
THE COMPARATIVE RENEWAL PROCESS: A NEW APPROACH BASED ON OLD LAW

L. Andrew Tollin*

Robert G. Kirk**

For more than twenty years, the Federal Communications Commission ("FCC" or "Commission") has conducted full comparative hearings in every license renewal case in which an incumbent seeking renewal of a license has been challenged by a mutually exclusive applicant proposing a new facility.¹ Even after a licensee has constructed a broadcast or common carrier facility and has operated it in the public interest over the license term, the Commission still holds a full comparative hearing to weigh the renewal application against the mere paper proposal of the challenger.² Enormous private and public resources have been spent on these comparative cases.³

Yet, challengers virtually never win on a comparative basis once the Commission awards the incumbent a license renewal expectancy because the FCC places more emphasis on a proven operating record than a mere paper proposal.⁴ Because the Commission's objective is to predict who will best serve the public interest in the coming license term, this "renewal expectancy" policy makes perfect sense.⁵

In 1983, the Commission granted the first of hundreds of licenses to provide Domestic Public Cellular Radio Telecommunications Service ("Cellular") on a common carrier basis to the public.⁶ The licenses were granted for ten-year terms, with the renewal

* Mr. Tollin is a member of the firm Wilkinson, Barker, Knauer & Quinn, Washington, D.C. His practice concentrates in telecommunications and litigation. The firm is active in the telecommunications, international communications, and broadcast areas. Mr. Tollin previously worked in the Office of General Counsel/Litigation Division at the Federal Communications Commission.

** Mr. Kirk is an associate with Wilkinson, Barker, Knauer & Quinn, Washington, D.C.; B.A. 1988, Merrimack College; J.D., 1991, The National Law Center, George Washington University.

¹ If it is determined that a licensee has provided meritorious service and there are no serious deficiencies in its operating record, the licensee is awarded a "renewal expectancy." This renewal expectancy is then considered as one of the primary factors in a comparative hearing to determine whether the incumbent licensee or the challenger should be awarded the license. The renewal expectancy is not dispositive, however. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *opinion clarified*, 463 F.2d 822 (D.C. Cir. 1972).

² Title III of the Communications Act grants the FCC authority to issue licenses of a limited duration to broadcasters and common carriers (e.g., cellular telephone service, paging, etc.) using the radio spectrum. 47 U.S.C. §§ 301-99 (1988).

³ As one broadcast licensee noted: The "cost of fighting renewal challenges for Miami and Jacksonville [broadcast] stations was enormous . . . [Licensee's] staff was required to review 14,000 pages of records to compile information for one interrogatory alone out of 299." Formulation of Policies and Rules Re-

lating to Broadcast Renewal Applicants, *Report and Order*, 4 FCC Rcd. 4780, 4795 n.46 (1989). The FCC has recently gone to great lengths to conserve resources in the hearing process. See, e.g., Reexamination of the Policy Statement on Comparative Broadcast Hearings, *Notice of Proposed Rule Making*, 7 FCC Rcd. 2664 (1992). In the cellular field, section 22.916 of the rules was adopted to expedite the hearings by making them largely paper proceedings. 47 Fed. Reg. 10036 (1982) as amended at 47 Fed. Reg. 11710 (1982); 47 Fed. Reg. 50699 (1982); 48 Fed. Reg. 26822 (1983); 49 Fed. Reg. 23648 (1984); 51 Fed. Reg. 26897 (1986); 56 Fed. Reg. 58509 (1991). However, this attempt to truncate the hearing process has not met with much success. In the top thirty cellular markets, it took an average of 752 days from the filing of an application until a construction permit was awarded. In the recent *La Star* case, it took over two years from release of the Hearing Designation Order until release of a Commission order. See *In re La Star Cellular Telephone Company*, *Decision*, 7 FCC Rcd. 3762 (1992).

⁴ See *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) ("[W]e have too long hungered for just one instance in which the FCC properly denied an incumbent's renewal expectancy"). Occasionally, however, basic qualifying issues do get raised against an incumbent during the renewal hearing which lead to its disqualification. See *RKO General, Inc. v. FCC*, 670 F.2d 215, 231-33 (D.C. Cir. 1981) (discussing issue of candor), *cert. denied*, 456 U.S. 927 (1982).

⁵ See *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 43 (D.C. Cir. 1978), *cert. denied*, 460 U.S. 1084 (1983).

⁶ See *Chicago SMSA Ltd. Partnership, Memorandum Opinion and Order*, 95 F.C.C.2d 538 (1983). A cellular system is defined as:

process beginning in 1993. Between October 1, 1993 and 1996, approximately 259 of these cellular licenses will expire.⁷ In an effort to establish standards for the renewal of these cellular licenses, the Commission released a *Report and Order*⁸ requiring a comparative hearing whenever a competing applicant filed an application for the license being renewed.⁹ Consistent with its practice in the mass media service, the FCC decided that it might not be lawful to adopt a bifurcated renewal procedure for cellular licenses based on section 309 of the Communications Act of 1934 ("Act"),¹⁰ as interpreted in *Citizens Communications Center v. FCC*.¹¹

The "bifurcation" concept rejected by the Commission was as follows: assuming a challenger filed a competing application in the first phase of the renewal process, the Commission would initially determine whether the incumbent licensee should be renewed based on its operating record; second, if the incumbent was found to have served the public interest, the renewal application would be granted a dis-

positive renewal expectancy and the proceeding would be terminated. A full comparative hearing between the renewal applicant and the challenger would commence only if the incumbent's license was not renewed in the first phase.¹²

The perceived value of cellular licenses has now outstripped broadcasting licenses and, given the past litigiousness of this service during the initial licensing process, any number of renewal challenges can be expected. The Commission has described the comparative hearing process as "unacceptably complex, costly, and slow"¹³ and in one report to Congress categorically stated: "Because the comparative renewal process involves an evaluation of an existing licensee's record as against the competing applicant's proposals . . . it is conceptually unsatisfactory. . . ." ¹⁴ Accordingly, avoiding comparative renewal hearings through a bifurcated renewal process would save millions of dollars in both industry and Commission resources.¹⁵

This Article will review the *Citizens* case and its

A high capacity land mobile system in which assigned spectrum is divided into discrete channels which are assigned in groups to geographic cells covering a cellular geographic service area. The discrete channels are capable of being reused in different cells within the service area.

47 C.F.R. § 22.2 (1991). For additional definitions for cellular service, see Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Report and Order*, 86 F.C.C.2d 469 (1981), *modified*, 89 F.C.C.2d 58 (1982), *further modified*, 90 F.C.C.2d 571 (1982), *appeal dismissed sub. nom.* United States v. FCC, Docket No. 82-1526 (D.C. Cir. Mar. 3, 1983).

⁷ See *In re* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Notice of Proposed Rule Making*, 7 FCC Rcd. 3658 n.3 (1992).

