comparatively preferable to awarding the license to the challenger.

The upshot may very well be an improvement in radio and television programming performance by all licensees.

At the present time many broadcasters know that a minimal performance is all that's required for license renewal. This belief is exascerbated by an FCC majority's willingness to find that no news and public affairs adequately serves the public interest, Herman C. Hall, 11 F.C.C. 2d 344 (1968), and that a licensee on probation who has bilked advertisers of $6,000 through fraud is entitled to another probationary term, Star Stations of Indiana, Inc., 19 F.C.C. 2d 991, 996 (1969). Commissioner Cox and I have tried, so far without success, to urge the application of some standards, however minimal, to the Commission's license renewal process. Renewal of Standard Broadcast and Television Licenses [Oklahoma], 14 F.C.C. 1 (1968); Renewal of Standard Broadcast and Television Licenses [New York-New Jersey], 18 F.C.C. 2d 268, 269, 322 (1969); District of Columbia, Maryland, Virginia, West Virginia Broadcast License Renewals, _____ F.C.C. 2d _____ (1969).

The industry's response to the initial WHDH decision, WHDH, Inc., 16 F.C.C. 2d, (1969), and the increased effectiveness of public groups devoted to improving broadcasting has been confused and irrational, and of mixed impact on programming. The policy statement will remove much of this confusion.

The Commission has made it clear that it will not permit chaos to reign, that the better broadcasters have nothing to fear, and that all can get back to the task of programming their stations in ways that serve the awesome needs of the American people for quality entertainment, cultural enrichment, continuing education, and information and analysis about life in the communities and world in which they live. The more responsible broadcasters now know they will be protected from harassment from audience or FCC.

On the other hand, the public now clearly understands that a new day has dawned; licenses will not be automatically renewed; those licensees not offering "substantial" service are open to challenge.

The below-average broadcasters should respond to this new state of affairs by upgrading their programming from a "minimal" to a "substantial" performance. They now have a very real incentive to purchase this "renewal insurance" against the possibility of a challenge.

Moreover, the statement only relates to competing license challenges, not petitions to deny license renewals. Such petitions may still be filed and considered against any licensee. Their consideration in the future may very well be more rigorous than at present. No smart licensee will lightly risk walking too close to the cliff of "minimal performance." And, of course, a competing license challenge may also be *filed* against any licensee in good faith, even though it ultimately may be rejected by an examiner. Only the broadcaster who is confident his performance is well above average can be assured of the outcome.

And, in the last analysis, as the statement concedes, its ultimate impact will only be known *after* the examiners, FCC and courts have processed some cases. No statements of policy can affect the FCC's will to act (or lack thereof) in deciding whether to deny license renewal in 1/100 of 1%, 1/10 of 1%, 1% or 10% of the renewal cases coming before it. (With roughly 2500 license renewals a year, these percentages are equivalent to one denial every four years, two or three a year, 25 a year and 250 a year, respectively.) No statement of policy can be the basis for predicting such percentages with any greater precision until the results are in.

There are legal and public relations considerations involved in issuing this statement as *fait accompli* rather than as proposed rule making for public comment. I will not review the issues here, except to say that I think it would have been wiser, on such a controversial matter, to use the rule making procedure.

I cannot avoid reference, in passing, to the significance of this particular kind of necessary compromise with broadcasting's power. The record of Congress and the Commission over the years shows their relative powerlessness to do anything more than spar with America's "other government," represented by the mass media. Effective reform, more and more, rests with self-help measures taken by the public. Recognizing this, the broadcasters now seek to curtail the procedural remedies of the people themselves. The industry's power is such that it will succeed, one way or another. This is sad, because—unlike the substantive concessions it has obtained from goverment from time to time—there is no turning back a procedural concession of this kind once granted. Not only can the industry win every ball game, it is now in a position to change the rules.

I have considerable sympathy and respect for my colleagues' commendable and good faith effort to resolve this conflict between formidable political power and virtually unrepresented public interest. They have tried. They really have. And it is not at all clear to me that more than they have done would have been politically possible, or could have withstood political appeal. It is not even clear that today's effort is secure.

Thus it is, with no feelings save understanding, frustration and sorrow, that I dissent.

APPENDIX B

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

FCC 70-738 49674

(RM-1551)

In the Matter of

Policy Statement on Comparative Hearings Involving Regular Renewal Applicants

In re Petitions filed by

BEST, CCC, and Others for Rule Making To Clarify Standards in All Comparative Broadcast Proceedings

MEMORANDUM OPINION AND ORDER

(Adopted: July 8, 1970; Released: July 21, 1970)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT

1. On January 15, 1970 the Commission released a *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 35 F.R. 822, in which we set forth the approach we intend to follow in comparative broadcast hearings where a new applicant challenges a licensee seeking a renewal of license. The next day we released a Memorandum Opinion and Order adopted January 14, 1970 in RM-1551, 21 FCC 2d 355, dismissing a petition for rule making filed by BEST (Black Efforts for Soul in Television), CCC (Citizens Communications Center), William D. Wrigth, and Albert H. Kramer in which the petitioners proposed a new rule to clarify the standards in all comparative broadcast hearings, including contests on renewal, along the lines of our 1965 *Policy Statement on Comparative Broacast Hearings*, 1 FCC 2d 393. We now have before us petitions for reconsideration of the January 15, 1970 policy statement filed by BEST, *et al.* (BEST), and (jointly) by Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc. BEST has also filed a petition "for repeal" of the policy statement and a third petition, to reconsider the dismissal of the BEST petition for rule making; these pleadings are based upon the memorandum submitted with the petition to reconsider the policy statement. The petitions are opposed by several other licensees, and replies have been received.

2. Our January 15, 1970 policy statement set forth our proposed approach to the disposition of broadcast hearings involving contests between new applicants and regular renewal applicants. It followed and supplemented our 1965 policy statement on comparative broadcast hearings between new applicants for the same facilities. Several of the objections raised to the 1970 policy statement were treated in the opinion on BEST's petition for rule making. Thus, as we there made clear, the policy statement was not a rule and did not have the force or effect of a rule; consequently, as we stated, "parties are always free to argue in a hearing that a policy should be changed, or should be applied differently because of the facts of their particular situation." (21 FCC 2d at 356.) [1] Therefore, we must reject the contention that the adoption of the policy statement contravenes the rule making requirements of the Administrative Procedure Act. That statute specifically makes its notice requirements inapplicable to "general statements of

[1] Even in the case of a rule, parties are allowed to make a showing why the rule should be waived in a particular case. See *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-205; Section 1.3 of our rules, 47 CFR 1.3. *A fortiori*, a party may show why a policy should not be applied in his fact situation. In short, the touchstone for all Commission action remains the public interest, and therefore, the Commission must be alert to a showing that the public interest would be served by action different from that embodied in any general rule or policy.

policy." 5 U.S.C. § 553(b). That the policy statement expresses our views on matters of substance of course does not take it out of the statutory exemption nor, in light of the further exemption for rules of procedure, does the fact that it contains a procedural element. Substantive rules must be preceded by notice and comment. Substantive policy statements need not be. While we understand that the parties seeking reconsideration do not agree with our view that the policy statement contains a unified expression of policies largely formulated in earlier adjudicatory cases, their argument still misses the point that it is only a policy statement—subject to full reargument in individual cases—with which we are dealing. Although, in view of these considerations, we do not believe that a petition for reconsideration properly lies under Section 405 of the Communications Act, it nevertheless seems desirable to consider the contentions put before us.[2]

3. It is urged that there is no support in fact for the weight we have given to stability and predictability in station operation. But we think it is amply clear that in an industry requiring substantial investments, often with long periods of financial loss, the public interest is served by a reasonable assurance that good public service will constitute a protection against a complete loss of the business. In this connection, we point out that Hampton Roads and Community are incorrect in their assertion that we have required a successful challenging applicant to purchase the facilities of the incumbent licensee. We said that it would be expected that arrangements could and would be made to purchase the facilities of the existing station, but we have not imposed any such requirement.[3] It is no answer to this problem that many stations are profitable, even highly profitable, for not only do many stations have unprofitable operations for substantial initial periods, but for all stations we can only expect the required initial and continuing investments if there is a reasonable expectation, consistent with the overriding requirements of the public interest, that the station will be treated as a going business. And, certainly, it would make no sense to apply the policy statement only to losing operations and to deny its benefits to any existing station which is operating in the black. This would hardly be an inducement to good operation. In short, a contrary policy would, we believe, result in a chaotic situation wholly at odds with the Congressional purpose in creating this agency and its predecessor.

4. As mentioned above, we have attempted to provide stability only insofar as it is consistent with the paramount public interest, and have given no advantage to any existing licensee who is qualified but only barely so. We have given up the fullest advantages of competition only in favor of continuance of a solid measure of performance without substantial defects. We have, however, maintained the competitive spur of the statutory scheme by not only permitting but encouraging competing challenge to renewal applicants who are believed to have only minimally served the public interest. And to make this policy effective, we have precluded "upgrading," either after the competing application is filed or during the third year of the license term because of the imminence of public challenge.[4] This, we stress, is a reasonable balancing of two considerations—the desirability of stability and the competitive spur of challenge—which best serves the public interest. It is said, nevertheless, that any such balancing is forbidden by the Communications Act as already interpreted by the courts, and that nothing short of a full comparative hearing involving all factors will suffice. We do not so read the statute. The cases relied upon all deal with initial applications and do not reach the question of whether it is permissible or, as we believe, necessary to give special weight to a solid record of performance in the renewal situation. The question is one of substantive policy, since our instruction to the examiners on the conduct of the hearing is peripheral procedure. If the policy is reasonable, and we have set forth our reasons for adopting it, we see no merit to the contention that it creates a right in the frequency or its use beyond the terms of the license (see Sections 301, 304, 307(d), 309(h), 47 U.S.C. 301, 304, 307(d), 309(h)). The

[2] Taking into consideration that we are not adopting a binding rule and that these matters may be reopened in particular cases, we do not believe that oral argument is either appropriate or required.

[3] We note also that purchase of physical facilities will not provide recompense for operating costs.

[4] In this connection, we note that our assignment and transfer forms require a showing as to the programing performance of the assignor or transferor, when an assignment or transfer is sought more than 18 months after the last renewal. This is intended to insure that the transferor has not ignored his renewal commitments in anticipation of sale. Thus, we would not permit transfers during the last 18 months of a license period where the transferor's operation raises a substantial question of basic qualification because of a failure to adhere to promises (or of course for any other public interest reason coming to our attention at any time). This is not new policy, *cf. Jefferson Radio Co .v. Federal Communications Commission*, 119 U.S. App. D.C. 256, 340 F. 2d 781 (1964), but it seems desirable to reiterate it here.

assignment of conclusive weight to a solid record of operation in the public interest is not the grant of a right to future use based upon past occupancy of a channel. As we have made amply clear, past occupancy by itself is irrelevant under our policy statement. But there is nothing in the Communications Act that prohibits the assignment of different weights to different public interest factors in this situation, or the assignment of conclusive weight to a factor we find to be determinative in its relationship to the public's interest in future use of the frequency or channel. While this policy may eliminate a direct comparison between applicants on factors such as integration of ownership with management and diversification of control of the media of mass communications, it does not sanction a grant to any renewal applicant who is disqualified in any respect, or in the face of a competing challenger, who is not substantially serving the public interest. Barring an unusual showing, it eliminates a comparison but does so upon a basis rooted in actual operation of the facilities in question. The Constitution is obviously not affronted by this policy if we are correct in our judgment that it is a policy reasonably calculated to best serve the public's interest. *National Broadcasting Co.* v. *United States,* 319 U.S. 190.[5]

5. We have carefully considered the arguments contained in the petitions before us and we are not convinced that our announced policy on comparative renewal proceedings is either illegal or unwise. Of course, those adversely affected may raise any relevant contention in individual proceedings, where they will be examined *de novo.* However, it should be useful to all parties concerned to have the Commission set forth the overall views to which its experience has led it. Finally, we stress again what we said in concluding our 1970 statement:

In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

6. For the foregoing reasons, the petitions before us *are denied.*

FEDERAL COMMUNICATIONS COMMISSION*
BEN F. WAPLE, *Secretary.*

COMPARATIVE RENEWALS (PETITION FOR RECONSIDERATION)

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

[In re Petitions for reconsideration of the Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants.]

I dissent to the denial of these petitions for reconsideration on three grounds: The Commission's January 15, 1970 Policy Statement (1) violates Section 4 of the Administrative Procedure Act (5 U.S.C. Section 553), or, at least, is an abuse of agency discretion; (2) violates Section 309(e) of the 1934 Communications Act; and (3) violates the First Amendment to the United States Constitution.

The Administrative Procedures Act (APA) requires the Commission to follow certain procedures (notification, opportunity to file comments, etc.) in all cases of administrative "rule making." Section 2(c) of the APA defines a "rule" as:

> "* * * the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency * * *"

Section 4(a) of the APA, however, exempts from rule making:

> "* * * interpretative rules, general statements of policy, rules of agency organization, procedure, or practice * * *"

The majority argues that the January 15, 1970 Policy Statement is an exempted "general statement of policy" under Section 4(a), and not subject to the safeguards of Section 4. Although the legal precedent, on this question is by no means clear, I believe there are valid reasons for disagreement.

[5] See also *Hale* v. *Federal Communications Commission* — U.S. App. D.C. — , — F. 2d — (No. 22,751, February 16, 1970), holding that issues of concentration of control applicable to the industry as a whole and involving an overhaul of multiple ownership policy, may appropriately be reserved for treatment in general rule making.

*See attached Dissenting Statement of Commissioner Nicholas Johnson.

The rule making safeguards of the Administrative Procedure Act were clearly designed to limit the discretion of federal agencies in their legislating function—that is, the adoption of substantive rules or general schemes of administration to affect differing groups or individuals across-the-board. In delegating its legislative authority to non-elected bodies of men not directly responsible to the electorate, I do not believe that Congress intended to cast this and other agencies adrift on the limitless sea of their own unbounded discretion, able to enact substantive rules at will (under the guise of "policy statements") without due consideration of interested parties' views. This, at any rate, appeared to be the position of Attorney General Francis Biddle who gave the following interpretation of "policy statement" in a 1941 Report;

> "[A]pproaches to particular types of problems, which as they become established, are generally determinative of decision * * *. As soon as the "policies" of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that may advantageously be brought to public attention by publication in a precise and regularized form."

Report of the Attorney General's Committee on Administrative Procedures, S. Doc. No. 8, 77th Cong., 1st Sess., pp. 26–27 (1941). In other words, certain procedural safeguards exist to protect the public in formal rule making and adjudication; once law has been established through these procedures, however, the agency may *explain* it to the public through "policy statements."

Procedurally, at least, this Commission could have addressed the substance of its Policy Statement through adjudicatory or rule making proceedings—both of which contain the safeguards of the adversary process. Arguably, however, it cannot do so without *any* procedural safeguards at the time of adoption, as it has attempted here. *Cf. Moss* v. *Civil Aeronautics Board*, —— F. 2d —— (D.C. Cir., July 9, 1970). There must be some logical and legal distinction between a "rule" and a "policy statement." An administrative agency is apparently not free to characterize its action in any way it sees fit:

> "The particular label placed on it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

Columbia Broadcasting System v. *United States*, 316 U.S. 407, 416 (1942). The appropriate distinctions may well turn on whether the agency takes action affecting a change in substantive legal rights (through a rule on adjudication), or whether the agency's action merely explains or interprets existing policies or decisions *previously* enacted through proper legal procedures (a policy statement). Thus, the Commission can issue a "Public Notice" through its Office of Information, explaining or summarizing the import of a particular rule; but it cannot adopt that rule, without procedural safeguards, merely by captioning its document a "Public Notice" and pretending that no substantive change in the law is involved.

The issue here, therefore, turns on whether the January 15, 1970 Policy Statement effected a substantive change in our comparative renewal standards. I frankly do not think even the majority can seriously contend that the Commission has not substantially changed its hearing procedures in comparative renewals by its January 15, 1970 Policy Statement. We have designated many cases for comparative hearings since the *Hearst* case, yet we have never even suggested to the Examiner that he first determine whether the incumbent licensee "has been substantially attuned to meeting the needs and interests" of the community. Indeed, we have recently reimbursed Voice of Los Angeles, Inc., for costs incurred during the initial portions of a comparative challenge to the license of KNBC, Los Angeles, essentially on the ground that our January 15, 1970 Policy Statement came as an unannounced surprise to Voice, and that given the change in policy it would be inequitable not to permit them to withdraw. *National Broadcasting Co., Inc. (NBC)*, FCC 70–691 (Docket No. 18602) (released July 7, 1970). Prior to January 15, 1970, no communications lawyer or even FCC Hearing Examiner would have dreamed that a competing application would not even be considered if the incumbent licensee met certain programming standards. Accordingly, we must conclude that a substantive change in law has been made, and the rule making procedures of the APA should apply.

Even if action by policy statement is a legally available option to the Commission in this case, I believe the Commission has abused its discretion by so acting without clearly articulated reasons. In dismissing petitioners' request for rule making, *Petitions by BEST*, 21 F.C.C. 2d 355 (1970), the Commission cited *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947), for the proposition that the Com-

mission has the discretion to choose between adjudication and rule making. The Commission, however, does not attempt to explain why the use of a policy statement in this case was *preferable* to the use of adjudication and rule making. Rather, it simply asserts that it had the *power* to act without the usual procedural safeguards. Even conceding that the Commission has this power, it must exercise its discretion in a rational way in an opinion explaining its reasoning. Even *Chenery* recognized that agency discretion was limited by certain fundamental standards of fairness.

The Commission's Policy Statement decision cannot be considered "reasonable" or "fair"—particularly in view of the political events surrounding its adoption. Following the decision in *WHDH*, Inc., 16 F.C.C. 2d 1 (1969), the broadcasting industry sought to obtain from Congress the elimination or drastic revision of the comparative hearing procedure. See, *e.g.*, *Hearings on S. 2004 [Orderly Renewals] Before the Subcommittee on Communications of the Senate Committee on Commerce*, 91st Cong., 1st Sess. ["The Pastore Bill"] (Dec. 1, 1969). Although more than 100 Congressmen and 23 Senators quickly announced their support, a number of citizens groups testified that S. 2004 was "back door racism" and would exclude minorities from access to media ownership in most large communities (Black Efforts for Soul in Television), would perpetuate excessive concentrations of control (National Citizens Committee for Broadcasting), and would remove "competition" from broadcasting and "freeze out every underrepresented class in American Society" (American Civil Liberties Union). See *Hearings on S. 2004, supra.*

The impact of citizen outrage measurably slowed the progress of S. 2004, and many Senate observers began to predict the Bill would never pass. Then, without formal rule making hearings, or even submission of written arguments, the Commission suddenly issued its January 15, 1970 Policy Statement—achieving much of what Congress had been unable or reluctant to adopt.

There were many parties who had invested substantial time and money fighting the threatened diminution of their rights, and who no doubt would have opposed our January 15, 1970 Policy Statement on numerous grounds. In challenging S. 2004, many of these parties claimed to represent the interests of important segments of our population: the minorities, the poor, and the disadvantaged. By refusing even to listen to their counsels, this Commission reached a new low in its self-imposed isolation from the people; once again we closed our ears and minds to their pleas. See, *e.g.*, *National Broadcasting Co.*, 20 F.C.C. 2d 58 (1969); *KSL, Inc.*, 16 F.C.C. 2d 340 (1969); *Office of Communication of the United Church of Christ [WLBT–TV]*, — F. 2d —, No. 19,409 (D.C. Cir., June 20, 1969), and 359 F. 2d 994 (D.C. Cir. 1966).

