A PROPOSAL TO DEREGULATE BROADCAST PROGRAMMING

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To Clay T. Whitehead

Good luck in life

to a swell guy

H. Goldberg

A Proposal to Deregulate Broadcast Programming

HENRY GOLDBERG*

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

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THE FOLLOWING AUTHORITIES ARE CITED AS INDICATED BELOW:

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

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

1. 47 U.S.C. § 151-609 (1970).

2. Section 309 of the Act provides:

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

47 U.S.C. § 309(a) (1970).

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

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

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

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

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

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

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

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

6. 16 F.C.C.2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

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

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

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

Broadcast Programming and the License Renewal Process

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

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

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

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

11. *Id.* at 7293.

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

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

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

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

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

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

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

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17. *See Introduction and Appendix* at 68.

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

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

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

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

Id. at 1913.

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

probably be presented in prime time,[22] if this were a reporting category on the renewal form. The FCC's recent interest in encouraging presentation of more children's programs, for example, has followed this pattern, and has led to such a new reporting requirement.[23] In short, the Government has given every indication of expanding the use of program classification, record-keeping, and reporting requirements to influence broadcasters to provide certain types of programs at certain times of the day.[24]

The type of relationship between the broadcaster and the FCC, engendered by such regulatory policies, raises a serious question: To whom is the television broadcaster responding when he designs his

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22. *See* note 40 *infra*. The definition of prime time may vary; for example, for the purpose of the Prime Time Access Rule, prime time is a four-hour period, generally 7-11 p.m. 47 C.F.R. § 73,658(k) (1972).

23. In adding this requirement, the FCC left no doubt as to its intent:

> To underline our interest in children's programming aired on television . . . We have added as Question 6 . . . the following . . . "Attach as Exhibit — a brief description of programs, program segments or program series aired during the license period that were primarily directed to children twelve years old and under. Indicate the source, time and day of broadcast, duration and program type."

27 P & F Radio Reg. 2d 553, 613 (1973). Other recent changes in the record-keeping and reporting requirements for television broadcasters include the necessity to file an annual program report focusing on local news, public affairs, and all other entertainment programs during "prime time." *See id.* app. D.

24. The double standard implicit in such program reporting requirements is illustrated by a question recently added to the FCC's license renewal application. The question asks all network-affiliated stations whether they carried more than half of the news and public affairs programs supplied by the network. *See* 27 P & F Radio Reg. 2d 639, app. E (1973). When the issue of whether to add this question to the application was before the FCC, support for its use came from two public interest groups—United Church of Christ and Black Efforts for Soul in Television (BEST)—and from the ABC television network. *Id.* at 610-11. Apparently, BEST and the United Church felt that their interests would be better served if affiliates carried more network news and public affairs programs. The parties in opposition to the proposed question generally argued that the FCC had no duty to encourage affiliates to carry network programs. *Id.* at 611. Commissioner Nicholas Johnson, who concurred in the FCC's decision to use the question, registered his disappointment that it did not go even further, stating he felt that "we should ask which programs, by name and date, were and were not carried, and (when pre-empted) what was carried in their stead." *Id.* at 611. All those supporting and opposing the question appear to have assumed that the FCC was once again employing the program reporting requirements to influence stations to carry a kind of programming considered to be good for the viewers. *See* note 21 *supra*.

Suppose, however, that the Commission used the answers to network news carriage question to crack down on stations that were carrying too much network news and public affairs that the Commission considered slanted or biased. In such a case, the network news question might well be bitterly opposed by the "public interest" groups, and Commissioner Johnson would be unlikely to urge that more detailed information be elicited. This speculation is not too fanciful, in light of the initial adverse reaction when Clay T. Whitehead, the Director of the OTP, announced the Administration's intention to introduce a license renewal bill. It was mistakenly believed that the bill would lead to such an FCC crackdown on stations carrying network news and public affairs programs. *See Hearings on the Overview of the Office of Telecommunications Policy Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93rd Cong., 1st Sess., 55-112 (1973). The point is that unless the first amendment is interpreted as incorporating a double standard of good and bad censorship varying according to the subjective values of government officials and the public, questions similar to the network news carriage question should not be included on renewal forms.

program format, when he selects nonentertainment programs, and when he schedules those programs—the Government or the local audience?[25] The answer appears to be the Government. For example, one candid member of the communications bar has stated:

> [T]he lawyer can quite unerringly outline to his client the programs that the Commission favors and disfavors. . . . To deny that this constraint exists is to indulge in pure myth. To say that . . . an applicant proposes or 'promises' programs on the basis of his independent judgment of the needs and wants of his area compounds the myth.[26]

Thus, it appears that the television broadcaster serves two audiences: His local viewers and government officials. In serving his viewers, the broadcaster relies upon program ratings, viewer surveys, and his own business judgment. The programming intended for this audience is listed and advertised daily in the newspaper and presented at times most accessible to the viewer. In serving the Government audience, the broadcaster relies upon advice from his lawyer, his own experience as a member of a regulated industry, and the informal programming standards of the FCC, as conveyed by the regulatory technique known as the "lifted eyebrow."[27] The programming intended for the government audience is catalogued in the broadcaster's renewal application and usually presented during hours of light viewership.

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25. Answers to this question might be suggested by a careful reading of TV GUIDE listings in any major city. For example, WRC-TV in Washington, D.C., a station owned and operated by the National Broadcasting Company, and therefore "vulnerable" to government influence, *see* text accompanying note 16 *supra*, scheduled "Across the Fence," an "agricultural program," on Tuesday morning, August 22, 1973, at 1:05 a.m. *See* TV GUIDE, Aug. 18, 1973, at A46 (Washington-Baltimore ed.). One would think that programs of apparent interest to farm families would not normally be scheduled at times when they can be expected to be asleep.

26. Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 20 (1963). Pierson also elaborated on the sources of information that the lawyer relies upon to assist his client in selecting programs favored by the Commission.

> [T]he lawyer has a number of guides. First, in his day-to-day dealings with the Commission and its staff, he learns of their attitudes toward various kinds of proposals. He knows that certain program proposals are accepted and favorably processed with alacrity. Other program proposals create problems not only of getting expeditious action but of getting favorable action. On occasion his client is almost directly threatened with costly litigation unless program proposals are changed. In addition, Commission decisions, statements of policy and the public statements of its members afford insight into Commission attitudes toward various types of programming.

Id. at 19-20.

27. The "lifted eyebrow" phrase was first used by FCC Commissioner John C. Doerfer, dissenting in Miami Broadcasting Co. (WQAM), 14 P & F RADIO REG. 125, 128 (1956). Professor Robinson has elaborated on the technique, stating:

> [A] letter to the station from the Commission or even a telephone call to the station's Washington attorney from the Commission's staff

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

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

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

ROBINSON 119-21.

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

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

Id. at 906-07.

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

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

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

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

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

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

Although the Government has consistently made efforts to encourage "good" programming, there has been little detailed articulation of affirmative program standards.[35] In the past broadcasters felt assured of renewal if they conformed to the FCC's notions of balanced formats and public interest programs. For the most part, they could expect that the renewal application would not even receive close scrutiny at the upper echelons of the Commission staff and probably would never reach Commissioner level. In recent years, however, the risk of renewal challenges—whether by competing application,[36] petition to deny,[37] or informal objection[38]—has become much more

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sex-talk radio program. Sonderling Broadcasting Corp., 27 P & F RADIO REG. 2D 285, 294-98 (1973). Commissioner Johnson noted that the program was top-rated and did not offend local listeners, although the FCC appeared to have determined that listeners ought to have been offended. Commissioner Johnson said:

> While I certainly do not condone programming such as that before us, I am nevertheless extremely reluctant to use my power as a federal official to impose my tastes upon anyone, let alone upon an entire nation. The F.C.C. majority, however, does not entertain such hesitations, preferring instead to sit as an omniscient programming review board, allegedly capable of deciding what is and is not good for the American public to see and hear.
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> The dangers in such an approach are obvious. But they are amplified ten-fold when the F.C.C.—the agency which possesses the power to grant and deny all broadcast licenses—plays the Big Brother role. For it seems patently clear that any F.C.C. pronouncement against a particular kind of programming will cast a pall over the entire broadcasting industry—not so much because these broadcasters fear the imposition of fines, but, rather, because they fear the potential loss of their highly profitable broadcast licenses.

Id. at 297-98. The Commissioner's reasoning applies with equal force to affirmative program standards imposed by the FCC. *See id.* at 294.