⁸ *In re* Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, 7 FCC Rcd. 719 (1992).

⁹ *Id.* at 719, para. 1.

¹⁰ 47 U.S.C. § 309 (1988). See *Report and Order*, 7 FCC Rcd. 719, para. 35 (1992).

¹¹ 447 F.2d 1201 (D.C. Cir. 1971), *opinion clarified*, 463 F.2d 822, (D.C. Cir. 1972).

¹² Preferably, if a challenger filed a competing application, it would only be considered tendered and not accepted for filing. Thereafter, the renewal applicant's past performance would be considered. If found deserving, a finding would be made (pursuant to 47 U.S.C. § 307(c)) that the public interest would be served by the grant of the renewal application. Thereafter, the renewal challenger's application would be dismissed because there would be no open frequency. If no public interest finding was made, however, then the challenger's application would be accepted for filing, and both applications would then be declared mutually exclusive and designated for a full comparative hearing. In the alternative, at the expiration of the license term, both renewal applications and license challenge applications would be

accepted for filing. The renewal expectancy issue would be considered first, and if awarded to the incumbent, a dispositive preference then would be given. Thereafter, the competing applications would be denied without a further hearing.

In keeping with broadcast precedent, the Commission decided that a non-broadcast incumbent who is awarded a renewal expectancy would instead be awarded a rebuttable presumption of renewal expectancy. Thereafter, a full comparative hearing will be held involving four different issues with many subparts. *Report and Order*, 7 FCC Rcd. 719, para. 18. The renewal preference was made "the most important factor" in a renewal proceeding. *Id.* See also *In re* Reexamination of the Policy Statement on Comparative Broadcast Hearings, *Notice of Proposed Rule Making*, 7 FCC Rcd. 2664, 2671 n.1 (1992) ("Comparative renewal proceedings differ from new applicant proceedings because of the great importance in comparative renewal proceedings given to whether the incumbent has earned a renewal expectancy based on [past performance] . . . Nonetheless, in comparative renewal proceedings where the incumbent has not earned a renewal expectancy, the applicants are compared as if they were all new applicants.").

¹³ *In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Notice of Proposed Rule Making*, 7 FCC Rcd. 5676, para. 23 (1992) (describing the history of comparative hearings in licensing initial cellular systems). The Commission also noted that "two major problems associated with comparative hearings are cost and delay. It is not uncommon for litigation to take years, with participants incurring huge legal bills. . . . There is also considerable doubt as to whether using comparative hearings for non-broadcast services furthers the public interest." *Id.* app. D at 5762 (emphasis added).

¹⁴ See FCC, Report of the Federal Communications Commission to the Congress of the United States *re* The Comparative Renewal Process 21, para. 32.

¹⁵ For example, in comparative hearings to license the top thirty cellular markets, the average hearing time from the filing

recent application to cellular renewal proceedings by the Commission. The authors conclude that the *Citizens* case does not limit the Commission's authority to bifurcate the renewal process in the common carrier services. First, *Citizens* relied on the unique First Amendment nature of broadcasting and second, section 307 of the Communications Act specifically authorizes the FCC to grant the renewal applications of incumbents upon a public interest finding. Moreover, section 307 and its legislative history were never properly accounted for in the *Citizens* case.

This Article also demonstrates that subsequent case law has substantially narrowed the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*,¹⁸ on which *Citizens* relies. The authors thus assert that the Commission is free to adopt a renewal process for non-broadcast licensees under the Act that excludes consideration of competing applications where a determination is made that the incumbent licensee served the public interest. The authors also conclude that the Commission can utilize this process not only in the cellular service, but in new licensing regimes such as personal communications services and "low-earth orbit" satellites.

A. The *Citizens* Case Failed to Account for Critical Changes in the Communications Act

The language of the Communications Act imposes few specific requirements on the FCC and grants the Commission broad powers to define the public interest by rule.¹⁷ Section 307(c) specifically permits the FCC to grant renewal applications upon a public interest finding.¹⁸ Nothing in the text of section 307(c) requires, as part of that public interest finding, the consideration of mutually exclusive applications. Specifically, nothing in the Act requires the FCC to "open a window" for the filing of renewal challenges if the Commission finds that a renewal application merits renewal.

Nevertheless, in *Citizens*, the Court of Appeals struck down a 1970 FCC policy statement which announced the agency's future intention to avoid com-

parative hearings in the broadcast renewal process where it had been determined that the incumbent had served the public interest during the license term.¹⁹ The case was based on an extension of *Ashbacker*, which held that section 309 of the Communications Act required simultaneous consideration of mutually exclusive applications for an open broadcast frequency.²⁰ The *Citizens* court recognized that *Ashbacker* did not involve a renewal situation, but noted off-handedly that "no one has seriously suggested that its principle does not apply to renewal proceedings as well."²¹

1. The *Citizens* Argument before the Court

The brief filed by Citizens Communications Center ("Citizens") concentrated primarily on section 309(e) of the Act²²—the provision on which the *Ashbacker* Court had relied—and not section 307. Under section 309(e), the Commission must hold a hearing on an application whenever there are substantial or material questions presented or insufficient information to determine whether a grant of a license will serve the public interest.²³

The arguments discussed in the *Citizens* court's decision revolved around how the Commission's 1970 Policy Statement would disenfranchise the opportunity for minorities to have a voice in their community.²⁴ The *Citizens* court cited the fact that of 7,500 broadcast licenses issued, racial minorities owned no more than a dozen.²⁵ Thus, *Citizens* concluded that "in order to satisfy the First Amendment there must be an opportunity for all to compete at renewal time for existing frequencies."²⁶

In its brief, *Citizens* did mention section 307(c) of the Act as setting up license terms and allowing the FCC to treat renewal applicants differently than initial applicants.²⁷ Specifically, *Citizens* focused on an exchange between CBS Vice-President Joseph Ream and Congressman John E. Bennett (R-MI) during a 1951 hearing on proposed amendments to section 307. In the exchange, Congressman Bennett suggested to Mr. Ream that his view of the amend-

of applications to: (1) designation for hearing was 304 days; (2) the close of the hearing record was 514 days; (3) release of the initial decision was 606 days; and (4) grant of the construction permit was 752 days.

¹⁸ 326 U.S. 327 (1945).

¹⁷ 47 U.S.C. § 303(j) (1988).

¹⁸ See Appendix for the text of Section 307(c).

¹⁹ *Citizens*, 447 F.2d at 1214.

²⁰ *Ashbacker*, 326 U.S. at 332-33.

²¹ *Citizens*, 447 F.2d at 1211.

²² Brief for Appellant at 20-25, *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971) (No. 24,221 and 24,471) [hereinafter Brief].

²³ 47 U.S.C. § 309(e) (1988). See, e.g., *United States v. FCC*, 652 F.2d 72, 88-89 (D.C. Cir. 1980).

