PREFACE

Since the enactment of the Communications Act of 1934, there has been confusion concerning the appropriate policies to govern the situation in which an incumbent broadcast licensee applies for renewal of license and a newcomer files a competing application for the same frequency or channel. In a pending proceeding, the Federal Communications Commission is seeking to clarify its policies in this respect in television. The purpose of this study is to assist the FCC in its consideration of the matter.

The study is based solely upon the existing law, and not possible future changes in that law: It thus does not constitute proposals for legislative reform, although such reform could take several interesting and different approaches from the present statutory scheme. There is pending legislation in the 94th Congress, but in its present form, that legislation would still leave for FCC resolution the main problem discussed here.

The analysis of background material necessarily reflects the views of the author. Others might well reach different conclusions because in their judgment different policy factors should be weighted. The same consideration is applicable to the courses of action we suggest. Further, while specific reference to this factor is made at several points, it should be acknowledged that the author participated in several key FCC actions in this area when he served as General Counsel of the Commission and later as Special Assistant to the Chairman for Policy and Planning.

A draft report and order in the pending FCC proceeding (Docket No. 19154) is included. This draft report is not intended to indicate the disposition of all the facets and details of this complex proceeding. That would be presumptuous and inappropriate in any case. Rather, the draft report constitutes a further showing that the main principles of the suggested basic approach are sound; hopefully, the draft report will also be useful to the FCC as one of several views for discussion.

PREFACE

Since the enactment of the Communications Act of 1934, there has been confusion concerning the Commission's policies to govern the situation in which an incumbent broadcast licensee applies for renewal of license and a newcomer files a competing application for the same frequency or channel. In a growing controversy, the Federal Communications Commission is seeking to clarify its policies in this complex situation. The purpose of this study is to assist the FCC in its consideration of the matter.

The study is based upon the existing law, and not possible future changes in that law. It thus does not consider proposals for legislative change, although such action could take several directions and different approaches from the present regulatory scheme. There is pending legislation in the 91st Congress, but in its present form, that legislation would still leave for FCC resolution the main problem discussed here.

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A draft report and order in the pending FCC proceeding (Docket No. [illegible]) is included. This draft report is not intended to deal in the disposition of all the issues and details of this complex proceeding. That would be time-consuming and [illegible]; the draft report constitutes [illegible] the present proceeding, [illegible].

[illegible]

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SUMMARY

The statutory scheme of the Communications Act of 1934 provides for the issuance of short-term licenses to broadcast applicants who pledge to operate in the public interest. These public trustee licensees may obtain renewal of license upon a showing that such action will serve the public interest. To insure or promote operation in the public interest, the Act relies upon two concepts:

- Public notice of the filing of the licensee's application for renewal with the FCC must be given in the community, and interested members of the public may file formal or informal objections with the FCC. The Commission collects statistical and related data concerning the station's operation. On this basis, it makes the decision whether to grant renewal or designate the application for a full hearing.*
- A newcomer may file a competing application for the same frequency or channel. The Commission must then hold a comparative hearing to determine whether grant of the newcomer's application or that of the incumbent licensee will better serve the public interest.

The test for renewal of the incumbent licensee is different in the two situations. In the first, or noncomparative, case, the licensee need not show that his past service is somehow praiseworthy. He need only provide evidence that he has operated in a way sufficient to win renewal; that is, there is necessarily some level of operation that can be said to have barely or minimally met the public interest requirement.

But this same licensee should not be guaranteed renewal in the second, or comparative, situation. If he has chosen to render minimally sufficient service, and if his rival will do significantly more, the public interest is

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*Sections 307-309, 311(a), 47 U.S.C. 307-309, 311(a).

served by granting the newcomer an application. In this way -- since the incumbent never knows when he will be challenged -- the statutory scheme promotes solid effort in the public interest.

Clearly, however, the renewal applicant cannot be treated as if he were a newcomer. Broadcasting -- both as a business concerned with the public interest and as part of the communications media -- must have reasonable stability. If, for example, the FCC were to grant a license to a multiple owner or newspaper and three years later were to prefer a newcomer on the ground that he would diversify control of the media of mass communications or effect local rather than absentee ownership, the result would be chaotic, and the public interest would not be served by such a pattern of "musical chairs."

The Commission was thus called upon to strike a balance between the competitive spur to solid service and the need for reasonable stability. The FCC, however, did not develop guidelines or criteria in this field; it did not act in the comparative renewal field until compelled to do so, and then took actions that were contradictory and inconsistent with the above described statutory scheme.

For example, in its 1951 *WBAL* decision, the FCC renewed the license of the incumbent against the challenge of a newcomer. The Commission set out no clear standard as to the nature of a past record warranting renewal in the face of comparative challenge. Worse, it permitted the incumbent to "upgrade" -- that is, to improve its performance even while the hearing was going on, thus undermining the concept of the renewal applicant having to "run on his record." The decision struck no balance, but rather opted for stability.

Almost two decades later the FCC, by a 3-to-1 vote in the *WHDH* opinion, went to the other extreme. It denied renewal of the incumbent with a past record of broadcasting over 21 percent local live programming, on the ground that the newcomer was preferable because of his advangages on two criteria: integration of ownership and management (a larger percent of the newcomer's stock ownership was engaged in day-to-day management) and diversification (WHDH was owned by a local newspaper). This undermined reasonable industry stability. And while the FCC in a later opinion in the case explained that there were special circumstances making this an atypical comparative renewal case, the result was nevertheless unsettling.

The following actions then occurred:

- o The FCC sought to clarify its policy by issuing its 1970 Policy Statement: The incumbent was to be preferred if he showed in the comparative renewal hearing *substantial* service (in the sense of strong, solid, and as contrasted with minimal service); no "upgrading" such as that which occurred in *WBAL* would be permitted. The hearing could be terminated if the renewal applicant demonstrated substantial service; if not, a full hearing would be held with the incumbent at a marked disadvantage.
- o The FCC issued a Notice of Inquiry in Docket No. 19154, exploring the feasibility of supplying general guidance in the television field concerning the criteria by which "substantial" service was to be judged (e.g., as to local and informational programming).
- o Upon appeal, the court reversed the 1970 Statement, holding that under the law, a full hearing was required in any event. *Dicta* in the court opinion stated that to look forward reasonably to renewal in such a hearing, the incumbent must show a "superior" record ("far above average"); and that diversification is an important factor to be considered along with the past record.
- o The FCC then issued a further notice in its inquiry in Docket No. 19154, stating that what was important was not the label given the past service reasonably insuring renewal in the comparative context, but the guidelines adopted to describe such service. It stated its intention to develop such general criteria.

The Commission also decided two comparative renewal cases after *WHDH*: *Moline* and *KHJ-TV*. In both, the incumbent won despite serious shortcomings. In *Moline*, the renewal applicant failed to present any of its twelve proposed prime-time public service programs. In *KHJ-TV*, the incumbent performed lowest among the community's independent stations with regard to local live and informational programming, and was substantially below industry averages. The station was given no preference on past record, yet won because of the desirability of industry stability, despite apparent clear disadvantages on other criteria such as diversification and integration of ownership and management.

These two cases demonstrate a firm commitment by the present Commission to no more decisions like that of *WHDH*; the renewal applicant wins the comparative hearing, no matter what his past record might be. Although there may be many factors contributing to this failure to follow the statutory scheme, it is the author's belief that an important consideration is the absence of any guidelines as to what is reasonably expected of the renewal applicant to assure his renewal in the face of a comparative challenge. When a renewal applicant confronts what is for him capital punishment, the FCC is in large part equally responsible for his dilemma, having kept him in the dark. Further, FCC action here affects not only this applicant, but scores of others who are similarly ignorant and vulnerable. The consequence is the pattern exemplified by *WBAL*, *Moline* and *KHJ-TV*.

This study finds both extremes to be unsound policy. To attempt to obtain the best possible applicant through the comparative renewal process undermines reasonable industry stability: Thus 80 percent of the stations in the top 50 markets where comparative challenges are most likely, are multiply owned or licensed to a newspaper owner, and would be subject to displacement on that ground alone.

On the other extreme, to proceed on an *ad hoc* basis as the FCC has done, would appear to continue the pattern that the renewal applicant always wins. This contravenes the statutory scheme by eliminating the competitive spur to solid service.

The course of action suggested in this study is to adopt general guidelines, afford a reasonable period of time for licensee compliance (e.g., one year), and then adhere to the statutory scheme: Those licensees that do not render meritorious past service should not be granted renewal in the comparative case in order to "ensure" industry stability.

The study recommends that the Commission follow these principles in formulating guidelines:

- Standards should be defined in terms of percentages for two broad categories of programs: local and informational programming (the latter defined as all programming other than entertainment and sports). This allows the licensee maximum discretion as to the choice of particular programs or program categories -- yet it focuses on basic *allocations* areas. The FCC has stated several times that its main purpose in allocating so much spectrum to broadcasting is to obtain effective local outlets and ensure the unique contribution that broadcasting can make to an informed electorate. These goals have received explicit congressional sanction.

- The percentage guidelines chosen should therefore reflect FCC judgment and expertise as to implementation of allocations policy. The matter is not one of industry averages (although industry statistics can and should be examined as one factor in determining the reasonableness of the percentages adopted). And it is certainly not a matter of ever-advancing percentages for local/informational programming, to the detriment of other popular programming that the public reasonably wishes to receive, and has come to expect.

The study does not find persuasive arguments against this guideline approach. The argument that the approach emphasizes quantity over quality is shortly answered: A government agency cannot and should not deal with quality. The approach focuses on a matter within the agency's ambit: How can a licensee be said to meet basic allocations goals in a strong, solid manner if he does not devote a reasonable amount of time to these areas?

And because the guidelines are limited to these two basic areas, there is no violation of the First Amendment by skewing the licensee's choice of programming to government preference. Indeed, far from violating the First Amendment, the guidelines are needed as a matter of law and policy in order to promote the purposes of the Amendment. *For it is not a matter of the Commission avoiding appraisal of the incumbent's programming under one approach as compared with another. Under the statutory scheme, the critical issue is the incumbent's record, and programming is the essence of that record.* So the question is whether in this sensitive area involving an important press medium, the First Amendment is served by examination of an incumbent's programming without any objective standards which the licensee has the opportunity to meet.

It is also argued that however reasonable the percentages adopted may be initially, they will inevitably go up -- to the detriment of the public's real interest. Or, the FCC will specify percentage guidelines not merely in these two broad allocations areas but in every programming category (e.g., agricultural, instructional, children's, minority). But again there is a short answer: One should not fail to adopt sound policy today based on the supposition that a future Commission will act unsoundly.

This is particularly so when the present policy poses so many problems. It is unfair to the potential challenger, to the broadcast industry, and above all to the public. Effective long-range programming efforts and robust, wide-open debate cannot flourish without reasonable *stability*, and and will not be fully promoted without the basic statutory impetus of possible *competition*. The suggested course of action, while having some drawbacks, appears to be a feasible route that strikes the appropriate balance between these two considerations.

ACKNOWLEDGMENTS

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I. INTRODUCTION

Since January 1970 the Federal Communications Commission (FCC) has sought to clarify the policies applicable to the comparative renewal process in television broadcasting -- that is, where an existing TV licensee seeks renewal and a new applicant files a competing application for the channel. The FCC has a pending inquiry in Docket No. 19154 with this purpose.* However, the field remains one of great confusion, with FCC decisions pointing in one direction, court opinions in another, and the Congress trying to mediate by amending the Communications Act of 1934.

This report discusses several important issues in the comparative TV renewal field and recommends solutions. These issues and solutions are discussed in the context of the existing law. For while considerable progress has been made in revision of that law,** it is still difficult to predict the details of any final revision or clarification. It would appear likely, however, that the revision, if enacted, will still permit the comparative renewal hearing, and will still require further FCC implementation, including delineation of standards in the comparative renewal situation.*** In short, the FCC must act in this type of situation, and can, we believe, do so in a manner that promotes the public interest.

BACKGROUND

To understand the comparative renewal, it is first necessary to appreciate the public trustee concept. As the Supreme Court has pointed out,† the unique feature of radio is that it is inherently not open to all. The government must license, or there will be chaotic frequency interference.††

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*See FCC 71-159, issued February 23, 1971.

**The House passed H.R. 12993 on May 1, 1974, and the Senate Commerce Committee has scheduled hearings in June and July, 1974 on broadcast renewal legislation. See *Broadcasting Magazine*, May 20, 1974, p. 27.

***See discussion within, pp. 44-45, of the House Bill, H. R. 12993.

†*NBC* v. *U.S.*, 319 U.S. 219 (1943); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1968).

††See history cited in *NBC* v. *U.S.*, *supra*, 319 U.S. at pp. 210-214.

The government (FCC) therefore chooses one licensee to operate on a frequency, and precludes all others from doing so. There could be a number of bases for this selection -- auction, "rent," or simply distribution by lot.

The Congress decided in 1927* and again in 1934** on the public trustee approach -- to grant short-term licenses to broadcasting applicants who volunteer, and are obligated, to *operate in the public interest.**** Broadcast licenses are thus granted initially or renewed after a three-year period only if the applicant demonstrates that this public interest standard is met.† Congress did not specify what "operate in the public interest" meant: Indeed, it had no notion of how broadcasting might develop, and left the matter to the interaction of the marketplace and the FCC.

It also left to the FCC the choice of selecting among competing applicants for the same channel, with the understanding that the successful applicant would be the one that better or best served the public interest. The FCC was expected to develop criteria for making that selection.†† Under the Communications Act, a hearing must be held before an application can be denied.††† The FCC tried a short-cut in the comparative hearing area. In a 1941 Kalamazoo, Michigan case, the FCC granted without a hearing the application of one competing applicant (Fetzer), and then designated the other applicant (Ashbacker) for a hearing, as required by the statute. The Supreme Court reversed, asserting that such a process was unfair -- that it required the designated applicant to displace an existing operation: "Legal theory is one thing but the practicalities are different."‡ The *Ashbacker*

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*Radio Act of 1927, 44 Stat. 1162 *et seq.*

**Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*

***See *Red Lion Broadcasting Co.* v. *FCC, supra.*

†See Sections 307-309, 47 U.S.C. 307-309.

††See H. Friendly, *The Federal Administrative Agencies*, Harvard University Press, 1962, pp. 53-73; R. A. Anthony, "Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings," 24 *Stan. L. Rev.* 1 (1971).

†††See Section 309(e), 47 U.S.C. 309(e).

‡*Ashbacker Radio Corp.* v. *U.S.*, 326 U.S. 327 (1945).

decision thus requires a full comparative hearing *before* an applicant is selected.

That decision also is applicable to the comparative renewal case. For, as stated, the Act bestows only a short-term license and, under Section 307(d),[*] requires the filing of an application for renewal. It is this renewal process that is designed to ensure or promote operation in the public interest through two methods:

- o Public notice of the filing of the application for renewal with the FCC is given in the community, and the public may file formal or informal objections with the FCC. The Commission also collects data concerning the station's operation, and makes the decision whether to grant renewal or designate the application for a full hearing.[**]
- o A newcomer may file a competing application for the same frequency. The Commission holds a comparative hearing to determine whether grant of the newcomer's application or that of the incumbent licensee will better serve the public interest.

The test for renewal of the incumbent licensee is different in the two situations. In the first, or noncomparative, case, the licensee need not show that his past service is somehow praiseworthy. He need only show that he has operated in a way sufficient to win renewal; that is, there is necessarily some level of an operation that can be said to have barely or minimally met the public interest requirement.[†]

But such a renewal applicant should not be insured renewal in the second, or comparative, situation. He has chosen to render minimally sufficient service, and if his rival will do significantly more, the public interest is served by a grant of the newcomer's application. In this way -- since the incumbent never knows when he will be challenged -- the statutory scheme

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

[**] Sections 307-309, 311(a), 47 U.S.C. 307-309, 311(a).

[†] Hearings before House Subcommittee on Communications and Power, on Broadcast License Renewal, 93d Cong., 1st Sess., p. 61 (testimony of FCC Chairman Dean Burch).

spurs solid effort in the public interest, rather than just "sliding by."*

This study is concerned solely with the second method to ensure operation in the public interest -- the stimulus of the competitive challenger at renewal. The basic issue is the governing criteria to be followed in such a situation. Are the criteria the same as if this were a comparative hearing between new applicants? If so, does the broadcasting industry lack reasonable stability so that the public interest suffers? If it is a matter of striking a balance between the competitive stimulus to service in the public interest and reasonable stability, how should this be done? If it is a matter of weighting the past record of the incumbent, what kind of record is required to assure renewal in the face of a comparative challenge? And whatever label is used to describe such a record, how is the existing station's performance to be evaluated by the government licensing agency -- qualitatively or quantitatively, and in all or some programming categories?

THE PLAN OF THIS STUDY

In Section II we discuss the legislative history of the statutory provision pertaining to renewal. Section III reviews the administrative history (i.e., the FCC's treatment of the comparative renewal). Section IV presents an analysis of the problems and recommends courses of action.

Id. at pp. 58-59.

II. THE LEGISLATIVE HISTORY OF SECTION 307(d)

EARLY HISTORY

The Radio Act of 1927 provided that short-term broadcast licenses could be renewed if the Federal Radio Commission found that renewal would serve the public interest.* The Communications Act of 1934 retained that provision, with the added clause:

> . . . but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.**

The House Report notes only that this section ". . . follows part of Section 9 of the Radio Act, with the addition taken from H.R. 7716 . . . ."*** The legislative history of H.R. 7716, 72nd Congress, shows that the above provision was added to negate any notion of a "vested right" in the license.† It thus reinforces other provisions of the Act to the same effect.††

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*Section 9, Radio Act of 1927, 44 Stat. 1162.

**See Section 307(d), 48 Stat. 1064.

***H. Rept. No. 1918, 73d Cong., 2d Sess., on S. 3285 (1934), p. 48.

†See Hearings before the Senate Commerce Committee on H.R. 7716, 72d Cong., 1st Sess., at p. 13:

> Senator White: It is an effort to negative the suggestion that because you are in possession of a license you have any rights which carry over from the granting of that license . . .
> Senator Smith: So that when your license expires when you ask for renewal, you are on the same footing as one that asks for an original license?
> Senator White: Practically on the same footing.
> Senator Dill: It is just one more of those provisions or declarations of Congress that you acquire no vested right because you have a license for a period of time.

††The Act provides that "no * * * license shall be construed to create any right beyond the terms, conditions, and periods of the license" (Section 301); that an applicant waives any claim to a frequency "because of the previous use of the same" (Section 304); that a renewal license may be granted for "a term of not to exceed three years" (Section 307(d)); and that a license does "not vest in the licensee any right * * * in the use of the frequencies * * * beyond the terms thereof" (Section 309(h)). See *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940).

THE 1952 AMENDMENT

Under Section 307(d) and the predecessor Radio Act provision, great weight was given to maintaining existing licenses against comparative challenge.* But an important comparative challenge was pending before the Commission in the late 1940s;** and the broadcasting industry was uneasy about the construction of Section 307(d). The industry therefore pressed for a revision of the section, and specifically requested deletion of the provision added in 1934, which stated that grants for renewal should be governed by the same considerations that affect grants for the original application.*** In the 1952 Amendments to the Communications Act, this provision was deleted.†

There is some indication in the legislative history that the deletion was originally intended to preclude the comparative hearing -- to allow the challenger to compete for the frequency only if the incumbent were found not to have served the public interest.†† Some broadcast proponents regarded the revision in this way, as did some of its opponents.††† Thus, FCC Chairman Wayne Coy testified before the House Commerce Committee:‡

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*See, e.g., *Chicago Federation of Labor* v. *FRC*, 41 F.2d 422, 423 (D.C. Cir. 1930) ("It is not consistent with true public convenience, interest, or necessity, that meritorious stations . . . should be deprived of broadcasting privileges when once granted to them . . . unless clear and sound reasons of public policy demand such action . . . ."); *WOKO, Inc.* v. *FCC*, 153 F.2d 623 (D.C. Cir. 1945), reversed on other grounds, 329 U.S. 223 (1946).

**The *WBAL* case (15 FCC 1149 (1951)), discussed within. The case was decided in 1951, a year before the enactment of the 1952 Amendment.

***See Section 6 of S. 658, 82d Congress. Prior efforts to delete the provision had been unsuccessful. See Hearings before a Subcommittee of the Senate Commerce Committee, on S. 1333, 80th Cong., 1st Sess. (1947), p. 97; Hearings on S. 1973, 81st Cong., 1st Sess. (1949).

†See Public Law No. 554, 82d Cong., 2d Sess.; 66 Stat 711.

††This would have been the same scheme as proposed in the later Pastore Bill, S. 2004, 91st Congress, discussed within.

†††See Hearings on S. 1973, pp. 17, 29, 91-92, 120-123; Hearings before the House Commerce Committee on S. 658, 82d Cong., 1st Sess. (1951), pp. 20-21, 37, 72-73, 304, 324-325, 334-335.

‡House Hearings on S. 658, *supra*, at p. 72.

> By deleting the existing provision that renewal applications be considered like initial applications, it might be argued that Congress has accorded persons who once obtain a license a perpetual franchise providing only that the licensee meets the minimum standards of service in the public interest and has previously been found qualified irrespective of the existence of greatly superior applicants who are entitled by law to apply for that frequency. The basic intent of the act, to allow opportunity for competitive applicants to apply for any frequency which has become available because of expiration of the limited statutory term of three years for which licenses can be issued, may be frustrated by this proposed amendment since few if any prospective applicants would be inclined to undertake a competitive proceeding with an existing marginal license. And since the presence of the possibility of competitive applications does serve as a spur to better service in the public interest on the part of existing licensees, it is particularly important that the existing law not be changed in any way which would eliminate or lessen that possibility . . . .
>
> This does not mean, as has been charged, that the existing language of section 307(d) leaves existing stations in an uncertain position where they need fear that when their licenses come up for renewal they will be taken away and given to any applicant who has been able to make a better paper showing as to how it proposes to operate its station. Obviously there is a significant difference between the promise of a new applicant and the demonstrated performance of an existing licensee which the Commission necessarily takes into account in passing upon conflicting applications.*

However, the above view was challenged by others. Thus, Commissioners Hyde and Jones asserted that the revision would not eliminate the comparative hearing, but rather would make clear that "past service will be an element to be considered in determining . . . the public interest . . . ."** The President of the National Association of Broadcasters (NAB) testified to the same effect.†

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*And see also at pp. 92-93, where Chairman Coy stated that ". . . under existing law stated in court as well as Commission decisions . . . ," the fear ". . . that a competing application would be preferred to an existing station on the basis of untested promises as contrasted with the actual service of an existing station . . ." is ". . . completely unfounded . . . ."

***Id.* at pp. 151-152; 206-207.

†*Id.* at pp. 352-353.

In these circumstances, the congressional reports are especially important. Significantly, they do not reflect any intent to eliminate the comparative hearing at renewal. The Senate Report is silent on this score,* and the House Report states regarding the 1934 provision in question (that granting a renewal ". . . shall be limited to and governed by the same considerations and practices which affect the granting of original applications"):**

> . . . The committee feels that the quoted language is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases. Therefore, this subsection of the bill strikes out the quoted language, and in lieu thereof provides that upon expiration of any license, upon application therefor, any renewal applied for may be granted 'if the Commission finds that public interest, convenience, and necessity would be served thereby.'

The reference to how the FCC has actually handled renewal cases must be to *WBAL* (discussed within) since it is the landmark comparative renewal case and was decided just one year earlier.

This is not to say that the Congress approved every aspect of *WBAL*. But it is clear from the foregoing legislative history of the 1952 amendment that (1) a newcomer has the right to file a competing application at renewal, and (2) the incumbent is not to be displaced as if this were a proceeding involving new applicants; he is to be judged on his past record and that record is of great importance in determining the outcome of the contest.

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*See Sen. Rept. No. 44, 82d Cong., 1st Sess., p. 7 (1951).

**See H. Rept. No. 1750, 82d Cong., 2d Sess., p. 8 (1952). See also H. Conf. Rept. No. 2426, 82d Cong., 2d Sess., p. 183 (1952), which referred to a provision (not adopted by the conference) requiring the newcomer to purchase the plant and equipment of the unsuccessful renewal applicant.

III. THE ADMINISTRATIVE HISTORY: THE FCC'S HANDLING OF THE COMPARATIVE RENEWAL CASE

FIRST IMPORTANT FCC RULING IN THE COMPARATIVE RENEWAL FIELD: *WBAL*

While competitive challenge has thus been inherent in the Act, the FCC did not develop policies or indeed confront this type of case until the *WBAL* case in 1951.[*] The FCC had criticized WBAL's operation in a 1946 report,[**] and a new group, calling itself the Public Service Corporation, filed a competing application.

In a 5-to-2 decision, the FCC renewed WBAL's license. It is difficult to state the precise standard employed by the majority in finding that WBAL's record entitled it to renewal. For, the majority opinion asserts that "*excellent* service as a licensee will be given favorable consideration . . ."; that the FCC ". . . must give serious consideration to the high degree of probability of continuation of *desirable* service as against paper proposals which . . . we are not convinced can be fulfilled"; that ". . . when a finding is justified that the service being rendered is in the *public interest,* consideration should be given to the desirability of continuing such proven *acceptable* service"; and that WBAL is to be preferred ". . . on the basis of its actual performance during 1947, and the probability of the continuation of its *meritorious* service . . ." [italics added].[†]

Factors that the Commission would take into account in a comparative hearing involving only *new* applicants were found inapplicable to this hearing because the hearing concerned a renewal applicant. Thus, the integration of owners into daily station activities was found to be ". . . a presumption that will not be involved when a record is available,"[††] and similarly the

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[*] *Hearst Radio, Inc. (WBAL)*, 15 FCC 1149 (1951).

[**] Public Service Responsibility of Broadcast Licensees (1946), pp. 6-9; see *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225 (D.C. Cir. 1948).

[†] 15 FCC at pp. 1175-1176, 1178. The recent House Report, on H.R. 12993, cites "meritorious" as the standard of the *WBAL* case. See H. Rept. No. 93-961, 93d Cong., 2d Sess., p. 18.

[††] 15 FCC at p. 1179.

local residence of the owners was "not a controlling element."* As to diversifying control over media of mass communications, WBAL's ownership by a local newspaper had been licensed by the Commission and was within the FCC rules; therefore, the majority found, diversification was not a factor to be considered in this renewal situation.**

While the standard for judging the renewal applicant's past record was not clearly defined and the majority professed that it was possible that the public interest might be served by granting a competing application "under different circumstances and on a different record,"*** the message of the *WBAL* case is clear: The renewal applicant won because the Commission would not jeopardize the existing investment. The majority not only did not establish why Public Service's "excellent proposals . . . will [not] be carried to fruition,"† but more important, it permitted WBAL to "upgrade" its performance after the case had been designated for hearing, and even while the case was being heard. The Commission could not properly rely on WBAL's improved service or its "actual performance in 1947" (when the case was designated for a hearing on February 15, 1946): To do so would undermine the Congressional scheme of encouraging the existing licensee to demonstrate a strong operation in the public interest in order to fend off any comparative challenge; the existing licensee could simply render minimal service, or indeed, less than minimal, and if and when challenged, could "upgrade."

In his dissent, Chairman Coy stressed this defect in the majority's approach, and found that ". . . WBAL's record is certainly not one of superior service to the community . . . ."†† His dissent concludes:†††

> . . . I am not unmindful of the fact that the Commission should not lightly disturb extensive investments which are made in broadcast properties. However, as I have indicated, on the basis of this record I do not believe any other conclusion can be reached. Moreover,

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* *Id.* at p. 1180.

** *Id.* at p. 1181.

*** *Id.* at p. 1179.

† *Id.* at p. 1178.

†† *Id.* at pp. 1186-1187.

††† *Id.* at p. 1187.

> I am firmly of the opinion that this view, if adopted by the Commission, will not introduce instability in the radio industry. Because under this opinion and under the consistent opinions of this Commission, a licensee may invest in broadcast facilities with full confidence that its license will be renewed even as against competition from others if such licensee utilizes its station to render a real public service to the community. On the other hand, licensees should not be permitted to utilize their investment in broadcast facilities as a reason for retaining their facilities when they have not utilized those facilities in rendering a real public service to their community. This is the scheme of things provided for by Congress. It insures stability to the operator who performs a real service to a community and furnishes the stimulus of competition to such licensee to make sure that he faithfully discharges his obligation to operate in the public interest.

THE PERIOD AFTER *WBAL*

The *WBAL* decision discouraged competing applicants so thoroughly that with one exception no regular renewal TV applicant faced a comparative hearing for the decades of the fifties and sixties.*

Indeed, the next significant development involved the comparative hearing with new applicants only (i.e., no regular renewal applicant). The FCC's record here was subject to severe criticism, chiefly on the ground that its decision criteria were being manipulated to achieve a predetermined

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*That one exception -- *Wabash Valley Broadcasting Corp.*, 35 FCC 677 (1963) -- represents an unusual case of no great precedential value. Wabash Valley, the existing licensee on Channel 10 in Terre Haute, Indiana, applied for Channel 2, which had just been made available. Because there was another application pending for Channel 2, a comparative hearing was necessary. Wabash Valley also filed for renewal of operation on Channel 10, and found itself confronted with a competing application filed by Livesay Broadcasting Company. The latter's strategy was unusual: It hoped that Wabash Valley would win the Channel 2 proceeding, and that it in turn would receive Channel 10 "by virtual default" (*Id.* at p. 682 -- dissenting opinion of Chairman Henry).

Consequently, Livesay did ". . . not want 'its adversary' to look bad," and entered no objection to Wabash Valley's policy of using an example station week some six months after the FCC's designation order (*Id.* at pp. 680, 684). The FCC majority held again that the past record ". . . is the most reliable gauge as to what can be expected of Wabash in the future," and the latter won renewal on Channel 10 chiefly on its "commendable record" (*Id.* at pp. 678-679).

result.* In a policy statement issued in 1965** the Commission sought to restore some measure of objectivity to this process. The FCC stated therein that it would no longer award preferences based on "puffed" promises regarding proposed programming*** or proposed participation in station operation that was less than full-time.† It specified that broadcast experience would not be considered an important factor,†† and that a past record would be of significance only if it was unusually good or unusually poor, since "average . . . performance is expected . . . ."††† Finally, the Commission stressed the importance of the diversification factor.‡

The Statement did not deal with the situation "where an applicant is contesting with a licensee seeking renewal of license."‡‡ That situation came before the FCC in late 1965 in the *Seven League Productions* case.‡‡‡

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*See W. K. Jones, *Licensing of Major Broadcast Facilities by the Federal Communications Commission*, Administrative Conference of the U.S., September 1962, pp. 198-199; Schwartz, "Comparative Television and the Chancellor's Foot," 47 *Geo. L. J.* 655 (1959); *Report of the Ad Hoc Advisory Committee on Allocations to the Senate Interstate and Foreign Commerce Committee*, 85th Cong., 2d Sess., p. 9 (". . . comparative cases are resolved through an arbitrary set of criteria where application . . . is shaped to suit the cases of the moment"); L. Jaffe, "The Scandal in TV Licensing," *Harper's Magazine*, September 1957, pp. 77, 79 (". . . [s]tandards are announced only to be ignored, ingeniously explained away, or so occasionally applied that their very application seems a mockery of justice"); and see H. Geller, *A Modest Proposal to Reform the Federal Communications Commission*, P-5209, The Rand Corporation, April 1974, pp. 22-28.

***Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

***1 FCC 2d at pp. 397-398; see *Moline Television Corp.*, 31 FCC 2d 263, 272-273 (1971).

†1 FCC 2d at p. 395.

††*Id.* at p. 396.

†††*Id.* at p. 398.

‡*Id.* at pp. 394-395. The 1965 effort has not been successful; experience shows that the Commission continues to warp the criteria to fit the foregone result. See *Star Television, Inc.* v. *FCC*, 416 F.2d 1086, 1089 (D.C. Cir. 1969) (dissenting opinion of Judge Leventhal); *RKO General, Inc. (KHJ-TV)*, FCC 73-1263 (1973) (treatment of the diversification and integration factors -- see pp. 31-32, *infra*); *Moline Television Corp.*, *supra*, 31 FCC at pp. 263, 273, 284-285 (1971) (arbitrary treatment of the integration factor); H. Geller, op. cited note * above, pp. 25-26.

‡‡1 FCC 2d at p. 393, n.1.

‡‡‡1 FCC 2d 1597. To the same effect, see *RKO General, Inc. (KHJ-TV)*, FCC 66-503 (1966).

In it, there were two competing applicants -- a renewal applicant and a new applicant. In its order designating the case for a comparative hearing, the Commission stated that ". . . the [1965] policy statement should govern the introduction of evidence in this and similar proceedings where a renewal application is contested. However, we wish to make clear that the parties will be free to urge any arguments they may deem applicable concerning the relative weight to be afforded the evidence bearing on the various comparative factors."[*] This order, while foreshadowing possible future difficulties, aroused little interest because it was so carefully "hedged," and because it was merely a designation (interlocutory) order in a case that raised the issue of the financial qualifications of all the applicants.

WHDH

The initial proceeding to select a licensee to operate on Channel 5 in Boston commenced in 1954 with the Commission's consideration of four mutually exclusive applications. The proceeding ended in 1957 when the Commission granted the application of WHDH, a wholly-owned subsidiary of the Boston Herald-Traveler Corporation.[**] During the course of the Court's review of that decision, it became apparent that *ex parte* contacts may have influenced the Commission's action. Retaining jurisdiction, the Court remanded the case to the Commission with instructions to investigate the alleged *ex parte* contacts.[†]

After a hearing upon remand, the Commission found that Robert B. Choate, president of WHDH, had "demonstrated an attempt to establish a pattern of influence" and that such attempt did violence to the integrity of the Commission's processes.[††] Choate's misconduct did not, however, disqualify WHDH. Rather, the Commission recommended to the Court that FCC processes could best be protected by voiding the grant to WHDH, and by having the

[*] 1 FCC 2d at pp. 1298-1299.

[**] 22 FCC 767

[†] *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F.2d 55 (1958). *Ex parte* contacts are off-the-record presentations to Commissioners or other decisional personnel, made without notice or opportunity for all parties in the proceedings to participate. See 409(c)(1), 47 U.S.C. 409(c)(1).

[††] *WHDH, Inc.*, 29 FCC 204 (1960).

Commission hold a new comparative evaluation of the applicants in light of the facts disclosed.*

The Court approved the Commission's findings and recommendation, vacated the Commission's grant of April 25, 1957, and remanded the proceedings for further consideration.** As a result of its reevaluation of the applicants, the Commission reinstated the WHDH construction permit and granted its pending application for a license to cover that permit.*** However, in view of WHDH's attempt to influence the outcome of the proceeding by means not in accordance with recognized public processes of adjudication, the license was issued for a period of four months only. The Commission explained:

> In the usual situation, a license application would be granted for a term of 3 years. It is within our authority, however, to grant a license for a lesser term than 3 years. Even though the inroads made by WHDH upon the rules governing fair and orderly adjudication have been concluded to result in compromise and impairment of comparative standing only, the Commission's concern with these matters extends to the point that it believes that the public interest would be served in the circumstances here shown by granting the license application of WHDH, Inc., for a term of 4 months only.†

Because of the circumstances that had led to this short-term renewal, the Commission found that there were "compelling public interest considerations" that warranted the acceptance of competing applications for the channel.†† WHDH filed for renewal of its license on October 26, 1962, and the Commission issued an order stating that new applications for Channel 5 would be accepted within a specified two-month period. Applications were submitted by three other parties, including Boston Broadcasters (BBI).

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*29 FCC at 213.

***Massachusetts Bay Telecasters, Inc.* v. *FCC*, 111 U.S. App. D.C. 144, 295 F.2d 131, *rehearing denied* February 16, 1961, *cert. denied* 366 U.S. 918.

****WHDH, Inc.*, 33 FCC 449 (1962).

†33 FCC at 454.

††*WHDH, Inc.*, 25 Pike and Fischer, Rad. Reg. 78, 80 (1963).

The FCC issued its decision in 1969, awarding the permit to BBI on the basis of its preferences on two factors: integration of ownership and management, and diversification.* The majority opinion stated that the 1965 comparative policy statement was fully applicable to the comparative renewal proceeding;** WHDH therefore received no credit for its past record -- over 21 percent of its broadcasting time devoted to local live programming -- on the ground that it was not "unusually" good.*** The opinion made no mention of the *ex parte* considerations, other than to say that they were not being taken into account as a comparative factor.†

Further, Commissioner Johnson issued a concurring opinion stating:††

> Nor is the significance of this case limited to the impact on media ownership in Boston. For the Commission also speaks generally of situations in which a new competitor is seeking the right to broadcast as against a present broadcast license holder. We suggest that the standards at renewal time ought to be the same standards that would prevail if all applicants were new applicants. In doing so the Commission removes an ambiguity in its comparative hearing standards and procedures. In the words of the order:
>
> > 'We believe that this approach is sound, for otherwise new applicants competing with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset" (par. 19).
>
> Cases are overruled where licensees with substantial media concentrations were able to retain their license under a renewal comparative challenge. The door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder.

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*16 FCC 2d 4, 19. The vote was 3 to 1.

***Id.* at pp. 7-10.

****Id.* at p. 10.

†*Id.* at p. 7.

††*Id.* at p. 28.

The opinion caused consternation in the broadcast industry.* WHDH sought reconsideration, which was denied in a 1970 opinion.** The last paragraph (No. 40) of that opinion states:***

> * * * we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of three years. Thus, although WHDH has operated station WHDH-TV for nearly twelve years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular three-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '. . . inroads made by WHDH upon the rules governing fair and orderly adjudication . . . .' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an Order directing that new applications for Channel 5 would be accepted within a specified two-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license.

Upon appeal to the Court, the Commission's action was sustained on the basis of the above FCC holding.† The Court noted that the Commission's first opinion raised the question ". . . whether the Commission has unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act."†† The reconsideration opinion, however, made clear that this was not the usual regular renewal proceeding but rather one where the existing operation, "for *sui generis* reasons" (here the *ex parte*

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*See *Broadcasting Magazine*, February 3, 1969, p. 19 ("$3 Billion in Stations Down the Drain"); L. Jaffe, "WHDH: The FCC and Broadcasting License Renewals," 82 *Harv. L. Rev.* 1693 (1969).

**17 FCC 2d 856.

***17 FCC 2d at pp. 872-873.

†*Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 402 U.S. 1007 (1970), 403 U.S. 923 (1971).

††*Id.* at p. 854.

considerations), was to be treated as a new applicant.*

The Court's opinion would appear sound.** Because of "the inroads made by WHDH upon the rules governing fair and orderly adjudication . . . ,"*** the FCC awarded WHDH only a four-month license *and* expressly invited the filing of competing applications because of "compelling public interest considerations."† It would be senseless to adopt the above extraordinary process and then inform the competing applicants at the end of the comparative hearing that this case was merely one of regular renewal, governed by *WBAL* -- not the 1965 policy statement.

The difficulty engendered by *WHDH* stems from the FCC's first opinion. As Chairman Burch pointed out in his criticism of the *WHDH* decision,††

> . . . But if the ex parte background were the critical consideration, you would think that the majority opinion would so state, at some point in its lengthy discussion. There is no reference to this crucial point anywhere in the opinion of January 22, 1969. See WHDH, Inc., 16 FCC 2d 1, (1969). Rather, the opinion makes clear that the majority believed it was dealing with the general renewal - new applicant comparative situation, and not some sui generis case. Thus, the discussion (16 FCC 2d at pp. 7-10) concludes that the 1965 Comparative Policy Statement as to new applicants is generally applicable to the renewal comparative case, and specifically to this case, even though the case began in 1963, and the hearing record was closed before the adoption of the 1965 Policy Statement. And the concurring opinion of one of three members making up the majority trumpets this point. That opinion argues that the law of the decision is generally applicable and is an invitation to challenge media concentration in other cities (see 16 FCC 2d at pp. 27-28 . . .).
>
> On reconsideration, the Commission again ignored this crucial ex parte point until the very last paragraph (par. 40) of its opinion where it simply recited the prior history and cryptically called the situation 'unique.' See WHDH, Inc., 17 FCC 2d 856, 872-73 (1969). When one remembers that this is a most valuable and

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*Id. at pp. 854-859.

**The reader should be aware that the author represented the FCC in oral argument before the Court.

***33 FCC at 454.

†25 Pike and Fischer, Rad. Reg. 78, 80 (1963).

††*In re Application of WHDH*, FCC 72-67, concurring statement of Chairman Burch.

important channel -- and that this proceeding is the culmination of years of litigation -- surely such handling of what is now regarded as the crux of the majority action (i.e., a cryptic, throw-in last paragraph on reconsideration) is wholly deficient.

AFTERMATH OF *WHDH*: THE 1970 COMPARATIVE RENEWAL POLICY STATEMENT AND THE *CITIZENS* CASE

The *WHDH* decision had far-ranging consequences. The FCC's first opinion made a large proportion of TV stations in the top markets vulnerable to comparative challenge. The critical elements in the *WHDH* case are not difficult to duplicate: Newcomers often have considerable integration of ownership and management; many existing stations are at a disadvantage on the diversification factor;* and their past records are not better than that of WHDH.** Even more important, the decision did stimulate the filing of a number of competing challenges to regular renewal applicants. Thus, whereas only one such application had been filed in FCC FY 1968, 24 competing applications were filed in the next two years, including 9 in TV.† That many clearly hoped to win on the diversification factor was shown by the case

*In the top 50 markets, 80 percent of the TV stations are either multiply owned or have a newspaper affiliation. See Hearings before the House Subcommittee on Communications and Power, on Broadcast License Renewals, 94th Cong., 2d Sess. (1973), pp. 62-63 (testimony of FCC Chairman Burch).

**As stated, WHDH received no credit for its past record with over 21 percent local live programming, because it was not "unusually" good (see 1965 Comparative Policy Statement, *supra*, 1 FCC 2d at p. 398). Most stations do not broadcast as large a percentage of local programming. See Notice in Docket No. 19154, FCC 71-159, Table 4, showing a median of 15 percent for local programming in the top 50 markets; see also *Moline Television Corp.*, 31 FCC 2d 263, 272-273 (1971).

†See Hearings cited in note * above; H. Rept. No. 93-961, on H.R. 12993, 93d Cong., 2d Sess., p. 10, sets out the following table, as reflecting ". . . the effects of the *WHDH* case [and subsequent actions] . . .":

Competing Applications Filed For Broadcast Licenses

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

KNBC-TV,[*] where the competing applicant so stated.

In this situation, broadcasters turned to Congress for relief.[**] A bill (S. 2004) introduced by Chairman Pastore of the Communications Subcommittee would require a two-stage hearing in the comparative renewal situation: First the renewal issue would be determined, and if the FCC found that the past record of the licensee met the public interest standard, the incumbent was to be renewed; competing applications would be considered only if the incumbent's license was not renewed. More than 100 congressmen and 23 senators announced their support. However, the bill was vigorously attacked by a number of groups who claimed that it was racist because it would exclude minorities from access to broadcast ownership and was inconsistent with efforts to improve television programming.[***]

Clearly, the policy in S. 2004 was markedly pro-broadcaster because it removed entirely the stimulus of competitive challenge. It left but one standard: Had the incumbent licensee served the public interest? He would be granted a renewal even if he had only barely met the standard, and a newcomer offering to provide meritorious service would be turned away without consideration. Thus there would be no incentive to provide good or meritorious service, in contrast to service just sufficient to win renewal. Since newcomers could always apply when a renewal was denied, the bill, in practical effect, eliminated the comparative hearing.[†]

The opposition to S. 2004 slowed its progress, and consideration of the bill ended with the FCC's issuance in January 1970 of its Policy Statement on Comparative Hearings Involving Regular Renewal Applicants.[††] The FCC

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[*] *KNBC-TV, Inc.*, 21 FCC 2d 195 (1970).

[**] See Hearings on S. 2004 before the Senate Subcommittee on Communications, 91st Cong., 1st Sess. (1969).

[***] See Hearings, cited in note ** above; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1210 (D.C. Cir. 1971), herein cited as *Citizens*.

[†] Comment, "The Aftermath of WHDH: Regulation by Competition or Protectection of Mediocrity?" 118 *U. Pa. L. Rev.* 368, 401-402 (1970): "[T]he Pastore Bill, in its endeavor to promote security in the broadcasting industry and to avoid irrational decision-making, would have the effect of protecting licensees rendering mediocre service and eliminating the most powerful available incentive for better broadcasting."

[††] 22 FCC 2d 424. See *Citizens, supra,* at p. 1210. Again, it should be noted that the author participated in the preparation of this document while General Counsel of the FCC.

stated that the public interest calls for balancing two 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.

To strike a proper balance between these considerations, the FCC set forth the following policy:

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

The Commission stressed that it was not using the term "substantially" in any sense of partial performance in the public interest:†

> . . . On the contrary . . . it is used in the sense of 'solid,' 'strong,' etc. . . . 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).

Further, the Commission expressly overruled the "upgrading" aspect of the *WBAL* case. It stated that no evidence of improved service after the filing of the competing application would be admissible in the hearing, since "to give weight to such belated efforts to meet [the] obligation to

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*22 FCC 2d at p. 424-425.

***Id.* at p. 425.

†*Id.* at p. 425.

provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act."* The renewal applicant must run, the FCC stressed, on his record over the entire three-year period of operation.

If that record were "substantial," the hearing would end -- with no consideration of the competing applicant, such as his integration, local residence, and programming proposals; and diversification would not be a factor. If, however, the incumbent's past record were not shown to be substantial, the hearing would consider all these factors, although the Commission pointed out that their consideration ". . . might 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."** The FCC summed up its new policy as follows:

> . . . 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.

The FCC left to the hearing process the delineation of whether a record was "substantial." Thus, the parties could call community leaders or make showings as to the licensee's ascertainment and programming performance and also ". . . the efforts of like stations in the community or elsewhere to supply substantial service . . . ."†

In February 1971 the Commission issued a Notice of Inquiry in Docket No. 19154, the purpose of which was to explore the feasibility of supplying

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**Id.* at p. 427.

***Id.* at p. 428.

†*Id.* at pp. 428-429. On July 21, 1970, the Commission denied petitions for reconsideration of its Policy Statement. See FCC 70-738.

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

The FCC proposes the following:

> (i) With respect to local programming, a range of 10-15 percent of the total broadcast day (including 10-15 percent 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 percent for the network affiliate, 5 percent for the independent VHF station (including a figure of 8-10 percent and 5 percent, respectively in the prime time period).
>
> (iii) In the public affairs area, the tentative figure is 3-5 percent, with a 3 percent figure for the 6-11 p.m. time period.**

The FCC also proposes a range in each category to account for different revenue figures and different size markets. 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. The Commission proposes to exclude unprofitable stations, particularly the new or struggling independent UHF stations.†

The 1970 Policy Statement was short-lived. In June 1971, the Court in

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*FCC 71-159.

***Id.* at par. 5.

†*Id.* at par. 4. Both this proposal and the Policy Statement are analyzed within.

the *Citizens* case held the Statement to be invalid. The Commission had there provided for a full comparison between the incumbent and challenger only where in an initial stage of the hearing the incumbent could not demonstrate a past record of substantial service without serious deficiencies. The Court held that this truncated procedure violated Section 309(e) of the Communications Act and the *Ashbacker* decision -- that the law requires a single full hearing in which the parties may develop evidence and be adjudged on all relevant criteria.

While that is the essential holding of the *Citizens* case, the Court's opinion contains interesting observations and suggestions. First, it clearly equates the Policy Statement with the Pastore Bill (S. 2004):*

> . . . Thus, in effect, the Policy Statement administratively 'enacts' what the Pastore bill sought to do. The Statement's test for renewal, 'substantial service,' seems little more than a semantic substitute for the bill's test, 'public interest,' and the bill's two-stage hearing, the second stage being dependent on the incumbent's failing the test, is not significantly different from the Statement's summary judgment approach . . . .

Further, the opinion cannot be squared with its essential holding of the need for a *full* hearing. The Court stresses that ". . . incumbent licensees should be judged primarily on their records of past performance . . . ," and ". . . *superior* performance should be a plus of major significance in renewal proceedings . . . .": *"The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service* . . . [emphasis added]."**

The italicized statement raises a host of questions. If the renewal applicant with a superior record must reasonably be renewed under the public interest standard, does not that result in a "two-stage" or "summary procedure"? Where then is the full hearing that the Court says is required under Section 309(e)? Is it merely a useless presentation, a "full" hearing on insignificant factors?† Does the only difference between the Court

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* *Citizens, supra,* at p. 1210.

** *Id.* at p. 1213.

† Thus, at a later point, the Court states: ". . . Diversification is a factor properly to be weighed and balanced with other important factors,

and the FCC approach lie in their standards for the past record that warrants renewal (i.e., "substantial" versus "superior" service)?* Is it the province of the Court or the FCC to develop the applicable standard?**

The Court appears to be saying ". . . that the same comparative criteria set out in the [1965 Policy] Statement (if not the weight assigned to each criterion) must also be considered in renewal hearings . . . ."† But the legislative history of the 1952 revision establishes that the renewal hearing stands on an entirely different footing from the hearing involving new applicants -- that in the renewal comparative hearing, criteria such as diversification, integration, and local residence should not play the controlling or significant role that they do in the ordinary comparative hearing. The Court's opinion appears to be inconsistent with the Congressional action in 1952: If Congress in 1952 sought to reflect administrative practice in this area, as the House Report expressly states,†† the Court in *Citizens* clearly was wrong in setting aside the administrative practice, since it was based upon the same manner of handling the renewal case as in 1952 (with the exception that no more "upgrading" would be allowed).

The *Citizens* opinion leaves the issue in a most confused state. The Court clearly misconstrued the FCC's essential holding as to the difference between "substantial" service and service just meeting the public interest standard. It substituted its own standard, without any discussion of the policy consequences or legal reasons therefor. And it required that a *full* hearing be held, although it is implied that if the Court standard as to past record is met, the full hearing serves no useful purpose.

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including the renewal applicant's prior record, at a renewal hearing . . . ." *Citizens, supra,* at pp. 1213-1214, n. 36. But if the past record is such that the licensee should reasonably be able to look forward to renewal, how can this conclusion be "balanced" with factors like diversification?

*In a subsequent opinion, the Court stated that it ". . . used the word 'superior' in its ordinary dictionary meaning: 'far above the average' . . ." *Citizens Communications Center* v. *FCC,* 463 F.2d 822, 823 (1972).

**See *FCC* v. *Pottsville Broadcasting Company,* 309 U.S. 308 (1940).

†*Citizens, supra,* at p. 1212, n. 33; see also pp. 1212-1213.

††See quotation on page 8, *supra.*

AFTERMATH OF *CITIZENS*

The Court suggested in *Citizens* that the Commission in its rule making proceedings should try to clarify what constitutes "superior" service.* In August 1971 the Commission issued a Further Notice in Docket No. 19154** to take account of the Court's action in *Citizens*. The Commission stated that the Court had misread "substantial" service as meaning minimal service just meeting the public interest standard. It also observed that the term "superior" cannot realistically be used in a comparative sense, because it results in ever-increasing amounts of public service programming to the detriment of what the public reasonably wants in light of its interest in entertainment programming. The Commission stressed that it was unnecessary to dwell on the label; rather what is important are the guidelines indicative of service which would reasonably assure renewal in the comparative situation. Similarly, on the diversification issue, the Commission expressed its belief that the Court was not seeking to have the ownership patterns of the broadcast industry restructured through the renewal process.

The House Subcommittee on Communications and Power held hearings in 1973 on broadcast license renewals. In his March 14, 1973 testimony, Chairman Burch was largely negative toward the concept of adopting some percentage guidelines in this area.† In his September 18, 1973 testimony -- and apparently after further experience with the *ad hoc* disposition of the comparative renewal -- Chairman Burch changed his testimony. The lack of any "standard" or "guidance" is, Chairman Burch stated, ". . . an invitation to the exercise of unbridled administrative discretion, applied unpredictably from one case to the next . . .":†† ". . . the public interest requires some degree of certainty and predictability in the outcome of renewal

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**Citizens, supra,* at p. 1213, n. 35 (The Court noted ". . . with approval that such rule making proceedings may soon be under way . . ."). In a later decision, the Court made it clear that it is within the Commission's discretion to proceed either by rule or by *ad hoc* decisions. See *Citizens Communications Center* v. *FCC, supra,* 463 F.2d at p. 822.

**FCC 71-826 (analyzed within).

†See FCC Docket No. 19154. Hearings before the House Subcommittee on Communications and Power, 94th Cong., 2d Sess., pp. 110, 112, 1119 (March 14, 1973).

††*Id.* at p. 1119. In an address to the International Radio and Television Society on September 14, 1973, Chairman Burch stated (p. 3):

If I were to pose the question, what <u>are</u> the FCC's renewal policies proceedings, and some measure of consistency in the applicable criteria . . . ."[*] Chairman Burch therefore concluded:

> . . . I can perceive no real alternative to an approach similar to that of Docket 19154 -- 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 . . . .[**]

Following this testimony, on October 9, 1973, the FCC issued a *Second Further Notice of Inquiry in Docket No. 19154,*[***] stating "a growing consensus [for] the broad principle of establishing definitive guidelines . . ." and requesting further comments relating to the practical problems. In connection with this *Second Further Notice,* the Commission issued a questionnaire to all commercial television stations, requiring statistical data based on a composite week. On November 30, 1973, the Commission released its *Third Further Notice of Inquiry,*[†] which contained the results of that questionnaire reflecting nonentertainment and local programming during a specified period. Comments and reply comments were filed in response to those Notices.

FCC'S HANDLING OF TWO RECENT COMPARATIVE RENEWAL CASES

During this same period after the *Citizens* case, the FCC disposed of two comparative renewal cases -- *Moline Television Corporation*[††] and *RKO General Inc. (KHJ-TV).*[†††] Its handling of these cases is most instructive with regard to the need of general guidelines.

> and what are the controlling guidelines, everyone in this room would be on equal footing. You couldn't tell me. I couldn't tell you -- and no one else at the Commission could do any better (least of all the long-suffering renewals staff).

[*] *Id.* at pp. 1120-1121.

[**] *Id.* at p. 1121: Chairman McDonald of the House Subcommittee noted his approval (*Id.* at p. 1124: ". . . I don't see how you can . . . expect the licensees to know . . . whether they are doing a good enough job unless you give them something to shoot at . . .").

[***] FCC 73-1040.

[†] FCC 73-1262.

[††] 31 FCC 2d 263 (1971).

[†††] *RKO General, Inc. (KHJ-TV),* FCC 73-1263.

Moline

Moline Television Corporation acquired its license by winning a comparative hearing in 1962, largely on the basis of its integration proposals.* The FCC found, however, that during its actual operation of the station (1963 through 1967), ". . . it appeared that Moline had failed to carry out its proposals with respect to local live programming . . .";** in explanation, it "had merely stated that 'it was the judgment of the licensee not to present [the proposed programs].'"*** The FCC also noted that Moline ". . . had failed to implement a number of its integration proposals made in the prior comparative hearing . . . ," and had tried to sell the station before the end of the first license period. This raised the issue of whether Moline, in acquiring its station, ". . . had intended to serve the public interest or to traffic in broadcast licenses . . . ."† The FCC accordingly sent Moline a prehearing letter when it filed for renewal, and designated Moline for a hearing on the issue of whether it should be disqualified from holding the license. In addition, a comparative issue was specified, since a new applicant, Community Telecasting Corporation (CTC), filed for the channel.

In an opinion issued in August 1971, the FCC, by a 4-to-2 vote, renewed Moline's license and denied the application of CTC. The FCC recognized the applicability of the *Citizens* case, and found that Moline's past record did entitle it to "a plus of major significance." It took into account the percentages devoted by Moline to local live programming (i.e., 14.9 percent overall and 11.7 percent in prime time), the testimony of community leaders, and the comparison between Moline's efforts and those of the two other Moline TV stations.††

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*32 FCC 923 (1962).

**31 FCC 2d at p. 264.

****Ibid.*

†*Ibid.*

††See 31 FCC 2d at pp. 268-270. Moline's performance was somewhat below that of one rival (WOC-TV's local live was 16.4 percent overall and 14.7 percent in prime time) and much better than the other station, WHBF-TV (5.8 percent local live overall). But as the dissenting opinion of Commissioner Bartley points out, it is not logical to call a renewal applicant "superior" simply because it is better than another station giving relatively poor service:

The majority opinion had some difficulty disposing of the promise-versus-performance issue. It found that Moline had not satisfactorily explained its failure to present any of the 12 weekly prime-time local programs it had proposed and that it should ". . . have done somewhat more to fulfill its proposals . . ."; it therefore imposed "a slight demerit" on Moline.[*] The opinion states that the demerit is only slight because Moline's proposals were part of a "puffing" process engaged in by virtually all comparative applicants, and finally ended by the issuance of the 1965 Comparative Policy Statement.[**]

The opinion absolved Moline of both trafficking and failure to carry out integration proposals. Indeed, the opinion awarded Moline a decisive preference on the integration factor, because Moline's integration is ". . . superior qualitatively to the proposed integration in management of CTC's Mr. Quinlan who is not a present local Quad City resident."[***]

The dissenting opinions strike at all the above findings. They point out that in *KORD, Inc.*,[†] the FCC had stressed the importance of renewal applicants meeting their proposals -- yet here Moline had failed to keep any of its promises regarding local live prime-time programming (and had proposed 24 percent total local live but delivered only 15 percent). As the dissent of Commissioner Johnson states:[††]

"The rationale means that if other stations in a market carry no news, no educational programs, no public service programs of any kind, and another station carried one-half percent of each, that station should be accorded a 'superior performance' award . . ." (31 FCC 2d at p. 276).

[*] 31 FCC 2d at pp. 271, 274.

[**] *Id.* at pp. 271-273. Thus, the FCC stated (at p. 272): ". . . If one takes a sample of 35 cases during the period 1952 to 1965 (when the Commission abandoned this policy), the winning applicants on the average proposed to devote 31.5% of their broadcast time to local live programming, whereas in fact they devoted only an average of 11.8% to such programming [footnote omitted] . . . ."

[***] *Id.* at p. 274. It is puzzling why the majority awarded this preference, since the integration factor should be of no significance in judging the renewal applicant: His preference depends solely on his past performance. See 1970 Policy Statement, *supra;* Cf. *Belo Broadcasting Corp.*, FCC 74-673, par. 15.

[†] 31 FCC 85 (1961).

[††] 31 FCC 2d at p. 282; see also Chairman McDonald's comments on Moline's failure to keep its promises, Hearings on H.R. 12993, *supra*, at p. 110.

> . . . The explanation that the evidence shows, and the majority accepts, is that Moline concluded it could make more money by plugging into the network fulltime and ignoring its proposed programming. Its general manager was fired because he would not go along, or as the majority characterizes it in paragraph 34, he was 'too extravagant.' Thus, not only did Moline <u>not</u> perform on its programming proposals, it fired the man who tried to put those proposals into effect -- the man whose presence in Moline's operation the Commission relied on in granting the original license!

The dissent further points out that Moline's news performance, 4.3 percent, far from being "substantial," ". . . would rank in the lowest 10% of all VHF network affiliates . . . ."* Further, the Commission's 1965 Policy Statement clearly called for a preference to CTC, not Moline, on integration:

> Two owners, who hold 80% of the [CTC] stock, would be fully integrated into the management of [CTC]. The President and General Manager would be a 69% owner. For Moline, only one stockholder, who owns roughly 10% of the Moline stock, would be fully integrated.**

<u>KHJ-TV</u>

This case began in 1965 when RKO General, Inc. (KHJ-TV) filed its application for renewal, and Fidelity Television, Inc. (Fidelity) filed a competing application. Four years later the Hearing Examiner issued his initial decision recommending that the license be granted to Fidelity.*** The FCC held oral arguments two years later in 1971, and then, after Fidelity went to the Court for Appeal for a writ of mandamus to force FCC action, issued its decision in December 1973, granting the renewal application of KHJ-TV and denying the competing application.†

On the crucial issue of KHJ-TV's past record, the FCC noted that KHJ-TV concentrated on presenting feature-film programming;†† that its actual

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* *Id.* at p. 287.

** *Id.* at p. 284.

*** FCC 69D-43, 44 FCC 2d 149 (1969).

† 44 FCC 2d 123 (1973), appeal pending, *Fidelity Television, Inc.* v. *FCC*, D.C. Cir., No. 73-2213.

†† The Examiner found that ". . . an inordinate amount of time was devoted by KHJ-TV to a bit-of-old-movie, a plea-for-the-sale-of-goods-or- services, a

performance met or exceeded the promises made; and that it was an independent station competing in a market with six other VHF facilities. The Commission described KHJ-TV's performance -- for example, 86.5 percent entertainment; 3.375 percent news; 3.375 religious, agricultural, and discussion programming; 7.13 percent local live programming, with 5 percent in prime time -- and stated:*

> In comparison with the three other independent, VHF television stations in the market, KHJ-TV during this period had the highest percentage of entertainment programming, the lowest percentages in the news and discussion categories, and the lowest percentages of live programming, for both the total day and prime time.

