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LESSONS IN REGULATING INFORMATION FLOW: THE FCC'S WEAK TRACK RECORD IN INTERPRETING THE PUBLIC INTEREST STANDARD

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Since Congress' initial regulation of broadcasting in 1927, broadcast licensees have been required to perform according to the public interest. The Federal Communications Commission has defined the "public interest" to include requirements that licensees provide public issues programming. Recently, much of a complex regulatory system has been abandoned, and further deregulation of broadcast programming is being considered. This deregulation has added significance because of the new communications technologies that are emerging. Professor Chamberlin analyzes the attempted regulation of issue-oriented programming since 1927, focusing particularly on the period from 1960 to the present. The major regulatory principles of public issues programming are discussed, as are the efforts to dismantle this system. Professor Chamberlin concludes by providing recommendations for any new regulation of public issues and information programming.

For nearly fifty years, the Federal Communications Commission (FCC) has stressed the need for broadcasters to provide programming of value to the nation's electorate. The FCC's regulation of programming has been anchored on the importance of encouraging programming about public affairs—much of it from local sources. As noble as the policy pronouncements sound, serious questions can be raised about the FCC's regulatory supervision of public issues programming on radio and television.

Indeed, this is a propitious time to evaluate broadcast programming regulation. The FCC has recently completed two decades of the most extensive governmental effort to supervise information flow in the nation's history. Much of the regulatory system established in the last two decades is being dismantled, and Congress and the FCC are considering further steps toward the deregulation of broadcast programming. Finally, during the next few years, the nation has a unique opportunity to establish an effective communications system for the future. Many new communications technologies are in the early stages of development, and political and economic forces have not yet dictated the content or the nature of the supervision of these systems. If the nation, or a significant part of the population, needs particular kinds of information, a regulatory system that will meet those needs should be

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established.¹

As we try to plan for the future, we should evaluate carefully the government's only previous effort to encourage the dissemination of information. There is substantial evidence that attempts to regulate informational programming during the last fifty years have not worked. For much of that time, efforts to encourage this kind of programming were half-hearted and spasmodic. Although the FCC took the position that issue-oriented programming was important, for much of this period the FCC actually did very little to ensure that broadcasters took steps to meet this need. In contrast, over the last two decades the FCC has fostered a multifaceted and burdensome regulatory system. The Commission developed three different approaches to the supervision of informational programming, each with its own definitions and enforcement provisions. The overall effort was expensive for both the public and for broadcasters. In addition to being generally ineffective, the FCC's regulatory scheme was in some ways threatening to first amendment principles. In all, then, after more than fifty years of public issues programming regulation, the FCC does not have much to boast about.

The purpose of this Article is to analyze the attempted regulation of issue-oriented programming by the federal government since 1927, and most particularly since 1960. The Article will outline the major principles of the regulation of public issues programming established before 1960 and will review the developments during the 1960s and 1970s. It then will describe the efforts underway to dismantle the regulatory system. Finally, it will propose a new regulatory model.

For the sake of clarity and manageability, the precise focus of this Article—the FCC's encouragement of public issues programming²—is relatively narrow. The Article will not address specifically the encouragement of news and "other" informational programming.³ Neither will it deal directly with

1. Although this statement might sound a bit presumptuous—if not contrary to the spirit of the first amendment—this is exactly what the FCC has tried to do during the last five decades, with little planning and a limited number of regulatory alternatives.

2. The FCC often used the term "public issues programming" before 1960. E.g., see text accompanying notes 22 & 26 *infra*. Since 1960 primarily it has used the terms "public issues" and "controversial public issues" when discussing the fairness doctrine requirements, see note 5 *infra*, but the term "public affairs" when discussing license renewal requirements. See notes 40, 45 & 87 *infra*. This Article uses the term "public issues," both when that term was used specifically by the FCC and also to refer to issue-oriented programming in general. The terms "public affairs" and "controversial public issues," when used to describe programming types, are used only as the Commission used them. The Article also deals with programming provided by licensees that relates to "community needs" or is about "community problems." The FCC has seen a close relationship between this kind of programming and what it has called "public affairs" programming. See note 87 and text accompanying notes 84-87 *infra*.

3. The FCC has defined "news" as "reports dealing with the current local, national and international events, including weather and stock market reports; and commentary, analysis, or sports news when it is an integral part of a news program." FCC Form 303, Application for Renewal of Broadcast Licensee, §§ IV-A (radio), IV-B (television) (1974) [hereinafter cited as Form 303—1974]. "Other" informational programming includes non-entertainment programming (sports is considered entertainment) that does not fit the "public affairs" or "news" categories. This classification includes religious, agricultural and instructional programming. E.g., *id.* § IV-A, at i, ii, i; Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to

the FCC's requirement that broadcasters ascertain the needs and interests of their communities⁴ or with the fairness doctrine obligation to present opposing views on controversial public issues.⁵ The focus of this Article is on the regulation of commercial radio and television programming.⁶ The FCC's approach toward the regulation of public issues programming is not unlike its approach to other programming policies, however, and much of the discussion and analysis presented here apply generally.

I. THE FIRST THIRTY-TWO YEARS

In 1927, when Congress first adopted a system of broadcast regulation, it specified that licensees should perform according to the "public convenience, interest, or necessity."⁷ Congress did not explain what it meant by service in

the Chief, Broadcast Bureau, 59 F.C.C.2d 491, 492 (1976) [hereinafter cited as *Delegations of Authority*].

Although the FCC sometimes has regulated "news," "public affairs," and "other" informational programming together in an "information" category (see, e.g., text accompanying notes 141-42 *infra*), the Commission frequently has treated the categories separately and even emphasized the importance of public issues programming. See, e.g., *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974) [hereinafter cited as *Fairness Report*]; *Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms*, 27 F.C.C.2d 650, 656 (1971) [hereinafter cited as *1971 Primer*]; *Editorializing by Broadcast Licensees*, 13 F.C.C.2d 1246, 1249-50, 1258 (1949) [hereinafter cited as *Report on Editorializing*]; *FCC, Public Service Responsibilities of Broadcast Licensees 39-40* (1946) [hereinafter cited as *Blue Book*].

Programming that examines public issues more often and more directly prepares the electorate for governing better than programming categorized as agricultural, religious and instructional. Public issues programming generally is not so profitable as news programming, and therefore broadcasters are less inclined to carry it for financial reasons. See *Deregulation of Radio*, 84 F.C.C.2d 968, 1046, 1064-65 (1981); L. Brown, *Television: The Business Behind the Box* (1971); B. Chamberlin, *The Economics of Public Affairs Broadcasting or Why Public Issues Programming Continues to Be the Neglected Stepchild of Commercial Television* (May 1975) (unpublished manuscript); F. Friendly, *Due to Circumstances Beyond Our Control . . .*, at 271-72 (1967); R. Noll, M. Peck & J. McGowan, *Economic Aspects of Public Affairs Regulation 217-29* (1973).

4. See text accompanying notes 36-42, 55, 83 & 287-88 *infra*.

5. The fairness doctrine requires broadcasters (1) to devote a reasonable percentage of broadcast time to the coverage of public issues, and (2) in the coverage of these issues, to be fair in the sense of providing an opportunity for the presentation of contrasting points of view. *Fairness Report*, *supra* note 3; see note 26 *infra*. The fairness requirement, the better known of the two responsibilities, will not be discussed in this Article. The requirement to devote a reasonable amount of broadcast time to public issues is a significant issue addressed in this study.

6. Historically, public radio and television stations have had the same general programming responsibilities as their commercial counterparts. See FCC, BC No. 81-496, *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees* 1, 3-11 (Aug. 25, 1981). Nevertheless, the FCC frequently has considered different issues when regulating commercial broadcasting and sometimes has used slightly different programming policies. *Id.* at 2-23.

7. *Radio Act of 1927*, Pub. L. No. 69-632, § 4, 44 Stat. 1163 (repealed 1934). Congress responded after Secretary of Commerce Herbert Hoover was told that he did not have the power either to refuse to issue a broadcast license, even when available frequencies were occupied, *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923), cert. dismissed per stipulation, 266 U.S. 636 (1924), or to require broadcasters to operate on particular wavelengths or at particular operating times, *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926). Broadcasters took to the air at any frequency they chose and at any time they chose, and radio signals frequently were incoherent. Radio set sales, which had skyrocketed in the first five years of the 1920s, dropped. See *Broadcasting Yearbook D-110* (1980).

The language "public convenience, interest, or necessity" apparently was adopted primarily

the public interest.⁸ The authors of the legislation apparently wanted a flexible regulatory tool that the newly established Federal Radio Commission (FRC) could use as necessary to control effectively the energetic but unorganized radio broadcasters.⁹ It is also obvious that Congress intended to authorize program supervision¹⁰ and that it wanted local broadcast service.¹¹

The first task of the Federal Radio Commission was to establish order on the radio spectrum.¹² Programming was a consideration from the beginning. License applications issued during the Commission's first year asked programming questions of the applicants.¹³ The FRC often based licensing decisions,

from public utility legislation. Radio Control: Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess., pt. 2, at 104-05 (1926). See generally D. Holt, *Public Service Broadcasting: A Contextual and Historical Search for the Construct* (unpublished Ph.D. dissertation, Northwestern Univ. 1967). The order of the words used in the phrase "public interest, convenience, or necessity," and the conjunction used to join them, appear to be unimportant for statutory interpretation. The phrase is considered as a unit, and the same interpretation is given to the unit whether the conjunction is "or" or "and." *Id.* at 30-31.

8. The definition of the phrase is not explained in the debates, the reports or the law. Indeed, most senators and congressmen probably had little to say on the matter because many of them did not understand the new technology of radio broadcasting.

9. Senator Dill, for example, once indicated that he thought that his job was to establish the Commission and to give it the authority to regulate as circumstances required. Interview with former-Senator Clarence C. Dill, in Spokane, Wash. (Mar. 7, 1975). In hearings reviewing the activity of the Federal Radio Commission, Senator Dill was not pleased that the Commission had not provided a clear definition of the phrase "public convenience, interest, or necessity." *Federal Radio Commissioners: Hearings Before the Senate Comm. on Interstate Commerce, 70th Cong., 1st Sess., pt. 2, at 189 (1928)*. See also L. Caldwell, *The Standard of "Public Interest, Convenience or Necessity"—Quasi-Legislative Duties of the Federal Radio Commission, and Its Quasi-Judicial Duties as Applied to Non-Broadcasting Stations*, 17 *Cath. U. Am. Announcements: Radio L. Bull. Sch. L.*, Aug. 1931, at 31.

10. The two primary authors of the legislation, Senator Dill and Representative Wallace H. White, Jr., obviously believed that programming was to be taken into consideration when evaluating whether a licensee had performed in the public interest. Senator Dill, for example, indicated that another Senator was "mistaken" in claiming that "there is nothing in this bill that would empower the radio commission to compel radio broadcasters to give service." 68 *Cong. Rec.* 4,111 (1927). Representative White best stated his view later as a Senator when he said "I just do not see how there can be any judgment as to whether a station is serving a public interest or not unless there is a chance to view and review the programs which a station has been passing out to the listening ear of the American public." *To Amend the Communications Act of 1934: Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 409 (1947)*. The Radio Act of 1927 contained obvious programming provisions. For example, Congress specified that if a licensee allowed a political candidate use of his facilities, he must provide "equal opportunities" to any opponents. The FRC was instructed to "make rules and regulations" to enforce the provision. Radio Act of 1927, Pub. L. No. 69-632, § 18, 44 Stat. 1162 (repealed 1934). The law also proscribed "any obscene, indecent, or profane language by means of radio communication." *Id.* § 29.

11. The Act specified that broadcasting facilities were to be proportioned equitably to the states and communities. Radio Act of 1927, Pub. L. No. 69-632, § 9, 44 Stat. 1162 (repealed 1934). The language was made more emphatic just a year later with the passage of the Davis Amendment to the Act. Act Continuing the Federal Radio Commission Under the Radio Act of 1927, Pub. L. No. 70-195, § 5, 45 Stat. 373 (1928) (repealed 1934).

12. When the FRC held its first meeting in March 1927, more than 730 broadcasters were trying to use 90 channels. L. Schmeckebier, *The Federal Radio Commission: Its History, Activities and Organization* 23 (1932); L. White, *The American Radio* 134 (1947).

13. The applications asked for the "average amount of time weekly devoted" to six programming areas: entertainment, religious, commercial, educational, agricultural, and fraternal. Stations also were required to attach a list of programs broadcast in the week before the application was submitted. *Jurisdiction of Radio Comm'n: Hearings on H.R. 8825 Before the House Comm. on the Merchant Marine and Fisheries, 70th Cong., 1st Sess. 21-26 (1928)*.

at least in part, on programming criteria.¹⁴ Within a few years, the Commission had established several ingredients for meeting the requirement of service in the public interest, including local programming¹⁵ and the discussion of public questions.¹⁶

The successor to the Federal Radio Commission, the Federal Communications Commission,¹⁷ was too concerned about matters such as the financial soundness of licensees, newspaper domination of broadcasting and the implications of network broadcasting, to worry about programming matters during the late 1930s and the early 1940s. Although the Commission frequently stressed the importance of public issues programming,¹⁸ it did not review re-

14. As early as May 1927, the FRC provided an opportunity for increased daytime power to stations providing "service programs." The programming mentioned included "those of educational and religious institutions, civil organizations, and distributors of market and other news." 1927 F.R.C. Ann. Rep. 14. In 1928 the FRC denied 62 stations the authority to broadcast. Programming problems cited as reasons for "deleting" stations were the broadcast of false statements and personal attacks, a lack of educational or aesthetic value, a lack of community service, an expression of views on private matters, an extensive time devoted to phonograph records, and the airing of personal disputes. 1928 F.R.C. Ann. Rep. 16, 151-62. In a statement issued at the same time, the Commission said that when licensing decisions were made, "emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public," and not that of individual broadcasters or advertisers. *Id.* at 170.

A few months later, programming was the major issue in an FRC opinion deciding a battle for a choice radio frequency in the "most congested radio broadcasting center in the world." Commission on Communications: Hearings on S. 6 Before the Senate Comm. on Interstate Commerce, 71st Cong., 1st Sess., pt. 1, at 128 (1929) [hereinafter cited as Hearings on S. 6]. The quotation is taken from the FRC opinion in *Great Lakes Broadcasting Co.*, partially reprinted at 1929 F.R.C. Ann. Rep. 32-35. Three Chicago stations with a reputation for quality service wanted time on one clear channel frequency (a clear channel is a broadcast frequency set aside for the use of one station, or a very small number of stations, throughout the country). The FRC took the opportunity to emphasize again service to the radio listener and to establish a regulatory preference for stations serving broad audiences. 1929 F.R.C. Ann. Rep. 34. The FRC was partially overruled on appeal, *Great Lakes Broadcasting Co. v. F.R.C.*, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930), by a federal court acting pursuant to statutory authorization of de novo review of Commission cases, Radio Act of 1927, Pub. L. No. 69-632, § 16, 44 Stat. 1162 (repealed 1934). The *Great Lakes* court, however, challenged none of the concepts referred to in this footnote.

It should be noted that when a station lost a license, a major reason was the competition for space on the radio spectrum. The demand for radio licenses was greater than the radio spectrum as then understood could accommodate, and frequently more than one applicant was seeking to broadcast at the same time and on the same place on the spectrum. The Commission noted in 1928 that "perhaps, all of them give more or less service"; however, it continued, "those who give the least . . . must be sacrificed for those who give the most." 1928 F.R.C. Ann. Rep. 170. The standard of public service then was more comparative than absolute. The *Great Lakes* case was one example; the denials of 62 licenses in 1928, 1928 F.R.C. Ann. Rep. 151-62, provide others.

15. Hearings on S. 6, supra note 14, at 139; 1928 F.R.C. Ann. Rep. at 168.

16. 1929 F.R.C. Ann. Rep. 34.

17. In adopting the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979)), Congress abolished the Federal Radio Commission, *id.* § 602, and established the Federal Communications Commission, giving it supervisory authority over all wire and radio communication, *id.* § 1 (codified as amended at 47 U.S.C. § 151 (1976)). The contents of the Radio Act of 1927 were incorporated without many substantive changes, and the basis of the FCC's regulatory authority continued to be the general guideline of public convenience, interest, or necessity. *Id.* § 303 (codified as amended at 47 U.S.C. § 303). Congress did specify, for the first time, that license renewals, as well as new applications, were to be granted only if the public interest, convenience and necessity would be served. *Id.* § 307.

18. In *Western Broadcast Co. (KNX)*, 3 F.C.C. 179, 184 (1936), the Commission included programming about public issues in a list of beneficial services being provided by a licensee. A

newal applications routinely to check on the nature of the programming being offered.¹⁹ This laxity turned into concern, however, when one commissioner began checking the renewal applications and discovered the kind of programming that stations actually were providing.²⁰ The FCC soon adopted its infamous *Blue Book*,²¹ which was the first policy statement outlining licensee programming responsibility in light of the public interest standard of the Communications Act of 1934. The Commission told licensees to provide an

year later, the FCC's engineering department, reporting on the social and economic effects of proposed changes in frequency allocations, twice emphasized the importance of public issues programming. Engineering Dept., FCC, No. 4063, at 35, 168 (1937). In Metropolitan Broadcasting Corp. (WMBQ), 8 F.C.C. 557 (1941), the Commission asserted that a station had "a recognized duty to present well-rounded programs on subjects which may be fairly said to constitute public controversies of the day within the framework of our democratic system of government." *Id.* at 577. Still in the late 1930s, when the FCC considered adopting programming standards, categories such as news, activities of local civic enterprises, and education were mentioned. FCC, No. 5072-A, pt. I, at 21 (Apr. 1, 1939). The report said that diversified programming was an essential aspect of broadcasting service in a democracy, as was the necessity to "keep radio a vital force and available as an open forum for the discussion of questions of concern to the public on a fair and equitable basis." *Id.* at 2-3.

In 1940, in Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1940), the FCC emphasized the importance of radio in informing the electorate. In Radio Corp. of Am., 10 F.C.C. 212 (1943), the Commission made it clear that it wanted licensees to program controversial issues based on individual circumstances surrounding any request rather than on any preconceived policy. *Id.* at 214. Then, in United Broadcasting Co., 10 F.C.C. 515 (1945), the FCC said directly that under the statutory mandate of public convenience, interest, or necessity, stations had a duty to be "sensitive to the problems of public concern in the community and to make sufficient time available, on a non-discriminatory basis, for full discussion thereof." *Id.* at 517.

19. The Federal Radio Commission usually had checked on a station's programming as presented in its license renewal application and usually examined complaints in the station's file. That practice was discontinued by the Federal Communications Commission. Renewal applications were submitted to the commissioners in batches after being approved by the law, accounting, and engineering departments. The FCC renewed the applications *en masse*. Neither the FCC nor the staff examined licensee programming records. No attempt was being made to see if a licensee was performing as last promised. Center for the Study of Democratic Institutions, *Broadcasting and Government Regulation in a Free Society* 7 (1959); Brecher, *Whose Radio?*, *Atl. Monthly*, Aug. 1946, at 47; Letter from Edward M. Brecher to Frank J. Kahn (Dec. 3, 1975); Telephone Interview with Edward M. Brecher, Research Supervisor, Assistant to FCC Chairman 1941-1946 (Mar. 18, 1976); Telephone Interview with Dr. Charles A. Siepmann, former Director of Talks of the British Broadcasting Corporation, Consultant for the Blue Book, 1945-1946 (Mar. 10, 1976).

In the renewal applications being used at the time, the FCC was requiring stations to "state the average percentage of time per month" devoted to entertainment, educational, religious, agricultural, civic, governmental and news programming, both sponsored and unsponsored. Civic was defined as "fraternal, Chamber of Commerce, charitable, and other civic but non-governmental programs." The governmental category included "all municipal, state, and federal programs, including political or controversial broadcasts by public officials, or candidates for public office, and regardless of whether or not the programs included under this item are entertainment, educational, agricultural, etc., in character." *Blue Book*, supra note 3, at 13.

20. During the first half of the 1940s, Commissioner Clifford J. Durr began to abstain on license renewal votes because he said that he did not have enough information to say whether stations were performing in the public interest. He and his staff began to examine the records of stations about to come up for renewal. Center for the Study of Democratic Institutions, supra note 19, at 7; Telephone Interview with Edward M. Brecher, supra note 19. Durr's data bothered the entire Commission. In April 1945, more than twenty stations were given "temporary" renewals while the Commission decided on a next step. Comment, *Radio Program Controls: A Network of Inadequacy*, 57 *Yale L.J.* 275, 289 n.75 (1947) (citing FCC, Release No. 81,575 (Apr. 10, 1945)).

21. *Blue Book*, supra note 3. The cover of the report is blue. Historian Erik Barnouw relates the story that at the time the book was produced, blue was one of only two cover stocks available at the printing office. The other was red. 2 E. Barnouw, *A History of Broadcasting in the United States: The Golden Web* 229 (1968).

"adequate" quantity of time for the discussion of local, national and international issues.²² It did not define further the required kind of programming; nor did it provide any specific time requirements. Licensees were to be given a great deal of discretion,²³ but performance was to be checked at the time of license renewal.²⁴

The newly awakened conscience of the FCC set off a storm. The Commission met so much resistance from broadcasters and Congress that implementation of the *Blue Book* was soon abandoned.²⁵ Indeed, although in 1949 in *Editorializing by Broadcast Licensees (Report on Editorializing)* the FCC again emphasized a broadcaster's responsibility to devote a reasonable amount of time to public issues,²⁶ program regulation of any kind became

22. In addition to public issues programming, broadcasters also were expected to provide a "reasonable" number of local live presentations and sustaining programs. *Blue Book*, supra note 3, at 12-39, 55-56. Sustaining programs were those broadcast without advertising support, either because they might not attract sponsors or because they were, "by their very nature . . . not . . . appropriate for sponsorship." *Id.* at 12-18. The *Blue Book* also required broadcasters to limit advertising to a "reasonable amount" in relation to the time devoted to programming. *Id.* at 40-47, 56.

23. *Id.* at 40, 54-55.

24. The Commission announced that henceforth it would compare the amount of time that licensees proposed to devote to the four categories emphasized in the report to the amount of time actually provided. *Id.* at 3, 56.

In a revised application form, adopted in 1947, the Commission asked licensees to provide the percentage of time devoted to particular program categories for a "composite week" rather than an average amount of time devoted to specified categories per month as had been the case in the previous application. The composite week would be the measuring tool for licensees from the adoption of the 1947 application until 1981. *Id.* at 34. The FCC selected, from seven different months, a representative for each of the seven days of a week. The particular days were said to be chosen at random and varied year to year. (The *Blue Book* actually called for annual programming reports, but in practice the composite week was used only for the year prior to license renewal and the data included on the renewal form. *Blue Book*, supra note 3, at 58.)

In the 1947 application, the new list of program categories included entertainment, religion, education, news, discussion and talks. FCC, Broadcast Application, § IV, at 1 (1947). The new license application also asked for some information not previously collected. For instance, broadcast applicants were required to provide a list of sustaining programs made available to them by their networks. Applicants also were asked to attach a statement of their policy "with respect to making time available for the discussion of public issues." The FCC requested illustrations of the kinds of programs to be broadcast and information regarding the methods of selecting subjects and participants for the programs. *Id.* at 3.

25. For example, the editors of the industry-oriented magazine *Broadcasting* and Justin Miller, president of the National Association of Broadcasters, led a vicious three-month attack on the *Blue Book* and one of its major authors beginning March 7, 1946, only days after the *Blue Book* was published.

For a thorough discussion of the industry's reaction to the *Blue Book*, see Meyer, Reaction to the "Blue Book," 6 J. Broadcasting 295 (1962). Other sources include 2 E. Barnouw, supra note 21, at 231-36; M. Edelman, The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy (1950).