²⁴ *Citizens*, 447 F.2d at 1214 n.38.

²⁵ *Id.* at 1213 n.36.

²⁶ Brief, *supra* note 23, at 35 (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 398 (1969)).

²⁷ Brief, *supra* note 23, at 7-8.

ment—that the FCC must first determine whether the incumbent had served the public interest before considering a competing application—“should be written in[to 307(d)] so that there would not be any doubt about it.”²⁸ Citizens went on to conclude that since no such language was added to the Act, the FCC’s discretion to adopt its proposed bifurcated renewal process was never authorized, and therefore the Act did not relieve incumbents from participating in a comparative hearing, even where their past performance was meritorious.²⁹

2. *The Citizens Decision*

The *Citizens* decision focused almost exclusively on *Ashbacker*, section 309 of the Act, and the unique nature of broadcasting. In overturning the FCC’s 1970 policy statement, the court held that in a broadcast renewal proceeding, a challenger is entitled to a comparative hearing on the merits of his own application even if the incumbent is found deserving of license renewal because of the unique, speech-related nature of broadcasting and the Commission’s policy of encouraging diverse ownership of the mass media.³⁰ The court found that regardless of how meritorious the record of an incumbent broadcaster might be, there was always a remaining issue of fact to be resolved in a hearing with respect to diversity of ownership of those scarce mass media outlets.³¹ Thus, if the FCC decides to eliminate diversity as a broadcasting criteria, the vitality of the *Citizens* case would be in doubt, although there is some language in the case discussing a First Amendment right to challenge an incumbent broadcaster.³²

There are no diversity rules or First Amendment concerns in services other than mass media. Therefore, the court’s ruling in *Citizens* does not establish the automatic existence of an issue of fact with regard to diversity of ownership if a competing application is filed in a non-mass media service. Thus, at a minimum, *Citizens* does not restrict FCC discretion to adopt a cellular renewal procedure that avoids comparative hearings where the incumbent licensee has served the public interest during its license term. The *Citizens* case is clearly indicated by

the court:

Since one very significant aspect of the ‘public interest, convenience, and necessity’ is the need for diverse and antagonistic sources of information, *the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.* . . . The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation. . . . Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant’s prior record, at a renewal hearing.³³

Thus, the Court asserted the rationale behind its ruling was as follows:

Petitioners have come to this court to protest a Commission policy which violates the clear intent of the Communications Act that the award of a broadcasting license should be a ‘public trust.’ As a unanimous Supreme Court recently put it, ‘[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.’ Our decision today restores healthy competition by repudiating a Commission policy which is unreasonably weighted in favor of the licensees it is meant to regulate, to the great detriment of the listening and viewing public.³⁴

First Amendment diversification considerations, as discussed above, are unique to mass media services. In fact, the court in *Network Project v. FCC*³⁵ summarily rejected petitioner’s effort to apply First Amendment rights to the listening and speaking public in the common carrier context:

Petitioner contends, however, that the Commission in some way abridged the First Amendment rights of potential listeners or speakers by failing to assure access of all points of view to the carriers’ lines. It cites no cases, and we know of none, applying the doctrine of Red Lion

²⁸ Brief, *supra* note 23, at 8. See *Amending Communications Act of 1934: Hearings on S. 658 before the House Committee on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 325-26 (1951) [hereinafter *Hearings on S. 658*].

²⁹ Brief, *supra* note 23, at 7-8.

³⁰ *Citizens*, 447 F.2d at 1214.

³¹ *Id.* at 1213-14 n.36 “[T]he Commission simply cannot make a valid public interest determination [in the broadcast ser-

vice] without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.” *Id.* (citations omitted).

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ *Id.* at 1214 (citations omitted).

³⁵ 511 F.2d 786 (D.C. Cir. 1975).

Broadcasting Co., Inc. v. F.C.C. [sic], to common carriers.³⁶

Moreover, this distinction has also been clearly recognized by Congress. In a 1982 amendment to the Communications Act permitting the use of a random selection system for certain licenses,³⁷ Congress adopted a diversification preference scheme *exclusively* for mass media services applications:

[B]y definition [common carriers] . . . do not exclusively control the content of the information or programming which is transmitted over their facilities. Thus, section 309(i), as amended by this bill, only requires significant [diversification of control] preferences to be applied to licenses or construction permits for any media of mass communications.³⁸

3. *The 1952 Change in Section 307(c) of the Communications Act*

The *Citizens* decision paid scant attention to section 307(c) of the Act. The only reference was contained in a footnote which stated:

Perhaps to guard against the inference that an incumbent's past broadcast record could not be considered at all at renewal time, Congress in 1952 deleted the provision subjecting renewal applications to 'the same considerations and practice' as original applications, substituting the provision of the 1927 Act which subjected renewal and original applications alike to the standard of 'public interest, convenience and necessity.'³⁹

Both the plain language of section 307(c) and its legislative history are important in resolving the issue of Commission discretion to adopt bifurcation. Though never mentioned in *Citizens*, Congress made important changes in the text of section 307(d), currently section 307(c), in 1952. Prior to the 1952 amendments, the statute stated that action on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications."⁴⁰ This proviso was eliminated in 1952 and the "public interest" standard was added so that section 307(c) now reads:

"Upon the expiration of any license, upon application therefor, a renewal of such license may be granted . . . if the Commission finds that [the] public interest . . . would be served thereby."⁴¹ Congress also added the following sentence:

In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.⁴²

The above statutory changes thus authorized the FCC to greatly expedite consideration of the applications of incumbent licensees, as the Senate Report on the amendment clearly reflects:

Once a license has been granted, there appears to be not [sic] good reason why the Commission should be required to take into consideration many of the factors which it should and must take into consideration in granting a license in the first instance. Such matters as the character and ability of the applicant to operate a broadcast station or his financial ability to construct and maintain a station are important factors for the Commission to consider in evaluating original applications for a broadcast station; they no longer may be pertinent factors when the Commission is giving consideration to renewal of a station license. It should be emphasized that while the recommended amendment does eliminate the necessity for the type of involved and searching examination which the Commission must make in granting an original license, it does not in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the over-all performance of that station against the broad standard of public interest, convenience, and necessity. This authority of the Commission is made explicit by specifying that such renewal grants are subject to findings by the Commission that the 'public interest, convenience, or necessity would be served thereby'. . . . [T]he objective of the recommended changes is to expedite the administrative consideration of the renewal process and to reduce the work load and expenditure on both the licensee and the Commission.⁴³

³⁶ *Id.* at 795 (citations omitted). In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court observed that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390. It further added that: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*

³⁷ 47 U.S.C. § 309(i) (1982).

³⁸ H.R. REP. NO. 765, 97th Cong., 2d Sess. 41 (1982).