The FCC's overall conclusion was that ". . . there are sufficient good points to offset the less favorable aspects of KHJ-TV's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus warranting neither a preference nor a demerit."**

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bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, a bit-of-old-movie, a plea-for-the-sale-of-goods-or-services, hour after hour, day after day, week after week, month after month, year after year, ad infinitum, ad nauseam . . ." (44 FCC 2d at p. 220). In one week called typical by the Examiner, 113 hours and 41 minutes of the 133 hours and 40 minutes that KHJ was on the air were devoted to feature and syndicated film (see n. 23, FCC 73-1263). The issue is not whether such film and feature presentations serve the public interest; that is a matter of quality judgment beyond the FCC's proper ambit. But overcommercialization and the failure to devote "substantial" amounts of time to other programming to meet public interest needs (e.g., local and informational) is a matter of proper concern in the comparative case.

*44 FCC 2d at p. 130, n. 22. Fidelity, which proposed to operate roughly three hours more than KHJ-TV, set out the following programming proposal: 67.42 percent entertainment; 3.12 percent religious; 1.05 percent agricultural; 7.10 percent educational; 7.17 percent news; 6.41 percent discussion; 7.73 percent talk; 22.55 percent local programming with 25.71 percent in prime time. The Commission refused to include a programming issue under which Fidelity could develop these differences, on the ground that Fidelity had not demonstrated ". . . a sufficient need for the programs it proposes to warrant the requested issue, and the differences in percentages upon which Fidelity relies appear to be no more than differences in judgment . . ." *RKO General, Inc.*, 5 FCC 2d 517, 520 (1960); see also 8 FCC 2d 880 (1967); 10 FCC 2d 115 (1967).

**44 FCC 2d at p. 133.

But since KHJ-TV thus did not obtain any "plus of major significance" on the basis of its past record, the case was to be decided based upon the other comparative criteria. And on these criteria, KHJ-TV appeared to be at a marked disadvantage. Thus, on the diversification factor, RKO owns an AM and FM station in Los Angeles, and several AM, FM, and TV stations in other cities such as New York and Boston (i.e., seven AM stations, four TV stations -- excluding KHJ-TV but including CKLW-TV, Windsor, Ontario -- and seven FM stations); it also has very extensive cable television holdings. Fidelity has one (nonparticipating, 3-percent) stockholder with a 10-percent interest in a cable system in a small town (5,000 population) and another (1-percent) stockholder with a 26-percent interest in a corporation publishing newspapers in several Los Angeles area suburbs (with a total population of 45,000). The FCC majority holds that no preference is due Fidelity, reciting factors such as no abuse in news dissemination by RKO, the plethora of other media in Los Angeles, and the consideration that any restructuring of broadcast ownership patterns should be carried out by rule rather than the renewal process. But the dissent of Commissioner H. Rex Lee points out that none of these considerations obviate the fact that the RKO application is clearly inferior to that of Fidelity on diversification -- and ". . . the majority professes to evaluate the applicants on the basis of traditional comparative criteria, one of which has been diversification."[*]

As for integration, two persons, both local residents who are active in civic affairs and hold over 22 percent of Fidelity's stock, would occupy full-time positions, while none of KHJ-TV's management personnel has any significant ownership interest in the licensee. The majority again awarded no preference on the ground that Fidelity's principals lacked broadcast experience and had shown an inability to carry out licensee responsibilities by failing to file timely reports reflecting significant changes in its corporate structure. The first factor -- lack of broadcast experience -- was expressly downgraded in the Commission's 1965 Policy Statement since it ". . . could discourage qualified newcomers to broadcasting . . . ."[**] As

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[*]44 FCC 2d at p. 147.

[**]See 1 FCC 2d at p. 396.

to the second, Commissioner H. Rex Lee's dissent points out that the majority did not reopen the record to explore these matters and therefore could not properly rely on them.

Further, the dissent points out that there is record evidence as to activities reflecting adversely on one applicant -- KHJ-TV:*

> . . . The record illustrates numerous instances where General Tire [RKO's owner] utilized reciprocal trade agreements to obtain advertising business for its radio and television stations, including KHJ-TV. In fact, the evidence shows that General Tire attempted to bring pressure on advertisers to buy time over RKO stations, often for reasons completely unconnected with the quality of programming being produced by the stations. For instance, as the result of extensive negotiations in 1962, General Tire and Pepsi-Cola concluded a 'mutually beneficial association' whereby more Pepsi-Cola would be placed in General Tire plants in return for increased Pepsi-Cola radio and television advertising. As a result, Pepsi-Cola's advertising on KHJ-TV went from $3,500 in 1964 to $40,000 in 1965. Similarly, negotiations with Olin-Mathieson, which concerned the award of a fixed percentage of General Tire's needs for polyol for the synthetic rubber process, resulted in Olin-Mathieson advertising on KHJ-TV jumping from nothing in 1962 and 1963 to $12,350 in 1964 . . . .

The Department of Justice urged disqualification on the above ground. The majority opinion notes that ". . . many other corporations engaged in similar trade relations practices during this period and that the Department of Justice terminated its civil antitrust suit on the basis of injunctive provisions which are essentially prospective in nature . . . ." While the majority might rely on ". . . RKO's unblemished record as a broadcaster covering more than 25 years . . ." to find against disqualification (as did the Examiner), the majority (unlike the Examiner) does not assess a comparative demerit on this basis.**

Since the applicants remain equal in the majority's views, the FCC now comes to the basis of its decision:†

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*44 FCC 2d at pp. 143-144.

***Ibid.* But see *Mansfield Journal Co.* v. *FCC*, 173 F.2d 646 (D.C. Cir. 1949); *Uniform Policy in Connection with Violations by an Applicant of the Laws of United States*, 1 (Part 3) Pike and Fischer, Rad. Reg. 91:495 (1951).

†44 FCC 2d at p. 137.

. . . Under these circumstances, and in keeping with the views expressed in Greater Boston, supra, we believe that there is a public interest, both in the Los Angeles area and the nation at large in insuring the predictability and stability of broadcast service. If there is no such security for applicants seeking facilities with the intention of providing good service for the public, the overall development and motivation of the industry will suffer. While we recognize the need to avoid any burden upon an applicant for a new facility seeking to show that it will better serve the public interest, we are persuaded that credit must be given in a comparative renewal proceeding, when the applicants are otherwise equal, for the value to the public in the continuation of the existing service . . . .

But this means that the existing licensee wins, even when his record entitles him to no "plus" or preference. This is precisely contrary to the 1970 Policy Statement where the Commission stated that "barring the case where his competition 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."* Stated differently, the existing licensee was given a chance to render strong, solid service to the public, and did not do so; in those circumstances, if it is a stand-off with the challenger, the latter should be given his chance to render service that would warrant a "plus."

The majority opinion in KHJ-TV is thus questionable on two basic matters: (1) KHJ-TV, having been shown to fail to render substantial evidence, should have been at a marked disadvantage in the comparative hearing; and (2) in view of its past record, KHJ-TV could not escape comparison on factors such as diversification and integration, and its rival was superior with respect to these criteria. The majority's effort to handle the matters in (1) and (2) so that KHJ-TV is not at a disadvantage is strained. In the final analysis, KHJ-TV wins solely because it is the incumbent; it has nothing else in its favor -- not a good record, integration, diversification, etc.

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*22 FCC 2d at pp. 424, 428, n. 4. It should be emphasized that while the Statement was set aside by the Court on its deficient procedure (i.e., failure to comply with *Ashbacker* and afford a full hearing), that did not render nugatory precepts in the Policy Statement such as the need for the renewal applicant to run on his record and make a strong showing in order to obtain a plus in the comparative hearing. On the contrary, the *Citizens* case, if anything, reinforced these aspects of the Statement.

The explanation for *Moline* and *KHJ-TV* is clear: No more *WHDH* decisions. Chairman Burch referred to that case as "the nadir of the renewal process"* -- an "egregious boner";** and according to trade reports, he was "haunted [by] the prospect of another WHDH."† Thus, both *Moline* and *KHJ-TV* sent a message to the industry and the potential challengers: No matter what the record of the existing station, the latter wins.

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*Speech by Chairman Burch before the International Radio and Television Society, September 14, 1973, FCC Memo 06608, p. 3.

**Speech by Chairman Burch before the National Association of Broadcasters, March 1973.

†*Broadcasting Magazine*, March 11, 1974, p. 28.

IV. ANALYSIS AND SUGGESTED COURSES OF ACTION

CONSTRUCTION OF THE STATUTE

Congress obviously had no clear notion of the emerging broadcast structure when it adopted the basic regulatory scheme in 1927. As the Court stated in *Citizens,** ". . . the [Radio] Act provided for expiration of licenses, and consequent renewal hearings, every three years [footnote omitted]. At both initial and renewal licensing, applicants were to be tested by the basic standard of 'public interest, convenience, or necessity.'" The Court added:

> . . . The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; nor is an inability to displace operating broadcasters inherent in government management, as is established by the fact that in its early years of regulation the Federal Radio Commission often refused to renew licenses . . . .**

Carrying the above line of reasoning to its conclusion leads to the construction adopted by the concurring opinion of Judge MacKinnon in *Citizens*. He recognizes ". . . the desire and need for reasonable stability in obtaining renewal licenses . . . ," but concludes, in effect, that it cannot be accomplished "administratively," as the FCC sought in the 1970 Policy Statement.† For to do so would ". . . substitute a standard of <u>substantial</u> service for the <u>best possible</u> service to the public . . . . If such change is desired, in my opinion, it must be accomplished by amendment of the statute."††

But this extreme construction and even the construction in the *Citizens* majority opinion (stressing the continued importance of the diversification factor) both ignore the 1952 Amendment to Section 307(d). Congress did not act to revise the renewal provision to no purpose. The legislative history

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* *Citizens, supra,* at p. 1206.

** *Id.* at p. 1207.

† *Id.* at p. 1215.

†† *Ibid.*

of the 1952 Amendments makes clear that Congress wanted reasonable stability -- that it therefore approved and ratified the existing FCC practice of preferring the renewal applicant with a *meritorious* record[*] over the newcomer, even if the latter had advantages as to diversification or integration of ownership and management. The construction of the Act in *Citizens* is wrong because it does not take into account the lesson of the legislative history of the 1952 Amendment to Section 307(d).

Even without this pertinent and persuasive legislative history, the Act should not be construed as urged in the *Citizens* opinion. For, Congress clearly bestowed upon the agency broad authority to adopt policies reflecting the public interest in this shifting, dynamic new field of broadcast communications.[**] This means that under the public interest standard the FCC can devise policies that do take into account appropriately the need for stability in the broadcast industry. Otherwise, it would not be promoting "the larger and more effective use of radio in the public interest" -- the statutory standard.[***] That standard clearly encompasses ". . . legitimate renewal expectancies . . . ."[†]

For example, if the multiple owner or absentee owner were at a distinct disadvantage at renewal, why would such an owner provide the risk capital and large operating resources needed to establish a successful independent UHF station? Without some assurance of appropriate stability, there are severe obstacles to the development of new services such as UHF or FM. And while VHF television and AM radio are now well established, these services also were speculative and a risk at early stages in their development.[††]

Further, stability is needed to promote broadcasting's role as a vital disseminator of news information: If the license to operate this electronic

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[*] Or some similar descriptive phrase -- see p. 9, *supra*.

[**] See *NBC* v. *U.S.*, 319 U.S. 190, 216-220 (1943); *FCC* v. *Pottsville Broadcasting Co.*, *supra*.

[***] See Section 303(g), 47 U.S.C. 303(g); *NBC* v. *U.S.*, *supra*, 319 U.S. at p. 216.

[†] *Greater Boston Television Corp.* v. *FCC*, *supra*, at p. 854.

[††] There are *legislative* revisions that might seek to deal with this forfeiture aspect (although it is open to question whether they would be fully successful in ensuring needed stability); such revisions are beyond the scope of this study, which is restricted solely to FCC action.

press is "up for grabs" every three years and can be deleted on subjective grounds such as employed by the FCC in the comparative hearings involving only new applicants,* the important First Amendment goal of promoting robust, wide-open debate will clearly suffer.

The Court in *Citizens* states:**

> The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review . . . .

But that is not the issue: No Commission is likely to deny a renewal on First Amendment grounds. The issue is whether, if the stations licensed to an absentee multiple owner such as the Washington Post face a comparative challenge at renewal, robust, wide-open debate over the Post stations is likely to be promoted by a policy that gives no assurance of renewal of the operating license based on past record, but rather leaves those stations vulnerable to the type of decisional process employed in the case of a hearing involving only new applicants.†

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*See note *, p. 12, *supra; Star Television, Inc.* v. *FCC*, 416 F.2d 1086, 1089 (D.C. Cir. 1969) (dissenting opinion of Judge Leventhal).

***Citizens, supra,* at p. 1214.

†The need for definitive standards on this ground is underscored by the revelations concerning possible ". . . White House complicity in challenges to Post-Newsweek [Florida TV stations]" (*Broadcasting Magazine*, May 20, 1974, p. 25):

> Quoting sources who had heard the tape, the *Post* story said that the President and his aides suggested that the *Post* "be 'paid back,' in effect, for its coverage of the Watergate affair." The discussion was said to involve the desirability of using the FCC's licensing power against the *Post*. The fact that two Post-Newsweek stations were soon to seek renewal of licenses was noted, the story said.
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> ". . . The main thing is the *Post* is going to have damnable, damnable problems out of this one," President Nixon is said to have commented. "They have a television station . . . and they're going to have to get it renewed."
>
> The President then asked when the radio license was due for renewal -- a question that led Mr. Dean, who at one time worked for Welch and Morgan, a communications law firm in Washington, to

Thus, under the public interest standard and the clear legislative history of the 1952 Amendment, the FCC's policy here must strike a reasonable balance between stability and the need to stimulate operation in the public interest. To do that, the Commission must make a distinction between renewal in the comparative and noncomparative situation. Otherwise, there is no need for the comparative challenge; the petition to deny, or in any event, the FCC's own scrutiny would be sufficient to protect the public against less than minimal service. In Chairman Burch's apt testimony, "Congress wisely provided for a competitive spur to existing licensees -- to promote substantial rather than just minimal service barely meeting the public interest standard."*

But if the licensee does render the level of service warranting renewal in the face of a comparative challenge, he is not to lose because of disadvantages on diversification or integration. The foregoing construction comports with the legislative history of Section 307(d) and serves the public interest ". . . in the larger and more effective use of radio" (Section 303(g)).**

THE COMMISSION'S IMPLEMENTATION OF THE STATUTE: SOME BASIC ISSUES

The FCC's actions in this area have been confused and often inconsistent with the above general construction. In the *WBAL* case where the Commission first came to grips with the problem, it allowed "upgrading" by the existing applicant and in practical effect foreclosed the comparative challenge.

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mention the problem competing applications were causing broadcasters. He said he did not know when the radio license was up for renewal. "But," he said, "the practice of nonlicensees filing on top of licensees has certainly gotten more . . . active."

At that point, the President, according to that portion of the transcript of the tape published in the *Post*, said, referring to license renewal challenge activity, "it's going to be goddam active here . . . . Well, the game has to be played awfully rough."

The discussion occurred after Mr. Dean said that the *Post* has "a large team" assigned exclusively to investigate the Watergate matter.

*Hearings, cited *supra*, note †, p. 3, at p. 61.

**It is also consistent with the Congressional purpose reflected in H.R. 12993. See H. Rept. No. 93-961, 93d Cong., 2d Sess., discussed within, p. 44.

In the first *WHDH* decision, the three-man majority went to the other extreme: It opted for an approach along the lines of Judge MacKinnon's concurring opinion -- the best possible service, with full application of the 1965 Policy Statement and thus such criteria as diversification and integration. This does undermine essential industry stability, and while the Commission tried to repair the damage on reconsideration, it was not wholly successful.

In the author's view,* the 1970 Policy Statement struck a proper balance. It provided reasonable assurance of renewal to the licensee who delivered strong, solid service and no such assurance to the one who chose to perform only minimally; such a licensee would be "likely" to lose on the basis of his past record alone. Further, the existing licensee could no longer "upgrade" after the filing of a competing application; instead, he had to run on his past record over the *entire* three-year period. The Court reversed the 1970 Policy Statement on *Ashbacker* grounds, based on the need for a *full* hearing. But if it serves the public interest to renew an applicant with a certain kind of past record, as the Court indicates, what is the purpose of the full hearing? The FCC need not hold a useless hearing on the application for, say, a sixth VHF station in the face of a rule to the contrary.**

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*It should be noted that the author, as FCC General Counsel, prepared the 1970 Statement.

**See *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 195, 204-205 (1956). See also *FPC* v. *Texaco*, 377 U.S. 33 (1964). This does not mean that there can never be a departure from the policy. As the FCC stated in denying reconsideration of the 1970 Policy Statement (FCC 70-738, n. 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.

However, it would take most compelling and unusual circumstances to warrant a departure from the policy, in view of the basis of the policy. In the author's view, therefore, the essential holding of *Citizens* -- that a full hearing must be held in any comparative renewal case -- is incorrect. But it *is* the Court's holding and absent reversal by the Congress, or by the courts in some case, would appear to control FCC action in this respect. Therefore, a draft FCC report attached to this study reflects the *Citizens* holding.

Why then should it hold a useless *portion* of a hearing if it is established in the hearing process that the renewal applicant has achieved service of such a nature that "the public itself will suffer if [it] cannot reasonably expect renewal . . ."?*

The difference between the Commission's 1970 approach and that of the *Citizens* Court is in the standard of performance that reasonably ensures renewal. The Court's standard is "superior" while that used by the Commission is "substantial" in the sense of "strong" or "solid." The Court's approach would appear wrong -- and not just on the basis that the Court seems to have usurped the function of the Commission in developing the policy that best serves the public interest.** For, "superior," as used by the Court, means "far above the average,"† and a *comparative* standard is not appropriate. As the FCC pointed out in its Further Notice in Docket No. 19154:††

> . . . 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 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 . . . .

Under the Court's approach, the amount of local live or informational programming would increase, until there was substantial public reaction to displacement of popular entertainment fare -- then it would either stabilize or decrease, with some expansion at a later time. This way of proceeding is poor policy.

The key here is not relative performance or indeed, how the industry is performing now or at some particular time. Suppose the level of performance is only five percent for virtually all licensees: Would the Commission label *that* level sufficient to warrant renewal in a comparative situation?

**Citizens, supra,* at p. 1213.

**H. Rept. No. 93-961, on H.R. 12993, 93d Cong., 2d Sess. (1974), pp. 9-10.

†*Citizens, supra,* 463 F.2d at p. 823.

††FCC 71-826, par. 4, n. 2.

While the industry operation should be examined, along with other factors, to ensure that Commission criteria are reasonably capable of implementation, those criteria should be selected by the FCC on the basis of *allocations* goals.

It is the Commission, not the courts, that has allocated spectrum to broadcasting as against other claimants, in order to achieve certain goals. Those goals are stated in the Communications Act[*] and have been emphasized by the Commission on several occasions -- to obtain effective local outlets and informational programming that contribute to an informed electorate.[**] Having allocated valuable spectrum for these specific purposes, it is up to the Commission to ensure that these purposes are achieved or promoted. It could do so by specifying standards or guidelines for (1) minimum service and (2) service that warrants renewal in the face of a comparative challenge. But it would appear unnecessary to do both: The comparative situation must be dealt with, and since it is the higher standard, and one that all licensees would strive to meet in order to ensure renewal of license against a challenger,[†] there is no need to waste time on minimum standards.[††]

Finally, so long as the standard is not a comparative one (i.e., "superior"), it is not critical what label is used. The Commission might select from terms such as "substantial," "good," "meritorious," "strong,"

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[*] See Sections 307(b), 303(s), 47 U.S.C. 307(b), 303(s); S. Rept. No. 1526, 87th Cong., 2d Sess.; H. Rept. No. 1159, 87th Cong., 2d Sess.

[**] See Notice in Docket No. 19154, *supra,* par. 3; *Storer Broadcasting Co.,* 11 FCC 2d 678, 680 (1968); *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, 1248 (1949). It has been argued that different goals would better serve the public interest. See R. Noll, M. Peck, and J. McGowan, *Economic Aspects of Television Regulation,* Brookings Institution, Washington, D.C., 1973. However, such arguments are beyond the scope of this report, which is based on the existing Congressional and Commission scheme.

[†] See testimony of Chairman Burch before the House Subcommittee on Communications and Power, *supra,* p. 1121; see also oral arguments before FCC in Docket No. 19154, where it was acknowledged, by both proponents and opponents, that all licensees would meet the criteria, if adopted.

[††] In 1973, the FCC issued a rule that its staff should bring to its attention applications for renewal in which there is proposed less than eight, six or ten percent nonentertainment (including sports) programming for AM, FM, or TV respectively. See 0.282, 73 C.F.R. 0.282; FCC 73-1123.

etc.* What counts are the guidelines selected to indicate this level of performance reasonably warranting renewal.

This last point merits emphasis. In its 1970 Policy Statement, the FCC chose the term "substantial" to denote the requisite level of service assuring renewal in a comparative context. The Commission concluded the Policy Statement with the following caution:**

> . . . 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.

The FCC clearly did not hold to the concept of "substantial service." *Moline* and *KHJ-TV* show an obvious "tilt" toward renewal of the incumbent licensee, whatever his past record may be. Nor can this "tilt" be ascribed solely to fear of issuance of another opinion like the first *WHDH* decision. It goes back to *WBAL*.

Protection of the vested industry interests can be explained upon the basis that this is a general agency malaise.† But there may be a further

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*See H. Rept. No. 93-961, *supra*, at p. 18:

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

**22 FCC 2d at p. 420.

†See *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264, 273 (7th Cir. 1970); R. Coase, "The Economics of Broadcasting," in P. W. McAvoy, *The Crisis of the Regulating Commissions*, W. W. Norton and Company, Inc., New York, 1970, p. 96; R. Noll, *Reforming Regulation*, Brookings Institution, 1971, pp. 43-44.

consideration at work here. The agency has never informed the regulated industry of its responsibilities -- has never set out any guidelines or criteria as to what is expected of the licensee concerning even the most basic allocations goals such as local or informational programming.* When the incumbent faces loss of license on the issue of solid service in a comparative hearing, there can be a tendency to protect him, inasmuch as he and many others are operating in the dark because of *Commission* failure.

Suppose for example that a licensee provided roughly 7 percent local programming (in prime time), 6 percent news, and 1 percent public affairs; these percentages would not jeopardize renewal of license in a noncomparative situation.** But suppose the station found itself in a comparative hearing with an applicant who proposed 15 percent local programming, 10 percent news, and 5 percent public affairs, and argued that these were not "paper proposals"; that they had been achieved by many other licensees,† including in the station's community, and that they represented "substantial" service as against the "minimal" service of the incumbent. The station, and scores operating in similar fashion,†† have never been given any guidance as to what the Commission expects of them so as to constitute service warranting renewal in the face of such a challenge. The Commission is thus a partner to the station's dilemma, and will tend to assist it, in the face of a record that may well not warrant the label, "substantial."

ALTERNATIVE COURSES OF ACTION

The foregoing analysis, if correct, clearly points in the direction of supplying definitive guidelines. The other alternatives open to the

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*See pp. 25-26, *supra;* see also Henry J. Friendly, *The Federal Administrative Agencies*, Harvard University Press, 1962, p. 73 (". . . the Commission need not have drifted quite so helplessly for twenty-eight years"); James M. Landis, Report on Regulatory Agencies to the President-Elect (1960), p. 53.

**These are the actual percentages in the *Evening Star Broadcasting Co. (WMAL-TV)* case, 27 FCC 2d 316 (1970), affirmed, *Chuck Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972).

†See Tables attached to Notice in Docket No. 19154, FCC 71-159.

††*Ibid.*

Commission appear to represent dubious policy.*

One alternative would be for the Commission to do nothing and hope that new legislation would somehow rescue it. But cases like *KHJ-TV* continue to come before the Commission for decision. More important, there is no indication that congressional action will solve the main issue -- the nature of the past service that warrants renewal in the face of a comparative challenge. Thus H.R. 12993, as passed by the House, makes clear that the incumbent is to be judged on his past record, and that if that record is "good," the incumbent is not to be denied renewal because his challenger has advantages on diversification or integration:**

> If a broadcast licensee comes up for renewal in a noncomparative situation, i.e., one involving no challenge or only a petition to deny, we agree that the test should be the one stated by the Chairman of the FCC [citation to p. 58 of Hearings], namely, whether the applicant has served the public interest in a manner that is sufficient -- but no more . . .
>
> However, for the Commission to be satisfied with minimal service from an incumbent licensee in a comparative situation when another applicant would clearly provide much better service would not only ill serve the public interest, but would make a mockery of the hearing process. We believe that stability in the broadcasting industry is highly desirable, but that it should not be achieved at the cost of imposing barely sufficient service on the public by freezing out competitors who would provide better broadcast service.
>
> To summarize, we would propose that an applicant for renewal of a broadcast license be assured of renewal where overall during the expiring term of its license, it had provided *good* service to its service area and its broadcast operations have not been marked by serious deficiencies, i.e., violations of law or of the Commission's rules or policies. We use the term *good* in its defined sense, to wit: having the right qualities; as it ought to be; right. As we use *good* in this context, it is synonymous with *substantial* as used in the *Commission's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* and with *meritorious* as used by the Commission in the *WBAL* case.

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*One alternative not open to the Commission would be to return to the approach of the first *WHDH* opinion, and to apply the 1965 Policy Statement to the comparative renewal situation to obtain "the best possible service" (concurring opinion of Judge MacKinnon in *Citizens, supra,* 447 F.2d at p. 1215). This would be contrary to the correct construction of Section 307, as amended; it would endanger the stability of the entire industry, particularly the roughly 80 percent in the large markets at a disadvantage on the diversification factor.

**H. Rept. 93-961, *supra,* at pp. 17-18.

Thus, an approach such as H.R. 12993 still leaves for FCC implementation the basic issue: How is the past record to be judged?

One answer, and thus another alternative, would be continuation by the Commission of its present *ad hoc* approach. But whatever standards are set out -- that the incumbent must deliver "substantial" or "meritorious" or "good" service or that he must ascertain fully the needs and problems and "substantially respond" to them -- experience shows that they inform the industry and public of no definitive or intelligent criteria of performance, and result in decisions like *Moline* and *KHJ-TV*.* While the testimony involved different phrases,** Chairman Burch's testimony before the House Subcommittee is also applicable to *any* standard without definitive guidelines:†

> . . . These are, in the vernacular, 'marshmallow' phrases -- they mean almost nothing in and of themselves or, conversely, almost anything that one wants them to mean. Their use as statutory standards would come down in the end to wholly subjective judgments by transient Commission majorities, and thus perpetuate rather than alleviate the problems we now face.

This point merits emphasis. When the Commission proceeds to examine ascertainment efforts and programming designed to meet established community needs, or past programming records in terms of substantial or good or any other label, it is deep in a quagmire (other than in the unusual case where the licensee acts in a flagrant manner virtually to ignore the needs and interests of a large minority group).†† As shown by the FCC's activities in evaluating proposals or past records during the comparative hearings in the 1950s, it has great leeway in evaluating this mass of ascertainment and

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*Note that in *Moline* the FCC adjudged the past record as "superior" or "substantial" and in *KHJ-TV* as average -- in the face of record evidence strongly to the contrary. See testimony of Chairman Burch at House Hearings, *supra*, pp. 110-111, that with a "substantial service" standard in a revised statute, the ". . . result in the *Moline* case would have been the same . . . ."

**The phrases were those used in H.R. 5546, 94th Cong. (i.e., "good faith effort," "callous disregard").

†See Hearings before the House Subcommittee on Communications and Power, *supra*, p. 1120.

††See *Lamar Life Broadcasting Co.*, 38 FCC 1143, 1144-1153 (1965).

programming data, and can affix almost any label to it.* With such leeway, the probability is very strong that it will renew the incumbent for the reasons stated. But in any event, this becomes an area of "unbridled administrative discretion" (Chairman Burch's phrase; see p. 26), and that is most undesirable. As stated by the Court in *Greater Boston:***

> . . . a question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards -- a contention that may have increased significance if First Amendment problems are presented on renewal application by a newspaper affiliate, including the possibility that TV proceedings may come to involve over-view of newspaper operations . . . .

Under a definitive guidelines approach,† the licensee will for the first time have a notion of what he is expected to do in the critical allocations area -- local and informational programming. The licensee in the previous example (p. 43) would thus not perform at, say, the 7-percent level for local programming, but would undoubtedly move to meet the FCC criterion (e.g., 15 percent). The area would no longer be one of "unbridled" or "subjective" discretion, contrary to sound First Amendment principles governing the regulation of a medium of speech. The FCC would find that it could act on a fair, rational basis against the few, if any, licensees who failed to meet the criteria and had no satisfactory explanation or showing for this failure in the comparative hearing. It would no longer be taking an action that would endanger a substantial portion of the industry for failure to meet unknown and unknowable standards.

It may be argued that the Commission will not deny renewal of the incumbent's license even in a situation where the guidelines have not been met and no satisfactory showing for the failure has been made. It may be

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*See discussion in articles cited in n. *, p. 12; indeed, the revisions in the 1965 Comparative Hearing Policy Statement were designed to end this practice. See, e.g., *Moline Television Corp., supra,* 31 FCC 2d at pp. 272-273.

**444 F.2d at p. 854. And see discussion involving the Washington Post-Newsweek Florida renewals, pp. 37-38.

†Again, the author should acknowledge possible bias, having worked on the Notice in Docket No. 19154 while at the FCC.

that even when the problem has been reduced to a very few, the FCC will not act consistently with clear criteria. However, the Commission may never be faced with the situation in view of the strong likelihood that *all* licensees will meet these guidelines[*] -- surely a desirable goal. If there is such a case and the Commission does act improperly, the existence of the guidelines will facilitate appropriate court review. Finally, the alternative is to continue the present approach that, experience shows, results in decisions like *Moline* and *KHJ-TV*.

FEASIBILITY OF THE DEFINITIVE GUIDELINES APPROACH

While the definitive guideline approach appears preferable, there is the question of its feasibility and lawfulness. We consider here briefly the main arguments raised in opposition in the comments in Docket No. 19154.

First, it is argued that the approach elevates quantity over quality. The answer is that the FCC, as a government agency, cannot deal with quality of the programming presented. That is an area that government must avoid. The guidelines thus focus on what is appropriate for government regulation.

Second, it is argued that the guidelines nevertheless violate the First Amendment and the no-censorship provision of Section 326 of the Communications Act[**] because they skew the licensee's choice of programming to governmental preference. This argument could have some force if the FCC were prescribing guidelines for one programming category after another. But it lacks merit in the context of guidelines confined to two broad allocations goals -- local and informational programming.[†] Here the contrary position can be argued -- that the guidelines are needed on First Amendment grounds. For the FCC, acting pursuant to Congressional goals, has stressed that licensees must serve as an effective local outlet and devote a reasonable amount of time to discussion of controversial issues designed to inform the electorate. If these are valid requirements -- and the Supreme Court has so found[††] -- then they

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[*] See n. †, p. 41, *supra*.

