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The FCC's New Equation for Radio Programming: Consumer Wants - Public Interest

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Comment

THE FCC'S NEW EQUATION FOR RADIO PROGRAMMING: CONSUMER WANTS = PUBLIC INTEREST

The regulation of broadcast station programming under the Communications Act[1] is a difficult exercise in tightrope walking: on one side are the first amendment prohibitions against abridging the rights of free speech and press;[2] on the other is a statutory directive to regulate "in the public interest, convenience, and necessity."[3] The agency to whom this difficult task is assigned, the Federal Communications Commission (FCC or Commission), runs the constant risk of judicial reversal either because it has regulated too actively and has impinged on broadcasters' first amendment rights; or that it has exercised too little oversight and, thus, has failed to meet the public interest standard requirements.

A recent Commission action (Report and Order) to deregulate commercial radio broadcasting[4] has sparked added interest in the continuing questions of how actively the FCC must regulate broadcast programming and how much regulation is too much. The FCC had issued a

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1. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

2. The first amendment in part directs "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. First amendment protections have been extended to broadcasting and other media. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

The Communications Act also has an anti-censorship provision:

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

47 U.S.C. § 326 (1976).

3. This phrase, or a variation on it, is included in several of the Act's provisions. *See, e.g.*, 47 U.S.C. §§ 303, 307, 309, 311(c)(3), 316, 319(d) (1976). Congress did not provide a definition of the phrase and the conflicting interpretations its ambiguity engenders have been blamed for hindering the development of communications regulatory policy. E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 15 (2d ed. 1978) [hereinafter cited as KRASNOW & LONGLEY]. It is most often referred to as "the public interest standard," an abbreviated form which will be used throughout this comment.

4. Deregulation of Radio, 46 Fed. Reg. 13,888 (1981) (Report and Order) [hereinafter cited as Radio Deregulation R & O].

notice of proposed rulemaking (NPRM or Deregulation Proposal)[5] looking toward the deregulation of many aspects of radio station operation and programming including the elimination of quantitative guidelines for non-entertainment programming. After reviewing thousands of written comments[6] and hearing testimony from opponents and proponents,[7] the Commission, making only slight modifications to the original, adopted the proposal. This deregulation is an admittedly significant departure from past Commission regulatory practices[8] and the Commission and the courts may soon have to reassess the tension between Constitution, statute, and regulation.

Commission operations in four areas are affected by the rule changes: (1) guidelines for amount of nonentertainment programming;[9] (2) ceilings for amount of commercial time;[10] (3) formal procedures for community needs ascertainment;[11] and (4) requirements for program log maintenance.[12] The Commission listed an array of options for each of these areas[13] but indicated that it would prefer to cease completely its supervision of these aspects of radio station operation.[14] It contended that, by doing so, the Commission could eliminate what it believed to be unnecessarily burdensome details for itself and its licensees. The rule changes also allow licensees to determine according to their own perceptions of their programming and advertising marketplaces how best to serve their communities.[15]

While the four areas of deregulation are interrelated, the move to eliminate requirements for the presentation of minimum amounts of nonentertainment programming seems to present the issues in clearest focus and received the most attention from parties submitting com-

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5. Notice of Inquiry and Proposed Rulemaking; Deregulation of Radio, 73 F.C.C.2d 457 (1979) [hereinafter cited as Radio Deregulation NPRM]. Non-commercial radio broadcasting is not affected by the rule changes, *id.* at 525 n.187A, nor is television, Radio Deregulation R & O, 46 Fed. Reg. at 13,890.

6. *See* note 16 *infra.*

7. Radio Deregulation R & O, 46 Fed. Reg. at 13,908-09; *see Airing Out Deregulation at the FCC,* BROADCASTING, Sep. 22, 1980, at 28, 30.

8. Radio Deregulation NPRM, 73 F.C.C.2d at 457, 459.

9. 47 C.F.R. § 0.281(a)(8)(i) (1979).

10. *Id.* § 0.281(a)(7).

11. *Id.* § 0.281(a)(8)(ii); Ascertainment of Community Problems by Broadcasting Renewal Applicants, Primer, 41 Fed. Reg. 1371 (1976); Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1975), *reconsideration granted in part,* 61 F.C.C.2d 1 (1976); Community Problems-Broadcast Applicants, 27 F.C.C.2d 650 (1971).

12. 47 C.F.R. §§ 73.1800, .1810, .1850, .3526(a)(10) (1980).

13. Radio Deregulation NPRM, 73 F.C.C.2d at 525-29. For example, in the area of informational programming, the FCC offered alternatives such as marketwide regulation and imposition of quantitative standards. *Id.* at 526-27.

14. *Id.* at 529-38.

15. *Id.* at 529.

ments for Commission consideration.[16] It is this specific deregulatory aspect which is the focus of this comment. To this end, the legal and historical bases as well as the underlying policy of FCC regulation will be examined. The forces encouraging the change toward deregulation and the likely effects of such a departure on informational programming will then be discussed. Finally, the existence of potential impediments to the deregulation will be considered.

I. THE DEREGULATION OF INFORMATIONAL PROGRAMMING

The informational program guidelines eliminated under the deregulation were not strict program quotas, nor were they vigorously or inflexibly enforced. The regulations divided broadcast programming into a number of categories[17] which licensees noted in the "program

16. Pursuant to 47 C.F.R. § 1.415 (1979), persons interested in a proposed rulemaking are afforded an opportunity to participate and a reasonable amount of time to submit comments to the FCC for its consideration. The publication of the Radio Deregulation NPRM elicited more than 20,000 comments. Many of the parties, it appears, feared the rule changes would result in a reduction of religious programming. *Deregulation Filings Swamp FCC with Wide Range of Ideas,* BROADCASTING, Mar. 31, 1980, at 25-26. The Commission responded in an informal memorandum that it had no intention of discouraging religious broadcasting and, moreover, that "there are currently no FCC guidelines requiring radio stations to broadcast . . . religious programs." FCC Fact Sheet on Radio Deregulation Proposals (undated FCC release). *See* Radio Deregulation R & O, 46 Fed. Reg. at 13,889-90.

17. The categories and their definitions are found in the *Code of Federal Regulations*:

(i) *Agricultural programs* (A) include market reports, farming, or other information specifically addressed, or primarily of interest to the agricultural population.

(ii) *Entertainment programs* (E) include all programs intended primarily as entertainment such as music, drama, variety, comedy, quiz, etc.

(iii) *News programs* (N) include reports dealing with current local, national, and international events, including weather and stock market reports; and commentary, analysis and sports news when an integral part of a news program.

(iv) *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, vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings, congressional hearings and the like.

(v) *Religious programs* (R) include sermons or devotionals; religious news; and music, drama and other types of programs designed primarily for religious purposes.

(vi) *Instructional programs* (I) are primarily intended to instruct. They further the appreciation or understanding of such subjects as literature, music, fine arts, history, geography, the natural and social sciences, hobbies and occupations and vocations.

(vii) *Sports programs* (S) include play-by-play and pre-game or post-game related

type" columns of their station program logs to indicate the nature of each program presented. Upon application for renewal of the station's three year license,[18] the licensees were required to review selected program logs and provide the Commission with a tabulation of the amount of programming they presented in each category.[19] A minimum percentage[20] of air time was to be devoted to the presentation of nonentertainment programming[21] under the FCC specifications. A good deal of licensee flexibility was accorded, however, for station operators were free to adjust the amount of programming within the various categories combined to reach that specified percentage.[22] Should the licensee fail to achieve the guideline minimum, the Commission would not automatically reject the renewal application or set the application for hearing. Rather, the FCC developed a procedure wherein the power to approve renewal applications was delegated by the Commission to its Broadcast Bureau staff[23] *except* in instances where the application was deficient in one or more of several specified aspects, one of which was licensee failure to meet the nonentertainment guideline

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activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

(viii) Other programs (O) include all programs not falling within definitions (i) through (vii).

(ix) *Editorials* (EDIT) include programs presented for the purpose of stating opinions of the licensee.

(x) *Political programs* (POL) include those which present candidates for public office or which give expressions (other than in station editorials) to views on such candidates or on issues subject to public ballot.

(xi) *Education Institution programs* (ED) include those prepared by, in behalf of, or in cooperation with, educational institutions, educational organizations, libraries, museums, PTA's, or similar organizations. Sport programs shall not be included.

47 C.F.R. § 73.1810(d) (1980).

18. 47 U.S.C. § 307(d) (1976).