³⁹ *Citizens*, 447 F.2d at 1206 n.13 (emphasis added).

⁴⁰ Communications Act of 1934, Ch. 652, § 307(d), 48 Stat. 1064, 1084 (1934) (prior to 1952 amendments).

⁴¹ 47 U.S.C. § 307(c) (1988).

⁴² *Id.* See also Appendix. While the text explicitly refers to broadcasting station licenses, the legislative history makes clear that Congress intended this section to apply to all Commission licensees. See discussion *infra* notes 44-45 and accompanying text. The reference to broadcast licenses can be attributed to the fact that broadcasting was the predominant service at the time.

⁴³ S. REP. NO. 44, 82 Cong., 1st Sess. § 6 (1951). See also *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S.

An in-depth examination of the legislative history indicates that the 1952 amendments to section 307 were intended to allow the FCC to consider first whether a renewal applicant would serve the public interest (based on past performance) and, assuming such a finding could be made, to allow the FCC to grant the application without considering renewal challenges. The bill, which was enacted into law in 1952, was introduced on the floor of the Senate and sponsored by Senator McFarland, the subcommittee chairman. The proposed legislation, known as the "McFarland Bill," was introduced in two Congresses as S. 1973 and S. 658.⁴⁴ These bills were essentially identical.⁴⁵ In the hearings on the initial bill, Senator McFarland made it perfectly clear he intended the change to actually *prohibit* the FCC from entertaining comparative renewal challenges in instances where it found that grant of the renewal application would serve the public interest.⁴⁶

In the Senate hearings on the McFarland Bill, FCC Commissioner Rosel Hyde testified that there was a division of opinion among the seven Commissioners on the merits of the proposed legislation.⁴⁷ A majority objected to the bill because they believed it would prohibit the FCC from considering competing applications at renewal time if it could be determined that the granting of the renewal application would serve the public interest.⁴⁸ The minority (including Commissioner Hyde) supported the bill, believing it would merely make the consideration of competing renewal applications permissive.⁴⁹ In other words, the minority viewed the bill as allowing the FCC to bifurcate the renewal process or decide, on policy grounds, that consideration of a renewal challenge was a critical element in deciding whether to grant an incumbent's renewal application would serve the public interest.⁵⁰ With this background, the following lengthy exchange occurred:

SENATOR MCFARLAND. Mr. Hyde, I would call your at-

ention to this: The only part of section 307 (d) omitted from the bill under discussion is the wording:

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

Now, that deletion does not destroy or modify the right of the Commission. As a matter of fact, section 309 provides that the Commission in granting a license must determine that the public interest, convenience, and necessity would be served by the granting thereof.

MR. HYDE. Yes.

SENATOR MCFARLAND. That is still in the bill as written. As I interpret it—and if I am not correct, I want you to correct me, because what we are trying to do is to get the best possible law here—is if you find that the public interest and convenience and necessity are satisfied, you would grant him the license. But if at any time it would not be in the public interest to grant this license, you would have the right to deny it.

Now the change proposed here is in the fact if a present license makes an application for renewal, and you still felt it was in the public interest that license would be renewed. But under the existing law you would have the right to compare the service that the existing license gave with the promises of some applicant who might be applying for the same frequency in that community.

You do not, in fact, know what kind of service the new applicant is going to give by making that comparison, because he has never had a license; he has not operated a station. Whether a license should be canceled and given to some new applicant, merely because the Commission feels, 'Here is an applicant that certainly has put forward a good paper application' is the question. Is that not the real question?

MR. HYDE. Senator, I think you are right, but that assumes, if I might say so, there would be no difficulty in

775, 811 n.31 (1978) [hereinafter *NCCB*], where the Supreme Court noted that the Senate Report stated "the Commission has the right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience, and necessity."

⁴⁴ S. 1973, 81st Cong., 1st Sess. (1949); S. 658, 82d Cong., 1st Sess. (1951).

⁴⁵ See *Hearings on S. 658, supra* note 28, at 62. (Statement of Hon. Wayne Coy, Chairman, FCC) ("As you gentlemen are undoubtedly aware, except for four minor amendments . . . S. 658 is identical with S. 1973 which passed the Senate during the Eighty-First Congress and on which this committee held extensive hearings last August.")

⁴⁶ See *Amendments to Communications Act of 1934: Hear-*

*ings on S. 1973 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess., at 121, 126 (1949) [hereinafter *Hearings on S. 1973*].*

⁴⁷ *Id.* at 29.

⁴⁸ *Id.*

⁴⁹ *Id.* at 30.

⁵⁰ Mr. Hyde also believed the public interest standard ought to be directly inserted into section 307 to make the renewal standard perfectly clear. *Id.* Senator McFarland initially believed this was unnecessary because the public interest standard was referred to in section 309. *Id.* However, as the text of present section 307 reflects, the phrase was specifically added to prevent any confusion as to the governing standard. 47 U.S.C. § 307(c) (1988).

the legal construction of this statute as proposed to be changed.

SENATOR MCFARLAND. The Commission would be incorrect in asserting that a license would be a perpetual grant under the proposed new language. He has got at all times, and you have got to find every time, that he serves the public interest.

MR. HYDE. I have no doubt in my mind but what that [sic] is the thought you have, Senator.

SENATOR MCFARLAND. It is written in the law in section 309.

MR. HYDE. Right you are. But in this proposed change you would delete this language: 'Considerations on renewal shall be the same as on original application.'

It so happens in the Act the considerations on examination of original application are public interest, convenience, and necessity. I could not help but show some concern about the significance that might be attached to the removal of that language. It may well be that finally the view which you express would prevail, but in the meantime I feel that we would have litigation and perhaps some doubt.

Now Commissioner Jones and I have suggested a change here which might be of some help.

SENATOR MCFARLAND. Your suggestion is practically the same as is already written in 309, is it not?

MR. HYDE. It is, except we would insert at this very place where the proposed bill would strike out certain language. And if that were done we would have the result which I believe you have in mind.

SENATOR MCFARLAND. Without raising the question you have.

MR. HYDE. That is correct.⁵¹

As a result, the public interest standard was added to section 307 as the renewal standard.

At another juncture, Senator McFarland and a Department of Justice representative had the follow-

ing exchange which emphasizes that the Chairman's *only* intention in introducing the bill was to eliminate renewal challenges from consideration, once a renewal applicant was found deserving of renewal under the public interest standard:

SENATOR MCFARLAND. The only difference that this bill makes is that the renewal applicant would not be required to go through all of the details that an original applicant must. It provides in section 309 that the Commission must find the grant is in the public interest, convenience and necessity. Now, what more do you think that the Commission should be required to find than that?

MR. HUME. Well—

SENATOR MCFARLAND. Do you think, for instance, if there are two applicants, that the Commission should determine, based in one case on a paper promise that maybe one of them who does not have a dollar invested should be given this license because he makes a better paper showing than someone who has half a million dollars invested whose record of performance is before the Commission?