35. Professor Robinson noted this lack of articulation when he stated:

> [I]t is impossible to tell whether the Commission is in fact making value judgments about programming while its published opinions deny that it is doing so. One can scarcely accept the gratuitous and self-serving statements made by the Commission in its opinions that it has not recognized or given any decisive significance to any difference between program proposals. Since the Commission is not wholly oblivious to the constitutional implications of the close supervision of programming, it is not surprising that the opinions, written to be as "appeal-proof" as possible, attempt to show an abundance of caution and restraint in this area.

ROBINSON 125. Commissioner Johnson has apparently been troubled by the same lack of specificity in establishing and enforcing affirmative program standards, but he considers this lack to be a defect in broadcast regulation that the FCC should move to correct. *See, e.g.*, Sonderling Broadcasting Corp., 27 P & F RADIO REG. 2D 285, 294 (1973) (Commissioner Johnson dissenting); New York-New Jersey Renewals, 18 F.C.C.2d 268, 269, 322 (1969) (Commissioners Cox and Johnson dissenting); Oklahoma Renewals, 14 F.C.C.2d 1, 2 (1968) (Commissioners Cox and Johnson dissenting).

36. *See* 47 U.S.C. § 309(e) (1970). The term "competing application" in the license renewal context refers to a mutually exclusive application which is filed for the same broadcast service in the same community as is the application for license renewal. Under the rule of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), section 309(e) of the Communications Act has been interpreted to require the FCC to conduct a single, comparative hearing for all mutually exclusive applications. This requirement is considered to apply to the renewal situation. *See* Citizens Communication Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

37. *See* 47 U.S.C. § 309(d) (1970). The renewal challenger who files a petition to deny does not seek a license to operate broadcast facilities, but seeks only to prevent the incumbent from obtaining renewal.

38. *See* 47 C.F.R. § 1.587 (1972). Any person may file informal objections to the grant of a renewal application prior to FCC action on the application

real.[39] Thus, the likelihood that television renewal applications will receive close scrutiny by the FCC, including full evidentiary review in a comparative hearing when a competing application has been filed, has increased. These changed circumstances serve only to exacerbate government influence over programming as television broadcasters, in an effort to make their applications "challenge-proof," load their renewal applications with proposals that stress the kinds of programming favored by the FCC.

The Government itself may be inadvertently encouraging this kind of compliance, since the FCC has proposed programming guidelines to define the level of "substantial service" which would give the incumbent a plus of major significance in any renewal hearing.[40] The Commission was obviously troubled by its first venture into the field of setting quantitative programming guidelines. It pointed out that there was no intent to dictate particular programs or formats, and specifically stressed the need for community involvement and "feedback" in the broadcasters' programming judgments.[41] Although he was still troubled by this approach, the Chairman of the FCC re-

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without observing the time limitations and affidavit requirements for petitions to deny under section 309(d) of the Communications Act, 47 U.S.C. § 309(d) (1970).

39. On the basis of statistics available from the FCC, the number of renewal challenges increased from 14 to 77 between 1969 and 1972. In absolute terms, this increase does not seem to be particularly significant when one considers that the nation has roughly 8,500 operating broadcast stations of all kinds (AM and FM radio, VHF and UHF television). *See* 38 FCC ANN. REP., 160, 1972. The increase in renewal challenges, however, occurred primarily in the VHF commercial television service (72 out of 86 challenges against commercial television stations between 1969 and 1972). Applicants for renewal of commercial VHF television stations, especially those that are "vulnerable" because of group ownership or newpaper ownership (approximately 73 percent of all stations in the top 100 TV markets, *see Hearings on H. R. 3854 and related bills, supra* note 7) can reasonably anticipate some form of renewal challenge.

40. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). The proposed guidelines would have applied to UHF and VHF commercial television stations affiliated with the three major networks and to nonaffiliated VHF television stations. The guidelines are as follows:

> (i) 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). (ii) The proposed figure for news in 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.

See Notice of Inquiry, P & F RADIO REG., 2 CURRENT SERVICE 53:429 (1971).

After the court overturned the FCC's 1970 Renewal Policy Statement in *Citizens Communications Center*, the Commission issued a Further Notice of Inquiry, which stated that the guidelines would be used to give the renewal applicant a "plus of major significance," whether his performance was labeled by the court as "substantial" or "superior" service. *See* Further Notice of Inquiry, P & F RADIO REG., 2 CURRENT SERVICE 53:442 (1971).

41. *See id.* at 53:433; *id.* at 53:434 (Chairman Burch concurring; *id.* at 53:436 (Commissioner Lee concurring).