26. The FCC, after review of its policy that licensee editorializing was not in the public interest (promulgated in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940)), declared that licensees could editorialize but must provide "a reasonable percentage" of their broadcast time for news and other programs "devoted to the consideration and discussion of public issues of interest in the community" served by the station. Further, licensees must present "the different attitudes and viewpoints concerning these vital and often controversial issues" held by the various groups in the community. Report on Editorializing, supra note 3, at 1249. The Report said that "a long series of decisions" reaffirmed that broadcasters had a responsibility to provide time for the exploration of public issues." *Id.* at 1250. As in the case of the *Blue Book*, the Commission did not establish precise quantitative standards but said that each licensee "must determine what percentage of its limited broadcast day should appropriately be devoted to news and discussion or consid-

anathema for the next decade and a half. There was no serious examination of license renewal forms during the rest of the 1940s or throughout the 1950s.²⁷ Little effort was made to encourage the broadcast of public issues programming, and almost no effort was made to enforce any licensee programming responsibility.²⁸

II. THE 1960s

A. *The 1960 Programming Statement*

The FCC's attitude appeared to change at approximately the same time as the change in decades from the 1950s to the 1960s. The first indication of a

eration of public issues, rather than to other legitimate services of broadcasting." *Id.* at 1247. Like the *Blue Book* before it, the *Report on Editorializing* was not a self-enforcing document. The Commission had not adopted a rule or regulation that required broadcasters to live up to the standards enunciated or face prescribed penalties. Instead, the Commission merely articulated its version of a broadcaster's responsibility under the statutory requirement of public convenience, interest, or necessity. The Commission could enforce its view through the licensing process. *Id.* at 1255.

The requirements announced in the 1949 report, to provide public issues programming and to provide opposing views in the controversial programming provided, have become known as the fairness doctrine. For a history of the fairness doctrine, see S. Simmons, *The Fairness Doctrine and the Media* (1978). For background on the FCC's handling of the enunciated licensee responsibility to provide a reasonable amount of programming about public issues, see Chamberlin, *The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion*, 31 *Fed. Com. L.J.* 361 (1979).

27. Interview with Benedict P. Cottone, General Counsel of the FCC, 1946-53, in Washington, D.C. (Feb. 4, 1976). See E. Barnouw, *supra* note 21, at 228, 292-93; Address by Commissioner K. Cox, *Public Service Responsibilities of Broadcast Stations*, to Boston Federal Executive Board (Sept. 9, 1965).

28. Presaging the FCC's approach to programming regulation during the 1950s was its handling of WOAX, Inc., at the beginning of the decade. WOAX did not provide public issues programming. Indeed, a major officer of the licensee corporation said that such programming was to be avoided. *Morrisville Broadcasting Co.*, 15 F.C.C. 270 (1950). Although the FCC previously had warned WOAX about its behavior, the Commission did not take action against the licensee. The Commission did refuse to grant approval for improved broadcast facilities and reprimanded the station management. *Id.* at 88; WOAX, Inc., 6 *Rad. Reg. (P & F)* 1101 (1950).

Later in the decade, the FCC renewed the license of station WTIX of New Orleans in spite of one commissioner's contention that the licensee had not provided any religious, educational or discussion programming. *Mid-Continent Broadcasting Co.*, 12 *Rad. Reg. (P & F)* 1287 (1955). Commissioner John C. Doerfer asserted that the renewal of the license of a station with a "history" of failing to meet *Blue Book* and *Mayflower* standards, without any promise to improve, "nullifies the standards of licensee responsibility." *Id.* During the next year, Doerfer coined the phrase "lifted eyebrow" when protesting the FCC's policy of encouraging particular kinds of programming without enforcing its policies. *Miami Broadcasting Co.*, 14 *Rad. Reg. (P & F)* 124, 127-28 (1956).

Former FCC General Counsel Cottone said that if a station applying for a license had programmed, or proposed to program, little or no "discussion" shows, the Commission's staff would send a letter asking for a justification. (The "discussion" category itself was, of course, inadequate for television, a medium coming of age in the 1950s. A more suitable category was not provided until a 1965 change in the application form. See notes 43-45 *infra*.) Cottone asserted that the explanation from stations justifying their applications were "always good enough." Interview with Benedict P. Cottone, *supra* note 27. Commissioner Rosel H. Hyde contended that checks of a licensee's application to ensure that performance matched promises were more than perfunctory. Hyde said that if there had been an indication that the public was getting less than it should, he thought the Commission "would have indicated some concern." Hyde said that the FCC's procedures resulted in licensees' being more careful. He added that he believed that "all" stations probably were living up to their promises within "reasonable" limits. Interview with Rosel H. Hyde, in Washington, D.C. (Jan. 27, 1976).

shift, at least in part due to public concern over licensee behavior, was the announcement of a new approach to programming policy.²⁹ Although the *1960 Programming Statement* emphasized the public service responsibility of each licensee,³⁰ the FCC did not threaten directly the nonrenewal of broadcast licenses as it had done when it released the *Blue Book*. Instead, it emphasized first amendment concerns and the importance of licensee discretion.³¹ Unlike the *Blue Book*, the *1960 Programming Statement* survived to become the Commission's basic programming policy for at least twenty years.

One element making the 1960 report palatable to broadcasters was its assumption that programming decisions were the function of individual licensees rather than the FCC. The 1960 statement stressed broadcaster responsibility for day-to-day selection of programming material,³² and it also stressed the need for broadcasters to have broad discretion in the area.³³ The FCC said that it could not require particular kinds of programming.³⁴ It interpreted the first amendment language prohibiting the abridgment of free speech as also forbidding "interference asserted in aid of free speech."³⁵

The broadcaster's freedom to program was not absolute, however.³⁶ The 1960 statement acknowledged that, by law, the Commission could approve a license application only if a station was found to be operating in the public interest.³⁷ In a fresh approach to that statutory standard, the Commission asserted that the "principal ingredient" of a licensee's public service responsibility was a "diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his service area."³⁸ Rather than relying on the

29. Democratic Senator John F. Kennedy was not yet President and therefore had not had the chance to change the composition of the Commission. The FCC was responding, at least in part, to public pressure following the revelations of rigged quiz shows and disc jockey payola. Report and Statement of Policy Res.: Commission Programming Inquiry, 44 F.C.C. 2303, 2303-05 (1960) (en banc) [hereinafter cited as 1960 Programming Inquiry]. See generally 3 E. Barnouw, *A History of Broadcasting in the United States: The Image Empire* 58, 68-69, 122-26, 128 (1970).

It should be noted that the FCC's 1981 radio deregulation order states that the *1960 Programming Statement* was issued because of a lack of opportunity during the 1950s for the Commission to explain its 1949 *Report on Editorializing*. A paucity of case law was said to have occurred because there were very few fairness doctrine complaints. *Deregulation of Radio*, 84 F.C.C.2d 968, 1041 (1981). That assertion is rather extraordinary considering that in the 1949 report, the FCC did not discuss the opportunity to complain or explain a complaint procedure. There probably were other reasons for "an understandable confusion and uncertainty among broadcasters and the public as to the precise nature of the broadcaster's public obligations." *Id.* at 1041. Further, it should be noted that the FCC, in the *1960 Programming Statement*, did not explain the public interest standards of the 1949 report. Instead, the 1960 statement presented different standards.

30. 1960 Programming Statement, *supra* note 29, at 2304, 2311-12, 2315.

31. *Id.* at 2306-08, 2311-14, 2316.

32. *Id.* at 2308-09.

33. *Id.* at 2314.

34. *Id.* at 2308.

35. *Id.*

36. *Id.* at 2309.

37. *Id.* at 2307, 2310, 2315, 2317.

38. *Id.* at 2312, 2314, 2316. The Commission said that if a licensee conscientiously ascertained the needs and interests of its community and reasonably attempted to meet those needs in its programming, it had satisfied its public interest responsibility. *Id.* at 2312, 2314. As in past programming policy announcements, the FCC, in its 1960 statement, provided few details and few definitions. For example, the Commission made no attempt to define words such as "needs" or

Commission for a definition of the public interest, each licensee was to look for guidance from the people that his station was expected to serve.³⁹

The report emphasized the importance of community service in general rather than particular types of programs. Although the FCC listed fourteen program categories "usually necessary to meet the public interest, needs and desires of the community"—many of which were related to an informed electorate⁴⁰—it stressed that the list should not be treated as a "rigid mold" or a "fixed formula."⁴¹ The categories were to be considered in light of the licensee's ascertainment of the needs in his community. The FCC's task was limited to determining whether "the total program service of broadcasters was reasonably responsive to the interests and needs of the public they serve."⁴² The practical significance of the new document, like that of the earlier *Blue Book* and the *Report on Editorializing*, would be determined by the behavior of the Commission during the licensing process.

A badly split Commission took more than four years after the *1960 Programming Statement* to adopt new license application forms, the mechanism for enforcement.⁴³ When finally approved, the programming sections of the radio and television applications affirmed the concept of community service stressed in the *1960 Programming Statement*.⁴⁴ The new applications also fo-

"interests" and suggested nothing about the amount of programming necessary to fulfill the public interest.

39. *Id.* at 2316-17.

40. Among the fourteen programming types listed were "opportunity for local self-expression," "public affairs programs," "editorialization by licensees," "political broadcasts," and "news programs." *Id.* at 2314. The other areas mentioned were the development and use of local talent, children's programs, religious programs, educational programs, agricultural programs, weather and market reports, service to minority groups, sports programs, and entertainment programs. The FCC noted in the statement that it had been persuaded that "there is no public interest basis for distinguishing between sustaining and commercially sponsored programs," *id.* at 2315, an important distinction in the *Blue Book*, *supra* note 22. The 1960 statement said that sponsorship of public affairs and "similar" programs "may well encourage broadcasters to greater efforts in these vital areas." 1960 Programming Statement, *supra* note 29, at 2315. The Commission said that there was "convincing evidence" that sponsorship fostered the availability of "important public affairs and 'cultural' broadcast programming." *Id.* The term "public affairs," which had heretofore been used only rarely in Commission documents, was not explained.

41. 1960 Programming Statement, *supra* note 29, at 2314.

42. *Id.* at 2307-08. See also *id.* at 2315-17.

43. The new radio application form reached the Commission before the revised television form. It passed four to two, with Commissioner James J. Wadsworth abstaining. Commissioner Hyde opposed it, along with Commissioner Robert T. Bartley. In the majority were Commissioners Kenneth Cox, Lee Loevinger, Robert E. Lee and Chairman E. William Henry. Loevinger, usually an advocate of minimal program regulation, said that he supported the new programming section because it could not have been used without his vote. He asserted that the new form was a "considerable improvement" over the application then in use. Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315, 1 F.C.C.2d 439, 448 (1965) (Loevinger, Comm'r, concurring) [hereinafter cited as Broadcast Application Forms—Radio]. The new television form was adopted unanimously by the Commissioners present approximately a year later. Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315, 5 F.C.C.2d 175 (1966) [hereinafter cited as Broadcast Applications Forms—Television].

44. FCC Form 303, Application for Renewal of Broadcast License, §§ IV-A, at 1, & IV-B, at 1 (1966) [hereinafter cited as Form 303—1966]. The most significant change from the earlier application was a section inquiring about the licensee's efforts to ascertain, and his plans to meet, the "needs and interests of the public served by the station." Then, later in the application, the

cused on the program categories of news and public affairs.⁴⁵ The issue of how much to ask the licensee about programming apparently had been a major concern of several of the commissioners.⁴⁶

B. *The License Renewal Process, 1960-1973*

The heart of the Commission's program regulation is the license renewal process. Each of the nearly 10,000 radio and television stations must apply periodically for a renewal of its license.⁴⁷ Although the FCC also must approve applications for new licenses, transfers of ownership and improved broadcast facilities, it is only during the renewal process that the FCC has the opportunity to exercise continued authority over every broadcaster.⁴⁸ During

licensee was asked to list the programs that it had broadcast in the previous year that served the public's needs and interests. *Id.*

45. A major change involved program categories. The new application asked for information on only three: public affairs, news, and "all other programs, exclusive of Entertainment and Sports." Public affairs, mentioned for the first time in a license application, was defined tautologically to include "talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international affairs." *Id.* § IV-A, at 8. Political programs were defined as "those which present candidates for public office or which give expression (other than in station editorials) to views on such candidates or on issues subject to public ballot." *Id.*

Other items in the application related directly to news and public affairs. The new application requested, as had the previous one, a statement regarding the licensee's policy toward making time available for the discussion of public issues. The application also asked for particular information about the station's news programming. The application dropped an item used previously that had asked a licensee about network sustaining programs that his station had not carried.

46. Commissioner Kenneth A. Cox, an appointee of President Kennedy, wanted the application to ask more about the licensee's record of programming controversial issues. Broadcast Application Forms—Television, *supra* note 43, at 175, 183 (Cox, Comm'r, concurring). Long-time Commissioner Rosel H. Hyde, however, called the new form a violation of the Constitution and the 1934 Communications Act. Hyde labeled the application a "not too subtle scheme" of comprehensive program regulation. Broadcast Application Forms—Radio, *supra* note 43, at 444 (Hyde, Comm'r, dissenting). Hyde voted with the majority on the television form, approximately a year after his dissent on the radio form.

47. Until late last year, the Communications Act of 1934 required that both radio and television licensees file applications every three years. Communications Act of 1934, Pub. L. No. 73-416, § 307(d), 48 Stat. 1064. Then Congress approved an amendment to lengthen the renewal periods for radio stations to seven years and for television stations to five years. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241(a), 95 Stat. 736 (to be codified at 42 U.S.C. § 307(d)).

48. Most of the applications processed by the Commission do not trigger a published opinion. In the case of requests for a new license or a transfer of ownership, an opinion probably will be written only when an application has been contested or denied, or when one of the commissioners wants to protest the majority decision. During the 21 years since 1960, there may have been as few as a dozen published decisions involving a question of quantity of public issues programming apart from the renewal process. Most of these opinions were decided in favor of the applicants and referred to the same standards relied upon by the FCC during the license renewal process. E.g., *North Dakota Broadcasting*, 69 F.C.C.2d 1756, 1759-61 (1978); *EFEM, Inc.*, 43 Rad. Reg. 2d (P & F) 792, 794-95 (1978). In one case, the Commission approved an application for transfer even though the applicant said that he would provide no news or public affairs programming. Only Commissioners Nicholas Johnson and Kenneth Cox dissented. *Herman C. Hall*, 11 F.C.C.2d 344 (1968). Two exceptions to the general rule occurred during the 1960s. Both concerned unusual circumstances. In 1964, the FCC refused to approve without a hearing an application for a new UHF television station in Eugene, Oregon. Programming was one of the Commission's concerns. The applicant wanted to broadcast seventy percent entertainment and 30 percent educational programming during a 35-hour week. He planned no programming in the categories of news, discussion, talks, religion or agriculture. *Lee Roy McCourry*, 2 Rad. Reg. 2d

the renewal process, the Commission indicates what kinds of licensee behavior it will and will not tolerate.⁴⁹ Therefore, treatment of renewal applications is an even better indicator of actual FCC programming policy than are policy announcements.

From 1960 until 1973,⁵⁰ the renewal process appeared to be markedly superficial absent a third-party license challenge, despite the licensee accountability suggested in the *1960 Programming Statement*.⁵¹ Most licenses were

(P & F) 895 (1964). In 1969 the Commission rejected an application for the transfer of an AM radio station to the McLendon Corporation. A Commission opinion written by Nicholas Johnson said that McLendon had failed to demonstrate adequately that programming plans were designed to meet the needs of Camden, New Jersey. The case, *City of Camden*, 18 F.C.C.2d 412 (1969), is one of many preoccupied with the question of broadcast service to New Jersey. Among the major issues in this case was a proposed reduction in the station's news, public affairs, and other informational programming. *Id.* at 423-24. In the opinion, the Commission said that "some significant portion" of a station's programming must be responsive to community needs. *Id.* at 421. This language was repeated in a major FCC policy statement and later dropped in an updated version. See notes 90 & 219 *infra*.

49. See *Radio Broadcast Services; Revision of Applications for Renewals of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 46 Fed. Reg. 26,236, 26,239 (1981) [hereinafter cited as *Postcard Renewal*]; renewal procedures clarified, *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 87 F.C.C.2d 1127 (1981) [hereinafter cited as *Postcard Renewal Clarification*]; FCC, Report of the Federal Communications Commission to the Congress of the United States re the Comparative Renewal Process 1 (1976) [hereinafter cited as *Report to Congress*]. This Article will not examine the treatment of licensees at renewal when the licensee is challenged by someone who wants to broadcast on the same frequency. The comparative renewal process has had its own history during the last twenty years. See *Central Fla. Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), cert. denied, 441 U.S. 957 (1979); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971); *Cowles Broadcasting, Inc.*, 49 Rad. Reg. 2d (P & F) 1138, review granted in part on other grounds, 50 Rad. Reg. 2d (P & F) 219 (1981); *RKO Gen., Inc.*, 47 Rad. Reg. 2d (P & F) 921 (1980). See also *Report to Congress*, *supra*, at 5-40; *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). Nevertheless, it is noteworthy that the FCC has been equally reluctant to remove the license of a broadcaster during the standard license renewal process and during comparative proceedings.

50. In 1973 the FCC adopted new regulations affecting the staff's processing of renewal applications. The new approach appeared to have some effect on the renewal application process. See text accompanying notes 130-70 *infra*.

51. The brief discussion of the renewal process in the 1960s is the author's interpretation of FCC procedure after reading several articles by commissioners and observers of the Commission, and after talking to former commissioners, staff members and former staff members. Among the most useful discussions were Interview with Kenneth Cox, Commissioner of FCC, 1963-1970, in Washington, D.C. (Jan. 28, 1976); Interview with Henry Geller, General Counsel of FCC, 1964-1970, Assistant Secretary of Commerce, Administrator of National Telecommunications and Information Administration, Department of Commerce, 1976-1981, in Washington, D.C. (Jan. 22, 1976); Interview with Richard J. Shiben, Chief of Renewal and Transfer Division, Broadcast Bureau, in Washington, D.C. (Jan. 30, 1976). Books, articles and documents relied upon included the following: W. Emery, *Broadcasting and Government: Responsibilities and Regulations* (1971); S. Head, *Broadcasting in America* (2d ed. 1972); Cox, *The Federal Communications Commission*, 11 B.C. Indus. & Com. L. Rev. 595 (1970); Johnson & Dystel, *A Day in the Life: The Federal Communications Commission*, 82 Yale L.J. 1575 (1973); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967); Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701 (1964); Report to Congress, *supra* note 49, at 52-62. Useful comments by former Commissioner Nicholas Johnson were found in *Renewals of Broadcast Licenses for Ark., La. & Miss.*, 42 F.C.C.2d 1, 3 (1973) (Johnson, Comm'r, dissenting in form of case study entitled *Broadcasting in America: The Performance of Network Affiliates in the Top 50 Markets*) [hereinafter cited as *Top 50 Markets*]. See also *When Citizens Complain: UCC v. FCC a Decade Later*, Proceedings of the Mass Communications Law Section, AALS (Dec. 27, 1977) (panel discussion including Henry Baumann, Chief of Renewal Branch, FCC, 1976-1978; Charles Firestone, Director, Communications Law

renewed by the chief of the FCC's Broadcast Bureau through authority delegated by the Commission. The commissioners themselves usually did not review an individual broadcaster's performance and promises. Theoretically, the FCC's staff should have alerted the commissioners when a licensee's programming did not meet public interest standards.⁵² In practice, the Commission was more likely to hear from its staff only if a licensee apparently had made technical errors in filing for renewal or if an application revealed financial difficulties, engineering problems, or an unacceptably high percentage of commercials. Otherwise, unless a complaint had been lodged against a licensee, an application would be approved with all the others *en masse*.⁵³

In evaluating programming performance, the staff was supposed to ensure that the licensee had met two standards. First, an application should have revealed that a broadcaster had provided programming similar to what he had promised three years earlier.⁵⁴ Second, the application should have indicated whether the licensee had met the Commission requirements of ascertaining the needs and interests of his community and of planning programming appropriate for those perceived needs and interests.⁵⁵ Otherwise, the FCC staff was not instructed to review the programming proposals or programming practices to determine the quantity or quality of programming, either in general or for any single category such as public affairs.

If the licensing staff believed that a broadcast station had not matched its promises or fulfilled its ascertainment responsibilities, the broadcaster was to be sent a letter asking for a justification. The station's response would be presented to the Commission, along with a staff recommendation either to grant a renewal or to consider the issue further during a hearing. At the conclusion of the hearing, the FCC could deny a license renewal, grant the licensee only a temporary renewal or renew the license for a full term.⁵⁶

In practice, the staff seldom referred to the Commission a license renewal application revealing unsatisfactory programming. Commissioners Kenneth Cox and Nicholas Johnson had to request specifically that they be given lists of the stations failing to provide particular levels of informational program-

Program, U.C.L.A.; Erwin Krasnow, General Counsel, National Association of Broadcasters [hereinafter cited as Panel Presentation].

52. This was a difficult and frustrating task, of course, since the Commission had not provided specific programming standards and often demonstrated little concern even when advised of questionable programming practices. See text accompanying notes 54-56 *infra* and, e.g., note 64 *infra*.

53. This circumstance was altered somewhat by a change in the staff delegation authority in 1973. See text accompanying notes 136-53 *infra*.

The lack of individual attention by the Commission or the staff is understandable considering the number of renewal applications received each year and considering the review of broadcast licensee performance is only one of many functions of the FCC. Serious questions can be raised, however, about the FCC's fulfillment of its statutory obligations, as interpreted by the Commission itself, if each license application does not receive individual attention from someone.

54. For a discussion of this policy, see text accompanying notes 183-87 *infra*.

55. For a discussion of this policy, see text accompanying notes 78-114 *infra*.

56. Communications Act of 1934, Pub. L. No. 73-416, § 307(d), 48 Stat. 1064 (amended by Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 1241(a), 95 Stat. 736 (1981)).

ming.⁵⁷ In the official FCC reports of the 1960s and early 1970s, only a few cases concerning a station's public affairs programming were initiated by the staff rather than by an outside complaint.⁵⁸ Even when the Commission was aware that a station provided very little air time for public affairs, it was unlikely that the licensee would be penalized.⁵⁹ Commission observers cannot

57. Interview with Kenneth Cox, *supra* note 51.

58. See *Titanic Corp.*, 31 F.C.C.2d 81 (1971); *WSER, Inc.*, 29 F.C.C.2d 441 (1971). In *Titanic* the licensee told the Commission that it was not providing any public affairs programming. See note 59 *infra*. In the case of station *WSER*, the FCC noted a variance in promise and performance at the same time it served notice of several technical violations. If the Commission discovered the programming problem only because a thorough examination of the license application was made after the technical violations had been found, it would not be the first time that had happened. Indeed, a technical violation led to Commissioner Clifford Durr's discovery of the programming practices of *WBAL* in Baltimore, a major example in the *Blue Book*. 2 E. Barnouw, *supra* note 21, at 227; Telephone interview with Edward M. Brecher, *supra* note 19. Therefore, it is entirely possible that no station was queried about its public affairs programming during the time period discussed because of routine renewal examinations.

Nevertheless, during the FCC chairmanship of Newton N. Minow (Mar. 1961-June 1963), the license renewals of at least some television stations were deferred because the FCC stated that it wanted more information about local live programming. See *Local Live Programming of Television Stations*, 25 Rad. Reg. (P & F) 482 (1963). (Before the new license applications of the mid-1960s were available, and thus before the term "public affairs" appeared in the license renewal forms, the amount of time that a station devoted to local live programming was sometimes considered an indication of the time devoted to an examination of community issues.) See note 64 *infra*.