[**] 47 U.S.C. 326.

[†] Significantly, it is proposed to broaden this category to include all informational programming, not just news and public affairs. See draft report attached hereto, pars. 10-12.

[††] See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382-383, 391-392 (1969); see Section 303(b) of the Act, 47 U.S.C. 303(b) ("the Commission . . . ,

can and must be enforced at license and renewal time. Surely it makes sense to enforce them with clear standards that the licensees and the public know -- instead of muddled administrative discretion in an area dealing with a vital organ of the press.

Indeed, far from violating the First Amendment, the guidelines are needed as a matter of law and policy in order to promote the purposes of the Amendment. *For it is not a matter of the Commission avoiding appraisal of the incumbent's programming under one approach as compared with another. Under the statutory scheme, the critical issue is the incumbent's record, and programming is the essence of that record.* So the question is whether the First Amendment is served by examination of an incumbent's programming without any objective standards which the licensee has the opportunity to meet. The answer is obvious.

It is also argued that no matter how reasonable the initial percentage guidelines may be, there will be an inevitable tendency to increase them. But this would be a most unlikely occurrence if the guidelines are selected not on varying industry figures but rather the judgment of the FCC of what is called for to meet the allocations goal. In any event, Chairman Burch's testimony on this score is appropriate:*

> In very pragmatic terms, furthermore, there is an upper limit to local and informational programming that any Commission would disregard at its peril. That limit is fixed by viewer preference. Were the established percentages to begin creeping up, supplanting movies and sports and entertainment programming as a consequence, the Commission would soon hear about it -- and any Commission would be guided accordingly.

In the final analysis, this so-called "opening wedge" argument really is an attack against FCC regulation of broadcasting under the public

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as the public . . . interest requires shall . . . prescribe the nature of the service to be rendered by each class of licensed stations . . .). See testimony of Chairman Burch, Hearings cited on p. 3, at p. 1122: ". . . In light of the allocations scheme itself, and the affirmative obligations of Section 315, these categories of programming [local, news, and public affairs programming] are virtually mandated by the Act."

**Id.* at p. 1122.

interest standard.[*] There is a need to regulate, and it must be done with intelligible standards that do not interfere with First Amendment rights but do promote the allocations goals.

It is not necessary to discuss here the further objections to the definitive guidelines. For these are treated in the following draft report in Docket No. 19154.

The purpose of that draft report is to answer the question posed by Dean Landis: "Will it write?"[**] It is easy to spin out theory but sometimes difficult to reduce it to a concrete report that holds up under careful scrutiny. The attached draft report was prepared to show that the percentage guidelines approach "will write" -- that its essential principles are sound.

The draft report is thus not meant to be taken as the only appropriate way to proceed on the various facets of the proceeding, nor are the figures used or other details necessarily the most suitable ones.[†] Rather, the report is simply a device reflecting what could be a consensus approach to the problems, and designed to show that, as a general proposition, the Commission can soundly proceed along these lines.[††] Hopefully, the draft report may also assist the Commission in its consideration of this important matter, since it will constitute further "input" and may elicit additional response in this open inquiry.

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[*] As Chairman Burch stated (*Id.* at p. 1123):

> . . . what you end up with is not simply a case against percentage guidelines as to programming -- you end up with a case against broadcast regulation in its entirety. Perhaps that time will come. But, for now, there is a Communications Act. It is grounded in the public interest standard. And there is an FCC attempting to implement that standard -- hopefully, with more success in the immediate future than the recent past.

[**] See James Landis, *The Administrative Process*, 1938, pp. 105-106; K. C. Davis, *Administrative Law Treatise*, Volume 2, West Publishing Company, 1958, p. 90.

[†] See, e.g., n. 21, Draft Report.

[††] Thus, in some respects, the author might adopt a different stand from that consensus approach (e.g., par. 32, Draft Report, dealing with the relationship between revenues and programming expenditures; this facet may be the subject of a later report).

Appendix:

DRAFT REPORT AND ORDER IN DOCKET NO. 19154

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

REPORT AND ORDER*

Adopted: Released:

Introduction

1. In its *Notice of Inquiry*, 27 FCC 2d 580 (1971), the Commission set out to explore whether pertinent standards could be developed to give some definitive guidelines to the concept of "substantial service" as used in its 1970 Policy Statement on comparative hearings involving regular renewal applicants, 22 FCC 2d 424. Subsequent to the *Notice*, the United States Court of Appeals for the District of Columbia Circuit ruled that the 1970 Policy Statement was invalid, *Citizens Communications Center* v. *FCC* 447 F.2d 1201 (1970) (herein called *Citizens*). The Commission then released a *Further Notice of Inquiry*, 31 FCC 2d 443 (1971), that interpreted the effect of the *Citizens* case on the Inquiry and requested comments thereon. After receiving comments and reply comments, the Commission *en banc* held oral argument on May 4 and 5, 1972.

2. On October 9, 1973, the Commission issued a *Second Further Notice* (FCC 73-1040) stating "a growing consensus [for] the broad principle of establishing definitive guidelines . . ." and requesting further comments relating to the practical problems. In connection with this *Second Further Notice*, the Commission issued a questionnaire to all commercial television stations, requiring statistical data based on a composite week. On November 30, 1973, the Commission released its *Third Further Notice of Inquiry* (FCC 73-1262) setting out the results of that questionnaire. Comments and reply comments were filed in response to these *Notices*.

3. This inquiry deals with the comparative proceeding in which a renewal applicant is challenged by one or more new applicants for the same facility. The issue in the inquiry is to determine whether it would be appropriate to focus on two critically important areas, and to give some *prima facie* indication of what constitutes a "plus of major significance" (*Citizens, supra*, at p. 1213) in evaluating the renewal applicant's programming performance. Those two areas of importance are local programming and programming designed to contribute to an informed electorate. The following figures were proposed:

(i) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% 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 a 3% figure for the 6-11 p.m. time period.

4. We pointed out that if the guidelines were adopted, they would not constitute a requirement that would automatically be definitive, either for or against the renewal applicant. We proposed to exclude unprofitable stations, particularly the new or struggling independent UHF stations. We also proposed a range in each category to account for different revenue figures and different size markets. 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.

5. We have summarized the contentions of the commenting parties in the attached separate appendix A [not included]. We turn now to a discussion of the principal points.

General Discussion

6. The threshold question is whether issuance of a policy statement giving some guidance in this area will serve a useful purpose. After studying the comments, we have concluded that it will. We shall discuss briefly our reasons for this conclusion, and the advantages and limitations of the approach adopted.

7. The scheme of the Act in this area is clear -- to promote good service to the public through the spur of a challenge to a laggard performer; if the renewal applicant does provide strong, solid service, he should be able to look forward confidently to renewal. 1/ The Commission is thus balancing two considerations, both crucial to "the larger and more effective use of radio in the public interest" (Section 303(g)): the competitive spur and the necessary stability without which the broadcasting industry could not reasonably be expected to meet public interest obligations. Neither the broadcaster nor the public (the potential challengers) should be kept in the dark as to relevant Commission guideposts in this balance. Clearly, it facilitates both considerations -- the spur and the stability -- if the interested parties know as many of the ground rules as is feasible. Nothing is gained by having the Commission simply play dice with the renewal applicant and his challenger. 2/

8. But, it is argued, establishment of criteria here carries with it a straitjacket that inhibits all-important licensee discretion in programming matters. If the point were well taken, we would abandon this effort to set forth criteria or guideposts. We recognize that the genius of the American system of broadcasting is its pluralism -- its thousands of licensees making individual judgments on a daily basis. It would be anathema to seek to prescribe programming by Government fiat. See Section 326. But that is in no way the purpose or thrust of this proceeding. We are concerned here with two areas of programming: local and that designed to contribute to an informed electorate (herein called informational programming). Both these areas represent the most important Congressional and Commission allocation goals. Thus, the Congressional scheme of TV allocations is based on local out-

1/ See *Citizens, supra,* at p. 1213, n. 35; *Greater Boston Television Corp. v. FCC* 444 F.2d 841, 854 (D.C. Cir. 1971), cert. denied 402 U.S. 1007, 403 U.S. 923 ("legitimate renewal expectations [are] implicit in the structure of the [Communications] Act").

2/ See Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, Harvard University Press, 1962. The Court in the *Greater Boston* case, above, pointed out that there is a special question ". . . whether administrative discretion to deny renewal expectancies, which must exist under any standards, must not be reasonably confined by ground rules and standards . . ." (444 F.2d at p. 854).

lets. 3/ 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 non-local film programming, it is clearly not meeting its crucial role. 4/ It is thus not a question of FCC dictation of programming: Rather, it is FCC insistence that its allocations scheme -- for which so much precious spectrum has been given and so many policies such as in the cable television field have been based -- is not subverted. It follows that the Commission can insist that broadcast stations serve as effective outlets for local expression and that it can adopt policies in the comparative renewal field to promote that all-important goal. In doing so, we are not saying that a local program on some topic is "better" than a network show perhaps on the same subject or that local entertainment is "better" than, say, a BBC entertainment film or series. We are simply saying that television stations, assigned at considerable spectrum cost to the public in order to obtain local outlets, do serve reasonably as such outlets.

9. The same considerations are applicable to programming designed to inform the electorate. The radio spectrum is limited, and broadcasting must compete with many other uses. We have allocated a very large portion of the spectrum to broadcasting, as against these other competing demands. And we have stated that a main reason why we have allocated so much spectrum space to broadcasting is because of the contribution that it can make to an informed electorate. 5/ There is also an explicit Congressional policy here. See Section 315(a). If a broadcaster does not make the above contribution, he is again undermining a basic allocations policy. The Commission cannot properly allocate spectrum to obtain specific benefits, and then be indifferent whether those benefits in fact result. It is our duty to adopt policies that both assure and foster the achievement of basic allocations goals. That is our purpose here.

3/ See Section 307(b), 303(s); S. Rept. No. 1526, 87th Cong., 2d Sess.; H. Rept. No. 1559, 87th Cong., 2d Sess.

4/ See *Simmons* v. *FCC*, 169 F.2d 670 (D.C. Cir. 1948), cert. denied, 335 U.S. 856 (1948).

5/ See *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1248, (1949); *Storer Broadcasting Co.*, 11 FCC 2d 678 (1968).

10. There are two other important points on this issue of "strait-jacketing" licensee programming judgment. First, we have not prescribed what programs should be presented in these broad categories. The licensee, after appropriate surveys and community dialogue, 6/ has full and unfettered discretion to select the programming that he believes best serves the needs and interests of his area. Second, we have determined upon the *broadest* possible categories so as not to interfere with licensee judgment. Certainly "local" meets this requirement since it includes any possible programs of a local nature. 7/ As to informational programming, we have decided to include in this now broad category not only news and public affairs but also the programming designated as "other" -- namely, instructional, agricultural, religious, educational institution, etc. 8/ We focussed in our Notice on news and public affairs as these are obviously the categories that deal most directly with programming discussing "matters of great public concern." 9/ However, the comments cogently point out that the other categories can also make an important informational contribution. 10/ As the Court has stated

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6/ See Report and Order in Docket No. 19153, 38 Fed. Reg. 28762, 35389 (1973).

7/ Several parties have raised questions concerning the definition of "local" programming. We believe that these questions are largely handled by the discussion in our recent report in Docket No. 19153, *Renewal of Broadcast Licenses*, pars, 75-78, 38 Fed. Reg. 35389, 35405 (1973). If experience requires further revision, we shall take appropriate action. In any event, licensees may make special showings if they believe them to be in order. Thus, a licensee may get together with stations in other communities to share the expense of making a film (syndicated) documentary to cover a problem common to all the communities (and see also the example in par. 78, 38 Fed. Reg. at p. 35405). Clearly, this could be noted both in the application and at any hearing.

8/ Thus, the only excluded programming is entertainment and sports. It is contended that valuable informational material can be presented in entertainment programming and that our approach does not encompass such programming. We recognize this possibility. The renewal applicant will be permitted to develop this, both in his application and certainly in any comparative hearing that might be held. See 38 Fed. Reg. at p. 28797 (Question 7(B)). But, based on experience, we believe that by far the greatest coverage of controversial issues occurs in the broad informational areas we have delineated, and that therefore it makes sense to look to these areas when establishing general guidelines.

9/ *Red Lion Bctg. Co.* v. *FCC*, 395 U.S. 369, 394 (1969).

10/ Indeed, at times it is most difficult to determine whether a particular program should be classified as, for example, public affairs or "other" (instructional or religious).

in *Stone* v. *FCC*, 466 F.2d 316, 328, n. 44 (D.C. Cir. 1972):

> Community life . . . does not consist entirely of problems. Rather, it includes a spectrum of events and interests that range from newsworthy to purely aesthetic. It might be desirable for ascertainment proceedings to inquire into more than the problems or newsworthy events in a community. Such proceedings might be directed toward obtaining an awareness of the broad range of human activity that includes family life, art, and social interaction. These non-problem areas of interest are often much more important in both everyday life and in media programming than the problems of a community. It is not unreasonable for a cultural group to wish these elements of their existence to be treated with seriousness and sensitivity.

11. We see no disadvantages in using this broad definition of the informational category. We note here that in the important prime time period, informational programming now consists very largely of news and public affairs, 11/ because, as the comments stress, broadcasters do not schedule instructional, religious or agricultural material during this period. Since this is a long-established pattern by broadcasters themselves, there is no reason to expect that it will not continue in the future. 12/ On the other hand, there is a marked advantage to the use of the broadened category: It permits the greatest possible flexibility to the licensee, both as to choice of category and source regarding informational programming. We thus reject the contentions of several parties that we should specify a certain amount of local news or local public affairs. The broad local category is designed to insure that the licensee functions as an independent *local* program source. In the informational area, however, we regard it as crucial not to have governmental intervention as to what should be emphasized or from what source. See *Renewal of Broadcast Licenses*, 29 Pike and Fischer, R.R. 2d 1, 19 (1973). 13/ We recognize the good intentions of those urging this detailed infra-structure, but reject it as poor policy.

11/ See appendices to *Third Notice*.

12/ The annual reports will of course indicate any new trends here. See *Renewal of Broadcast Licenses, supra*, 38 Fed. Reg. at 28773-28778.

13/ We there stated: "While some problems and needs may best be met by local programming, other problems may appropriately be covered with non-local sources. It is not our intention to favor a particular program source or format, so long as the licensee's programming does, in fact, help to meet community problems and needs."

12. For the same reason, we do not adopt the suggestions for specified percentages as to several sub-categories, such as programming for children, for minorities, for women, etc. Such an approach cuts sharply against what we believe to be sound policy: the specification of guidelines in broad allocations areas, with wide licensee discretion in meeting those guidelines. 14/ A case can be made for each sub-category -- that where x or more percent of the population is engaged in agriculture, there be some specified percentage guideline for this category -- or where there is x or more percent minority population, a specified guideline for programming directed to this minority -- or, since all areas contain children, women or religious groups, guidelines for these facets. The sum total of such guidelines is *not* assurance of effectuation of basic allocations goals but rather programming by government fiat. To paraphrase a recent statement of Lord Devlin, 15/ "if [licensee freedom] perishes, it will not be by sudden death . . . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it." We stressed in the *Notice* that we would eschew such an approach. We adhere to that judgment here.

13. This does not mean that the Commission is indifferent whether the needs and interests of agricultural elements, minorities, children, etc., are served by the licensee. Some commentators have concluded that if the licensee meets the guidelines in these two broad areas, that assures him of renewal, both in the comparative hearing and in a petition to deny (non-comparative) situation. And some broadcast commentators have given support to this

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14/ For this same basic policy reason, we reject the contention that there should be a separate news and public affairs category. Many licensees insert mini-documentaries, some running as much as 15 minutes, in newscasts; they believe that such documentaries, often as a continuing series on several nights, can appropriately develop an issue and garner a larger audience. Other stations 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. These are matters for the judgment of the licensee -- without artificial restrictions from the Government. Similarly, the contention that we should require the licensee to delete portions of newscasts dealing with weather or sports is the type of "super-editor" approach that we shall eschew.

15/ *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 606 (D. C. Cir. 1973), cert. denied, 414 U.S. 914 (1973).

notion, by urging that if the guidelines are met, renewal should be automatic. But as we said in the *Notice,* ". . . the guidelines would not be a requirement that would automatically be definitive, either for or against the renewal applicant . . . ." *There remains the all-important ascertainment process and the consequences of the licensee's failure to discharge, reasonably and in good faith, his obligations in this respect.* 16/ For example, in local programming the licensee could meet the substantial percentage figure and yet not serve "equitably and in good faith" the needs of significant minority groups within his service area. 17/ The same thing could be true as to the percentage figure regarding informational programming. This would be a matter for particularized assessment, with the testimony of community leaders of particular significance. Both the renewal applicant and any competing party could call upon community leaders on this score.

14. This ascertainment discussion is also pertinent to two related contentions: (1) that we should deal with the quality of programs presented; and (2) that our action will result in the quality of programming being subordinated to quantity. As to (1), we are not the national arbiters of "quality" television programming. It would be wholly inappropriate for this Governmental agency to review programming efforts qualitatively. Such a process would be subjective; would leave all the parties completely uncertain of the outcome, dependent on the subjective judgment of a majority of Commissioners; and would contravene basic First Amendment principles. The very purpose of this quantitative effort is to avoid focus on quality 18/ -- to concentrate on what *is*

16/ The Commission has also sought to promote service to children, minorities, etc., through other policies. See, e.g., *Prime Time Access Report,* FCC 74-80, par. 83 (1974), reversed on other grounds, *NAITPD* v. *FCC,* F.2d (2d Cir. 1974); *Renewal of Broadcast Licenses,* 38 Fed. Reg. 28762, 28783 (1973). Significantly, these policies do not seek to impose specified amounts.

17/ See *Report and Statement of Policy Re: Commission's En Banc Programming Inquiry,* 20 Pike and Fischer, R.R. 1901 (1960); *Capitol Bctg. Co.,* 38 FCC 1135, 1139-1140 (1965).

18/ Of course, one can always visualize the "horror" case where the agency could take into account the nature of the program. We gave such examples in our *Notice* -- a news show consisting entirely of "ripping and reading" the wire dispatches, or a licensee who ignored the burning issues of his area to discuss issues like canoe safety. We have two observations here. First, such "horror" cases are extremely unlikely to occur in practice. Second, this Commission appropriate. Further, as shown by the above discussion, our policies do not leave these quantitative guidelines standing alone -- an empty numerical figure. The ascertainment requirements and the procedures and policies formulated in Docket No. 19153 insure a continuing dialogue between licensees and the public whom they have volunteered to serve. 19/ We believe that if the licensee is spurred to make an effort in these fields, he will strive, conscientiously and in good faith, to present what he believes to be the best possible programming. To put on mediocre or inferior programming would simply place him at a disadvantage with competing stations and with his all-important local audience. We do not see what incentive there would be for him to act in such a short-sighted fashion. For example, if the licensee, under these policies, presents additional news programming, common sense and market pressures would militate for his best effort -- not a slough; and if he has ascertained problems through continuing contacts, why would he be indifferent to coverage of such problems through mini-documentaries, news inserts, etc.? We therefore reject the assumption implicit in the argument that our action will result in greater quantity and lesser quality.

15. There is a further final consideration: The production of quality programming can best flourish in an atmosphere where there is stability -- where a licensee knows roughly what is expected of him and that if he makes a conscientious effort to meet his obligations to his area, he can reasonably look forward to continued operation. In such an atmosphere the licensee is willing to make the substantial and often long-term commitment to quality efforts. The contrary atmosphere -- no indication of even general guidelines, no way thus to predict even roughly the outcome of challenges, and hence no stability -- leads, we believe, to the operation much interested in the "quick-buck" -- in getting in and out of broadcast operations with maximum profits. While we thus do not and cannot consider qualitative programming measures, we

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has no list of proper issues for discussion, and would never undertake such a list. The matter of concentration on non-controversial issues to the exclusion of "matters of great public concern" would be brought before the Commission by community leaders or groups. The licensee has the greatest discretion in this area of selection of issues; again only the unusual (and probably hypothetical) situation could be appropriately considered by the Commission.

19/ See *Renewal of Broadcast Licenses*, 38 Fed. Reg. 28763, 28778-28779 (1973).

nevertheless strongly believe that our quantitative action contributes significantly to quality.

16. In sum, we believe that our action here promotes the First Amendment. There are at present no objective criteria controlling decisions in comparative renewal proceedings: The absence of any such standards is an invitation to the exercise of unbridled administrative discretion. This is poor policy in any case; it is doubly poor when it is considered that broadcasting is an important instrument of speech, a vital organ of the press. The Supreme Court has repeatedly stressed that clear standards are essential in any regulation bearing directly on First Amendment freedoms. 20/ We believe that these quantitative standards are important in supplying to a significant extent such standards and thus the stability needed for broadcasting as a free press.

17. The argument is also made that the figures we have selected will not remain constant -- that there will be continuing pressure upon future Commissions to raise them, with spiraling results. We do not say here that these figures are now fixed or immutable. We may revise them upon reconsideration, in light or errors pointed up by petitioners. 21/ And we can not bind future Commissions. Indeed, in a field as "dynamic" as this (see *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138), it is always necessary to review policies in the light of experience and changing conditions and to determine at appropriate intervals whether they should be revised. We can only state the policies that we believe strongly serve the public interest and hope that they stand the test of time. We do so in the following discussion.

18. We emphatically reject the notion that if a certain percentage of local and informational programming would appear better to serve the public interest, constantly raising that percentage also contributes to the public

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20/ E.g., *Cox* v. *Louisianna*, 379 U.S. 536 (1965); *Smith* v. *California*, 361 U.S. 147 (1959).

21/ Further statistical data was submitted to the Commission on March 1, 1974, and, when evaluated, might also indicate the desirability of revision to correct some flaw in the implementation of the policies here adopted. The basic policies, are, we believe, sound and enduring.

interest. 22/ It is as wrong as the notion that if the great majority of the audience wants to be entertained (as they do), it follows that the broadcaster should cater just to that group and present only entertainment programming. There is a substantial audience that watches local and informational programming: That audience is entitled to receive such programming. As stated, that is the reason why the spectrum was allocated in the previously described fashion to broadcasting. But this does not mean that local or informational programming should predominate or take up an inordinate amount of the broadcast day -- to the detriment of the entertainment, sports, and other programming that is so popular. Such an attempt to skew viewer preference by Governmental ukase would be wrong and wholly ineffectual: The real beneficiary would be the motion picture exhibitor or the bowling alley.

19. Indeed, the past is instructive here. In the comparative hearings for new channels after the 1948-1952 "freeze" was lifted, a bidding contest resulted where applicants promised ever higher amounts of local programming -- as much as 53 percent. 23/ The record shows that the winning applicant did not deliver these inordinate amounts -- that while the average proposed local programming in 35 hearings during the period 1952-1965 was 31.5 percent, the actual percentage devoted to such programming averaged 11.8 percent. 24/ In its 1965 Comparative Hearing Statement, the Commission ended this farcical way of proceeding -- which reflected adversely on the agency as much as the applicants. We no longer award preferences on the basis of inflated local programming proposals; if each applicant will serve the area's needs in a strong, solid fashion, proposed programming is not an issue. *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 397-398 (1965). And, correspondingly, we expect the applicant's proposal to be carried out conscientiously and fully. See *KORD, Inc.*, 31 FCC 2d 85 (1961). Having put our house in order in the

22/ For example, if the policies adopted here are successful, most licensees will increase their local and informational programming, and the median in the next annual report will accordingly rise; if the Commission now adopts the new higher median as the appropriate guideline, there would be a new "upgrading," a new median in the next report, and a new guideline -- and so on.

23/ *St. Louis Telecast, Inc.*, 22 FCC 625, 681 (1957).

24/ See *Moline Television Corp.*, 31 FCC 2d 263, 272 (1971).

comparative hearing for new facilities, we believe that it would make no sense to now return to a discredited process in the comparative hearing involving renewal applicants. We therefore adopt percentages that, based on our experience and judgment, reflect a proper weighting of the public interest considerations. It is for precisely this kind of balancing judgment that the agency was created. See *NBC* v. *U.S.*, 319 U.S. 190.

20. Finally, we are not indifferent to the desirability of supplying more local and informational programming to the public. Not only do our policies here result in greater service to the public in these important areas, but also we have devised other policies that should bear much fruit in future years. See, e.g., the access discussion in *Cable Television Report*, 37 Fed. Reg. 3252, 3269-3272 (1972); *First Report and Order* in Docket No. 18397, 20 FCC 2d 201 (1969). Thus, the judgment that we make here is one that takes into into account a number of considerations both short and long range.

21. It is important to point up several limitations on the scope of the policy adopted:

(i) It does not in any way eliminate the need for a full comparative hearing between the renewal applicant and the challenger. On the contrary, such a hearing will be afforded, with both parties assured of the right to adduce all material evidence in support of their relevant points or reliance. See *Citizens Communications Center* v. *FCC*, *supra*, (1971); *Ashbacker* v. *U.S.*, 326 U.S. 327 (1945). This does not denigrate the importance of the issue here under consideration. By far the most important factor in a renewal comparative hearing is the past record of the renewal applicant. If it warrants the "plus of major significance," it puts him a very long way toward winning, because, as the Court stated in *Citizens*, such an applicant should reasonably expect renewal or the public interest will suffer. See, also, *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at p. 854. On the other hand, if the past record is minimal or mediocre, the renewal applicant is correspondingly at a marked disadvantage, and could win only if his rival had major offsetting shortcomings.

This means that the 1965 Comparative Hearing Statement has no applicability to the renewal applicant. He is not to be judged on such presumptive factors as integration of ownership and management, local residence, broadcast experience, or the past record of some other stations with which the renewal applicant or his principals have been associated. Rather, such applicants are to be "judged primarily on their records of past performance." 25/ Suppose, for example, the renewal applicant has 100 percent integration and local residence but has not rendered service warranting a "plus"; it clearly makes no sense to award him preferences on integration or local residence, for these presumptive factors have not led to meritorious service. But conversely a renewal applicant with zero integration and local residence but with a meritorious service record should be given the "plus"; there is no need again to look to presumptions. 26/

(ii) The policy is applicable only to commercial TV broadcast situations. There is a profusion of licensees and specialized formats in aural broadcasting, and we deem it appropriate to leave those services (AM and FM) to the *ad hoc* process of full hearing, with no attempt to set out general guidelines of the nature here under consideration.

(iii) The percentages adopted here are not applicable to the non-comparative renewal situation. They do not go to whether an applicant can be said to have met the public interest standard in a minimal or slightly above minimal fashion. Rather, they are concerned with a higher standard of performance -- one that warrants a "plus of major significance" in the face of a competing challenger at renewal. It follows that they should not be relied upon by the petitioner to deny. This does not mean that these policies will not affect the non-comparative renewal process. For, if they are effective, as we expect them to be, they may profoundly affect the performance of the renewal applicant. He cannot know whether there will be a competing challenge, and therefore -- to place himself in the best possible position in the event of that contingency -- the licensee will be spurred *over his entire li-*

25/ *Citizens Communications Center* v. *FCC*, *supra*, at p. 1213.

26/ The 1965 Statement is pertinent and useful for evaluating the *new* applicant on such matters as integration of ownership and management, local residence, broadcast experience and past record of other stations. But normally, it will not be of great importance. This is because of the marked advantage or disadvantage the renewal applicant has: If his past record warrants the "plus", he will normally win; if it does not, he is unlikely to win. For, unless the new applicant has serious deficiencies in character, finances, etc., he should be preferred even if he has little integration, local residence or experience. The renewal applicant has been given the opportunity to render strong, solid service to his community; if he has chosen not to do so, the new applicant should be given his opportunity to render such service, barring major shortcomings. The same practical analysis applies normally to the diversification factor.

cense period to provide that type of service that does warrant a "plus of major significance." 27/ This should in turn lessen the likelihood that someone will challenge his service as less than minimally meeting the public interest; or, if such a challenge is filed and the licensee has made the above-noted effort to gain the "plus of major significance," it should often result in a quicker and easier disposition of the matter, absent a showing such as described in par. 13 (and see also par. 14). 28/ Similarly, the policies adopted here should greatly promote the goals set out in our Fairness Doctrine Report in Docket No. 19260. See 39 Fed. Reg. 26372 (1974).

(iv) Finally, the policies are inapplicable to the TV station in financial difficulties, including the largest category of such stations, the great majority of the new UHF independents. It is perhaps unnecessary to make this point, because such stations have never been challenged and are unlikely to be challenged in the future; understandably only the profitable station attracts the competitor. But if there were to be such a challenge, it is clear that the judgment to be made would have to take into account -- on the particular facts of the case --

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27/ We stress again two points: (1) that following the filing of the challenge, no upgrading will be allowed (but see par. 35 for the period of one year from the adoption of this Report); and (2) that the licensee's effort must be one over the entire three-year period and not a triennial (last year) burst of heightened service to his public. See in this connection the annual report requirement of Docket 19153, 38 Fed. Reg. at pp. 28773-28778.

28/ As an example, we cite the recent controversy concerning the renewal of WMAL-TV. The Commission rejected the argument that the licensee's operation did not meet the public interest standards. See *The Evening Star Broadcasting Co.*, 27 FCC 2d 316 (1971), affirmed *Chuck Stone* v. *FCC* 466 F. 2d 316 (D.C.Cir. 1972). If the proposed policies were in effect and WMAL met them to put itself in a better position vis-à-vis any comparative challenge, WMAL-TV would have provided 15% local prime time programming, 10% news, and 5% public affairs -- as against 7.2%, 5.7% and 1.3%. *The Evening Star Broadcasting Co.*, 27 FCC 2d at p. 328. Further, in providing this significantly greater amount of public service programming, WMAL would undoubtedly, in line with its ascertainment process, be correspondingly meeting to a greater extent the needs and interests of community groups within its service area. This new approach might thus have two consequences: (1) it might have obviated any challenge to WMAL-TV's renewal and (2) it would have rendered the decision in favor of renewal much easier and quicker for the Commission to make. In short, while the new policy will not eliminate non-comparative challenges at renewal time -- see par. 13 -- it should nevertheless be of major assistance in reducing the number or enhancing our ability to dispose of many such challenges.

> the straitened circumstances of the new UHF independent or the operator struggling to serve sparsely populated areas.