The majority argues for the Policy Statement's validity by contending that it is "only a policy statement" which may be fully reargued in future cases when it is applied. This argument is invalid. For one thing, the mere existence of the Policy Statement will deter groups that otherwise might have entered comparative contests. Between *WHDH, Inc.* and our Policy Statement, a number of applicants filed competing license challenges with the Commission. To my knowledge, not one TV application has been filed since January 15, 1970—and one major applicant has even withdrawn on the basis of our Policy Statement. See *National Broadcasting Co., Inc. (KNBC)*, FCC 70–691 (Docket No. 18602) (released July 7, 1970). In addition, our Policy Statement will doubtless be applied to future cases without exception. No man is likely to reverse himself once he has announced his decision in public, and no one seriously believes that applicants will be able to reargue the merits of our January 15, 1970 Policy Statement and obtain an impartial and open-minded reception. As in *Moss* v. *Civil Aeronautics Board*, — F. 2d —, (D.C. Cir., July 9, 1970), the basic decisions have been made *ex parte* in "closed sessions," and there is little anyone can do to re-open them.

Finally, the Commission's abuse of discretion becomes particularly severe in light of the First Amendment questions discussed below. Whatever discretion the Commission may have to choose various procedural modes in other cases, that discretion must be narrowly limited where it results in a curtailment of speech freedoms. Our failure to follow normal rule making procedures, therefore, is an abuse of agency discretion and cannot be justified by the principles of *Chenery*.

The January 15, 1970 Policy Statement also violates, in rather clear fashion, Section 309(e) of the 1934 Communications Act. That Section provides that if the Commission cannot find that the grant of any particular license application will serve the "public interest, convenience, and necessity," it must designate the application for "a full hearing in which the applicant * * * shall be permitted to participate." In other words, the Commission must either grant a license

application, or provide the applicant with a full hearing on the merits. Thus, where an incumbent licensee is challenged by an otherwise acceptable new applicant, Section 309(e) bars rejection of the competing application without a hearing. Yet this rejection is precisely what will happen under the Policy Statement when the Examiner finds the incumbent "substantially attuned" to community needs and interests. In *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), the FCC granted one of two mutually exclusive applications and designated the other for hearing. The Supreme Court reversed, saying:

> "We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing. We think that is the case here." (326 U.S. at 330.)

As *Ashbacker* said, "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333. Although *Ashbacker* involved competing applications for a new facility, its reasoning is equally applicable here. Even *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), and *Wabash Valley Broadcasting Corp.*, 34 F.C.C. 677 (1963), which the Commission cite to support its January 15, 1970 Policy Statement, granted both applicants a full hearing on all issues involved. I believe Congress intended in Section 309(e) to give new applicants with allegedly improved programming proposals at least a hearing to prove their claims. The Commission's Policy Statement eliminates this right.

Finally, I believe the January 15, 1970 Policy Statement imposes burdens on freedom of speech which are inconsistent with the First Amendment. Freedom of the press, for example, must do more than protect newspaper publishers from government censorship; it must also ensure that access to ownership of the print media is not blocked. Freedom of the press would not exist in this country if the government, while refraining from direct censorship over newspaper content, made it excessively difficult for people to own, control or publish a newspaper. The Supreme Court has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). And in *Red Lion*, the Court said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be *by the Government itself* or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (italic added).

Although the Commission's Policy Statement is ostensibly grounded in economic considerations, it undeniably impedes access to ownership of the broadcast media, and is therefore deeply imbued with First Amendment considerations. Upon review of agency and Congressional action, the Supreme Court will generally pay great deference to administrative and legislative expertise and experience in matters involving economic regulation, see, *e.g.*, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); but it has clearly warned that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Because the First Amendment freedoms of speech and the press occupy a "preferred position" in the spectrum of constitutionally guaranteed liberties, *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949), see *Saia v. New York*, 334 U.S. 558, 562 (1948); *Thomas v. Collins*, 323 U.S. 516, 529–30 (1945); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552–53 (1876), the government must prove that a "compelling," *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), or "paramount," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), governmental interest exists to justify restrictions upon First Amendment freedoms.

I think it is obvious that the Commission has made no "compelling" or "paramount" showing of necessity for the doctrines adopted in its January 15, 1970 Policy Statement. We have taken no hard economic evidence on the issue; we have consulted directly with neither licensees nor the public on this issue; and we have considered no alternatives to this scheme of regulation.

The Supreme Court has also indicated in First Amendment cases that legislative bodies must use "less drastic means" of regulation whenever possible to create the least interference with individual liberties. *E.g., United States v. Robel*, 389 U.S. 258, 268 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see generally, Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 (1969); Wormuth & Merkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254, 267–93 (1964). If the Commission is concerned that the scheme of competitive applications established by Congress in 1934 is unduly severe on the broadcasting industry, and that "stability and predictability in station operation" is needed to safeguard its "financial investments," then there are clearly "less drastic means" for accomplishing this goal than eliminating altogether potential licensees who might better serve their communities. The FCC, for example, might give losing incumbent licensees a tax certificate entitling it to involuntary conversion treatment under Section 1033 of the Internal Revenue Code. Another possibility would be to require the winning applicant to reimburse the losing incumbent for the fixed costs of his investment—or perhaps even his programming investments during the past two or more years. The point, simply, is that there are any number of alternative ways to increase stability in the broadcast industry without substantially impeding the access of various groups to ownership.

The importance of the First Amendment in this proceeding is threefold: First, the restrictions the Commission has placed on entry into the broadcasting field may well violate the standards of the First Amendment; second, the significant involvement of First Amendment issues in the comparative renewal procedure places on this Commission a greater burden of justifying its action than it has met; and third, the First Amendment considerations should limit the discretion of this agency to adopt substantive rules without the safeguards of the Administrative Procedure Act. We may be able to justify purely economic regulations by our alleged fund of "accumulated experience"; but we must do more when we curtail access to media ownership. We must demonstrate a "compelling" need for these regulations, and that there are no "less drastic means" available to us. This we have clearly failed to do.

APPENDIX C

POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

By the Commission: Commissioners HYDE and BARTLEY dissenting and issuing statements; Commissioner LEE concurring and issuing a statement.

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.[1] This commonly requires extended hearings into a number of areas of comparision. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228,[2] and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F. 2d 204. *cert. den.* 350 U.S. 1007.

All this being so, it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies. It is also obviously of great importance to prevent undue delay in the disposition of comparative hearing cases. A general review of the criteria governing the disposition of comparative broadcast hearings will, we believe, be useful to parties appearing before the Commission. It should also be of value to the examiners who initially decide the cases and to the Review Board to which the basic review of examiners' decisions in this area has been delegated. See Section 0.365 of our Rules, 47 CFR 0.365.[3]

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing.

We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.[4] Equally basic is a broadcast service which meets the needs of the public

[1] This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

[2] "[T]he doctrine of *stare decisis* is not generally applicable to the decisions of administrative tribunals." *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 383, 385, 174 F. 2d 38, 40.

[3] On June 15, 1964 the rule was amended to give the Review Board authority to review initial decisions of hearing examiners in comparative television cases, a function formerly performed only by the Commission itself.

[4] As the Supreme Court has stated, the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press* v. *United States*, 326 U.S. 1, 20. That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F. 2d 677, *cert. den.* 342 U.S. 830.

in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. *Diversification of control of the media of mass communications.*—Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area [5] and, finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements which we believe significant. Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

(*a*) Are larger, i.e., go towards complete ownership and control;

and to the degree that the existing media:

(*b*) Are in, or close to, the community being applied for;

(*c*) Are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;

(*d*) Are significant in terms of regional or national coverage; and

(*e*) Are significant with respect to other media in their respective localities.

2. *Full-time participation in station operation by owners.*—We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service.[6] It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se*, its value is increased if the participating owners are local resi-

[5] Sections 73.35(a), 73.240(a)(1) and 73.636(a)(1) of our rules, 47 CFR 73.35(a), 73.240(a)(1), 73.636(a)(1)' prohibit common control of stations in the same service (AM, FM and TV) within prescribed overlap areas. Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant.

[6] As with other proposals, it is important that integration proposals be adhered to on a permanent basis. See *Tidewater Teleradio, Inc.*, 24 Pike & Fischer, R.R. 653.

dents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs.[7] Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,[8] it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

3. *Proposed program service.*—The United States Court of Appeals for the District of Columbia Circuit has stated that, "in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 48, 175 F. 2d 351, 359. The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission *en banc* Programming Inquiry," 25 F.R. 7291, 20 Pike & Fischer, R.R. 1901, and need not be repeated here.[9] And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See *Henry* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. den.* 371 U.S. 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

[7] Of course, full-time participation is also necessarily accompanied by residence in the area.

[8] Lack of experience, unlike a high concentration of control, is remediable. *See Sunbeam Television Corp.* v. *Federal Communications Commission*, 100 U.S. App. D.C. 82, 243 F. 2d 26.

[9] Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. See *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged. We will not assume, however, that an unsually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.[10]

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient.[11]

4. *Past broadcast record.*—This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership *per se*, and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

5. *Efficient use of frequency.*[12]—In comparative cases where one of two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. The nature of an efficient operation may depend upon the nature of the facilities applied for, i.e., whether they are in the television or FM bands where geographical allocations have been

[10] We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

[11] It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation, i.e., to test the validity of integration proposals.

[12] This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

made, or in the standard broadcast (AM) band where there are no such fixed allocations. In addition, the possible variations of situations in comparative hearings are numerous. Therefore, it is not feasible here to delineate the outlines of this element, and we merely take this occasion to point out that the element will be considered where the facts warrant.

6. *Character.*—The Communications Act makes character a relevant consideration in the issuance of a license. See Section 308(b), 47 U.S.C. 308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. *Other factors.*—As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced.[13]

We pointed out at the outset that in the normal course there may be changes in the views of individual commissioners as membership on the Commission changes or as commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

Cases to be decided by either the Review Board or, where the Review Board has not been delegated that function, by the Commission itself, will be decided under the policies here set forth. So too, future designations for hearing will be made in accordance with this statement. Where cases are now in hearing, the hearing examiner will be expected to follow this statement to the extent practicable. Issues already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue, should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein. Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision. Administrative finality is also important. Therefore, cases which have already been decided, either by the Commission or, where appropriate, by the Review Board, will not be reconsidered. We believe that our purpose to improve the hearing and decisional process in the future does not require upsetting decisions already made, particularly in light of the basically clarifying nature of this document.

DISSENTING STATEMENT OF COMMISSIONER HYDE

I dissent to the adoption of the "Policy Statement on Comparative Broadcast Hearings" issued July 28, 1965.

One of the expressed objectives of the Policy Statement is the simplification and the expedition of the Commission's processes with respect to decisions in comparative cases. I agree with the majority that this is a most desirable objective; however, the policy statement as now framed will not achieve expedition. Moreover, to the extent that a degree of simplification of our decisional process may result from its adoption, this result, in my opinion, would be at a price which would be prohibitive and perhaps unlawful. It would press applicants into a mold in order to meet the Commission's preconceived standards, thus deterring

[13] Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for *ad hoc* determination.

perhaps better-qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to the mold, and eventually force the Commission to decide cases on trivial differences among applicants since basically they would all have come out of the same press. I consider this much too high a price to pay to achieve the majority's objective.

I think the initiative in proposing how stations should be owned and operated should remain with the applicants, thus providing opportunities for diversified approaches. Moreover, in the interest of diversity, the initiative for the presentation of program plans should be left with applicants and without undue circumscription as to what should be included or excluded. Then, as a matter of elementary fairness, as well as due process, applicants should be entitled to examination and comparison on the merit of their respective proposals—not merely comparison with previously-adopted positions. It may be that the check-off approach (as argued in the Policy Statement) will be helpful to Examiners and others in making decisions, but even this illusion of facility is certain to disappear as to cases involving competing new applicants who can plan to conform to prescribed formulas.

When competing applications for facilities are filed, the Commission must make an election which involves a comparison of characteristics. As was stated in *Johnston Broadcasting Company v. F.C.C.*, U.S.C.A., D.C., May 4, 1949:

"The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases * * *."

In this situation, and in order to comply with the directive of the Court, the Commission must consider among other things differences in makeup of applicants and differences in program proposals for the purpose of making the required comparison. But this requirement to consider differences in characteristics does not warrant the Commission to presume to establish—in the abstract—standardized preferences as to how applicants should be organized or as to how programs should be planned. I think that the effort to direct and standardize is incongruous with the basic policy of the Act.

I presume that one of the reasons for the adoption of the Policy Statement is to apprise potential applicants of the views of the Commission (and individual Commissioners) as to the manner in which differences among applicants will be treated. Decisions which have been made are available for this purpose. The views of the Commission and of individual Commissioners as to the effect of differences among applicants in comparative cases are set out in decisions which touch on such differences. Similarly, the specific views of dissenting or of separately-concurring Commissioners are available for analysis.

I know of no two cases where the underlying facts are identical. I know of no two cases where differences among the applicants are identical. Therefore, the significance to be given in each decision to each difference and to each criterion must of necessity vary, and must necessarily be considered in context with the other facts of the individual cases.

If the Commission has been remiss in the past in not spelling out the decisional process in each case as carefully as it should, the obvious remedy is improvement in the preparation of decisions. Moreover, through more carefully written decisions, both the Commission and the applicants can view the weight given to each difference and to each criterion in light of all of the facts in a given case. To the extent the other relevant facts in the applicant's case require the same conclusion, an applicant can assume such conclusion will be reached by the Commission. To the extent the other relevant facts require or permit a different conclusion, the Commission will be free to so conclude. However, to attempt to cure what might be considered past omissions in not fully spelling out reasons for decisions by prescribing an arbitrary order and weight to be given to each of such criteria seems to me to be idealizing form over substance, and avoiding statutory and legal requirements in doing so. This is especially true when no need exists for establishing this procedure since a simpler and more adequate solution is at hand.

The proposed fiat as to the weight which will be given to the various criteria—without sound predication of accepted data and when considered only in a vacuum and in the abstract—must necessarily result in a degree of unfairness to some applicants and in the fashioning of an unnecessary straitjacket for the Commission in its decisional process.

How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific long-time resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant? The majority now says that experience can always be acquired and, therefore, that it is less important than local residence. But the knowledge acquired from such local residence can by the same token be obtained just as easily—if not more easily—than broadcast experience. It seems clear to me that the importance to be given to the element of experience in one case or to the element of local residence in another case will necessarily vary in light of the additional factors involved in each case.

Moreover, the decision by an individual without broadcast experience (or perhaps even without business experience) to take full control of a complicated broadcast venture is held by this proposed Policy to be entitled to a significantly greater preference than a decision by a more prudent applicant who intends to secure competent, experienced and professional management to operate a station under his general direction until he acquires a reasonable degree of experience. It may be reasonable for the Commission to make such a conclusion in the light of all of the facts in a particular case, taking into consideration the specific attributes of the individual concerned, but it is obvious that the same conclusion need not be valid in a second case where the same attributes may not be present. The fact that it may be difficult to explain different decisions in the two cases is taken by the majority as sufficient reason to establish arbitrary preferences. This I cannot accept.

The evaluation of local needs and how best to provide for them is a highly subjective matter. Is the Commission competent—in advance of a review of all of the pertinent factors in a particular case—to decide that non-professional opinion as to the existence of needs or as to the manner in which the needs can best be fulfilled is automatically entitled to a greater weight than professional opinion based upon prior experience in substantially identical communities? I submit that it is not, and that although the decision might be difficult to make in any one case, and perhaps even more difficult to explain where the decisions differ on this factor in two cases, there can nevertheless be sound bases for different results in cases involving these elements. We should not be foreclosed from exploring them.

The language of the Policy Statement is quite broad in certain areas while, at the same time, the statement tries to be precise and restrictive in its proposed results. For example, terms such as "unusually high percentage of time", "unusual attention to community matters", "minor differences in the proportion of time", "ordinary differences in judgment", etc., are used without definition as to the meaning of the terms. I presume that future decisions will spell out at least some guidelines as to their meaning, but it is obvious that this will be achieved only at great cost to the applicants and after much litigation and then only in connection with the facts of a particular case. Since precise definitions are really not now feasible, why should these terms be employed? And since there appear to be no presently-existing guidelines which can be established in this document, then the ensuing wrangle in comparative cases as to what is ordinary, usual, unusual, high, etc., will take up at least the same time, if not more, than the mere introduction of proof of the basic facts.

I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to "new" applicants, and that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license". I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. Since we must assume that the Commission will find it appropriate or necessary to make uniform application of its statement of preferences, it is essential to consider the consequences of such application. The filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of any locally-owned applicants? Is the Commission now ready to read out established broad-

casters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?

I must assume that in the above cases the Commission will not reach its judgments arbitrarily and without giving consideration to all of the significant elements. Upon this assumption, I can foresee the development of case after case where exceptions to the Policy will be found to be necessary in order to reach a decision which a majority will consider to be fair and in the public interest. I can foresee a decisional process which eventually will be substantially similar—if not virtually identical—to the one in existence. Under these circumstances, I cannot believe that the public interest will be served, or the processes of the Commission expedited, by the adoption of the proposed Policy Statement.

No useful purpose would appear to be served by further belaboring these points. While the motives of the majority may be excellent, I do not believe that its objectives can thus be achieved. Moreover, I fear that the degree of uniformity which is being sought will necessarily be detrimental to broadcasting in general and to the public interest.

An overall objection which I think I should state is that the Commission is, in effect, placing legislative-like restrictions upon performance under the responsibility Congress intended it to implement with broad discretion. It would appear that we do not trust Commissioners to exercise judgment with as much discretion as Congress intended to repose in the Agency. This restrictive approach not only limits the Agency, but; as has been indicated, threatens to inhibit the development of services which do not conform to preconceived molds.

I think that the Commission should consider—instead of the adoption of this proposed "Policy Statement"—the introduction of such modern and accepted procedural methods as "discovery"—requiring its staff to make a more careful examination of each competing applicant prior to the issuance of hearing orders so as to specify issues which will encompass all material differences among the applicants rather than ordering hearings on generalized, boilerplate issues and preconceived conclusions; and writing its decisions with such care as to eliminate frivolous and inconsequential matter and in such a manner that applicants would be readily apprised of areas which the Commission considers to be vitally important. I believe that discovery procedure alone will do more to bring light—and to minimize heat—in comparative cases than a general abjuration of trivia. If the parties and, in fact, the Commission can secure factual information about each of the applicants before the hearing, and if thereafter, the Commission will exercise care and discretion in the framing of the issues, more will have been achieved to shorten our hearing procedures than can reasonably be expected from the adoption of this Policy Statement.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that our comparative hearings should be expedited by eliminating what has amounted to extensive bickering in the record over minutiae.

As I see it, however, the Commission majority is attempting the impossible here when it prejudges the decisional factors in future cases. My observation is that there are no two cases exactly alike. There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another. Broadcasting—a dynamic force in our society—experiences constant change. I have expressed it differently on occasions by saying, "There's nothing static in radio but the noise." If we are to encourage the larger and more effective use of radio in the public interest, we must avoid becoming static ourselves.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Even though I recognize the Policy Statement adopted by the Commission to be the result of a sincere effort to clarify the historical process of selecting a winner in comparative broadcast hearings, I am concurring with considerable reluctance. I am disappointed that the Commission did not examine alternative methods of "picking a winner" from a group of competing applicants, each of which may be fully qualified but only one of which may be granted. For example, in a recent case involving nine applications where I unqualifiedly concurred with the result arrived at by the majority, I said:

"However, I would much prefer such appropriate changes in the Communications Act and in the Commission's practices and policies as would have permitted, in a case such as this, adoption of a procedure which would, on a comparative basis, eliminate from further consideration several of the applications, and which would have permitted us to direct the remaining applicants to endeavor to work out a satisfactory merger arrangement within a stated reasonable period. In the event that such a merger were thereafter presented to the Commission, an award could have been given to the merged entity. Failing such a merger, the Commission would thereupon proceed to select a winner from among the limited eligibles." *Veterans Broadcasting Company, Inc., et al,* decided January 19, 1965.