59. The case of *WGGR* of Duluth, Minnesota, an FM radio station licensed by the *Titanic* Corporation, is an example. The Commission first approved *Titanic's* application as an assignee of the licensee of *WWJC, Inc.* on March 11, 1970. *Titanic Corp.*, 34 F.C.C.2d 501, 503 (1972). At that time, *Titanic* indicated that the station would devote five percent of its air time to news, one percent to public affairs, and five percent to other informational programming in a "good music" format (informational programming categories besides "news" and "public affairs" are "religious," "agricultural" and "instructional"). *Id.* However, in 1970, soon after the station began broadcasting, the *WGGR* program director notified the FCC that all of the public affairs programs were being dropped. The letter from the licensee said that the programming change was made because its audience did not want breaks in what would otherwise be an all-music format. *Titanic Corp.*, 31 F.C.C.2d 81, 81 (1971). The Commission already had asked about the change when it received the licensee's 1971 renewal application, proposing six percent news and no public affairs. *Id.* Instead of presenting a new ascertainment study, the licensee attached the one it had used in 1969. The licensee said that community needs would be met through a large number of public service announcements. *Id.*

The FCC balked. Instead of renewing the license, the Commission sent a warning letter asking for more information. The FCC suggested that, in spite of the station's proposal in the 1969 application, "*WGGR (FM)* never did broadcast public affairs and other programming and, further, never made a good faith effort to broadcast such material." *Id.* at 82. The Commission asked if there had been a new listener survey that prompted the programming changes. It also asked the licensee how it intended to approach such community problems as urban renewal and industrial development, listed in the 1969 ascertainment study, through public service announcements. The Commission warned that if it received an inappropriate response to its letter, a hearing would be scheduled. *Id.* Shortly afterwards, the president and part-owner of the station, Herbert Gross, admitted that *WGGR* had not broadcast public affairs programming, but said that it would do so in the future. 34 F.C.C.2d at 501-02. He admitted that no listener survey had been taken. In an apparent response to the FCC inquiry, he listed many public service announcements broadcast by the station. However, none of them appeared to be related to the 1969 list of community needs. Letter from Herbert Gross to Ben F. Waple (Aug. 16, 1971) (in public file of radio station *WGGR, FCC, Washington, D.C.*). In a second letter, the station announced a change of officers and a change in its public affairs programming proposal. Gross originally had said that the station would devote one percent of its time to public affairs programming, probably between 6:05 and 7:30 a.m. on Saturdays. In the second letter, the station proposed one half-hour each week, during the daytime or early evening, for public affairs. Letter from William Gregory to Ben F. Waple (Nov. 10, 1971) (in public file of radio station *WGGR, FCC, Washington, D.C.*). See also 34 F.C.C.2d at 501-02. The Commission did not follow through on its threat. Instead, it approved the license renewal over the dissent of Commissioner H. Rex Lee. 34 F.C.C.2d at

remember a single occasion during this period when the FCC denied the renewal of a license primarily because of a failure to provide issue-oriented programming.⁶⁰

Critics, particularly Commissioners Kenneth Cox and Nicholas Johnson, called the license renewal process a "sham."⁶¹ Cox and Johnson charged that a licensee would never be questioned about his programming unless there was a complaint and even asserted that the Commission and its staff usually did not look at licensee programming information.⁶²

While Cox and Johnson were on the Commission they frequently chastised their colleagues for a lack of concern for broadcast content. The two commissioners, particularly in their frequent dissents to mass license renewals, fretted especially about the low levels of programming being broadcast to inform the electorate.

Cox had been hired in 1961 as chief of the Commission's Broadcast Bureau by controversial FCC Chairman Newton N. Minow. In his position as Bureau chief, Cox tried to hold licensees responsible for what he understood to be their duty. He was forced to abandon his aggressive tactics⁶³ but began

502 (Lee, Comm'r, dissenting). Commissioners Robert E. Lee and Nicholas Johnson were absent. See Letter from Ben F. Waple to the Titanic Corp. (July 27, 1971) (in public file of radio station WGGR, FCC, Washington, D.C.). See also 34 F.C.C.2d at 501-02.

A veteran of the FCC's Broadcast Bureau, Henry Baumann, has said that the Commission was reluctant even to schedule a hearing against a licensee, considering this move "the death knell—the ultimate sanction." Panel Presentation, *supra* note 51, at 8. See B. Cole & M. Oettinger, *Reluctant Regulators: The FCC and the Broadcast Audience* 213 (1978).

For further evidence that broadcasters could provide very little public affairs, and even none at all, without being penalized, see *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Notice of Inquiry*, 27 F.C.C.2d 580, 586-87 (1971) [hereinafter cited as *Comparative Hearings—Notice of Inquiry*]; FCC, *Television Broadcast Programming Data* (1973); notes 48 *supra* & 65 *infra*. See also note 249 *infra*.

60. Interview with Benedict P. Cottone, *supra* note 27; Interview with Henry Geller, *supra* note 51. Throughout its history the Commission has been slow to take away licenses for any kind of violations and particularly for programming issues. Abel, Clift & Weiss, *Station License Revocations and Denials of Renewal, 1934-1969*, 14 J. Broadcasting 411 (1970); Weiss, Ostroff & Clift, *License Revocations and Denials of Renewal, 1970-78*, 24 J. Broadcasting 77 (1980). See also U.S. General Accounting Office, *Selected FCC Regulatory Policies: Their Purpose and Consequences for Commercial Radio and TV*, at 13 [hereinafter cited as *Selected FCC Policies*]. For recent license denials related to program practices, see *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970) (alternative holding), *aff'd* on other grounds, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973); *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975); *Star Stations of Indiana, Inc.*, 51 F.C.C.2d 95 (1975). See also note 88 *infra*.

The denial of a license has been referred to as the "death penalty." The Commission has avoided the use of such a weapon at least in part because of the fear of congressional reaction and because of the belief that nonrenewal of a license worth millions of dollars is too severe a sanction. See R. Noll, M. Peck & J. McGowan, *supra* note 3, at 115; Johnson & Dystel, *supra* note 51, at 1623 n.252; S. Head, *supra* note 51, at 459-60; E. Krasnow & L. Longley, *The Politics of Broadcast Regulation* (1978). See also Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 *Harv. L. Rev.* 1699 (1969).

61. *Renewal of Standard Broadcast & Television Licenses for Okla., Kan. & Neb.*, 14 F.C.C.2d 1, 9 (1968) (Johnson & Cox, Comm'rs, dissenting in form of study entitled *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*) [hereinafter cited as *Oklahoma Case Study*].

62. See *Top 50 Markets*, *supra* note 51, at 9; *Renewal of Radio & Television Licenses in N.Y. & N.J.*, 18 F.C.C.2d 268, 269 (1969) (Cox & Johnson, Comm'rs, issuing separate statement); Cox, *supra* note 51, at 617 n.58; Interview with Kenneth Cox, *supra* note 51.

63. Cox has said that programming is the essence of the broadcaster's public service require-

writing personal dissents to the mass license renewals after he was appointed commissioner in 1963.⁶⁴

Johnson was appointed to the Commission in 1966. He and Cox regularly protested the FCC's lack of concern for programming during the license renewal process.⁶⁵ Cox and Johnson were especially concerned about the lack of local public affairs programming.⁶⁶ The two did not necessarily want license renewal denied for every station not performing up to their standards;⁶⁷

ment and that news and public affairs programming is "probably the most important contribution broadcasting could make." Interview with Kenneth Cox, *supra* note 51.

64. At one point Cox obtained permission to refer for Commission consideration the applications of television stations that did not devote five percent of their prime time programming to local live presentations. Cox believed that there was a close relationship between local live programming and public affairs programming. He thought that much of the programming in the local live category should, and would, be devoted to the examination of community issues. See Oklahoma Case Study, *supra* note 61, at 8, 21; Broadcast Licenses for Ala. & Ga., 25 F.C.C.2d 801 (1967) (Cox, Comm'r, dissenting). See also note 63 *supra*. Cox also took it upon himself to write to those licensees, asking them to explain how their program schedules served the public interest. The double-barreled Cox approach lasted as long as it took some of the licensees and representatives of the National Association of Broadcasters to get to the Commission. Cox recalls Commissioners' stating that the examination of programming that he had initiated was "not such a good idea." The commissioners decided to look at a broadcaster's entire programming performance and to rely primarily on the judgment of the licensee. Interview with Kenneth Cox, *supra* note 51.

65. Typically the two would write a dissent around data provided to them by the FCC staff or collected by their personal staffs and volunteers. Sometimes the two simply added a brief statement to the list of stations proposing less than five percent of their air time be devoted to news, one percent to public affairs and five percent to public affairs and "other" informational programming (although the latter category varied from time to time), a standard that Cox initiated. Interview with Kenneth Cox, *supra* note 51.

The number of licensees subject to the wrath of the two commissioners varied but frequently amounted to more than 10% of the stations up for renewal at any one time. In 1967, for example, the Broadcast Bureau notified the Commission that 265 stations in Indiana, Kentucky and Tennessee had qualified for renewal. Of those, Cox and Johnson asserted that 12 had proposed less than 5% news, 39 intended less than 1% public affairs, and 50 proposed less than 5% "other." License Renewals in Ind., Ky. & Tenn., 10 Rad. Reg. 2d (P & F) 944, 946 (1967) (Johnson & Cox, Comm'rs, dissenting). Persons interested in the data presented by Cox and Johnson in their dissents should be aware of possible inaccuracies. The two commissioners sometimes even disagreed themselves on the number of stations in particular categories. In the proceeding referred to in this footnote, Johnson stated that 12 stations had proposed less than 5% news. *Id.* at 945 (Johnson, Comm'r, dissenting). Cox stated that fourteen stations had proposed less than 5% news. *Id.* at 944 (Cox, Comm'r, dissenting). Some of the 10 stations listed with minimal news proposals were VHF television stations in such markets as Memphis, Chattanooga and Nashville. *Id.* at 945. In one of Johnson's reports, he singled out the case of the CBS affiliate in Minneapolis, WCCO-TV. The station had received an automatic renewal, Johnson said, although it indicated no public affairs programming in its composite week and proposed 30 minutes per week for the future. Top 50 Markets, *supra* note 51, at 17. For explanation of the composite week, see note 24 *supra*.

66. They contended that the foundation of the nation's broadcast system was service to local needs and that the broadcast media were vital factors in the future of community self-government. Oklahoma Case Study, *supra* note 61, at 8, 10, 11; Renewal of Standard Broadcast Station Licenses, 7 F.C.C.2d 122 (1967) (Cox, Comm'r, dissenting); *id.* at 133-34 (Johnson, Comm'r, dissenting). They argued that too often local stations relied predominantly on the networks and other nationally-focused programming sources for any public affairs programming aired. Following an extensive study of Oklahoma broadcasting, Cox and Johnson reported that in the entire state there was no "single regularly scheduled prime time program" devoted to significant controversial issues in the state or its communities. Oklahoma Case Study, *supra* note 61, at 13. Only one commercial television station provided as many as two hours per week to what it classified as local public affairs. *Id.* at 12. Two stations carried none. *Id.* Radio licensees provided "almost literally no public affairs service at all other than news." *Id.* at 13. For another statement of concern for service to local needs, see Renewal of Broadcast Licenses for Ala. & Ga., 25 F.C.C.2d 801 (1970) (Cox, Comm'r, dissenting).

67. They often acknowledged that some of the spotlighted stations probably had satisfactory

instead, they primarily wanted the FCC to seek further information about stations appearing to provide low levels of "service" programs.⁶⁸ A major thrust of the Cox and Johnson remarks was that the Commission should adopt standards for deciding whether a licensee was providing programming in the public interest.⁶⁹ At three different times Cox and Johnson initiated studies of broadcast programming and suggested possible standards for the examination of programming during the license renewal process.⁷⁰

While Cox and Johnson certainly had an impact,⁷¹ they apparently did not influence directly the rest of the Commission in the 1960s. The two remained in the minority, and the majority did not even consider it necessary to respond to their sometimes barbed attacks.

The majority's viewpoint was best represented by Commissioners Lee

reasons for their performances. See, e.g., License Renewals in Ind., Ky. & Tenn., 10 Rad. Reg. 2d (P & F) at 946 (Johnson, Comm'r, dissenting) ("struggling UHF stations"). At times Cox and Johnson did suggest that some licensees should not be renewed. See, e.g., Renewal of Standard Broadcast Station Licenses, 7 F.C.C.2d 122 (Cox, Comm'r, dissenting); *id.* at 130 (Johnson, Comm'r, dissenting).

68. In Johnson's dissent to Indiana, Kentucky and Tennessee renewals, he explained that "I do not feel that the Commission can fulfill its responsibilities to the public by renewing such licenses without the slightest inquiry or concern as to justification or excuse." License Renewals in Ind., Ky. & Tenn., 10 Rad. Reg. 2d (P & F) at 946 (Johnson, Comm'r, dissenting).

69. Johnson, in one dissent, censured the Commission for going through the motions of reviewing programming against a public interest standard "when in fact doing nothing of the sort." Renewal of Standard Broadcast Station Licenses, 7 F.C.C.2d at 131 (Johnson, Comm'r, dissenting). He would prefer, he asserted, that the FCC make an explicit and reasoned judgment that the public interest would be best served by "encouraging broadcasters to select those program formats that will create the greatest possible advertising revenue." *Id.*

The two dissenting commissioners particularly deplored the Commission's failure to develop minimum standards for information programming. In 1968, when they submitted the Oklahoma report, Cox and Johnson proposed that stations in that study not meeting the five-one-five standard be required to justify their performance. They also proposed that the staff be instructed to develop procedures for presenting to the commissioners renewal applications "reflecting the lowest levels of past and proposed performance in the areas of news, public affairs, and other programming as well as in local live programming generally and in prime time." Oklahoma Case Study, *supra* note 61, at 2. Cox and Johnson were the only two Commissioners to vote for their proposals.

70. In the Oklahoma study, the two looked at station ownership patterns, other media available in the community, the amounts of particular kinds of programming, station records of the network news and public affairs programs offered, and station revenues and profits. Oklahoma Case Study, *supra* note 61. In studies of New York and mid-Atlantic region stations, the two commissioners ranked the television stations in order of performance in many categories. The studies compared licensee efforts in various programming categories, the number of people involved in the news operation, the airing of network news and public affairs, the number of public service announcements and the level of commercialism. See Renewal of Radio & Television Licenses in N.Y. & N.J., 18 F.C.C.2d at 268-322; Renewal of Standard Broadcast & Television Licenses for D.C., Md., Va. & W. Va., 21 F.C.C.2d 35 (1969) (Cox & Johnson, Comm'rs, dissenting). The data printed with the latter case, however, was taken from Stavins, *Television in the Mid-Atlantic Region: An Analysis and Statistical Account, in Television Today: The End of Communication and the Death of Community* (R. Stavins ed. 1969). In 1973, after Cox had left the Commission, Johnson ranked stations in the top 50 television markets on the basis of performance criteria similar to those used in the New York study. Top 50 Markets, *supra* note 51, at 6-172.

71. If nothing else, their vocal dissents to mass license renewal publicized Commission decisions that would have gone unnoticed and provided insights into Commission operations. Cox and Johnson also may have played a role in activating the citizen groups mentioned later in this Article. Further, their ideas may have laid the foundation for future FCC policies. See notes 136-53 and accompanying text *infra*.

Loevinger and Rosel Hyde, neither of whom was timid in his resistance to the imposition of programming standards. Both doubted the FCC's authority to base its evaluation of applicants on the amount of particular kinds of programming offered.⁷² They certainly rejected the desirability of such a practice.⁷³ But the Commission's majority could not control all persons and groups who participated or wanted to participate in the regulatory process. The focus of the regulatory process began to shift in the last part of the 1960s because of the demands of citizen groups and attorneys representing broadcast licensees. This change in regulatory focus had its genesis in a 1964 license challenge.

C. *Regulatory Focus Begins to Shift*

The Office of Communication of the United Church of Christ led a challenge to the license of Jackson, Mississippi television station WLBT.⁷⁴ The five-year proceeding, which twice wound up in the United States Court of Appeals for the District of Columbia, was to have a dramatic impact on the nature of the license renewal process. Two court opinions, both written by

72. Hyde and Loevinger believed that the Commission violated constitutional principles when it forced applicants to consider FCC program priorities. See Broadcast Application Forms—Radio, *supra* note 43, at 444-48; Lee Roy McCourry, 2 Rad. Reg. 2d (P & F) 895, 898 (1964) (Loevinger, Comm'r, dissenting); Loevinger, *The Issues in Program Regulation*, 20 Fed. Com. B.J. 3 (1966); Interview with Rosel H. Hyde, *supra* note 28. Loevinger stated that statistical programming standards amounted to a government requirement that broadcasters air programming that otherwise they would not air, thereby eliminating programming that the broadcasters preferred. Loevinger, *supra*, at 11. He believed that there were no court precedents suggesting that the Commission had the right to require "what it considers to be desirable program material." Lee Roy McCourry, 2 Rad. Reg. 2d (P & F) at 906.

73. Loevinger asserted that this would allow government agents to establish programming tastes. He wished that he "could feel the assurance of certitude and righteousness which seems to move those of my colleagues who believe they are justified in trying to secure programming which conforms to their own ideals." Lee Roy McCourry, 2 Rad. Reg. 2d (P & F) at 906-07 (Loevinger, Comm'r, dissenting). Loevinger argued that unsatisfactory programming would be a "small price to pay" for maintaining the freedoms fundamental to the existence of a "free and democratic society." *Id.* at 907.

74. Civil rights leaders and the FCC had been concerned for several years about the behavior of WLBT, licensed by Lamar Life Broadcasting Company. As early as 1955, complaints alleged that the station flashed, "Sorry, Cable Trouble" on the screen to cut off deliberately a network program about race relations. The featured guest on the show was Thurgood Marshall, then general counsel of the NAACP, who was later to be named to the United States Supreme Court. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966) (*Church of Christ I*). Participants in the license challenge included Aaron Henry and Robert L. T. Smith, Mississippi civil rights leaders who lived within WLBT's prime service area, and the United Church of Christ congregation at Tugaloo, also in the region covered by the station. The challengers asserted that WLBT did not provide a "fair and balanced presentation" of controversial issues, particularly those concerning blacks. They also contended the station broadcast too many commercials and too much entertainment programming. *Id.*

Nevertheless, the FCC did not allow the challengers to participate in the renewal proceeding, adhering to the traditional view that broadcast viewers and listeners did not have legal standing as parties of interest as required by section 309(d) of the Communications Act of 1934. 359 F.2d at 1000. The Commission's denial of standing was based on the theory that members of the listening public did not suffer a direct, substantial injury or adverse effect from licensee programming. *Id.* Up to this time, courts had granted standing only to those who had alleged economic injury or electrical interference. *Id.*

The Commission, without conducting a hearing, granted WLBT a one-term license renewal, "so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area." *Id.* at 999.

then-Circuit Judge Warren E. Burger, paved the way for increased involvement of broadcast consumers in the license renewal process. Burger's first opinion allowed for viewer participation.⁷⁵ The second clarified the roles of the viewer and the broadcast licensee when a renewal was contested.⁷⁶ Citizen groups immediately took advantage of the decisions. While only two petitions to deny the renewal of broadcast station licenses had been filed in 1969, the year of the second opinion, there were 60 to 70 challengers of approximately 150 licensees less than three years later.⁷⁷

Further impetus for a shift in regulatory focus arose from demands by broadcasters to the FCC for clarification of licensee responsibility. The FCC's 1960 discussion of broadcast licensee responsibility had been deliberately vague.⁷⁸ The Commission emphasized licensee discretion when it announced that a broadcaster's major duty was to ascertain "the needs and interests of his community and to program to meet those needs and interests."⁷⁹ The FCC should not have been surprised to find out that broadcasters, their attorneys and FCC staff members were giving a variety of interpretations to the Commission's language, even after the *1960 Programming Statement* had been incorporated into the renewal form.⁸⁰ The Federal Communications Bar Association even asked for a clarification of FCC policy.⁸¹ The FCC responded by initiating an inquiry in 1969 and publishing in 1971 a *Primer on Ascertainment of Community Problems by Broadcast Applicants (1971 Primer)*,⁸² which provided instructions for ascertainment studies and specifications for subsequent program plans.

75. A three-judge panel of the court of appeals heard the case and unanimously sent it back to the FCC with orders to hold hearings and allow some public intervention. Circuit Judge Burger, later named Chief Justice of the U.S. Supreme Court, said the FCC had denied participation to spokesmen for the listeners, those "most directly concerned with and intimately affected by the performance of a licensee." 359 F.2d at 1002. He emphasized the need for a mechanism which would allow for "listener appraisal of a licensee's performance" in order to vindicate the public interest vested in a broadcast license. *Id.* at 1006.

76. The Commission apparently did not completely absorb the court's message. A hearing was held, but the burden of proof was placed on the challengers of the license. In fact, in the later words of the court of appeals, the hearing examiner and the Commission "exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors and their efforts." *Office of Communication of the United Church of Christ v. FCC (Church of Christ II)*, 425 F.2d 543, 549-50 (D.C. Cir. 1969). The hearing examiner found that the challengers had "woefully failed" to sustain "their serious allegations," and the Commission renewed the license of WLBT for a full three-year term. *Id.* at 546.

The case was appealed again, and Burger did not waste any more words or time. He said the Commission had mistakenly forced onto the petitioners a burden of proof that properly belonged to the licensee. *Id.* at 550. The court ordered that Lamar Life's license be vacated. *Id.*

77. Broadcast License Renewal: Hearings on H.R. 5546, H.R. 3854, H.R. 370, H.R. 565, H.R. 1066, H.R. 1864, H.R. 2001, H.R. 2349, H.R. 2355, H.R. 3551, H.R. 6319, H.R. 6320, and All Similar and Identical Bills Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., pt. 2, at 1161 (1973) [hereinafter cited as Hearings on H.R. 5546] (statement of Richard J. Shiben). See also Selected FCC Policies, *supra* note 60, at 17; note 175 *infra*.

78. See notes 29-42 and accompanying text *supra*.

79. See notes 32-42 and accompanying text *supra*.

80. See notes 43-46 and accompanying text *supra*.

81. 1971 Primer, *supra* note 3, at 682, 685-86.

82. *Id.* The Primer was updated in 1976. See text accompanying notes 218-19 *infra*.

In the *1971 Primer* the Commission set forth its position that broadcast applicants had to determine the racial, ethnic, economic and social composition of their communities. The applicants were to consult with representatives of the major segments of the community and to survey the general public to determine the perceived problems in the community. An applicant had to list all of the ascertained needs and problems. He then was required to indicate which of the needs and interests he would address in his programming and to propose programs designed to meet those concerns.⁸³

In the *1960 Programming Statement* the FCC had not explained what it meant by terms such as community "needs" or community "interests."⁸⁴ The Commission asserted in its *1971 Primer* that many licensees were interpreting its language inappropriately.⁸⁵ The Commission tried to correct the misimpressions by offering a third word, "problems," which was identified as a synonym for "needs and interests."⁸⁶ The FCC did not define "community problems," but an abundance of evidence suggests that the Commission was concerned primarily about programming that would fit into the "public affairs" programming category.⁸⁷

A broadcaster was not charged by the FCC with providing programming for all of the community problems discovered during the ascertainment process. He was, according to the *1971 Primer*, expected "to determine in good

83. See *1971 Primer*, supra note 3, 685-86.

84. See note 38 supra.

85. *1971 Primer*, supra note 3, at 656-57. The FCC asserted that many broadcasters had been interpreting community "needs" to mean the program preferences of their service areas. "We are shown, for example," the Commission explained, "communities with 'needs' for more country and western music, or for more sports programs, but which apparently are not believed to have needs for improved schools, roads, or welfare programs." Id. at 656. The FCC said it intended "community needs" to mean more than it had to many licensees. Id.

86. Id. The Commission also said the word "problems" would be used as a short form for the phrase "problems, needs and interests." Id. at 687.

87. See, e.g., note 85 supra, and text accompanying notes 193-97 infra. The Commission often has stressed that it is more concerned with a broadcaster's overall programming performance than it is with performance in any one category. See, e.g., text accompanying notes 40-42 & 64 supra. See also *Taft Broadcasting Co.*, 38 F.C.C.2d 770, 789 (1972). However, the Commission also has suggested that some categories are less appropriate than others for coping with a community's problems. News programs, according to the *1971 Primer*, "are usually considered by people to be a factual report of events and matters—to keep the public informed—and, therefore, are not designed primarily to meet community problems." *1971 Primer*, supra note 3, at 686. The Commission also said "many complex problems" confronting society "can not be met by the brief comments" possible in public service announcements, messages usually lasting a minute or less. Id. at 676. The FCC said the applicant presenting only announcements "would have the burden of establishing that announcements would be the most effective method for meeting the community problems he 'proposes to meet.'" Id. at 686. See also *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 433 (1976) [hereinafter cited as *1976 Primer*].