19. FCC Form 303-R (1976).

20. 47 C.F.R. § 0.281(a)(8)(i) (1979) specifies the delegation threshold minimums of eight percent for commercial AM stations and six percent for commercial FM stations.

21. Although, strictly speaking, "nonentertainment" comprises all but categories (ii) and (vii) listed in note 17 *supra*, news and public affairs are the two principal components of nonentertainment programming. For example, radio license renewal form 303-R provides for a summary in which nonentertainment programming is tabulated only as "news," "public affairs," and "all other."

The news and public affairs categories may be spoken of together as a combined category, "informational" programming. 47 C.F.R. § 0.281(a)(8)(i) (1979).

22. For example, one AM station might present seven percent news and one percent public affairs while another might air two percent news and six percent religious.

23. The Broadcast Bureau is one of the principal staff units of the FCC and it assists and advises the Commission with respect to regulation of broadcast services. 47 C.F.R. § 0.71 (1979). Its Renewal and Transfer Division is charged with processing renewal applications. *Id.* § 0.75.

minimum.[24] It was generally accepted[25] that most licensees would comply with the delegation threshold percentages rather than risk Commission review, challenge by citizens' groups or competing applicants, and the attendant costs and uncertainty.[26]

The deregulation is the result of questioning the continued need for present methods of regulation in view of the increased number of radio broadcasting stations[27] and the modified role of radio[28] that has evolved since the first regulation of broadcasting. As revealed in the Deregulation Proposal, the Commission's initial reaction to the questioning was that conduct-related regulation is no longer desirable. In the Commission's view, regulations that involve it in licensee program decision-making should give way to less intrusive structural regulation which permits much of the "regulating" to be performed by commercial market forces.[29] Although the Commission listed alternative rule modifications, under its preferred option, the Commission would have eliminated the guidelines that indirectly require a licensee to devote a specified percentage of his station's broadcast time to nonentertainment programming. Reasoning that if there is a need for such programming it will manifest itself in the form of commercial potential, the Commission proposed to give the licensee discretion to decide whether to carry it.[30]

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24. *Id.* § 0.281(a)(8)(i). The FCC also could view a licensee's nonentertainment programming record as failing to live up to his earlier proposals. The same non-delegation approach applies to:

> (10) *Programming: Promise versus performance.* Commercial AM, FM, and TV renewal, transfer, and assignment applications which vary substantially from prior representations with respect to commercial practices or the programming categories set forth at § 0.281(a)(8)(i), and for which variation there is lacking, in the judgment of the Broadcast Bureau, adequate justification in the public interest.

Id. § 0.281(a)(10).

25. Goldberg & Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1, 14 (1979).

26. The use of this type of indirect regulation—as opposed to the imposition of strict standards—has been characterized as a variety of "regulation by raised eyebrow." *See* text accompanying note 96 *infra.*

27. There were 681 radio stations in the United States at the passage of the Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934), predecessor to the Communications Act. Radio Deregulation NPRM, 73 F.C.C.2d at 481. As of March 31, 1981, there are now 9,020 operating radio stations. *Summary of Broadcasting*, BROADCASTING, June 1, 1981, at 113.

28. Since the advent of commercial television programming, radio programming has changed from mass appeal entertainment to more specialized music and news formats. Radio Deregulation NPRM, 73 F.C.C.2d at 489-90.

29. *Id.* at 482-83, 539. *See generally* Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 FED. COM. L.J. 201 (1979).

30. 73 F.C.C.2d at 531-32.

The Commission nevertheless stopped short of adopting its preferred alternative. In its Report and Order, prepared after further deliberation and review of submitted comments, the Commission presents a more restrained view of licensee discretion and an express recognition of the importance of informational programming to service in the public interest.[31]

In addition, the Commission was forced to acknowledge that one remedial measure it had proposed would be unworkable. In the Deregulation Proposal, the FCC reserved the right to step in should the marketplace not prove to be a satisfactory regulator; *i.e.*, in the event of "marketplace failure."[32] But, as the FCC later realized, marketplace failure is difficult to define and the indicia of marketplace failure have not been established.[33] Further, even if it were possible to say with confidence that the media marketplace in a particular geographic area had failed—for example, that every station in the area had chosen to eliminate informational programming—the ability of the FCC to do anything about it is questionable. The FCC is authorized to license and regulate individual stations, and nothing in the Communications Act permits it to regulate broadcasting market by market rather than station by station.[34]

The proposed reservation of the right to intervene in the event of marketplace failure, though impractical, seemed to reveal some FCC misgivings about turning over to the licensee the ultimate decision about whether informational programming will survive. In its Report and Order, the FCC seems to have modified its view of what deregulation should mean and has attempted to retain some of the spirit of its earlier requirements while freeing itself and its licensees of administrative details. Instead of retaining the right to intervene in case of marketplace failure, the FCC stated that stations, though largely deregulated, would still be required to be responsive to community issues.[35] Thus, the FCC is striking the requirement that stations program minimum amounts of programming in the specific categories (and halting the indirect methods of enforcing the requirement), but it is not eliminating the *raison d'être* of informational programming: the discussion of issues that are important to the licensee's community.[36] In the Commission's view, apparently, these are two separate considerations and the elimination of the delegation threshold minimums does not necessitate the abandonment of all discussion of important issues.

31. *See* text accompanying notes 35-39 *infra*.
32. 73 F.C.C.2d at 613.
33. *See* Radio Deregulation R & O, 46 Fed. Reg. at 13,930.
34. *Id.* at 13,929-30.
35. *Id.* at 13,893.
36. *Id.*

The Report and Order also manifests a new Commission attitude toward station flexibility and heightened awareness of modern radio programming realities. Noting the large number of radio stations today, the Commission says it is no longer necessary to require each station to present something for everyone.[37] In the area of entertainment programming, this approach has been accepted for several years. When there are several stations in one city, it is not practical for each of them to try to respond to all of the entertainment tastes present in the market. Instead stations will specialize in presenting programming desired by particular segments of the community.[38] The guideline minimums now being eliminated served to prevent this approach from being extended to nonentertainment programming, however, and although there might be several specialized stations presenting particular varieties of entertainment, each station had to present news and information.

The Commission apparently is beginning to see less distinction between entertainment and nonentertainment programming. As stated above, a licensee still will be required to maintain presentation of programming that is responsive to public issues, but for the first time he will be allowed to decline to present discussion of some issues on the grounds that these issues are not of significance to his particular audience and that other stations in the market have already dealt, or could reasonably be expected to deal, with the issues.[39]

The mechanics of the new requirements are uncomplicated. The licensee must each year list five to ten issues of community importance along with respective examples of programming he has presented in response to these issues. The list is to include a description of how the licensee determined the issues to be of community importance and details of the time, date, duration, and nature of the responsive programming. This "Issues/Programs List" is to be placed in the station's public file and may be examined by anyone who wishes to see it.[40]

In summary, the Commission has decided that presentation of particular categories of nonentertainment programming is not essential to service in the public interest, but programming that is responsive to community issues must be maintained in some form. But even here, the FCC has allowed the licensee more discretion in determining whether an issue is important to his community and whether it is necessary that *his* station respond to it. The Commission analysis is based on a recognition that most broadcasters are in business to make profits, that profits result from the sale of advertising time, that

37. *Id.* at 13,895-96.
38. *See* text accompanying notes 144-146 *infra.*
39. 46 Fed. Reg. at 13,893 & n.32, 13,897.
40. *Id.* at 13,900.

advertisers will place their advertising dollars with stations that attract a large audience with their programming, and, thus, that it will be in the broadcasters' own best interests to satisfy the desires of the public. In the new FCC view, if the people want informational programming, the economic workings of the commercial broadcast system will ensure that the people get informational programming.[41]

II. COMMISSION AUTHORITY TO REGULATE BROADCAST PROGRAMMING

The foundation for current broadcast regulatory practices is found in the Radio Act of 1927.[42] The provisions of the Radio Act were born of necessity: broadcasting stations had multiplied at an enormous rate since the licensing of the first station.[43] The Secretary of Commerce, armed with very limited powers delegated to him in a law[44] written before the advent of broadcasting, found he was powerless to stop the proliferation of stations or to devise regulations that would reduce the amount of interference the stations caused each other.[45] When it become apparent that the broadcasters could not cope with the interference problem without governmental coordination,[46] Congress established the Federal Radio Commission (FRC)[47] and granted it the

41. Radio Deregulation NPRM, 73 F.C.C.2d at 529-30.

42. Pub. L. No. 69-632, 44 Stat. 1162 (1927) (repealed 1934).

43. The magnitude of the proliferation may be seen in the following table:

Year	Number of Radio Broadcasting Stations on the Air
1920	1
1921	5
1922	30
1923	556
1924	530
1925	571
1926	528
1927	681

C. STERLING & J. KITTROSS, STAY TUNED 510 (1978) [hereinafter cited as STERLING & KITTROSS].

44. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927).

45. Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923) (Commerce Secretary has no power to refuse license to qualified applicant); United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926) (1912 Act gives Commerce Secretary no authority to issue regulations); 35 Op. Att'y Gen. 126 (1926) (1912 Act is inadequate to cover broadcasting).

46. STERLING & KITTROSS, *supra* note 43, at 126-27.

47. Radio Act of 1927, Pub. L. No. 69-632, § 3, 44 Stat. 1162 (repealed 1934). The FRC was intended to be only a temporary body and most of its powers were to be vested in the Secretary of Commerce after a year of FRC operation. *Id.* at § 5. The temporary authority was extended repeatedly, however, and in 1929, the FRC became a permanent agency. S. HEAD, BROADCASTING IN AMERICA 132 (3d ed. 1976). Its duties were assumed by the Federal Communications Commission (FCC) pursuant to the 1934 Act. 47 U.S.C. § 151 (1976).

powers the Secretary of Commerce had lacked. The Radio Commission painstakingly redistributed and reclassified the stations and frequencies. It thereby reduced interference and provided better radio service to a greater number of citizens.[48] Once the immediate problems of interference had been alleviated, however, there remained unanswered questions about how far the powers of the FRC extended beyond mere technical supervision.

Like the present Communications Act which replaced it but in large part merely continues it, the Radio Act was nearly silent about how actively the government could regulate programming aspects of station operation.[49] Because of Congress' failure to spell out its intentions,[50] the Commission and the courts have been forced to look elsewhere in the statute for guidance. The only available foundation for the Commission's programming approach is the sweeping command that the FCC regulate communications within its jurisdiction "in the public interest, convenience, and necessity."[51]

Though broad, this public interest standard has received judicial approval; Commission actions which were not even hinted at in the statute have been declared proper under the sweeping language.[52] The Commission very early received judicial recognition of its power to consider programming in its licensing determinations in *KFKB Broadcasting Association v. FRC* (the Brinkley case).[53] In *Brinkley* the FRC decided not to renew Brinkley's KFKB license because it viewed as contrary to the public interest his practice of prescribing remedies over the air for unseen patients who merely mailed him descriptions of

48. STERLING & KITTROSS, *supra* note 43, at 128-30.

49. The 1927 Act included an anti-censorship provision almost identical to the present 47 U.S.C. § 326 (1976). Pub. L. No. 69-632, § 29, 44 Stat. 1162 (1927). The Act also included a forerunner of 47 U.S.C. § 315 (1976), the political candidates' "equal time" provision. Pub. L. No. 69-632, § 18, 44 Stat. 1162 (1927).

50. While the silence of the Radio Act is understandable in view of the youth of the broadcasting industry in 1927, the absence of updating in the 1934 Act is puzzling. For example, network broadcasting (1926) and the sale of time for advertising (1922) were relatively recent developments in 1927. But by 1934, nearly one-third of all radio stations were network affiliates, STERLING & KITTROSS, *supra* note 43, at 512, and radio advertising revenues had risen from $4.8 million in 1927 to $72.8 million, *id.* at 516.

51. 47 U.S.C. § 309 (1976). *See* note 3 *supra*. *See, e.g.*, Radio Act of 1927, Pub. L. No. 69-632, §§ 4, 9, 11, 21, 44 Stat. 1162.

52. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (FCC has power to restrict newspaper ownership of broadcasting stations); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC's cable television rules not in excess of commission's authority but reasonably ancillary to effective performance of its duties); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (FCC's rules barring certain network-station agreements are valid although not expressly authorized by Congress).

53. 47 F.2d 670 (D.C. Cir. 1931).

their symptoms. Brinkley appealed this decision to the United States Court of Appeals for the District of Columbia arguing that the Commission action constituted an exertion of prior restraint of broadcast programming, which was prohibited by the Radio Act[54] (as well as the later enacted Communications Act).[55] In rejecting Brinkley's contention that deprivation of his license amounted to censorship, the court held that there had been no attempt to bar programming prior to its broadcast. Thus, there had been no violation of the Radio Act's anti-censorship section.[56] In the court's view, the Commission had done merely what Congress required: it had considered whether the grant of Brinkley's renewal application would be in the public interest, using as an element of that consideration the applicant's past programming practices.[57]

Commission power to regulate broadcasting received significant recognition in *National Broadcasting Co. v. United States.*[58] The FCC, worried about the dominance of the national networks in radio broadcasting, had formulated "Chain Broadcasting Rules" which effectively prohibited networks and stations from entering into relationships the Commission found to hamper the licensees' ability to operate in the public interest.[59] The rules were challenged as exceeding statutory authority and violating first amendment rights.[60] The Court disagreed, stating that the formulation of the rules, though not expressly authorized by the statute, nevertheless was valid as a particularization of the FCC's conception of the public interest standard.[61]

Writing for the majority, Justice Frankfurter stated that Congress, aware that it was dealing with a new regulatory field,[62] drafted an act

54. Pub. L. No. 69-632, § 29, 44 Stat. 1162 (1927).

55. 47 U.S.C. § 326 (1976).

56. 47 F.2d at 672.

57. *Id. Accord,* Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir.), *cert. denied,* 284 U.S. 685 (1932).

58. 319 U.S. 190 (1943).

59. *Inter alia,* the Chain Broadcasting Rules limited network ownership of stations, restricted the duration of affiliation contracts, affirmed the right of a station to reject network programs, forbade the ownership of more than one network by a single organization, and ended network power to coerce stations into lowering their rates for non-network advertising. *Id.* at 196-209.

60. *Id.* at 209-10.

61. *Id.* at 218.

62. Justice Frankfurter relied in part on FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), for which he also wrote the majority opinion. *Pottsville* provides a succinct discussion of the FCC's operation under the public interest standard and Congress' reasons for adopting the standard:

> In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commis-

that "gave the Commission not niggardly but expansive powers"[63] to guide the new industry, and that the FCC was acting within its authority when it drafted the new rules. Turning to the network's first amendment argument, the Court held that the FCC's proposed denial of licenses to stations involved in the disfavored relationships was not an abridgment of free speech.[64] Setting forth a concept that has guided the analysis of FCC actions ever since, the Court recognized that, because of the finite number of channels available, not all who wished to broadcast could do so and that some would-be broadcasters would have to be denied.[65] The nature of the medium required that denial of a license, if made for a valid public interest reason such as violation of the Chain Broadcasting Rules, could not be held a violation of free speech rights.[66] *National Broadcasting* stands as a resounding affirmation of the Commission's discretionary power and convincing authority for subsequent Commission action.

With regard to regulation specifically affecting programming, however, *National Broadcasting* did not provide a complete resolution. The Chain Broadcasting Rules affected program content only indirectly and their affirmation did not answer the question of how much the Commission could interfere with licensee program decisions without committing an unconstitutional governmental trespass.

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sion's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. [Communications Act], Title I, § 4(j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

Id. at 137-38.

63. 319 U.S. at 219.

64. *Id.* at 227.

65. The concept has come to be known as "The Scarcity Doctrine." S. HEAD, BROADCASTING IN AMERICA 319 (3d ed. 1976). The use of the doctrine as regulatory base has been criticized as illogical. *See, e.g.*, Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 226-29; Goldberg & Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1, 26-30 (1979); *see also* Schmidt, *Pluralistic Programming and Regulation of Mass Communications Media*, in COMMUNICATIONS FOR TOMORROW 191 (G. Robinson ed. 1978).

66. 319 U.S. at 226-27.

A more active FCC involvement in station programming matters was permitted by the Court in *Red Lion Broadcasting Co. v. FCC.*[67] Although the case had sprung from a facially minor dispute, a small town station's refusal to give free time under the FCC's Fairness Doctrine[68] to a person who believed his character had been attacked on a syndicated religious program, the Court's resolution of the dispute had far-reaching impact.[69] The Court built upon *National Broadcasting* and extended to programming matters the recognition that the Commission could regulate without censoring. The FCC's Fairness Doctrine and the related Personal Attack Rules,[70] although they involve a measure of governmental intrusion into licensee programming decision-making,[71] were upheld.