MR. HUME. No, sir; I do not.

SENATOR MCFARLAND. Well, then, you agree with the provisions of the present bill instead of disagreeing, because that is all that this bill does. *The only difference in this bill and the law is that it does not permit the Commission to make a comparison between them; to put the licensee on a new-applicant status and thus have to go through all of the provisions of the law in regard to an application for a new station.*

* * *

SENATOR MCFARLAND. *Now, the only difference, as I see it, the only thing that could be argued that [my bill] does away with, is a comparative basis of some new applicant and some old applicant.*⁵²

The Department of Justice and CBS also observed that the new law did not appear to allow the FCC to entertain renewal challengers after it found the incumbent had served the public interest during the past license term.⁵³ At a minimum, the plain words of the amended section 307 gave the FCC discretion

⁵¹ *Hearings on S. 1973, supra* note 46, at 29-30 (emphasis added).

⁵² *Id.* at 121, 126 (emphasis added).

⁵³ *Id.* at 21. Subsequent cases not involving the review of an FCC license renewal policy have recognized the significance of this 1952 change in distinguishing the treatment of incumbent licensees from new applicants. For example, in *NCCB*, the Supreme Court, in upholding FCC regulations prohibiting com-

mon ownership of media in a community, stated:

Nothing in the language or the legislative history of § 303(g) indicates that Congress intended to foreclose all differences in treatment between new and existing licenses, and indeed, in amending § 307(d) of the Act in 1952, Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a somewhat different basis from new applicants.

in determining whether a renewal applicant had met the public interest standard before considering competing applications.

4. *Post Ashbacker Changes in Section 309 Narrowed the Hearing Rights of Competing Applicants*

In 1945, the Supreme Court decided *Ashbacker*, with Justice Douglas writing for the majority and Justice Frankfurter dissenting. At the time, radio licenses were still available in even the largest markets and television was only in its experimental stages. Two applicants had applied for an initial radio broadcasting license in Grand Rapids, Michigan.⁵⁴ The Commission summarily granted one application and designated the other for hearing.⁵⁵ The Supreme Court reversed, specifically holding that in an initial broadcast license context, “where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him” under section 309 of the Act.⁵⁶

The Court stated, however, in dictum: “§ 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied.”⁵⁷ At the time, present section 309(e) did not exist and, as indicated below, section 309(a) was susceptible to the interpretation that before any application—including renewal challenges—could be denied, a hearing must be held:

If . . . the Commission shall determine that [the] public interest . . . would be served by the granting [of an application], it shall authorize the issuance, renewal or modification thereof. . . . In the event the Commission . . . does not reach such decision with respect thereto, it shall . . . fix and give notice of a time and place for hearing thereon. . . .⁵⁸

436 U.S. at 810-811. Similarly, the Court of Appeals for the District of Columbia Circuit later affirmed the Commission’s deregulation of radio and television renewal requirements allowing a mere postcard application to be filed by incumbent licensees at renewal. See *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 412-13 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). In accord with *NCCB*, the Court emphasized that a 1952 change in section 307 specifically differentiated between initial licensing and renewals and that Congress had emphasized that the Commission should conserve administrative and licensee resources as much as possible with regard to license renewals. *Id.*

⁵⁴ *Ashbacker*, 326 U.S. at 328.

⁵⁵ *Id.*

In addition, based on the earlier version of section 309, the *Ashbacker* opinion did contemplate that the Commission could in the future place important limits on applicants’ hearing rights under appropriate circumstances. The Court observed:

It is suggested that the Commission, by granting the Fetzer application first, concluded that the public interest would be furthered by making Fetzer’s service available at the earliest possible date. If so, that conclusion is only an inference from what the Commission did. There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing.⁵⁹

The Court also implied that, for orderly administration, the FCC could adopt rules governing the acceptance of applications and ensuring they were *bona fide*.⁶⁰

At the time *Ashbacker* was decided, section 307(d) of the Act stated that action of the Commission with reference to the granting of an application for the renewal of a license “[shall be limited] to the same considerations and practice which affect the granting of original applications.”⁶¹ Again, in 1952 Congress eliminated this proviso and added the aforementioned public interest standard.⁶² Moreover, as the Commission’s authority to regulate the renewal process expanded, applicants’ hearing rights under section 309 narrowed after *Ashbacker*. In the 1956 case *United States v. Storer Broadcasting Co.*,⁶³ the Supreme Court significantly narrowed *Ashbacker* by rejecting its dictum that section 309 required a hearing on every application before the FCC could deny it.

In *Storer*, the applicant argued that section 309, as interpreted in *Ashbacker*, invariably requires a hearing before denial of an application even though grant of its application would have violated the Commission’s multiple ownership rules.⁶⁴ The court of appeals had agreed with the Commission that section 309 did not always require a hearing despite its “ap-

⁵⁶ *Id.* at 333 (emphasis in original).

⁵⁷ *Id.* at 330.

⁵⁸ *Id.* at 330 n.4. In other words, if the Commission accepts both the renewal application and challenging application for filing, it cannot find that both applications serve the public interest, as only one license will be issued. Thus, the Commission must find that one of the applications does not satisfy the public interest, thereby triggering the *Ashbacker* hearing requirement.

⁵⁹ *Id.* at 333.

⁶⁰ *Id.* at 333 n.9.

⁶¹ See *id.* at 332.

⁶² See *supra* notes 42-45 and accompanying text.

⁶³ 351 U.S. 192 (1955).

⁶⁴ *Id.* at 195.

parently unqualified" language. Nevertheless, it found that the applicant had a right to a hearing in the particular setting of the case.⁶⁵

The Supreme Court reversed, finding that section 309 *did not require a hearing in cases where the undisputed facts show that grant of the application would contravene the Commission's perception of the public interest*:

We agree with the contention of the Commission that a full hearing, such as is required by § 309 . . . would not be necessary on all such applications. . . . We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing.⁶⁶

Thus, implicit in the Court's ruling was a change in the reading of section 309 from requiring a hearing whenever the FCC found itself *unable to grant* an application to requiring a hearing on an application only when the Commission was unable to determine *whether or not* a grant of the application would serve the public interest (i.e., lacked sufficient information). The Court emphasized that the Communications Act had to be read as a whole. Therefore, an applicant's right to a hearing had to be balanced against the Commission's larger duty to define the public interest and regulate emerging communications technologies that rely on federal licenses.⁶⁷

In 1960, Congress created new section 309(d) that gave the Commission broad discretion to avoid hearings on petitions to deny unless a "substantial and material question of fact" was presented.⁶⁸ The second proviso in old section 309(d), that the FCC must hold a hearing if unable to arrive at a public interest decision, was also retained.