On the other hand, when the Commission talks about the kind of programming appropriate for meeting community needs, the subject matter clearly seems to be the same as that stressed in the *Blue Book* and the *Report on Editorializing*. The Commission usually mentions such topics as racial conflict, school building programs, zoning questions and environmental pollution. *City of Camden*, 18 F.C.C.2d 412, 421 (1969). See also *Radio Marion*, 52 F.C.C.2d 1229, 1237-39, 1241-44 (1975); *Time-Life Broadcast, Inc.*, 33 F.C.C.2d 1081, 1098 (1972); *Time-Life Broadcast, Inc.*, 33 F.C.C.2d 1050, 1056 (1972). Problems that could be appropriately addressed through agricultural, religious, or instructional programming are certainly not excluded, but neither are they often emphasized. But see *1971 Primer*, supra note 3, at 656-57.

faith which of such problems merit treatment by the station."⁸⁸ He could consider his station's format, his audience and the programming provided by other stations in the community.⁸⁹ The Commission said very little about the amount of programming required to deal with community problems but suggested that it must be a "significant proportion" of a station's programming.⁹⁰ The Commission said that broadcast time was best left to the licensee with the "general limitation that it should be presented at a time when it could reasonably be expected to be effective."⁹¹ Unfortunately, the FCC's attempt to clarify a broadcaster's responsibilities left many questions unanswered.

III. THE 1970s

A. *Petitions to Deny Through 1973*

When citizen groups began filing frequent petitions to deny, one of their most common targets was the past and proposed programming of licensees.⁹² By the end of 1973, the FCC had acted on more than a dozen petitions to deny based on the quantity or quality of the issue-oriented programming offered by a broadcast station.⁹³ Petitioners had to rely on the same criteria supposedly used by the FCC's staff in its review of license applications: whether licensees were providing programming adequately focused on community problems and whether they were providing programming as promised in the previous application.⁹⁴ In the first cases decided in the 1970s, citizen groups rarely challenged licensees on the basis of promise versus performance, and that

88. 1971 Primer, *supra* note 3, at 685.

89. *Id.* at 673, 685. The Commission articulated a few broad restrictions. All stations, regardless of format, must present programming about community problems. *Id.* at 687. A station could not program only for its audience, without regard to the problems of the entire community. *Id.* at 672-73.

90. *Id.* at 686. In the 1971 Primer, the FCC asked, "What is meant by devoting a 'significant portion' of a station's programming to meeting the community problems?" *Id.* The initial response was that there was no single answer—the amount required would vary from community to community and from time to time within a community. Yet the 1971 Primer indicated that the Commission would investigate when the amount of programming appeared "patently insufficient to meet significantly" the community problems. *Id.* But see text accompanying notes 218-19 *infra*. The question was taken from *City of Camden*, 88 F.C.C.2d 412, 421 (1969). The 1971 Primer also said that a broadcaster programming to meet "one or two" community problems would face a *prima facie* question "as to how the proposal would serve the public interest." 1971 Primer, *supra* note 3, at 686. See text accompanying notes 218-19 *infra*.

91. 1971 Primer, *supra* note 3, at 678.

92. The most frequent targets were equal employment opportunities and ascertainment procedures. See, e.g., Selected FCC Policies, *supra* note 60, at 17; Panel Presentation, *supra* note 51.

93. While not a statistically large amount, these case opinions established much of the precedent for similar cases throughout the decade. The year 1974 is used as a cutoff point because it marks the beginning of a new Commission activism, at least in part due to the chairmanship of Richard E. Wiley. See note 174 and accompanying text *infra*. One of the most frequent charges was that a licensee was not providing sufficient programming for a particular segment of the community, not directly a focus of this Article. See note 112 *infra*.

94. The FCC also would discuss the fairness aspect of the 1949 *Report on Editorializing* when petitioners complained about one-sided issue coverage. Until 1974, however, the Commission did not talk about the responsibility, also discussed in the 1949 report, to provide a reasonable amount of discussion of public issues, even though many petitioners complained that they were not receiving enough programming to meet community needs. See particularly note 127 *infra*. See also note 127 and text accompanying notes 117-20 & 208-17 *infra*.

standard was never a decisive issue.⁹⁵ Citizen groups challenged on the basis that licensee programming had not effectively addressed community needs, although they had little direct success on this basis, either.⁹⁶

The FCC's demand that broadcast licensees determine and respond to problems and needs of their communities would appear to have presented citizen groups with an excellent target for challenges. Nevertheless the petitioners soon discovered that it was difficult to convince the Commission that they had an adequate case. "Community problems" and "community needs" proved to be elusive terms even though the Commission had formalized the process of ascertainment after the concept was inaugurated in the *1960 Programming Statement*.⁹⁷ A citizen group challenging a license renewal had very little chance of getting past the first procedural step.

Although each broadcast licensee supposedly had to justify in its application why a license renewal would be in the public interest,⁹⁸ the challenger to a license carried a substantial initial burden of proof. Anyone petitioning to deny a license first had to convince the FCC to schedule a hearing.⁹⁹ The Communications Act of 1934 required that a challenger to a license make a specific allegation of fact sufficient to demonstrate that a license renewal would be prima facie inconsistent with the public interest.¹⁰⁰ The FCC required the petitioner to raise substantial questions of fact that, if true, would establish that a licensee's past or proposed programming could not reasonably meet the needs and interests of the people within its service area.¹⁰¹ The FCC would schedule a hearing only if it was convinced that a licensee had not exercised its judgment reasonably or in good faith.¹⁰²

By the end of 1973, the FCC had yet to schedule a hearing for a licensee that had been the object of a petition to deny because of programming issues. Although this situation may have been due in part to weaknesses in the petitions to deny,¹⁰³ it also may be attributed to the attitude of the Commission and its staff and to the lack of specific programming standards.

95. See, e.g., *Time-Life Broadcast, Inc.*, 33 F.C.C.2d 1065, 1068-69, 1078 (1972).

96. See text accompanying notes 97-103 & 128 *infra*.

97. See notes 78-91 and accompanying text *supra*; text accompanying notes 104-14 *infra*; 1971 Primer, *supra* note 3.

98. See, e.g., *Taft Broadcasting Co.*, 38 F.C.C.2d at 789. See also *Church of Christ I*, 359 F.2d at 1007; Communications Act of 1934, 47 U.S.C. § 309(a) (1976).

99. 47 U.S.C. § 309 (1976).

100. *Id.* § 309(d)(1). See also *Taft Broadcasting Co.*, 38 F.C.C.2d at 789; *Time-Life Broadcast, Inc.*, 33 F.C.C.2d at 1090. For a discussion of the petitioner's responsibility, including how this burden of proof is consistent with the *Church of Christ* cases, see *Stone v. FCC*, 466 F.2d 316, 321-22 (D.C. Cir. 1972).

101. E.g., *Taft Broadcasting Co.*, 38 F.C.C.2d at 789; *RadiOhio, Inc.*, 38 F.C.C.2d 721, 738 (1973), *aff'd sub nom. Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974).

102. E.g., *Taft Broadcasting Co.*, 38 F.C.C.2d at 789; *RadiOhio, Inc.*, 38 F.C.C.2d at 739. See note 59 *supra*, and notes 246-54 and accompanying text *infra*.

103. Some of the stations challenged had relatively strong programming but happened to be in communities with active citizen groups. The groups were inexperienced and frequently prepared less than perfect cases. See Panel Presentation, *supra* note 51, at 8 (remarks of Henry Baumann); *id.* at 13-14 (remarks of Charles Firestone); *id.* at 18-19 (remarks of Erwin Krasnow); Letter from Deborah C. Costlow, Staff Secretary, Media Access Project, to William F. Chamberlin (May 29, 1980).

The FCC reminded license challengers of its lack of specific program standards when it rejected petitions to deny broadcast licenses.¹⁰⁴ The Commission did not give broadcasters specific instructions on preferred timing, type or format of programming.¹⁰⁵ It refused to suggest how much of the programming should be offered¹⁰⁶ or how much should be focused on local issues rather than national affairs.¹⁰⁷

Several Commission opinions did provide some very general suggestions for what might be considered a breach of public trust serious enough to deny the renewal of a license. A licensee would have to ignore "strongly expressed needs,"¹⁰⁸ or provide programming that was not "sufficiently responsive" to community needs.¹⁰⁹ It would have to fail to meet a "substantial" number of community problems,¹¹⁰ rely totally on national programming to meet local needs¹¹¹ or ignore particular community interests.¹¹² The guidelines of "sufficiently responsive," "substantial" and "reasonable" were too vague to indicate what specific allegations would convince the FCC that a licensee was not providing programming to meet community needs. This uncertainty not only affected the ability of citizen groups to challenge renewals;¹¹³ it also made it impossible for broadcasters to know what was expected of them and for the FCC's staff to determine when a licensee was not serving in the public interest.¹¹⁴

104. E.g., Mahoning Valley Broadcasting Corp., 39 F.C.C.2d 52, 58 (1972); Time-Life Broadcast, Inc., 33 F.C.C.2d at 1092.

105. *Id.* The Commission had, of course, given licensees some very general instructions about what constituted programming to meet community needs and problems. See note 87 and accompanying text *supra*. It also said that it "recognized, of course, that broadcasters have an obligation to present some nonentertainment programming in prime evening time when a larger audience is generally available to watch." Time-Life Broadcast, Inc., 33 F.C.C.2d at 1092. The lack of strength in the Commission's conviction was demonstrated in RKO Gen., Inc., 52 F.C.C.2d 582 (1975), when community groups challenged two San Francisco stations broadcasting public affairs programming only between midnight and 6 a.m. on weekdays and on Sundays.

106. See text accompanying notes 117-27 *infra*.

107. See Time-Life Broadcast, Inc., 33 F.C.C.2d at 1055-56. There are, of course, first amendment concerns any time the government begins making decisions that affect programming. See notes 267-78 & 351-57 and accompanying text *infra*.

108. RadiOhio, Inc., 38 F.C.C.2d at 738. See also Storer Broadcasting Co., 41 F.C.C.2d 792, 805 (1973).

109. See Evening News Ass'n, 35 F.C.C.2d 366, 391 (1972). See also Taft Broadcasting Co., 38 F.C.C.2d at 789.

110. See Storer Broadcasting Co., 41 F.C.C.2d at 805, 811. See also The Evening News Ass'n, 35 F.C.C.2d at 391.

111. Time-Life Broadcast, Inc., 33 F.C.C.2d at 1056.

112. See Taft Broadcasting Co., 38 F.C.C.2d at 789; RadiOhio, Inc., 38 F.C.C.2d at 738. For FCC treatment of petitions asserting that a licensee did not provide adequate programming for certain segments of a community, see New Mexico Broadcasting Co., 49 Rad. Reg. 2d (P&F) 1355 (1981); Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975); Evening Star Broadcasting Co., 27 F.C.C.2d 316 (1971), *aff'd sub. nom.* Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

113. This was a concern expressed in the 1979 GAO report reviewing license renewal procedures. See Selected FCC Policies, *supra* note 60, at ii, 47-49, 52-60, 71-73.

114. Even FCC Chairman Dean Burch said,

If I were to pose the question, what the FCC's renewal policies are and what are the controlling guidelines, everyone in the 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).

Hence, the fact that none of the license challenges decided by 1973 resulted in a hearing does not mean that all of the broadcasters involved necessarily were providing exemplary programming.¹¹⁵ Because of the lack of specific standards, the FCC could find acceptable the programming of any broadcaster who was doing anything at all.¹¹⁶

One particularly significant aspect of this lack of discernible programming standards was the FCC's steadfast refusal to consider the requirement to provide programming to meet community problems in strictly quantitative terms. During the early 1970s, the Commission refused to discuss the amount of programming necessary apart from a discussion of whether a station's offerings sufficiently met community needs.¹¹⁷ The FCC continually reminded citizen groups that it had not adopted quantitative standards for judging a licensee's performance.¹¹⁸ Although the Commission itself had used such terms as "significant" and "substantial" in explaining the quantity of programming expected of licensees,¹¹⁹ it said repeatedly that a "bare allegation" that a certain percentage of public affairs programming was not sufficient did not present a prima facie case that the licensee was not serving the public interest.¹²⁰ The issues were whether a station had abused its discretion in its selection of programming designed to meet community needs¹²¹ and whether a licensee had lived up to its programming promises.¹²²

Although this approach appears consistent with the *1960 Programming Statement*, it ignored a significant aspect of the *1949 Report on Editorializing*. The *1949 Report* set forth the FCC position that a broadcaster had to devote a "reasonable" percentage of its time to the discussion of public issues, a policy that had never been renounced.¹²³ The FCC may have reaffirmed that responsibility in the early 1970s,¹²⁴ a few years after the duty had been recog-

Address to International Radio and Television Society (Sept. 14, 1973), as reported in The Communication Act of 1979: Hearings on H.R. 3333 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., vol. 2, pt. 1, at 15 (1979) (Statement of Henry Geller, Assistant Secretary for Communications and Information, U.S. Dep't of Commerce).

115. See *California La Raza, Media Coalition*, 38 F.C.C.2d 22 (1972). The complaint in this case was treated as an informal objection because of a late filing. The Commission, nonetheless, addressed the substantive issues raised. At least one station that was the object of a complaint was providing less than one percent of its programming time for public affairs. *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d at 60. See also notes 180-82 and accompanying text *infra*.

116. For critical assessments by two commissioners of the Commission's approach, see *Midland Broadcasters, Inc.*, 48 F.C.C.2d 195, 198 (1974) (Hooks, Comm'r, dissenting); *California La Raza, Media Coalition*, 38 F.C.C.2d 22, 25-26 (1972) (Johnson, Comm'r, dissenting); *Time-Life Broadcast, Inc.*, 33 F.C.C.2d 1050, 1138-41 (1972) (Johnson, Comm'r dissenting). See also *B. Cole & M. Oettinger*, *supra* note 59, at 173-87.

117. *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d at 61; *RadiOhio, Inc.*, 38 F.C.C.2d at 743; *California La Raza, Media Coalition*, 38 F.C.C.2d at 22-24.

118. *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d at 61.

119. See notes 90, 110-13 and accompanying text *supra*.

120. *Storer Broadcasting Corp.*, 41 F.C.C.2d at 813. See also *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d at 61; *RadiOhio, Inc.*, 38 F.C.C.2d at 743.

121. E.g., *Storer Broadcasting Co.*, 41 F.C.C.2d at 811, 813.

122. *Mahoning Valley Broadcasting Corp.*, 39 F.C.C.2d at 61.

123. *Report on Editorializing*, *supra* note 3, at 1249. See *Fairness Report*, *supra* note 3, at 7.

124. See FCC, 37th Ann. Rep./F.Y. 1971, at 30 (1972).

nized by the United States Supreme Court.¹²⁵ The FCC never transformed "reasonable" into numerical terms, and one federal appellate court had approved the FCC's rejection of "a simple percentage test."¹²⁶ The fact remained that the FCC was asserting that the amount of public issues programming was a responsibility of licensees while at the same time refusing to take that into consideration during the license renewal process.¹²⁷

Members of citizen groups could have been excused if, by the end of 1973, they considered participation in the license renewal process futile. No licensee renewal applications had even been scheduled for hearing, let alone denied. Nevertheless, the petitions to deny of the early 1970s did have an impact. They put the broadcast industry on notice that members of the public were aware of licensee responsibilities and might take broadcasters—and even the FCC—as far as the federal courts in an attempt to remedy deficiencies in broadcast programming. This increased the sensitivity of many licensees to community problems and needs.¹²⁸ The petitions to deny also led to discussions between broadcast licensees and community groups, and many grievances were settled without federal involvement.¹²⁹ In addition, Commission opinions resulting from the petitions put both the programming of broadcasters and the approaches of the FCC on record in a new way. The entire process was now more visible. Finally, the activity of the citizen groups was, in part, responsible for the flurry of FCC regulatory activity during the next few years. The FCC made several major efforts to tighten its license renewal process and increase the pressure on broadcasters to provide programming that would meet community needs.

125. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

126. In *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320 (D.C. Cir. 1974), aff'g *Radi-Ohio, Inc.*, 38 F.C.C.2d 721 (1973), the Court of Appeals for the District of Columbia backed the FCC's emphasis on examining whether programming met the needs of a community. The court said that "programming is a matter left largely in the discretion of the licensee and can never be measured by a simple percentage test." *Id.* at 327. The court said that evidence presented by the licensee that radio station WBNS-FM of Columbus, Ohio had met community needs was rebutted by the petitioners. Rather, the Columbus Broadcasting Coalition "simply asserted its subjective characterization of licensee's performance as unsatisfactory." *Id.* Therefore, the court stated, the FCC was correct in deciding that the station's programming was adequate and reasonable and that the allegations had not raised sufficient factual issues to warrant a hearing. The court would have reversed the Commission's decisions only if there were evidence that the FCC had been arbitrary, capricious or unreasonable. *Id.* at 324.

127. See note 94 *supra*. Although complaints based on the fairness responsibility announced in the *Report on Editorializing* had been considered initially apart from the renewal process since the early 1960s, see note 213 *infra*, the FCC had not made it clear as late as 1974 whether complaints about the lack of issue-oriented programming should be addressed to the FCC's Complaints and Compliance Division or to its Renewal and Transfer Division. Chamberlin, *supra* note 26, at 370-76, 381-88, 392-401. This simply meant that it was unclear whether these complaints should be considered as they arrived at the FCC or should be held for consideration in the context of the overall license renewal process. Even if the complaints had been evaluated at the time they had been made, the disposition of those issues could have been considered part of the renewal process.

128. See, e.g., Panel Presentation, *supra* note 51, at 9 (remarks of Henry Baumann); *id.* at 18-20 (remarks of Erwin Krasnow).

129. See B. Cole & M. Oettinger, *supra* note 59, at 204-25; Selected FCC Policies, *supra* note 60, at 16-19; Panel Presentation, *supra* note 51, at 9-10 (remarks of Henry Baumann); *id.* at 15 (remarks of Charles Firestone).

B. Procedural Reforms

In 1971 the FCC began a proceeding designed to improve the communications among licensees, the public and the Commission. A rulemaking proceeding known as Docket No. 19,153, or the *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses*,¹³⁰ was promulgated with three objectives: to simplify the renewal process; to encourage dialogue between listener groups and licensees; and to provide the public and the Commission with more information, on a continuing basis, about licensee programming.¹³¹ Although many of the new regulations adopted in 1973 by the Commission¹³² did not touch public affairs programming directly, three did. All three pertained only to commercial television. The Commission adopted an annual program reporting form,¹³³ a requirement that licensees annually make public a list of major community problems¹³⁴ and a revised programming section for the license application.¹³⁵

130. *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, Notice of Inquiry and Proposed Rulemaking*, 27 F.C.C.2d 697 (1971) [hereinafter cited as *Proposed Rulemaking*].

131. See *id.* at 698. See also testimony of FCC Chairman Dean Burch and of a Commission consultant, Dr. Barry Cole, in Hearings on H.R. 5546, *supra* note 77, at 1119-20 (statement of Dean Burch), 1147-48 (statement of Dr. Barry Cole); B. Cole & M. Oettinger, *supra* note 59, at 135-36.

132. *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, Final Report and Order*, 43 F.C.C.2d 1 [hereinafter cited as *Docket No. 19,153, Final Report*], superseded, *Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, Memorandum Opinion and Order*, 44 F.C.C.2d 405 (1973) [hereinafter cited as *Docket No. 19,153, Mem. Op. & Order*]. The six-to-zero vote apparently was more from a sense of compromise than a sense of conviction. Aspects of the proceeding appeared to bother those who wanted to increase the regulation of public affairs programming and those who wanted no more regulation than absolutely necessary. See *Docket No. 19,153, Final Report*, at 88-92. Nicholas Johnson was disappointed that the Commission had not authorized a ranking of licensee performance, a concept suggested in the notice of inquiry and proposed rulemaking (see *Proposed Rulemaking*, *supra* note 130, at 698). *Docket No. 19,153, Final Report*, *supra*, at 90. The notice of inquiry and proposed rulemaking had suggested that the ranking process would allow the FCC staff easily to sort out those license applications that needed more scrutiny. *Proposed Rulemaking*, *supra* note 130, at 698.

133. The Annual Programming Report, Form 303-A, basically asked for the same information as the previous application. Under the new approach, however, television licensees had to compile the information annually and to provide it in more detail. For the first time, time allotments for news, public affairs, and "other" programming had to be broken down into the amount spent on local efforts only, as well as overall. The data had to be provided for three different time periods rather than one overall figure. Further, a licensee was required to provide specific information about every individual public affairs program represented in the tabulations. FCC, Form 303-A, Annual Programming Report (1975). See also *Docket No. 19,153, Final Report*, *supra* note 132, at 79-80; *Docket No. 19,153, Mem. Op. & Order*, *supra* note 132, at 445-46.

134. As of January 1974, television licensees were required to make available for public inspection an annual list of the "significant" problems and needs of their service areas, as determined during the ascertainment process. Broadcasters were to attach a record of "typical and illustrative" programs designed to meet those needs. Copies of the lists also were to be submitted every three years with a broadcaster's license renewal application. 47 C.F.R. § 1.526(a)(9) (1974). See *Docket No. 19,153, Mem. Op. & Order*, *supra* note 132, at 446.

135. The simplification of the television section of the license application was due primarily to the annual requirement of the 303-A form. The form eliminated the need to ask for information about problems in the licensee's community and the programs designed to deal with those problems. It also eliminated the need to ask questions relating to the amount of particular kinds of programming provided. The new application asked television licensees to indicate only whether they anticipated adding to the next annual list of programs designed to meet community needs,

Other 1973 changes in public affairs programming policy occurred as part of an overhaul in FCC operating procedures. With little or no prior public notice, the FCC reversed its approach toward delegating authority to the Chief of the Broadcast Bureau for a wide range of activities, including the processing of license renewal applications.¹³⁶ Commission regulations previously had enumerated all of the occasions when the Broadcast Bureau could act without the specific approval of the commissioners.¹³⁷ Under the new regulations, the Commission listed only those matters that it did not want to delegate, a much shorter list.

Among the license renewal applications that the Commission said it wanted to see were those that did not meet certain programming criteria. Although this was the first time the Commission had described in regulations certain programming matters that it wanted to examine, the changes were deemphasized. The Commission said that the actual practice of handling license renewal applications would not change substantially.¹³⁸ That may have been true for the review of applications with defects in ascertainment¹³⁹ or discrepancies between promise and performance,¹⁴⁰ but it was not true for a delegation standard concerning program percentages.

For the first time the FCC was instructing the Broadcast Bureau to send to the Commission licensee applications proposing levels of nonentertainment programming below specified minimums.¹⁴¹ A television application was to be reviewed by the Commission if the licensee proposed less than ten percent news, public affairs and "other" informational programming combined. Minimums of eight, six and ten percent, respectively, were established for radio

rather than to list anew typical and illustrative programs that the applicants planned to broadcast during the next license period to meet those needs. Further, the application no longer asked the licensee about his approach to providing time for the discussion of public issues. The application added one item—network affiliates had to indicate whether they carried their network's news or public affairs programming more than half of the time. See Form 303—1974, supra note 3.

136. Amendment of Part of the Commission's Rules—Commission Organization—With Respect to Delegations of Authority to the Chief, Broadcast Bureau, 43 F.C.C.2d 638 (1973) [hereinafter cited as *Delegations of Authority—Order*]. For a discussion of the change, see B. Cole & M. Oettinger, supra note 59, at 140-42.

137. 47 C.F.R. § 0.281 (1973).

138. *Delegations of Authority—Order*, supra note 136, at 638.

139. There were no criteria for processing applications with regard to the licensee responsibility to provide programming related to community needs.

140. Since in the past there had been little published evidence of a meaningful review, see generally text accompanying notes 47-73 supra, any lack of such a review certainly could continue. This may not have been the intended meaning of the Commission's statement. More to the point, the Commission's change in delegation authority clearly did not require a change in approach to renewal application review.

