opportunity to cross-examine as long as adverse evidence to be presented is available for inspection. This access to cross-examination is adequate because "the requirement . . . is not that the witness be cross-examined, but only that the opponent have opportunity to cross-examine."[52] Thus, the *Perales* decision represents a sound liberalization of administrative procedure by a realistic appraisal of the probative worth of hearsay in view of the attendant circumstances. The ruling should increase the efficiency of the administrative process while preserving procedural safeguards.

D. RIGHT TO A COMPARATIVE HEARING

In *Citizens Communications Center v. FCC*[1] the Court of Appeals for the District of Columbia Circuit held that an FCC policy statement[2] which denied full comparative hearings[3] to mutually exclusive[4]

52. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 380 (1942). *See generally The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 328 (1971).

1. 447 F.2d 1201 (D.C. Cir. 1971), *noted in* Comment, *Implications of Citizens Communications Center v. FCC*, 71 COLUM. L. REV. 1500 (1971). The Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST), a co-petitioner, are non-profit citizens' groups organized for the purpose of representing the public interest in proceedings before the FCC. After the Commission had denied their request to reconsider its 1970 Policy Statement, discussed at notes 7-11 *infra* and accompanying text, see Memorandum Opinion and Order, 24 F.C.C.2d 383, 19 P & F RADIO REG. 2D 1902 (1970), CCC and BEST petitioned the court of appeals for review of the statement and related opinions and orders of the Commission. 447 F.2d at 1202 n.2; Memorandum Opinion and Order, 21 F.C.C.2d 355, 18 P & F RADIO REG. 2D 1523 (1970). The court consolidated this petition with petitions to review the 1970 statement filed by Hampton Roads Television Corp. and Community Broadcasting of Boston, Inc., two applicants for television channels who had filed in competition with renewal applicants. In a third consolidated case, dismissed for laek of jurisdietion at the district court level, CCC and BEST sought to enjoin the FCC from making any change in the standards applicable to comparative broadcast license renewal hearings without first giving all interested parties notice and an opportunity to be heard pursuant to § 4 of the Administrative Procedure Act. 5 U.S.C. § 553 (1970). In light of the decision discussed herein, the court held that this case was moot. Two intervenors, RKO General, Inc. and WTAR Radio TV Corp., filed briefs defending the policy statement and subsequent FCC actions.

2. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants [1970 Policy Statement], 22 F.C.C.2d 424, 18 P & F RADIO REG. 2D 1901 (1970).

3. A comparative hearing involves a determination of the relative qualifications of two or more applicants. All parties participating in such a comparative determination have the right to support their allegations by argument and by proof, if necessary. Londoner v. Denver, 210 U.S. 373, 386 (1908).

4. Applications are mutually exclusive "if the grant of one effectively precludes the other." Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330 (1945). This situation arises most commonly

applicants seeking to oust incumbent licensees in radio or television license renewal proceedings violated section 309(e) of the Communications Act of 1934,[5] as interpreted in *Ashbacker Radio Corp. v. FCC*.[6] The FCC policy statement provided that if an applicant seeking renewal of a radio or television license could show that his program service had substantially met the needs and interests of his broadcasting area[7] and that his service was not otherwise characterized by serious deficiencies,[8] his license would be renewed, irrespective of the qualifications of other applicants. Under this policy the performance of the incumbent was considered during the first part of a two-phase hearing[9] and challengers were permitted to appear only for the limited purpose of pointing out the incumbent's deficiencies.[10] If

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when only one frequency is available, and the granting of one such application effectively results in a denial of all others. When a large number of mutually exclusive applications are received, the best solution is often to consider them all in one proceeding. *See, e.g.*, Renewal of Radio and Television Licenses [New York—New Jersey], 18 F.C.C.2d 268 (1969). *See generally* I DAVIS § 8.12.