22. We also stress the need to comply with basic Commission policies. Such compliance does not warrant the award of a "plus of major significance." Failure to comply, however, will block such an award, and indeed may result in denial of renewal -- whether or not there is a competing applicant. The Commission expects all renewal applicants to comply with policies that are a *sine qua non* for renewal -- such as fairness (*Office of Communications of the Church of Christ* v. *FCC* 359 F.2d 994, 1009 (D.C. Cir. 1966)); promise versus performance (*KORD, Inc.*, 31 FCC 85 (1961)); avoidance of illegal lotteries or fraudulent contests (Sections 312 (a)(6), 509, 47 U.S.C. 312(a)(6), 509); *KWK*, 34 FCC 1039, 35 FCC 561 (1963)); over-commercialization. We thus disagree with the Court's suggestion (*Citizens Communications Center* v. *FCC*, 463 F.2d 822, 823 (1972)) that an applicant's record as to "elimination of excessive and loud advertising" contributes to an award of the "plus." Compliance with our policies concerning loud 29/ and excessive advertising 30/ constitutes a basic qualification for remaining a licensee. It follows, therefore, that compliance could not constitute evidence of past performance of such a nature to warrant a "plus of major signifi-

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29/ In a Public Notice setting forth the Commission's *Statement of Policy Concerning Loud Commercials*, 5 R.R. 2d 1631 (1965), we concluded that the presentation of objectionably loud commercials is contrary to the public interest. We noted that while there is no precise test for determining whether or not a given sound is objectionably loud, there are various methods by which loudness can be controlled by the licensee. Thus, where a licensee has received numerous violation notices for over modulation or where there is a history of complaints concerning loud commercials, a question could be raised concerning the licensee's basic qualifications.

30/ The Commission has never adopted any specific rules concerning the amount of time which a licensee may devote to commercial advertisements. Rather, we defer to the judgments of the broadcaster as long as those judgments are reasonable. Although great weight is given to industry standards as set forth in the NAB Codes, the reasonableness of the licensee's judgment will be evaluated on a case-by-case basis. *Public Notice on Proposed Commercial Practices*, 31 F.R. 13875, FCC 66-923 (1966). Where there is a question as to the reasonableness of the licensee's judgment in this area, it may be the subject of a basic qualifications issue. *WHUT Broadcasting Company, Inc.* 16 FCC 2d 777 (1969).

cance" in a comparative proceeding. However, noncompliance could be used to rebut a licensee's showing which would otherwise constitute a "plus of major significance," and in any event could result in a denial of renewal. Similarly, "independence from Governmental influence on promoting First Amendment objectives" (*Citizens, supra,* 463 F.2d at p. 823) is not a "plus." Every licensee must act in good faith to present informational programming; rigging or slanting such informational programming for any purpose -- to favor the Government or the licensee's own views -- is patently inconsistent with the public interest and would raise the most serious questions concerning the licensee's qualifications. See *CBS* ("Hunger in America"), 20 FCC 2d 143 (1969); *KMPC (Richards)*, 14 Fed. Reg. 4831 (1949). 31/

The Percentages in the Two Broad Categories

23. A crucial consideration is what percentages should be assigned as warranting a "plus of major significance" in the two broad categories -- local and informational programming. And here we repeat what we said in our *Further Notice*. There is no profit in focusing on past quarrels (see n. 1 of the *Further Notice,* FCC) or on labels. We certainly agree that the "plus" is not to be awarded for "mediocrity" (*Citizens, supra,* at p. 1213, n. 35). But we disagree that the appropriate label here is "superior" -- the term used by the Court in *dicta*. For, as the Court has noted (*Citizens Communications Center* v. *FCC, supra,* 463 F.2d at 823), the dictionary definition of "superior" is "far above average." But the matter is not one of a comparative nature. This is seen by assuming that every licensee improved his performance 100%, or 200%, or 300% in these categories. Under a "far above the average" or comparative approach, only the top would continue to warrant the "plus." But as we have stressed, while it is critical to the public interest to have "strong" or "solid" or "substantial"

31/ We do not require the renewal applicant to prove the negative -- that he has complied with all applicable policies. Rather, unless a specific issue is included by the Commission, the burden would be upon the challenger to show some deficiency. The latter should proceed by petitioning the ALJ that a particular area of past operation should be explored in depth in the hearing; if he makes a reasonable preliminary showing that there could be a significant issue, the Administrative Law Judge should then allow full exploration in the hearing process.

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. It is thus emphatically not a matter of spurring ever greater amounts of time in these categories; in our judgment, that policy would be folly and would wholly undermine the public interest goal sought to be achieved. We have therefore chosen the percentages based on what we believe -- in light of our experience and expertise 32/ -- does promote "the larger and more effective use of radio in the public interest" (Section 303(g)). The percentages, taken as a whole -- and to merit the "plus," the licensee must meet them on an overall basis -- are "far over the average" inasmuch as only a minority of licensees (roughly about 14 percent) do meet all the standards. But that was not our purpose; and, if as we expect, there is general compliance with these standards over the next few years, we shall not advance them in order again to arrive at some "far above the average" result -- where only "extraordinary performance" could reasonably expect renewal. See *Greater Boston, supra* at p. 854.

24. We shall amplify the basis of selecting the percentages in view of the importance of this issue. We did not proceed simply by examining the results of present licensee efforts, and adopting some figure, above or below or at the median. For the matter essentially involves judgment, by this agency, as to what constitutes solid or strong service in light of the allocations goals sought and the sound practical limitations that should be observed (pars. 18-19, supra). 33/ To give a hypothetical -- albeit far-out -- example, if the median in local programming were 5 percent, this agency clearly could not adopt a figure in that range as meeting the requirement of strong, solid service. Of course, the judgment must be a reasoned one and must take

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32/ *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96 (1953); *Storer Broadcasting Co.* v. *U.S.*, 240 F.2d 55, 56 (D.C. Cir. 1956).

33/ See Section 303(b); *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at p. 393-395.

into account the practicalities of station operation. We have set out the basis of our judgment within. We believe that the percentages adopted are reasonably called for in light of the allocations goals and are practical ones. In the latter connection, we have taken into account the survey data received as a result of the *Third Notice* 34/ and the information in our renewal files (including that issued in the original *Notice*). On that basis it appears to us that the guidelines adopted in these two categories can reasonably be met by the TV licensee. As to the point made in the prior paragraph that only a minority of about 14 percent of licensees now meet *all* the guidelines (in the two categories and in the two time periods, 6 A.M. to midnight and 6 to 11 P.M. 35/), this does not mean that all licensees either cannot or should not do so. They clearly can meet the guidelines adopted, and they clearly should: For this is not a matter of licensee decision to emphasize one programming category (e.g., instructional or agricultural or public affairs) over another, based on his judgment of various factors (e.g., his area, what other stations or media are emphasizing, etc.). These are two *bedrock* allocations areas -- local and informational -- and the licensee should therefore meet the guidelines in both; the wide discretion comes in how he meets them.

25. There are some other preliminary matters to be disposed of. First, except for the independent, we have continued to use a range, because, based on our experience and industry data, we do not believe it reasonable to call upon the station with lesser resources to do as much as those with the large base of revenues. However, rather than using revenue figures, we have accepted the suggestion that we employ average prime time households to delineate the range: 120,000 average prime time households would constitute the high end, while the cut-off

34/ We recognize that this data may be flawed in several significant respects (e.g., the failure of 193 out of 708 TV licensees to file the useful information; the atypical nature of the composite week as to public affairs). We have taken this into consideration in our evaluation and use of the data.

35/ See par. 25 for a discussion of the appropriate time periods.

for stations at the low end is 25,000 average prime time households (using the most current ARB Television Market Analysis). 36/ A station between these figures would fall appropriately within the range (with no specification of a precise, decimal-point figure but rather a general "ball-park" figure). 37/ By using this range based on average prime time households, we again simplify the application of the policy. There is no need to delineate market groupings (e.g., 1-50, 51-100, etc.) or UHF as against VHF affiliates. There are but two sets of figures: the range for the affiliate, and percentage guidelines for the independent. 38/ Second, we shall also adopt the suggestion that for the purposes of this proceeding, the broadcast day not include the midnight to 6:00 A.M. period. It is obviously unfair to penalize the station that broadcasts movies or other entertainment fare in these early morning hours; this would simply discourage a service to the portion of the public that for whatever reason does view television in this unusual period. 39/ Third, we shall, however, continue to use the prime time period (6 to 11 P.M.). Experience and statistics (see Appendix D for some sample audience figures) demonstrate that the audience for local and informational shows is both potentially and in fact greater when presented in prime time than, say, Sunday afternoon. It would thus disserve the public interest

36/ These figures correspond roughly to the $5,000,000-1,000,000 revenue cut-off points proposed in the *Notice*. In appendix B [not included] we set forth the most recent pertinent audience figures (and we will issue such lists periodically). The licensee would of course look to the last list, and have a reasonable period to adjust to that list.

37/ See Appendix C for helpful groupings of audience-percentage figures.

38/ This guideline would be largely applicable to the VHF independent, because only 20.8 percent of the UHF independents (11 stations out of 53) reported a profit in the last available statistics, and of those, five reported a profit of less than $200,000 (before Federal taxes); two reported profits less than $25,000. See TV Broadcast Financial Data, 1972, Table 7 (FCC Memo 05693). We do not now have enough data on the emerging hopefully profitable UHF independent operation to adopt a range for the independents. As we gain experience (particularly from the annual reports), we may act further in this area. For the present, the single figure largely applicable to the VHF independent would appear sufficient.

39/ By using the midnight cut-off, we also take care of the issue of "graveyard" public service programming.

to adopt policies that do not take into account this important factor, and to a significant and reasonable degree promote the availability of these types of programming in the prime time hours. We recognize that prime time varies with time zones, and in any event leave it to the applicant, wherever located, to designate the particular five-hour period which he has employed (e.g., 6 to 11 P.M.; 5:30 to 10:30 P.M.). 40/

26. As reasonable and meeting the basic allocations goal, we have adopted the following figures for strong, solid service in the two broad areas:

> (i) With respect to local programming (excluding commercials) a range for the network affiliate of 9 to 13 percent, including 9 to 13 percent in the prime time period; for the independent, the figure is 13 percent, including in prime time.
>
> (ii) As to the network affiliate, the range for informational programming (excluding commercials) is 16 to 20 percent in the time period 6 A.M. to midnight, and 13 to 18 percent in the prime time period; for the independent station, the figure is 16 percent in the 6 A.M. to midnight period, and 13 percent in the prime time period.

In our judgment these figures represent solid meritorious service. This can be seen, we believe, by considering the hours of programming represented each week by the figures (and indeed for those not presenting sustaining programming, this is a rough alternative way of expressing the guidelines). The range of programming *hours* (and thus including commercials) for the informational category is roughly:

40/ There is a further reason to allow such flexibility, and that is the matter of presenting programs such as newscasts slightly outside the normal prime time hours as a counter-programming device (e.g., WMAL-TV presented its local evening news at 5:30 P.M. in order to meet an unfilled need for a local news program at an earlier time than the other stations' local news programs -- see *The Evening Star Broadcasting Company*, 27 FCC 2d 316, 328). We recognize the worth of allowing and fostering such programming judgments through flexible approaches such as the above. In any event, rather than any general revision of the form to meet these *ad hoc* situations, we shall simply allow showings to be made. (Information in this respect would be available on the Form 303.)

network affiliate: 21 to 28 hours a week in the 6 A.M. to midnight period;
5 to 7 hours a week in the 6 to 11 P.M. time period. 41/

independent: 21 hours a week in the 6 A.M. to midnight period;
5 hours a week in the 6 to 11 P.M. time period.

For local programming, the range is roughly:

network affiliate: 12.5 to 18 hours a week in the 6 A.M. to midnight time period;
3.5 to 5 hours a week in the 6 to 11 P.M. time period.

independent: 18 hours a week in the 6 A.M. to midnight time period;
5 hours a week in the 6 to 11 P.M. time period.

27. In each case, we believe that analysis bears out our judgment of strong, solid service. Thus, in the case of informational programming, the station with a large revenue base will be called upon roughly to broadcast four hours a day of such programming (out of 18 hours a day), and one hour an evening (out of five hours), if one assumes an approximately even division over the seven days of the week. The same analysis can readily be made for the other categories; in each case, it shows solid service in light of the revenue base.

28. There are two other pertinent comments. First, the percentage figures adopted here equal or better those proposed in the *Notice*, and

41/ These figures correspond to the above percentage figures. Thus the 7 hour prime informational figure is 7 out of 35 or 20 percent; the figure is reduced to 18 percent by the rough estimate of seven minutes of commercials per hour (7/60 or .883). How the seven hours are apportioned to informational programming would be a matter for licensee judgment. For example, it might consist of an hour of news a weeknight (30 minutes network; 30 minutes local), a 30-minute newscast on the week-end, one hour public affairs, and one 30-minute "other" program; or the licensee might increase the number of newscasts on week-ends, and not devote time to "other" or public affairs. All such programming variations would be left, of course, to unfettered licensee discretion.

we regarded the *Notice* figures as reasonably indicative of substantial service. The refinements in this report simply tend to give added assurance of such service, along with greater flexibility of programming choice. Second, the substantial nature of the figures is shown by contrasting them with other figures that have resulted in renewal in non-comparative situations. For example, WMAL-TV was renewed, and correctly so, 42/ with local and informational efforts that were roughly half of those adopted here as guidelines for the comparative situation (see note 28, p. 12).

29. The figures selected must not only be of a strong, solid nature but also must be within the practical reach of the licensee in the light of the data and experience. Here again analysis of the 1971 data and the 1973 questionnaire shows that the guideline figures meet the test of practicality. In each instance, substantial percentages of licensees are now supplying programming in the amounts meeting or exceeding the guideline figures. In some cases, the number is above the median, in others, below. But for reasons already developed, that is not the determining factor 43/; nor is it significant that the number drops off when all four categories are considered (see discussion, pp. 15-16).

30. It is argued that the percentage figures do not fairly represent the broadcaster's public service efforts because they exclude commercials, and yet are taken as a part of total broadcast period from

---

42/ See *Stone* v. *FCC*, *supra*.

43/ There are a number of difficulties, were we to use median or 30 or 40th percentile figures: Thus, we cannot be wholly sure of the data in light of the large number of stations not counted; indeed, there may also have been "upgrading" since the issuance in 1971 of our *Notice*, and that upgrading should not now be met with increased guideline figures -- a process that we stated we would avoid. We need not discuss these and other problems. For, we have *not* proceeded by using the median or some other percentile but rather by our judgment as to what constitutes strong, solid service in light of the allocations goals and the practicalities (e.g., 28 hours a week of informational programming, seven hours a week in prime time).

which commercials are not deducted; thus, some comments urge that commercials should be subtracted from the time period (6 to 11 P.M. or 6 A.M. to midnight), so as to obtain a true percentage figure. It is true that the percentage figure would and should be higher in the sense urged. However, in our judgment it is not worth the time-consuming and tedious effort to accomplish this. We have decided upon a course of excluding commercials for the reasons given in our December 27, 1973 *Report* in Docket No. 19153 (see 38 Fed. Reg. at p. 35406). The percentage figures used here, with commercials excluded, are perfectly adequate to depict strong, solid service; the public and all interested parties can readily comprehend that the figures do not necessarily reflect programs (with commercials) but actual time devoted to these categories -- and that if compared to a total time period also excluding commercials, the figures would be significantly higher. If experience shows that exclusion of commercials presents substantial problems, we can readily revise the forms and this policy statement. Further, we have set out weekly figures in terms of hours of programming time (including commercials), and this should be helpful for evaluation of stations not employing sustaining time to any significant extent.

31. Finally, several parties have pointed out that composite week statistics may be atypical, and in particular may not reflect public service rendered by a pattern of specials. The short answer is that we recognize this, and have made provision for such supplemental showings. 44/

Other Factors

32. While we cannot consider quality of programming, it is urged that there is generally a relationship between quality and the amount spent for programming, and that we should therefore take into account this factor -- especially, the extent to which the incumbent has reinvested the profit from his operation (*Citizens, supra,* 463 F.2d at p. 822). There are great difficulties here. First, while generally substantial

44/ See 38 Fed. Reg. at 28797 (Question 7(B)).

sums of money are needed for both local and certainly for effective local news programming, there can be most worthwhile programming (e.g., entertainment, public affairs, other) that does not cost an undue amount. For example, are we to fault a public affairs show because it involved appropriate partisan spokesmen debating an important issue (a relatively inexpensive show)? Clearly we cannot become involved in such qualitative judgments. Further, there are no standardized forms of accounting for broadcasting, so that profit becomes an unreliable touchstone. 45/ There is also the point whether any policy adopted should penalize the broadcaster who has been more efficient or resourceful in his sales operation or in implementing his programming goals. We are inclined for the present to develop expertise in the area by examining the matter if and when appropriate in *ad hoc* hearings, and to obtain experience as to the efficacy of the policies adopted here. We see no detriments to the public interest in proceeding in this fashion because in the final analysis the programming service is the essence of the public interest (*Johnston Bctg. Co.* v. *FCC*, 85 U.S. App. D.C. 40, 48, 175 F.2d 351, 359 (1949)) and our processes do focus on that crucial element.

33. There remains the factor of diversification of control of media of mass communications. After study of the comments, we believe that our discussion in the *Further Notice* is still apt:

> . . . 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, 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

45/ In any event, if two stations have equal revenues and invest the same amount on programming, the one whose other expenses are higher will have invested a higher percentage of its profits; this, however has nothing to do with performance in the public interest.

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. 5215; 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.

Thus, diversification is a factor to be weighed in all comparative cases (and indeed can be a most important issue in an unusual non-comparative case such as *Frontier Bctg. Co.*, 21 FCC 2d 570 (1970); 27 FCC 2d 486 (1971)) but with the following special emphasis:

(i) If there have been abuses in the broadcast operation stemming from the control of other media, this factor obviously takes on heightened importance.

(ii) The large multiple owner or newspaper applicant might well have to make a strong showing depending on the facts of his case (e.g., at the high end of the range and perhaps a demonstration of greater devotion of resources to children's, first-run syndicated programming or some similar area of the licensee's choosing). More has been given the multiple owner and correspondingly more can be expected of him. But we stress again that this is not a matter of advancing percentages (see par. 18, *supra*).

Conclusion and Applicability

34. This Policy Statement thus supplants the invalidated 1970 State-

ment. As stated, the 1965 Comparative Statement, applicable to comparative hearings involving new applicants, does not control the proceeding involving the regular renewal applicant. For, it has no applicability to the evaluation of the renewal applicant.

35. As we noted, it would be clearly unfair to make such policies immediately applicable to the renewal applicants and to judge their performance in hearings on policies which were not yet formulated or known to them. Rather, there should be an appropriate time interval of 12 months afforded licensees to meet these guidelines. Any comparative hearings involving renewal applicants before that period would be governed by the present, more amorphous standards (see par. 1, *Notice*, FCC 71-159), unless the renewal applicant chose to be judged by the more stringent standards set forth here. Further, we believe that inasmuch as we are deliberately spurring virtually all TV stations to increase their efforts in the two categories, we should allow all future renewal applicants to show upgrading to meet these new criteria during this period of one year; for it makes little sense to make the accident of filing date for renewal the critical point whether an existing station gets the benefits of this new policy, if it assumes the public interest obligations. Similarly, we would temper the three-year requirement of performance (see n. 27, p. 12) to take into account this necessary phasing-in period. We stress that after this year period, upgrading after the filing of the renewal application will be given no weight; the renewal applicant must run on his record -- not promises made when a challenge appears.

36. We have not adopted a rule because as we have previously made clear, a rule is not feasible in this area where there are so many variables and so much depends on the facts of each case. We do not pretend that we have solved all the renewal comparative hearing problems with the issuance of this document. We clearly have not. 46/ Much remains to be clarified, both through fuller proceedings and in *ad hoc*

46/ Renewal policies in the non-commercial field are not dealt with in this proceeding. See Docket No. 19142.

opinions that deal with specific situations. But we have acted here as best we can to supply guidance in two critically important areas to the public interest. We believe that the combined effect of this policy and the policies and procedures adopted in Docket No. 19153 47/ will markedly serve the public interest. We shall await experience from these actions, before proceeding to clarify or revise further our renewal policies.

37. Authority for the adoption of the policies set forth herein is contained in Sections 1, 4(i)(j), 303, 307-309, and 315(a) of the Communications Act of 1934, as amended.

38. The proceeding in this docket IS TERMINATED with the issuance of this policy statement.

47/ For example, that action requires the delineation of public service announcements (PSA) as a total and in the time period, 8 A.M. to 11 P.M., and also whether primarily designed to promote activities located in the station's service area. See 38 Fed. Reg. at 35408. This will, we believe, inhibit or eliminate any abuse of scheduling many or most PSA's in the very poor listening times (11 P.M. to 8 A.M.). Here again it is a matter of obtaining experience as to the efficacy of our policies. Clearly, if effective, a disclosure policy, representing as it does minimal Governmental intervention, is most desirable. We cite this as one example, but the approach is a general one.

APPENDICES TO

DRAFT ORDER AND REPORT

APPENDICES A AND B OMITTED AS NOTED

IN PARAGRAPH 5 AND IN FOOTNOTE 36.

APPENDIX C

Program Percentages1/ Constituting "Substantial Service" for Network Affiliated Television Stations

Average Quarter Hour Prime Time Households	% News, Public Affairs and Other Non-entertainment 6 A.M.-Midnight	% Local Programming 6 A.M.-Midnight	% Local Programming 6 P.M.-11 P.M.2/
0-25,000	16	9	9
25,100-57,000	17	10	10
57,100-89,000	18	11	11
89,100-120,000	19	12	12
Over 120,000	20	13	13

Average Quarter Hour Prime Time Households	% News, Public Affairs and Other Non-entertainment 6 P.M.-11 P.M.2/
0-25,000	13
25,100-49,000	14
49,100-72,000	15
72,100-96,000	16
96,100-120,000	17
Over 120,000	18

1/ Percentages are calculated as the ratio of minutes in the category excluding commercial time to total minutes broadcast in the composite week including commercial time.

2/ 5 P.M. to 10 P.M. in Central and Mountain time zones.

Appendix D

RANDOM SAMPLING OF AUDIENCES FOR INFORMATIONAL PROGRAMMING IN EVENING AND NON-EVENING TIME PERIODS

Evenings				Millions of Households
Friday	7/20/73	8:00-9:00	"60 Minutes"	6,160
		9:00-10:00	"CBS Reports"	6,090
		10:00-11:00	"CBS Reports"	6,030
Tuesday	7/17/73	10:00-11:00	"NBC Reports"	4,730
Sunday	7/22/73	6:00-7:00	"CBS News Retro-spective	3,820
Sunday	7/29/73	6:00-7:00	"CBS News Retro-spective"	5,310
Tuesday	2/27/73	10:00-11:00	"America"	6,930
Tuesday	3/6/73	10:00-11:00	"First Tuesday	4,920
Friday	3/9/73	8:00-9:00	"CBS Reports"	5,380
Sunday	3/4/73	6:00-7:00	"60 Minutes"	8,290
Friday	10/19/73	10:00-11:00	"The Israelis"	5,490
Tuesday	4/10/73	10:00-11:00	"America"	7,910
Thursday	4/12/73	8:00-9:00	"National Geographic Special"	13,150

Sunday				
	7/22/73	1:30-2:00	"Issues and Answers"	1,490
		11:30-12:00	"Face the Nation"	2,270
		12:30-1:00	"Meet the Press"	2,920
	3/4/73	1:30-2:00	"Issues and Answers"	2,330
		11:30-12:00	"Face the Nation"	2,980
		12:30-1:00	"Meet the Press"	2,980
	10/21/73	1:30-2:00	"Issues and Answers"	2,650
		11:30-12:00	"Face the Nation"	1,850
		12:30-1:00	"Meet the Press"	4,500
	11/18/73	1:30-2:00	"Issues and Answers"	1,720
		11:30-12:00	"Face the Nation	2,650
		12:30-1:00	"Meet the Press"	3,910

Geller

THE COMPARATIVE RENEWAL PROCESS IN TELEVISION:
PROBLEMS AND SUGGESTED SOLUTIONS

P-5253

The Economics of Network Children's Television Programming

A report by Alan Pearce

Communications Economist,
Office of the Chairman,
Federal Communications Commission.

July, 1972.

This report was prepared for consideration in the proceeding on children's television. Any views or conclusions in the report are those of the author and do not, in any way, represent FCC views or conclusions that may be reached in the Inquiry.

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The purposes of this presentation are:

1. To give a brief outline of a basic economic law governing the broadcast industry.

2. To list the major advertisers in children's programming and the extent of their financial support of network children's shows.

3. To outline the costs and revenues of children's programming.

4. To explore the financial impact on the networks of a reduction of commercial time in children's weekend programming.

5. To examine the broad economic implications to the networks of the ACT petition on children's programming.

1. BROADCAST ECONOMICS

In the broadcasting business, ratings determine revenues. The bigger a network's audience, the more it can charge for the time it sells to advertisers. From an advertiser's point of view, what matters is the size of the audience watching the program surrounding the commercial minutes. The ratings points, which express the absolute numbers of television homes tuned in to a particular program, are, in effect, the only way broadcasters have yet figured out to price their merchandise, which is the time the public spends watching television. The demographic make-up of the audience has begun to play a more important role in the pricing mechanism of television commercials, but generally speaking, ratings still determine revenues.

Audience measurement ratings equate with circulation (or readership) in the print media, with one important economic difference. This difference concerns unit costs--copies of newspapers or magazines in the print media, and numbers of homes tuned in to a program in broadcasting.

If a newspaper publisher has a newspaper operation that costs $1 million a day, with a daily circulation of 1 million and advertising revenue of $500,000 daily, he has to sell his newspapers for 50 cents each in order to break even. If his circulation increases to 2 million copies a day and his advertising revenue doubles to $1 million, he might still have to charge a high price per copy because some of his costs increase. He might need more presses, more metal for type, and more ink; more pages to carry his advertising which means higher newsprint costs, and possibly more labor to handle the extra circulation and advertising; or even more vehicles and manpower to handle distribution of his product. In fact, if a newspaper or magazine becomes really popular, and if advertising revenue does not keep pace because the readership is not attractive to advertisers, then unit costs may actually begin to rise and this can result in uneconomic publishing. This was part of the reason for the deaths of <u>The Saturday Evening Post</u> and <u>Look</u>.

The broadcasting industry, on the other hand, is not beset by the threat of increases in per unit costs; indeed the reverse is true, for as more people or more homes watch or listen to a program, per unit costs fall quite dramatically. If a broadcaster has a product--a children's television special for example--that costs $1 million to produce and sell at a profit, and he has an audience of a million households, it costs him $1 for each household in the audience and he attempts to fix the rates for his commercial minutes accordingly. If the audience for the show increases to 2 million households, the unit cost become only 50 cents and so on. The broadcaster, like the newspaper or magazine owner, can charge more for his commercial minutes because he is offering a larger audience to the advertisers, but unlike his competitors in the print media, the broadcaster's unit costs always fall once break even point has been reached. (This is not to say, of course, that overall costs decline; in fact, overall production costs on most television shows have been rising at an average of 8 percent a year).

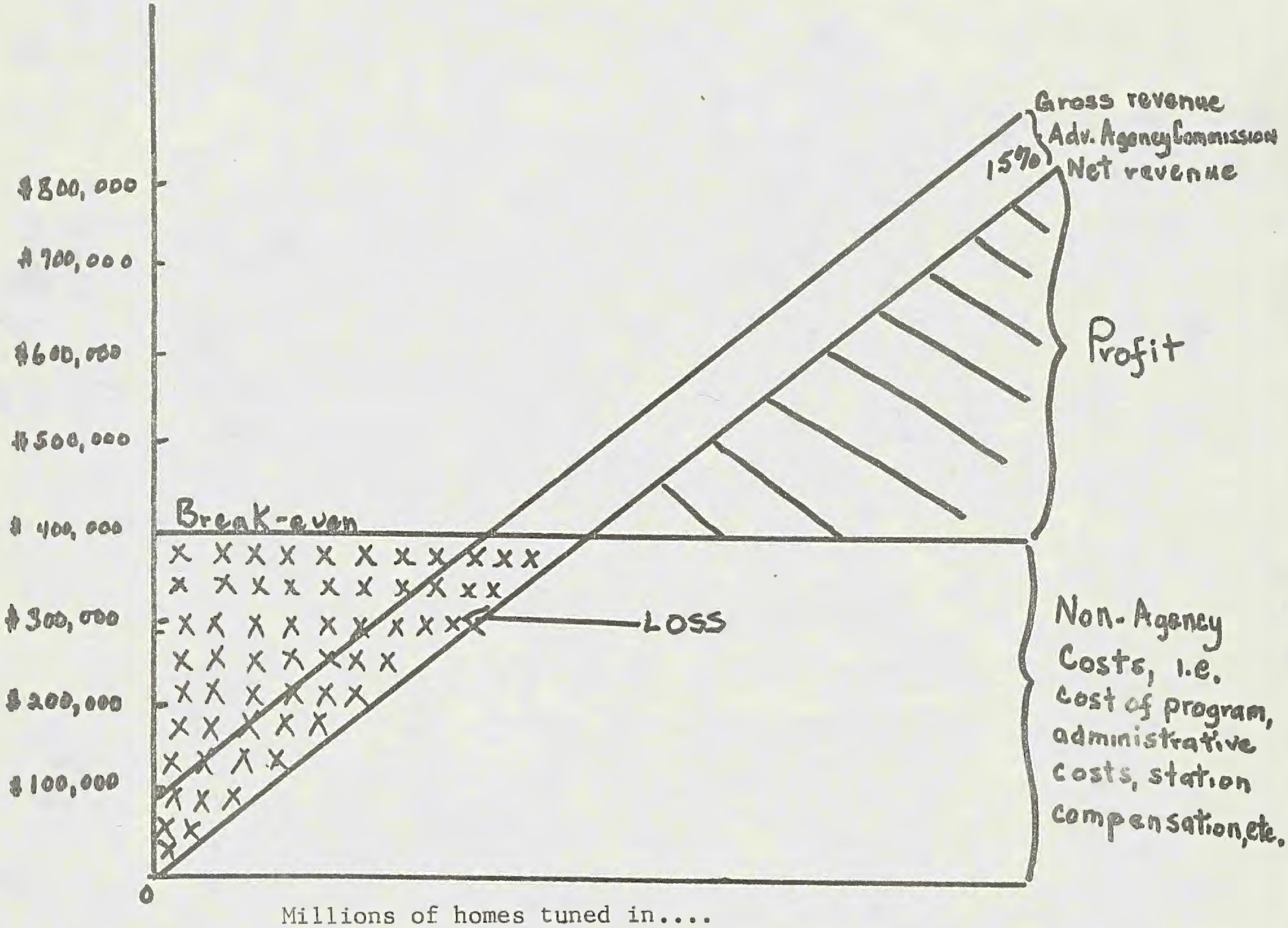
The above is only given as a simple example, of course, but it shows why the broadcasting industry can make a lot of money when audience size increases. The bigger the audience in broadcasting, the higher the advertising rates, the smaller the per unit costs, and the bigger the profit per program. This is why the broadcasting business is tied very much to numbers--numbers of homes with television sets turned on, numbers of people watching or listening.