New section 309(e) was also created as the successor to old section 309(b), the provision which described when an application that was *not* subject to a petition to deny must be designated for hearing. The same "substantial and material questions of fact" and "unable to make the finding" language was incorporated into section 309(e). The word "whether" was also added to section 309(a). Thus, in both peti-

tion to deny and application settings, the Commission was required to designate an application for hearing only where it was unable to decide *whether* the public interest would be served by a grant or where there was a material issue of fact needing resolution. The fact that subsections (d) and (e) contained parallel hearing criteria—substantial question of fact and inability to decide the public interest—meant a narrowing not only of a *petitioner's* entitlement to a hearing but also of an *applicant's* right to a hearing. In fact, the Committee Report accompanying the legislation stated that "the [C]ommittee expects that the Commission will use any procedural devices available to it to expedite its business."⁶⁹

After the implementation of new section 309, the Commission was routinely affirmed by the Court of Appeals for the District of Columbia Circuit in denying hearings to petitioners who had not raised substantial and material issues of fact.⁷⁰ The court also interpreted the "unable to make the finding" proviso of section 309 as requiring hearings only where the Commission had too little information to decide whether or not the application would serve the public interest. For example, in *United States v. FCC*,⁷¹ the court of appeals ruled *en banc* that:

Section 309(e) does not 'give[] the Commission no [sic] authority to consider the public interest in deciding whether a hearing must be conducted[.]'. . . Section 309(e) requires an evidentiary hearing *if* a substantial and material question of fact is presented, or *if* the FCC is unable to reach a determination on the public interest. . . . The substantiality and materiality of purported issues of fact, and the need for further information, are issues to be evaluated in the first instance by the Commission in the light of its public interest responsibility. This court's oversight role is quite limited.⁷²

In *RKO General, Inc. v. FCC*,⁷³ the court of appeals made clear that even renewal applications could be denied under section 309 without a full evidentiary hearing where there were no issues of fact and there was sufficient information upon which to

⁶⁵ *Storer Broadcasting Co. v. United States*, 220 F.2d 204, 208 (D.C. Cir. 1955).

⁶⁶ *Storer*, 351 U.S. at 205.

⁶⁷ *Id.* at 203.

⁶⁸ See S. REP. NO. 690, 86th Cong., 1st Sess. 3 (1959). See also 47 U.S.C. § 309(d) (1988).

⁶⁹ Communications Act Amendments, 1960 U.S.C.C.A.N. 3516, 3521.

⁷⁰ In *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 324 (D.C. Cir. 1974), the court observed that "the decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and expertise is para-

mount. We must examine the Commission's statement of reasons for denial, and if the Commission's action was not arbitrary, capricious or unreasonable, we must affirm." See, e.g., *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965) ("Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings in this field whenever possible . . .") (emphasis added).

⁷¹ 652 F.2d 72 (D.C. Cir. 1980).

⁷² *Id.* at 90-91 n.87 (emphasis in original) (citations omitted).

⁷³ 670 F.2d 215 (D.C. Cir. 1981) cert. denied, 456 U.S. 927 (1982).

base a decision.⁷⁴

Thus, in contrast to *Ashbacker*, the law under section 309 has now evolved to the point where hearings are required on FCC applications (for renewal or for initial licensing) only where there is an issue of fact to resolve or where the FCC lacks sufficient information to reach a decision on the application. The dictum in *Ashbacker* stating that section 309 requires a hearing before *any* application can be denied was effectively eliminated in *Storer*.

B. Recent Case Law Narrowly Interpreting *Ashbacker* Further Signals a Departure from *Citizens*

In keeping with a changing judiciary, the foundation of the *Citizens* case—*Ashbacker*—has been limited by court decisions virtually to its facts in a number of recent cases involving open frequency situations where mutually exclusive applicants were similarly situated. Beginning with *Cellular Mobile Systems of Pennsylvania v. FCC*,⁷⁵ the court recognized the FCC's authority to adopt "streamlined procedures" for processing cellular applications so as to expedite cellular proceedings.⁷⁶ Further, the court referred to the Communications Act as a "supple instrument for the exercise of discretion . . ." by the Commission and stated that "[a]s technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible."⁷⁷ Based on this expansive view of the statute, the court also stated that the "full hearing" requirement of section 309 "does not, by its terms, require a traditional, trial-type evidentiary hearing at all; quite to the contrary, the Commission could, under settled law, determine that the 'demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing.'"⁷⁸

Thereafter, in *Maxcell Telecom Plus, Inc. v. FCC*,⁷⁹ the petitioner argued that the Commission's decision to use a lottery rather than comparative

hearing, after the filing of its application, deprived it of its right to a comparative hearing under *Ashbacker*. Judges Bork, Buckley, and H. Greene unanimously disagreed, stating that "[t]he *Ashbacker* decision found no such 'right,' but merely held that the Commission must use the same set of procedures to process the applications of all *similarly situated persons* who come before it seeking the same license."⁸⁰

A renewal applicant and an applicant for an initial license are not similarly situated. This point was especially emphasized by the 1952 amendments to section 307, where Congress differentiated between initial and renewal applicants.⁸¹ The Court of Appeals for the District of Columbia Circuit has also confirmed that Congress intended a meaningful difference between such entities.⁸²

Similarly, in *Public Utility Comm'n of the State of California v. FERC*,⁸³ Judges Williams, Wald, and R. Ginsburg upheld a decisive preference scheme granted to certain applicants despite the existence of other mutually-exclusive applications. The court stated that *Ashbacker* "requir[es] only that an agency 'use the same set of procedures to process the applications of all *similarly situated persons* who come before it seeking the same license.'"⁸⁴ The court aptly observed that if *Ashbacker* applied to non-similarly situated applications, "such a principle would destroy *any* agency's decision to streamline adjudicatory procedures for a specifically defined class of applicants . . ."⁸⁵

In *Hispanic Information and Telecommunications Network, Inc. v. FCC* ("HITN"),⁸⁶ Judges Wald, Robinson, and Edwards upheld a Commission determination, after notice and comment, that the public interest would best be served if local ITFS applicants were granted an absolute priority over non-local applicants.⁸⁷ Returning to the view of section 309 after the 1960 change in the Act, the court observed that:

⁷⁴ *Id.* at 231-33.

⁷⁵ 782 F.2d 182 (D.C. Cir. 1985).

⁷⁶ *Id.* at 197.

⁷⁷ *Id.* (alteration in original) (citations omitted).

⁷⁸ *Id.* (quoting *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945)).

⁷⁹ 815 F.2d 1551 (D.C. Cir. 1987).

⁸⁰ *Id.* at 1555 (emphasis added).

⁸¹ See *supra* notes 52-53 and accompanying text.

⁸² See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

⁸³ 900 F.2d 269 (D.C. Cir. 1990).

⁸⁴ *Id.* at 278 (emphasis in original).