141. A majority of the Commission had not indicated recently that it wanted to see license renewal applications with programming deficiencies. See, e.g., text accompanying notes 55-73 supra. Since under the changes in delegation authority the Commission was indicating the circumstances under which it wanted to review license renewal applications, it put itself in a position of having to spell out for the first time a processing guideline for programming that a staff member could interpret. There is evidence that the Commission inadvertently did what it had refused to do in response to Cox and Johnson. For one version of how the processing guidelines were arrived at and how aware the Commissioners were of what they were doing, see B. Cole & M. Oettinger, supra note 59, at 140-42.

licensees.¹⁴² The Commission also announced that it wanted to see applications in which programming practices varied "substantially" from promises on previous applications.¹⁴³ The word "substantially" was not explained.

Three years later, in 1976, the Commission modified the delegation authority. The FCC stated that it wanted to see television applications proposing less than five percent of their time for local programming and less than five percent of their time for news and public affairs presentations combined.¹⁴⁴ For television applicants, all of the processing guidelines were to apply to programming broadcast between six a.m. and midnight.¹⁴⁵ In another change, the processing standard for promise versus performance, which applied to all commercial stations, was modified to indicate that applications should be sent to the Commission if there was not "adequate justification" for the substantial variance.¹⁴⁶ The Commission's order, however, declared that a fifteen percent variation in one category or a twenty percent variation in all categories represented a substantial variation.¹⁴⁷ This was the first time that the Commission had suggested specific quantitative guidelines for its staff to use in the promise versus performance evaluation.¹⁴⁸

The 1973 change in delegation authority represented the first time that the commissioners officially instructed the staff to inform them about licensees with particular levels of nonentertainment programming.¹⁴⁹ The changes in the delegation authority were not programming *requirements*. The Commission did not say that it would penalize licensees for failing to meet the delega-

142. Delegations of Authority—Order, *supra* note 136, at 640. The commissioners established a processing guideline for proposed levels of programming, but not for percentages of the time devoted to programming in the past.

Commissioners Benjamin L. Hooks and Joseph R. Fogarty stated in a separate opinion in 1977 that "it is an open secret that by delegation of authority to the staff, the rough rule of thumb employed by the Commission to gauge ordinary licensee renewability is our '5-1-5' rule." Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 66 F.C.C.2d 419, 435 (1977) (Hooks & Fogarty, Comm'rs, issuing separate statement) [hereinafter cited as Comparative Hearings—Report & Order]. In this author's opinion, the statement is erroneous. See also note 65 *supra*.

143. Delegations of Authority—Order, *supra* note 136, at 640. For a discussion of the Commission's use of the promise-versus-performance criterion, see text accompanying notes 183-87 *infra*.

144. Delegations of Authority, *supra* note 3, at 493. Independent UHF television stations were exempted from delegation guidelines on program levels but not on the promise-versus-performance criterion. *Id.* at 492. For a discussion of the promise-versus-performance criterion, see text accompanying notes 183-87 *infra*.

145. Delegations of Authority, *supra* note 3, at 493.

146. *Id.* at 491, 493. See 47 C.F.R. § 0.281(10) (1976), revised in 46 Fed. Reg. 13,906 (1981). For an explanation of this adjustment, see B. Cole & M. Oettinger, *supra* note 59, at 151-52.

147. Delegations of Authority, *supra* note 3, at 492. The promise versus performance percentage guideline was not published in the regulations "to permit flexibility in changing circumstances." *Id.* at 493 n.3. Accord, Revision of FCC Form 303; Application for Renewal of Broadcast License, and Certain Rules Relating Thereto, 41 Fed. Reg. 19,536, 19,544, 19,555 (1976) [hereinafter cited as 1976 License Renewal Form].

148. See note 185 *infra*.

149. Kenneth A. Cox, Chief of the Broadcast Bureau in the early 1960s, had the permission of the FCC for a short time to inform it when licensees proposed particularly low levels of local live programming. See note 64 *supra*.

tion criteria.¹⁵⁰ The FCC simply had provided the renewal staff with specific processing guidelines;¹⁵¹ the Commission wanted to see applications that did not meet the criteria. The FCC did not indicate what might happen once the applications were reviewed.

Even so, the implications of the new delegation guidelines were not lost on broadcasters, who protested what they considered to be the adoption of program standards.¹⁵² Broadcasters did not want to risk a lucrative business by failing to provide the specified levels of programming, thereby—at the very least—calling the attention of the FCC to their license applications.¹⁵³

The FCC staff appeared to take the quantitative processing guidelines seriously.¹⁵⁴ Stations proposing less nonentertainment programming than specified in the guidelines were sent letters asking how they proposed to meet the needs of their communities.¹⁵⁵ Some licensees responded by increasing the

150. This was not a regulation adopted during a rulemaking proceeding. Therefore, the FCC could not fine a licensee for failing to meet the guidelines. The Commission could have considered failure to meet the guidelines as an indication that a licensee was not serving in the public interest. The FCC did not announce this as an approach when the guideline was adopted. Delegation of Authority—Order, *supra* note 136, at 638.

151. See text accompanying notes 54-56 *supra*.

152. See, e.g., Selected FCC Policies, *supra* note 60, at 46; Letter from Sylvan Taplinger, Vice President, SJR Communications, to Wallace E. Johnson, Chief, Broadcast Bureau (May 3, 1977) (in public file of radio station WJMD, FCC, Washington, D.C.).

153. FCC Commissioner Robert Wells, reacting to an FCC inquiry into the possibility of establishing percentage guidelines for programming to be used during the comparative renewal process, said

We are naive if we think that the licensee of a television station that is worth millions of dollars will take any chances on falling below our numerical floor. If by meeting or exceeding these numbers he is practically assured of license renewal, there can be no doubt as to the course he will follow.

Comparative Hearings—Notice of Inquiry, *supra* note 59, at 590 (Wells, Comm'r, dissenting). See references listed in note 226 *infra*. If a license application were not called to the attention of the Commission, it probably would have been processed routinely by the staff unless there had been a citizen complaint. Risk to the licensee would have been minimal. See text accompanying notes 50-60 *supra*.

As a matter of fact, most broadcast stations met the processing guidelines. See, e.g., Selected FCC Policies, *supra* note 60, at 41, 43. For reference to other sources of programming data, see note 258 *infra*. Although one reason may have been that broadcasters did not want to risk a confrontation with the FCC, another may have been that the processing guidelines were low enough that they were easily met, possibly without even changing programming practices. (The processing figures themselves may have been arrived at arbitrarily. See, e.g., B. Cole & M. Oettinger, *supra* note 59, at 141, 152.) Further, the guidelines included all "informational" programming—including news, which frequently appears to be offered independent of regulation (see, e.g., Deregulation of Radio, 84 F.C.C.2d 968, 1063-64 (1981); see also note 3 *supra*) and commercially-sponsored religious programming. See also B. Cole & M. Oettinger, *supra* note 59, at 152-53.

154. The Commission, however, apparently was not prepared to take the promise versus performance substantial variance guideline too seriously. See *id.* at 148-51, 154. For a discussion of the staff's approach to the processing guidelines from a perspective different from that presented here, see B. Cole & M. Oettinger, *supra* note 59, at 148-55.

155. E.g., Letter from Richard J. Shiben to South Jersey Radio, Inc. (March 29, 1975) (in public file of radio station WMGM-FM, FCC, Washington, D.C.). There is evidence that the FCC had queried some stations about low levels of nonentertainment programming before the delegation guidelines were passed. See, e.g., Letter from Joseph F. Zias to Leslie L. Cunningham (Dec. 10, 1971) (public file of radio station KCIV-FM, FCC, Washington, D.C.); note 59 *supra*. However, it also is evident that many stations were surprised that the Commission was raising questions about programming that it had accepted before as being suitably tailored to the public interest. See, e.g., Letter from Sylvan Taplinger to Wallace E. Johnson, *supra* note 152.

proposed levels of informational programming,¹⁵⁶ and some explained that they believed their proposals to be adequate.¹⁵⁷ Others further described their programming,¹⁵⁸ tried to justify it on the basis of format or financial problems¹⁵⁹ or explained it in terms of other programming available in the community.¹⁶⁰ The FCC staff sent at least some of the responses to the Commission.¹⁶¹ Frequently the Commission asked the staff to send yet another letter asking the licensees how they were meeting their public service obligations.¹⁶² The second letter often generated an improved proposal.¹⁶³ In all cases except one, the Commission eventually was satisfied that licensee responses demonstrated that the broadcasters were meeting the needs of their communities.¹⁶⁴

Only once during the 1970s did an application review triggered by the processing guidelines lead to an evidentiary hearing. That occurred when WQAL-FM of Cleveland, Ohio, indicated in its 1976 renewal application that it intended to devote only 0.6 percent of its broadcast time to public affairs and 2.3 percent to news during the next three years.¹⁶⁵ The licensee did not amend its application after receiving either the original or the second staff letter.¹⁶⁶ The Commission ordered a hearing because it said that the application did not indicate whether the station was meeting the needs of the community.¹⁶⁷ WQAL then amended its programming proposals,¹⁶⁸ and following oral arguments,¹⁶⁹ an administrative law judge issued a summary decision granting the

156. E.g., Letter from George A. Collias, Chairman of the Board, KWST, to Richard J. Shiben (Nov. 20, 1974) (in public file of radio station KWST-FM, FCC, Washington, D.C.).

157. E.g., Letter from Howard L. Green, President, WMGM, to FCC (Apr. 10, 1975) (in public file of radio station WMGM, FCC, Washington, D.C.).

158. E.g., Letter from George A. Collias to Richard J. Shiben, *supra* note 156.

159. E.g., SJR Communications, Inc., 67 F.C.C.2d 1103, 1103-04 (1978); Letter from Edward Davis, Vice President, Sundial Broadcasting, to Richard J. Shiben (Nov. 4, 1974) (in public file of radio station KIBE-AM, FCC, Washington, D.C.). The FCC sometimes did warn stations that the same proposal might not be acceptable in the future. See, e.g., Roy H. Park Broadcasting, Inc., 69 F.C.C.2d 1603, 1604 (1978).

160. Letter from Edward Davis to Richard J. Shiben, *supra* note 159.

161. E.g., SJR Communications, Inc., 67 F.C.C.2d at 1104; FCC, Agenda Item referring to issue of renewal of two UHF television stations (Aug. 16, 1978) (in public file of WUTR-TV, FCC, Washington, D.C.).

162. E.g., SJR Communications, Inc., 67 F.C.C.2d at 1104; Letter from Wallace E. Johnson, Chief, Broadcast Bureau, to Sundial Broadcasting Corp. (Oct. 10, 1975) (in public file of KIBE, FCC, Washington, D.C.).

163. E.g., Letter from Pikes Peak Broadcasting Co. to FCC (Aug. 7, 1978) (in public file of radio station KRDO-FM, FCC, Washington, D.C.).

164. See, e.g., SJR Communications, Inc., 67 F.C.C.2d at 1105-06.

165. *Id.* at 1103.

166. *Id.* at 1104.

167. *Id.* at 1105. The FCC particularly was concerned with the limited amount of public affairs programming, and the timing and questionable content of the public affairs programming. *Id.*

168. The licensee proposed shifting the public affairs program, "Community Close Up," from between 4:30 and 6:30 a.m. on Saturdays and Sundays to between 10 and 11 p.m. on Saturdays and between 8 and 9 a.m. on Sundays. It also proposed to increase its public affairs programming to 1.2% and its news to 5.59%. SJR Communications, Inc., BC No. 78-94, slip op. at 3, 5 (FCC Oct. 27, 1978) (summary decision of Kraushaar, A.L.J.).

169. Judge Kraushaar had scheduled an oral hearing before proceeding with the hearing des-

station a one-year renewal.¹⁷⁰

C. FCC Reactions to Petitions to Deny License Renewals, 1974-1978

WQAL was not the only station whose programming was subjected to close scrutiny during the mid-1970s. The FCC processed more than two dozen petitions to deny renewals that protested the amount and nature of programming designed to meet community needs, and the Commission appeared more ready than it had been in the early 1970s to hold broadcasters accountable for their public interest responsibilities.¹⁷¹ Between 1974 and 1976, the FCC designated at least six license applications for hearing in large part because of questions about the licensee's public affairs programming.¹⁷² Two stations lost licenses, and two others received only short-term renewals.¹⁷³ This increased impact of citizen groups probably was the result of improved petitions, the nature of the stations being challenged and the priorities of the FCC under Chairman Richard E. Wiley.¹⁷⁴ Overall, however, the success of citizen group efforts to deny broadcast license renewals remained quite limited during the mid-1970s, at a time when the number of petitions to deny was at its peak.¹⁷⁵

In responding to petitions to deny between 1974 and 1978, the Commission used the same threshold test and the same criteria as in the early 1970s.¹⁷⁶ The FCC continued to emphasize the importance of a licensee's discretion in

ignated by the Commission because he thought the issues could be settled without the expense of a hearing. *Id.* at 2, 3.

170. *Id.* at 5, 8, 13.

171. This same attitude, of course, accounted for the new delegation guidelines and subsequent treatment of licensees with programming levels falling below the guidelines. See text accompanying notes 154-70 *supra*. The number of petitions to deny license renewals varied year to year, but averaged 56 annually from 1970 to 1977. Selected FCC Policies, *supra* note 60, at 17.

172. See text accompanying notes 188-207 *infra*. Any grouping of cases depends upon an evaluation of the central issues in the individual opinions. The six considered in this Article included major concerns about general service to the problems of the communities involved. Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975), was not included because it was a non-commercial station with an entire state to service and the focus of the case was on the needs of the state's blacks.

173. See note 188 *infra*.

174. Although Wiley pushed for deregulation, called re-regulation at that time, he also lacked patience with the "five percenters," the "small proportion of businessmen who simply cannot conform to a decent standard of professional conduct." Address by Richard E. Wiley, FCC Chairman, 1974-1977, before the Council of Better Business Bureaus, Inc., New Orleans, La. (Sept. 27, 1976). See also B. Cole & M. Oettinger, *supra* note 59, at 90, 193.

175. Unofficial statistics kept by James J. Brown, Assistant Chief, Renewals and Transfer Division, indicate that for fiscal year 1969 there were two petitions filed to deny broadcast licenses. Subsequently, there were 15 in fiscal year 1970, 38 in 1973, 68 in 1972, 48 in 1972, 37 in 1974, 94 in 1975 and 35 in 1976. There was a shift in the fiscal year in 1976 from a July 1-June 30 year to an October 1-September 30 year. There were 14 petitions to deny filed from July to September in 1976. Nineteen petitions to deny were filed in fiscal year 1977, 97 in 1978, 19 in 1979, 17 in 1980 and 57 in 1981. Brown said that these statistics reflected a general decline since the mid-1970s, with the fluctuations being accounted for by the activity of citizen groups in particular states, such as California. Telephone interview with James J. Brown, Washington, D.C. (Mar. 26, 1981).

176. The FCC frequently cited such cases as *Storer, Taft* and *RadiOhio*. See notes 93-116 and accompanying text *supra*. E.g., *Max M. Leon, Inc.*, 56 F.C.C.2d 387, 389 (1975). The opinion addresses the substantive issues involved although the petition to deny was treated as an informal objection because of a late filing. *Id.* at 388. See Report to Congress, *supra* note 49, at 54, 59 & 60.

the presentation of its programming,¹⁷⁷ although at least twice it put licensees "on notice" that nonentertainment programming should be offered at times when it "reasonably could be expected to be effective."¹⁷⁸ The Commission reiterated that the adequacy of a licensee's public affairs programming was not determined by a percentage test, even after the adoption of the quantitative delegation guidelines.¹⁷⁹

The FCC dispensed with most petitions to deny license renewals by finding that the broadcast licensee had adequately served community needs, even in cases in which applications revealed little or no public affairs programming.¹⁸⁰ In one opinion, the FCC granted renewal to a licensee that listed no public affairs programming but planned to meet community problems through news, public service announcements, a "Calendar of Events" and a weekly program produced by a nearby air force base.¹⁸¹ The station did not appear to be providing much local programming or programming for many of its ascertained community needs.¹⁸²

Promise versus performance, another programming standard, was first emphasized by the FCC in the 1946 *Blue Book*. The FCC stated that licensee performances would be measured against what had been promised previously.¹⁸³ Although enforcement of the *Blue Book* principles was short-lived, the FCC in 1961 again served notice to licensees that they could not disregard their programming proposals without risking the denial of renewal.¹⁸⁴ Since 1961, the FCC had used the promise-versus-performance criterion as a processing standard for renewals but appeared to be less than vigorous in its enforcement of the policy.¹⁸⁵

177. E.g., Patrick Henry, 59 F.C.C.2d 1204, 1212, aff'd on reconsideration, 62 F.C.C.2d 293 (1976); National Broadcasting Co., 47 F.C.C.2d 803, 812 (1974).

178. Southern Broadcasting Co., 68 F.C.C.2d 850, 854 (1978) (quoting 1976 Primer, supra note 87, at 445); see text accompanying notes 218-19 infra; Sonderling Broadcasting Corp., 68 F.C.C.2d 752, 756 n.9 (1978). But see note 105 supra.

179. E.g., Miami Valley Broadcasting Corp., 48 F.C.C.2d 177, 186 (1974). See Capital Cities Communications, Inc., 70 F.C.C.2d 2311, 2313 (1979), in which the Commission mentions its quantitative processing guidelines in this context.

180. E.g., Patrick Henry, 59 F.C.C.2d at 1214-15 (in which one-half hour of public affairs programming was broadcast during the composite week); General Elec. Broadcasting Co., 54 F.C.C.2d 523, 524, 526 (1975) (station devoted 0.59% of its composite week programming to public affairs); Hubbard Broadcasting, Inc., 48 F.C.C.2d 517, 520 (1974) (television licensee proposed to devote 1.7% of its time to public affairs). See Rust Communications Group, 73 F.C.C.2d 61, 135-36 (1977) (decision of Lozner, A.L.J.), aff'd, 73 F.C.C.2d 39, 57, 59 (1979).

181. Palmetto Radio Corp., 58 F.C.C.2d 1104, 1107-08 (1976). See note 87 supra.

182. Palmetto Radio Corp., 58 F.C.C.2d at 1106-08.

183. See note 24 supra.

184. KORD, Inc., 31 F.C.C. 85 (1961).

185. See text accompanying notes 57-60 supra. See, e.g., Moline Television Corp., 31 F.C.C. 2d 263 (1971). Even when enforcement had been threatened, the FCC until 1976 had not provided any concrete standard for evaluation of the promise-versus-performance issue. (Even in 1976, the FCC adopted only a processing guideline. See text accompanying notes 146-48 supra). In KORD, Inc., 31 F.C.C. 85, 86 (1961), the Commission stated that a licensee had a "duty to carry out substantially" the programming policies announced in its proposal. That remark was prefaced by a statement that "considerable flexibility and discretion is not only permitted but called for in the public interest." Id. As in other programming matters, the Commission suggested the yardstick that would be applied was whether the licensee had "reasonably" complied

Citizen groups had seldom based petitions to deny on the promise-versus-performance criterion during the early 1970s and later experienced mixed results when they tried the approach. The difference between broadcast promise and performance was a critical factor in two license denials and one short-term renewal.¹⁸⁶ In at least a few cases the FCC chose to disregard substantial differences between what a broadcaster had promised to provide and the programming actually aired to serve community needs.¹⁸⁷

The few broadcast licensees that were designated for hearing from 1974 through 1978 tended to have similar difficulties. The FCC usually had questions about the station's service to the community, about the nature of the programming considered to be public affairs programming by the licensee, about the comparison of performance to previous promises and about the good faith effort of the licensee.¹⁸⁸ That latter point appeared to be a major factor when a licensee was denied renewal.

Radio station WNIA of Cheektowaga, New York, was designated for a hearing, in part because it proposed to broadcast no public affairs (as defined by the FCC) and it failed to link any of its proposed programming to its ascertained community needs.¹⁸⁹ The FCC also questioned whether radio station WJAM-AM of Marion, Alabama, was meeting the needs of its community because it appeared that the licensee, upon finishing the ascertainment,

with his promises or exercised "good faith" in his performance. *Id.* at 89. See text accompanying notes 99-102 *supra*.

186. See *Rust Craft Broadcasting, Inc.*, 54 F.C.C.2d 1222, 1230-31 (1975) (FCC raised an issue that had not been brought to its attention by a petitioning citizen group); text accompanying notes 199-201 *infra*.

187. *Patrick Henry*, 59 F.C.C.2d at 1214-15 (station broadcast one-half hour of public affairs programming during composite week instead of a promised two and a quarter hours); *Television Wisconsin, Inc.*, 58 F.C.C.2d 1232 (1975) (in responding to an informal objection by a citizen group, the FCC appears to have ignored that it had established promise versus performance as a standard; the station had failed to broadcast 35 percent of public affairs programming promised). Both stations would have been considered in violation of the promise-versus-performance processing standard the FCC adopted in 1976. See text accompanying notes 146-48 *supra*.

188. *Station KGGM-TV* was designated for hearing in *New Mexico Broadcasting Co.*, 54 F.C.C.2d 126, 134-35 (1975), one-year license renewal approved, 49 *Rad. Reg. 2d* (P & F) 1355 (1981). Stations *WHAM* and *WHFM-FM* were scheduled for a hearing in *Rust Communications Group*, 53 F.C.C.2d 355 (1975), modified, 57 F.C.C.2d 873 (1976). Although programming issues were a significant issue in the hearing order, the primary focus was on the licensee's employment practices. Both stations were granted one-year renewals in *Rust Communications Group*, 73 F.C.C.2d 39 (1979).

Station WSWG-AM was designated for hearing in *LeFlore Broadcasting Co.*, 46 F.C.C.2d 980 (1974), license denied, 65 F.C.C.2d 556 (1977), *aff'd*, 636 F.2d 454 (D.C. Cir. 1980). *WJAM-AM* was scheduled for a hearing in *Radio Marion, Inc.*, 52 F.C.C.2d 1229 (1975), full-term renewal granted in *Radio Marion, Inc.*, No. 20,385 (July 13, 1976) (opinion of *Lazner, A.L.J.*). Radio stations *WSAY* and *WNIA* were designated for a hearing in *Federal Broadcasting System*, 59 F.C.C.2d 356 (1976). Administrative Law Judge *David Kraushaar* decided that the stations merited license renewals in *Federal Broadcasting System*, Nos. 20,791, 20,792 (June 9, 1978) (initial decision of *Kraushaar, A.L.J.*). The owner of the stations, whose character was a major issue in the case, died in 1979, and the FCC approved the renewal. 46 *Rad. Reg. 2d* (P & F) 1361 (1980).

Station KDIG-FM was designated for hearing in *West Coast Media, Inc.*, 61 F.C.C.2d 577 (1966), renewal denied, 79 F.C.C.2d 610 (1980). In the 14-year interval, the station had changed its call letters to *KIFM*. 79 F.C.C.2d at 624.

189. *Federal Broadcasting System*, 59 F.C.C.2d at 370.

"merely pitted present programs against ascertained problems."¹⁹⁰ When no programs existed, the FCC said, the licensee merely indicated that appropriate editorials, news reports, or public service announcements would be provided.¹⁹¹ When the FCC denied the license renewal of station KDIG-FM of San Diego, California, the Commission said that the prolonged failure of the station to provide any significant amount of nonentertainment programming reflected a dereliction in the licensee's duty to be responsive to the community's problems.¹⁹²

The FCC was also concerned because WJAM planned to provide programming for only seventeen of thirty ascertained needs, and twelve of the seventeen were to be addressed only by news, editorials and public service announcements.¹⁹³ The Commission asserted that none of the programming described by the station as public affairs properly fit the category.¹⁹⁴ The FCC also found that WSWG-AM of Greenwood, Mississippi misclassified its programming, including the labeling of the "Miss Hospitality Pageant" as public affairs.¹⁹⁵ The Commission said the licensee failed to show how programming "so short and so general" could meet complex needs.¹⁹⁶ Most of the programming labeled public affairs by WNIA turned out to be entertainment, military recruiting films, and public service announcements.¹⁹⁷

In 1970, WJAM proposed to spend 8.23 percent of its broadcast week providing public affairs programming. The licensee reported offering 2.34 percent public affairs programming during the composite week, and none of that satisfied the FCC.¹⁹⁸ WHAM of Rochester, New York proposed four hours of public affairs a week and offered only one hour.¹⁹⁹ The FCC concluded that the most serious deficiency of WSWG-AM was the failure to provide almost all of the public affairs programming promised.²⁰⁰ The Commission stated that KDIC-FM's failure to comply "with the spirit or the letter of its programming promises" was the determining factor in denying its renewal.²⁰¹

Actually, the factor that appeared to distinguish those stations that lost their licenses was the Commission's perception of their motivation.²⁰² The

190. *Radio Marion, Inc.*, 52 F.C.C.2d at 1244.