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

Analysis of the Administration Bill

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

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

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

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

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

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

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

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

License Term

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

Renewal Standards

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

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

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

similar industry structure policies, applicable to all licensees. Other Commission policies, however, could not be reduced to rules under the terms of this bill because they would fall within the category of predetermined performance criteria, which are prohibited by the proviso contained in paragraph (2) of the proposed section 307(d). For example, to the extent that the FCC's current policy opposing "over-commercialization" incorporates a de facto upper limit on the amount of commercial time a licensee may carry, it would come within the terms of the proviso 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, as well as his own, needs.[53] In addition, the FCC would be forbidden to establish rules regarding statistical program performance criteria.[54]

The only policies that would apply directly to the renewal applicants without having been reduced to rules would be the ascertainment and fairness policies, which are incorporated in subsections (A) and (B) respectively of the proposed section 307(d)(2). The overall fairness policy would include attendant rules, such as the personal attack and editorial endorsement rules,[55] and such policies as the *Cullman*[56] doctrine, which requires free time to respond to controversial issues, and the *Zapple*[57] holding, which provides for "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 should be reduced to rules.

The proposed legislation would codify the ascertainment and fairness tests as criteria by which the FCC should evaluate past and proposed programming performance of the incumbent licensee. These criteria, in turn, are based upon the two critical obligations of the broadcaster to his local public: To respond to the needs and interests of the public in the communities served by the broadcast station, the ascertainment obligation; and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance, the fairness obligation. Under the bill, the Commission's role would be limited to review of the licensee's good faith in ascertaining community needs and interests. The same good faith standard would also apply to the Commission's review of the licensee's performance under the fairness obligation.[58] Thus the FCC would not make a de

53. *See* Report and Order, 1 P & F Radio Reg 2d 1606 (1964) (Commercial Advertising Standards), in which the FCC chose to "protect the public" from overcommercialization by case-by-case adjudication rather than the adoption of formal standards or rules setting maximum limits for commercials.

54. Examples of criteria currently being considered by the Commission are found in note 40 *supra*.

55. Personal attack and editorial endorsement rules may be found at 47 C.F.R. § 73.123 (1972) for AM radio; *id.* § 73.300 for FM radio; and *id.* § 73.679 for television.

56. Letter to Cullman Broadcasting Co., 40 F.C.C. 577 (1963).

57. Letter to Nicholas Zapple, 23 F.C.C.2d 707 (1970).

58. This would conform with what the Commission itself 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 Licensee to Carry Political Broadcasts, 25 P & F Radio Reg. 1731, 1740 (1963)

novo determination of the facts, but would simply determine whether the licensee's ascertainment was reasonable and made in good faith.

Ascertainment

The present public interest standard of the Communications Act, as interpreted by the Commission, 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.[59] Ascertainment requires the broadcaster to consult with a representative range of community leaders and the general public on a continuing basis throughout the license period.[60] The broadcaster must not only determine what the significant public issues are, but he must also respond to them in his programming. In television, the programming response usually takes the form of news, public affairs, and other informational programming. The ascertainment standard in the bill incorporates the present requirement.[61] It means only that the Commission hold the licensee to the programming standards he sets himself, based on his own objective judgment of the nature of community needs and interests.[62] The ascertainment standard in the proposed legislation would not obligate the licensee to present programs to deal with every public issue or to meet every community interest.[63] The broadcaster could take into account the other stations serving the community, a factor especially relevant in radio; the composition of his audience; and his own judgments as to his programming format.[64] This objective standard of reasonableness would therefore allow the FCC to differ its regulatory treatment of

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(emphasis added). "In passing on any complaint in this area [fairness], 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 subsections A and B of the proposed law would thus be similar to an appellate court's review of an administrative agency. *See, e.g.*, SEC v. Chenery Corp. 332 U.S. 194 (1947).

59. Programming Inquiry *supra* note 10, at 1915.

60. Ascertainment Primer, *supra* note 29, at 4104-05.

61. *See Introduction and Appendix* at 70.

62. As the FCC interprets it, "good faith" is an objective standard of reasonableness and does not refer to the licensee's subjective intent. For example, it is 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." *See* note 58 *supra*. The standard is similar to the Supreme Court's description of the FCC's responsibility under the fairness doctrine, "to judge whether a licensee's overall performance indicates a sustained good faith effort to meet the public interest in being fully and fairly informed." CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2098 (1973).

63. Ascertainment Primer, *supra* note 29, at 4105.

64. *See id.* at 4095, 4096, and 4100-01.