Over the years I have participated in decisions in hundreds of "comparative proceedings" and candor compels me to say that our method of selection of the winning applicant has given me grave concern. I realize, of course, that where we have a number of qualified applicants in a consolidated proceeding for a single facility in a given community, it is necessary that we grant one and deny the others. The ultimate choice of the winner generally sustains the Commission's choice despite the recent rash of remands from the Court. Thus, it would appear that we generally grant the "right" application. However, I am not so naive as to believe that granting the "right application" could not, in some cases, be one of several applications.

The criteria that the Commission now says will be decisive—assuming all other things are substantially equal—in choosing among qualified applicants for new broadcast facilities in comparative hearings, are not new. However, the Policy Statement does tend to restrict the scope somewhat of existing factors and if undue delay in the disposition of comparative broadcast hearings is thus prevented, some good will have been accomplished.

I wish to make clear that my concurrence here does not bind me with respect to the weight I might see fit to put upon the various criteria in a given case. For example, while I recognize the problem of diversification of the mass media, I also recognize some counter balancing in the advantages of common ownership of a radio station and a newspaper. I am also persuaded that the public interest may be served by the common ownership of a radio station and a CATV system in the same market. In other words, if it should appear to me in a given proceeding that the owner of a newspaper or of a CATV system would do the better job of serving a particular community, I would not be so concerned with the composition of such an applicant that I would select another that was not "tainted" with the media of mass communication.

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a torturous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The Examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the Oral Argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counter claims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 percent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a "helleva way to run a railroad", and I hope these few comments may inspire the Commission to find that better system even if it requires changes in the Communications Act.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process.	)	Docket No. 19154

NOTICE OF INQUIRY

Adopted: February 17, 1971; Released: February 23, 1971

By the Commission: Commissioners Burch, Chairman; Johnson, and H. Rex Lee concurring and issuing statements; Commissioner Bartley dissenting; Commissioner Wells dissenting and issuing a statement.

1. On January 15, 1970, the Commission issued its policy statement on comparative hearings involving regular renewal applicants (22 FCC 2d 424). The crux of this policy statement concerned the rendering of "substantial service" by the renewal applicant. If the latter has rendered such service, without substantial defects, he will be preferred over newcomers; if not, he obtains no preference against the newcomer, and, while the ultimate issue will be determined on the comparative criteria, obviously has a handicap since he is then competing as one who chose to deliver less than substantial service to the public. The Commission noted that the term "substantial", of necessity, lacks mathematical precision, but was nevertheless a perfectly appropriate standard, much used in statutes. It pointed to the dictionary definition, "strong, solid, firm, much, considerable, ample, large, of considerable worth or value; important." 22 FCC 2d at 426. Finally, the Commission stated that the hearing process would be critical in implementation of this standard (22 FCC 2d at p. 426):

> The renewal applicant would have a full opportunity to establish that his operation was a 'substantial' one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if this is, indeed, the case. The programming performance of the licensee in all programming categories (including the licensee's response to his

ascertainment of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service is also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field."

2. The purpose of this Notice is to explore whether some pertinent standards can be evolved in the area of television broadcasting. The reason for restricting the inquiry to television is that our preliminary study of renewals has focused on this area. It clearly constitutes a most important beginning point. In view of their present problems, we exclude from our discussion within (pars.3-5) the independent UHF stations.

3. Clearly, any possible guidelines must be general in nature; there is no way, we repeat, to delineate with mathematical precision what constitutes "substantial service." However, the issue in this inquiry is whether it is appropriate to focus on two critically important areas, and to give some prima facie indication of what constitutes substantial performance in these areas. The areas are local programming, and programming designed to contribute to an informed electorate. The reason for focus on these two areas is obvious. The Congressional scheme of TV allocations is based on local outlets. See Sections 307(b), 303(s); S.Rept. No. 1526, 87th Cong., 2d Sess.; H. Rept. No. 1559, 87th Cong., 2d Sess. If a television station does not serve in a substantial manner as a local outlet -- if it is, in effect, a network spigot or mere purveyor of nonlocal film programming, it is clearly not meeting its crucial role. Similarly, we have stated that the reason we have allotted so much spectrum space to broadcasting is because of the contribution which it can make to an informed electorate. See Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1248 (1949). If a broadcaster does not make such a contribution in a substantial fashion, he is again undermining the basic allocations scheme.

4. We thus single out these two areas: (1) local programming and (2) informed electorate programming (i.e., news and public affairs), and turn now to what figures should be proposed in these areas for the comment of interested persons. In resolving that matter, we have had, necessarily, to rely upon our judgment and experience as to what should constitute "substantial service" in order to achieve the all-important basic allocation goals delineated above. However, it would make no sense to propose goals which are unrealistic, so we have also undertaken a study of all renewal applicants in the television markets. Based on

that study, we do not believe our proposals to be unrealistic because in each of these categories, substantial numbers of broadcasters are meeting the proposed guidelines. There are three caveats to be noted in this respect. We have no data in some areas; thus, the form does not now require information on public affairs programming in prime time. The figure which we have selected for comment (3% of prime time or about an hour a week) appears to us to be both a reasonable and realistic one, called for to achieve the above noted basic allocations goal. The second caveat is the extent to which we should take into account the different revenue posture of stations. We believe that as a general matter we should exempt the unprofitable station from these guidelines. It is for that reason that for the present (i.e., until they become profitable), we have excluded from this inquiry the independent UHF stations. Similarly, in the unlikely event that any other station losing money were to find itself in a comparative renewal hearing, the station could show the inapplicability of these guidelines because of its financial posture; judgment of its operation would thus have to be on an ad hoc basis, directed to the particular facts. But aside from this consideration of unprofitability, there is also the issue whether, based on the study, different guideline figures are not appropriate for stations with lesser revenue figures. To take this factor into account, we propose, for the most part, a range in these categories. The high end of the range would apply to the station in the top 50 markets with revenues over $5,000,000, while the low end would apply to the station with revenues below $1,000,000; a station with revenues between these figures would fall appropriately within the range (with, we stress, no specification of a precise, decimal-point figure but rather a general or "ball-park" figure). The appropriate revenue bracket would be denoted on the renewal or annual form, by checking a box. We specifically ask for comments directed to this question of the appropriate range, and to facilitate such comments, will make public our study data.[1/] The third caveat has to do with the area of programming designed to contribute to an informed electorate. In view of the clear, close relationship between news and public affairs programming, comments are requested whether these two categories should not be viewed together, with one overall figure and leeway for the licensee to make judgments within that figure. Thus, a station in a very large community might make the judgment to concentrate on public affairs programming, in light of the very intensive news efforts of several other stations in the community. Or, a station, if it judged it a more effective way of illuminating issues, might increase its news programming as against public affairs, with the insertion in such news programming of substantial segments dealing with public affairs discussions.

5. With this as necessary background, we now set out the following proposed figures as representing substantial service:

(i) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15%

1/ See Tables 1-4, attached hereto.

in the prime time period, 6-11 p.m., when the largest audience is available to watch).

(ii) The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF station (including a figure of 8-10% and 5%, respectively in the prime time period).

(iii) In the public affairs area, the tentative figure is 3-5%, with, as stated, a 3% figure for the 6-11 p.m. time period.

These figures are, of course, tentative ones set forth for comment by the interested parties.

6. There are a number of obvious considerations as to the above inquiry. First, as stated, it does not constitute the complete picture as to whether a station is rendering substantial service. Thus, it does not deal with every programming category. We believe that not every category is susceptible to the drawing of general guidelines. For example, there may be substantial agricultural interest in one area, and virtually none in another. As to such variables, only individual inspection, perhaps in the hearing process, could definitively delineate whether substantial service was being rendered in every respect. This point merits emphasis; we have 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. Second, even as to the two general areas where we think we can usefully set forth overall guidelines for the reasons set forth in par. 3, supra, we point out that the guidelines, if adopted, would not be a requirement that would automatically be definitive, either for or against the renewal applicant. Thus, if the applicant did not meet these guidelines, he could still argue in a comparative hearing that his service was substantial, using means such as described in par. 1, supra; he might point to an exceptional qualitative effort, e.g., an exceptional dedication of funds, staff and other resources to compensate for the lesser quantitative showing. On the other hand, the fact that a renewal applicant did meet these general guidelines would not preclude the contention at renewal or at a comparative hearing that his service was not substantial in these two areas. An applicant could devote a most substantial percentage of his time to public affairs, for example, but with coverage solely of issues like canoe safety, rather than the issues that are truly of "great public concern" in the area. See Red Lion Bctg. Co. v. F.C.C., 395 U.S. 367, 394 (1969). In local programming

the licensee again could have a substantial percentage figure and yet not serve "equitably and in good faith" the needs of significant groups within his service area. See Report and Statement of Policy re: Commission's En Banc Programming Inquiry, 20 Pike & Fischer, R.R. 1901 (1960); Capitol Bctg. Co., 38 FCC 1135, 1139-40 (1965). Here again, this would be a matter for particularized assessment, with the testimony of community leaders of particular significance. See par. 1, supra. There could of course also be substantial issues as to compliance with bedrock policies such as the fairness doctrine, the anti-discrimination rules, or over-commercialization. In short, the general guidelines are just that -- general or prima facie indications of substantial service, not definitive mathematical models. Even so, these general guidelines would appear useful and helpful, both to the industry and to the interested public. For they would give a general indication of what is called for, at least quantitatively, to meet substantial public interest requirements in these two critically important areas. Finally, we stress that assuming guidelines were to be adopted on the basis of this notice, such guidelines would not then become fixed or immutable. Clearly, in a field as "dynamic" as this (see FCC v. Pottsville Bctg. Co., 309 U.S. 134, 138), it would be necessary to review them in the light of experience and changing conditions and thus to determine at appropriate intervals whether they should be revised, upwards or downwards.

7. The above proposal focusses on the renewal applicant in relation to the criterion of substantial service where there are competitors. That concept clearly has great relevance to the renewal process generally since it constitutes the critically important competitive spur. See Policy Statement, supra. There are other revisions or proposals generally applicable in this renewal television field which should be briefly noted and which, we believe, complement the foregoing proposal:

(i) A renewal applicant would be required to list the most important problems or concerns facing his area during the twelve months preceding filing of his application which, in his opinion, were most serious or important. He would then be required to list all the programs he has presented during that same period which dealt with these issues, giving the name of each program, the date, time and duration of its broadcast, and a brief description of the program. At yearly intervals (specifically on September 1), the broadcast licensee would again prepare the information set out in the first two sentences of this subsection (i). This information would be an attachment to a shortened form which he would prepare at this annual interval, setting out, inter alia, his performance in the above described categories (local; news; public affairs).

(ii) As proposed in Docket No. 19153, the licensee would also make announcements at specified intervals, concerning his obligation to serve the needs and interests of his area and, if appropriate, his renewal application.

8. In view of the policy considerations discussed, we would propose not to require the extensive survey now incumbent upon the new broadcast applicant (including a transferee or assignee). The basis of this proposal to simplify our procedures is that there is no need at renewal for a new, detailed survey; the licensee should have been digging in each year of his operation to ascertain and meet needs, and would have maintained a continuing stream of contacts with interested individuals, leaders, and groups. In short, when it comes to renewal -- to a question of performance consistent with the public interest standard -- it is substance, not form, which is of critical importance. See par. 9, infra.

9. We stress this point of community involvement. The above proposals in par. 7 are geared to a continuing dialogue between station and community -- not a triennial spurt; to actual performance in crucial areas rather than elaborate surveys; and, finally, to reliance upon community leaders and groups, both to point up the need for any further inquiry by the Commission at renewal time or to spur substantial performance by the possibility of filing of a competing application. See Policy Statement, supra. By facilitating both awareness of the station's performance in critical areas throughout the license term and a continuing participation by the public, we believe that we are acting in a manner fairer to the licensee and fairer to the interested public. None of these proposals,

we emphasize, is designed in any way to dictate a particular program or format. They do indicate areas where the licensee must focus in view of sound and basic allocations policy. But the programming to be chosen to implement these policies is a matter for the licensee's judgment, after giving appropriate and good faith attention to the area's needs and interests. Since that is so, the Commission intends to place great reliance on community interest and participation in the renewal process. If the approach is successful in the area here under consideration, a simplified approach to renewal, with emphasis on community feed-back, will be considered for other broadcast areas. However, we intend to complete our study of this television area, and to gain experience therefrom, before turning to its consideration elsewhere.

10. If adopted, there is the question of the applicability of the new policy criteria as to substantial service. It would be clearly unfair to make such policies immediately applicable to the renewal applicants and judge their performance in hearings on policies which were not yet formulated or known to them; rather, if adoption of these general criteria is found to be warranted, there should be an appropriate time interval (e.g., 12 months) afforded licensees to meet these guidelines. We ask for comment on that time period. Any comparative hearings involving renewal applicants before that period would be governed by the present, more amorphous standards, with showings along the lines of the policy set out in par. 1, supra. In short, there would be a moratorium not on the filing of competing applications but on the applicability of these general criteria.

11. The foregoing proposal thus constitutes the basis of an inquiry to explore whether it is feasible or appropriate to give greater guidance with respect to the critically important concept in our 1970 Policy Statement of "substantial service." If it is not feasible or appropriate, one obvious alternative is simply to develop our policies in this area through a series of ad hoc decisions, with any overall policy awaiting the accumulation of greater experience. We have of course reached no final or tentative conclusion, but rather would stress our openness to all alternatives or suggestions as to what action would best serve our objective and, in the final analysis, the "public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act of 1934, as amended).

12. Authority for this inquiry is contained in Sections 4(i), 303, 307(d), 309, and 311(a) of the Communications Act of 1934, as amended.

13. Pursuant to applicable procedures set forth in §1.415 of the Commission's Rules and Regulations, interested persons may file comments on or before May 3, 1971, and reply comments on or before June 3, 1971. In accordance with the provisions of §1.419 of the Rules, an original and 14 copies of all comments, replies, briefs, and other documents shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

Attachment

*See attached concurring statements of Commissioners Burch, Chairman; Johnson, and H. Rex Lee; and dissenting statement of Commissioner Wells.

Table 1. Percentage of Total Broadcast Time Devoted to News, By Class of TV Station 1/

		VHF AFFILIATES				UHF AFFILIATES		VHF INDEPENDENT
		In Top 50 Markets		Markets Below 50		All Markets		All Markets
	Percentile 2/	Revenues over $5 million	Revenues less than $5 million	Revenues over $1 million	Revenues less than $1 million	Revenues over $1 million	Revenues less than $1 million	All Revenue Cl
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	10	12.2	11.3	11.7	11.1	11.0	9.2	6.7
	20	11.0	10.0	10.8	10.1	10.1	8.4	5.6
	25	10.0	9.7	10.2	9.8	10.1	8.2	5.4
	33	10.1	9.1	9.6	9.1	8.8	8.0	4.9
MEDIAN	50	9.0	7.7	8.6	8.0	8.4	7.2	4.6
	75	7.0	6.1	7.0	6.3	5.4	5.5	3.1
	90	5.5	4.7	5.5	5.2	3.9	3.0	2.8
Number of stations in class:		67	76	149	110	30	44	18

1/ Time devoted to news does not include time for commercial matter.

2/ Percentiles can best be explained by means of an example. For instance, in column (2) the figure 11.0 across from the 20th percentile means that 20 percent of the 67 stations in the top 50 markets with revenues greater than $5 million devoted 11.0 percent or more of their program hours to news during the composite week. The figure 7.0 in column (2) across from the 75th percentile means that 75 percent of the 67 stations devoted 7.0 percent or more of their program hours to news.

Source: Data from latest renewal forms.

Table 2. Percentage of Total Broadcast Time Devoted to Public Affairs, By Class of TV Station[1/]

		VHF AFFILIATES				UHF AFFILIATES		VHF INDEPENDENTS
		In Top 50 Markets		Markets Below 50		All Markets		All Markets
	Percentile[2/]	Revenues over $5 million	Revenues less than $5 million	Revenues over $1 million	Revenues less than $1 million	Revenues over $1 million	Revenues less than $1 million	All Revenue Classes
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	10	5.6	4.7	4.8	4.9	5.0	5.8	8.3
	20	4.4	3.9	4.0	3.8	4.6	4.4	3.9
	25	4.0	3.5	3.7	3.5	4.5	3.5	3.7
	33	3.7	3.2	3.2	3.1	4.1	3.2	2.8
MEDIAN	50	3.0	2.5	2.5	2.4	2.8	2.5	2.2
	75	2.2	1.8	1.7	1.5	1.4	1.2	1.2
	90	1.6	1.1	1.1	1.0	1.1	0.8	1.1
Number of stations in class:		67	76	149	110	30	44	18

1/ Time devoted to public affairs does not include time for commercial matter.

2/ The meaning of percentile is explained in footnote 2/ of Table 1.
Source: Data from latest renewal forms.

Table 3. Percentage of Broadcast Time Between 6 PM and 11 PM Devoted to Local Programming, By Class of TV Station 1/

		VHF AFFILIATES				UHF AFFILIATES		VHF INDEPENDENTS
		In Top 50 Markets		Markets Below 50		All Markets		All Markets
	Percentile 2/	Revenues over $5 million	Revenues less than $5 million	Revenues over $1 million	Revenues less than $1 million	Revenues over $1 million	Revenues less than $1 million	All Revenue Classes
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	10	19.9	18.6	19.3	19.0	18.8	18.8	30.8
	20	18.6	16.8	18.5	18.1	17.9	16.4	24.1
	25	17.6	14.7	17.4	17.1	16.2	13.7	22.8
	33	17.1	12.0	16.1	16.1	13.4	11.4	18.7
MEDIAN	50	15.2	8.9	11.4	11.7	8.6	8.6	17.2
	75	10.0	7.1	8.6	8.2	6.8	2.9	11.4
	90	5.0	1.4	7.1	6.4	2.4	0.0	5.1
Number of stations in class:		67	76	149	110	30	44	18

1/ Time devoted to local programming includes the time for commercial matter.

2/ The meaning of percentile is explained in footnote 2/ of Table 1.
Source: Data from latest renewal forms.

Table 4. Percentage of Total Broadcast Time Devoted To Local Programming, By Class of TV Station[1/]

Percentile[2/] (1)	VHF AFFILIATES: In Top 50 Markets: Revenues over $5 million (2)	VHF AFFILIATES: In Top 50 Markets: Revenues less than $5 million (3)	VHF AFFILIATES: Markets Below 50: Revenues over $1 million (4)	VHF AFFILIATES: Markets Below 50: Revenues less than $1 million (5)	UHF AFFILIATES: All Markets: Revenues over $1 million (6)	UHF AFFILIATES: All Markets: Revenues less than $1 million (7)	VHF INDEPENDENTS: All Markets: All Revenue Classes (8)
10	21.3	18.1	16.4	14.8	12.1	13.2	27.3
20	17.2	16.3	14.3	12.1	11.6	10.9	25.4
25	16.9	15.6	13.6	11.5	10.9	10.4	23.5
33	16.2	14.9	12.6	10.8	10.4	9.4	22.5
MEDIAN 50	15.0	12.8	11.2	9.4	9.3	8.2	18.2
75	13.3	10.0	9.3	7.2	7.4	5.8	16.2
90	12.1	8.3	7.2	6.1	6.3	4.8	10.6
Number of stations in class:	67	76	149	110	30	44	18

1/ Time devoted to local programming includes the time for commercial matter.

2/ The meaning of percentile is explained in footnote 2/ of Table 1.
Source: Data from latest renewal forms.

CONCURRING STATEMENT OF CHAIRMAN DEAN BURCH

In our 1970 Policy Statement on comparative hearings involving renewal applicants, we indicated that the critical concept of "substantial service" would be determined by the hearing process or by pertinent standards formulated by the Commission. I recognize the need for the ad hoc process as to many facets of such a hearing. In view of the considerations discussed in the majority opinion, there can be no all-embracing detailed rule or policy in this field. But it seems to me that to the extent that it is feasible to do so, there are policy advantages to proceeding here in a general or overall fashion with respect to some of the important bedrock criteria. It allows all interested persons to participate in formulating the appropriate standards, rather than having them fashioned by a series of narrow adjudications with limited parties. It affords a much larger perspective than the record compiled by parties in one proceeding. This method also eventually results in affording prior and general notice to the industry and the interested public as to what the general guidelines are -- obviously a fairer way to proceed.