191. *Id.*

192. *West Coast Media, Inc.*, 79 F.C.C.2d at 623.

193. *Radio Marion, Inc.*, 52 F.C.C.2d at 1243. See note 87 *supra*.

194. *Id.* at 1238.

195. *LeFlore Broadcasting Co.*, 46 F.C.C.2d at 983.

196. *LeFlore Broadcasting Co.*, 65 F.C.C.2d at 567.

197. *Federal Broadcasting System*, Nos. 20,791 & 20,792, slip op. at 67-68 (June 9, 1978) (initial decision of Kraushaar, A.L.J.). See also *id.* at 20, 22, 30, 49, 65-66.

198. *Radio Marion, Inc.*, 52 F.C.C.2d at 1240-41. But the Commission did note that the significant discrepancy was due to misclassification of programs in the 1970 proposal. *Id.* at 1241.

199. *Rust Communications Group*, 53 F.C.C.2d 355, 359 (1975).

200. *LeFlore Broadcasting Co.*, 46 F.C.C.2d at 982 (the licensee promised 5.1% and delivered 0.9%).

201. *West Coast Media, Inc.*, 79 F.C.C.2d 577, 614 (1966) (the station's management promised 1.1% and delivered nothing for most of the license term). *Id.* at 617.

202. Broadcaster misrepresentation traditionally has been a serious issue for the FCC. See *WOKO, Inc.*, 10 F.C.C. 454, 468 (1944), *rev'd*, 153 F.2d 623 (D.C. Cir.), *rev'd*, 327 U.S. 776 (1946). See also *LeFlore Broadcasting Co. v. FCC*, 636 F.2d at 461.

FCC found that the licensee KGGM-TV of Albuquerque, New Mexico had not consciously discriminated against Mexican-Americans in station programming.²⁰³ The FCC accepted an administrative law judge's ruling that the licensee of WJAM made a "good faith effort" to provide "public affairs" or "public service" programming.²⁰⁴ Both stations received license renewals. On the other hand, the FCC held that the management of station WSWG-AM never intended to carry out the representations made in its renewal application.²⁰⁵ The licensee of KDIG-FM also did not plan to carry out its proposals, according to the Commission.²⁰⁶ The licensee had "proven unreliability."²⁰⁷ The licenses of WSWG-AM and KDIG-FM were not renewed.

D. Fairness Doctrine Responsibility to Provide Issue-Oriented Programming

Meanwhile, virtually undetected at first, substantial changes were occurring in the FCC's twenty-five-year-old "requirement" that licensees provide a reasonable amount of time for the discussion of public issues. The policy, one of two mentioned in the 1946 *Report on Editorializing*, had never played a significant part in the regulatory process, including the renewal of licenses.²⁰⁸

In 1974, in a major policy document, the FCC restated the language of the *Report on Editorializing* as a part of the fairness doctrine but appeared to be adding to its meaning. The Commission stated that it had, "in the past, indicated that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely."²⁰⁹ For a time the Commission seemed to be confused over the meaning and application of the fairness doctrine requirement, still described in terms of "a reasonable amount" of public issues programming. The same language was being interpreted in different ways by the FCC's Renewals and Transfer Division and by its Complaints and Compliance Division.²¹⁰

Finally, in 1976, the *Representative Patsy Mink* decision seemed to settle the issue.²¹¹ In *Mink*, the Commission held that stations had a responsibility under the fairness doctrine to provide programming on issues of critical im-

203. New Mexico Broadcasting Co., 9 Rad. Reg. 2d (P & F) 1355, 1370 (1981). The FCC also found that the station had made a "good faith" effort to be accurate in programming representations. *Id.* at 1357.

204. Radio Marion, Inc., No. 20,385, slip op. at 20 (July 13, 1976) (opinion of Lazner, A.L.J.). Judge Lazner said the effort was made in the face of "a veritable gallimaufry of imprecise definitions, interpretations by the Commission, its staff and others, and by Court decisions which underlined the vagueness of the definitions." *Id.*

205. LeFlore Broadcasting Co., 65 F.C.C.2d at 561.

206. West Coast Media, Inc., 79 F.C.C.2d at 622.

207. *Id.*

208. See text accompanying notes 123-27 *supra*.

209. Fairness Report, *supra* note 3, at 10. The Commission was quoting a 1970 case, but in that opinion the FCC had not suggested the responsibility to provide programming on specific critical issues was a fairness doctrine requirement. See *Friends of the Earth ex rel. Fairness Doctrine*, 24 F.C.C.2d 743, 750-51 (1970).

210. See, e.g., *American Broadcasting Co.*, 56 F.C.C.2d 275, 283 (1975); *Complaint of Public Communications, Inc.*, 50 F.C.C.2d 395, 399 (1974).

211. 59 F.C.C.2d 987 (1976).

portance to their communities.²¹² Since fairness doctrine complaints were handled by the Complaints and Compliance Division,²¹³ the FCC appeared to be ready to administer the policy on a complaint-by-complaint basis. There have been several related complaints since *Mink*, but the FCC has rejected all of them.²¹⁴ The *Mink* decision was construed so narrowly that it had no effect on most broadcast licensees except as a warning.²¹⁵

Eventually the FCC began to say in official documents that the fairness doctrine required licensees "to cover controversial issues of public importance."²¹⁶ The new Commission language eliminated any reference to how much coverage there ought to be and narrowed the range of issue coverage by defining the responsibility only in terms of controversy. Apparently the FCC was ready to stop the charade of stating that licensees were required to devote a "reasonable amount of time" to the discussion of public issues, a policy that had never been enforced.²¹⁷

212. *Id.* at 993-97.

213. See *Billings Broadcasting Co.*, 40 F.C.C. 518 (1962); H. Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* 19-20 (1973); S. Simmons, *supra* note 26, at 11-12; Chamberlin, *supra* note 26, at 370-71; Ford, *The Fairness Doctrine, in Free and Fair: Courtroom Access and the Fairness Doctrine* 119, 125-26 (J. Kittross & K. Harwood eds. 1970). Fairness doctrine issues could be considered when the Renewal and Transfer Division evaluated a licensee's three-year performance to determine if it was serving in the public interest. See generally notes 94 & 127 *supra*.

214. See, e.g., *In re Complaint of Council on Children, Media & Merchandising v. ABC*, 65 F.C.C.2d 421 (1977); Horace P. Rowley, III, 67 F.C.C.2d 177 (1977); Karl E. Smith, 40 Rad. Reg. 2d (P & F) 266 (1977).

215. The FCC has quoted *Mink* in license renewal decisions when discussing the licensee's obligation to provide programming on significant community problems. E.g., *Bay Area Broadcasting Co.*, 69 F.C.C.2d 1452, 1455 (1978); *Pacific FM, Inc.*, 69 F.C.C.2d 1366, 1370 (1978). The FCC has never used *Mink* during the license renewal process to decide a case against a licensee. Neither has the FCC ever said that failure to provide programming for "a strongly expressed need," see note 108 and accompanying text *supra*, discovered in the ascertainment process could be handled as a complaint apart from the renewal process. Interview with Henry Baumann, Assistant Chief of Broadcast Bureau, FCC, in Washington, D.C. (Nov. 9, 1981). See generally *Deregulation of Radio*, 84 F.C.C.2d 968, 983 n.36 (1981).

216. E.g., *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 74 F.C.C.2d 163, 168 (1979) [hereinafter cited as *Fairness Report Review*].

217. Even to say that the FCC has a fairness doctrine requirement to cover controversial issues of public importance is a gross exaggeration, considering the narrow application of *Mink* and the fact that the fairness doctrine is triggered only by complaints. The FCC makes no effort to monitor licensee programming for fairness doctrine violations. Hence, comments such as that made by Commissioner Joseph Fogarty in *Deregulation of Radio*, which indicate that even with radio deregulation, licensees are under a fairness doctrine obligation to cover controversial issues of public importance, are misleading at best. See *Deregulation of Radio*, 84 F.C.C.2d at 1125. This "fundamental licensee obligation" that Fogarty refers to has existed, except for *Mink*, only on paper. *Id.* Fogarty said the obligation was statutory. That issue is in doubt. A 1959 amendment to section 315(a) of the 1934 Communications Act imposes on licensees an obligation "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1976). The FCC has asserted that the language codifies the fairness aspect of the fairness doctrine. See *1960 Programming Statement*, *supra* note 29, at 2311, and the Supreme Court has upheld that position in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-86 (1969). In *Red Lion*, the Supreme Court also recognized the licensee responsibility to provide a reasonable amount of time for the discussion of public issues as part of the fairness doctrine. *Id.* at 369. But that obligation was not recognized as part of the fairness doctrine by the FCC until the 1970s. See Chamberlin, *supra* note 26, at 370-72, 381-88, 392-96. The obligation to provide programming about public issues was not considered to be part of the fairness doctrine in the early 1960s, when the FCC claimed the fairness doctrine had been codi-

E. More Procedural Reform and A Rejection of Formal Quantitative Standards

In 1976, the same year in which *Mink* was decided, the FCC released a new ascertainment primer. In the revision the FCC extended to radio licensees the requirement of maintaining a public file including an annual list of community problems and representative programming designed to relate to those problems.²¹⁸ The Commission also dropped two questions suggesting that the FCC had vague minimum standards for the amount of programming relating to community needs that ought to be offered.²¹⁹

In the same year, the Commission also adopted revisions for a new programming section for radio license applications.²²⁰ In the same proceeding, the FCC adopted a new definition of public affairs programming, replacing the circular definition that had been in existence for more than a decade.²²¹

Although the Commission had approved several changes in license renewal procedures during the 1970s, including the adoption of quantitative processing guidelines, it decided in 1977 not to adopt percentage programming standards for television.²²² The standards had been introduced as a way of clarifying the license renewal process and providing some security to broad-

fied. *Id.* In fact, the obligation to provide programming about critical issues to the community—currently the FCC's interpretation of one aspect of the fairness doctrine—was not part of the fairness doctrine until at least 1974. *Id.* at 381-88, 392-406.

The FCC has refused to provide more specific requirements, such as mandating television licensees to list a specific number of community and national controversial issues of public importance they covered in the past year. See, e.g., Fairness Report Review, *supra* note 216.

218. 1976 Primer, *supra* note 87, at 419, 439.

219. The new primer did not contain a question suggesting that licensees ought to devote a "significant" amount of time to programming addressing community needs and problems. *Id.* at 441-46. Neither did it include an item suggesting that a broadcaster not treating more than two community problems might be questioned about his public service. *Id.* See note 90 *supra*.

220. 1976 License Renewal Form, *supra* note 147. Each licensee was asked to provide, in one table, the amount of programming proposed in the previous application, the amount broadcast during the composite week, and the amount proposed for the next renewal period. *Id.* at 19,559. The program categories remained the same as in recent applications. The new radio form asked that licensees provide detailed information about the programming claimed during the composite week in the three categories of nonentertainment programming, as Form 303-A had of television licensees. *Id.* at 19,554, 19,559. See note 133 *supra*. The new radio form echoes the 1973 revised television application in dropping some of the questions used in the previous application. See note 135 *supra*. Further, the FCC no longer required either radio or television licensees to provide a list of the programming planned for the future to meet community needs. They had to list only programming already broadcast. 1976 License Renewal Form, *supra* note 147, at 19,542. The FCC also "clarified" a statement on the application form since the 1960s, that applicants should explain a substantial variance between the programming provided during the last renewal period and that promised in the last application. The Commission stated that licensees should explain a decrease of 15% from what was promised of any of the three nonentertainment program categories or a 20% decrease overall. *Id.* at 19,544. See text accompanying notes 143 & 146-48 *supra*.

221. The new definition:

Public Affairs programs (PA) are programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables, and vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings, Congressional hearings, and the like.

1976 License Renewal Form, *supra* note 147, at 19,554, 19,567.

222. Comparative Hearings—Report & Order, *supra* note 142.

casters performing in the public interest.²²³ The proposed standards would have applied only if a licensee was challenged for its position on the broadcast spectrum by a would-be broadcaster. The notice of inquiry suggested percentage guidelines for local programming, news, and public affairs, which, if met, would have provided licensees with a favorable comparative factor against any competition.²²⁴ The programming levels suggested would not have been required for a standard license renewal.

As a matter of practice, the proposed standards probably would have been observed by nearly every television licensee.²²⁵ Many persons involved in the consideration of the proposal agreed that the effect of the proposal would be the same as a program requirement simply because no broadcast station owner wants to risk losing its license.²²⁶

In killing the proposal, the Commission's majority stated that quantitative program standards would have artificially increased the time that most television stations devoted to local, news, and public affairs programming.²²⁷ The Commission was not convinced that it should impose a national performance standard.²²⁸ Further, although the Commission said it initiated the inquiry in order to improve the quality and efficiency of the comparative renewal process—and, in particular, to afford licensees a degree of certainty regarding their program performance—it also stated that quantitative standards would not accomplish the objective and might further complicate the issues.²²⁹

223. See Comparative Hearings—Notice of Inquiry, *supra* note 59; Comparative Hearings—Report & Order, *supra* note 142, at 428.

224. The proposal:

(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, as stated, a 3% figure for the 6-11 time period.

Comparative Hearings—Notice of Inquiry, *supra* note 59, at 582.

225. See, e.g., Comparative Hearings—Notice of Inquiry, *supra* note 59, at 590 (Wells, Comm'r, dissenting). See also Comparative Hearings—Report & Order, *supra* note 142, at 427.

226. E.g., Interview with Henry Geller, *supra* note 51; Interview with Richard J. Shiben, *supra* note 51. See FCC, Official Report of Proceedings Before the FCC at Washington, D.C., The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, No. 19,260, vol. 1-A, at 112, 115-16 (Mar. 27, 1972) (in public file of FCC, Washington, D.C.) (statements by Kenneth Cox and Nicholas Johnson).

227. Comparative Hearings—Report & Order, *supra* note 142, at 428.

228. *Id.* at 428-29.

229. *Id.* at 429. The FCC said that competing applicants would make precise percentages within the specified ranges a point of contention. In addition, the Commission stated that, "even once it were determined that a station's performance fell above or below the appropriate standards, the parties would indubitably dispute whether other factors overcame the *prima facie* showing of substantial or insubstantial service." *Id.* at 428. The FCC said that quantitative standards also were defective because they did not allow judgments on the nature of programming. *Id.* For another view see *id.* at 433 (Hooks & Fogarty, Comm'rs, issuing separate statement).

F. The License Renewal Process, 1979 to Present

The defeat of the comparative renewal guidelines marked the end, at least for the time being, of the Commission's attempts to clarify the license renewal process. In fact, the Commission became much less interested in programming regulation in general, particularly under the leadership of Chairman Charles D. Ferris, who replaced Wiley late in 1977.²³⁰ In 1980, for example, under Ferris, the Commission's staff was preparing for radio deregulation rather than concerning itself with licensee programming practices.²³¹ There is no evidence in the official record that the Commission questioned a licensee's performance unless it was considering a petition to deny renewal.²³² Few petitions to deny were being filed, and fewer still focused on programming grounds.²³³

IV. THE 1960S AND 1970S IN RETROSPECT

For the time being, the peak of broadcast programming regulation has been reached. The chairmanship of Charles Ferris marked a change in FCC priorities. The relatively intense Commission interest in informational regulation that began in 1960 has waned.

Any evaluation of the FCC's approach to the regulation of public issues programming during the decades of the 1960s and 1970s must be made with an appreciation of the agency's circumstances.²³⁴ The FCC is a bureaucracy

230. Ferris preferred structural regulation to most regulation related directly to programming content. E.g., Address by Charles D. Ferris, FCC Chairman, 1977-1981, before the UCLA Communications Law Symposium, Los Angeles, Calif. (Feb. 3, 1979). See also 3 The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 87-125 (1978).

231. The Commission also closed two proceedings somewhat related to the encouragement of public issues programming. The FCC voted to amend the ascertainment primer (see text accompanying notes 218-19 *supra*) to allow broadcasters to use public service announcements (PSAs), "where appropriate," as tools in meeting community needs. Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees, 81 F.C.C.2d 346, 369 (1980). The FCC said PSAs should not be the primary method for meeting community problems, however. *Id.* See also note 87 *supra*. The Commission decided not to create a new program category of "community service" programming. It also decided not to allow dramatic programs to count as public affairs programming even when they were produced by nonprofit or religious groups, related to public issues and not sponsored. Amendment of the Commission's Rules Concerning Program Definitions for Commercial Broadcast Stations by Adding a New Program Type, "Community Service" Program and Expanding the "Public Affairs" Category and Other Related Matters, 82 F.C.C.2d 130 (1980).

232. The Commission did tell one licensee that it was "gravely concerned" that for at least half of the time during 1976 and 1978 the broadcast station provided one-third less public affairs programming than had been promised. The Commission voted to grant the license renewal of station WPXY (FM), of Rochester, New York, after an agreement—that the station would increase its public affairs programming and improve its procedures for monitoring public affairs programming—was reached between the licensee and the citizen group filing the petition to deny. Associated Communications Corp., 71 F.C.C.2d 1353 (1979).

233. Interview with Henry Baumann, *supra* note 215.

234. This Article will not try to explain all of the factors affecting the FCC's approach to public issues programming regulation. Many of them are related to the structure of the agency as it was established by Congress, a topic clearly beyond the focus of this Article. The critique in the following text was written, however, with an appreciation of the limitations of the FCC.

and behaves as one.²³⁵ Its policies are directed by an ever-changing set of presidential appointees who are acutely aware of pressure from Congress and the industry being regulated. Most of the commissioners during the 1960s and 1970s had legal and political backgrounds.²³⁶ Few had previous experience with first amendment concerns or information policy.²³⁷

The commissioners are charged with upholding the 1934 Communications Act, which instructs that they are to license broadcasters if the public interest will be served. Since 1934, the FCC consistently has interpreted broadcasting in the public interest to include programming about public issues. The concept has been endorsed by the United States Supreme Court.²³⁸

After 1960, the Commission's primary approach to public issues program regulation was to encourage licensees to define and provide programming to meet the needs, interests and problems of the communities that they were serving. The FCC spent much of the next sixteen years amplifying and clarifying these criteria and adding to the paperwork required of licensees. By the late 1970s, most broadcasters had to ascertain the needs of their communities every three years and annually make public a list of the programs aired to address those needs.²³⁹

During the two decades, licensees also had to report regularly the amount of time spent on news, public affairs and other informational programming and the amount of time they proposed to devote to these categories during the next licensing period.²⁴⁰ Broadcast station owners were told at various times that their performances would be matched against their promises by the FCC renewal processing staff. In 1973 licensees were told further that the Commission would review their applications if their stations were providing less informational programming than FCC processing guidelines specified.

In addition, apart from the license renewal process, the FCC had a policy that licensees were to provide a reasonable amount of time for public issues programming. During the early 1970s, the FCC began to say that licensees must provide programming on controversial issues of extreme importance to their communities.²⁴¹ The FCC elicited no information from licensees specifi-

235. See, e.g., E. Krasnow & L. Longley, *supra* note 60, at 28-30.

236. See *id.* at 33.

237. Glen Robinson, on the Commission from 1974 to 1976, was an exception. He is a law professor with an interest in communications law. He has been chairman of the Aspen Institute Project on Communications Policy and was the U.S. Ambassador to the 1979 World Administrative Radio Conference.

238. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 369-70, 379-90, 392-94 (1969).

239. Radio stations located outside Standard Metropolitan Statistical Areas and licensed to communities of 10,000 or less population were exempted from the formal ascertainment requirements. 1976 License Renewal Form, *supra* note 147, at 19,548.

240. Television licensees had to complete annual programming reports and radio licensees were required to include the information in their license renewal applications every three years. See notes 133 & 220 *supra*.

241. During much of the 1960s and 1970s, licensees were asked to provide in their applications information about their policy "with respect to making time available for the discussion of public issues and the method of selecting subjects and participants." See Form 303—1966, *supra* note 44, §§ IV-A, IV-B. This item was dropped from the application during the mid-1970s. See notes 135 & 220 *supra*.

cally as a result of the latter responsibility.

All of this was confusing enough, but in addition the FCC rarely explained its policies in definitive terms, and it used different terms and phrases for each set of policies. No one—broadcasters, broadcast consumers or the FCC's renewal processing staff—could know the practical meaning of words like reasonable, significant, or substantial.²⁴² The FCC never discussed effectively the relationship between public affairs programs (one category of nonentertainment programming used in renewal applications and annual programming reports), public issues programming (a term used in fairness doctrine documents) and programming provided to meet community problems and needs (the major focus of license renewal determination). Indeed, for more than a decade public affairs programming was defined as programming related to local, national and international public affairs. Public issues programming was never defined. At least one administrative law judge was very sympathetic to broadcasters who, under these circumstances, were accused of incorrectly categorizing their programming.²⁴³

Policy instability probably caused further confusion. From 1965 to 1976, the FCC adopted inquiry notices, policy changes or policy explanations related to public issues programming at an average of two per year. There was very little long-term planning.²⁴⁴ Never did the Commission evaluate all of its policies relating to public issues programming, in the broad use of that term, in one proceeding. At times, the FCC allowed little opportunity for prior public consideration before the adoption of highly significant policies.²⁴⁵

The FCC's approach to enforcement was two-fold. First, the Commission—with a few exceptions—relied on the public to complain about broadcasters not fulfilling their public interest responsibilities, rather than initiating action against a licensee. This was especially true for fairness doctrine requirements, for which there is no enforcement at all unless a complaint is filed with the Complaints and Compliance Division of the FCC. Even in the Renewal and Transfer Division, which by delegation of the Commission has a

242. Since 1976, there has been no pretense that there was any standard whatsoever in connection with the responsibility for providing programming related to the needs and problems of a broadcaster's community. See notes 219 *supra* & 246 *infra*.

According to one former FCC staff member, Richard Shiben, Chief of the Renewal and Transfer Division, sometimes gave ad hoc policy clarification to broadcasters in an attempt to fill the gap created by vague Commission policy. B. Cole & M. Oettinger, *supra* note 59, at 160.

243. See note 204 *supra*.

244. That, of course, would be difficult to do because of the political pressures faced by the Commission and because of the rapid turnover of Commissioners. See E. Krasnow & L. Longley, *supra* note 60, at 189-92.