Although it had been argued that the challenged rules impinged on the broadcasters' freedom of speech, the Court held that, as explained in *National Broadcasting*, the scarcity of radio channels necessitates a licensing scheme which includes criteria for determining who shall be awarded the channels.[72] The first amendment considerations in such a scheme are not limited to those of the broadcaster, the Court said, rather it is the public's right to be exposed to various ideas and experiences that is crucial. The fact that only some of the competing applications can be granted does not mean that the public must be cut off from the views of those the FCC could not accommodate.[73] The fortunate few who are granted licenses must be "proxies"[74] for their communities and are required to give attention to public issues. They are not to ignore community problems or exclude disfavored views of important questions.[75]

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67. 395 U.S. 367 (1969).

68. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949). *See* text accompanying note 85 *infra*. Congress incorporated the essence of the Fairness Doctrine into section 315 of the Communications Act in Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557.

69. F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 3-5 (1975).

70. 47 C.F.R. § 73.1920 (1979). The Personal Attack Rules set out a procedure whereby persons verbally attacked during a presentation of controversial issues may force the station to allow them to respond. *Id.*

71. *See* note 85 and accompanying text *infra.*

72. 395 U.S. at 388-89.

73. *Id.* at 389-90.

74. *Id.* at 394. A term more often used in describing the licensee's relationship to his frequency is "public trustee." This term is not found in the Communications Act, but it comports both with the Act's requirement that a prospective licensee disavow any claim of ownership of his assigned channel, 47 U.S.C. § 304 (1976), and the Act's distinction between broadcast stations and common carriers, *id.* §§ 153(h), (o). *See* KRASNOW & LONGLEY, *supra* note 3, at 25 n.23.

75. 395 U.S. at 394.

In short, although the present Commission may not desire to exercise it, the Commission has judicially-recognized ability to make regulations that affect broadcast programming. Its experience in the courts demonstrates that the Commission, consistent with both the Constitution and the public interest standard, can affect what comes out of the nation's radio loudspeakers.

III. INFORMATIONAL PROGRAMMING AS A PUBLIC INTEREST CRITERION

As its power to regulate programming in general was being validated, the FCC concurrently was developing its policy that an important element of public interest service is the presentation of informational programming. While definitions of news and public affairs—and guidelines as to the amount that should be presented—were later in arriving, the Commission's early interpretations of its function under the public interest standard reveal an orientation that the Court was to echo in *Red Lion*: It is the interest, convenience, and necessity of the listener—not the broadcaster—which is emphasized.[76] Many early broadcasters viewed their stations as private soapboxes, but as early as 1929, the FRC declared that stations were to serve all the people with balanced programs of entertainment, "religion, education and instruction, important public events, discussion of public questions, weather, market reports, and news and matters of interest to all members of the family. . . ."[77]

Nevertheless, the Commission for many years hesitated to confront broadcasters about radio programming. Finally, in its 1946 statement, *Public Service Responsibilities of Broadcast Licensees*,[78] informally labeled "The Blue Book," the Commission criticized broadcasters for not living up to their promises of public interest service.[79] It identified programming characteristics which it considered significant in determining whether a station operator had met his public interest obligations and thus deserved to have his license renewed. Significant to this comment is the Blue Book's inclusion of "Discussion of Public Issues,"[80] a category which appears to coincide with the modern definitions of news and public affairs. Although it declined to interfere with the licensee's judgment in how best to use broadcasting as an informa-

76. FRC statement on the Public Interest, Convenience, or Necessity, August 23, 1928, *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 55 (F. Kahn ed., 3d ed. 1978) [hereinafter cited as Kahn].

77. Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *reprinted in* Kahn, *supra* note 76, at 59-60.

78. The statement was not published or included in the FCC's official reports. It may be found in slightly edited form in Kahn, *supra* note 76, at 132-216.

79. *Id.* at 134.

80. *Id.* at 188-91.

tional medium, the Commission concluded that it could make decisions about the quantity of news and public issue discussion time even though it could not properly affect the content. The Commission thus struck a balance: the selection of particular issues to be discussed was for the licensee, but the FCC, in deciding whether to renew a license, could consider the adequacy of the amount of time the licensee had allotted to such discussions over the three year license term.[81]

Although the Blue Book standards appear to require a manner of regulation that places the Commission at a respectful distance from the perimeters of the first amendment, the industry and political reaction to the Blue Book was so markedly negative that the Commission for many years effectively ignored its own statements in resolving subsequent programming issues and resigned itself to accepting performance falling short of Blue Book goals.[82]

The FCC eventually devised a middle-ground approach to the attainment of many of the ends sought in its promulgation of the Blue Book. Again, the Commission refused to impose its own conclusions about which issues a licensee should present to his community. But to ensure that the licensee's audience received the information intended, the Commission developed a system that required the licensee to ascertain the major problems facing his public and to report to the FCC what had been done in his programming to speak to those needs.[83] These community needs ascertainment procedures required public interest program service while affording stations flexibility. The Commission established no hard and fast program quotas, but, to provide guidance, noted that broadcasters themselves, with Commission recognition, had usually found fourteen enumerated program categories necessary to meet community needs. Complementing an implied "given" that some level of informational programming would always be necessary to satisfy the public interest requirement is the composition of the table of categories itself: Nine of the fourteen are informational in nature.[84]

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81. *Id.* at 191, 210.

82. *Id.* at 133. Indeed, the very stations identified in the Blue Book as egregious examples all got their licenses renewed. E. BARNOUW, THE GOLDEN WEB 231-36 (1968).

83. En banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960).

84. The Commission stated:

> The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.

Id.

Some of the most emphatic Commission statements regarding the importance of informational programming may be found in the reports in which it developed its Fairness Doctrine. Although it has produced much litigation and has been the subject of many learned commentaries, the Fairness Doctrine may be reduced to two simple requirements: Each broadcaster has an affirmative obligation to provide adequate discussion of controversial issues; and, in his overall presentation of these discussions, the broadcaster must ensure that each side of an issue is given a reasonable opportunity to be heard.[85]

In *Editorializing by Broadcast Licensees*[86] the FCC declared that the very basis for setting aside large portions of the spectrum for broadcasting was broadcasting's potential for contributing to informed public opinion. In the agency's view, it was necessary for these stations to devote a reasonable amount of time to news and discussion of community issues.[87] This view was reaffirmed in the FCC's *Fairness Report*.[88] The FCC stated that the reasonableness of a licensee's record of providing time for public interest programming would be subject to review and that broadcasters would not be allowed to ignore their public interest responsibilities and thereby frustrate the development of informed public opinion. Amplifying one of its earlier statements, the FCC called Fairness Doctrine compliance, including meeting the

85. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-50 (1949).

86. 13 F.C.C. 1246 (1949).

87. The Commission observed:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radio broadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radio broadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

Id. at 1249 (footnote omitted).

88. 48 F.C.C.2d 1 (1974).

obligation to provide coverage of public issue discussion, the "*sine qua non*" for license renewal.[89]

Another manifestation of the Commission's deference to the news and public affairs program is its *Carroll*[90] doctrine procedures. These procedures come into play when an existing licensee attempts to block the authorization of a new, competing station in his community by claiming that the new competition will cause him economic harm. A claim of economic harm, without more, does not require Commission attention. There must be a showing of potential impairment of the existing licensee's ability to operate in the public interest.[91] The Commission has formulated criteria for the grant of a *Carroll* issue hearing. Their net effect is to require the existing licensee to show the existence of substantial and material questions of fact about whether the increased competition will affect his ability to present informational and public service programming.[92] Without such a showing, the licensee has not demonstrated that harm to him is harm to his public.

In summary, the Commission over the years has repeatedly stressed the importance of informational programming. In a variety of contexts, the FRC and FCC established that news and public issue discussion are more than merely desirable; they are essential to service in the public interest. The Commission that now says informational programming can be discretionary with the licensee is a Commission with a short memory.

IV. CONTRIBUTORS TO THE DEREGULATORY MOOD

The radio deregulation decision is a reaction to forces within the Commission and elsewhere in government. A perceptive observer might have anticipated the recent action in one or more of the following: (1) A general movement within government toward eliminating unnecessary laws and regulations; (2) a series of Commission actions toward reducing its supervision of day-to-day broadcasting station operations; (3) the sense of resolve developed by the FCC in reaction to judicial criticism of its handling of radio entertainment format changes; (4) recent economic analyses of media regulation; (5) Supreme Court decisions which arguably provide support for a retreat from *Red Lion*; (6) Congressional dissatisfaction with the 1934 Act; and

89. *Id.* at 10 (quoting Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970)).

90. Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

91. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475-76 (1940).