To put the above more scientifically:

1. Volatility--A small percentage increase in price (resulting from or following an improvement in ratings) causes a large percentage improvement in profits. This profit is usually around 85 cents on every dollar--the 15 cents being paid to advertising agencies as commission.
2. Profit Effect--After break-even point has been reached, 85 percent of the additional revenue falls to the bottom line as profit. Conversely, to the extent that break-even point is not achieved, 100 percent of the revenue shortage is reflected in a bottom line loss.

In other words, the broadcasting industry presents great opportunities for windfall profits if a program earns ratings popularity, or it can result in great losses if a program is unpopular and does not reach break-even.

All of this can be expressed graphically:



STRUCTURE OF TELEVISION BROADCASTING

In order to put the system of network television into perspective for the purposes of this study, the following chart might prove helpful:

THE TELEVISION NETWORKS

Parent Company	American Broadcasting Companies (includes United Paramount Theatres)	Columbia Broadcasting System	Radio Corporation of America (RCA)
Subsidiary			National Broadcasting Company
Network	ABC Television Network	CBS Television Network	NBC Television Network
O & O's (5 VHF)			
Cleveland			WKYC-tv
Chicago	WLS-tv	WBBM-tv	WMAQ-tv
Detroit	WXYZ-tv		
Los Angeles	KABC-tv	KNXT-tv	KNBC-tv
New York	WABC-tv	WCBS-tv	WNBC-tv
Philadelphia		WCAU-tv	
St. Louis		KMOX-tv	
San Francisco	KGO-tv		
Washington, D.C.			WRC-tv
Number of Affiliates (1971)	168 primary 118 secondary*	192 primary 3 also available	219
Number of Commercial Independents (1971 Estimate)	29 VHF 48 UHF		

* A secondary affiliate carries less programming than a primary affiliate and might also have an affiliation with another network. Consequently, there is double counting of affiliates. All told, there are about 600 affiliates.

Compiled by Alan Pearce from data collected from the networks, from Broadcasting Yearbook 1971, and from Television Factbook, 1970-71 Edition/No. 40.

2. ADVERTISERS IN NETWORK CHILDREN'S PROGRAMS

According to Broadcast Advertisers Reports, an estimated $74,664,400 was spent by advertisers in 1970 on network weekend children's television shows. This was divided among the networks as follows:

ABC Television Network: $20,206,300, or 27.06 percent of the total;

CBS Television Network: $39,878,400, or 53.41 percent of the total;

NBC Television Network: $14,579,700, or 19.52 percent of the total.

The three leading advertisers in network children's television programs--Kellogg, Mattel, and General Mills--account for almost 30 percent of total revenues from children's shows:

> Kellogg Company, which spent a total of $8,902,800 on network weekend children's shows in 1970. Nearly 62 percent of this, or over $5½ million, was spent with CBS; about 38 percent,or roughly $3¼ million, was spent with NBC; and less than 1½ percent, or $125,000, was spent with ABC.
> Mattel Inc., which spent a total of $7,837,200 in network weekend children's programs in 1970. A little over 65 percent of this, or nearly $5,100,000, went to CBS; 18 percent, or just over $1.4 million, went to ABC; and nearly 17 percent, or roughly $1.3 million, went to NBC.
> General Mills Inc., which spent $7,097,500 on network weekend children's programs in 1970. Over 65 percent of this, almost $5,100,000, was spent with the CBS Network; over 25 percent, or $1.8 million, with ABC; and nearly 9 percent, or $634,000, with NBC.

The next five advertisers in children's weekend programs on the networks--General Foods Corporation, DeLuxe Topper Toys, Quaker Oats, Miles Laboratories, and Mars--account for a further 25 percent of gross revenues:

Parent Company	Total Est. Revenue (in 000's)	ABC Est. Rev.	% of Rev.	CBS Est. Rev.	% of Rev.	NBC Est. Rev.	% of Rev.
General Foods	$6,034.7	$1,647.7	27.30	$4,035.2	66.86	$ 351.8	5.82
DeLuxe Topper	4,005.1	220.8	5.51	3,210.0	80.14	574.3	14.33
Quaker Oats	3,782.4	655.9	17.34	2,162.1	57.16	964.4	25.49
Miles Labs	2,639.0	738.7	27.99	1,332.4	50.48	567.9	21.51
Mars Inc.	2,275.3	1,237.6	54.39	4.2	.18	1,033.5	45.42

Source: BAR.

Another 15 companies--Milton Bradley, Bristol-Myers, Ideal Toy, Hasbro, Louis Marx, IT&T, Nabisco, Borden, Nestlé, American Home Products, Pepsico, Campbell Soups, Norton Simon, McDonalds, and Keebler--account for a further 25 percent of gross revenues. These companies spent from $2,168,900 down to $721,400 on network children's weekend television in 1970. A further 57 companies accounted for the last 20 percent of gross revenues.

Thus children's programming at the network level is characterized by a situation where relatively few advertisers are competing for commercial time offered by 3 suppliers. As we have seen, the top 3 advertisers account for 30 percent of gross revenue; the top 8 advertisers account for 55 percent; and the top 23 advertisers account for 80 percent of the gross revenue derived from network weekend children's programming.

Children's programming is further characterized by the business nature of the top 23 advertisers (with some overlap because of the diversified nature of some of the companies):

Cereal: Kellogg ($8.9 million spent on advertising in weekend network children's shows in 1970); General Mills ($7 million); General Foods ($6 million); Quaker ($3.8 million).

Toys: Mattel ($7.8 million); Deluxe Topper ($4 million); Milton Bradley ($2.2 million); Ideal ($1.75 million); Hasbro ($1.55 million); Louis Marx ($1.55 million).

Vitamins/Non-Prescription Drugs: Miles ($2.6 million); Bristol-Myers ($1.9 million); American Home Products ($1 million).

Food/Candy/Beverages: Mars ($2.3 million); IT&T ($1.5 million); Nabisco ($1.3 million); Borden ($1.25 million); Nestlé ($1.25 million); Pepsico ($.9 million); Campbell Soup ($.85 million); Norton Simon ($.8 million); McDonalds Corporation ($.75 million); Keebler ($.7 million).

NB: General Mills, although listed as a cereal manufacturer, has a substantial interest in toys through its subsidiaries, Kenner Products and Parker Brothers (manufacturers of Monopoly, the world's most popular board game). Quaker, another cereal manufacturer, owns Fisher-Price Toys.

3. COSTS AND REVENUES OF NETWORK CHILDREN'S PROGRAMMING

(a) Costs of Programs: Introduction

Naturally enough, the costs of children's programs vary enormously; Captain Kangaroo, for example, produced by CBS as a weekday program for pre-schoolers from 8-9 a.m. Monday through Friday, has a weekly production budget in the region of $75,000, or $15,000 a show. This figure excludes certain development overheads and administrative costs that are sustained by CBS. Show budgets do not normally reflect their shares of top administration salaries, or of the costs of selling the commercial time in the program, or the costs of press and publicity, and other services. These costs are absorbed by the networks producing or presenting the shows, and are eventually deducted from the total profit contribution made by the program departments. We shall return to this question of profit contribution later. Captain Kangaroo, in fact, is an expensive show for daytime television--The Today Show on NBC cost $100,000 a week in 1970 and for that NBC was able to provide 10 hours of adult news-magazine type programming. Generally speaking, the cartoon fare that comprises most of what is known as children's weekend television--shows like Scooby-Doo Where Are You?, Sabrina the Teenage Witch, Funky Phantom, and The Pink Panther Meets the Ant and the Ardvark, cost an average of between $10,000 and $11,000 per half hour, as compared with $7,500 for Captain Kangaroo. The networks pay $1,054,000 for 17 original negatives which they buy from the leading suppliers of cartoons; thus each negative costs the network $62,000, and it is played a total of 6 times over a 2-year period at a cost of just over $10,000 a showing, before ownership reverts to the cartoon producer for syndication sale. Consequently, each showing costs the network an average of $10,333, but this does not include editing and reprint costs.

Costs of Programs at CTW

Other children's programming is similarly expensive. For example, The Electric Company, produced by Children's Television Workshop for Public Television, cost around $8 million for the first 160 half hour shows. At first glance, this seems to be prohibitively expensive and, as one NBC network executive said, Bonanza, a top rated prime-time adult show, can be bought for less than that. The fact is, however, that the costs of The Electric Company, and other shows that have been described as "quality" children's programs, can be amortized over a great many years. If each episode of

The Electric Company was shown only once, then it would cost $50,000 per half hour--well below the average cost of $62,000 per negative for cartoons. But like the cartoons, The Electric Company is shown several times, so if each program is aired at least five times, the actual cost per half hour is only $10,000. In addition, a program like The Electric Company can be shown to successive generations of children with equal interest, so the final cost per half hour can be reduced substantially. Finally, unlike the networks, CTW includes all of its costs in its program budgets, so The Electric Company includes costs of research and administration, which tend to inflate the overall costs of production. Sesame Street, the other program produced by CTW, costs roughly $5 million for 160 1-hour shows--an average cost of $31,250 per hour. Here again, the program costs can be written off over several airings, so that the actual cost is much lower. Incidentally, the reason that The Electric Company is so much more expensive than Sesame Street is because of the use of animation, which costs CTW $4,000 a minute; the networks, however, pay less for their animation because they buy in bulk and also because they often cut costs on animation by ordering fewer frames per second. Sesame Street uses very little animation. producing jumpy movement.

Costs of Prime-Time Children's Programs

NBC is the only network that regularly programs for children in prime-time with its Wonderful World of Disney on Sunday evenings from 7:30 to 8:30 p.m. The Disney Company has, of course, a long established record in the field of children's entertainment. The Disney contract with NBC stipulates that the network pays Disney $250,000 for each of 20 original programs in a season. The rest of the programs that fill the schedule are repeats from previous seasons with a price tag of between $30,000 and $40,000 a showing. Usually the network buys about 48 hours of television from Disney over the year--20 originals and 28 repeats, down from 26 originals and 26 repeats a few seasons ago. The change was made for reasons of economy. Disney material, and children's prime-time evening specials, are usually very expensive programs. A National Geographic special costs $350,000 for an hour, with a $100,000 fee if the program is repeated by the network--a total cost of $450,000 for 2 hours of prime-time television. CBS Television Network paid over $400,000 for a 1-hour special, JT, a dramatic presentation about a Black child.

Costs of Saturday Morning Programs

For the current Saturday morning season, all 3 networks tried to diversify their programming somewhat by introducing something other than cartoons. CBS introduced You Are There, a half-hour which costs $65,000 for one episode that will be repeated at least once; Children's Film Festival, a 1-hour program which costs $35,000 for two runs; and In-the-News, periodic 2-minute news segments put into the Saturday morning children's schedule at an annual cost of around $500,000. ABC introduced Curiosity Shop, an entertainment-information program which costs $130,000 for each

1-hour program. The original plan was to produce 17 original shows, costing $130,000 each for a total cost of $2,210,000 and then repeat each show 6 times for an average cost of nearly $22,000 per hour, per showing, which means that the show costs roughly what a cartoon costs. NBC introduced Barrier Reef, a half-hour Australian live-action adventure series with a lot of underwater filming and an ecology theme, which costs $20,000 for 3 showings--below the usual average cost. In addition, the network introduced Take a Giant Step a one-hour entertainment-information program budgeted at $30,000 a show. NBC plans to produce at least 26 original shows, and possibly 30, then repeat the best of them. So the average cost per showing will be $15,000--or $7,500 per half hour, considerably lower than the average cost of children's Saturday morning programming.

The program cost figure to bear in mind therefore is an average of $10,000 or $11,000 per half hour per showing for weekend children's programming at the network level, with programming costs of around $250,000 per hour for first showings of network prime-time children's television.

(b) Revenues

Although the costs of programs listed above are current costs, i.e. 71-72 season, the revenues listed below are for the 1970 calendar year. The data were derived from Broadcast Advertisers Reports Inc., in New York. As we have seen, total gross revenues from network weekend children's shows for 1970 were

$74,664,400, up from an estimated $68,994,300 in 1969; ABC was the only network that registered a decline in gross revenue from $22,221,500 in 1969 to $20,206,300 in 1970, while CBS's gross revenue rose from $34,827,000 in 1969 to $39,878,400 in 1970, and NBC's went from $11,945,800 in 1969 to $14,579,700 in 1970. It must be remembered that 1970 was a bad year financially for the networks, and for broadcasters in general, so a rise in revenue from children's programming was helpful in what otherwise was a poor year.

The following chart will be of help in comparing gross revenues from children's programming with gross revenues from other types of programming. It can be seen that revenues from children's programs account for roughly 5 percent of total revenues:

Estimated Network Revenues: Calendar Year 1970

Daypart	Total Est. in 000's	ABC Rev.	% of Total	CBS Rev.	% of Total	NBC Rev.	% of Total
Prime Time	$897,420.2	$264,964.1	29.52	$322,688.8	35.95	$309,767.4	34.51
M-F Daytime	331,387.0	83,431.1	25.17	156,602.1	47.25	91,353.8	27.56
Kids Shows	74,664.4	20,206.3	27.06	39,878.4	53.41	14,579.7	19.52
AM/PM Var.	68,605.6	6,820.3	9.94	13,794.0	20.10	47,991.3	69.95
News	108,332.3	13,298.4	12.27	57,104.4	52.71	37,929.5	35.01
Sports	175,329.5	68,899.6	39.29	51,232.9	29.22	55,197.0	31.48
Ev. Ent. Spec.	66,685.8	13,348.1	20.01	15,138.7	22.70	38,199.0	57.28
Other	10,233.9	523.9	5.11	5,212.7	50.93	4,497.3	43.94
Total	$1,732,658.7	$471,491.8	27.21	$661,652.0	38.18	$599,514.9	34.60

Source: BAR.

What follows is a breakdown, program by program, and network by network, of the 1970 gross revenues from network children's programs. It should be noted that not all programs run for the full 12 months because some were introduced in the 69-70 season, while others were introduced for the 70-71 season.

ABC Television Weekend Children's Shows: 1970.

Adventures of Gulliver grossed $323,200 in 9 months from 100 minutes of advertising, an average of $3,232 per minute. Biggest advertiser: General Foods - $58,000 for 19 minutes of advertising.

Bullwinkle grossed $1,373,200 in 12 months from 267 minutes of advertising, an average of $5,143 per minute. Biggest advertiser: General Mills - $528,300 for 103 minutes.

Cattanooga Cats I grossed $1,348,700 in 12 months from 250 minutes and 45 seconds of advertising, an average of $5,373 per minute. Biggest advertisers: Ralston Purina Company - $98,100; Marx - $92,800.

Cattanooga Cats II grossed $983,600 in 9 months from 181 minutes of advertising, an average of $5,434 per minute. Biggest adverstiser: General Foods - $155,800 for 31 minutes.

Dudley Do-Right grossed $463,200 in 10 months from 147 minutes of advertising, an average of $3.151 per minute. Biggest advertiser: General Mills - $182,200 for 58 minutes.

Fantastic 4/Fantastic Voyage grossed $656,600 in 12 months from 153 minutes of advertising, an average of $4,291 per minute. Biggest advertisers: Mattel - $110,700; General Foods - $58,000

George of the Jungle grossed $711,100 in 9 months from 143 minutes of advertising, an average of $4,972 per minute. Biggest advertisers: General Mills - $149,200; General Foods - $84,000.

Hardy Boys grossed $1,665,100 in 12 months from 280 minutes of advertising, an average of $5,946 per minute. Biggest advertisers: Mars -$202,200; General Foods- $182,400; General Mills - $143,700; Mattel - $140,700.

Here Come the Double-Deckers grossed $866,000 in 4 months from 94 minutes of advertising, an average of $9,212 per minute. Biggest advertiser: General Mills - $147,200 for 16 minutes.

Hot Wheels grossed $1,697,600 in 12 months from 265 minutes of advertising, an average of $6,406 per minute. Biggest advertisers: Mars - $255,800; Mattel - $224,000; General Foods - $134,800.

Jonny Quest grossed $439,200 in 4 months from 91 minutes of advertising, an average of $4,826 per minute. Biggest advertisers: General Mills - $116,700; Quaker - $67,000.

Lancelot Link Chimps I grossed $712,400 in 4 months from 91 minutes and 30 seconds of advertising, an average of $7,828 per minutes. Biggest advertisers: General Mills - $116,700; Quaker - $67,000.

Lancelot Link Chimps II grossed $783,200 in 4 months from 89 minutes of advertising, an average of $8,800 per minute. Biggest advertisers: Eldon Industries - $123,200; Mattel - $96,800; Marx - $70,400.

Motor House grossed $394,200 in 4 months from 79 minutes of advertising, an average of $4,989 per minute.

Reluctant Dragon - Mr. Toad grossed $253,000 in 4 months from 73 minutes of advertising, an average of $3,465 per minute. Biggest advertisers: General Mills - $57,600; General Foods - $36,000.

Sky Hawks grossed $1,316,700 in 12 months from 249 minutes of advertising, an average of $5,287 per minute. Biggest advertisers: Mars- $184,800; General Foods - $173,700; Ideal Toy - $112,600; Quaker - $111,900.

Smokey Bear Show grossed $889,700 in 12 months from 225 minutes of advertising, an average of $3,954 per minute. Biggest advertisers: General Foods - $122,800; General Mills - $113,500.

Spiderman grossed $264,700 in 3 months from 63 minutes of advertising, an average of $4,201 per minute. Biggest advertisers: Mattel - $66,600; Remco - $39,000; Tootsie Roll - $33,400.

Will Jerrry Lewis Sit Down grossed $872,100 in 4 months from 93 minutes of advertising, an average of $9,377 per minute. Biggest advertisers: Ideal Toy - $139,600; General Mills - $112,700.

American Bandstand grossed $2,841,800 in 12 months from 464 minutes of advertising, an average of $6,124 per minute.

Together, all the programs listed above grossed $18,974,800 in 1970, with a total of 3,411 minutes of advertising, an average of $5,562 per minute.

ABC Television Children's Specials broadcast in 1970:

Santa Claus, a one-hour show broadcast in December, grossed $298,800 from 6 minutes of advertising, an average of $49,800 per minute. Advertisers: American Home, Bristol-Myers, Campbell, Norton Simon, Polaroid, and RCA - all 1 minute.

The Animals Talked, a half-four show broadcast in December, grossed $194,400 from 3 minutes of advertising, paid for by Norton Simon, at an average of $64,800 per minute.

Tales of Muppetland, broadcast in April, grossed $763,200 from 15 minutes of advertising, an average of $50,880 per minute. Reynolds Industries bought 6 minutes for $270,000, an average of $45,000 per minute.

Animal World, a series of six one-hour specials broadcast monthly, grossed $1,501,100 from 63 minutes of advertising, an average of $23,826 per minute.

With These Hands, a one-hour show broadcast in May, grossed $297,000 from 6 minutes of advertising, an average of $49,500 per minute. The sponsor was S.C. Johnson.

In addition, ABC carried the following series of special interest to children:

Undersea World of Jacques Cousteau grossed $2,916,000 from 54 minutes of advertising, an average of $54,000 per minute. There were 9 shows during 1970. Biggest advertisers: DuPont - $1,248,000; Hartford Insurance Company - $1,248,000; Armstrong Cork - $420,000.

3M Specials grossed $1,757,300 from 39 minutes of advertising, an average of $45,058 per minute. 3M was the sole sponsor.

CBS Television Weekend Children's Shows: 1970.

Wacky Races grossed $1,600,600 in 9 months, selling 199 minutes of advertising, an average per minute cost of $8,043. Biggest advertisers: General Foods - $274,300; General Mills - $238,200; Mattel - $213,200; Quaker - $166,500; Topper - $139,400.

Tom and Gerry grossed $1,431,000 in 12 months, selling 279 minutes of advertising, an average per minute cost of $5,129. Biggest advertisers: General Mills - $413,200; Topper - $153,400; Mattel - $139,800; Kellogg - $75,700; Bristol-Myers - $69,600; Miles Labs - $68,300; General Foods - $56,600.

Superman grossed $1,155,000 in 9 months, selling 182 minutes of advertising, an average per minute cost of $6,346. Biggest advertisers: General Mills - $307,700; Mattel - $177,400; General Foods - $17,700; Topper - $88,800; Pepsico - $51,500; Quaker - $43,200.

Scooby Doo Where Are You? grossed $3,200,500 in 12 months, selling 307 minutes of advertising, an average per minute cost of $10,425. Biggest advertisers: Mattel - $569,900; General Foods - $515,200; Quaker - $391,200; Kellogg - $394,300; Topper - $165,800; General Mills - $159,100; Bradley Milton - $117,800; Borden - $116,100.

Sabrina Groovie Goolies grossed $2,200,300 in 4 months, selling 176 minutes of advertising, an average per minute cost of $12,501. Biggest advertisers: Mattel - $227,700; General Foods - $184,600; General Mills - $179,800; Marx - $179,800; Topper - $179,600; Ralston Purina - $119,800; Quaker - $92,600; Nestlé - $92,400; Bristol-Myers - $92,400.

The Monkees grossed $2.954,800 in 12 months, selling 286 minutes of advertising, an average per minute cost of $10,331. Biggest advertisers: General Foods - $675,900; Mattel - $671,000; Topper - $320,200; General Mills - $198,600; Nabisco - $183,600; Kellogg - $161,600; Nestlé - $119,600.

Perils of Penelope Pitstop grossed $2,234,100 in 12 months, selling 290 minutes of advertising, an average of $7,703 per minute. Biggest advertisers: General Mills - $583,900; Mattel - $29,900; Topper - $259,700; General Foods - $203,400; Quaker - $164,900; Kellogg - $112,400.

Josie and the Pussycats grossed $1,172,700 in 4 months, selling 94 minutes of advertising, an average of $12,475 per minute. Biggest advertisers: Kellogg - $597,100; Mattel - $565,400.

Jonny Quest grossed $1,036,000 in 9 months, selling 193 minutes of advertising, an average of $5,367 per minute. Biggest advertisers: General Mills - $317,100; Mattel - $154,900; Topper - $79,100; General Foods - $60,900; Pepsico - $52,700; Keebler - $47,600.

The Jetsons grossed $1,143,600 in 12 months, selling 290 minutes of advertising, an average of $3,943 per minute. Biggest advertisers: General Mills - $395,300; Topper - $123,100; Mattel - $122,300; Miles Labs - $88,200; General Foods - $77,700.

The Jetsons, shown on one Sunday in November, grossed $33,000 for 5 minutes of advertising, an average of $6,600 per minute.

In The Know grossed $612,500 in 4 months, selling 40½ minutes of advertising, an average of $15,122 per minute. Only advertisers: Mettel and Kellogg.

Harlem Globetrotters grossed $1,235,800 in 4 months, selling 87 minutes of advertising, an average of $12,358 per minute. Biggest advertisers: Topper $230,700; Kellogg - $169,100; General Foods - $165,000; Quaker - $115,700; Nestlé - $111,400.

Dastardly and Muttley grossed $2,521,700 in 12 months, selling 286 minutes of advertising, an average of $8,817 per minute. Biggest advertisers: Kellogg - $914,000; Topper - $298,700; Mattel - $285,500; American Home Products - $152,600; Bradley Milton - $113,800; Nestlé - $109,300; Miles Labs - $85,800.

Bugs Bunny Road Runner I grossed $420,700 in 14 months, selling 91 minutes of advertising, an average of $4,623 per minute. Biggest advertisers: General Mills - $95,800; Bradley Milton - $47,200; Marx - $38,100; Quaker - $36,300; Miles - $33,000.

Bugs Bunny Road Runner II grossed $678,100 in 4 months, selling 88 minutes of advertising, an average of $7,705 per minute. Biggest advertisers: General Mills - $152,800; Kellogg - $91,800; General Foods - $77,600; Quaker - $62,800; Ralston Purina - $62,000.

Bugs Bunny Road Runner grossed $2,613,300 in 12 months, selling 414 minutes of advertising, an average of $6,312 per minute. Biggest advertisers: General Mills - $509,700; General Foods - $277,400; Mattel - $240,700; Quaker - $246,300; Topper - $155,200; Kellogg - $136,800; Bristol-Myers - $120,400; Miles Labs - $110,400; Nabisco - $109,700.

Batman grossed $942,600 in 9 months, selling 212 minutes of advertising, an average of $4,446 per minute. Biggest advertisers: General Mills - $247,000; General Foods - $141,400; Mattel - $89,200.

Archie's Fun House grossed $2,434,200 in 4 months, selling 181 minutes of advertising, an average of $13,448 per minute. Biggest advertisers: Mattel - $656,500; Quaker - $322,500; General Foods - $224,300; Topper - $205,700; Kellogg - $161,800; Ideal Toy - $123,000.

Archie Comedy Hour grossed $3,832,300 in 9 months, selling 495 minutes of advertising, an average of $9,462 per minute. Biggest advertisers: General Foods - $811,400; Topper - $417,300; Quaker - $351,000; Mattel - $336,300; General Mills - $269,400; Kellogg - $210,400; Miles Labs - $180,600; Nabisco - $176,000; Nestlé - $175,500; Bristol-Myers - $167,200; Borden - $125,000.

Together, all the programs listed above grossed $33,452,800 in 1970, with a total of 4,105 minutes of advertising, an average of $8,149 per minute.

In addition, CBS presented Captain Kangaroo from 8 to 9 a.m. daily, Monday through Friday for pre-schoolers as part of its regular children's television schedule. In 1970, the show grossed an estimated $6,591,800, carrying a total of 2,010 minutes of advertising, at an average of $3,379 per minute. The biggest advertisers were: Kellogg - $1,912,400; General Mills - $531,200; Colgate-Palmolive - $491,800; Bradley Milton - $447,500; Bristol - Myers - $416,200; ITT - $312,500.

CBS Children's Specials broadcast in 1970:

You're in Love Charlie Brown, a half-hour show, carried 3 minutes of advertising for which Coca-Cola paid $88,200, an average of $29,400 per minute.

Short Summer Charlie Brown, a half-hour show, carried 3 minutes of advertising shared between Coca-Cola and Interstate, for which they paid $175,400, an average of $87,700 per minute.

He's Your Dog Charlie Brown, a half-hour show broadcast in March, carried 3 minutes of advertising shared between Coca-Cola and Interstate Brands, for which they paid $140,600, an average of $46,866 per minute.

Charlie Brown's Christmas, a half-hour show broadcast in December, carried 3 minutes of advertising for which Coca-Cola paid $168,900, an average of $56,300 per minute.

Charlie Brown's All-Stars, a half-hour show, carried 3 minutes of advertising shared between Coca-Cola and Interstate Brands, for which they paid $112,000, an average of $37,333 per minute.

It's a Great Pumpkin, a half-hour show broadcast in October, carried 3 minutes of advertising shared between Coca-Cola and Interstate Brands, for which they paid $175,400, an average of $87,700 per minute.

How Grinch Stole Christmas, a half-hour show broadcast in December, carried 3 minutes of advertising - 1 minute each from Eastman-Kodak, Singer, and Swift, for which they paid a total of $243,000, an average of $81,000 a minute.

Frosty the Snowman, a half-hour show broadcast in December, carried 3 minutes of advertising paid for by Pillsbury to gross $224,600 in advertising revenue for CBS, an average of $75,200 per minute.

Dr. Seuss, a half-hour program broadcast in March, carried 3 minutes of advertising for which Nabisco paid $374,800, an average of $124,933 per minute.

Cinderella, a 1½ hour show broadcast in April, carried 9 minutes of advertising to gross $349,200, an average of $38,800 per minute. Borden, Bristol-Myers, ITT, Miles Labs, Pillsbury, Proctor and Gamble, and the RCA Corporation, all bought a minute.

Archie and His Pals, a half-hour show broadcast in March, carried 3 minutes of advertising to gross $72,000, an average of $24,000 per minute. Bristol-Myers bought 2 minutes and Coca-Cola 1 minute.

Tales of Washington Irving, broadcast in October, carried 8 minutes of advertising, for which General Mills paid $123,100, an average of $15,387 per minute.

Christmas Carol, broadcast in November, carried 10 minutes of advertising paid for by General Mills, to gross $120,000, an average of $12,000 per minute.

CBS Children's Film Festival, a show broadcast in March, carried 7 minutes of advertising to gross $46,900, an average of $6,700 per minute. General Foods bought 3 minutes for $20,400, with General Mills, Keebler, Kellogg, and Health Tex each buying a minute.

CBS Children's Hour, broadcast in prime-time in November, carried 6 minutes of advertising to gross $217,400, an average of $36,233 per minute. Health Tex bought 2 minutes, with Campbell, Kentucky Fried Chicken, Nestlé, and Richardson-Merrell buying 1 minute each.

CBS Children's Hour, broadcast at various times throughout the season, carried a total of 28 minutes of advertising to gross $521,700, an average of $18,632 per minute. Reynolds Metals bought 8 minutes for $149,200, Health Tex bought 7 minutes for $137,800, Topper bought 4 minutes for $77,400, General Foods bought 4 minutes for $69,700, and Campbell bought 2 minutes for $48,800.

Yankee at King Arthur's Court, shown in November, carried 14 minutes of advertising to gross $159,900, an average of $11,421 per minute. General Mills was the biggest backer, buying 10 minutes for $114,100.

Where's Huddles, broadcast in July, carried 3 minutes of advertising, for which Coca-Cola paid $62,000, an average of $20,666 per minute.

The specials listed above earned a total gross revenue of $3,376,100 in 1970, and carried a total of 115 minutes of advertising, to average $29,357 per minute.

Altogether, including specials and Captain Kangaroo, CBS earned $43,420,700 from programs directed towards children in 1970. All of these programs carried a total of 6,230 minutes of advertising.

NBC Television Weekend Children's Shows: 1970.

Banana Splits grossed $1,927,500 in 9 months, selling 315 minutes of advertising, an average of $6,119 per minute. Splits is a one-hour show. Biggest advertiser was Kellogg which spent $1,226,300 on 201 minutes.

The Bugaloos grossed $784,600 in 4 months, selling 90 minutes of advertising, an average of $8,717 per minute. Biggest advertisers: Mattel - $202,400; Quaker - $138,700; Kellogg - $137,500.

The Flintstones grossed $678,600 in 9 months, selling 150 minutes of advertising, an average of $4,524 per minute. Biggest advertiser was General Foods which spent $146,900 on 32 minutes.

Further Adventures of Dr. Doolittle grossed $838,500 in 4 months, selling 86 minutes of advertising, an average of $9,750 a minute. Biggest advertisers: Mattel - $294,200; Quaker - $154,700; Kellogg - $124,200.

H.R. Pufnstuf grossed $2,235,100 in 12 months, selling 294 minutes of advertising, an average of $7,602 per minute. Biggest advertisers: Kellogg - $791,700; Hasbro - $701,200; Topper - $167,200.