I am aware that the matter is a difficult, sensitive one. The genius of the American system is its pluralism -- its individuality. Any governmental effort which undermines or thwarts that individuality is probably bad law and certainly bad policy. I therefore fully subscribe to the statement in paragraph 6 that we will and must eschew ordaining that x% of time be devoted to agricultural, religious, etc., programming.

The Notice seeks to avoid that pitfall by concentrating on two bedrock general areas, local programming and programming designed to contribute to an informed electorate. And the Notice is limited to television, which, unlike radio with its many specialized operations, is akin to a "general store." Even as so limited, there may be drawbacks to this or any percentage guideline approach.

However, I think that the approach is worthy of full exploration. To paraphrase Winston Churchill's famous remark about democracy, this may be the worst way of proceeding except when you consider all other ways of proceeding. Sooner or later -- generally or in ad hoc fashion, the agency must come to grips with the basic questions here raised. I believe that it may well be both better and fairer to do so sooner and in a general inquiry than to await the slow accretion of policies formulated in narrow adjudications with limited records and limited participation by interested persons.

If the record of this inquiry establishes that it is not feasible to formulate general guidelines even in these limited areas, then we must await the judgment of the individual cases. But we will at least have tried to explore a method which appears to be fairer to the interested groups, to the broadcasters, and above all to the public interest.

[In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant . . . Docket No. 19154]

Concurring Opinion of Commissioner Nicholas Johnson

The history of this proceeding and my views on it, have been spelled out earlier. Comparative Hearing on Renewal Applicants, 22 F. C. C. 2d 833, 841 (1970), reconsideration denied 24 F. C. C. 2d 383, 386 (1970); Hearings on S. 2004 Before the Comm. Subcom. of the Senate Comm. on Commerce, 91st Cong. 1st Sess., ser. 91-18, pt. 2 at 393 (1969); "No We Don't," New Republic, Dec. 6, 1969, pp. 16-19; How to Talk Back to Your Television Set (1970).

Suffice it to say, the Commission is now obliged to deal, in some fashion, with the creation of a definition of "substantial performance."

Thus, while I cannot relax and enjoy it, I can at least bring myself to confront the inevitable. Accordingly, I concur in the issuance of this Notice of Inquiry.

As I see it, we have two basic alternatives: (1) a "common law" case-by-case evolution of "substantial performance," or (2) an effort at general definition and promulgation as a general policy statement or rule.

The latter approach clearly has the advantages of (1) administrative ease, reducing our hearings and processing load substantially, and (2) reducing the sense of insecurity and instability in the industry when standards are vague, unarticulated or unknown.

If general guidelines are to be used, we then reach the following issues.

First, there is a fundamental conceptual issue regarding the nature of "substantial." Is the FCC to determine levels of programming performance (or other criteria) which, if met, constitute "substantial" performance? Is it theoretically--and practically--possible for all licensees to be "substantial" performers?

Or does "substantial" refer to the "best" performers--necessarily a comparative evaluation?

The industry's arguments at the time (and later before this Commission), and the concern of public interest groups, I had always assumed the latter standard was what was desired and anticipated.

If the comparative approach is to be used, we must then address some crucial "details." What percentage of the broadcasters can be found to have demonstrated "substantial performance"--2%, 10%, 25%, 50%, 80%?

So far in this discussion we have not considered criteria. That is, we have simply put the question, "regardless of the criteria used, once they are selected and applied, what percentage of the top performers will be deemed to be substantial?"

But once that has been resolved, we confront the question of criteria. Are news, public affairs and local programming the only quantifiable measures?

As the notice now stands it is not necessarily a commitment to revise the performance levels upward in such manner as to continue to "protect" approximately the same percentage of broadcasters as the present levels. Should it be?

In short, so far as I am concerned there are a great many open questions to be addressed in this inquiry--even apart from the most fundamental misgivings as to why we painted ourselves into this corner in the first place.

I concur in the proposition that we have to move. Aside from that, I'm open to suggestions on where we go.

(Formulation of rules and policies relating to the renewal of broadcast licenses and to the definition of substantial service)

CONCURRING STATEMENT

COMMISSIONER H. REX LEE

I have concurred in putting out for inquiry the Commission's newly proposed renewal standards and definitions of substantial performance by television broadcast licensees. As the Chairman states in his concurring opinion, the search for standards by all parties concerned is far preferable to the process of allowing such standards to evolve through adjudications standing on limited records and entirely on local public interests.

Nevertheless, I am concerned with the inclusiveness and generality of these standards and definitions. Their broad brush and sweep tend to neglect economic realities and structural differences within the broadcasting industry. While it may be entirely realistic and financially reasonable to impose these new requirements on television stations in the top fifty markets, the competitive and financial position of television stations in smaller markets seems to demand a search for different approaches. In other words, wisdom would seem to dictate that the Commission, for renewal purposes, begin exploring the advisability of classifying broadcasting stations based on financial and competitive considerations rather than begging off the question with a statement that our guidelines may not be definitive or conclusive either in finding, or being unable to find, that the public interest has been served.

Moreover, there seems to be some degree of short-sightedness in a system of regulation which encourages local live origination, local news and public affairs by broadcasters in markets "bristling" with CATV activity where the importation of distant network signals undercut a broadcaster's efforts to meet his regulatory and public interest obligations. The same may be said of the situation where small market broadcasters must cope with these severe local public interest requirements in the face of specialized programming demands

imposed by competition and the growing law of community group rights. Yet I am fearful that the generality of these new standards does not allow, with sufficient clarity, adequate exception or local variations which may be in the public interest. Under any system of law it may be appropriate to leave certain questions unanswered. But business enterprises need a higher standard of certainty in order that their operations may take place in an environment of relative stability.

These considerations, of course, should not paralyze the search for general standards. It is for this reason that I have concurred. But I do hope the various parties will provide us with sufficient information so that we may begin to address these questions.

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 take 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.

I realize that handling renewals on a case-by-case basis is not the most expeditious way to discharge our responsibilities. But, after all, the function of this agency is to render judgment, not necessarily to set hard and fast rules. True, there will be leeway for some judgment under the proposal that the majority has sanctioned. It will be minimal compared to the latitude which both the broadcaster and the public have a right to expect. We have taken the easy road.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 71-826
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In the Matter of)
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Formulation of Policies Relating to) Docket No. 19154
the Broadcast Renewal Applicant,)
Stemming from the Comparative)
Hearing Process.)

FURTHER NOTICE OF INQUIRY

Adopted: August 4, 1971 ; Released: August 20, 1971

By the Commission: Commissioners Bartley and Johnson concurring and issuing statements; Commissioner Houser absent.

1. We have just issued an order extending the filing dates in this proceeding (FCC 71-425). This Further Notice deals with substance and is called for in light of the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Citizens Communications Center v. F.C.C., Case No. 24,471, decided June 11, 1971.

2. The essence of that decision is that in a comparative hearing involving a regular renewal applicant, the Communications Act and Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), require a single full hearing in which the parties may develop evidence and be adjudged on all relevant criteria. The Court for this reason held invalid the Commission's "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants," 22 FCC 2d 424 (1970), which provided a full comparison of 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. Only with a single comparative hearing, the Court ruled, would all matters material to the public interest judgment in the particular case be fully developed.

3. The Court's decision does not obviate the need for this proceeding. On the contrary, it reinforces it. For, the Court stressed that ". . . incumbent licensees should be judged primarily on their records of past performance . . .," and that "[i]nsubstantial past performance should preclude renewal of a license . . .[while] [a]t the same time, superior performance should be a plus of major significance in renewal proceedings" (Sl. Op. 25). Further, 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" (Sl. Op. 25, fn. 35). It urges the Commission to strive to clarify in rulemaking proceedings what constitutes superior service, and notes "with approval that such rule making proceedings may soon be underway. News Notes, 39 U.S.L. Week 2513 (March 16, 1971)" (Sl. Op. 26, fn. 35). The proceedings referred to are, of course, the instant proceedings in this Docket.

4. We believe that while the Court disapproved the procedure set up in the Renewal Policy Statement, and emphasized the need for a more flexible weighing of the good and bad points of both the renewal applicant and the new applicant, it did not intend to overturn the policy that "a plus of major significance" should be awarded to a renewal applicant whose past record warrants it or to undercut the purpose of the present proceeding to seek out and quantify, at least in part, that degree of performance. We therefore continue to propose for the comment of interested persons the percentage guidelines set forth in our prior Notice. It appears to us that they would prima facie indicate the type of service warranting a "plus of major significance" in the comparative hearing. That is the standard at whose recognition we are directing our efforts. We recognize that particular labels can be misleading. Thus, we used the term "substantial service" in the sense of "strong, solid" service -- substantially above the mediocre service which might just minimally warrant renewal (see 22 FCC 2d at p. 425, n. 1). 1/ We believe that the Court may have read this use of "substantial" service as meaning minimal service meeting the public interest standard (Sl. Op. 20), and therefore employed the term "superior" service to make clear that it had in mind a contrast with mediocre service -- as it put it (Sl. Op.

1/ We there stated:

> We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid," "strong," etc. (see p. 3, supra) performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish between two types of situations--one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

26, fn. 35), a "lapse into mediocrity, to seek the protection of the crowd." 2/ In short, we believe that it is unnecessary to further refine the label. What rather counts are the guidelines actually adopted to indicate the "plus of major significance" -- the type of service which, if achieved, is of such nature that one can ". . . reasonably expect renewal" (Sl. Op. 25, fn. 35). Interested parties should therefore address themselves to the appropriateness in this respect of the percentages set forth in the prior Notice.

5. Parties may also advance other proposals. Thus, the Court raised for consideration the criterion of "whether and to what extent the incumbent has reinvested the profit on his license to the service of the viewing and listening public." (Sl. Op. 26, fn. 35). We had previously considered the possible use of a guideline directed to the relationship between revenues and program expenditures but had tentatively concluded that this matter should be left to exploration as appropriate in the hearing process. Parties may of course address themselves to this and other possible guidelines. The issue is whether in any proposed area a guideline is appropriate or whether the matter is one best left to the full hearing, where its significance can be adjudged in the particular circumstances.

6. Thus, the important factor of diversification of control of media of mass communications is one which must be evaluated on the facts of each case. This, we think, is the thrust of the Court's statement that, "Diversification is a factor properly to be weighed and balanced with other important factors,

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2/ Here again confusion can arise, since the term "superior" is sometimes used comparatively, and it is a quantum of service to the public -- not a comparison -- which is the essence of the matter. That the matter is not of a comparative nature may be shown by assuming that every licensee improved its performance 100%, or 200%, or 300%, in the categories denoted in our prior Notice. Under a comparative approach, only the top would continue to warrant the "plus." Further, while it is critical to the public interest to have "strong" or "solid" or "superior" or "meritorious," service in these categories (whatever the appropriate label may be), it does not serve the public interest artificially to require ever advancing amounts, to the detriment of what the public reasonably wants in light of other interests.

including the renewal applicant's prior record, at a renewal hearing." (Sl. Op. 27, fn. 36). While generally a renewal licensee who had performed in the meritorious manner described above could "reasonably expect renewal" (Sl. Op. 25, fn. 36), the full hearings could adduce facts that change the picture. Thus, where a large multiple owner or newspaper licensee was involved in a hearing, it might win renewal based on defects in its opponent's comparative case, but to gain renewal on its own record, it might have to make a strong public interest showing as to its past broadcast record. It is, we think, impossible to formulate any general standard here since, as the Court has indicated, the matter turns upon the facts of the diversification issue and the renewal applicant's record. Finally, we add our belief that the Court is not seeking to have the ownership patterns of the broadcast industry restructured through the renewal process. This would be chaotic in the extreme and administratively a horror. If overall restructuring is to be considered -- and there are more substantial issues on this score -- it should be in the context of an appropriate rule making, with a reasonable opportunity for all parties to comment fully on the proposed rules; Notice of Proposed Rule Making in FCC Docket No. 18110, 33 Fed. Reg. 5315; 35 Fed. Reg. 5948 (22 FCC 2d 306); cf. Hale & Wharton v. FCC, 425 F.2d 556, 560 (C.A.D.C., 1970); and, if rules requiring restructuring are subsequently adopted, they should fairly apply to all and should allow reasonable periods for divestment or other appropriate arrangements.

7. The Court indicated serious doubt as to the Commission's procedures in adopting the Policy Statement (Sl. Op. 7, fn. 5). This proceeding affords full opportunity for all interested persons to set forth their views on the formulation of appropriate policies in this important area. Such views must of course be consistent with the Court's essential holding of the necessity for a full hearing.

8. In view of the foregoing, we shall also revise the time table for comments in this proceeding, with comments due on or before November 1, 1971 and reply comments on or before December 1, 1971.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

*See attached Concurring Statement of Commissioner Robert T. Bartley.
*See attached Concurring Opinion of Commissioner Nicholas Johnson.

CONCURRING STATEMENT
OF
COMMISSIONER ROBERT T. BARTLEY

I dissented to the Notice of Inquiry with which this proceeding was initiated.

However, since a majority of the Commission approved the proceeding, I have no objection to the inclusion of this Further Notice.

Renewal Procedures

[In the Matter of Formulation of Policies Relating to the . . . Hearing Process Dkt. No. 19154]

Concurring Opinion of Commissioner Nicholas Johnson

I concur in the issuance of this further notice. My own views on this proceeding and some of the issues raised by it are set out in my opinion concurring in the original notice, 27 F. C. C. 2d 580, 588 (1971), 36 Fed. Reg. 3939 (March 2, 1971), 2 Current Service P & F Radio Reg. 53:429, 435 (1971). I have some disagreement with the particular views outlined by my colleagues in this further notice as well.

A careful reading of the court's opinion in the Citizens case yields several important principles that should be stressed. One is the temporary nature of a license grant and the explicit command in the Communications Act that no property right accrues to the license holder. Slip opinion at 16 n. 23 and accompanying text. This is a very important point that I shall discuss later.

A second is that competing applicants are entitled to a full hearing to choose not a "substantial" performer, or even a "superior" performer, but the "best" performer as the succeeding licensee. Slip opinion at 26, and concurring opinion at 30.

Further the court unanimously suggested specific criteria for use in determining whether an incumbent had performed in a "superior"

manner and was therefore entitled to a plus in the overall weighing process of a comparative hearing. These include:

1) Elimination of excessive and loud advertising

2) Delivery of quality programs

3) The extent to which the incumbent has reinvested the profit from his license to the service of the viewing and listening public

4) Diversification of ownership of mass media

5) Independence from government influence in promoting First Amendment objectives

Slip opinion at 25 n.35, 26 n.36, 28.

Several of these criteria deserve discussion but two merit particular treatment. My colleagues seem to minimize the importance of the diversification issue in their analysis in paragraph 6, holding out the hope that diversification issues would be treated solely in rulemaking. Nowhere is there a citation to the most recent renewal case involving diversification of control in ownership: Frontier Broadcasting Co., 21 F.C.C.2d 570 (1970). In that case a majority of the Commission clearly indicated that diversification issues could be raised in a renewal context, despite the existence of ownership rulemaking in Dkt. No. 18110. The hearing in Frontier resulted from a petition to deny, and while it appears that there will be no "forfeiture" of Frontier's licenses--divestiture is presently proposed--the original hearing provided for

denial of the license renewal applications. By analogy the problem of "forfeiture"--the total loss of a license by an incumbent who is unable to offset the comparative demerit effects of multiple mass media ownership--might be lessened by permitting an incumbent who faces a competing application to "cure" his multiple ownership situation by divesting during the comparative hearing process. At some point early in the proceeding, the incumbent would have to decide whether he was going to go ahead in his present status, or whether he would divest his other properties. It is this problem for the multiple owner that my colleagues apparently find "chaotic in the extreme and administratively a horror." Perhaps a process that would permit divestiture in the comparative hearing process--as well as in petition to deny hearings, or in rulemaking--would leave my colleagues less horrified.

The question of "forfeiture" is related to another criterion suggested by the court for evaluating incumbent renewal applicants. The court suggested that reinvestment of profits "to the service of the listening and viewing public" would "certainly" be one test. I disagree with my colleagues that this is a question to be left "to the hearing process." In my view it goes to the heart of the Commission's discomfiture caused by the court's decision in this case.

It is a commonplace that the Communications Act bars property rights in the license held by the broadcaster as a public trustee. But it is also clear that this "law" has been ignored by the Commission over the years. When a license is transferred for $20 million, 80-90% of the value of the transfer is made up of the opportunity to broadcast--the property that is the license. The value of the transfer depends on the medallion value of the broadcasting permit. The "forfeiture" that occurs when an incumbent loses to a new competitor is precisely that property value that the Act says shall not be created. The 1952 amendments to the Act simply accentuated this dilemma by insuring a free market in the buying and selling of licenses, subject only to Commission regulation. 47 U. S. C. 310(b) (1964). An oligopolistic industry (especially in television), profit maximizing behavior, virtually automatic renewal, and a Commission permissive to the buying and selling of licenses have combined to make an industry with very large profits which were then translated into capital gains as licenses were sold. Profits which were very large, as compared with the original investment to secure a license, then appear "normal" to a licensee who has bought his way in by paying the full price for a license where the profit stream expectations have been capitalized. It is against this background of illicit property rights, and requirements for high profits, that the

court's suggestion that profits be turned back into service rests. The licensee is trapped between his desire (1) to profit-maximize, either to meet the required return on his investment, or to enhance the value of his present investment, and (2) his need to insure his license against challenge through performance--performance which will require him to forego some profits. If the Commission permits challengers to be considered on their merits, as the law and the courts now require, then incumbent licensees will have to put more resources into service in order to insure themselves against successful challenge. Since not all this increment in service is consistent with full profit-maximizing behavior, profits and capital values will be reduced. But this is exactly the result the temporary grant of a license to use a public resource was meant to achieve. If granting of licenses was simply to authorize the accumulation of maximum profits by the licensee, it is difficult to see why the grant was temporary, or why comparative hearings were required to choose the applicant who would provide the "best possible service" rather than "substantial service." Judge MacKinnon's concurring opinion in the Citizens case, Slip opinion at 30 (emphasis in original).

There are two other threads in the court's opinion that are worth emphasizing. One is its concern over the de facto segregation of broadcast station ownership and the Commission's apparent willingness

to foreclose entry to minority groups. Slip opinion at 26 n.36. A second is the clear feeling of the court that the Commission's standard of "substantial service," as embodied in the 1970 Policy Statement, was no more than the standard a licensee had to meet to show that he was not absolutely disqualified from renewal under the public interest standard. I believe this is what leads the court to conclude that the Policy Statement was an administrative enactment of S. 2004. Slip opinion at 20. Of course, there are no Commission cases defining what it meant by "substantial." My colleagues now apparently equate "substantial" with "superior" (paragraph 4). It is not clear to me that all broadcast service is either "minimal" or "superior." There is also implicit in the court's opinion a criticism of the "insuperable advantage" for the incumbent which seemed to be the standard of the Wabash and Hearst cases. Slip opinion at 15 n.19 and 20, and 16.

The importance of the Citizens case and this proceeding cannot yet be determined. The Commission has apparently concluded that it must live with this decision. Enlightened leadership, on the part of the Commission and the industry, would seem to require that these issues be confronted directly. It is the long term interests of the public that the courts, the Commission, and ultimately the broadcast industry must keep clearly in mind. The process of bringing the Commission broadcast renewal process in line with the requirements of the Communications Act has been a difficult experience. The time for false

starts and straying from the path of "law and order" is long past. I hope that all who are vitally concerned with these fundamental regulatory questions will give them careful consideration in this proceeding.