92. WLVA, Inc. v. FCC, 459 F.2d 1286, 1297 (D.C. Cir. 1972). *See generally* Litman, *Public Interest Programming and the Carroll Doctrine: A Reexamination*, 23 J. BROADCASTING 51 (1979).

(7) the Commission's alleged failure to achieve by its guidelines the kind of contribution to informed public opinion it had intended.

A. *Presidential Preference for Deregulation*

A general policy of reducing government supervision of regulated industries was announced early in President Carter's administration; executive agencies were directed to review their rules and rulemaking procedures.[93] Among the goals of this regulatory analysis were the simplification and clarification of regulations, efficient achievement of legislative goals, and the reduction of unnecessary burdens on the public and government.[94] The FCC, identified as a notorious generator of paperwork,[95] is a highly visible target for such deregulatory efforts.

The deregulation moves are likely to accelerate during the Reagan administration. In early 1980, then-candidate Reagan wrote to the editor of the trade magazine, *Broadcasting*:

> I wanted to take this opportunity to . . . reaffirm my position that over-regulation and regulation by "raised eyebrow" stifles creativity, ingenuity, diversity of programming and allows the government to intrude into sensitive First Amendment areas to the detriment of the public and broadcasters alike. Deregulation reduces such intrusion and produces more diverse programing. I believe that the needs, tastes and interests of the community can be served through more reliance on marketplace forces and less on the heavy hand of government regulation and control.[96]

The same magazine subsequently noted that "signs of a new beginning are evident," at the FCC, and that "for broadcasters, at least, they portend a gentler time."[97]

B. *Earlier FCC Deregulatory Actions*

The deregulatory trend within the Commission had already begun at the time President Carter took office. Particularly with regard to its technical rules, many of which had been written when radio equipment was unstable and undependable, the FCC began to eliminate rules it

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93. Executive Order No. 12044, 3 C.F.R. 152 (1979). Because the President wished to avoid a confrontation with Congress, independent agencies such as the FCC were not directly affected by the order. The order was accompanied by an appeal to chairmen of independent agencies to apply its policies and procedures voluntarily, however. 43 Fed. Reg. 12,670 (1978). *See* Radio Deregulation NPRM, 73 F.C.C.2d at 459 n.4.

94. 3 C.F.R. 152 (1979).

95. *See Top Rating for FCC as Generator of Paperwork*, BROADCASTING, Dec. 4, 1978, at 24-27.

96. *New Brooms are Coming*, BROADCASTING, Nov. 10, 1980, at 27.

97. *Emerging Shape of Reagan FCC Comes in View*, BROADCASTING, Feb. 2, 1981, at 23.

considered no longer necessary.[98] Though the initial deregulation was largely limited to engineering rules,[99] the FCC, pressed in part by a sizeable backlog of applications to be processed and complaints from its staff, began to reduce other regulatory activities. For example, it eased the formal procedures of community needs ascertainment for licensees in small communities,[100] simplified the radio license renewal application form,[101] eliminated many constraints on radio network operation,[102] and commenced inquiry into the efficacy of its television network rules.[103]

The FCC has coupled its desire to reduce its involvement in day-to-day station operations with a series of proposals that would allow more stations on the air.[104] The purported goals of these actions include the development of greater program service, specifically service to ethnic minorities and persons living in areas reached by few nighttime signals.[105] Although the FCC did not make approval of the radio deregulation proposal contingent on the authorization of more stations, its approach favoring regulation by marketplace forces seems to have been conceived as a corollary to the proposals recommending more competitors in the marketplace.[106]

C. *The Radio Format Cases*

The Commission's concept of its role in radio program decision-making in general is illustrated by its resolute stance in its radio

98. In 1972, the FCC set up a task force on deregulation to examine its technical regulations and make recommendations for change. Radio Deregulation NPRM, 73 F.C.C.2d at 458.

99. More than 800 rule changes were effected as part of this program. *Id.*

100. Ascertainment of Community Problems, 57 F.C.C.2d 418, 435-39 (1975).

101. FCC Form 303, 59 F.C.C.2d 750 (1976).

102. Network Broadcasting by Standard AM & FM Stations, 63 F.C.C.2d 674 (1977).

103. Commercial TV Network Practices, 62 F.C.C.2d 548 (1977).

104. *See, e.g.*, Report and Order, Clear Channel Broadcasting in the AM Broadcast Band, 45 Fed. Reg. 43,172 (1980); FM Allocations, 45 Fed. Reg. 17,602 (1980); 9 Khz Spacing for AM Broadcasting, 44 Fed. Reg. 39,500 (1979); VHF TV Top 100 Markets, 63 F.C.C.2d 840 (1977).

105. *See, e.g.*, Report and Order, Clear Channel Broadcasting in the AM Broadcast Band, 45 Fed. Reg. 43,172, 43,173 (1980).

106. *See The Laissez Faire Legacy of Charlie Ferris*, BROADCASTING, Jan. 19, 1981, at 37.

The National Association of Broadcasters in its formal comments resisted even the inference that the proposed deregulation be contingent on the addition of new stations or other structural changes. *See* Comments of the National Association of Broadcasters 7-8 (March 25, 1980).

Note also that addition of new stations likely would raise the *Carroll* issue of economic harm to existing stations. *See* notes 90-92 and accompanying text *supra*. With the Radio Deregulation Proposal now adopted, the FCC may be forced to formulate new criteria for determining if a *Carroll* hearing is warranted.

entertainment format cases.[107] The disputes have followed a typical pattern: (1) Local radio listeners discover that their favorite radio station is about to be sold and that the prospective buyer plans to abandon the current programming for something potentially more profitable; (2) the group petitions the FCC and, claiming the loss of a unique program format, asks the FCC to deny the license assignment application; (3) the FCC declines to provide even a hearing on the issue and grants the assignment application; (4) a court of appeals[108] reverses the Commission action and directs the agency to afford a hearing.

The FCC's position on entertainment format changes is that its involvement is unnecessary, unwise, and, possibily, unconstitutional. It has noted the difficulty of determining if an entertainment format is unique, the possible chilling effect on program experimentation, and the danger of intrusion into decisions that should be made by the licensee alone according to his perceptions of the tastes and desires of his community.[109] This position was criticized by the appeals court because, according to its reading of the Communications Act, the public interest standard requires such hearings.[110] The FCC took the unusual step of initiating an inquiry[111] into the propriety of following the court's directive—a move which Judge McGowan characterized as an inquiry into how to circumvent the law.[112] The FCC concluded that it would be better to continue its judicially disapproved pattern.[113] Subsequent to the publication of the FCC's Deregulation Report and Order, the United States Supreme Court held that the FCC's policy was not inconsistent with the Communications Act or its public interest standard, and reversed the court of appeals.[114]

Although the Commission views the entertainment format issue as distinct from the informational program requirements under discussion here, an adverse ruling would have seriously undermined the Deregulation Proposal. Had the Supreme Court determined that even entertainment matters cannot be determined solely on the basis of

107. WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), *rev'd and remanded*, 101 S. Ct. 1266 (1981); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973); Citizens Comm. v. FCC, 436 F.2d 263 (D.C. Cir. 1970).

108. Appeals from FCC licensing decisions are brought to the United States Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b) (1976).

109. WNCN Listeners Guild v. FCC, 610 F.2d at 843-44.

110. *Id.* at 842-43.

111. Notice of Inquiry, Changes in Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1976).

112. 610 F.2d at 850.

113. Memorandum Opinion and Order, Changes in Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858 (1976), *reconsideration denied*, 66 F.C.C.2d 78 (1977).

114. FCC v. WNCN Listeners Guild, 101 S. Ct. 1266 (1981).

commercial demand, the Commission would have found it difficult to support a proposal that would leave news and public affairs programming to be decided by marketplace forces. The Court's ruling expressly did not extend to nonentertainment programming,[115] but by its deference to the FCC on entertainment matters, it may have signalled a shift in direction away from *Red Lion*—a shift that some say had already begun.

D. *A Retreat from Red Lion?*

The Supreme Court may have contributed to the deregulatory mood at the Commission by its decisions in two recent cases. The two decisions have been viewed as a retreat from *Red Lion* and provide a possible basis for a deregulatory move that would deviate from the spirit and mandate of *Red Lion*.[116] After the *Red Lion* Court validated the FCC's Fairness Doctrine, some licensees attempted to avoid some potentially costly Fairness Doctrine confrontations by simply refusing to accept advertisements that presented editorial points of view. Although a court of appeals held that flat bans on such advertisements could not be maintained,[117] the Supreme Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*[118] disagreed. Allowing more flexibility to stations in their editorial choices, the Supreme Court held that the first amendment does not require licensees to accept commercials for a point of view.[119] Much of the optimism following *Red Lion* was thus dampened: the right of the listener to hear ideas apparently was not to be a basis for a right of access to the air waves to speak those ideas.