Heckle and Jeckle grossed $534,800 in 12 months, selling 190 minutes of advertising, an average of $2,814 per minute. Biggest advertisers: General Foods - $59,500; Miles Labs - $50,400; ITT - $44,200. This show broadcast at 8 a.m.

Heckle and Jeckle grossed $619,100 in 9 months, selling 183 minutes of advertising, an average of $3,383 per minute. Biggest advertisers: Kellogg - $121,300; Quaker - $73,400. This show broadcast at 8:30 a.m.

Here Comes the Grump grossed $1,584,600 in 12 months, selling 279 minutes of advertising, an average of $5,715 per minute. Biggest advertisers: Mars - $294,600; Kellogg - $177,500; Bristol-Myers - $149,900; Miles Labs - $141,600.

Hot Dog grossed $410,400 in 4 months, selling 76 minutes of advertising, an average of $5,400 per minute. Biggest advertiser: Mattel - $210,600 for 39 minutes.

Jambo grossed $667,500 in 12 months, selling 168 minutes of advertising, an average of $3,973 per minute. Biggest advertiser: Mars - $166,800 for 41 minutes.

NBC Children's Theatre grossed $254,300 from 3 one-hour shows in October, November, and December, selling 30 minutes of advertising, an average of $8,476 per minute. Biggest advertiser: Mattel, which bought all 30 minutes for $254,300.

Pink Panther grossed $2,084,300 in 12 months, selling 296 minutes of advertising, an average of $7,041 per minute. Biggest advertisers: Kellogg - $376,500; American Home Products - $363,100; Quaker - $284,000; Mattel - $265,500; Mars - $226,000.

Tom Foolery Show grossed $658,900 in 4 months, selling 90 minutes of advertising, an average of $7,321 per minute. Biggest advertisers: Topper - $163,200; Kellogg - $115,300; Quaker - $94,200.

Underdog grossed $523,1900 in 9 months, selling 130 minutes of advertising, an average of $4,023 per minute.

Woody Woodpecker grossed $447,800 in 4 months, selling 93 minutes of advertising, an average of $4,815 per minute.

Together, all the programs listed above grossed $14,269,300 in 1970, with a total of 2,470 minutes of advertising, an average of $5,777 per minute.

NBC Children's Specials broadcast in 1970:

House on the Mayflower, a one-hour program, was shown in November and carried 8 minutes of advertising for which Ideal Toy paid $235,500, an average of $29,437 per minute.

The American Rainbow Series, a 6 one-hour programs over a period of 6 months, carried 48 minutes of advertising for which Howard Johnson paid $570,400, an average of $11,883 per minute.

Goldilocks, a half-hour show, was shown twice - in March and in November. In March, Armstrong Cork paid $397,200 for 3 minutes of advertising, an average of $132,400 per minute. In November, Sun Maid paid $207,200 for 3 minutes of advertising, an average of $69,066 per minute.

Hans Brinker, shown in December, carried 12 minutes of advertising during the 1-hour program. This grossed $639,600, an average of $53,300 per minute. The show was sponsored by Florists Transworld.

Hey, Hey, Hey Fat Albert, a half-hour program shown in April, grossed $76,800 for 3 minutes of advertising, an average of $25,600 per minute. Mattel was the sponsor.

Little Drummer Boy grossed $166,000 from 3 minutes of advertising, an average of $55,333 per minute. The sponsor was American Gas Association.

Pogo Birthday Special, broadcast in February, carried 3 minutes of advertising for $176,400, an average of $58,800 per minute. Proctor and Gamble was the sponsor.

Rudolph the Red Nose Reindeer, broadcast in December, carried 6 minutes of advertising in a 1-hour show to gross $401,900, an average of $66,983 per minute. The sponsors were General Electric (3 minutes) and Ideal Toy (3 minutes).

Uncle Sam Magoo, a one-hour show broadcast in February, grossed $309,900 from 6 minutes of advertising, an average of $51,650 per minute. The sponsor was General Foods.

Winnie the Pooh Blustery Day, a half-hour show broadcast in November, grossed $344,400 from 3 minutes of advertising, an average of $114,800 per minute. The sponsor was Sears Roebuck.

Winnie the Pooh Honey Tree, a half-hour show, carried 3 minutes of advertising and grossed $399,000, an average of $133,000 per minute. Sears Roebuck was the sponsor.

Together, all the above-named children's specials grossed $3,924,300 in 1970, with a total of 101 minutes of advertising, an average of $38,854 per minute. Total children's show advertising: $18,193,600.

In addition, NBC presented The Wizard of Oz, which is usually aired once a year. This was broadcast in February and grossed $959,600 from 14 minutes of advertising, an average of $68,542 per minute. The sponsor was the Sugar Company.

Finally, NBC presents Wonderful World of Disney, a 1-hour weekly program aired on Sunday. In 1970 this program carried 325 minutes of advertising to gross $15,909,700, an average of $48,952 per minute. The sponsors were: Walt Disney products bought 25 minutes for $1,222,700; Gulf Oil bought 148 minutes for $7,252,000; Kentucky Fried Chicken bought 1 minute for $38,000; Mars bought 47 minutes for $2,110,200; McDonald's Hamburgers bought 3 minutes for $114,000; Metropolitan Life Insurance bought 23 minutes for $1,380,000; Nabisco bought 76 minutes for $3,717,000; 7 Up bought 1 minute for $38,000; Standard Brands bought 1 minute for $37,800.

16,869,300

These last two programs, Oz and Disney, grossed $[redacted] in 1970.

The BAR figures outlined above are probably overstated by up to 7 percent, but they are generally accepted as being "reasonably accurate" by the 3 networks. The breakdown figures do not tally exactly with the total figures supplied by Broadcast Advertisers Reports because only those children's specials aired at weekends would be included in the weekend totals for network children's television. In addition, it should be stressed that some children's specials are advertiser-owned in which case the advertiser pays the network a flat fee for networking the special and the advertiser can sell time in that program to other advertisers. However, the revenue earned by the network presenting the program probably results in the same amount of profit since a pre-packaged special with proved appeal is usually willingly accepted for networking.

Looking at the above advertising figures for the 3 networks by categories results in the following breakdown:

CHILDREN'S PGM CATEGORY	ABC TV NET.	CBS TV NET.	NBC TV NET.
Reg. scheduled weekend programming	$18,974,800	$33,452,800	$14,269,300
Specials, incl. weekends	3,054,500	3,376,100	3,924,300
Reg. scheduled weekday programming (Capt. Kangaroo)	-------	6,591,800	-------
Other programs with child interest	4,673,300 (Cousteau/ 3M specials)	--------	16,869,300 (Disney/Oz)
TOTALS	$26,702,600	$43,420,700	$35,062,900

So although NBC does poorly in revenues from its regularly scheduled Saturday morning children's shows, the network is able to bring up its revenue because of its prime-time children's program, Wonderful World of Disney. The Jacques Cousteau programs, aired by ABC, are thought to be primarily adult interest but nonetheless usually attract a good children's audience because the programs are scheduled periodically at 7:30 p.m.

4. IMPACT ON PROFITS OF A REDUCTION OF COMMERCIAL TIME ON NETWORK CHILDREN'S PROGRAMMING.

There are two important deductions that are made from gross advertising revenues, and these must be considered before going on to see what kind of profit is generated by children's programming and before attempting to see what impact a reduction of commercial time might have.

The first deduction is quite simple and straightforward: it is a 15 percent commission paid to the ad agencies that place the advertising with the network or other broadcasting organization. This 15 percent commission is deducted from all gross advertising receipts. Although it is a cost, it is mentioned here because it is a cost directly associated with revenue, rather than a cost of programming or an operating cost.

The second deduction from advertising revenue is station compensation, and this a slightly more complicated deduction. Put simply, it is a deduction of up to 20 percent from all television network advertising and it is paid to affiliates and owned stations in the form of compensation to them for broadcasting network programs and network advertising.

A special station compensation formula is used to compute the payments made to affiliates, including the owned stations, for each hour of network programming the stations clear. The hours are weighted in proportion to approximate audience levels at different time periods:

Name	Hours	Days	Weighting
A-Hour	6-11 p.m.	Mon-Sun	100 percent
C-Hour	5-6 p.m. 4-6 p.m.	Mon-Fri) Sat-Sun)	50 percent
E-Hour	10 a.m.-5 p.m. 8 a.m.-1 p.m.	Mon-Fri) Sat-Sun)	35 percent

NB: Special compensation arrangements are made for time periods not listed above.

After a month of programming network material has passed, the number of hours of each type is added up, multiplied by its weighting factor and converted to what are known as "equivalent A-Hours." The amount paid to a particular station in compensation depends upon the multiplication of these equivalent A-Hours by a factor which is approximately one-third the A-Hour rate. The A-Hour rate is a price per hour established by the network for each affiliate. The price approximates to the rate the station could get if the station were selling the air-time locally. This rate depends upon the prime-time audience the local station has managed to obtain. If the station were selling the air-time locally, however, the station would incur program and selling costs. To reflect the reduced costs and risks, affiliates and owned stations are compensated at one-third of their A-Hour rate. The rates are published annually by the networks in their rate guides. For the 1970-71 season, the <u>NBC Television</u>

Network Rate Guide listed WNBC-TV in New York City, a wholly owned station, as having an A-Hour rate of $10,000, while WBZ-TV in Boston was assessed at $3,450, WFBM-TV in Indianapolis was $1,625, and KMOT-TV in Minot, North Dakota, was $125. The total for all 217 NBC affiliates was nearly $166,000.

Supposing that an affiliate's A-Hour rate is $1,500, and it clears the following hours in a given month:

Name	Cleared	Factor	Equivalent A-Hours
A-Hours	80	100 %	80
C-Hours	10	50 %	5
E-Hours	100	35 %	35
		TOTAL :	120 A-Hours Cleared

Station compensation is then worked out according to the following formula:

Equivalent A-Hours Cleared X A-Hour Rate X 1/3 = Total Compensation.

This becomes :

$120 \times \$1{,}500 \times \frac{1}{3} = \$60{,}000$ a month, or more simply:

$120 \times \$500 = \$60{,}000.$

Because the television network pays AT&T for inter-connection and feeding the program by lines to the affiliates transmitter, most affiliates agree to forego the first 24 A-Hours of compensation. If the affiliate provides its own inter-connection and line facilities, it is fully compensated. Continuing with the above example, the affiliate, assuming that it was fed by AT&T land line paid for by the network, would be assessed at $12,000 a month for this service and would receive $48,000 in compensation for transmitting the network's programs and advertisements. Beginning in 1970, however, the affiliates receiving signals from AT&T had a further 6.5 percent subtracted from their total compensation to help the networks offset increased AT&T line costs.

So the basic station compensation formula and the one used for the owned stations is:

93.5 percent of Equivalent A-Hours - 24 A-Hours x A-Hour Rate x $\frac{1}{3}$

NB: ABC, rather than complicate the compensation formula, decided to reduce the affiliates hourly rates rather than deduct the 6.5 percent land lines price increase from the station compensation formula.

Station compensation and clearances are the twin examples of the intangible nature of a network. A network exists as a result of its contracts with its owned stations and affiliates. Without the affiliates and without network program clearances, there is no network. Without affiliate clearances, programs cannot attain large audiences. Without large audiences, network programs cannot be sold.

For the purposes of the computations that follow, and for the sake of simplicity, station compensation for network children's programs will be assessed at 10 percent of gross revenues. This is probably somewhat high, but it brings total deductions from gross advertising receipts to 25 percent--15 percent agency commission and 10 percent station compensation--and makes things easier to understand. However, fully 20 percent of the total amount paid in station compensation goes to the 5 owned stations that belong to the broadcast groups of the 3 networks, so a fifth of the compensation money stays within the family.

Profit contributions of children's television programs

The reason for having a maximum of 16 minutes per hour (12 minutes for the networks and 4 minutes for affiliate sold commercials, station ID's and billboards, with 8 commercial interruptions in each hour) of non-program material in children's television is because it has not hitherto been treated as a separate programming segment, but has been lumped together with daytime television. Historically, daytime television has had much more advertising per hour than prime-time television. Generally speaking, however, few children's programs carry the maximum number of advertising minutes throughout the year. The familiar pattern that has developed is that the programs tend to be fully booked by advertisers during the fourth quarter--October through December--and 80 percent booked for the rest of the year. Public service announcements and/or promotional material usually fill unsold commercial minutes.

Bearing all of this in mind, the profit effects of a number of well known children's programs will be examined:

Captain Kangaroo, a one-hour program presented by CBS TV network from 8-9 a.m. Monday through Friday, grossed $6,591,800 in 1970 from a total of 2,010 minutes of advertising. Thus the average price per minute was $3,279, and the average number of network advertising minutes per show was 8--considerably fewer than the 12 network minutes that will be allowed starting January, 1973. In addition, the show carried local commercials sold by the affiliates carrrying the show. The weekly show budget for Captain Kangaroo in 1970 was $75,000, or $3,900,000 for the year. The profit contribution of this show can now be computed:

Gross Advertising Receipts :	$6,591,800
Deductions : 15 percent agency commission; 10 percent station comp.	1,650,000
Net adv. revenue	4,941,800
Deduct annual show costs	3,900,000
Profit effect	1,041,800

Effect of reducing commercial time

There have been suggestions that the amount of commercial time in children's television should be reduced. The purpose of this next section is to explore the financial impact on the networks of a reduction in commercial time in children's programming. In the cases that are examined below, the networks can still make a profit from children's shows that have 8 minutes, as distinct from 12 minutes, of network advertising per hour, even if no change in price per minute is assumed. From January 1, 1973, the networks will permit only 8½ muntes of network sold commercials in children's weekend programming.

As we have seen, Captain Kangaroo averaged only 8 network commercial minutes per show in 1970, even though a maximum of 12 network commercial minutes are allowed under the NAB Code. However, it might be worthwhile to examine the financial impact on this show if a one-minute commercial were taken away per day, to make an average of 7 network sold commercial minutes per show. In 1970 the average per minute price of a 1-minute network commercial in Captain Kangaroo was $3,279, which has to be multiplied by the 260 weekday programs in the year, to give a total of \$852,540. We can now measure the financial impact of this situation as follows:

Gross advertising receipts in 1970 :	\$6,591,800
Less cost of 1-minute commercial per day for 260 days	852,540
	\$5,739,260
Deductions: 15 percent agency Commission: 10 percent station compensation	1,434,814
Net advertising revenue	\$4,304,445
Deduct annual show costs	3,900,000
Profit effect	\$ 404,445

If two minutes of advertising were taken away from the program and making the same assumption about price, theoretically Captain Kangaroo would go into a loss position.

However, the assumption that advertising prices would remain the same if the number of advertising minutes were reduced is probably an unrealistic assumption. It is much more likely that there would be some upward movement in price since advertisers would be willing to pay more for greater relative exposure due to a reduction of advertising clutter. It is assumed that clutter reduces advertising prices, so less clutter should increase prices.

CBS has threatened to terminate production on Captain Kangaroo more than once because of claims that the show was losing money.

The show certainly made money in 1970 and probably made money in 1971 because of its reputation, among advertisers, as a "quality" program for young children. Captain Kangaroo was probably put into its particular time-slot by CBS because of NBC's leadership in the ratings at that time of day with its long running news magazine program, The Today Show. Consequently CBS programmed alternative viewing for the pre-schoolers, a group that is normally ignored by the commercial network on weekdays. Even so, if CBS programmed a re-run of a show like Lucy in the 8 to 9 a.m. slot, the network would probably make a far higher profit contribution than it does from Captain Kangaroo.

A number of popular cartoon programs from all 3 networks, will now be examined:

Hot Wheels, a half-hour Saturday morning cartoon on ABC, grossed $1,697,600 in 1970 from 265 minutes of advertising. The average price per minute was $6,406, and there were an average of 5 network commercial minutes per show.

The profit contribution of this cartoon show can be computed as follows:

Gross adv. receipts	:	$1,697,600
Less 25 percent deductions	:	424,500
Net adv. revenue		1,273,100
Deduct ann. show costs (11,000 x 52)		572,000
Profit effect		701,100

The contribution to ABC profits of this show in 1970 was $701,100. Consequently there is room to give up 1-minute of advertising per half-hour, even if the average price per minute remains the same:

Gross advertising receipts in 1970 :	$1,697,600
Minus cost of reduction in commercial time assuming price per minute remains the same ($6,406 x 52)	333,112
	$1,364,488
Deductions: 15 percent agency Commission: 10 percent station compensation	341,122
Net advertising revenue	$1,023,366
Deduct annual show costs	572,000
Profit effect	$ 451,366

CBS, as we shall see later, has traditionally been the winner of the contest to attract vast numbers of child viewers on Saturday morning and much of its 1970 schedule for children remains intact in the current season. One of the favorites, Scooby Doo Where Are You? attracted gross advertising revenue of $3,200,500 in 1970 from a total of 307 minutes of advertising. The average price per minute of commercial in this half-hour cartoon cost $10,425 in 1970, and the show carried an average of almost 6 minutes of network commercials for each screening:

Gross advertising receipts	:	$3,200,500
Less duductions of 25%	:	800,125
Net advertising revenue	:	2,400,375
Less annual show costs ($11,000 x 52)	:	572,000
Annual profit contribution	:	1,838,375

If two minutes of commercials were deducted for every week during the year, and assuming no change in average price per minute, the profit contribution of the show would be as follows:

Gross advertising receipts in 1970 :	$3,200,500
Minus cost of reduction in commercial 2 minutes per week for 52 weeks ($10,425 x 52)	1,084,200
	$2,116,300
Deductions: 15 percent agency Commission: 10 percent station compensation	529,075
Net advertising revenue	$1,587,225
Deduct annual show costs	572,000
Profit effect	$1,015,225

NBC has done poorly in the weekend children's television ratings in recent years. One of the network's most profitable shows in 1970 was H.R. Pufnstuf, a half-hour cartoon that grossed $2,235,100 from 294 minutes of advertising. The average price per minute was $9,750, and the network carried an average of 5½ minutes of advertising per show:

Gross adv. receipts :	$2,235,100
Less deductions of 25%	558,775
Net advertising revenue	1,676,325
Less annual show costs ($11,000 x 52)	572,000
Annual profit contribution	1,104,325

If one-and-a-half minutes of advertising were deducted for every week during the year--in order to bring the amount of advertising down to 4 minutes per half-hour--and assuming no change in average price per minute, the profit contribution of the show would be as follows:

Gross advertising receipts in 1970 :	$2,235,100
Deduct $1\frac{1}{2}$ minutes per week for 52 weeks--$14,625 x 52	760,500
	1,474,600
Deductions of 25 percent	368,650
Net advertising revenue	1,105,950
Less annual show costs	572,950
Profit effect	533,000

American Bandstand, presented by ABC, is a 1-hour or half-hour pop record show hosted and produced by Dick Clark. ABC has a contract with Dick Clark to buy 10 half-hour shows (when the program has to be cut short due to the Saturday afternoon football games), and 36 one-hour programs at a current cost of $17,000 per hour. Thus the total cost of the program for the season is $697,000. In 1970 the program grossed $2,841,800 from 464 minutes of advertising. The average price per minute was $6,124, and there were an average of just over 11 minutes of network commercial time per hour:

Gross advertising receipts :	$2,841,800
Less deductions of 25%	710,450
Net advertising revenue	2,131,350
Less annual show costs (41 x $17,000)	697,000
Profit effect	1,434,350

Assuming no change in average price per minute, this would be the impact on profit of a 3 minute reduction of commercials:

Gross advertising receipts in 1970 :	$2,841,800
Deduct 3 minutes per hour for 41 hours ($6,124 x 3 x 41)	753,252
	2,088,548
Deductions of 25 percent (station compensation and ad agency commission	522,137
Net advertising revenue	1,566,411
Less annual show costs	697,000
Profit effect	869,411

It might be interesting to look at the profit effect of the only regularly scheduled prime-time program aimed directly at children. Wonderful World of Disney, presented by NBC from 7:30 to 8:30 p.m. on Sunday. NBC buys 48 hours of programming from Disney, 20 originals at $250,000 each, and 28 re-runs at between $30,000 and $40,000 each. The total contract, therefore, is in the region of $6,120,000 for the year. In 1970 Wonderful World of Disney grossed $15,909,700 in revnue from 325 minutes of commercials. The average price per minute was $48,952 and the program carried an average of 6 minutes of advertising--in prime-time the networks usually carry 6 minutes of network advertising per hour, or 7 minutes in movies. The profit contribution of this program in 1970 was:

Gross advertising receipts	:	$15,909,700
*Less deductions of 33%		5,303,233
Net advertising revenue	:	10,606,467
Less annual show costs		6,120,000
Profit effect		4,484,467

*Higher deductions because the program is in prime-time when station compensation increases.

While it is generally agreed that the networks can make money on cartoon shows, which have a broad appeal among 2 to 12 year olds, the networks fear that they might lose money if they attempt to diversify programming or attempt to program for a specific age group, say the 6 to 9 year old, or the 12 to 14 year olds. This clearly relates to the point made earlier that ratings determine revenues, and it might be helpful to take a look at the latest census data dealing with the number of television households and the number of children under 12 in such households:

Estimates of U.S. Households

September 1, 1971

	Total Households 000's	Total Households %	TV Households 000's	TV Households %	TV Households in % of Total Households
Total U.S.	64,850	100	62,100	100	96
Household Size					
1-2			28,090	45	
3-4			20,870	34	
5 or more			13,140	21	
Presence of Non-Adult					
None under 18			32,260	52	
Any under 18			29,840	48	
Any under 12			22,990	37	
Any under 6			14,530	23	
Any aged 6-11			15,320	25	
Any aged 12-17			15,400	25	

The economics of network television tend to lead a network into a programming policy of trying to attract the maximum number of people to as much of the programming as possible. Naturally there are certain exceptions like news and public affairs which the networks and the licensees feel that they must program in order to fulfill their public interest obligations. The table above shows that there is a child under 6 in 1 in 4 television households which means that if a network decides to program for pre-schoolers the audience is fragmented. One in 3 television households have one or more children under the age of 12, so far from being a desirable audience commercially the children tend to get their programs on Saturday and Sunday mornings, when adults don't want to watch anyway, with some all-family shows in the early evening, when parents will usually allow their children to watch for awhile before going to bed. By programming for all the family, a network hopes to keep the parents as viewers once the children have gone to bed.

Because children are not regarded as consumers in the full sense of the term--that is having the financial power to buy a good that is advertised, many leading companies prefer not to advertise to children at all. Those that do advertise do so in the belief that the child has some influence over the buying habits of his or her parents. Because children are not regarded as full consumers, advertising space in children's television is sold cheaply--from \$1.25 to \$2 per thousand homes, against a price of \$3.50 to \$4.50 per thousand in prime-time television, and up to \$7 for a national football game.

All of these factors militate against diversified programming for children and the result has been the weekend diet of cartoon material

The Ratings

A glance at some of this season's program ratings for network children's shows will tell us what programs children are watching:

FALL 1971 THREE NETWORK SATURDAY DAYTIME SCHEDULE

Time	NBC	CBS	ABC
8:00 AM	DR. DOOLITTLE RATING: 1.8 SHARE: 24	BUGS BUNNY RATING: 4.4 SHARE: 46	JERRY LEWIS RATING: 1.6 SHARE: 21
8:30 AM	WOODY WOODPECKER RATING: 2.1 SHARE: 17	SCOOBY DOO RATING: 8.0 SHARE: 55	ROAD RUNNER RATING: 3.2 SHARE: 25
9:00 AM	DEPUTY DAWG RATING: 3.6 SHARE: 19	GLOBETROTTERS RATING: 8.6 SHARE:43	FUNKY PHANTOM RATING: 6.1 SHARE: 32
9:30 AM	PINK PANTHER RATING: 6.3 SHARE: 26	HELP! RATING: 9.0 SHARE: 37	JACKSON 5 RATING: 8.2 SHARE: 34
10:00 AM	BARRIER REEF RATING: 4.0 SHARE: 15	PEBBLES AND BAM BAM RATING: 13.2 SHARE:49	BEWITCHED RATING: 2.3 SHARE: 9
10:30 AM	TAKE A GIANT STEP RATING: 2.3 SHARE: 9	ARCHIE RATING: 13.4 SHARE:49	LIDSVILLE RATING: 9.1 SHARE: 34
11:00 AM		SABRINA RATING: 14 SHARE: 53	CURIOSITY SHOP RATING: 6.0 SHARE: 23
11:30 AM	THE BUGALOOS RATING: 4.0 SHARE: 16	JOSIE RATING: 11.2 SHARE:44	
12:00 PM	MR. WIZARD RATING: 3.4 SHARE: 14	MONKEES RATING: 10.8 SHARE:41	JONNY QUEST RATING: 5.7 SHARE:24
12:30 PM	THE JETSONS RATING: 6.3 SHARE: 24	YOU ARE THERE RATING: 6.3 SHARE:24	LANCELOT LINK, SECRET CHIMP HOUR RATING: 5.3 SHARE:22
1:00 PM	LOCAL TIME	CBS CHILDREN'S FILM FESTIVAL RATING: 5.7 SHARE:21	
1:30 PM			

SOURCE: Nielsen /for a Sat. Sept., '71

For the fourth quarter of 1971, the following viewing pattern emerged:

	NBC	CBS	ABC
10:00 a.m.	Barrier Reef Av. Share : 14	Pebbles and Bam Bam Av. Share : 35	Bewitched Av. Share : 36
10:30 a.m.	Take a Giant Step Av. Share : 12	Archie's TV Funnies Av. Share : 47	Lidsville Av. Share : 32
11:00 a.m.		Sabrina The Teenage Witch Av. Share : 54	Curiosity Shop Av. Share : 24
11:30 a.m.	The Bugaloos Av. Share : 13	Josie and the Pussycats Av. Share : 47	
12:00 p.m.	Mr. Wizard Av. Share : 15	The Monkees Av. Share : 40	Jonny Quest Av. Share : 24
12:30 p.m.	The Jetsons Av. Share : 23	You Are There Av. Share : 28	Lancelot Link, Secret Chimp Hour Av. Share : 22
1:00 p.m.	Local Time	CBS Children's Film Festival Av. Share : 28	American Bandstand Av. Share : 27

Source : Nielsen Seasonal Average Shares/ Nielsen Nationals.

Two of the networks, ABC and CBS, program for children on Sunday mornings, but not competitively:

SUNDAY DAYTIME/NIELSEN NATIONAL, 9/12/71 through 10/10/71.

		ABC (5-week average)			CBS (5-week average)		
Time	Program	Rating	Share	Homes (000)	Rating	Share	Homes (000)
9:00 a.m.	Tom and Gerry				3.8	29	2,360
9:30 a.m.	Sabrina and the Goolies				4.8	26	2,980
10:00 a.m.	Red Dragon	5.0	27	3,110			
10:30 a.m.	Double-deckers	5.9	29	3,660			
11:00 a.m.	Bullwinkle	5.7	27	3,540			
11:30 a.m.	Make a Wish	5.8	27	3,600			

The tables above are a good indication of what children have been watching. One rating point equals 600,000 homes, so if a network gets a rating of 10.00 that translates to 6 million homes tuned in to that particular program. If the program is being sold at $2 per thousand homes the advertising rate for a 1 minute commercial would be $12,000. The share is the percentage of the homes where the television is turned on that are tuned in to your particular network. Therefore if you have a share of 55 it means that 55 percent of the homes with a set in use at that particular time are tuned in to your program.

We can see from the ratings tables that the live programs introduced this season in order to diversify the regular children's television diet of cartoons, namely Take a Giant Step on NBC and Curiosity Shop on ABC, fare badly against the cartoon competition of Archie, Sabrina, and Josie on CBS, which become the most popular programs for children along with Pebbles and Bam Bam, another CBS offering. When CBS moves to live or diversified (some would say "quality") programming at 12:30 p.m. with You Are There and CBS Children's Film Festival, both shares and ratings fall dramatically. This viewing trend has led to the belief by some network executives that children's television suffers from Gresham's Law, i.e. that bad programming drives out good programming. However, it is possible to argue that Curiosity Shop, with 3.6 million homes tuned in, and You Are There, with an even higher rating, have proved to be successful diversified and age specific programs, but some have not.

Some unprofitable diversified children's programming.

We can now take a took at how some of the diversified programming fared financially on one of the networks, NBC, which claims to be the first television network to attempt diversification in its children's schedule.

Hot Dog, a half-hour live-action and animated show presented for children on the NBC Television Network in the 1970-71, was an informational type program which asked and answered the questions why or how. For example, the program asked and answered such questions as how toothpaste got into tubes, and why a lead pencil writes. The show featured such celebrities as Woody Allen, and a number of the Laugh-In cast; it won critical acclaim and was awarded a Peabody. However, the show was a disaster financially and never attracted sufficient viewers to attract significant advertiser support. As a result, NBC sustained a loss of $431,000 on this program for the season:

HOT DOG

1970 - 1971 SEASON

QUARTER	PLAYS	% SOLD	(LOSS) (000)
1970 FALL START	3	100	(9)
1970 4TH QTR	10	97	(25)
1971 1ST QTR	11	40	(158)
1971 2ND QTR	13	58	(160)
1971 SUMMER	9	75	(79)
TOTAL SEASON	46	68	$(431)

Total Program Cost For The Series $697,000.

The per minute advertising rate for Hot Dog was between $5,400 and $5,900 in the fall of 1970, between $4,200 and $4,700 during the winter (first quarter of 1971), down to between $3,200 and $4,200 in the spring, and sinking to between $2,600 and $3,200 for the summer. The program never got more than a 26 percent share of the audience and sank as low as 10; its average share was around 18 to 20. Anything significantly below a 30 percent share usually loses money when the advertisers begin to switch their buying into the more popular programs.

This season's disaster on NBC seems to be Take a Giant Step, and network executives estimate that the show will lose $635,000 by the time the 1971-72 season ends:

TAKE A GIANT STEP

1971-72

QUARTER	PLAYS	% SOLD	(LOSS) (000)
1971 - FALL START	3	68	9
1971 - 4TH QTR	12	86	77
1972 - 1ST QTR	9	60	(250)
1972 - 2ND QTR	11	80	(337)
1972 - SUMMER	5	78	(134)
TOTAL SEASON	40	76	$(635)

Total Program Cost For the Series:	Originals	$1,070,000
	Repeats	10,000
		$1,080,000

In addition to the series program cost, the network spent $69,000 in development costs.