For Release 10:00 a.m.
Monday, December 18, 1972

Remarks of

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

at the

Sigma Delta Chi Luncheon
Indianapolis Chapter

Indiana State Teachers Association Building
Indianapolis, Indiana

December 18, 1972

In this calm during the holidays, we in Washington are thinking ahead to 1973; among other things, planning our testimony before Congressional committees. For my part, I am particularly concerned about testimony on broadcast license renewal legislation. Broadcasters are making a determined push for some reasonable measure of license renewal security. Right now they are living over a trap door the FCC can spring at the drop of a competing application or other renewal challenge. That is a tough position to be in, and, considering all the fuss about so-called "intimidation," you would think that there wouldn't be much opposition to giving broadcasters a little more insulation from government's hand on that trap door.

But there is opposition. Some tough questions will be asked--even by those who are sympathetic to broadcasters. Questions about minority groups' needs and interests. Questions about violence. Questions about children's programming; about reruns; about commercials; about objectivity in news and public affairs programming--in short, all questions about broadcasters' performance in fulfilling their public trust. These are questions the public is asking. Congress is asking the questions, too; Senatore Pastore on violence; Senator Moss on drug ads; Representative Staggers on news misrepresentations.

Despite this barrage of questioning, the Congress is being urged to grant longer license terms and renewal protection to broadcasters. Before voting it up, down, or around, the Congress will have to judge the broadcasters' record of performance.

And where do we see that performance? It leaps out at you every time you turn on a TV set, and it's definitely not all that it could be. How many times do you see the rich variety, diversity, and creativity of America represented on the TV screen? Where is the evidence of broadcasters doing their best to serve their audiences, rather than serving those audiences up to sell to advertisers? And, most disturbing of all, how do broadcasters demonstrate that they are living up to the obligation--as the FCC puts it-- to "assume and discharge responsibility for planning, selecting, and supervising all matter broadcast by the stations, whether such matter is produced by them or provided by networks or others."

It's been easy for broadcasters to give lip service to the uniquely American principle of placing broadcasting power and responsibility at the local level. But it has also been easy--too easy--for broadcasters to turn around and sell their responsibility along with

their audiences to a network at the going rate for affiliate compensation.

The ease of passing the buck to make a buck is reflected in the steady increase in the amount of network programs carried by affiliates between 1960 and 1970. It took the FCC's prime time rule to reverse this trend, but even so, the average affiliate still devotes over 61% of his schedule to network programs. This wouldn't be so bad if the stations really exercised some responsibility for the programs and commercials that come down the network pipe. But all that many affiliates do is flip the switch in the control room to "network," throw the "switch" in the mailroom to forward viewer complaints to the network, sit back, and enjoy the fruits of a very profitable business.

Please don't misunderstand me when I stress the need for more local responsibility. I'm not talking about locally-produced programs, important though they are. I'm talking now about licensee responsibility for all programming, including the programs that come from the network.

This kind of local responsibility is the keystone of our private enterprise broadcast system operating under the First Amendment protections. But excessive concentration of control over broadcasting is as bad

when exercised from New York as when exercised from Washington. When affiliates consistently pass the buck, to the networks, they're frustrating the fundamental purposes of the First Amendment's free press provision.

The press isn't guaranteed protection because it's guaranteed to be balanced and objective--to the contrary, the Constitutition recognizes that balance and objectivity exist only in the eye of the beholder. The press is protected because a free flow of information and giving each "beholder" the opportunity to inform himself is central to our system of government. In essence, it's the right to learn instead of the right to be taught. The broadcast press has an obligation to serve this free flow of information goal by giving the audience the chance to pick and choose among a wide range of diverse and competing views on public issues.

This may all seem rather philosophical. Cynics may argue that all television, even the news, is entertainment programming. But in this age when television is the most relied upon and, surprisingly, the most credible of our media, we must accept this harsh truth: the First Amendment is meaningless if it does not apply fully to broadcasting. For too long we have been interpreting the First Amendment to fit

the 1934 Communications Act. As many of you know, a little over a year ago I suggested ways to correct this inversion of values. One way is to eliminate the FCC's Fairness Doctrine as a means of enforcing the broadcasters' fairness obligation to provide reasonable opportunity for discussion of contrasting views on public issues.

Virtually everyone agrees that the Fairness Doctrine enforcement is a mess. Detailed and frequent court decisions and FCC supervision of broadcasters' journalistic judgment are unsatisfactory means of achieving the First Amendment goal for a free press. The FCC has shown signs of making improvements in what has become a chaotic scheme of Fairness Doctrine enforcement. These improvements are needed. But the basic Fairness Doctrine approach for all its problems, was, is and for the time being will remain a necessity; albeit an unfortunate necessity. So, while our long range goal should be a broadcast media structure just as free of government intrusion, just as competitive just as diverse as the print media, there are three harsh realities that make it impossible to do away with the Fairness Doctrine in the short run.

First, there is a scarcity of broadcasting outlets. Second, there is a substantial concentration of economic and social power in the networks and their affiliated TV stations. Third, there is a tendency for broadcasters and the networks to be self-indulgent and myopic in viewing the First Amendment as protecting only their rights as speakers. They forget that its primary purpose is to assure a free flow and wide range of information to the public. So we have license renewal requirements and the Fairness Doctrine as added requirements--to make sure that the networks and stations don't ignore the needs of those 200 million people sitting out there dependant on TV.

But this doesn't mean that we can forget about the broader mandates of the First Amendment, as it applies to broadcasting. We ought to begin where we can to change the Communications Act to fit the First Amendment. That has always been and continues to be the aim and intent of this Administration. We've got to make a start and we've got to do it now.

This brings me to an important first step the Administration is taking to increase freedom and responsibility in broadcasting.

OTP has submitted a license renewal bill for clearance through the Executive Branch, so the bill can be introduced in the Congress early next year. Our bill doesn't simply add a couple of years to the license term and guarantee profits as long as broadcasters follow the FCC's rules to the letter. Following rules isn't an exercise of responsibility; it's an abdication of responsibility. The Administration bill requires broadcasters to exercise their responsibility without the convenient crutch of FCC program categories or percentages.

The way we've done this is to establish two criteria the station must meet ~~before~~ the FCC will grant renewal. First, the broadcaster must demonstrate he has been substantially attuned to the needs and interests of the communities he serves. He must also make a good faith effort to respond to those needs and interests in all his programs, irrespective of whether those programs are created by the station, purchased from program suppliers, or obtained from a network. The idea is to have the broadcaster's performance evaluated from the perspective of the people in his community and not the bureaucrat in Washington.

Second, the broadcaster must show that he has afforded reasonable, realistic, and practical opportunities for the presentation and discussion of conflicting views on controversial issues.

I should add that these requirements have teeth. If a station can't demonstrate meaningful service to all elements of his community, the license should be taken away by the FCC. The standard should be applied with particular force to the large TV stations in our major cities, including the 15 stations owned by the TV networks and the stations that are owned by other large broadcast groups. These broadcasters, especially, have the resources to devote to community development, community service, and programs that reflect a commitment to excellence.

The community accountability standard will have special meaning for all network affiliates. They should be held accountable to their local audiences for the 61% of their schedules that are network programs, as well as for the programs they purchase or create for local origination.

For four years, broadcasters have been telling this Administration that, if they had more freedom and stability, they would use it to carry out their responsibilities. We have to believe this, for if broadcasters were simply masking their greed and actually seeking a so-called "license to steal," the country would have to give up on the idea of private enterprise broadcasting. Some are urging just that; but this

Administration remains unshaken in its support of the principles of freedom and responsibility in a private enterprise broadcasting system.

But we are equally unshaken in our belief that broadcasters must do more to exercise the responsibility of private enterprise that is the prerequisite of freedom. Since broadcasters' success in meeting their responsibility will be measured at license renewal time, they must demonstrate it across the board. They can no longer accept network standards of taste, violence, and decency in programming. If the programs or commercials glorify the use of drugs; if the programs are violent or sadistic; if the commercials are false or misleading, or simply intrusive and obnoxious; the stations must jump on the networks rather than wince as the Congress and the FCC are forced to do so.

There is no area where management responsibility is more important than news. The station owners and managers cannot abdicate responsibility for news judgments. When a reporter or disc jockey slips in or passes over information in order to line his pocket, that's plugola, and management would take quick corrective action. But men also stress or suppress information in accordance with their beliefs. Will station licensees or network executives also take action against this ideological plugola?

Just as a newspaper publisher has responsibility for the wire service copy that appears in his newspaper--so television station owners and managers must have full responsibility for what goes out over the public's airwaves--no matter what the origin of the program. There should be no place in broadcasting for the "rip and read" ethic of journalism.

Just as publishers and editors have professional responsibility for the news they print, station licensees have final responsibility for news balance--whether the information comes from their own newsroom or from a distant network. The old refrain that, quote, "We had nothing to do with that report, and could do nothing about it," is an evasion of responsibility and unacceptable as a defense.

Broadcasters and networks took decisive action to insulate their news departments from the sales departments, when charges were made that news coverage was biased by commercial considerations. But insulating station and network news departments from management oversight and supervision has <u>never</u> been responsible and <u>never</u> will be. The First Amendment's guarantee of a free press was not supposed to create a privileged class of men called journalists, who are immune from criticism by government or restraint by publishers and

editors. To the contrary, the working journalist, if he follows a professional code of ethics, gives up the right to present his personal point of view when he is on the job. He takes on a higher responsibility to the institution of a free press, and he cannot be insulated from the management of that institution.

The truly professional journalist recognizes his responsibility to the institution of a free press. He realizes that he has no monopoly on the truth; that a pet view of reality can't be insinuated into the news. Who else but management, however, can assure that the audience is being served by journalists dedicated to the highest professional standards? Who else but management can or should correct so-called professionals who confuse sensationalism with sense and who dispense elitist gossip in the guise of news analysis?

Where there are only a few sources of national news on television, as we now have, editorial responsibility must be exercised more effectively by local broadcasters and by network management. If they do not provide the checks and balances in the system, who will?

Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks--or who acquiesce by silence--can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time.

Over a year ago, I concluded a speech to an audience of broadcasters and network officials by stating that:

> "There is a world of difference between the professional responsibility of a free press and the legal responsibility of a regulated press. . . . Which will you be--private business or government agent?--a responsible free press or a regulated press? You cannot have it both ways--neither can government nor your critics."

I think that my remarks today leave no doubt that this Administration comes out on the side of a responsible free press.

EKLY Television Digest with Consumer Electronics

A TELEVISION DIGEST WHITE PAPER

DECEMBER 25, VOL. 12:52

Full Text

Whitehead — On License Renewals and Network Programming

Address by Clay T. Whitehead, Director, Office of Telecommunications Policy, Executive Office of the President, Before Sigma Delta Chi Indianapolis Chapter, Dec. 18, 1972

plus

Proposed Renewal Legislation

Including Draft of Letter to Congress Under Consideration by Office of Management & Budget

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Virtually everyone agrees that the fairness doctrine enforcement is a mess. Detailed and frequent court decisions and FCC supervision of broadcasters' journalistic judgment are unsatisfactory means of achieving the First Amendment goal for a free press. The FCC has shown signs of making improvements in what has become a chaotic scheme of fairness doctrine enforcement. These improvements are needed. But the basic fairness doctrine approach for all its problems, was, is and for the time being will remain a necessity; albeit an unfortunate necessity. So, while our long range goal should be a broadcast media structure just as free of government intrusion, just as competitive, just as diverse as the print media, there are 3 harsh realities that make it impossible to do away with the fairness doctrine [redacted] short run.

First, there is a scarcity of broadcasting outlets. Second, there is a substantial concentration of economic and social power in the networks and their affiliated TV stations. Third, there is a tendency for broadcasters and the networks to be self-indulgent and myopic in viewing the First Amendment as protecting only their rights as speakers. They forget that its primary purpose is to assure a free flow and wide range of information to the public. So we have license renewal requirements and the fairness doctrine as added requirements – to make sure that the networks and stations don't ignore the needs of those 200 million people sitting out there dependent on TV.

But this doesn't mean that we can forget about the broader mandates of the First Amendment, as it applies to broadcasting. We ought to begin where we can to change the Communications Act to fit the First Amendment. That has always been and continues to be the aim and intent of this Administration. We've got to make a start and we've got to do it now.

This brings me to an important first step [redacted] Administration is taking to increase freedom and responsibility in broadcasting.

OTP has submitted a license renewal bill for clearance through the Executive Branch, so the bill can be introduced in the Congress early next year. Our bill doesn't simply add a couple of years to the license term and guarantee profits as long as broadcasters follow the FCC's rules to the letter. Following rules isn't an exercise of responsibility; it's an abdication of responsibility. The Administration bill requires broadcasters to exercise their responsibility without the convenient crutch of FCC program categories or percentages.

The way we've done this is to establish 2 criteria the station must meet before the FCC will grant renewal. First, the broadcaster must demonstrate he has been substantially attuned to the needs and interests of the communities he serves. He must also make a good faith effort to respond to those needs and interests in all his programs, irrespective of whether those programs are created by the station, purchased from program suppliers, or obtained from a network. The idea is to h[redacted] the broadcaster's performance evaluated from the p[redacted]spective of the people in his community and not the bureaucrat in Washington.

Second, the broadcaster must show that he has afforded reasonable, realistic and practical opportunities for the presentation and discussion of conflicting views on controversial issues.

I should add that these requirements have teeth. If a station can't demonstrate meaningful service to all elements of his community, the license should be taken away by the FCC. The standard should be applied with particular force to the large TV stations in our major cities, including the 15 stations owned by the TV networks and the stations that are owned by other large broadcast groups. These broadcasters, especially, have the resources to devote to community development, community service and programs that reflect a commitment to excellence.

The community accountability standard will have special meaning for all network affiliates. They should be held accountable to their local audiences for the 61% of their schedules that are network programs, as well as for the programs they purchase or create for local origination.

For 4 years, broadcasters have been telling this Administration that, if they had more freedom and flexibility, they would use it to carry out their responsibilities. We have to believe this, for if broadcasters were simply masking their greed and actually seeking a so-called "license to steal," the country would have to give up on the idea of private enterprise broadcasting. Some are urging just that; but this Administration remains unshaken in its support of the principles of freedom and responsibility in a private enterprise broadcasting system.

But we are equally unshaken in our belief that broadcasters must do more to exercise the responsibility of private enterprise that is the prerequisite of freedom. Since broadcasters' success in meeting their responsibility will be measured at license renewal time, they must demonstrate it across the board. They can no longer accept network standards of taste, violence, and decency in programming. If the programs or commercials glorify the use of drugs; if the programs are violent or sadistic; if the commercials are false or misleading, or simply intrusive and obnoxious; the stations must jump on the networks rather than wince as the Congress and the FCC are forced to do so.

There is no area where management responsibility is more important than news. The station owners and managers cannot abdicate responsibility for news judgments. When a reporter or disc jockey slips in or passes over information in order to line his pocket, that's plugola, and management would take quick corrective action. But men also stress or suppress information in accordance with their beliefs. Will station licensees or network executives also take action against this ideological plugola?

Just as a newspaper publisher has responsibility for the wire service copy that appears in his newspaper – so TV station owners and managers must have full responsibility for what goes out over the public's airwaves – no matter what the origin of the program. There should be no place in broadcasting for the "rip and read" ethic of journalism.

Just as publishers and editors have professional responsibility for the news they print, station licensees have final responsibility for news balance – whether the information comes from their own newsroom or from a distant network. The old refrain that, quote, "We had nothing to do with that report, and could do nothing about it," is an evasion of responsibility and unacceptable as a defense.

Broadcasters and networks took decisive action to insulate their news departments from the sales departments, when charges were made that news coverage was biased by commercial considerations. But insulating station and network news departments from management oversight and supervision has *never* been responsible and *never* will be. The First Amendment's guarantee of a free press was not supposed to create a privileged class of men called journalists, who are immune from criticism by government or restraint by publishers and editors. To the contrary, the working journalist, if he follows a professional code of ethics, gives up the right to present his personal point of view when he is on the job. He takes on a higher responsibility to the institution of a free press, and he cannot be insulated from the management of that institution.

The truly professional journalist recognizes his responsibility to the institution of a free press. He realizes that he has no monopoly on the truth; that a pet view of reality can't be insinuated into the news. Who else but management, however, can assure that the audience is being served by journalists dedicated to the highest professional standards? Who else but management can or should correct so-called professionals who confuse sensationalism with sense and who dispense elitist gossip in the guise of news analysis?

Where there are only a few sources of national news on TV, as we now have, editorial responsibility must be

exercised more effectively by local broadcasters and by network management. If they do not provide the checks and balances in the system, who will?

Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks – or who acquiesce by silence – can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time.

Over a year ago, I concluded a speech to an audience of broadcasters and network officials by stating that:

> "There is a world of difference between the professional responsibility of a free press and the legal responsibility of a regulated press. . . . Which will you be – private business or government agent? – a responsible free press or a regulated press? You cannot have it both ways – neither can government nor your critics."

I think that my remarks today leave no doubt that this Administration comes out on the side of a responsible free press.

Proposed Renewal Legislation

Drafted by Office of Telecommunications Policy

A BILL

To amend the Communications Act of 1934 to provide that licenses for the operation of a broadcast station shall be issued for a term of five years, and to establish orderly procedures for the consideration of applications for the renewal of such licenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection 307 (d) shall be amended to read as follows:

Sec. 307 (d) (1) No license granted for the operation of any 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 therefore, a renewal of such license may be granted from time to time for an additional term of not longer than five years if the Commission finds that the public interest, convenience, and necessity would be served thereby.

(2) With respect to any application for the renewal of a broadcasting license, the Commission shall grant such application if it finds that the applicant is qualified legally, financially, and technically, and is otherwise competent to hold such a license under the provisions of this Act and the general rules and regulations of the Commission and that, during the preceding license period in question, the applicant:

(A) has been substantially attuned to the needs and interests of the public in its service area, and has demonstrated, in its program service and broadcast operations, a good faith effort to be responsive to such needs and interests; and

(B) has afforded reasonable opportunity for the discussion of conflicting views on issues of public importance;

Provided, however, that in making the findings set out in subparagraphs (A) and (B), the Commission shall not consider any predetermined performance criteria of general applicability respecting the extent, nature, or content of broadcast programming; except that in determining whether reasonable opportunity has been provided for the discussion of conflicting views on issues of public importance, the Commission may consider the overall pattern of programming on particular public issues provided by the applicant during the preceding license period.

(3) Notwithstanding any other provision of this Act, the procedure to be followed in the event that an application for the renewal of a broadcasting license is challenged by a petition to deny or by a competing application for the same broadcast service is as follows:

(A) The petitioner or party filing such competing application shall make specific allegations of fact sufficient to show that grant of the application for renewal would be prima facie inconsistent with paragraph (2) of this subsection. 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 for renewal shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(B) If the Commission finds on the basis of the application, the pleadings filed, and other matters which it may officially notice, that there are no substantial and material questions of fact and that a grant of the application to renew the license would be consistent with paragraph (2) of this subsection, it shall grant such application, terminate the proceeding, and issue a concise statement of the reasons for its finding. 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 paragraph (2) of this subsection, it shall proceed with the hearing provided in subsection 309(e) of this Act.

(4) In order to expedite action on applications for [redacted]wal of broadcasting station licenses and in order to [redacted]id 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 hearings 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."

Summary and Sectional Analysis of the Bill

[redacted]The bill is intended to achieve three principal [redacted]rposes relating to provisions of the Communications Act of 1934 governing the grant and renewal of licenses to operate broadcast stations. These purposes are:

(1) To extend the term of broadcast licenses from three to five years.
(2) To establish criteria for the evaluation of applications for renewal of such licenses.
(3) To establish orderly procedures for the consideration of competing applications for the same broadcast service covered by such licenses.

A section-by-section analysis follows:

Paragraph (1) of subsection 307(d) as amended provides for an extension of the term of broadcast licenses to five years, the period for which other types of licenses are granted. The five-year term would be applicable to any original license which the FCC grants, or to any existing license which the FCC renews.