A possible retreat from *Red Lion* is also to be seen in *Miami Herald Publishing Co. v. Tornillo*.[120] The Court considered the constitutionality of a Florida statute that afforded a right of reply to political candidates attacked by a newspaper in its columns.[121] When a Florida candidate attempted to use the statute to respond to an editorial attack, the Supreme Court held the statute invalid and an impermissible impingement on the newspaper's freedom of the press.[122] The decision is remarkable not only for its conservative first amendment analysis but

115. *Id.* at 1278.

116. Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COM. L.J. 215 (1979).

117. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd*, 412 U.S. 94 (1973).

118. 412 U.S. 94 (1973).

119. *Id.* at 121-25.

120. 418 U.S. 241 (1974).

121. FLA. STAT. ANN. § 104.38 (West 1973) (repealed 1975).

122. 418 U.S. at 258.

also for its lack of acknowledgment that the statute struck down was a newspaper equivalent of the FCC's broadcast Fairness Doctrine.[123]

E. *Economic Analyses of Communications Regulation*

In recent years, the FCC has begun to consider the economic, as well as the legal effects of its regulatory operations. FCC intervention into programming matters has been criticized as inefficient and counterproductive.[124] A common economic view of the broadcast regulatory structure is that Congress, in drafting the 1927 and 1934 Acts, chose an inefficient method for program delivery. Proponents of this approach contend that government should have auctioned-off frequencies rather than force the Commission to choose among applicants after a difficult public interest comparison.[125] It also has been suggested that the present system of advertiser financing of programming is an inexact method of assessing and satisfying consumer program preferences and that a widespread system of pay television and pay radio would allow program suppliers to discover not only the number of potential listeners and viewers but the intensity of their wants.[126]

Made in the comfortable environment that hindsight provides, these economic analyses of what should have been done appear valid, but they would be difficult to effectuate today. Given the entrenched nature of today's broadcasting industry and advertising practices, not to mention the adverse political reaction likely to greet a proposal to change the industry so radically, the economic insights may have value only insofar as they stimulate continued examination of ways to improve American broadcasting. This kind of discussion has given birth to related concepts which could be implemented without causing severe disruption of the established system. It has been suggested that communications policy goals can be attained by tinkering with the economic structure of the industry. Thus, for example, the FCC's goals of program diversity could be achieved by allowing more stations on the air.[127] This structural approach, it has been argued, would be preferable to trying to achieve diversity by commanding each licensee to balance his programming.[128]

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123. *See* B. SCHMIDT, FREEDOM OF THE PRESS V. PUBLIC ACCESS 241 (1976).

124. *See, e.g.*, Owen, *Diversity and Television* in REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS 317-22 (D. Ginsberg ed. 1979).

125. *See* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

126. Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 31-32 (1967).

127. Radio Deregulation NPRM, 73 F.C.C.2d at 505.

128. *Id.* at 517.

It seems only natural that an agency burdened with paperwork and frequently criticized for intruding into licensee discretion would embrace the opportunity to adopt structural regulation. Structural regulation would involve less day-to-day supervision, less paperwork, and fewer factors to consider at license renewal time. And structural regulation would allow the Commission to retire gracefully from the first amendment battlefield.

F. *Congressional Inclinations to Deregulate*

The economic discussion appears to have made an impact on Congress as well as the FCC. The ability of the 1934 Act to guide communications regulatory policy has been increasingly questioned.[129] Among other considerations, the absence of a unified communications policy, the lack of flexibility to deal with media forms developed since 1934,[130] the conflict-producing ambiguity of the public interest standard, and the demand from the industry and public interest groups for statutory change, led to legislative proposals to modify or abandon the Act.[131] Proposals to replace the present mode of regulation with structural regulation have been advanced. It may be that even if the FCC had declined to adopt its Radio Deregulation Proposal, Congress would have provided a statutory equivalent.[132]

G. *FCC Enforcement Problems*

The Commission's own enforcement failings and limitations may have contributed to its disinclination to continue its demand for informational programming. Despite the clarity of the approval it received in *Red Lion* and the emphatic tone of its own pronouncements about the importance of informational programming, the Commission has not vigorously prodded licensees to meet its requirements and may have signalled to them that it would be satisfied with minimal compliance. For example, it has declined to require that informational programs be scheduled during hours when there would be a large potential audience

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129. *See, e.g.*, STERLING & KITTROSS, *supra* note 43, at 466-67.

130. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC's authority over cable television limited to that which is reasonably ancillary to its functions as broadcast regulator).

131. *See, e.g.*, H.R. 13015, 95th Cong., 2d Sess., 124 CONG. REC. E4431 (daily ed. August 8, 1978). This bill would have replaced the FCC with a new agency having significantly less supervisory power over programming.

132. A recent bill, Communications Act Amendments of 1980, S. 2827, 96th Cong., 2d Sess., 126 CONG. REC. S7016 (daily ed. June 13, 1980), would have directed the FCC to reduce or eliminate the regulations that are the focus of the Commission's Radio Deregulation Proposal. *Id.* § 332.

Another such bill, The Radio Deregulation Act of 1981, S. 270, 97th Cong., 1st Sess., recently passed the Senate. BROADCASTING, June 29, 1981, at 27.

available and has allowed stations to "graveyard" public affairs and news programming,[133] it does not have a reporting system that would allow it or the public to look beyond program titles to assess the licensee's performance,[134] and it does not have a means of evaluating public interest performance on an industry-wide basis for a given time period.[135] Moreover, although there may be no practical or constitutional way to mandate quality production in informational programming, the FCC appeared reluctant to go beyond the specification of delegation threshold percentages.[136] It seems that all but the most blatant noncompliance would be accepted,[137] particularly if the renewal application in question was not challenged by a contender for the same channel or by a public interest group. The incidence of license loss for program-related infractions is negligible,[138] and few stations have been fined for program-related infractions.[139] Whether this reluctance is based on fear of first amendment violation or the prospect of adverse industry and political reaction, the FCC has not been aggressive in policing informational programming.

The present deregulatory climate at the FCC seems to be a result of all these forces and developments. Support is available to those who believe it is time for a bold administrative move to reject regulatory supervision in favor of purposeful non-involvement.

V. The Future of Informational Programming in a Deregulated Industry

The effects of radio deregulation of informational programming are difficult to predict with certainty, but the Commission itself appears to

133. Broadcasting Renewal Applicant, 66 F.C.C.2d 419, 424-25, 428-29 (1977) (rejecting, *inter alia*, standards that would require minimum amounts of prime time informational programming).

134. Chamberlin, *The Impact of Public Affairs Programming Regulation: A Study of the FCC's Effectiveness*, 23 J. Broadcasting 197, 199-200 (1979) [hereinafter cited as Chamberlin].

135. *Id.* at 210 n.9. The FCC now requires television licensees to submit annual programming reports (FCC Form 303-A). *Id.* at 198-99.

136. *See* notes 23-26 and accompanying text *supra*.

137. B. Cole & M. Oettinger, Reluctant Regulators: The FCC and the Broadcast Audience 151-58 (1978).

138. S. Head, Broadcasting in America 360-61 (3d ed. 1976); Weiss, Ostroff & Clift, *Station License Revocations and Denials of Renewal, 1970-78*, 24 J. Broadcasting 69-77 (1980).

It would appear that it is not so much the fear of FCC disapproval that motivates licensees to include news and public affairs programming as the fear that a challenging applicant will promise more informational programming and thus tilt the balance in a comparative hearing. *See* note 159 *infra*.

139. Clift, Abel & Garay, *Forfeitures and the Federal Communications Commission: An Update*, 24 J. Broadcasting 301, 305-06 (1980).

foresee this result: Radio news programming will continue, although perhaps on fewer stations; but public affairs programming may well disappear.[140] Public issues will continue to receive discussion but not necessarily on news and public affairs programming.