245. The Commission settled on its definition of the first requirement articulated in the 1949 *Report on Editorializing* in a case opinion. See text accompanying notes 208-17 *supra*. There was no opportunity to debate a new and important FCC policy. In addition, the quantitative processing guidelines for informational programming were adopted as one of many regulations with no prior public notice. See text accompanying notes 136-51 *supra*. This approach would not be inappropriate for a purely procedural matter, but the question of quantitative programming guidelines had been an issue for much of the decade. See text accompanying notes 222-29 *supra*. Usually, the Commission entertained comments on programming matters by issuing a notice of inquiry or a notice of proposed rule making.

statutory responsibility to ensure that licensees seeking license renewals are acting in the public interest, license applications appear to have been questioned only rarely unless a listener or viewer complaint had been filed.²⁴⁶

The FCC's second approach to enforcement, simply stated, was to encourage licensees to do better. Because of the lack of definition in FCC policy, no one knew what was required. The FCC could hardly penalize broadcasters for performing "below" a standard of "significant" or "substantial,"²⁴⁷ especially considering the severity of some of the sanctions available to the FCC—an expensive hearing²⁴⁸ or loss of license. As a result, a broadcaster was seldom subjected to a hearing as long as he provided some public issues programming and kept the promises made in his previous application.²⁴⁹ The FCC's enforcement approaches then, took the form of Commission threats that unacceptable programming practices would lead to penalties or increased regulation.²⁵⁰ The FCC enforced its policies through the intimidation inherent in the requirements of detailed programming data that could have given broadcasters the impression that their programming efforts were being monitored.²⁵¹ FCC intimidation also could have been inferred in the delegation guidelines that established the criteria for referral of a broadcast renewal application to the Commission itself, the prerequisite to any kind of penalty.²⁵² Direct harassment was added if a station's level of programming fell below the quantitative processing guidelines. This harassment took the form

246. Henry Baumann, Deputy Chief of the FCC's Broadcast Bureau, has said that people in Washington, D.C. have no way to judge whether a station is serving the interests of the community. He asked rhetorically whether this means that community interests are not being served if the station fails to provide programming about one of the top ascertained issues. He said that there is not much the FCC can do at renewal time other than to check whether all of the paperwork has been submitted unless there is a petition to deny from the broadcaster's community. Interview with Henry Baumann, *supra* note 215.

247. The quantitative processing guidelines for informational programming could be used only in determining whether a licensee's application should be reviewed by the Commission. The guidelines had no force of law themselves.

248. A hearing scheduled to determine whether or not a licensee was operating in the public interest is technically not a sanction. Because of the expense and delay involved, however, the hearing was perceived as a sanction by the FCC. See note 59 *supra*. A GAO report said that the Commission estimated that a licensee could incur costs amounting "to tens or hundreds of thousands of dollars." Selected FCC Policies, *supra* note 60, at 18. The report also cited estimates in 1975 "press reports" that suggested that broadcasters "defending their licenses before the Commission or the courts incurred litigation costs ranging from \$100,000 to \$1.5 million." *Id.* The FCC could grant a short-term renewal or a conditional renewal without a hearing. Such a renewal required submissions to the FCC beyond the usual renewal application every three years. The FCC might be able to fine a licensee for violating the fairness doctrine principle that licensees must provide programming about controversial issues. See note 217 *supra*; Chamberlin, *supra* note 26, at 370 n.42. This approach has never been attempted.

249. Some licensees were not penalized even though they provided no public affairs programming. See, e.g., *Rust Communications Group*, 73 F.C.C.2d 61, 135-36 (1977). See generally notes 48, 59 & 65 and text accompanying notes 181-82 & 190-91 *supra*.

250. See, e.g., *Sonderling Broadcasting Corp.*, 68 F.C.C.2d 752, 756 n.9 (1978) (threat of penalty implied). See also Speech by FCC Chairman Richard E. Wiley before the Radio and Television News Directors Ass'n, in *Montreal, Canada* (Sept. 13, 1974).

251. For a description of the FCC's reasons for requiring the annual programming reports from television licensees, see *Postcard Renewal*, *supra* note 49, at 26,244.

252. If a license application was not referred to the Commission, renewal generally was automatic. See text accompanying notes 50-53 *supra*. Broadcasters therefore perceived the processing guidelines as a form of regulation. See text accompanying notes 152-53 *supra*.

of successive letters asking the licensee how his programming could be serving the public needs.²⁵³ The Commission's approach had a purpose: as one member of the staff put it, the Commission wanted to encourage recalcitrant licensees to improve their performance, rather than to penalize them, if that was possible.²⁵⁴

The available evidence suggests that the Commission's approach to public issues programming during the 1970s accomplished very little.²⁵⁵ While the average television station was devoting 4.5 percent of its broadcast time in 1979 to public affairs programming,²⁵⁶ that is not much of an increase when viewed in the light of ten years of intense regulatory activity.²⁵⁷ Furthermore, some television and many radio stations were spending much less than 4.5 percent of their time on public affairs programming during this period,²⁵⁸ and

253. This letter-writing approach was used even before the 1973 adoption of quantitative processing guidelines. See note 28 and text accompanying note 56 *supra*. The use of the word "harassment" is not meant to imply that the FCC approach was unwarranted in view of stated licensee responsibilities. The word is being used in its descriptive sense. Most of the attention was directed toward radio licensees, particularly FM stations. See, e.g., see notes 155-64 *supra*.

254. Interview with Henry Baumann, *supra* note 215. The Commission's renewal staff of about 15 analysts and attorneys during the 1970s was inadequate for any thorough review of all applications and any concentrated effort to "prosecute" all licensees with low levels of informational programming. The Commission's approach, however, seems to have been a matter of policy rather than necessity due to staffing problems.

255. The only available measure is the amount of "public affairs" programming reported on renewal applications and annual programming reports. Since the applications using the term "public affairs" were only adopted in the mid-1960s, data is available only after that time.

256. FCC, Television Broadcast Programming Data (1979). Only an average of 1.8 percent of that is locally produced. *Id.* For a general description of the kind of programming being aired, see Chamberlin, *The Impact of Public Affairs Programming Regulation: A Study of the FCC's Effectiveness*, 23 *J. Broadcasting* 197 (1979). For a discussion of problems with such programming data, see 1976 Primer, *supra* note 87, at 461 n.5 (Robinson, Comm'r, dissenting).

257. See *Deregulation of Radio*, 84 *F.C.C.2d* 968, 1057-58 (1981); *Comparative Hearings—Notice of Inquiry*, *supra* note 59, at 586; FCC, *Television Broadcast Programming Data* (annual reports issued 1973-1979). There may have been some increase between 1967 and 1973. See 1976 Primer, *supra* note 87, at 460-61 (Robinson, Comm'r, dissenting); *Top 50 Markets*, *supra* note 51, at 10.

There certainly was an overall increase of nonentertainment programming during the 1970s, possibly beginning in the late 1960s. FCC, *Television Broadcast Programming Data*, *supra*. See also 1976 Primer, *supra* note 87, at 460-61 (Robinson, Comm'r, dissenting). Of course, there is no way to determine the reason for any increase in nonentertainment programming. The pressure of the FCC may have been a factor; so might have been the attention of individual Commissioners such as Kenneth Cox and Nicholas Johnson (see text accompanying notes 61-73 *supra*) and citizen group activity. Some stations might have adjusted logging procedures. 1976 Primer, *supra* note 87, at 460-61 (Robinson, Comm'r, dissenting).

258. For programming data, particularly about television, see *Deregulation of Radio* (Notice of Inquiry and Proposed Rule Making), 73 *F.C.C.2d* 457, 507-16 (1979); *Top 50 Markets*, *supra* note 51; *Comparative Hearings—Notice of Inquiry*, *supra* note 59, at 586; *Renewal of Radio & Television Licenses in N.Y. & N.J.*, 18 *F.C.C.2d* 268 (1969); *Oklahoma Case Study*, *supra* note 61; FCC, *Television Programming Data* (1979); *Selected FCC Policies*, *supra* note 60; Chamberlin, *supra* note 256; Wirth & Wollert, *Public Interest Program Performance of Multimedia-Owned TV Stations*, 53 *Journalism Q.* 233 (1976); Wirth & Wollert, *Public Interest Programming: FCC Standards and Station Performance*, 55 *Journalism Q.* 554 (1978) [hereinafter cited as *Public Interest Programming*]. See note 65 *supra*.

There is very little data available about performance of radio stations, at least in part because of the lack of annual programming reports. Not even the licensee applications of the period can be considered totally representative of radio programming since radio licensees only had to report programming performance during the last year of their three-year renewal period. Form 303—1974, *supra* note 3, § IV-A, at 1. FCC programming processing guidelines specified less informa-

some stations provided no such programming at all.²⁵⁹ Most broadcast stations offered very little local public issues programming,²⁶⁰ the focus of the FCC's regulatory concerns during the 1960s and 1970s and the heart of the commercial broadcasting system as established by Congress.²⁶¹

While the value of the regulation has been questionable, its costs have been immense—to broadcasters, the FCC and citizen groups. The expense to the licensees, counting ascertainment,²⁶² program logging,²⁶³ preparation of the numerous applications and reports, and attorneys' fees, is staggering.²⁶⁴ The FCC has estimated its total costs for processing the television 303-A programming reports alone at between \$300,000 and \$500,000.²⁶⁵ Other Commission costs include staff and supplies for preparing the endless number of inquiry notices, staff reports and policy statements, as well as for processing the renewal forms. In addition, there are out-of-pocket costs to the citizen groups for gathering information, filing petitions to deny and taking a case to an FCC hearing, as well as the cost of the time and effort involved.²⁶⁶

The FCC's approach to the regulation of public issues programming also raises first amendment issues, even assuming, as the Supreme Court has decided, that content regulation is not a per se violation of broadcasters' rights.²⁶⁷ Although the Court has tolerated government protection and en-

tional programming for radio stations than for television licensees, but radio stations were more frequently questioned for falling below the guidelines. See, e.g., notes 155-64 supra.

While most broadcast stations during the mid-1970s were meeting the FCC's renewal processing guidelines, those guidelines did not ask specifically for the amount of public affairs programming being broadcast. News and public affairs programming were treated as one category for television licensees. All informational programming was combined into one category for radio licensees. See text accompanying note 142 supra. The guidelines themselves mean very little in terms of quality of licensee performance. They were established arbitrarily. B. Cole & M. Oettinger, supra note 59, at 141, 152; Interview with Henry Baumann, supra note 215.

259. See, e.g., Selected FCC Policies, supra note 60, at 56, notes 48, 59 & 65 and text accompanying notes 181-82 & 189-92 supra.

260. See, e.g., Renewal of Broadcast Licenses for Ala. & Ga., 25 F.C.C.2d 801 (1970); Oklahoma Case Study, supra note 61; FCC, Television Broadcast Programming Data (individual reports issued 1973-79); Chamberlin, supra note 256, at 201-02; Public Interest Programming, supra note 258, at 556-59.

261. See text accompanying notes 11, 38-42, 83-91, 108-112, 131, 144, 188-93 & 209-16 supra. See also Report to Congress, supra note 49, at 49; Comparative Hearings—Notice of Inquiry, supra note 59, at 581; Oklahoma Case Study, supra note 61, at 8, 10, 11.

262. The radio deregulation report estimated that ascertainment cost broadcasters between \$167 and \$20,000 a year. The average cost for stations reporting to the FCC was \$3,411 a year. The report indicated that Billboard Broadcasting Corporation and Radio Stations WLAC-AM and WKQB-FM contended that their minimum annual costs for leader interviews in the Nashville, Tenn., market was \$3,272. Deregulation of Radio, 84 F.C.C.2d 968, 1077 (1981).

263. The deregulation report quoted a 1978 GAO document that said compliance with FCC logging rules for AM and FM stations required a total of 18,233,940 hours per year. *Id.* at 1008-09.

264. None of those expenses assume that the station is challenged by a listener through a complaint to the FCC.

265. Postcard Renewal, supra note 49, at 26,244.

266. Commissioner Benjamin Hooks once suggested that viewer and listener frustration with the handling of license renewal challenges would discourage their future participation in FCC processes. Midland Broadcasters, Inc., 48 F.C.C.2d 195, 198 (1974) (Hooks, Comm'r, dissenting).

267. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

couragement of an uninhibited flow of information and ideas,²⁶⁸ it clearly has been concerned about government influence on programming.²⁶⁹ The danger of government interference in the nature of the content dictates that any government agency should avoid close supervision of that content.²⁷⁰ Yet, the FCC's policies aimed at encouraging the presentation of public issues programming invite close scrutiny of programming. The Commission has established itself as the final editor when it reviews programming records in an effort to determine whether programming has met community needs or has focused on specific issues of particular concern to a licensee's community.²⁷¹ The Commission, for the most part, has admirably avoided a detailed examination of program content,²⁷² but only by sacrificing the policies themselves. These policies could have been enforced only if the Commission had involved itself deeply in second-guessing the program efforts of licensees—surely a sign that the policies themselves endangered first amendment values.

The first amendment risks inherent in the programming policies were exacerbated by the discretion left to the Commissioners. The courts have held that the first amendment requires a specifically drawn regulation²⁷³ that is consistently applied.²⁷⁴ Yet, there is no way that licensees could have known

268. *Id.* at 388-95; *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See generally A. Meiklejohn, *Free Speech And Its Relation to Self-Government* 16-27, 88 (1948); W. Hocking, *Freedom of the Press: A Framework of Principle* 129, 131 (1947).

269. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90, 396 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943). See also *LeFlore Broadcasting Co.*, 636 F.2d 454, 457 (D.C. Cir. 1980).

270. David Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia, once said, "When the right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity." Address to U.C.L.A. Communications Law Symposium, Los Angeles, California (Feb. 2, 1979). In a court opinion during the next year, Bazelon said there was no question "that such content-based regulation in any context other than broadcasting would seriously offend the First Amendment." *LeFlore Broadcasting Co.*, 636 F.2d at 457.

271. See generally 1976 Primer, *supra* note 87, at 463 (Robinson, Comm'r, dissenting). The regulation touches a particularly sensitive first amendment area since it is the regulation of programming focused on *public issues*. For example, the issue in the *Patsy Mink* case (see notes 211-15 and accompanying text *supra*) was whether a West Virginia radio station had provided programming about anti-strip mining legislation. Representative Patsy Mink, 59 F.C.C.2d 987 (1976). One of the petitioners was a principal participant in the congressional debates. In a case concerning KGGM-TV, of Albuquerque, New Mexico, the key issue was whether a broadcaster had discriminated against Mexican-Americans. *New Mexico Broadcasting Co.*, 49 Rad. Reg. 2d (P & F) 1355 (1981).

If the protection from government interference in the debate on public issues was not *the* driving force behind the establishment of the first amendment, it was certainly a significant factor. See generally Z. Chafee, *Free Speech in the United States* (1941); L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (1963). See also A. Meiklejohn, *supra* note 268.

272. But see Representative Patsy Mink, 59 F.C.C.2d 987 (1976); *Accuracy in Media, Inc.*, 40 F.C.C.2d 958, *aff'd* on reconsideration, 44 F.C.C.2d 1027 (1973); *Complaints Concerning the CBS Program "The Selling of the Pentagon"*, 30 F.C.C.2d 150 (1971); *Complaints Covering CBS Program "Hunger in America"*, 20 F.C.C.2d 143 (1969).

273. In other first amendment contexts, the Court has found that a statute is void on its face for vagueness. See, e.g., *Baggett v. Bullitt*, 374 U.S. 360 (1964) (loyalty oath overreached "unlawful zone"); *Crump v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (oath denying past "aid, support, advice, counsel or influence to the Communist Party").

274. The Court has required that the regulation be applied in a nondiscriminatory fashion.

what was expected of them in order to obtain license renewal until the Commissioners had told them whether they had succeeded or not. This large amount of Commission discretion because of a lack of programming standards left the door open for political abuse²⁷⁵ and self-censorship on the part of licensees.²⁷⁶ The potential for Commission influence of program content was enlarged by the FCC's approach of regulation through intimidation and harassment²⁷⁷ and its tendency selectively and unpredictably to corner a single licensee for a programming violation.²⁷⁸ Indeed, the Commission's reliance on citizen complaints to trigger enforcement almost certainly meant that licensees providing the same kind of programming would be treated differently. The potential for unequal treatment would chill anyone concerned about first amendment values.

This concern for first amendment considerations, as well as for the other problems mentioned, does not mean that the Commission's approach was completely inappropriate. The notion of tying public issues programming to

See, e.g., *Thornhill v. Alabama*, 310 U.S. 88 (1940) (statute "lend[ing] itself to harsh and discriminatory enforcement" struck down).

275. There is no evidence of abuse of the Commission's discretion during the last two decades, but a mixture of politics and programming regulation is not unknown. In the 1950s, at least two of the commissioners were allies of Senator Joseph McCarthy and harassed at least one Democratic activist who also happened to be a broadcast licensee. See E. Barnouw, *Tube of Plenty: The Evolution of American Television* 152-53 (1975).

More recently, former President Richard M. Nixon frightened many broadcasters when he and his friends challenged broadcast stations owned by the *Washington Post*, and key aides plotted, among other things, to use the FCC to intimidate the major television networks. Impeachment Panel Hears Evidence on Hush Money, *N.Y. Times*, May 17, 1974, at 1, col. 1; White House Defends Deletion of Threat, *N.Y. Times*, May 17, 1974, at 24, col. 6; Threats by Nixon Reported on Tape Heard by Inquiry, *N.Y. Times*, May 16, 1974, at 1, col. 5; Brown, *The Administration vs. TV: How the Tide Turned*, *N.Y. Times*, Dec. 17, 1973, at 75, col. 1; Memos on the Media, *Wash. Post*, Dec. 3, 1973, at A24, col. 3; O'Connor, *No Back Talk from the Press, Please*, *N.Y. Times*, Nov. 11, 1973, § 2, at 17, col. 1.

Officials in the administration of the late President John F. Kennedy may have initiated an attack on political enemies through broadcast regulation. Author Fred Friendly said that the Democratic National Committee used the fairness doctrine in an attempt to scare stations into dropping right-wing commentators. F. Friendly, *The Good Guys, the Bad Guys, and the First Amendment: Free Speech vs. Fairness in Broadcasting* 32-35 (1976).

276. Broadcasters may be willing to do a great deal to avoid risking the loss of a license. See, e.g., note 278 *infra*. See also notes 153 & 270 and accompanying text *supra*.

277. See text accompanying notes 249-54 *supra*.

278. For example, the owners of WQAL in Cleveland, Ohio, had little reason to believe that the FCC would schedule its station for hearing when the licensee failed to revise its public issues programming plans even though asked by the Commission to justify how WQAL's programming was serving the public interest. See text accompanying notes 165-70 *supra*. The Commission did not warn WQAL that it might order a hearing. See *Selected FCC Policies*, *supra* note 60, at 42-45. The Commission had not ordered a hearing in the case of other licensees who refused to conform their programming to meet the FCC's quantitative guidelines. See text accompanying note 164 *supra*. As soon as the WQAL management was aware of the implications of its refusal to revise programming plans, it offered to amend its programming proposal. *Selected FCC Policies*, *supra* note 60, at 45; *SJR Communications, Inc.*, BC No. 78-94, slip op. at 3 (Oct. 27, 1978). See also Representative Patsy Mink, 59 F.C.C.2d 987 (1976). Charles Siepman, a Commission observer of the 1940s, said that the FCC was "starved at birth and neglected in infancy" and "grew up to be a timid child, subject to rare but alarming bursts of frustrated rage, uncertain of its rights." C. Siepman, *Radio's Second Chance* 214 (1946). Former FCC Chairman Dean Burch said the lack of any programming standards or guidelines for license renewal was "an invitation to the exercise of unbridled administrative discretion, applied unpredictably from one case to the next." Hearings on H.R. 5546, *supra* note 77, at 1119 (statement of Dean Burch).

needs of the community as perceived by a broadcaster is a good one, though difficult to supervise. There apparently was no effort by the FCC to supervise the quality of programming during the 1960s and 1970s. The efforts under FCC Chairmen Dean Burch and Richard Wiley to simplify and clarify the processes were laudable.²⁷⁹ The processing guidelines, even if inappropriately adopted, finally gave some form to the renewal process.²⁸⁰ Indeed, during the mid-1970s the FCC came as close as it ever has to encouraging public affairs programming effectively.

Fortunately or unfortunately, the FCC will not soon have a chance to perfect its regulatory approach. The mood favoring deregulation became an important political factor of the late 1970s and early 1980s, and the FCC's complex approach to encouraging issue-oriented programming was a likely candidate for elimination.

V. THE 1980s

The first of two major efforts in 1981 to deregulate radio and television broadcasting was announced in February in *Deregulation of Radio*.²⁸¹ The FCC significantly reduced government supervision of radio programming by eliminating the nonentertainment programming guideline, the formal ascertainment process and the program logs.²⁸²

The most significant change was the elimination of any kind of numerical assessment of a radio licensee's informational programming. The Commission's report focused on dropping the nonentertainment guidelines and seemed to attach more importance to their demise than had been attributed to their existence.²⁸³ A related change actually had more profound implications. For the first time in the regulation of broadcasting, the FCC eliminated all quantitative assessments of radio programming. Radio stations are no longer required to keep program logs, the source for the quantitative data.²⁸⁴ No longer is there a requirement that stations report the time, or percentages of time, devoted to informational programming.²⁸⁵ Radio licensees have to list only five to ten issues they believe to be important to the community, or to their listeners, and to provide examples of the programming that they have provided in the past year related to those issues.²⁸⁶

279. Burch was chairman of the Commission from 1969 to 1974, when many of the procedural changes in public issues programming regulation were initiated. Wiley was chairman from 1974 to 1977.

280. See note 245 supra.

281. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981).

282. *Id.* at 971. The FCC also eliminated regulations controlling the maximum amount of time that could be devoted to commercials. *Id.* at 971, 999-1008.

283. *Id.* at 971, 975-92, 1053-56. See text accompanying notes 138-40 supra.

284. *Deregulation of Radio*, 84 F.C.C.2d at 971, 990-91, 1007-11. This, of course, eliminated the promise-versus-performance guideline often emphasized as a part of the license renewal consideration. See *id.* at 983 and text accompanying notes 183-87 supra.

285. See 84 F.C.C.2d at 971, 998-99, 1114-15.

286. *Id.* at 971, 978, 982. See *id.* at 997-98. The Commission seemed to suggest that once again it was looking for a "reasonable" amount of programming. *Id.* at 983.

The FCC also dropped all formal ascertainment requirements for radio, repealing both the 1971 and 1976 ascertainment primers.²⁸⁷ Licensees seeking renewal are obligated only to determine the issues facing their community "by any means reasonably calculated to apprise them of the issues."²⁸⁸

The thrust of the deregulation report was that the forces of the marketplace, rather than government policy, should be the determining influence on radio programming.²⁸⁹ The report contended that programming regulation was no longer necessary because of the number of radio stations, structural regulation²⁹⁰ and listenership demands.²⁹¹ The FCC stated that the public interest would be served best by allowing broadcasters maximum flexibility in responding to the concerns of their listeners and by minimizing government interference.²⁹²

The FCC's interpretation of a licensee's primary responsibilities remain unchanged. Supposedly, broadcasters still must be responsive to the needs of their listeners.²⁹³ They still must provide local programming and broadcasts focused on public issues.²⁹⁴ The Commission did, however, deemphasize the importance of balanced programming by every licensee and the focus on specified programming types, including "public affairs." It repeatedly indicated that broadcasters could serve the needs of their listeners as long as the needs of the community in general were being served by the programming of other stations.²⁹⁵ The Commission also asserted that the pertinent issues could be addressed "by virtually any means."²⁹⁶ This included, "by way of example, and not limitation," public affairs, public service announcements, editorials, free speech messages,²⁹⁷ community bulletin boards and religious

287. *Id.* at 971.

288. *Id.*

289. *E.g.*, *id.* at 971-72, 977, 1014, 1115-16, 1119, 1129-30.

290. *See id.* at 977-78.

291. *Id.* at 1014.

292. *Id.* at 978. The Commission said the Communications Act of 1934 required it to regulate when necessary, but more importantly, "to assure maximum service to the public at the lowest cost and with the least amount of regulation and paperwork." *Id.* at 971.

293. *E.g.*, *id.* at 977-79, 982-84.

294. *Id.*

295. *Id.* at 971, 978, 994-98. *See* note 89 and text accompanying notes 37-42 *supra*.

296. 84 F.C.C.2d at 982.

297. "Free speech messages" were the focus of a plan to provide access to the broadcast media by outside groups. The plan was proposed by the Committee for Open Media, a California citizen group, during the mid-1970s, as an alternative to compliance with the fairness doctrine for individual licensees. The plan provided that:

(1) A licensee would set aside one hour per week for spot announcements and lengthier programming which would be available for presentation of messages by members of the public.

(2) Half of this time would be allocated on a first-come, first-served basis on any topic whatsoever; the other half would be apportioned "on a representative spokesperson system."

(3) Both parts of the allocation scheme would be "non-discretionary as to content with the licensee."

(4) Nevertheless, the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" were broadcast.