In addition to these losses, NBC has been losing money in recent years on its Saturday morning children's specials:

NBC CHILDREN'S SPECIALS

1969-70	# Plays	Program Costs (000)	Profit/(Loss) (000)
CHRISTOPER DISCOVERS AMERICA	1		
CHILDREN'S FESTIVAL AT LINCOLN CENTER	1		
THE BOSTON SPY PARTY	1		
HOT DOG	1		
THE INSIDE WORLD OF OUTER SPACE	1		
WILDERNESS ROAD	1		
A KID'S EYE VIEW OF WASHINGTON	1		
TOTAL	7	$525	$(413)
1970-71			
FOR THE LOVE OF FRED	2		
THE WONDERFUL WORLD OF JONATHAN WINTERS	2		
PETS ALLOWED	1		
RAPPING WITH BRINKLEY	1		
SUPER PLASTIC ELASTIC GOGGLES	1		
CIRCUSTOWN	1		
A DAY WITH BILL COSBY	2		
THE SOUNDS OF CHILDREN	1		
TOTAL	11	$584	$(63)

At first glance these losses sound horrendous, and should perhaps be placed in some kind of broader context. Diversified and age specific programs are not always financial disasters, as can be seen from the ratings of such programs as Curiosity Shop, You Are There, and CBS Children's Film Festival. Also, if age specific and diversified programs are placed into the cartoon programming schedule for children, then it is possible to carry some programming that breaks even, or loses money, because most cartoons make a high return on investment. In addition, there has been no long-term commitment so far to diversified and age specific programming by any of the commercial networks. Many programs take some time to win public acceptance, and other programs die because of the strong cartoon competition placed against them at a particular time period. All of these factors should be considered before reaching easy and general conclusions about the costs of age specific and diversified programs.

This problem of the economics of age specific and diversified programming for children will be examined again in the section of the report dealing with the economic implications of the ACT petition.

A new program for pre-schoolers

Beginning in February, 1972, NBC introduced a new half-hour program for pre-schoolers entitled Watch Your Child/The Me Too Show, to be shown Monday through Friday. Gross costs for the first 29 weeks of programs come to $1,152,500, broken down as follows:

Original run--20 weeks at $52,000 a week =	$1,040,000
Repeat run--9 weeks at $12,500 a week	112,500
Total cost	1,152,500

This new project is being organized as a special service to the NBC Television Network, and each program will be fed on network lines at 1 p.m. to 1:30 p.m. in order that each station can tape the program for local broadcast at a suitable time. NBC is underwriting the costs of production and is also taking on the job of distributing the programs nationally to owned stations and all affiliates (assuming that they agree to take the program). Each of the NBC owned stations is committed to take the program, but affiliate response has been slow--by Friday, February 11, 1972, just 3 days before the first airing of the show, only 19 stations had agreed to program it : Five NBC Owned Stations, WNBC, New York; WMAQ, Chicago; KNBC, Los Angeles; WRC, Washington, D.C.; WKYC, Cleveland; and 14 affiliates in Hartford, Connecticut; Philadelphia; Pittsburgh; Providence, Rhode Island; Wheeling, West Virginia; Fort Wayne, Indiana; Lexington, Kentucky; Jackson, Michigan; Clarksburg, West Virginia; North Platte, Nebraska; Parkersburg, Virginia; Paducah, Kentucky; Tucson, Arizona; Fort Worth, Texas. Unfortunately, this program seems doomed since it is not offered during network time.

The fee for this children's program is 30 percent of the station's network hourly rate for two-and-a-half hours of programming a week, which is thought to be modest. If half the network affiliates agree to carry the program--about 100 stations-- then the network will cover its costs. If not, NBC will lose, and the amount will depend on the degree of acceptance. The network will not sell commercials in the show, but the affiliates can sell 4 minutes of commercials--2 at the beginning of the program and 2 at the end.

Profits from children's programming.

Having gone into some depth in this section to explain the possible profits and possible losses to networks in the area of children's programming, it might be useful to sum up by discussing, in very general terms, the overall profits made by the networks in 1970 in the area of children's programming, and to attempt to assess the overall impact of a reduction of commercial time in such programming.

The only network to make a filing on the amount spent on children's programming in a given season was ABC. This network, in its filing on the ACT petition, claimed that it would spend \$7 million on weekend children's programming in the 1971-72 season. Because BAR provides the estimated gross revenue of weekend children's television shows, it is possible to generate the overall profit effect of children's programming on ABC, a company that has lost money on its network operations for the last 10 years, although it has been profitable on its overall broadcast operations because of the highly profitable 5 owned and operated television stations. Excluding children's specials, ABC's gross revenues from children's weekend programming in 1970 amounted to \$18,974,800. After agency commission and station compensation, the net revenues came to an estimated \$14,231,100. If program expenses in that year are taken at ABC's admitted current level of \$7 million, then the network made a profit contribution of

$7,231,100 in 1970.

However, when these figures were put to ABC business affairs executives, they said that they did not include the program costs for American Bandstand and Make a Wish in the filing to the FCC, but even with these included a considerable profit was still made by ABC from weekend children's programming in 1970, even though the network as a whole lost money. ABC executives did, incidentally, admit that the network made a profit on children's programming.

In 1970 ABC carried 3,411 minutes of advertising at an average price of $5,562 per minute. If this commercial content were reduced by one-quarter, or 852 minutes, and assuming no change in the price per minute of commercial time, the gross advertising reduction to ABC would amount to $4,738,824, or a net reduction of $3,554,118 (making allowances for station compensation and advertising agency commission), leaving the network with a profit contribution in the region of $3.5 million.

Making an estimate of CBS's weekend programming costs for children should not be difficult since it is possible to use ABC's costs as a guideline. Because CBS claims to use more expensive animation techniques than ABC, an estimate of between $8 million and $8,500,000 might be what CBS pays for its weekend programming for children. Again this excludes specials and it also excludes Captain Kangaroo, which has been examined separately. In 1970, CBS grossed $33,452,800 from 4,105 minutes of advertising, an average price of $8,149 per minute. After deductions, CBS netted

\$25,089,600. When program expenses are taken away from this figure, the network is left with a handsome profit contribution of over \$16.5 million--perhaps a far higher rate of profit than the network makes on other types of programming.

Again assuming a 25 percent reduction in commercial content, and further assuming no change in average price, CBS would lose 1,026 minutes of advertising for a gross reduction of \$8,360,874, which would result in a net reduction of \$6,270,656. But this would not impair the network's overall profitability in the area of children's programming because CBS would be left with an overall profit contribution of \$10 million.

NBC's weekend children's programming probably costs around \$7,000,000 but NBC's gross advertising revenues, again excluding specials, amounted to \$14,269,300. After deduction for agency commission and station compensation, estimated net advertising revenues of \$10,701,975 remained. Consequently, a profit effect of just over \$3.7 million was returned by NBC's weekend children's programming in 1970, but after administrative expenses the overall profit was probably very small. NBC executives admitted that the network made a small profit from children's programming in 1970, but claim that profits have fallen since because of losses with programs like <u>Hot Dog</u> and <u>Take a Giant Step</u>, and some of the Saturday morning children's specials. In 1970, NBC's average minute on Saturday morning cost \$5,777, and the network carried a total of 2,470 minutes of advertising. If this were reduced by a quarter, the network would lose a total of 617 minutes of advertising at a gross cost to the network of $3,564,409, or $2,673,307 after deductions. So NBC's profit would be reduced to $1 million, assuming that price per commercial minute remained the same and there was no change in its relative competitive position. With administrative costs the network would barely break even.

Throughout the computations above, an unrealistic assumption has been made--that is, that price per minute would remain the same if the amount of commercial content in children's programming were reduced. As we have seen, relatively few advertisers account for most of the advertising revenue derived from children's programming, and these advertisers have a fairly inelastic--that is a reasonably fixed--demand for the available commercial positions in children's programming. For example, the top 3 advertisers--Kellogg, Mattel, and General Mills--account for 30 percent of the total revenue; the top 8 advertisers account for 50 percent of the revenue; and the top 23 advertisers account for 75 percent of the revenue derived from children's programming. Consequently, in an oligopolistic situation where relatively few advertisers are competing for time offered by 3 suppliers, prices will increase if a situation of scarcity is created. Ratings still determine revenues, and the leader of the ratings race will continue to attract more advertising revenue. There might be some benefits for the less popular programs, like Take a Giant Step: those advertisers who are forced out of the most popular shows when prices go up as the number of commercial minutes is reduced might elect to buy into low rated programs rather than be forced out of children's network television completely.

CBS, the most profitable network so far as children's programming is concerned, has expressed doubts about the plan to reduce the non-programming content in children's television from 16 to 12 minutes from January 1, 1973. Of these 12 minutes, 8½ will be sold as network commercials, the other 3½ will be divided between affiliate sold commercials, station ID's, and billboards. CBS's main fear seems to be that the two opposition networks, ABC and NBC, will pick up some of the revenue that CBS feels it is going to lose. Alternatively, CBS feels that unless the commercial time reduction is applied across the board, and not just at weekends, there will be some revenue seepage out of network children's television into spot children's television, and particularly into the hands of the independents, whom, many network executives feel, make a high profit out of old and often tasteless cartoon shows that they program in the mid to late afternoons.

Although this is a distinct possibility, the commercial viability of children's programming looks secure after the reduction in commercial time is put into effect January 1, 1973, when the networks will be selling 8½ commercial minutes an hour instead of the current 12, especially since for 2 of the 3 networks children's television provides a particularly high rate of return.

A possible second stage is to reduce the amount of commercial content in all children's programming, Sunday through Saturday, that is if the definitional problem of what exactly is children's programming can be sorted out.

Finally, regarding the reduction of commercial time in weekend children's programming it seems probable that the networks will suffer no appreciable loss of revenue in the short to medium term.

There might be a fallback when the rule becomes effective, but this will be quickly made up as advertising prices rise to a new level. Most major advertisers will remain in children's television for the simple reason that they have no other place where they can advertise as cheaply and as effectively. Furthermore, if the networks are to really minimize the effects of this self-imposed reduction of commercial time, they have got to sell children's programming more effectively and persuasively.

5. THE ECONOMIC IMPLICATIONS TO THE NETWORKS OF THE ACT PETITION

The petition from Action for Children's Television specifically states: (a) That there shall be no sponsorship and no commercials on children's programs; and (b) that each station shall provide daily programming for children, and in no case shall this be less than 14 hours a week as part of its public service requirement. In addition, the petition further states that programming shall be divided into three child viewing groups: aged 2-5; aged 6-9; and aged 10-12.

Amount of children's programming.

Using the current television season, and counting only those children's programs presented by the networks, ABC presents 6 hours of children's programs on Saturday and 2 hours on Sunday; CBS presents 6 hours of children's programs on Saturday, 1 hour on Sunday, and 5 hours Monday through Friday; NBC presents 5 hours of children's television on Saturday, 1 hour on Sunday (Wonderful World of Disney), and 2½ hours during the week. These are regularly scheduled programs and exclude specials and occasional children's programs. Therefore the bulk of regularly scheduled network children's television comes from CBS with a total of 12 hours a week, followed by NBC with 8½ hours, and ABC with 8 hours. To ask all 3 networks to increase their programming to 14 hours a week would require additional annual expenditure of something like \$2.5 million for CBS; \$4.3 million for NBC; and \$5 million for ABC. This assumes that the new programming would be original and not merely re-runs of old cartoons.

For each and every station, both independents and affiliates, additional programming would involve them in additional expenditure with little chance to recoup programming expenses, since the current market situation in weekday children's television does not make economic sense if all stations are competing for the same audience at the same time periods. A system has developed whereby one station in one market becomes known as the "children's station" by programming cartoons in the afternoons, and often in the mornings. Stations that program for children are often the independents--WPIX in New York, and WTTG in Washington, D.C.--and these stations often make a handsome profit from programming to children--programming that consists mostly of cartoons. Stations like WPIX and WTTG program more than 14 hours a week to children, although ACT would hardly approve of the program content because it lacks diversity and probably represents what they consider to be the worst type of television.

Although the ACT petition's request for 14 hours of programming per week from each station would have an immediate and costly impact, it must again be stressed that children's programming can be a long-term investment in the sense that the same programs--like Sesame Street and The Electric Company for example--can be shown many times as the child population is renewed, and thus costs can be amortized over the long-term. Disney proved that an investment in so-called quality films for children had a long-term payoff because many of his early films make a handsome profit every time they are released on the cinema circuit. It is for this reason that the Disney Company refuses to sell the rights to its films to the networks, all of whom would be only too interested in buying them. Disney's movie executives figure that their primary audience turns over every 7 years; as each crop of children grows up, a new one is ripe for the same movies.

Loss of revenue

If there were no sponsorship of children's programs whatsoever it would result in a serious financial loss to all 3 networks. In 1970, as we have seen, the 3 networks earned between them gross weekend revenues of almost $75 million from children's programming--or $56,250,000 net. If this amount of money were wiped out, the networks would have serious problems in recouping. The only way they could do this would be to increase the prices in prime-time and daytime television in order to sustain the losses in children's television, or alternatively drop children's programming completely. Unlike the ban on cigarette advertising, a ban on commercials in 14 hours of children's programming every week would be a total loss of advertising time, since the commercial minutes available in children's television would be taken away from the networks completely, whereas in the case of cigarette advertising one source of revenue was taken away but the supply of commercial minutes was not reduced--in other words, the time previously sold to cigarette advertisers could be (and was) sold to other buyers.

Underwriting and Insitutional Advertising

Two alternatives to the commercialism that currently exists in children's television are: 1. the possibility of underwriting the costs of children's television; and, 2. only allowing image or institutional advertising (not advertising that aims to sell a product) in children's programs.

If underwriting the costs of children's programs were to be encouraged, then presumably the big U.S. Corporations would be directly involved. Any companies wishing to reduce the commercialism in children's programming would help support the costs of such programming in return for a credit that would simply say: "This program has been brought to you with the help of grants from the following companies and foundations..." Although underwriting is part of an increasing trend in broadcasting, the trend has not reached the stage where it promises to reduce the amount of advertising aimed at children.

Currently, a very small percentage of any large company's total advertising budget is devoted to the second alternative, institutional advertising. One firm that spends all of its advertising on institutional advertising is Health Tex Inc., the clothing manufacturer, of New York City. This company spends $1 million a year in promoting its corporate image, and is one of the very few such business concerns that does this. The company's position is that it wishes to engender in the minds of parents a feeling that Health Tex is a responsible manufacturer of pre-schoolers clothing. Accordingly, it sponsored a children's special, Babar Comes to America, in prime-time on the NBC Television Network on Sunday, February 27, 1972, by spending $250,000 on advertising a moral theme. For example, one ad asked and answered the question: Why do we go to war? It ended by saying that it would be nice if we were all friendly towards each other. Although image advertising, like underwriting, is part of an increasing trend, normally no more than 5 percent of a company's total advertising budget is devoted to the promotion of a company image. Because of this, and lacking any encouragement, institutional advertising and/or underwriting, seem to provide no easy or simple answers to the problem of paying for children's television programs that have fewer commercials or are commercial-free.

Age specific programming

In addition to asking the networks and other television companies to give up a total of 112 minutes of advertising per week (this assumes that each hour of children's programming carries only 8 minutes per hour and currently the figure is much higher than this), ACT also asks that such programming be age specific. This means that children's programming would no longer be attractive as lead-in programming because the child audience would be fragmented. As we have seen, the latest U.S Census shows that 37 percent of the total TV households in this country have children under the age of 12; and 23 percent of the TV households have children under the age of 6. The economics of the commercial broadcasting system are geared to a mass audience--advertising revenues increase as more viewers tune-in, so any attempt to fragment an audience would have a serious impact on revenues, say the networks. One of the main reasons why much children's television lacks diversity, according to network executives, is because for any program to be economically viable it must attract viewers from 2-12 and treat them as a homogeneous group. In fact, children are a heterogeneous group. However, in a commercial system where numbers of viewers have to be supplied or sold to advertisers, the networks or program suppliers tend to maximize profits by lumping together several different audiences in an attempt to get a mass audience that is sufficiently attractive to advertisers that all commercial time is fully sold.

In order to ascertain what kind of financial impact age specific programming would have, it is possible to make certain assumptions and to calculate the revenue from programs directed towards fragmented audiences.

Assumptions:

1. That the network will provide age specific programs to the 3 age groups outlined in the ACT petition and that such age specific programming will not be in direct competition, for example ABC's programming for pre-schoolers will not be shown at the same time that CBS's and NBC's programming for this age group.

2. That such age specific programming will have fully sold commercial sponsorship of 6 minutes per hour.

3. That the bulk of children's programming from the networks continues to be shown on Saturday morning when a large number of children are available, and that the networks continue to have roughly the same audience rankings that they did in the 1971-72 season, i.e. CBS first, ABC second, NBC third.

4. That because age specific programs seem to be less popular than cartoons, there will be some audience loss--at least in the short run.

Unfortunately the above assumptions do not completely describe the real world. For example, many families have several children whose ages range from 2 to 12, and usually the older children dictate what the younger children will watch. This fact poses a threat to any age specific programming directed to pre-schoolers outside of school hours when an older brother or sister can demand that all the children watch something else. However, we have seen that Captain Kangaroo, a program for pre-schoolers, did make money for the CBS Television Network in 1970.

For the sake of the following analysis, children's Saturday programming is assumed to be the time period from 8 a.m. to 2 p.m.--a 6-hour period which is an extension of the current time schedule devoted to children's programming. Because of the assumption that there would be no competition between the networks for age specific audiences, this reduces seepage to a minimum:

	ABC	CBS	NBC
8:00 a.m.	Pre-school program Est. rating : 1.5	6-9 program Est. rating : 4.0	10-12 program Est. rating : 1.5
8:30 a.m.	Pre-school Est. rating : 3.0	6-9 Est. rating : 7.0	10-12 Est. rating : 2.0
9:00 a.m.	Pre-school Est. rating : 5.0	6-9 Est. rating : 8.0	10-12 Est. rating : 3.0
9:30 a.m.	Pre-school Est. rating : 7.0	6-9 Est. rating : 9.0	10-12 Est. rating : 5.0
10:00 a.m.	6-9 Est. rating : 2.0	10-12 Est. rating : 10.0	Pre-school Est. rating : 3.0
10:30 a.m.	6-9 Est. rating : 6.0	10-12 Est. rating : 10.0	Pre-school Est. rating : 3.0
11:00 a.m.	6-9 Est. rating : 6.0	10-12 Est. rating : 10.0	Pre-school Est. rating : 3.0
11:30 a.m.	6-9 Est. rating : 5.0	10-12 Est. rating : 11.0	Pre-school Est. rating : 3.0
12 noon	10-12 Est. rating : 5.0	Pre-school Est. rating : 6.0	6-9 Est. rating : 4.0
12:30 p.m.	10-12 Est. rating : 5.0	Pre-school Est. rating : 5.0	6-9 Est. rating : 5.0
1:00 p.m.	10-12 Est. rating : 5.0	Pre-school Est. rating : 5.0	6-9 Est. rating : 5.0
1:30 p.m.	10-12 Est. rating : 5.0	Pre-school Est. rating : 5.0	6-9 Est. rating : 5.0

The average ratings for the above are : CBS 7.5; ABC 4.6; NBC 3.5.

We will now further assume that the above programs are sold at a cost of $2 per thousand homes. We have already seen that a rating of 1.0 equals 600,000 homes, so the above average ratings equate to the following: CBS 4,500,000 homes; ABC 2,760,000 homes; NBC 2,100,000 homes. At a cost of $2 per thousand homes, the average per minute advertising rate for the 3 networks would be: CBS $9,000;

ABC $5,520; NBC $4,200. The gross advertising receipts for the 3 networks for an average Saturday morning would be: Average per minute advertising rate X number of minutes per hour X number of hours of programming. This would result in the following for CBS: $9,000 X 6 X 6 = $324,000 gross receipts for each Saturday morning, or $16,848,000 for the year. For ABC: $5,520 X 6 X 6 = $198,720 gross for each Saturday morning, or $10,333,440 for the year. For NBC: $4,200 X 6 X 6 = $151,200 gross for each Saturday morning, or $7,862,400 for the year. After payments for station compensation and advertising agency commission, these figures would net out at: CBS $12,636,000; ABC $7,750,080; NBC $6,000,000.

Since the above assumptions are reasonably conservative, in all probability CBS and ABC would make a profit, though NBC would lose, assuming that each network spent around $7 million a year, or less, on Saturday morning programming. However, 20 percent of the total amount paid in station compensation, is paid to the owned and operated television stations that belong to the same companies as do the networks, so even for NBC the loss would be minimal. If there were more than 6 minutes of commercials sold in age specific programming, and if such commercial minutes were sold at a cost of above $2 per thousand homes, then all 3 networks could then expect to make a fair return on investment in children's programming. Again, if such age specific programming were divided into 2 groups as distinct from 3 groups, say from 2 to 7 and from 8 to 12, then an even higher return could be expected.

The purpose of this discussion has been to show that it <u>might</u> be possible to program to age specific groups and also make money. In addition, it might behoove the networks and other broadcasting organizations to attempt to convince advertisers that they ought to support such age specific programming so as to expose children to new ideas and to new experiences.

Currently Public Broadcasting seems to be attempting to fill the breach caused by commercial broadcasting's lack of diversity in children's programming by airing such programs as Mister Roger's Neighborhood for young children, Sesame Street for pre-schoolders, and The Electric Company for the 6-9 year olds. Altogether Public Television provides 2 hours of programming for children Monday through Friday (ignoring repeats) for a total of 10 hours. There is also a ½ hour program Zoom, aired on Sundays at 7 p.m.

SUMMARY

This report has concentrated on analysing the situation as it exists, or as it is seen to exist in the minds of network executives. Later in this presentation a number of alternative actions will be explored and the economic implications of those alternatives will be analysed.

It should be said that it has never been contended that every segment of network programming should be profitable in and of itself; for example, many documentary programs lose money for the networks. Maybe some children's programming ought to be treated in this way. The networks have always been charged with a responsibility to present a diversified programming schedule, within the limitations of overall commercial viability. The networks claim that they need a fairly high rate of return on their capital if they are to be adventurous or experimental in their programming, especially in the areas of news and minority appeal programming (and perhaps age-specific children's programming is minority appeal programming). Traditionally profits from programs such as *The Tonight Show*, with host Johnny Carson, have been used to finance non-profitable programming, especially some of the ambitious coverage of moonshots and other costly public affairs specials that attract relatively little or no advertising revenue. In 1970, *The Tonight Show* earned gross advertising revenue of $31,451,600 from its 2,194 minutes of network advertising. After deductions of 15 percent agency commission and around 10 percent station compensation, the program earned around $23,625,000 net. After the program costs are taken from that figure--the show budget was around $100,000 a week in 1970, or $5.2 million for the year--The Tonight Show made a profit contribution to the NBC Television Network of around $18.5 million. This situation is repeated with other popular prime-time and daytime shows. Consequently, with shows that attract big audiences, there are opportunities to make large windfall profits. This also explains why television companies are continually tempted to satisfy mostly a mass appeal, rather than direct programs towards minorities or segmented audiences.

Finally, we should take a look at the financial rewards of the 3 networks by looking at their financial results, and also the results of their owned and operated stations. Using the FCC's Broadcast Financial Data for the last few years, the reported pre-tax profits of the networks and their owned stations can be traced from 1966, when revenues and profits reached a new peak:

> 1966 : Total pre-tax profits $187 million; the networks taken together made pre-tax profits of $79 million, and the owned stations made pre-tax profits of $110 million.
>
> 1967 : Total pre-tax profits $163 million; $56 million to the networks, and $107 million to the owned station.
>
> 1968 : Total pre-tax profits $179 million; $56 million to the networks, and $135 million for the owned stations.
>
> 1969 : Total pre-tax profits up to an all-time record of $226 million; $93 million to the networks, and $133 million for the owned stations.
>
> 1970 : Total pre-tax profits down to $167.4 million; $50.1 million for the networks, and $117.3 million to the owned stations.

The ABC Television Network has been losing money quite heavily since 1963, but this has been made up by profits from its 5 owned and operated stations, and the network claims to have "turned the corner" financially in 1971.

List of people interviewed

The following people have been interviewed in connection with the economic analysis of children's television:

Action for Children's Television

Peggy Charren
Evelyn Sarson

Boston University

Dr. Earle Barcus
Dr. Hy Goldin

Harvard Business School

Dr. Scott Ward

Columbia University Graduate School of Business

Dr. Donald Lehmann

Children's Television Workshop

Dave Connell, Executive Producer, formerly CBS Producer of *Captain Kangaroo*

Tom Kennedy, Vice President, Finance
Richard DeFelice, Director, Financial Planning
Dr. Edward L. Palmer, Vice President, Research

ABC Broadcast Group

James Duffy, President, ABC TV Network
Mark Cohen, Vice President, Planning/Business Analysis, ABC
Michael Eisner, Vice President, Daytime Programming, ABC

CBS Broadcast Group

Dr. Frank Stanton, Vice Chairman of the Board
Jack Schneider, President, CBS Broadcast Division
Robert Wood, President, CBS TV Network

Bill Tankersley, former Vice President, Rules and Standards
Oscar Katz, Vice President, Programming
Allen Ducovny, Director, Children's Programming
Dr. David Blank, Vice President, Economics and Research
David Wilkovsky, CBS Economist
Martin Ewenstein, CBS Economist
Norman Morris, CBS News and author of book on children's television
Richard Jencks, CBS, Washington, D.C.
Sarge Carleton, CBS, Washington, D.C.

NBC

Julian Goodman, President, NBC, Inc.
Tom Ervin, Executive Vice President
Don Durgin, President, NBC TV Network
Corrie Dunham, Vice President, Legal Services
Larry White, Vice President, East Coast Programming
Don Carswell, Vice President, NBC Business Affairs
Bill Dannhauser, Director, Business Affairs
Jerry Wexler, Director, Sales Pricing
Mike Weinblatt, Vice President, Talent and Program Administration
George Heinemann, Vice President, Children's Programming
Howard Monderer, NBC, Washington, D.C.

NAB

Stockton Helffrich, Director, NAB Code Authority
Jerome Lansner, Assistant Director

Television Information Office

Roy Danish

Federal Trade Commission

Dr. James Meehan, Economist

Broadcast Advertisers Reports

Pro Sherman, Vice President

National Institute of Mental Health

Dr. Eli Rubinstein and others

Office of Child Development, HEW

Lillian Ambrosino

Community Relations Service, Department of Justice

Mike Hernandez

Television Stations

Leavitt Pope, Vice President, WPIX-TV, New York City
Ray Hubbard, Vice President, Programming and Production, WTOP, Wash., D.C.
Daniel Gold, General Manager, WTOP-TV, Washington, D.C.
G. Richard Shafto, Ex-President, Cosmos Broadcasting Corporation
Harry L. Francis, Vice President, Meredith Broadcasting

Romper Room Enterprises

John H. Claster, Vice President

Advertising Agencies and Advertisers in Children's TV Shows

Al Fields, Vice President of Merchandising, Advertising, and Promotion, Health-Tex Inc.
Jack Jones, Senior Vice President, Marketing, Topper Corporation
Seymour Banks, Vice President, Leo Burnett Inc.
Steve Campbell, Vice President, General Foods
Arch Knowlton, Director, Media Services, General Foods
Frank Charlton, General Foods Lawyer
Richard A. Aszling Vice President, Public Relations/Public Affairs General Foods
Vernon Kanner, Vice President, Benton and Bowles
Les Towne, Vice President, Helfgott and Partners
Donald B. Miller, Chairman of the Board, Rumrill-Hoyt Inc.
Joseph M. White, M.D., Miles Laboratories

Newsweek

Lee Weston, Assistant to the Publisher

Grocery Manufacturers of America

Bart O'Hara
Charles Saffron

Toy Manufacturers Association

Aaron Locker

Communications Lawyers

Vic Ferrall, of Koteen, Burt
Bruce McDonald, of Kirkland, Ellis
Erwin Krasnow, of Kirkland, Ellis
Kenneth Cox, of Haley, Bader and Potts

October 24, 1974

SUMMARY

CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT
(DOCKET 19142)

The Children's Television Report, a policy statement designed to clarify broadcasters' responsibilities in programming and advertising aimed at children, was today adopted by the Federal Communications Commission

The Report establishes the following policies:

-- Television stations must provide a reasonable amount of programming for children and a significant portion of this programming must be educational or informational in nature.

-- Children's programming should make some provisions for the special needs of the pre-school child.

-- Children's programming should not be confined solely to weekends.

-- The level of advertising should be reduced to accord with reforms recently instituted by the National Association of Broadcasting, whose TV Code standards limit non-program material on children's programs to 9 1/2 minutes per hour on weekends and 12 minutes per hour on weekdays, beginning January 1, 1976. (During calendar year 1975 the limit will be 10 minutes per hour on weekends and 14 minutes per hour during the week)*

-- "Host selling" and other sales techniques that blur the distinctions between programming and advertising should be avoided.

-- A clear separation between program and advertising content should be made.

The Report is the end product of a wide-ranging inquiry into children's programming and advertising practices instituted by the Commission on January 26, 1971.

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* Similar standards have been set by the Association of Independent Television Stations (INTV) except that on weekends, during calendar 1975, the level will be 12 minutes per hour.

Television stations, the Report stressed, "clearly have a special obligation to serve children---Further, because of their immaturity and special needs, children require programming designed specifically for them...Educational or informational programming is of particular importance." This "bears a direct relationship to the licensee's obligation to operate in the public interest."

Although it did not adopt rules specifying a set number of hours of children's programming to be presented, the Commission warned that it expected stations to make "a substantial effort in this area."

The Commission did not adopt ACT's proposals that would have banned all advertising from children's television, required specific amounts of children's programming at stated time periods, and eliminated all mention of brand names on children's programs. (ACT: Action for Children's Television)

The Commission rejected ACT's proposal to eliminate all commercial sponsorship on grounds that this could have "a very damaging effect on the amount and quality of such programming... Moreover, it seems unrealistic on the one hand to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task." However, the Report states, "the current levels of advertising are in excess of what is necessary to provide programming serving the public interest."

NAB's and INTV's new time standards for children's shows were commended by the Commission as "actions...which reflect a responsive and responsible attitude on the part of broadcasters. We are willing to postpone direct Commission action, therefore, until we have an opportunity to assess the effectiveness of these self-regulatory measures. If it should appear that self-regulation is not effective in reducing the level of advertising, then _per se_ rules may be required."

"Self-regulation preserves flexibility and an opportunity for adjustment which is not possible with _per se_ rules," the Report said. "In the final analysis, the medium of television cannot live up to its potential in serving America's children unless individual broadcasters are genuinely committed to that task."

The Commission's renewal form will be amended to elicit more detailed information from broadcasters on children's programs and the advertising on those programs. "The broadcast of more than the amount of advertising proposed by the NAB and the INTV after January 1, 1976, may raise a question as to whether the licensee is subordinating the interests of the child audience to his own financial interests."

Licensees will be expected to eliminate practices which take advantage of the immaturity of young viewers. Advertising on children's shows should be evaluated with great care, and licensees should refrain from broadcasting material which, when directed to children, is unfair, deceptive, or otherwise inconsistent with their public service responsibilities.

The proceeding (Docket 19142) will be kept open, to enable the Commission to review and evaluate the anticipated improvement in programming and advertising.