Recent broadcasting industry studies and trends give support to this conclusion. A recent study cited by the FCC indicates that many persons seek out certain radio stations because of their news programming and that many other persons, although they do not tune in specifically for news, listen attentively when the station they select presents news.[141] In addition, teen-oriented music stations, previously notable for their practice of "burying" news in the early morning hours of their schedules,[142] are decreasing in number as the demographic bulge of "baby boom" children grows older. Anxiously viewing the decreasing ratings achieved by traditional "top-forty" popular music stations, many station operators have restructured the approach into other contemporary music formats which, unlike their teen-oriented predecessors, feature rather than hide the news as programmers respond to increased listener demand for news.[143]

The commercial attractiveness of news is underscored by the development of all-news stations in several markets.[144] Since the advent of television and the consequent decline of radio as a source of mass entertainment programming, radio stations have been forced to specialize. Few licensees can hope to please most of the audience most of the time. Instead, most station operators will try to find a niche: an underserved but commercially attractive segment of the population. Foreign language, ethnic music, and country-western music formats were among the first specialized programs,[145] but an increased number of AM stations and the increased commercial potential of FM have contributed to the achievement of markets where several minority programming tastes can all be served.[146] And despite its relatively high overhead costs, many broadcasters have seen commercial potential in all-news programming because their respective communities include significant numbers of people who demand news and who prefer not to wait for news on music stations.

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140. Radio Deregulation NPRM, 73 F.C.C.2d at 507-16.

141. *Id.* at 511 (citing Radio News Listening Attitudes, a 1979 study prepared by Frank Magid Associates for the Associated Press).

142. E. ROUTT, J. MCGRATH & F. WEISS, THE RADIO FORMAT CONUNDRUM 39, 61, 65 (1978).

143. *See Radio News: Satellites and Narrower Demographics*, BROADCASTING, Dec. 1, 1980, at 68.

144. In 1979, 110 radio stations were identified as presenting all-news programming, BROADCASTING YEARBOOK D-87-88 (1980).

145. STERLING & KITTROSS, *supra* note 43, at 336-41.

146. *Id.* at 397-98. S. HEAD, BROADCASTING IN AMERICA 153-57 (3d ed. 1976).

This niche-seeking by radio station operators gives support to the argument that news programming will continue even though the FCC has decided to drop the requirements for it. It may develop that some station programmers, upon deregulation, will delete all of their newscasts and present uninterrupted music. But the mechanics of the radio marketplace, at least as observed so far, indicate that if some stations choose to forego news, other station operators, sensing an unsatisfied demand for news, will maintain or even increase their news presentations.

Unfortunately, this optimistic observation cannot be extended to public affairs programming. It is apparent that few licensees see commercial potential in public affairs programming and carry it only because they believe the Commission expects it.[147] Public affairs programming seems to be harmed by the operation of a vicious circle: Because licensees perceive little commercial appeal in public affairs programming, they schedule it at odd hours[148] and spend little money on its production; the resulting low ratings confirm the programmers' conclusion that such programs do not deserve more money or better schedules. In all fairness, it seems unlikely that public affairs programming in its usual form could ever attract a majority of the radio audience. Unlike news programs, which typically consist of brief treatments of several stories and which may be given audio variety through the presentation of on-the-spot reports, the typical public affairs program is a half-hour interview which focuses on a single issue and which does not lend itself to enhancement through creative production techniques. Public affairs programs need not be dreary, but to an audience accustomed to listening to radio to be entertained, public affairs production is not as compelling. It is a kind of minority taste programming that is nearly always at a ratings disadvantage. Even if public affairs programming were to attract substantial audiences, advertisers may be disinclined to have their products associated with unsettling or perhaps unpleasant discussions.[149] Consequently, if licensees are allowed to use commercial considerations as the only bases for deciding whether to continue public affairs programming, this variety of informational program is likely to vanish from radio program schedules.

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147. *See* Cox, *The FCC's Role in Television Programming Regulation*, 14 VILL. L. REV. 590, 593-94 (1969) [hereinafter cited as Cox]. The FCC concedes there is no evidence of demand for public affairs programming similar to the predicted consumer demand for news. Radio Deregulation R & O, 46 Fed. Reg. at 13,927; Radio Deregulation NPRM, 73 F.C.C.2d at 514-15.

148. Radio Deregulation NPRM, 73 F.C.C.2d at 514.

149. Cox, *supra* note 147, at 593-94. *See also* E. BARNOUW, THE SPONSOR 130-39 (1978).

VI. Obstacles to Deregulation of Informational Programming

The critical question in the consideration of radio deregulation is whether the FCC is free to substitute a structural mode of regulation by marketplace forces for its more active supervision of broadcast content. Although the prospect of a less intrusive regulation is in many respects appealing, there are precedential, pragmatic, and perhaps constitutional reasons why the Commission should maintain programming requirements even though the guidelines were only grudgingly obeyed and minimally enforced.

In determining whether FCC regulatory discretion accommodates deregulating radio informational programming, one must consider the FCC's own actions and precedents, the statute under which it operates, and judicial interpretations of the FCC's proper role under the Act and the first amendment.

The Commission noted in its proposal that it has a recognized ability to depart from its rules and policies provided that it explains and justifies the departure.[150] In view of the many years the FCC has taken the position that informational programming is an important, even essential, element of licensee service, a change to a policy that accords importance to informational programming only if listeners in commercially significant numbers want it requires great care in its ennunciation.

The Commission appears to downplay the magnitude of its policy departure by attempting to find authority for regulation by market forces in its early, emphatic statements. Because the Commission has always been wary of impinging on licensee first amendment rights, many of its statements on the importance of informational programming were coupled with assurances that licensees would have substantial discretion in determining how to serve their communities. The Commission now, however, appears to be saying that the emphasis of these statements was on licensee discretion rather than on the duty to inform and that the germ of regulation by marketplace was present even in the Blue Book.[151] Assuming that the statement could be so interpreted today, it was not so read at the time of its promulgation:

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150. 73 F.C.C.2d at 481 (citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). A recent example of an FCC change in regulatory direction is its elimination of many of the rules on network radio operation that were upheld in *National Broadcasting*. *See* note 59 *supra*. The basis for the deregulation of network radio was the reduced importance of network affiliation in the operation of a modern radio station. Network Broadcasting by Standard AM & FM Stations, 63 F.C.C.2d 674 (1977).

151. 73 F.C.C.2d at 466-67.

then it was viewed as an unconscionable intrusion into the licensee's province.[152]

As originally proposed, the deregulation posed some pragmatic problems. Although some of them remain, the Commission appears to have avoided a significant one. The Fairness Doctrine, developed by the FCC but incorporated by Congress into the Communications Act[153] has two elements: (1) The licensee must devote a reasonable amount of time to public issue discussion, and (2) he must allow persons with opposing views a reasonable opportunity to respond.[154] While the preponderance of attention has been given to Part 2 compliance, Part 1 presents broadcast licensees with an affirmative obligation to present public issue programming.[155]

Although the doctrine itself does not specify that a particular programming category must be employed to satisfy its requirements,[156] the usual method of Fairness Doctrine compliance has been the airing of public affairs and news programs in which the controversial issues are presented and/or debated. Public affairs programs may be even more important than news in achieving compliance because news alone is unlikely to suffice: News content is dictated by the events of the day[157] rather than licensee desire to provide adequate, balanced discussion of controversial issues. Moreover, the short time given each news story makes sufficient discussion impractical.

In its original form, then, the deregulation was illusory. The Commission could tell its licensees that it was all right to eliminate public affairs programming if they wished, but practical problems of Fairness Doctrine compliance would ensure that stations would continue to need public affairs programming. Although the professed intention of the FCC had been to allow complete deregulation of informational programming while retaining the full force of the Fairness Doctrine,[158] there was no practical way it could do both.

The Report and Order does not remove the practical difficulty completely, but in it the FCC does not pretend to do what it cannot. By re-

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152. *See* note 82 and accompanying text *supra.*

153. *See* note 68 *supra.*

154. Fairness Report, 48 F.C.C.2d 1, 9, 10 (1974); Report on Editorializing, 13 F.C.C. 1246, 1257-58 (1949).

155. Representative Patsy Mink, 59 F.C.C.2d 987, 993, 996 (1976).

156. For example, discussion of controversial issues is not infrequent on TV talk programs such as The Tonight Show, and these discussions, although they occur on programs officially logged as "entertainment," may be considered by the FCC in assessing a licensee's overall Fairness Doctrine compliance.

157. Ascertainment of Community Problems, 27 F.C.C.2d 650, 686 (1971).

158. 73 F.C.C.2d at 516 n.178.

taining the bare bones requirement that stations must address some issues of community concern, the Commission probably has required each station to do just enough to satisfy the requirements of Part 1 of the Fairness Doctrine. Whether in actuality stations will be able to provide sufficient discussion without the presentation of public affairs programs, however, remains to be seen.