See National Citizens Comm. for Broadcasting v. FCC, 467 F.2d 1095, 1112 (1977). The FCC rejected the proposal in a reconsideration of the 1974 *Fairness Report*. *Id.* at 1112. The United States Court of Appeals for the District of Columbia instructed the Commission to reex-

programming.²⁹⁸

The Commission was convinced that significant amounts of nonentertainment programming would be broadcast.²⁹⁹ It stressed that the concept of deregulation was based on increasing the discretion of licensees rather than the abandonment of regulation in the public interest.³⁰⁰ Broadcasters are still required to adhere to the fairness doctrine³⁰¹ and are subject to the license renewal process.³⁰² The FCC was not dropping its Equal Employment Opportunity rules, its technical requirements or its network affiliation regulations.³⁰³ It was clear from the report that enforcement in the programming area would come from citizen pressure on local licensees and from complaints and petitions to deny sent to the FCC.³⁰⁴ The Commission made it evident that public complaints would be the basis of the Commission's monitoring of radio programming.

The ink was barely dry on the radio deregulation order when the FCC issued a second major deregulation document, commonly referred to as *Postcard Renewal*.³⁰⁵ This rulemaking proceeding reduced substantially the opportunities for FCC review of broadcast licensee performance for television as well as radio during the renewal process.

The *Postcard Renewal* proceeding made procedural rather than substantive changes. The new standard renewal application for *all* broadcast licensees is a one-page, five-question form that asks no programming-related questions.³⁰⁶ Except for specifically audited television licensees, no renewal applicants are required to send programming information to the FCC for review.³⁰⁷ Rather, required program data is to be kept on file only at the broadcast station.³⁰⁸ Licensees are subject to random inspections of the file by the Commission's Field Operations Bureau.³⁰⁹

For radio, a shortened renewal form was a logical extension of the deregulation process begun in February. The second proceeding merely reinforced what had been implied in the *Deregulation of Radio* report—that the FCC would not review radio programming information unless a listener complained.³¹⁰

amine the issue. *Id.* at 1113, 1116. After conducting an inquiry, the FCC again rejected the proposal in *Fairness Report Review*, *supra* note 216.

298. 84 F.C.C.2d at 982-83. See also notes 87 & 231 *supra*.

299. E.g., 84 F.C.C.2d at 977. The Commission said that deregulation would allow for more issues to be addressed by radio stations.

300. *Id.* at 978.

301. *Id.* at 974, 976, 979.

302. *Id.* at 974.

303. *Id.* at 977-78.

304. *Id.* at 1011. See generally *id.* at 990-93.

305. *Postcard Renewal*, *supra* note 49.

306. *Id.* at 26,250.

307. See, e.g., *id.* at 26,236, 26,243-46.

308. See, e.g., *id.* at 26,240.

309. *Id.* at 26,236 and 26,245-46.

310. See *Deregulation of Radio*, 84 F.C.C.2d at 1011-12.

In contrast, television's programming has not yet been substantially deregulated, and thus *Postcard Renewal* means a major shift in approach to regulation (unless the renewal staff was not effectively examining the applications previously).³¹¹ Following implementation of the *Postcard Renewal* rules, television licensees still have to keep program logs, calculate percentages of informational programming provided and establish a list of ascertained issues and illustrative programming. They are still subject to the percentage processing guidelines and the promise-versus-performance standard.³¹² In *Postcard Renewal*, however, the FCC did eliminate the annual programming report, Form 303-A.³¹³ Hence, the Commission has no programming record to examine for any licensees other than the five percent selected randomly for an audit at renewal.³¹⁴ Those audited will have to fill out a form similar to the previous renewal application.³¹⁵ The Commission stated that Broadcast Bureau personnel "could be used" for on-site inspections of licensees with faulty renewal or audit forms.³¹⁶ Also, the *Postcard Renewal* report stated that licensees may be selected at random for field audits if necessary.³¹⁷

For television, *Postcard Renewal* may be just the first step toward deregulation. The FCC's staff has been asked to prepare a notice of proposed rulemaking for a substantive deregulation.³¹⁸ In addition, the FCC recently encouraged Congress to adopt deregulation legislation.³¹⁹ The FCC sent to Congress proposals that included codification of the deregulation order and the elimination of all Commission supervision over programming, including the fairness doctrine.³²⁰

Although the FCC thus far has taken the initiative in the deregulation of broadcast programming, Congress could codify the action. During the summer of 1981, the Senate amended an omnibus budget package to include a

311. The Commission said:

Historically, the Commission has used the renewal process to enforce its rules and policies. For example, our review of renewal applications has allowed the Commission to ferret out applicants who transgress processing guidelines for too many commercials, not enough nonentertainment programming, problems-program lists that do not correlate, or licensees who have fallen significantly short of prior programming promises. Those who cross the established thresholds have their applications referred to the full Commission for review. Those who do not transgress those processing criteria are ordinarily granted renewal pursuant to delegated authority.

Postcard Renewal, supra note 49, at 26,239.

312. *Id.* at 26,240. The FCC said that promises made to the Commission about programming in the latest renewal application or audit form remain in effect until a licensee files an amendment. *Id.* at 26,244, 26,246.

313. *Id.* at 26,243-44, 26,246. The annual composite week was replaced by a triennial composite week, which the FCC said would be revised when the Commission changes its procedure to comply with the new license terms adopted by Congress in 1981. *Postcard Renewal Clarification*, 87 F.C.C.2d at 1129. See also note 56 supra.

314. See generally *id.* at 26,241-42.

315. *Id.* at 26,236. See *id.* at 26,251.

316. *Id.* at 26,242-43.

317. *Id.*

318. Interview with Henry Baumann, supra note 215.

319. FCC, Report No. 5068, FCC Sets Forth Proposals for Amending Communications Act (Sept. 17, 1981).

320. *Id.* at 2-3.

codification of the FCC's deregulation.³²¹ However, this was unacceptable to the House members on the conference committee, and passage was blocked.³²²

Soon afterwards, bills that would codify radio deregulation were introduced in both houses.³²³ The House bill also would have applied radio deregulation principles to television.³²⁴ Many observers believe deregulation might be acceptable to the Senate but will face strong opposition in the House, at least during the present congressional session.³²⁵

Without formal congressional adoption of deregulation, the FCC's actions may or may not withstand court review.³²⁶ The Communications Act of 1934 granted the FCC the authority to regulate within the "public convenience, interest, or necessity."³²⁷ FCC attorneys could argue that the 1981 deregulation documents do not interfere with the Commission's statutory obligation—that the agency has only redefined what the public interest requires of broadcast licensees.³²⁸ On the other hand, although Congress has never by statute directly instructed the FCC to monitor closely licensee programming activity, members of Congress frequently have said that programming was the essence of broadcast service.³²⁹ The courts could claim that the FCC has a responsibility to review programming in its effort to determine whether licensees are operating in the public interest, and that such a review has been all but eliminated by the FCC's actions.

As a matter of practice, the radio deregulation does not render all of the FCC's interpretations of the public interest involving programming since 1934 meaningless. While it is true that the Commission has required program logs

321. S. 270, 97th Cong., 1st Sess. § 4 (1981); Tate, Republicans Press Reconciliation Alternative, 39 Cong. Q. 1079, 1081 (1981).

322. Sarasohn, Critics Charge New Rules for Radio, TV Licensing Whittle Citizen Rights, 39 Cong. Q. 1383 (1981); Broadcasters Win Big on License Terms, Broadcasting, Aug. 3, 1981, at 27-28.

323. S. 270, 97th Cong., 1st Sess. § 4 (1981); H.R. 4781, 97th Cong., 1st Sess. § 6 (1981). Actually the bills may go a bit beyond the FCC's *Deregulation of Radio* order. While the FCC eliminated formal ascertainment, the bills forbid the FCC from requiring licensees "to ascertain the problems, needs, and interests" of their service area. *Id.* See text accompanying notes 287-88 *supra*.

324. Compare H.R. 4781, *supra* note 323, with S. 270, *supra* note 323.

325. See, e.g., Dingell Puts Brakes on Deregulation, Broadcasting, Dec. 14, 1981, at 27.

326. Both deregulation orders have been appealed to the United States Court of Appeals for the District of Columbia. *Deregulation of Radio*, 84 F.C.C.2d 968, appealed sub nom. Office of Communication of the United Church of Christ v. FCC, No. 81-1032 (D.C. Cir. filed Jan. 14, 1981); *Postcard Renewal*, *supra* note 49, appealed sub nom. Black Citizens for a Fair Media v. FCC, No. 81-1710 (D.C. Cir. filed June 26, 1981).

327. 47 U.S.C. § 303 (1976).

328. In *Deregulation of Radio*, 84 F.C.C.2d at 1053-56, the Commission addressed the issue of elimination of the quantitative guidelines from this perspective but did not discuss other changes related to issue-oriented programming in the same light. In *Postcard Renewal* the FCC insisted that it was not making substantive policy changes. *Postcard Renewal*, *supra* note 49, at 26,240.

Actually the FCC has not redefined completely the public interest responsibilities even of radio licensees since the Commission still insists that licensees must abide by the fairness doctrine and serve community needs. See text accompanying notes 293-98 *supra*. The FCC has redefined how it will oversee these programming responsibilities and hence reduced the amount of information about programming required of licensees.

329. See, e.g., text accompanying notes 7-11 *supra*. Congress itself, of course, has passed some programming policies. See 47 U.S.C. § 315(a) (1976).

and the reporting of time allotted to various categories of programming since 1931,³³⁰ it was not until after 1960 that these procedures were publicly used on a regular basis to encourage the broadcast of public issues programming.³³¹ The same is true for the promise-versus-performance license renewal processing tool, first announced in 1946 in the *Blue Book*.³³² In the *Deregulation of Radio* report, the FCC reaffirms the principles of the 1960 *Programming Statement* although the report does not mention specific categories of programming that should be used to serve the public interest.³³³ The Commission reasserted that it was a broadcaster's responsibility to address issues of concern to the public.³³⁴ While the new enforcement mechanism—the list of five to ten community issues and the programming related to them—is not as sophisticated as that used by the FCC in the 1970s, it is more specific than anything in existence in 1960.³³⁵

For television, *Postcard Renewal* means that the FCC staff will not be examining most television renewal applications, but there is little evidence that application review served any significant purpose. The random audit mechanism should be as effective in convincing licensees that the FCC is "looking over their shoulders" as was the extensive renewal application required of everyone.

In the case of radio, the two deregulation documents virtually ended FCC supervision of programming. The combination of the lack of periodic review and the elimination of program logs means no comparison to quantitative guidelines, no promise-versus-performance measurement and no examination of programs designed to meet community problems.³³⁶ With the lack of logs, observers will have a difficult time finding out what radio stations as an aggregate are doing. Citizen groups will have to provide more of the relevant data when challenging a station on the grounds that its choice of issues or programming to meet those issues was unreasonable.³³⁷ That will make their work even more difficult than it already has been.

The FCC's *Deregulation of Radio* report insisted that the action will not affect the fairness doctrine. Without program logs, however, the Commission may find it difficult to adequately review complaints asserting that broadcast licensees have failed to provide programming on "burning issues of controver-

330. According to the *Deregulation of Radio* report, logs have been required since 1931. *Deregulation of Radio*, 84 F.C.C.2d at 1111. The reporting of time devoted to particular kinds of programming was started during the first year of radio regulation. See note 13 *supra*.

331. See text accompanying notes 12-31, 78-221 & 239-54 *supra*.

332. See note 24 *supra*.

333. See, e.g., 84 F.C.C.2d at 982; see note 40 *supra*.

334. 84 F.C.C.2d at 982.

335. Further, the FCC encouraged the activity of citizen groups, something that it did not do until the late 1960s, after the United States Court of Appeals for the District of Columbia ordered listener and viewer participation. See 84 F.C.C.2d at 1011-12 and text accompanying notes 74-76 *supra*. See also text accompanying notes 301-03 *supra*.

336. In the latter case only, citizen groups could file a petition to deny the renewal of a license on this basis.

337. 84 F.C.C.2d at 991-93, 1011.

sial nature.”³³⁸ The Commission itself has said that the required list of five to ten community issues might not include the controversial issues covered by the fairness doctrine.³³⁹

The FCC's radio deregulation also can be criticized for its acceptance of a standard requiring programming for as few as five public issues. While the FCC asserts that its deregulation may indeed encourage licensees to provide programming on more issues than are currently being covered,³⁴⁰ stations could limit their coverage to five. The implicit suggestion that this is adequate is a very narrow view of the number of problems and needs in most communities.

Of course, no observer is in a position to predict accurately radio licensee response to deregulation. The FCC's action may not have a dramatic impact on station programming, particularly that of AM licensees. It is not at all clear that the FCC's previous regulatory efforts have had a major effect.³⁴¹ Further, local issues programming may be sufficiently important for AM stations that they will not significantly change programming practices. FM stations, on the other hand, often have been reluctant to interrupt their music with public issues programming and have frequently fallen below the Commission's processing guidelines.³⁴² Nevertheless, most FM stations probably will do something to comply with new programming requirements, and many have very little issue-oriented programming to drop.

An extensive revision of FCC regulation affecting the encouragement of public issues programming was overdue. The FCC's approach was unwieldy and generally ineffective. After radio deregulation, however, there is even less precision regarding what the public interest requires. The combination of this lack of precision and the lack of supervision makes any public issues “requirement” virtually meaningless. The only reason for keeping this policy at all is for the “enforcement” value of the rhetoric. But rhetoric also is dysfunctional—it suggests that the king is wearing clothes when actually he is wearing nothing at all. Perhaps the time has come to eliminate—at least for radio, and maybe for television as well—all pretense of programming regulation.

VI. CONCLUSION

The Federal Communications Commission, after flirting with a complex but ineffective scheme to regulate information programming on radio and television, seems to be returning to the policy of nonregulation used by the Commission for most of its first twenty-five years. Neither regulatory tactic is appropriate for such a significant and sensitive aspect of national life—the distribution of information relating to public issues, including government and politics. The FCC's approaches have not worked.

338. *Id.* at 984 n.36. See text accompanying notes 209-17 *supra*.

339. 84 F.C.C.2d at 984.

340. *Id.* at 988.

341. See, e.g., *id.* at 1057-58.

342. See, e.g., *id.* at 1058 & n.39.

The foundation of the American broadcasting system is individually-owned stations that respond to economic market forces.³⁴³ The system provides what the consumer demands—good entertainment programming. The system does not provide very much quality information programming, even when “regulated.”³⁴⁴

The distribution of information is critical to the maintenance of the nation's social, cultural, economic and political life.³⁴⁵ During the next few decades, new technological developments may provide new communication tools—including direct broadcast satellites, improved cable service and videotext—for informing the public. At this point, we have an opportunity as a nation to decide what kind of information we need and to channel the development of the new technologies accordingly. We have an opportunity to apply what we should have learned from fifty years of FCC broadcast programming policy.

As a nation, we need to address the issue of information needs. Once we do so, we may or may not decide that we should regulate in order to obtain information policy goals. The point is that, although the question of information needs necessarily entails subjective judgment, the mere assumption of need, as has occurred with the FCC's public issues programming regulation, is no longer acceptable. The monetary and social costs and dangers are too significant. We need to study information needs in order to determine whether the current flow of information is adequate. If it is, no further action is necessary. If our methods of information distribution are unsatisfactory, we must engage in long-term planning in order to address the concerns identified. A carefully planned information policy is not alien to the Constitution,³⁴⁶ and

343. See generally E. Barnouw, *A Tower of Babel—A History of Broadcasting in the United States to 1933* (1966); S. Head, *supra* note 51, at 247-357; B. Owen, J. Beebe & W. Manning, *Television Economics* (1974).

344. For data, see sources cited at notes 256-58 *supra* and particularly B. Chamberlin, *supra* note 256. Works expressing concern about the amount and nature of information available to the public include Commission on the Freedom of the Press, *A Free and Responsible Press* (1947); D. Lacy, *Freedom and Communications* (1961); Porat, *Communications Policy in an Information Society*, in *Communications for Tomorrow* 3-60 (G. Robinson ed. 1978). Former Commissioner Loevinger once said,

[T]he greater the appeal to the mass the more alienated the majority of intellectuals seems to become. Most of those who articulate the demand for democracy and service to the public interest, and who are accustomed to influence policy and social action in this manner, are of an intellectual elite. Such leaders think of democracy as a system in which they define the public interest and the public is persuaded to accept or acquiesce in leadership views. But in fact the public wants to see its own image in the mass media mirrors, not the image of intellectual leaders. Consequently when the public gets what its wants from the mass media this incurs the wrath of an intellectual elite and the slings and arrows of outraged critics who have been demanding service to the public but have been expecting their own rather than the public's views and tastes.

Speech at Regional Conference, National Association of Broadcasters (Oct. 17, 1967), quoted in G. Robinson & E. Gellhorn, *The Administrative Process* 145 (1974).

345. E.g., see generally Commission on the Freedom of the Press, *supra* note 344; D. Lacy, *supra* note 344.

346. See generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Associated Press v. United States*, 326 U.S. 1 (1945); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); W. Hocking, *supra* note 268; A. Meiklejohn, *supra* note 268.

such a policy may be essential for the survival of the social systems upon which the Constitution relies.³⁴⁷

If we determine that information regulation is necessary, we now know more than we did fifty years ago about what we can and cannot do with regulation. We know, for example, that government regulation will not necessarily have the intended impact.³⁴⁸ This is particularly true when we try to regulate in terms of abstract constructs such as community needs, a notion that defies definition and, therefore, defies equal application by any two people—broadcasters, viewers, policy-makers or administrators. Regulation also is apt to break down when government tries to mandate behavior contrary to the instincts of the regulated, as in the case of the public issues programming “requirements.”³⁴⁹ Regulation in such instances will achieve its intended purpose only when it is well defined and strictly enforced.³⁵⁰ In fact, regulation aimed at reorganizing industry structure rather than at changing behavior patterns directly may be more effective in achieving established goals.

If the country should adopt a policy encouraging information flow, the regulation must be designed so that stated objectives can be realized. The objectives must be clearly defined in terms of both what and how much are required.³⁵¹ The media, government officials and the public must know what is expected. Enforcement tools should be strong enough to be effective but not so harsh that any administrator is reluctant to use them or so harsh as to endanger the financial stability of the medium. Enforcement should involve close supervision and consistent application.

Regulation should not, however, afford any government official the opportunity to affect the nature of the information or the ideas provided. Although the Supreme Court has ruled that government can be a facilitator of information flow without abridging the first amendment,³⁵² government intervention cannot be taken lightly. Any government efforts to influence the debate of public issues are, and should be, anathema.³⁵³ Therefore, any consideration of a public policy to encourage the flow of information and ideas should be limited in several ways. First, the government should not be given authority to examine the content of information in order to determine

347. See generally Commission on the Freedom of the Press, *supra* note 344; D. Lacy, *supra* note 344.

348. See generally, G. Robinson & E. Gellhorn, *supra* note 344, at 15-18. In the case of broadcast programming regulation during the last half century, the intent of the commissioners as an aggregate is impossible to judge. The performance of many broadcasters certainly does not match reasonable interpretations of official Commission documents.

349. See generally L. Brown, *supra* note 3; B. Chamberlin, *supra* note 3; F. Friendly, *supra* note 3; R. Noll, M. Peck & J. McGowan, *supra* note 3; B. Owen, J. Beebe & W. Manning, *supra* note 343.

350. The regulation of public issues programming is an example of what occurs when standards are not specifically defined. No one involved knows what is expected and enforcement is for the most part impossible.

351. For possible alternatives, see text accompanying notes 359-60 *infra*.

352. See note 346 *supra*.

353. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969); W. Hocking, *supra* note 268, at 98-99, 129, 131; A. Meiklejohn, *supra* note 268, at 16-27, 88.

adequacy.³⁵⁴ Second, government discretion always should be limited so that officials cannot apply direct political pressure or intimidate media personnel by "lifted eyebrow" tactics.³⁵⁵ Third, government policy should not require so much of any medium that it interferes with the medium's ability to distribute ideas or otherwise conduct business.³⁵⁶ Fourth, government policy cannot be allowed to be determined by the perceived power or influence of any medium.³⁵⁷

The combination of the requirements of constitutionality and enforceability severely limits the alternatives for a public policy that would encourage the distribution of information about public issues. If we were to use broadcasting for illustrative purposes, there might be only two approaches of direct program regulation that would satisfy the recommended criteria. Both involve quantitative measures: programming percentages like those used by the FCC as license renewal processing tools and a point system based on specifically designated kinds of programming.³⁵⁸ Another approach would entail a requirement that the regulated medium devote a certain percentage of its gross earnings to producing information about public issues. Alternatively, a percentage of gross earnings could be used to fund information programming through another outlet.³⁵⁹ Finally, Congress could designate space on the broadcast spectrum, or possibly one channel on a cable system, to someone willing to provide certain amounts of issue-oriented programming. Any necessary supplemental funding could be provided by government, possibly through taxes on the gross revenues of regulated media or a tax on the sales of communications equipment.

354. Nevertheless, this is exactly the authority that the FCC has assumed for itself under the statutory standard of public interest, convenience or necessity. This authority was exercised in the encouragement of public issues programming and in the examination of fairness doctrine cases. See, e.g., text accompanying notes 154-216 *supra*. See also note 272 *supra*.

355. See text accompanying notes 105, 150-70, 178 & 247-54 *supra*.

356. For the latter reason, the FCC has exempted independent UHF television stations from one regulation and proposed that they be exempted in another proceeding that was eventually rejected. See note 144 *supra*; Comparative Hearings—Notice of Inquiry, *supra* note 59, at 581. However, some broadcasters and critics have contended that FCC programming regulations have threatened the stability of broadcast stations and have intimidated stations that might want to provide programming about public issues. See, e.g., Hearings on H.R. 5546, *supra* note 77, pt. 1, at 195-97, 328-30; pt. 2, at 628-29; H. Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* 4-5, 40-43 (1973).

357. Would we have had a first amendment if the founding fathers had considered the power of the newspapers of the period? But see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

358. Representative Al Swift of Washington introduced a bill in October 1981 that would have forced the FCC to establish within two-and-one-half years a system for awarding points to broadcasters for specific kinds of programming. H.R. 4726, 97th Cong., 1st Sess., 127 Cong. Rec. H7196 (daily ed. Oct. 7, 1981). Under the Swift proposal, licensees would have earned credit for locally produced or live programming and for programs aired in prime time. See *Swift Admits Evaluation Bill Repels Everyone*, *Broadcasting*, Oct. 19, 1981, at 50.

359. Such an approach was suggested in two major attempts to rewrite the Communications Act of 1934—H.R. 13015, 95th Cong., 2d Sess. § 413 (1978), and H.R. 3333, 96th Cong., 1st Sess. 414 (1979). The concept, introduced as a spectrum use fee, was widely criticized by both broadcasters and public interest groups. E.g., see generally Lucoff, *The Rise and Fall of the Third Rewrite*, 30 *J. Com.*, Summer 1980, at 47-53; Jacobsen, *Who Gets What in the Information Society?—Distributional Aspects of Communications Policymaking*, in *Telecommunications Policy and the Citizen* 41-43 (T. Haight ed. 1979).

The fact that policy makers are in a mood to deregulate suggests that no legislation regarding information flow will be adopted soon. That should be a positive development for two reasons. It will give us an opportunity to see the impact of deregulation; commercial radio stations, at least, will have an opportunity to demonstrate the quantity and quality of issue-oriented programming without FCC supervision. Secondly, the hesitancy to regulate will allow for time to consider and develop a sound public policy toward the encouragement of information distribution.

We should not wait too long, however, before aggressively enacting a policy concerning the new communications technologies. In the 1920s, Congress acted only after patterns for ownership and behavior were at least partially established. Both the FCC and Congress have discovered the difficulties of altering the regulation of an established industry.³⁶⁰ We need to enact a comprehensive information policy that can work and that protects first amendment values before economic and political realities force upon us another policy in name only, as in the case of the regulation of public issues programming for the past fifty years.

360. See, e.g., text accompanying notes 25-28 *supra*; see generally Lucoff, *supra* note 359.