Paragraph (2) of subsection 307(d) as amended establishes two general criteria to be employed by the FCC in acting upon applications for renewal of broadcast licenses. If these criteria are met, the FCC is to grant the application. The first criterion is whether or not the renewal applicant meets the legal, financial and technical qualifications for holding a license, and is competent to do so under pertinent statutory provisions and FCC rules and regulations. The second criterion, broadly stated, is the degree to which the renewal applicant has been responsive to the needs and interests of the communities it undertakes to serve, and has afforded opportunity for discussion of conflicting views on important public issues. Paragraph (2) also prohibits the FCC from adopting any predetermined performance standards such as program categories, percentages, or formats in applying the two general renewal criteria. It does, however, make clear that the FCC may consider the overall pattern of programming in determining whether the renewal applicant has afforded a reasonable opportunity for the discussion of conflicting views on important public issues. This provision recognizes the current practice of the FCC with regard to renewal applications and does not effectuate any change in the case-by-case enforcement of the Fairness Doctrine.

Paragraph (3) of subsection (d) as amended sets out the procedure to be followed in the event that a renewal application is contested by a petition to deny or by a competing application for the same broadcast service. In essence, it is as follows: First, the contesting party is required to make a showing by factual allegation and affidavit that grant of the renewal application would be inconsistent with paragraph (2). The renewal applicant is then given the opportunity to respond, in the same fashion. If, based upon the record thus placed before it, the Commission determines that there is no substantial

and material question of fact, and that grant of the application for renewal would be consistent with paragraph (2), it is to make a statement of its findings, grant the application for renewal, and terminate the proceeding. If, however, there is such a question of fact, or if the Commission is unable to conclude from the record before it that grant of the application for renewal would be consistent with paragraph (2), the Commission is to proceed with a hearing under the provisions of section 309(e). Paragraph (3) does not change the current procedures for the consideration of petitions to deny set out in section 309 of the Act, except to conform the showing required in the petition to the criteria established in paragraph (2).

Paragraph (4) of subsection (d) as amended retains the original provisions of the earlier subsection (d) pertaining to interim procedures and to certain rules of the Commission regarding terms of licenses.

Draft of Proposed Letter to Speaker of the House

Prepared by Office of Telecommunications Policy, to Accompany Proposed Renewal Legislation

Dear Mr. Speaker:

I am submitting herewith for the consideration of the Congress a proposed revision of subsection 307(d) of the Communications Act of 1934. This subsection establishes the term for which the Federal Communications Commission (FCC) grants licenses to operate television and radio broadcasting stations. It also sets out the manner in which the FCC considers applications for the renewal of such licenses.

The broadcasting media are unique among our many outlets for expression in that only they are licensed by the Federal Government. And, within the system of licensing, the most important aspect is the license renewal process. It is the pressure point of the system, because the manner in which renewals are treated goes to the heart of government's relationship to broadcasting. The ultimate sanction over the broadcaster is non-renewal of his license, no less effective for the fact that it is rarely used. The mere existence of the triennial requirement of seeking permission to continue in business, and the threat of non-renewal, can affect the daily operations of broadcast stations. And, when the business involved is a powerful medium of expression operating under First Amendment protections, concerns about license renewal could have a stifling effect on the free flow of information.

Under the First Amendment, there can be no authorized voice of government. Creation of a *de facto* government voice, however, could result from the manner in which government deals with license renewals. That danger exists when broadcasters, affected by the uncertainty and instability of their business, seek safety by rendering the type of program performance necessary to obtain renewal. If government encourages this type of compliance by setting detailed performance criteria for renewal, then broadcasters could turn away from the communities they are licensed to serve and seek only to serve the government agency that charts the course for them.

Counterbalancing the goal of stability in the renewal process, however, is the clear mandate of the Communications Act that no one can acquire a property right in a broadcast license. The license is a public trust – an opportunity to render service and a privilege to use a scarce public resource to speak to and on behalf of the public. No licensee who renders poor service can have any expectation of renewal. Consequently, the threat of non-renewal and the spur of competition for the license are important parts of the overall statutory plan for broadcasting.

The revision of Section 307(d), which presently provides for a three-year license term and the renewal of license under a broad "public interest, convenience and necessity" standard, is an attempt to resolve this conflict of statutory and policy goals. The legislation does this by making the following changes in the Communications Act.

License term – the legislation would lengthen the term of broadcast licenses from three to five years. In 1934, when the Communications Act was adopted, a three-year license term was a reasonable precaution in dealing with a new industry. But a five-year license term seems to be a reasonable period at this stage in broadcasting history. A longer license term would provide a sufficiently long period to enable broadcast licensees to render a high quality broadcast service. It would also inject more stability into the license process. This provision would apply prospectively to any original

[redacted]cast license or any existing license which the FCC renews after the enactment of the bill.

Renewal standards – the legislation would make specific the Communication Act's broad "public interest" criterion as it applies to renewal applications. First, the legislation would preclude any restructuring of the broadcast industry on an *ad hoc* basis. If the Commission wished to adopt a policy concerning media cross-ownership or concentration of control, for example, it could do so only through promulgation of a general rule and not through action on a particular renewal application.

The legislation would also establish the following two specific criteria for evaluating the performance of the incumbent licensee in passing upon his renewal application: (1) the responsiveness of the licensee to the needs and interests of the public in the communities and areas served by the broadcast station, and (2) the licensee's fairness obligation, as stated in Section 315(a) of the Communications Act.

The legislation also would require that the Commission, in applying the criteria for renewal, avoid the use of detailed predetermined performance standards, relating to various categories of programs, program formats, program percentages, etc. In taking this approach, the legislation would establish the local community as the point of reference for evaluating a broadcaster's performance. In effect, it would place the responsibility and incentive for superior performance in the hands of the local licensee and the public he undertakes to serve.

Procedure for competing applications – the legislation would not change the current procedures for Commission consideration of petitions to deny license renewal applications. It would, however, change the procedures for dealing with competing applications for the same broadcast service. It would require the competing applicant to show that a grant of the renewal application would be inconsistent with the legislation's criteria for renewal. If this burden cannot be met, the Commission would grant the renewal application and dismiss the competing application. If, however, the Commission is unable to make the requisite finding, or if there is a material factual question presented, the renewal application would be set for full comparative hearing under the requirements of Section 309(e) of the Act.

This change is needed because a licensee seeking renewal should not be put to the same tests used for applicants seeking an original license. The legislation would thus balance the interest of using the competing application to spur licensee performance with the equally important interest of injecting more predictability and stability into broadcast operations.

It is a long standing principle that meritorious licensees should not be deprived of the broadcasting privilege unless clear and sound reasons for public policy demand such action. This does not represent a presumption in favor of any incumbent licensee nor does it give the incumbent an unfair advantage solely by reason of its prior operations. The legislation would simply require the FCC to exercise its independent judgment on the question of whether the incumbent licensee has rendered meritorious service. Under present procedures, the independent judgment of the Commission is precluded once a competing application is filed by a qualified applicant.

The Office of Management and Budget advises that the proposed legislation is in accord with the program of the President.

A similar letter is being sent to the President of the Senate.

file

January 11, 1973

MEMORANDUM FOR

Mr. Ron Ziegler
The White House

Attached is a copy of the speech Tom Whitehead will be delivering today at 12:30 p.m. to the New York Chapter of the National Academy of Television Arts and Sciences at the Americana Hotel in New York City. As you requested, the following are the four major changes in broadcast license renewal procedures that would be brought about by the OTP bill.

1. The legislation extends the term of license for a broadcast station from three to five years. This increase is proportionate with the time required to recoup the substantial investment in money and effort that a broadcaster must now make, as well as with the time that it takes for a broadcasting operation to provide a high quality of service.

2. The legislation provides that policies regarding the grant of licenses -- such as policies regarding multiple or cross media ownership -- must be contained in rules of general application promulgated through the Commission's rule-making procedures. This provision does not modify any of the Commission's powers enumerated under the Communications Act, or constrain its determination of substantive policy. It simply requires that such policy be made through a proceeding in which all views are given the opportunity to be heard and considered, and all information analyzed and weighed.

3. The legislation replaces the broad "public interest" standard now governing the evaluation of renewal applications by two specific criteria geared to the applicant's past performance. This is the best evidence there is as to the applicant's qualification for license renewal.

The first of these criteria is the licensee's responsiveness to the needs and interests of the communities he services, and the second is the licensee's fulfillment of the fairness obligation, as it is stated in section 315(a) of the Communications Act. Employment of these criteria will have two effects: it will establish the local community rather than any artifical or arbitrarily determined program mix requirements or performance standards as a point of reference in determining whether or not a license should be renewed. Furthermore, it will provide for general oversight by the Commission of the licensee's adherence to the fairness obligation, and lessen the need for day-to-day enforcement of the obligation on a case-by-case basis.

4. The legislation establishes procedures for consideration of competing applications for the license for which renewal is sought. As with those governing petitions to deny -- which are not changed by the legislation -- these procedures specify that the challenger must first show that grant of the renewal application would be inconsistent with the legislation's criteria for renewal. If this showing is made, then a full comparative hearing is held. These procedures assure that healthy competition for licenses is an essential part of broadcasting, but that at the same time, such competition occurs within an overall environment of predictability and stability.

If you have any further questions, you can reach me through my secretary at X4990.

Brian P. Lamb
Assistant to the Director

Attachment

BPL:cjc
cc:
DO Chron
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BPE Subject
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OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C. 20504

January 26, 1973

DIRECTOR

Mr. Mark Evans
Vice President for Public Affairs
Metromedia, Incorporated
5151 Wisconsin Avenue, N. W.
Washington, D. C. 20016

Dear Mark:

I appreciate the concern that you--and the entire broadcasting community--have regarding the relationship between my December 18, 1972, speech on the responsibility of broadcast licensees and our proposed license renewal legislation. On January 11, 1973, I discussed in detail the philosophy and the facts of our proposed bill. Those remarks were not covered as extensively as the initial speech, so I have enclosed a copy for your information. The speech and the bill are related--but not in the way portrayed in the press coverage of my speech.

As you will see, the proposed bill would add nothing to broadcasters' present obligations to be responsible for all the programming presented or carried by the station, regardless of source. Neither OTP nor the White House has any power to affect the grant or denial of any broadcast license. And we have no intent or desire to influence in any way the grants or denials of licenses by the FCC. Moreover, the FCC has consistently refused to involve itself in questions of news bias, slanting or accuracy, unless there is extrinsic evidence of intentional wrongdoing on the part of the licensee. Neither the proposed bill nor the import of my speech would lead any objective observer to think that we desire to change this commendable practice of regulatory restraint.

In short, the bill would add no new burden, impose no new obligation, or require new affirmative showings on the part of any licensee.

As for the speech, it was intended to remind licensees of their responsibilities to correct faults in the broadcasting system that are not (and should not) be reachable by the regulatory processes of government. For network affiliates, exercise of these responsibilities does not

mean that the station manager has to monitor each network feed and "blip" out "ideological plugola" or "elitist gossip." The station management must simply be aware of all the program content on the station. Management should consciously reach its own conclusions as to what mixtures of conflicting views on public issues the station should maintain to inform the public in an adequate manner. Over the license term, the broadcaster should make a conscientious effort to provide reasonable opportunity for discussion of conflicting views on issues and see that he has the opportunity to bring his concerns to the attention of his network.

The relationship between the proposed bill and my speech is no more than the relationship between freedom and responsibility we find everywhere in our society. As you know, this Office has steadily promoted the cause of less rather than more regulation in broadcasting. But the public and the Congress would not think of increasing the freedom in broadcasting by easing government controls without also expecting some indication that voluntary exercise of responsibility by broadcasters can operate as an effective substitute for such controls.

The core issue is: Who should be responsible for assuring that the people's right to know is served, and where should the initiative come from--the government or the broadcasters. The speech focused on the three TV networks as the most powerful elements in the broadcast industry and asked how this concentration of power was to be effectively balanced. Some, who now profess to fight for broadcasters' freedom, would rely on regulatory remedies such as licensing the networks, burdening the broadcaster and the audience with the clutter of counter-advertising, banning ads in children's programs, ill-defined restrictions on violence, and the like.

Anyone who has followed OTP's policy pronouncements knows that we reject this regulatory approach. We have always felt that the initiative should come from within broadcasting.

The broadcaster should take the initiative in fostering a healthy give-and-take on important issues, because that is the essence of editorial responsibility in informing the public. That does not mean constricting

the range of information and views available on television. It does not mean allowing three companies to control the flow of national TV news to the public; accountable to no one but themselves. The public has little recourse to correct deficiencies in the system, except urging more detailed government regulation. The only way broadcasters can control the growth of such regulation is to make more effective the voluntary checks and balances inherent in our broadcast system.

These issues are worthy of widespread debate. But the public discussion taking place outside of the broadcasting community is far below the level of reasoned debate. I grant you that the language I used in the December 18 speech was strong. But those who have twisted an appeal for the voluntary exercise of private responsibility into a call for government censorship--that they can then denounce--have abandoned reasoned debate in favor of polemics.

In the next few months, broadcasters will have a rare opportunity to assist the Congress in choosing the future direction for broadcast regulation.

I hope you can realistically come to grips with the problems and issues involved in broadcast regulation, and help reverse the recent trend toward more extensive, more detailed regulation. Indeed, if OTP's bill is a successful first step in the reversal of this trend, the Congress can be urged to move further in this direction.

But this attempt to increase freedom in broadcasting will be opposed by those who are now complaining most loudly about my speech. One might think that the people who are attempting to portray our efforts as an Administration attempt to stifle criticism would support our proposed legislation, if they actually wanted to diminish government control of broadcasting.

But it seems that they do not wish to diminish the government's power to control broadcast content. They seem quite willing to create and use powerful tools of government censorship to advance <u>their</u> purposes and <u>their</u> view of what is good for the public to see and hear. We disagree. The danger to free expression is the <u>existence</u>

of the legal tools for censorship, not in the political philosophy of the particular Administration in power. We are proposing actions to begin to take those tools from the hands of government. We hope that broadcasters will support us in this endeavor, despite the rhetoric of their present unlikely allies.

In the final analysis, however, no progress can be made in reducing government power over broadcasting unless broadcasters can demonstrate that they can make licensee responsibility work in practice. It is only then that the Congress can be convinced that reliance on the good faith judgment and discretion of licensees is a better way to preserve freedom in broadcasting.

Sincerely,

Clay T. Whitehead

METROMEDIA, INC.
5151 WISCONSIN AVE., N.W.
WASHINGTON, D.C. 20016
TEL: 202-244-5151

MARK EVANS/VICE PRESIDENT
DIRECTOR OF PUBLIC AFFAIRS

January 4, 1973

Dr. Clay Whitehead
Director
Office of Telecommunications
1800 G Street, NW
Washington, D. C.

Dear Dr. Whitehead:

I have watched with great interest the reaction to your recent talk in Indiana regarding license renewal matters. As I read the national press, I recognize there is considerable misunderstanding in regard to your speech as it relates to your proposed legislation.

As Chairman of a special Task Force for the National Association of Broadcasters to seek legislative action on license renewals, I am immensely interested in this matter.

I know I speak for my committee and the national membership of the NAB in requesting from you clarification in order that we might more aptly decide our future course.

Most sincerely,

Mark Evans

ME/jm

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

March 13, 1973

DIRECTOR

Honorable Carl Albert
Speaker of the House
of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

I am submitting herewith for the consideration of the Congress, a proposed revision of section 307 of the Communications Act of 1934, as amended, which pertains to the term of broadcast station licenses.

The basic concept of the American system of broadcasting is that of localism. It means that broadcasting will be rooted in private enterprise at the community level, with many autonomous and independent local broadcasters throughout the country seeking to construct program schedules in accordance with the tastes, desires, needs, and interests of the public in the area which they serve. This principle reflects the American tradition of having a multitude of diverse local voices serving both local and national purposes in many communities and areas throughout the country.

The broadcast media, however, are unique among our many outlets for expression, in that only they are licensed by the Federal Government. Our system of broadcasting presents this country with a unique dilemma that goes back to the basic policy embodied in the Communications Act of 1934. On the one hand, the Act requires a government agency -- the Federal Communications Commission -- to grant applications for broadcast licenses only if the public interest, convenience, and necessity will be served thereby. This necessarily means that, to some extent, the government will be involved in passing judgment on the heart of that broadcast service, which is the broadcasters' programming. On the other hand, the First Amendment, which applies fully to radio and television broadcasting, denies government the power of censorship and the power to interfere with our most valued rights of free press, free speech, and free

expression. It is within the system of government licensing that these two somewhat contradictory objectives must be balanced. And, within the system of licensing, the most important aspect is the license renewal process. It is the pressure point of the system, because the manner in which renewals are treated goes to the core of the government's relationship to broadcasting.

The requirement to seek government permission to continue in business and the threat of nonrenewal affect the licensee throughout the license term not just at renewal time. Renewal procedures and the factors to be considered by the government at renewal time have a substantial impact upon the daily operations of broadcast stations and the manner in which broadcasters exercise their public responsibilities. Therefore, these procedures and factors could have a stifling effect on the free flow of information, which is so vital to the interests of a free society.

The First Amendment should guarantee broadcasters the right to disseminate ideas, popular and unpopular, and without regard as to whether they are consistent with the views of government. Yet, the role of the broadcasters, not as free agents, but as agents authorized to act only so long as they espouse views consistent with government views, is a possibility under current license renewal procedures. That danger exists when broadcasters, affected by the uncertainty and instability of their business and lacking assurance that they will be able to continue to exercise their local responsibilities, seek safety by rendering the type of program performance necessary to obtain renewal. If the government encourages this type of compliance by setting detailed criteria to determine such performance, the effect could be to turn broadcasters away from the communities that they are licensed to serve and to cause them to seek to serve the government that charts the course for them.

Counterbalancing the goal of stability in the renewal process, however, is the clear public interest mandate of the Communications Act and its prohibition against anyone acquiring a property right in the broadcast license. The license is and must continue to be a public trust; an opportunity to render service; and a privilege to use a scarce public resource to speak to and on behalf of the public. No licensee who fails to exercise the responsibility to his local audience can have any assurance of renewal. Accordingly, the threat of nonrenewal and the spur of competition in broadcasting are important parts of the overall statutory plan.

At present the license renewal process is conducted in an unstable environment. The bill submitted with this letter would restore balance and stability to the license renewal process and enable the private enterprise broadcasters, operating within the rights and the responsibilities of the First Amendment, to serve the public's paramount right in the broadcast media.

The Administration bill would change the present practice and procedures with respect to license renewals in the following four essential ways:

1. License terms for radio and television stations would be extended from three to five years. When the Communications Act was prepared in 1934, the relatively brief three-year license term was a reasonable precaution in dealing with a new and untested broadcast industry. A five-year term, however, seems to be more reasonable at this stage in broadcasting's development. It would inject more stability into broadcast operations and would allow more time for the licensee to determine the needs and interests of his local community, and plan long-range programs of community service.

2. The bill would eliminate the present requirement for an automatic, lengthy, and costly comparative hearing whenever a competing application is filed for the same broadcast service. The FCC would be able to exercise its independent judgment as to whether a comparative hearing is necessary. The renewal challenger would bear the burden of demonstrating that the renewal applicant has not met the criteria of the Act. If the incumbent licensee had performed in the public interest, he would be assured of renewal. A hearing would be required only if the Commission were unable to conclude that the broadcaster's performance warranted renewal.

3. The bill would preclude the FCC from restructuring the broadcast industry through the renewal process. Presently, the FCC can implement policies relating to broadcast industry structure -- such as a policy restricting newspaper ownership of broadcast stations -- through the criteria it uses to decide renewal hearings. This allows for the restructuring of the broadcast industry in a haphazard, highly subjective, and inconsistent manner. The bill would establish that if these industry-wide policies affecting broadcast ownership are imposed or changed, only the general rulemaking procedures of the FCC would be used, with full opportunities provided to the entire broadcast industry and to all interested members of the public to participate in the proceeding.