Radio deregulation may also cause problems for the FCC when it conducts comparative hearings. The FCC has established sets of criteria for selecting among mutually exclusive applications.[159] Many such adjudications have been decided on the basis of one applicant's superior programming proposals or past performance. The elimination of programming guidelines would seem to necessitate the elimination of programming as a comparative hearing consideration, leaving as deciding factors issues which only tangentially relate to what comes out of the listener's radio speaker.[160] The FCC, in the Deregulation Proposal, recognized the importance of the programming criterion and the difficulty of trying to abandon it.[161]

Therefore, the Commission has concluded that it will retain its use of programming as a comparative hearing criterion even though it has eliminated the guideline minimum percentages. This will require the administrative law judge making the comparison to make an ad hoc determination. He will have to look at many considerations not easily reduceable to neat formulas and try to determine if an applicant's programming provides a substantial community service (and thus is deserving of a plus in the balancing of applications) or whether the applicant has provided only minimal service (and thus deserves no credit).[162]

While this procedure is not appreciably different from the present procedure, without the use of program categories, and without the availability of the threshold percentages to use as a benchmark, the whole process of challenge and hearing may become more difficult for the incumbent, the competing applicant, and the Commission.

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159. Central Fla. Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir.), *cert. dismissed*, 441 U.S. 957 (1979); Policy statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). (The Commission's comparative renewal procedures are presently being reformulated to meet the demands of *Central Fla.*) The categories established for comparative renewals and mutually exclusive applications for station construction permits are: (1) diversification of mass media control; (2) full time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; (6) character; and (7) other (*i.e.*, the commission will consider petitions to add other issues if of demonstrated significance). *Id.* at 394-99.

160. *See* Comments of the National Telecommunications and Information Administration 6-8 (March 25, 1980).

161. Radio Deregulation NPRM, 73 F.C.C.2d at 536.

162. Radio Deregulation R & O, 46 Fed. Reg. at 13,896.

The radio deregulation also presents an interference to the participation of citizens and public interest groups in achieving public interest service for a community. The value of public participation has been acknowledged by the courts[163] and the Commission itself.[164] Deregulation of informational programming would make unavailable a benchmark useful to public interest groups in determining whether a licensee's performance record is so insufficient as to warrant nonrenewal. Listeners would no longer be able to challenge the renewal application[165] of a licensee on the grounds that, as demonstrated by his failure to meet guideline minimums, his programming was unresponsive to the needs of the community. Instead they must show either that the station has done little or nothing to address any issues of community importance, or that the station has ignored issues of importance to a significant portion of the community.[166] Without the program categorization and tabulations, this will require intensive monitoring of the challenged stations. In addition to this burden on the challenger, the station licensee will be allowed to demonstrate the reasonableness of his omission with regard to specific issues by showing that other stations in the market have already treated the subject adequately or could be reasonably expected to do so.[167] Thus, the challenger will have to monitor not only the target station but any other station the challenged licensee might reasonably have expected to have carried such programming.

Turning to potential statutory barriers to deregulation, the Communications Act, not uncharacteristically,[168] offers little help in determining whether the FCC has the power to undertake its announced action. Aside from the Fairness Doctrine elements of section 315,[169] the only potential Communications Act barrier to deregulation would be the public interest standard itself. Does the public interest standard contemplate regulation by market forces? If, as the *National Broadcasting* Court concluded, Congress meant the Act to be read expansively so that the Commission could deal with changing circumstances,[170] perhaps there is room for an interpretation that the increased number of stations and availability of a multiplicity of formats is the kind of

163. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1004-05 (D.C. Cir. 1966).

164. The Public and Broadcasting—A Procedure Manual, 49 F.C.C.2d 1, 2 (1974).

165. Such challenges, "Petitions to Deny," are authorized in 47 U.S.C. § 309(d) (1976).

166. Radio Deregulation R & O, 46 Fed. Reg. at 13,896-97.

167. *Id.* at 13,897.

168. In *Red Lion* the Court noted "[t]he Communications Act is not notable for the precision of its substantive standards . . . ." 395 U.S. at 385.

169. See note 68 *supra.*

170. 319 U.S. at 219.

change in circumstances that warrants a regulatory departure. The Act is sufficiently broad to support many interpretations, and the new Commission approach that satisfaction of consumer wants is, per se, satisfaction of the public interest standard is arguably permitted by the statute.[171]

The troubling ambiguity in the Communications Act is offset by the firmness of the *Red Lion* decision. In its declaration that listeners' rights are paramount, the Court was not content with giving perfunctory approval to the Fairness Doctrine; it recognized a first amendment public right to hear.[172] Neither *Columbia Broadcasting* nor *Miami Herald* disturbed this basic *Red Lion* teaching: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[173] It is difficult to sense in the opinion sufficient flexibility to accommodate an FCC policy that would allow licensees who find audiences too small to be commercially attractive the discretion to abandon programs which provide this access to ideas.[174] While the Commission has taken pains in the Report and Order to caution licensees that deregulation of certain categories of informational programming is not to mean that stations will no longer be required to respond to community issues, it remains to be seen if the standards of *Red Lion* will be satisfied by the discussion of a minimum number of issues per year. The Court in *Red Lion* seemed to have something more ambitious—and significant—in mind.

Finally, even if the Commission can find a detour around *Red Lion*, there may be a last barrier to the adoption of the radio deregulation proposal. It is an issue less easily definable than those discussed above and without persuasive legal authority. Nevertheless, as a matter of policy, some Commission introspection seems appropriate if, in its haste to get out of the regulating business, the Commission is to avoid irreparably upsetting the American commitment to perpetuating public dialogue.[175]

Transcending economic inefficiencies, enforcement impracticality, and even the question of statutory authorization is the value of an in-

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171. Radio Deregulation R & O, 46 Fed. Reg. at 13,923-24.

172. *See* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 148-49 (1973); Barron, *Access—The Only Choice for the Media?* 48 TEX. L. REV. 766 (1970).

173. 395 U.S. at 390.

174. Economist Bruce Owen, who advocates sweeping deregulation, acknowledges that *Red Lion* presents an obstacle to radio deregulation. B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 123 (1975) [hereinafter cited as OWEN].

175. *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

formed society. It is true that other, non-broadcast mass media operate relatively free of regulation. It may also be true that the disparate first amendment treatment given broadcasting is only the result of a chain of historical accidents.[176] But it also seems that, even if only by accident, the people have been given an opportunity to receive from radio and television dependable access to ideas while other media are subject to publisher caprice and the vicissitudes of commercial potential. One should not lose sight of the fact that "the people" and "the marketplace" are nearly one in the same—but "the people" also includes persons, perhaps so few in number that they exert insignificant marketplace force,[177] who nevertheless need maximum exposure to ideas so that they may make informed decisions that affect the quality of life of all the people. It seems a small thing to ask of a licensee to provide what is needed by many although wanted by few. This important function of broadcasting does not seem reduceable to the mere identification of and response to a handful of issues each year. The Issues/Programs List may satisfy FCC regulations, the Communications Act, or even the *Red Lion* standards, but the FCC in deregulating has given scant attention to the larger social values of informational programming.

VII. CONCLUSION

Radio deregulation is an attempt to shift more of the control over programming decision-making from a government agency to licensees whose business it is to satisfy the desires of their audiences. The Commission has outlined a method of regulation that has two praiseworthy elements: Economically more efficient satisfaction of consumer desires and reduced governmental intrusion into the decision-making of licensees.

Between the lines of the Deregulation Proposal and the Report and Order, however, there appears a picture of an agency buried under paperwork, criticized from all sides for its actions, frustrated by its own inability to enforce its rules, and, now, embarrassed by the clarity of its earlier statements and the support it found in the courts. It would simply like to abandon program-related regulation. It is entirely likely that the FCC will get its wish. Such a removal will not be without

176. OWEN, *supra* note 174, at 88-89. *See also* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 219-20 (Disparate first amendment treatment given broadcasting may be traceable to an early belief that broadcast news was not serious journalism).

177. *See* Radio Deregulation NPRM, 73 F.C.C.2d at 601 (separate statement of Commissioner Brown).

difficulty, however, unless a sympathetic Congress can modify the Communications Act and a sympathetic Court can somehow distinguish away the forceful constitutional argument it made in *Red Lion*.

The FCC has taken a chance on the good faith of broadcasters and the workings of the commercial marketplace. If the marketplace cannot do what the FCC envisions, it is to be hoped that the Commission—or someone—will be able to intercede before informational programming is lost to the American radio audience. There is much that is objectionable in government regulation of programming, but regulation by commercial marketplace could have its own evils. The satisfaction of consumer desire may be the satisfaction of the public interest—but it may be an injury to the public good.

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