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

Fairness

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

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

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

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

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

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

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

395 U.S. at 394.

68. The 1960 Programming Inquiry stated that:

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

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

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

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

The Proviso

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

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

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

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

certainment efforts; an evaluation of the applicant's past, present, and proposed programming in light of the ascertained needs, interests, problems and issues, using the community's standards of program performance and not the FCC's program standards; the promise versus performance aspects of the broadcaster's programming showing, and various "content-neutral" aspects of the applicant's programming, such as programming expenditures, equipment and facilities devoted to programming, policies regarding preemption of time for special programs, and the like.

Procedure for Competing Applications

The proposed legislation would not change the current procedures for Commission consideration of petitions to deny license renewal applications. Most petitions under the present Act have been filed by minority and special interest groups in the broadcasters' communities and contain allegations directed toward the licensees' ascertainment efforts, programming for minority groups, and employment practices.[71] Nothing in the proposed legislation would adversely affect the ability of these groups to file such petitions.

H.R. 5546 would change only the procedures for dealing with mutually exclusive 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 renewal criteria established by this legislation. 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 a material question of fact were disputed, the renewal application would be set for a hearing.

The first issue to be resolved in the hearing would be whether the renewal applicant had, in fact, met the criteria set out in section 307(d)(2) of the bill. If so, the hearing would be terminated, the renewal application granted, and the competing application dismissed. If the Commission were to find, however, that the renewal applicant did not meet the criteria, it would have the choice of dismissing the renewal application, or, if appropriate, entering the second phase of the hearing by considering the renewal application together with the competing application or applications. The criteria to be used in such an eventuality would be based upon the showing of all the applicants with respect to the section 307(d)(2) standards: The applicants' qualifications and their programming proposals, as well as "the standard comparative issue."[72]

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71. *See* Mayer, *The Challengers, supra* note 32.
72. The "standard comparative issue" refers to the key criteria or issues used by the FCC in comparative broadcast hearings. The criteria are: (a) Diversification of control of the media, (b) full-time participation in station operation by owners, (c) proposed program service, (d) past broadcast record, (e) efficient use of the frequency, (f) character of the applicant, and (g) other factors, as relevant. *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

An incumbent licensee should not be put to the same tests as an applicant seeking an original license,[73] and he should not be deprived of his broadcasting privilege unless there are sound reasons of public policy to support such action.[74] The change in competing application procedures would not give the incumbent an unfair advantage solely by reason of prior operations, but would require the FCC to exercise its independent judgment on the question of whether the incumbent licensee has rendered meritorious service. Although competition in broadcasting is a fundamental goal of the Communications Act, the present procedures for competing applications are not the most appropriate means to foster it. The competition fostered by current procedures is not competition in the programming marketplace. It amounts to no more than one applicant vying with another for the license. It does not result in a net increase in broadcast service for the community, but simply substitutes one licensee for another. There is a need for increased competition in broadcasting but this need should be met by government policies that expand broadcast outlets and reduce economic concentration among existing broadcasters.[75]

Conclusion

Passage of H.R. 5546 would increase the separation between the Government and the broadcast media by minimizing government influence on program content. Passage of this bill would also be a significant step towards treating broadcasting more like the print media for purposes of the constitutional restrictions on government censorship. The libertarian thrust of H.R. 5546, however, was seen to be inconsistent with recent trends in broadcast regulation and with general perceptions regarding the relationship between the government and the broadcast media. During the period when government regulation of broadcast program content was increasing, the prevailing view was that the broadcaster, not the FCC, was the monopolist censor sitting astride the public's airwaves.[76] For the most part, dissatisfaction with program quality and antagonism towards the business-

73. *See* Policy Statement on Comparative Renewal Hearings, 22 F.C.C.2d 425 (1970); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 403 (1965) (Chairman Hyde dissenting); Burch address, *supra* note 7.

74. *See* Chicago Fed. of Labor v. Federal Radio Comm., 41 F.2d 422 (1930), where the court, in affirming the Federal Radio Commission's refusal to take a frequency assigned to one broadcaster and assign it to another, said: "The cause of independent broadcasting in general would be seriously endangered . . ., if the licenses of established stations should be arbitrarily withdrawn from them, and appropriated to the use of other stations." *Id.* at 423.

75. *See* CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2113-14, 2116 (Douglas, J., concurring); PECK, NOLL & MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973).

76. ROBINSON 68.

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

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

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

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