4. The license renewal bill would also forbid FCC use of predetermined criteria, categories, quotas, formats, and guidelines for evaluating the programming performance of the license renewal applicant. There has been an increasing trend for the FCC to dictate to the broadcasters as to what "good" or "favored" program performance is from the government's point of view. The bill, therefore, would halt this trend toward an illusory quantification of the public interest in broadcast programming and would remove the government from the sensitive area of making value judgments on the content of broadcast programming. The bill would make the local community the touchstone of the public service concept embodied in the Communications Act. Serving the local communities' needs and interests instead of the desires of government would become the broadcasters' number one priority.

The Office of Management and Budget advises that enactment of the proposed legislation would be in accord with the program of the President.

A similar letter is being sent to the President of the Senate.

Sincerely,

Clay T. Whitehead

Enclosure

A BILL

To amend the Communications Act of 1934 to provide that licenses for the operation of a broadcast station shall be issued for a term of five years, and to establish orderly procedures for the consideration of applications for the renewal of such licenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 307 of the Communications Act of 1934 shall be amended by striking subsection (d) of said section, and inserting in lieu thereof the following:

"Sec. 307(d) (1) No license granted for the operation of any 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 an additional term of not longer than five years, if the Commission finds that the public interest, convenience, and necessity would be served thereby.

(2) With respect to any application for the renewal of a broadcasting license, the Commission shall grant such application if it finds that the applicant is legally, financially, technically, and otherwise qualified to hold such a license under the provisions of this Act and the rules and regulations of the Commission, and that the applicant:

(A) is substantially attuned to the needs and interests of the public in its service area, and demonstrates, in its program service and broadcast operations, a good faith effort to be responsive to such needs and interests; and

(B) affords reasonable opportunity for the discussion of conflicting views on issues of public importance;

Provided, however, that in applying subparagraph (A), the Commission shall not consider any predetermined

performance criteria, categories, quotas, percentages, formats, or other guidelines of general applicability respecting the extent, nature, or content of broadcast programming; and that in applying subparagraph (B), the Commission shall consider only the overall pattern of programming provided by the applicant on particular public issues.

(3) Notwithstanding any other provision of this Act, the procedure to be followed in the event that an application for the renewal of a broadcasting license is challenged by a petition to deny or by a competing application for the same broadcast service is as follows:

(A) The petitioner or party filing such competing application shall make specific allegations of fact sufficient to show that grant of the application for renewal would be prima facie inconsistent with paragraph (2) of this subsection. 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 for renewal shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(B) If the Commission finds on the basis of the application, the pleadings filed, and other matters which it may officially notice, that there are no substantial and material questions of fact and that a grant of the application to renew the license would be consistent with paragraph (2) of this subsection, it shall grant such application, terminate the proceeding, and issue a concise statement of the reasons for its findings. 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 paragraph (2) of this subsection, it shall proceed with the hearing

provided in subsection 309(e) of this Act to determine whether grant of the application would be consistent with paragraph (2) of this subsection. If, in such hearing, the Commission finds that a grant of the application would be consistent with such paragraph, it shall grant such application, terminate the proceeding and issue a concise statement of the reasons for its finding. If the Commission for any reason is unable to make such a finding, it shall either deny the renewal application or consider it together with any competing application or applications for the same broadcast service, then on file or later timely filed, and shall grant the application that will best serve the public interest, convenience and necessity.

(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. 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."

EXPLANATION AND SECTIONAL ANALYSIS

REGULATORY BACKGROUND

Twelve years ago, the Federal Communications Commission (FCC), in its "Report and Statement of Policy Re: Commission En Banc Programming Inquiry," 20 P&F Radio Reg. 1901 (1960), sought a delicate balance between the public interest performance of broadcast licensees and minimal governmental interference with program decisions. In doing so, the Commission stressed the same principle that underlies the proposed legislation, namely the separation of government from broadcasting.

This principle is consistent with the intent of the Communications Act of 1934 and Congress' continual refusal to impose, or to permit the FCC to impose, affirmative programming requirements or priorities. For example, in the face of "persuasive arguments" that the Commission require licensees to present specific types of programs, the Commission stated that:

> "[W]e are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise."

Id. at 1907.

The Commission noted that, while it may inquire of licensees what they have done to determine community needs, it cannot impose its own notions of what the public should see and hear, stating:

> "Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program."

Id. at 1907.

Finally, in summarizing the obligations and responsibilities of broadcast licensees, the Commission stated that:

> "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."

Id. at 1912.

Yet, during the past decade, there has been a trend toward a more expansive view of the government's power to require licensees to present certain types of programs. Recently, this has led the Commission to propose various quantitative criteria for such program types.

It is, therefore, appropriate that the Congress reaffirm its views regarding the relationship between government and the broadcast media that it must license. The proposed revision of section 307(d) of the Communications Act of 1934 enables the Congress to reaffirm the independence, freedom and responsibility of the broadcast licensee by making the following changes in the Communications Act, which would apply to all pending and future broadcast license renewal applications.

DISCUSSION OF THE PROPOSED LEGISLATION

A. Section 307(d)(1): License Term

The proposed legislation would lengthen the term of broadcast licenses from three to five years; thereby reducing the frequency of government intervention and enhancing the free enterprise character of the broadcast media.

In 1934, when the Communications Act was enacted, a three-year license term was a reasonable precaution in dealing with a new industry. A five-year license at this

stage in the development of broadcasting, however, is reasonable since the longer term enables licensees to render high quality service, by injecting more stability into the license renewal process.

The Commission's power to protect the public by use of forfeitures, "early" renewal applications, and license revocations is in no way diminished by the extended license term. Moreover, the longer term would enable the Commission to give closer scrutiny to each renewal application, since the number of renewal applications to be processed annually would be reduced from 2,700 to 1,600. Further, this closer scrutiny would allow the Commission to resolve problems without deferring the grant of as many renewal applications as is now the case. Curent estimates, for instance, are that some 140 applications are in deferred status.

It should be noted that this provision would apply prospectively to any original broadcast license or to any existing license which the FCC renews after the enactment of the bill.

B. Section 307(d)(2): Renewal Standards

The proposed legislation clarifies the Communications Act's broad "public interest" criterion as it applies to renewal applications.

As a starting point, the proposed legislation specifies that the renewal applicant must be qualified, under the Act and the rules and regulations of the Commission, to hold a license. This requirement goes beyond minimal legal, technical and financial qualifications. The applicant's broadcast record must be free of serious deficiencies in compliance with the Act and with the rules and regulations of the Commission, such as a pattern of failure in making sponsorship identification announcements, violation of the equal employment opportunity rules, fraudulent practices in keeping logs or in reporting changes in owership information, and the like.

However, with the exceptions noted below, policies developed by the Commission could not be enforced against the applicant at renewal time unless reduced to rules.

Thus, Commission policies applicable to initial licensing, such as local ownership, integration of ownership and management, and diversification of media control, would not be applicable to renewal applicants, unless the Commission had decided that the applicant did not satisfy the renewal criteria of the proposed subsection 307(d)(2) (see p. 12 infra). The proposed legislation, however, would not prevent these or similar industry structure policies from becoming rules that would be applicable to all licensees on an industry-wide basis.

Some policies, however, could not be reduced to rules, since they would fall within the category of predetermined performance criteria prohibited by the proviso contained in paragraph (2) of section 307(d). Such current policies as the over-commercialization policy would fit within this category, since it substitutes a government-imposed quota for the judgment of the licensee as to what limits on commercial matter would best serve his community's needs, as well as his own needs. In addition, any future policies regarding statistical program performance criteria, such as those being considered in the pending Commission proceeding on license renewals (Docket No. 19154), would also fall within this forbidden category.

The only policies that would apply directly to the renewal applicants without having been reduced to rules would be the ascertainment and fairness policies incorporated in subsections (A) and (B) of section 307(d)(2). The overall fairness policy would include attendant rules, such as the personal attack and editorial endorsement rules, and policies such as the Cullman doctrine (free time to respond to controversial issues) and the Zapple ruling ("quasi-equal" time to respond to an authorized spokesman of a political candidate). The Commission would be free to determine which aspects of its ascertainment or fairness policies would best be reduced to rules; however, whether in the form of rules or not, they would be applicable to renewal applicants directly through operation of the proposed subsections (A) and (B).

In addition to acknowledging that a renewal applicant must comply with the requirements of the Communications Act and the general rules and regulations of the Commission, the proposed legislation sets out two criteria for evaluating past and proposed programming performance of the incumbent licensee. These criteria in turn are based upon the two

critical obligations of the broadcaster in serving his local public. They are the responsiveness of the licensee to the needs and interests of the public in the communities and areas served by the broadcast station (ascertainment obligation), and the licensee's performance in affording reasonable opportunity for the discussion of conflicting views on issues of public importance (fairness obligation).

As noted above, these two obligations are of long standing. The enactment of the proposed legislation would amount to an explicit confirmation by the Congress that the Commission has authority to review and evaluate the programming performance of the renewal applicant. But, consistent with the First Amendment and with the anti-censorship provision of the Communications Act (section 326), the Commission's role would be limited to an evaluation and review of the licensee's good faith and reasonableness in meeting the community needs and interests, conducting his broadcast operations, and providing a program service.

As the Commission has stated:

> "In short, the licensee's role in the area of political broadcasts is essentially the same as in the other programming areas -- to make good faith judgments as to how to meet his community's needs and interests."

"Obligation of Licensees to Carry Political Broadcasts," 25 P&F Radio Reg. 1731, 1740 (1963) (emphasis added).

A similar standard applies specifically with respect to the Commission's review of the licensee's performance under the fairness obligation:

> "In passing on any complaint in this [fairness] area, the Commission's role is not to substitute its judgment for that of the licensee...but rather to determine whether the licensee can be said to have acted reasonably and in good faith."

"Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 2 P&F Radio Reg. 2d 1901, 1904 (1964) (emphasis added).

The Commission's review of licensee programming performance under the proposed subsections (A) and (B) would be similar to an appellate court's review of an administrative agency. The FCC would not decide the facts anew from its own perspective and substitute its own judgment, but would simply determine whether the licensee's determinations were reasonable and made in good faith.

1) Section 307(d)(2)(A): Ascertainment

The public interest standard of the Act requires licensees to make a "diligent, positive, and continuing effort...to discover and fulfill the tastes, needs and desires of [the]...community or service area, for broadcast service." "Report and Statement of Policy Re: Commission En Banc Programming Inquiry," 20 P&F Radio Reg. 1901, 1915 (1960). This has been explained as consisting in part of eliciting information concerning the community's needs, interests, problems and issues. Ascertainment, which is a continuing process through the license period, requires the broadcaster to consult with a representative range of community leaders and members of the general public. The broadcaster must not only seek out and determine the nature of significant public issues, he must respond to them specifically. In television, this most usually means news, public affairs discussions, and other informational programming.

The ascertainment standard in the proposed bill incorporates this FCC precedent, although it would require the present renewal application to be changed, since the present application relates ascertainment only to the applicant's proposed programs and not his past program service. With this change in the form and evidence of a continuing

record of ascertainment and programming responsive to that ascertainment, the Commission would have sufficient information before it to hold the applicant to a so-called "promise v. performance" test. This means nothing more than the Commission holding the licensee to the programming standards he sets himself, based on his objective judgment as to the nature of community needs and interests.

The term "substantially attuned" to the public's needs and interests as used in subsection (A) of section 307(d)(2), is the same term that was used in the FCC's "Policy Statement On Comparative Hearings Involving Regular Renewal Applicants," 18 P&F Radio Reg. 2d 1901 (1970); i.e., the renewal applicant must show that its service during the preceding license period "has been substantially attuned to meeting the needs and interests of its area." In the context of the proposed legislation, however, there is special emphasis on ascertainment.

Moreover, the proposed legislation would require that the applicant demonstrate a "good faith" effort to be responsive to the needs, interests, problems and issues he ascertains. The "good faith" standard is an objective standard of reasonableness as it is often used in the law. It is also the standard that the Commission usually uses to describe the essential responsibility of the licensee (i.e., "to make good faith judgments as to how to meet his community's needs and interests").

As a rule of reason, the standard would not obligate the licensee to present programs to deal with every problem or issue facing the public, or meet every need or interest. In responding to the significant matters that have been ascertained, the broadcaster may take into account the composition of his audience; the other stations serving the community, a factor especially relevant in radio; and his own judgments as to his programming format. Thus, this objective standard of reasonableness would allow flexibility for the FCC to recognize the need for differences in treatment between radio and television stations, AM and FM radio stations, VHF and UHF television stations, profitable and unprofitable stations, and similar reasonable distinctions among classes and types of broadcast stations.

This standard would in no way preclude the Commission from using its 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 the Congress were to decide that the virtually total deregulation of radio would be in the public interest, this proposed legislation, along with many other existing provisions of the Act, would have to be amended accordingly.

2) Section 307(d)(2)(B): 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).

Use of the fairness obligation as a standard for license renewal is fully consistent with the law and the established practice of the Commission. The Supreme Court, in the Red Lion case, 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 abridgment of freedom of speech and freedom of the press."

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969).

Inclusion of the fairness obligation in the renewal standards would also serve as a Congressional expression of intent as to the preferred method for fairness obligation enforcement. The obligation was initially enforced by reviewing the overall performance of the licensee at renewal time. For example, the 1960 "Programming Inquiry" report 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 applications made each three-year period for renewal of station licenses."

20 P&F Radio Reg. 1901, 1910 (1960) (emphasis added).

By the mid-1960's, however, the Commission began to assess the performance of this obligation on an issue-by-issue basis. It undertook to inquire, with respect to each issue, whether various sides were presented; and effectively to compel adjustment or redress when it determined that a particular point of view was inadequately represented. As this method of enforcement -- or the Fairness Doctrine -- has escalated, the government has been injected with increasing frequency into the licensee's responsibility to make reasonable fairness judgments.

Although the proposed legislation does not eliminate issue-by-issue enforcement of the fairness obligation, there is a need for the Congress to clarify that the appropriate way for the government to evaluate what is essentially a journalistic and private responsibility is by overall review of licensee fairness performance at renewal time.

Here again, the rule of reason would apply, in that the broadcaster would not jeopardize his license by occasionally failing to achieve perfect "fairness" and "balance," as long as he had 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 with respect to problems and issues dealt with by the broadcaster.

3) Section 307(d)(2): Proviso

The proviso makes clear that, in applying subsection (A)'s ascertainment standard, 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 broadcast programming. Thus, the legislation would establish the local community as the point of reference for evaluating a broadcaster's performance. In effect, it would place the responsibility and incentive for superior performance in the hands of the local licensee and the public he undertakes to serve, without the convenient crutch of government specifications as to the kind of program performance that will satisfy the statutory standard.

At present, the Commission's programming policy categorizes programming by type (i.e., agricultural, entertainment, news, public affairs, religious, instructional and sports) and by source (i.e., local, network and recorded, which means only non-local non-network). Although enforcement of program standards, quotas and the like is not made explicit or formal, broadcasters, especially television broadcasters, are expected to provide a "well-rounded" program service consisting of programming in each of the categories, which respectable showings in the most favored categories of news and public affairs.

Moreover, the Commission has proposed the establishment of program quotas in certain categories as representing a prima facie showing of "substantial service" to be used in evaluating a television applicant's program performance in the context of a comparative renewal hearing.*/

*/"With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% of the prime-time period, 6-11 p.m., when the largest audience is available to watch).

"The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF station (including a figure of 8-10% and 5%, respectively in the prime-time period).

"In the public affairs area, the tentative figure is 3-5% with, as stated, a 3% figure for the 6-11 p.m. time period."

Notice of Inquiry in Docket No. 19154, 2 Current Service P&F Radio Reg. 53:429,431 (1971).

Although the percentage quotas are expressly limited to use in such hearings, it is only the foolhardy broadcaster who does not treat them as minimum standards in creating his program service and preparing his renewal application.

Government guidelines respecting the extent and content of television programs are inappropriate to the statutory scheme for broadcasting. The existence of such guidelines changes the character of the broadcast license. Instead of reflecting a public trust to be carried out by an independent, private licensee, the license merely becomes a government contract, under which the licensee performs in accordance with government specifications regarding the quantity and content of program service. Thus, the proviso would take from the FCC's hands the authority to create and enforce such specifications. It would stress that the proper role for government in the program area is as arbiter in the ascertainment and programming dialogue between the broadcaster and the public, without injecting its own judgments into this dialogue.

Accordingly, under the proposed legislation, the Commission's review of program performance would be based upon considerations such as:

(1) the mechanics, quantity and quality of the applicant's ascertainment efforts;

(2) an evaluation of the applicant's past, present, and proposed programming in light of the ascertained needs, interests, problems and issues, i.e., the community's standards of program performance and not the FCC's program standards;

(3) the "promise v. performance" aspects of the broadcaster's programming showing; and

(4) various "content neutral" aspects of the applicant's programming, such as programming expenditures; equipment and facilities devoted to programming; policies regarding preemption of time to present special programs; and the like.

In addition, the proviso also makes clear that, in applying the "fairness" standard of subsection (B), the Commission may consider only the overall pattern of programming on particular public issues, as explained above.

C. Section 307(d)(3): Procedure for Competing Applications

The proposed legislation would not change the current procedures for Commission consideration of petitions to deny license renewal applications.

FCC records show that during fiscal year 1972, 68 petitions to deny were filed against the renewal applications of 108 broadcast stations. Most petitions were filed by minority and special interest groups in the broadcasters' communities and contained allegations directed toward the licensees' ascertainment efforts, programming for minority groups, and employment practices. Nothing in the proposed legislation would adversely affect the ability of these groups to file such petitions.

The proposed bill, however, would change the procedures for dealing with competing applications for the same broadcast service. It would require the competing applicant to show that a grant of the renewal application would be inconsistent with the legislation's criteria for renewal. If this burden could not be met, the Commission would grant the renewal application and dismiss the competing application. If, however, the Commission were unable to make the requisite finding, or if there were a material factual question presented, the renewal application would be set for hearing.

The first issue to be resolved in the hearing, with the full participation of the competing applicant, would be whether the renewal applicant has, in fact, met the criteria set out in section 307(d)(2). If so, the hearing would be terminated, the renewal application granted, and the competing application dismissed. If it is found, however, that the renewal applicant does not meet the criteria, the Commission would have the choice of dismissing the renewal application, or, if appropriate, entering the second phase of the hearing by considering it together with the competing application or applications. The criteria to be used in such an eventuality would be based upon the showings of all the applicants with respect to the section 307(d)(2) standards

i.e., the applicants' qualifications and their programming proposals, as well as the standard comparative issues.

This change in the competing application procedures is needed because a licensee seeking renewal should not be put to the same tests used for applicants seeking original licenses. An incumbent licensee should not be deprived of the broadcasting privilege unless clear and sound reasons of public policy demand such action. This does not give the incumbent an unfair advantage solely by reason of its prior operations. The proposed legislation would simply require the FCC to exercise its independent judgment on the question of whether the incumbent licensee has rendered meritorious service. The legislation would thus balance the interest of using renewal process to spur licensee performance with the equally important interest of injecting more predictability and stability into broadcast operations.

The goal of fostering competition in broadcasting is fundamental to the Communications Act, but the present procedures for competing applications are not the most appropriate means of serving this goal. The competition fostered by current procedures is not competition in the marketplace of programming and services offered to the public. It amounts to no more than one applicant vying with another before a government agency for the license privilege. It does not result in a net increase in competition in the offering of community broadcast services, but simply operates to substitute one licensee for another. There is a need for increased competition among broadcasters, but this need should be met by government policies that expand broadcast outlets and reduce economic concentration among existing broadcasters.

D. Section 307(d)(4): Miscellaneous Provisions

This section of the proposed legislation simply incorporates the portions of the present section 307(d) that would remain unchanged by the bill.

MARKUP OF SUBSECTION 307(d) OF
THE COMMUNICATIONS ACT OF 1934

(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 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.

"Sec. 307(d) (1) No license granted for the operation of any 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 an additional term of not longer than five years, if the Commission finds that the public interest, convenience, and necessity would be served thereby.