⁸⁵ *Id.* (emphasis in original). *In re Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order*, 6 FCC Rcd. 3488, para. 33, n.5 (1991), *recon.*, 7 FCC Rcd. 1808, para. 8 (1992), the Commission ruled that *California PUC v. FERC* and *Storer* permit the Commission to adopt rules providing for a "dispositive preference," permitting grants without comparative hearings to applicants entitled to the preference.

⁸⁶ 865 F.2d 1289 (D.C. Cir. 1989).

⁸⁷ *Id.* at 1294.

Given the absence of disputed factual issues, no *Ashbacker* hearing is necessary. Such a hearing would either require FCC reconsideration of established policy, or else it would be a pointless formality in which the result was preordained. . . . *The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.*⁸⁸

The court also indicated that “[t]he Communications Act requires a comparative hearing only when ‘a substantial and material question of fact is presented or the Commission for any reason is unable to make [a public interest] finding.’”⁸⁹

Explaining the latter clause further, the court quoted *United States v. FCC*,⁹⁰ which emphasized that deference should be given to the Commission’s determinations regarding “[t]he substantiality and materiality of purported issues of fact, and the need for further information.”⁹¹ The *HITN* court added that “[t]he statute does not preclude the FCC from establishing threshold standards to identify qualified applicants and excluding those applicants who plainly fail to meet the standards.”⁹² Once the Commission decided, as a threshold matter, that it was in the public interest to renew existing licensees’ applications where their past record merited it, the filing of a competing application would not raise any substantial and material questions of fact needing resolution in a hearing; nor would the Commission be in a position of being unable to make a public interest determination. Viewed another way, competing applicants would simply fail to meet the eligibility requirement, similar to the way an otherwise eligible non-local ITFS applicant effectively became ineligible when competing with a local applicant in the *HITN* case.

In *La Star Cellular Telephone Co. v. FCC*,⁹³ Judges D.H. Ginsburg, Buckley, and Williams unanimously upheld an FCC interim operating order allowing the existing New Orleans cellular licensee to continue operating in a contested area during the pendency of an upcoming comparative hearing.⁹⁴ The court seemed to anticipate a change in the FCC’s previously restrictive view of *Ashbacker* observing:

The *Ashbacker* Court also implied that the Commission could, without a hearing, grant one of two competing applications for a permanent license *if it found that the public interest demanded such urgency*. This court has not confronted precisely that situation, but we have said that *Ashbacker* does not preclude the Commission from issuing an interim license, without a hearing on competing applications, if the Commission validly determines that the public interest so requires.⁹⁵

An FCC order adopting a renewal process in cellular similar to the bifurcated process proposed in the 1970 policy statement overturned by *Citizens* would obviously be predicated on such a public interest finding. Yet, such a procedure would still permit comparative hearings to be held in instances where it was determined that the public interest had not been served by the incumbent.

In *Rainbow Broadcasting Co. v. FCC*,⁹⁶ Judges Sentelle, Mikva (Chief Judge), and Henderson affirmed an FCC order which precluded the filing of competing applications for UHF television channel swaps among incumbent licensees. The court emphasized:

[T]he Commission possesses the authority to change its policies and interpretations of [*Ashbacker*], so long as it provides a reasoned explanation. It may not, of course, run afoul of *definitive* pronouncements of the Supreme Court as to the meaning of statutory provisions, but it has not done so in this case.⁹⁷

The court then held that the:

so-called ‘*Ashbacker* doctrine’ arises from a decision in which the High Court required the FCC to hold hearings to compare competing applications for *free channel space*. . . . But the *Ashbacker* court did not address the issue of what circumstances create an ‘open’ frequency triggering the competition requirement. Particularly, the Court never said that the Commission must open a frequency for competing applications whenever it assigns that frequency to a community.⁹⁸

Thus, the court affirmed the FCC order not to entertain competing applicants because the channel swap effectively prevented *Ashbacker* rights from ripening because no open channel was created for which to apply.⁹⁹

⁸⁸ *Id.* at 1294-95 (emphasis added).

⁸⁹ *Id.* at 1294 (quoting 47 U.S.C. § 309(e)).

⁹⁰ 652 F.2d 72, 91 n.87 (D.C. Cir. 1980) (*en banc*).

⁹¹ *HITN*, 865 F.2d at 1294.

⁹² *Id.*

⁹³ 899 F.2d 1233 (D.C. Cir. 1990).

⁹⁴ *Id.* at 1234.

⁹⁵ *Id.* at 1235 (emphasis added) (citation omitted).

⁹⁶ 949 F.2d 405 (D.C. Cir. 1991).

⁹⁷ *Id.* at 408 (emphasis added) (citation omitted).

⁹⁸ *Id.* at 408-09 (emphasis added) (citation omitted).

⁹⁹ The court also emphasized the FCC’s broad discretion in defining the public interest:

[T]he Supreme Court has validated broad parameters within which the FCC may further its view of the public interest without interference from the courts. The Supreme Court has held that Congress delegated to the FCC the task of making the initial determination of how its

The *Rainbow* case would seem to make *Ashbacker's* recognition of comparative hearing rights inapplicable in a renewal setting—as long as the Commission validly adopted rules establishing that it was in the public interest to grant the renewal application non-comparatively where the appropriate incumbency showing had been made. In such a case, there would be no free channel space for competing applications since the incumbent's license would be renewed.

Finally, in *Aeronautical Radio, Inc. v. FCC* (“*ARINC I*”),¹⁰⁰ Judges Edwards, Buckley, and Williams reversed an FCC rulemaking order which, in lieu of a comparative hearing, required *bona fide* mutually exclusive applicants for an *initial* mobile satellite license to form a consortium to hold the license. Thus, the situation was unlike a renewal setting and more akin to the situation in *Ashbacker*. Even in this setting, however, the court did not hold that each applicant had an absolute right to a comparative hearing; rather, it ruled that the FCC had not provided any “compelling reason” to avoid the comparative process.¹⁰¹ The court observed that “the Supreme Court has recognized . . . the right to a hearing created by section 309(e) is not absolute.”¹⁰² The court proceeded to describe various situations where an application could be denied without a hearing because an applicant violated a valid FCC rule.¹⁰³

The court nevertheless observed that *Ashbacker* had added to section 309 a presumption, at least in the setting of an initial license, that where two *bona fide* applications are filed and are mutually exclusive, the comparative licensing process will be utilized.¹⁰⁴ It found that if it affirmed the Commission order, the FCC could render the comparative hear-

ing requirement in *Ashbacker* a nullity through the exercise of its rulemaking authority.¹⁰⁵ On remand, however, the Commission reaffirmed its consortium order adding reasons to justify its departure from the comparative hearing process. The Court of Appeals for the District of Columbia Circuit responded in *Aeronautical Radio, Inc. v. FCC*¹⁰⁶ (“*ARINC II*”) by dismissing the appeal of the remand order on standing grounds but warned in dictum:

We emphasize, however, that *nothing* in our decision today should be read to suggest that the court accepts the Commission's position that it possesses statutory authority to impose the formation of a mandatory consortium of license applicants in lieu of holding comparative hearings. In *ARINC I*, we doubted the Commission's authority to bypass comparative hearings in these circumstances. . . . That concern remains, but its resolution must await another day.¹⁰⁷

Nothing in the court's decision, however, limited the Commission's ability to avoid comparative hearings in the *renewal* context. The case was clearly premised on initial licensing procedures and the unique consortium ruling.