(2) With respect to any application for the renewal of a broadcasting license, the Commission shall grant such application if it finds that the applicant is legally, financially, technically, and otherwise qualified to hold such a license under the provisions of this Act and the rules and regulations of the Commission, and that the applicant:

(A) is substantially attuned to the needs and interests of the public in its service area, and demonstrates, in its program service and broadcast operations, a good faith effort to be responsive to such needs and interests; and

(B) affords reasonable opportunity for the discussion of conflicting views on issues of public importance;

Provided, however, that in applying subparagraph (A), the Commission shall not consider any predetermined performance criteria, categories, quotas, percentages, formats, or other guidelines of general applicability respecting the extent, nature, or content of broadcast programming; and that in applying subparagraph (B), the Commission shall consider only the overall pattern of programming provided by the applicant on particular public issues.

(3) Notwithstanding any other provision of this Act, the procedure to be followed in the event that an application for the renewal of a broadcasting license is challenged by a petition to deny or by a competing application for the same broadcast service is as follows:

(A) The petitioner or party filing such competing application shall make specific allegations of fact sufficient to show that grant of the application for renewal would be prima facie inconsistent with paragraph (2) of this subsection. 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 for renewal shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(B) If the Commission finds on the basis of the application, the pleadings filed, and other matters which it may officially notice, that there are no substantial and material questions of fact and that a grant of the application to renew the license would be consistent with paragraph (2) of this subsection, it shall grant such application, terminate the proceeding, and issue a concise statement of the reasons for its findings. 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 paragraph (2) of this subsection, it shall proceed with the hearing provided in subsection 309(e) of this Act to determine whether grant of the application would be consistent with paragraph (2) of this subsection. If, in such hearing, the Commission finds that a grant of the application would be consistent with such paragraph, it shall grant such application, terminate the proceeding and issue a concise statement of the reasons for its finding. If the Commission for any reason is unable to make such a finding, it shall either deny the renewal application or consider it together with any competing application or applications for the same broadcast service, then on file or later timely filed, and shall grant the application that will best serve the public interest, convenience and necessity.

STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR
OFFICE OF TELECOMMUNICATIONS POLICY

before the

Subcommittee on Communications and Power
Honorable Torbert H. Macdonald, Chairman
Committee on Interstate and Foreign Commerce
U.S. House of Representatives

April 17, 1973

Mr. Chairman and members of the Subcommittee, I welcome the opportunity to come here today to discuss the various license renewal bills which have been introduced to amend the Communications Act of 1934.

When the basic structure for the American system of broadcasting was created in the 1920's and 1930's, it was decided that this system should reflect the institutional values and traditions of this country. The structure, therefore, was built on the twin concepts of individual responsibility and localism -- concepts essential to all social and economic institutions, including the media for mass communications.

Built into this broadcast system structure, however, was another important element, which clearly distinguishes broadcasting from the other outlets for expression in this country. Unlike these other media, the broadcast media are federally licensed to preclude property rights in the radio frequency spectrum and to prevent interference among broadcast signals. This fundamental decision was made by the Congress in the Radio Act of 1927 and again in the Communications Act of 1934.

This licensing system presents the Government with a unique dilemma. On the one hand, the Act requires the Federal

Communications Commission to grant applications for broadcast licenses if the public interest, convenience, and necessity are served thereby. This necessarily means that the Commission will have to pass judgment in some way on the totality of the broadcaster's service, an important component of which is the broadcaster's programming. On the other hand, however, the broadcast media should have the full protection of the First Amendment.

This dilemma requires a delicate balancing act on the part of the Government which must be performed within the license renewal process. The FCC and the courts have wrestled with this dilemma in licensing continually since 1934. And as broadcasting has become increasingly powerful and important as a medium of expression and information in our society, the pressures on the licensing system have intensified.

The manner in which renewals are treated goes to the heart of the Government's relationship to broadcasting. The procedures and criteria governing the license renewal process have a profound effect on the daily operations of licensees and the way in which they determine their public interest responsibilities. Considering the power of broadcasting in our society today, these procedures and criteria potentially could have a stifling effect on the free flow of information and ideas to the public.

Current procedures in the license renewal system -- and the trends in broadcast regulation generally over the last decade -- raise the possibility of an unnecessary and unhealthy erosion in First Amendment rights in broadcasting. This could happen if broadcasters, affected by the uncertainty and instability of their business, seek economic safety by rendering the type of program service that will most nearly assure renewal of their license; and that license is, after all, the right to function as a medium of expression. If the Government sets detailed performance criteria to be applied at renewal time, the result could be that the Government's criteria, instead of the local community's needs and interests, would become the touchstone for measuring the broadcaster's public interest performance. Stability in broadcast licensing is, therefore, an important goal of public policy.

Counterbalancing the goal of stability in the license renewal process, however, is the prohibition in the Communications Act against anyone acquiring a property right in the broadcast license. The public has access to the broadcast media only through the broadcaster's transmitter, unlike their access to printing presses and the mails. The First Amendment rights of those who do not own broadcast stations

thus must also be recognized, along with society's interest in a diversity of information and ideas. The Government has an affirmative duty under the Communications Act and the First Amendment, therefore, to foster competition in broadcasting. So the spur of competition and the threat of non-renewal also are indispensable components of the renewal process.

These are lofty and complex considerations. There is room for differing views on the priorities and about the proper balance to be struck. This Administration is convinced, however, that the issues at stake warrant widespread public awareness and debate. They transcend short-run political differences. The age of electronic mass media is upon us; the decisions the Congress makes on license renewal and on other broadcasting and cable matters it will face in the next few years will have a major effect on the flow of information and expression in our society for the rest of this century.

I would now like to address myself, briefly, to the provisions of H.R. 5546 -- the Administration's license renewal bill.

H.R. 5546 would, if enacted, make four major changes with respect to present practice and procedures in the license renewal process: (1) it extends the term of broadcast

licenses from three to five years; (2) it eliminates the requirement for a mandatory comparative hearing for every competing application filed for the same broadcast service; (3) it prohibits any restructuring of the broadcasting industry through the renewal process; and (4) it prohibits the FCC from using predetermined categories, quotas, formats and guidelines for evaluating the programming performance of the license renewal applicant.

Mr. Chairman, my letter to the Speaker of the House transmitting the Administration's proposed bill sets forth in detail the reasoning behind each of our proposals. With your permission, I would like to insert that letter into the record at this point and discuss briefly the four changes we propose.

1. Longer License Term

The first change in the Act made by the Administration's bill would extend broadcast license terms from three to five years.

In 1934, when the Communications Act was enacted, a three-year term was a reasonable precaution in dealing with a new industry. All other transmission licenses are issued for five years, however, and a five-year term would seem

more in keeping with the present maturity of the industry and the modern complexities of broadcasting.

An increased license term would strengthen the First Amendment rights of both broadcasters and the public. It would reduce the opportunity for government interference and the disruption that more frequent, often capricious, challenges can have on the free and unfettered flow of information.

2. Comparative Hearing Procedures

The second change would eliminate the present requirement for an automatic, lengthy, and costly comparative hearing whenever a competing application is filed for the same broadcast license. The FCC would be able to exercise its independent judgment as to whether a comparative hearing is necessary. In the initial stage, the renewal challenger would bear the burden of demonstrating that the renewal applicant has not met the criteria of the Act; 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 not only the incumbent's license, but also his

right to do business as a private enterprise medium of expression. The incumbent, therefore, should not be deprived of the right to stay in business unless 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.

Nothing in this second change would affect the ability of community groups to file petitions to deny license renewal applications. Many of these petitions have in the past served the important purpose of bringing the licensees' performance up to the public interest standard and driving home to broadcasters the interests of the communities they serve.

3. Prohibition Against Restructuring Through the Renewal Process

The third change is designed to preclude the FCC from any restructuring of the broadcasting industry through

the license renewal process. Presently, the Commission can implement policy relating to industry structure -- such as a policy restricting newspaper ownership of broadcast stations -- through the criteria it uses to decide individual renewal challenges. This allows for the restructuring of the broadcasting industry in a haphazard and inconsistent manner.

This change would prohibit the FCC from using against the applicant at renewal time any of its policies that were not reduced to rules. If the FCC wished to impose or change industry-wide policies affecting broadcast ownership or operation, it would have to use its general rulemaking procedures. Besides preventing arbitrary action against individual broadcasters, this has the benefit of assuring that the entire broadcasting industry and all interested members of the public would have full opportunity to participate in the proceeding before the rule was adopted.

By securing important procedural protections for licensees, this change recognizes more fully the First Amendment rights of broadcasters to be free of unpredictable, disruptive Government interference. It also recognizes the public's important right to full participation in any restructuring of such an important medium of expression.

4. Clarification of the Public Interest Standard and Prohibition Against Use of Predetermined Performance Criteria

The Communications Act of 1934 does not anywhere define what constitutes the "public interest, convenience and necessity," and in the intervening years this standard has come to mean all things to all people. To delegate important and sweeping powers over broadcasting to an administrative agency without any more specific guidelines as to their application than the "public interest" is to risk arbitrary, unpredictable ever-increasing regulation.

The FCC has been under pressure to reduce the arbitrariness inherent in this vague standard and establish ever more specific criteria and guidelines. Presently pending before the FCC in Docket Number 19154 is a proposal to establish quotas in certain program categories as representing a prima facie showing of "substantial service." These quotas would be used in the evaluation of a television applicant's program performance in the context of a comparative renewal hearing.

While the Administration recognizes the necessity for a clarification of the FCC's public interest mandate, this clarification should not risk an abridgement of the First Amendment rights of broadcasters and the public.

Our bill is designed to balance this need for clarification of the public interest standard--and the reduction of the potential for arbitrary and intrusive regulation--with the mandates of the First Amendment. It would stipulate that in addition to compliance with the requirements of the Communications Act of 1934 and the FCC rules when evaluating a licensee's performance under the public interest standard, the FCC could apply only the following two criteria: (1) the broadcaster must be substantially attuned to community needs and interests, and respond to those needs and interests in his programming--this is known as the ascertainment obligation; and (2) the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues--this is known as the fairness obligation. The FCC would be prohibited from considering any predetermined performance criteria, categories, quotas, percentages, formats, or other such guidelines of general applicability with respect to the licensee's broadcast programming.

These two criteria represent a distillation, as stated by the FCC and the courts, of what the most important aspects of the public interest standard mean in the context of license renewals. They do not add anything new to the broadcaster's responsibilities and have routinely

been applied to licensees in the past. However, in addition to these obligations, the FCC (often at the urging of the courts) has been imposing other less certain and less predictable obligations on licensees under the vague "public interest" mandate.

This fourth change in the Administration's bill is also designed to halt the FCC's movement toward quantification of the public interest. The pending FCC Docket 19154 extends the trend to establish ever more specific programming guidelines as criteria for renewal, and indeed it seems that nothing short of Congressional action can stop it.

The statutory scheme for broadcasting envisions the local broadcaster exercising his own independent judgments as to the proper mix and timing of programming for his local community. The FCC's proposed predetermined program quotas and categories further substitute the Government's judgment for that of the local

licensee. Instead of reflecting a public trust, the broadcast license would be a Government contract with the programming designed in accordance with the specified quotas and categories of the Government.

Mr. Chairman, I would now like to address myself briefly to some of the concerns that have been raised during these hearings and in the press concerning the Administration's bill.

First, some critics have argued that if the Administration feels that the current "public interest" standard is too vague and too sweeping, it should support the enactment by Congress or the FCC of specific program standards such as those proposed by the Commission in Docket 19154. Such criticism seriously confuses the issues. Stability in licensing is, as I have already discussed, an important ingredient in securing First Amendment freedoms in broadcasting. But the ultimate stability of specific and detailed program categories and percentages set by the Government is grossly incompatible with the letter and the spirit of the First Amendment.

The First Amendment expressly prohibits the Congress from abridging the freedom of speech and of the press. Yet when the FCC, as an arm of the Congress, begins determining what is

or what is not good programming and what programming is required in order to be permitted to stay in business, surely this threatens nothing less than abridgment of important First Amendment rights.

The FCC's proposal in Docket Number 19154 would intrude the Government into the content, extent, and even timing, of the broadcaster's programming. Moreover, even if such intrusions are disregarded for the purpose of affording licensees some certainty at renewal time, the FCC's proposal appears to be illusory. As Chairman Burch stated before this Subcommittee, "Quality is what we are after rather than number." Nor, I might add, would there be any assurance that the standards would not be expanded over time.

The second concern centers on the bill's "good faith effort" criterion for evaluating the broadcaster's responsiveness to the needs, interests, problems, and issues he ascertains in his community. This "good faith" standard, along with the fairness obligation, would further elaborate on the present "public interest, convenience, and necessity" standard used by the Commission at renewal time.

This "good faith" standard is an important elaboration of the present vague "public interest" mandate. It is the standard the FCC usually uses to describe the essential responsibility of the licensee, namely to make good faith judgments as to how to meet his community's needs and interests. It also appears in the FCC's 1960 Programming Policy Statement and is reprinted from this statement in an attachment on the renewal form. Moreover, the standard is used successfully in other areas of the law where the Government seeks to strengthen incentives for cooperation by private parties without directing the actual outcome of such cooperation.

The most important point about the good faith standard is that, 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.

Under the "good faith effort" test, the FCC would still have to make judgments about broadcaster performance, but those judgments would be more neutral as to program content.

Moreover, the courts would have less amorphous issues, with more direct relationship to relevant constitutional considerations in considering appeals from FCC actions.

The third concern is directed toward the Administration's supposed "backtracking" on the Fairness Doctrine. The supposed evidence from this "backtracking" is the inclusion of the Fairness Doctrine as one of the renewal criteria under our bill.

The licensee's fairness obligation in Section 315(a) of the Communications Act to present representative community views on controversial issues is a long-standing requirement, upheld in the Supreme Court's Red Lion decision, and an established practice of the Commission. It is an unfortunate, but for the time being necessary, protection of the free speech rights of those who do not own broadcast stations and of the broader interest of the public to a diverse flow of information and ideas.

The Administration has supported the enforcement of this fairness obligation as long as it is done principally on an overall basis at renewal time. What we have not supported is the Commission's 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.

The renewal criterion in our bill is not the Fairness Doctrine, as that term has been used to indicate issue-by-issue enforcement. Rather it is the fairness obligation: the unchanged, long-standing requirement of the licensee in Section 315(a) of the Act to "afford a reasonable opportunity for the presentation of conflicting points of view on controversial issues of public importance." Its inclusion in the renewal standards would serve as an expression of Congressional intent as to the preferred method for its enforcement.

A fourth concern is the one voiced by most of the representatives of the minority groups that have appeared before your Committee. They are concerned that the Administration's bill would effectively cut off the rights of minority groups to challenge the actions of incumbent licensees on their community responsibilities in such areas as minority hiring and minority programming.

It is true that competing applications based on frivolous or unproven grounds would be more easily rejected. But responsible competing applications based on real evidence of the incumbent licensee's abrogation of his public trust are in no way penalized and would still have the benefit of a thorough public hearing.

Indeed, with the explicit language of the ascertainment criterion we propose, the focus of the hearings would be shifted to the community's concerns in each case, away from legalistic conformance to uniform FCC percentages.

Moreover, the Administration bill does not change the existing procedures for petitions to deny, the tool that has been the traditional and most useful recourse of the minority groups; it will still be available to them intact. I should also point out that the extension of the license term is not going to put licensees out of the reach of their local communities or the FCC for the five-year term. Community groups may still file complaints at any time, and the FCC would still have ample interim tools available to it -- such as short-term renewals, license revocations, suspensions, and forfeitures -- to protect the public interest.

Finally, Mr. Chairman, I would like to address the concerns that have been voiced during these hearings and elsewhere about my remarks in a speech in Indianapolis last December 18. There apparently is some puzzlement over the relationship between our bill and that speech, in which I announced our intention to submit license renewal legislation. There also has been concern about the motives behind our bill. I would like to set the record straight.

The central thrust of my Indianapolis speech was that broadcast licensees have not, by and large, been doing an adequate job of listening to their communities and correcting faults in the broadcasting system--faults that are not, and should not, be dealt with through use of government power. Important First Amendment freedoms were secured to broadcast licensees under the Communications Act of 1934. And with these freedoms came important responsibilities for licensees to ensure that the people's right to know is being adequately and fully served. As has so often been pointed out in Congressional hearings over recent years, the licensees have not, unfortunately, always met these responsibilities--in part because it is easier to let Government define the limits of those responsibilities.

My speech was intended to remind broadcasters and the public that such attention takes on even more importance if governmental controls are to be reduced, as we have proposed. The speech and the bill are related--but <u>not</u> in the way portrayed in the press coverage of my speech. The relationship between the proposed bill and my speech is no more than the relationship between freedom and responsibility we find everywhere in our society. This Office has steadily promoted the cause of <u>less</u> rather than more regulation of broadcasting. But the public and the Congress should not think of increasing the freedom in broadcasting by easing government controls

without also expecting some indication that voluntary exercise of responsibility by broadcasters can operate as an effective substitute for such controls.

The core issue is: Who should be responsible for assuring that the people's right to know is served, and where should the initiative come from -- the government or the broadcasters. The speech focused on the three TV networks as the most powerful elements in the broadcast industry and asked how this concentration of power was to be effectively balanced. Some, who now profess to fight for broadcasters' freedom, would rely on regulatory remedies such as increased program category restrictions, burdening the broadcaster and the audience with the clutter of counter-advertising, banning ads in children's programs, ill-defined restrictions on violence, and the like.

Anyone who has followed OTP policy pronouncements knows that we reject this regulatory approach. We have always felt that the initiative should come from within broadcasting.

The broadcaster should take the initiative in fostering a healthy give-and-take on important issues, because that is the essence of editorial responsibility in informing the public. That does not mean constricting the range of information and views available on television.

The public has little recourse to correct deficiencies in the system, except urging more detailed government regulation. The only way broadcasters can control the growth of such regulation is to make more effective the voluntary checks and balances inherent in our broadcast system.

Some broadcasters, including network executives, have claimed they believe the Administration bill to be a good one, but only if clearly separated from the speech in which it was announced. But freedom cannot be separated from responsibility.

Some observers profess to see in our bill a conspiracy to deprive broadcasters of their First Amendment freedoms. But, clearly, it is others, not this Administration, that are calling for more and more government controls over broadcasting.

Many newspaper editors and columnists have opposed the Administration bill, preferring apparently to keep the current panoply of government control over broadcasting. Freedom from government

regulation for part of the printed press, but not for the electronic press escapes reason, especially when many of those who wish to expand government controls over broadcasting would also see these controls as the precedent for similar controls over the print media.

Other critics, I fear, do not wish to diminish the government's power to control broadcast content. They seem quite willing to create and use powerful tools of government censorship to advance their purposes and their view of what is good for the public to see and hear. We disagree. The danger to free expression is the existence of the legal tools for censorship. We are proposing actions to begin to take those tools from the hands of government.

The Administration bill is designed to strengthen the First Amendment freedoms of broadcasters. All four changes 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 hand of government. I challenge anyone to find in our bill any increase in government power over the media.

In my judgment, Mr. Chairman, the Administration bill is not only the most comprehensive of the many bills before you; it also represents the best attempt at balancing the

competing statutory goals of the Communications Act. The dilemma the Government faces in regard to the regulation of broadcasting is by no means insoluble. And our bill is a step in the direction towards a solution--a solution which means less Government control and more reliance on the licensee's individual initiatives. We are asking the Congress to reduce controls not because broadcasting is perfect, but because its problems should be corrected by the broadcasters and their employees, rather than by government action. Indeed this was the intent of Congress from the very beginning as embodied in the Communications Act. And it is time for Congress now to take an important step towards furthering these long-standing statutory goals.

In your opening statement, Mr. Chairman, you indicated that it was the intention of the Subcommittee to make as complete a record as possible of the many viewpoints and interests affected by the proposed license renewal legislation. You and your Subcommittee are to be commended for focusing attention and debate on these issues, and I welcome the opportunity to add the Administration's comments to this important record.