C. Conclusion

As a creature of Congress, the FCC is entrusted with broad rulemaking discretion to define the public interest.¹⁰⁸ At the same time, section 309 of the Communications Act provides some measure of procedural protection for initial applicants for an FCC license.¹⁰⁹ Renewal applicants, however, are placed by section 307 in a special class apparently protected from paper challenge if they have served the public interest under section 307.

policies may best serve the public interest.

Id. at 410 (citations omitted).

¹⁰⁰ 928 F.2d 428 (D.C. Cir. 1991).

¹⁰¹ *Id.* at 453.

¹⁰² *Id.* at 439.

¹⁰³ *Id.* See, e.g., *Guinan v. FCC*, 297 F.2d 782, 785 (D.C. Cir. 1961) (holding no comparative hearing necessary once it has been established that one of the competing applicants is basically unqualified); *Ranger v. FCC*, 294 F.2d 240, 242-43 (D.C. Cir. 1961) (holding that where application fails in material respects to comply with Commission rules, agency can reject application without hearing).

¹⁰⁴ *ARINC I*, 928 F.2d at 438, 450.

¹⁰⁵ *Id.* at 452.

¹⁰⁶ 983 F.2d 275 (D.C. Cir. 1993).

¹⁰⁷ *Id.* at 284.

¹⁰⁸ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Congress, of course, has paramount power in the regulatory field and its authority to retroactively cut off applicants'

rights for the larger public good, under its broad Interstate Commerce Clause powers, has been upheld. *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1526 n.12 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984) (“the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power.”).

FCC authority clearly parallels that of Congress as long as it stays within its enabling act. See *Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 344 (D.C. Cir. 1962) (upholding that deletion of channel at renewal was not against renewal applicant's right to a hearing). Congress broadened the FCC's policy-making authority in the area of new technologies by enacting new section 7 to the Communications Act, 47 U.S.C. § 157 (1988). See also *Telocator Network of America v. FCC*, 691 F.2d 525, 538 n.107 (D.C. Cir. 1982) (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981)) (discussing the breadth of FCC policy-making and the Court's deference thereto).

¹⁰⁹ See 47 U.S.C. § 309(e) (1988).

The 1945 *Ashbacker* case added to section 309 the general right to comparative consideration with regard to *bona fide mutually-exclusive* applications for an open broadcast license. In *Citizens*, however, the court of appeals extended *Ashbacker's* recognition of applicants' comparative hearing rights to the broadcast renewal process—based on the rights of the listening and viewing public and First Amendment considerations, without fully considering the 1952 change in section 307.

The essence of the *Citizens* holding was that in renewal challenges for broadcast licenses, there will always be an issue of fact which must be heard concerning diversity of ownership in a broadcast context—whether or not the incumbent broadcaster has operated meritoriously. No such issue exists in a non-broadcast setting such as cellular or PCS, however, since diversity is not a relevant issue in these services. Thus, section 309 is never implicated and section 307 controls. Accordingly, the Commission has the discretion to adopt, by rule, a bifurcated cellular renewal process which grants an incumbent licensee's renewal application, irrespective of competing applications, as long as the FCC makes a supportable finding that such a procedure is in the public interest.*

APPENDIX

SECTION 307(D) [PRESENTLY SECTION 307(C)]**

Prior to the Communications Act Amendments of 1952

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

After the Communications Act Amendments of 1952

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

Present Section 307

(c) No license granted for the operation of a television broadcasting station shall be for a longer term than [three] *five* years and no license so granted for any other class of station (*other than a radio broadcasting station*) shall be for a longer term than [five] *ten* years, and any license granted may be revoked as hereinafter provided. *Each license granted for the operation of a radio broadcasting station shall be for a term of not to exceed seven years. The term of any license for the operation of any auxiliary broadcast station or equipment which can be used only in conjunction with a primary radio, television, or translator station shall be concurrent with the term of the*

* *Editor's Note:* While awaiting publication, the Commission, in response to Petitions for Reconsideration filed in CC Docket No. 90-358 by BellSouth Corporation and US West NewVector Group, Inc., adopted a bifurcated renewal procedure

for cellular renewals. See FCC Public Notice, Report No. DC-2363, released March 11, 1993.

** Symbols used: [text removed]; text added.

license for such primary radio, television, or translator station. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed [three] five years in the case of television broadcasting licenses, for a term not to exceed seven years in the case of radio broadcasting station licenses, and for a term not to exceed [five] ten years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

SECTION 309

Ashbacker Radio Co. v. FCC and Section 309

(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Section 309 *Post-Ashbacker* and Prior to the Communications Act Amendments of 1960

(a) If upon examination of any application [for a station license or for the renewal or modification of a station license] *provided for in section 308* the Commission shall [determine] *find* that public interest, convenience, [and] necessity would be served by the granting thereof, it shall [authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe] *grant such application.*

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and

not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

Section 309 After the Communications Act Amendments of 1960

(a) *Subject to the provisions of this section, [If upon examination of any application provided for in section 308,] the Commission shall [find] determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and [or] necessity would be served by the granting thereof, it shall grant such application.*

(c) revised and renumbered as (d) and (e)

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall

contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

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

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

Section 309 Prior to the Communications Amendments Act of 1982

(a) same

(d) same

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

(i)(1) If there is more than one applicant for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining the qualifications of each such applicant under section 308(b), shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) The determination of the Commission under paragraph (1) with respect to the qualifications of applicants for an initial license or construction permit shall be made after notice an opportunity for a

hearing, except that the provisions of section 409(c)(2) shall not apply in the case of any such determination.

Section 309 After the Communications Amendments Act of 1982

(a) same

(d) same

(e) same

(i)(1) If there is more than one *application* for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining [the qualifications of each such applicant under section 308(b)] *that each such application is acceptable for filing*, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) [The determination of the Commission under paragraph (1) with respect to the qualifications of applicants for an initial license or construction permit shall be made after notice and opportunity for a hearing, except that the provisions of section 409(c)(2) shall not apply in the case of any such determination.] *No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law—*

(A) *adopt procedures for the submission of all or part of the evidence in written form;*

(B) *delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and*

(C) *omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).*

REMAINDER OF SUBSECTION (i)
OMITTED