5. Communications Act of 1934, § 309(e), 47 U.S.C. § 309(e) (1970). When an application for a broadcasting license is not initially granted pursuant to § 309(a), see notes 20-23 *infra* and accompanying text, the Commission must "formally designate the application for hearing on the ground or reasons then obtaining . . . . 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 . . . ." *Id. But see* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Guinan v. FCC, 297 F.2d 782 (D.C. Cir. 1961); Simmons v. FCC, 145 F.2d 578 (D.C. Cir. 1964). These cases hold that when an applicant fails to comply with FCC rules or is basically unqualified, no hearing need be held.

6. 326 U.S. 327 (1945). See text accompanying notes 27-30 *infra*.

7. The FCC explains that the term "substantially" is used in the sense of a "strong," "solid" performance as contrasted with service only minimally meeting the needs and interests of its area. 1970 Policy Statement, 22 F.C.C.2d at 425 n.1, 18 P & F RADIO REG. 2D at 1904 n.1.

8. Examples of serious deficiencies are rigged quiz shows, violations of the fairness doctrine, over-commercialization, the broadcasting of lotteries, violation of racial discrimination rules, and fraudulent practices with respect to advertisers. *Id.* at 426, 18 P & F RADIO REG. 2D at 1905.

9. The first phase involved consideration of the incumbent's renewal application. During this phase the incumbent had an opportunity to demonstrate that his service during the preceding license period was "substantial." *Id.* at 425, 18 P & F RADIO REG. 2D at 1904; see note 7 *supra*. If the Commission decided that the incumbent's service was not substantial during the preceding license period, a second stage of the hearing ensued, in which the incumbent and the challengers competed for the license. 1970 Policy Statement, 22 F.C.C.2d at 426, 18 P & F RADIO REG. 2D AT 1905.

10. 1970 Policy Statement, 22 F.C.C.2d at 426, 18 P & F RADIO REG. 2D at 1906. The Commission did not *state* that the challengers might appear only for this purpose in the policy statement. However, this was made clear in a decision involving the 1970 Policy Statement in which the FCC indicated that the *only* relevant evidence in the initial stage of a proceeding was the performance of the incumbent—and not the proposed program policies of a challenging applicant. RKO General, Inc. (WNAC-TV), 23 F.C.C.2d 448, 451 (1970).

the FCC determined that the "substantial service" test had been met, the license would be renewed without any hearing at all on the qualifications of the challengers.[11]

Comprehensive national regulation of broadcasting began with the Radio Act of 1927,[12] which established an elaborate licensing system. Licenses were granted for a period of no longer than three years,[13] after which a renewal hearing was required if the licensee wished to continue in operation.[14] Both initial and renewal applications for licenses were approved only if granting the license would serve the "public interest, convenience, or necessity."[15] To guard against monopoly control of the broadcasting industry, the Act provided that no licensee was to have any interest in the nature of a property right[16] as the result of the granting of a license.[17] The Radio Act was later included under Title III of the Communications Act of 1934,[18] which continued the same objectives of government regulation.[19]

The FCC may grant without hearing an application for a license submitted under the Communications Act if it determines that the grant would serve the public interest.[20] If, however, the Commission is unable to make such a determination, or if a material question of fact is presented, the application must be designated for hearing.[21]

11. The FCC did not *state* that no hearing would be held. However, after the grant of the incumbent's application, the challenger's application would be moot. See notes 27-30 *infra*.

12. Radio Act of 1927, cb. 169, 44 Stat. 1162.

13. 44 Stat. 1166.

14. *Id.* at 1167.

15. *Id.* at 1166-67.

16. This is in contrast to, for example, licenses granted under the Federal Power Act, which are granted for "a period not exceeding fifty years," 16 U.S.C. § 799 (1970); if the United States determines to assume the operation of power facilities upon the expiration of a license, the licensee is entitled to reimbursement to the extent of his net investment and for reasonable damages resulting from the takeover. *Id.* § 807(a).

17. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 331 (1945); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). The intent of Congress that a license convey no property right is even clearer in the Communications Act of 1934. See Communications Act of 1934, §§ 301, 304, 307(d), 47 U.S.C. §§ 301, 304, 307(d) (1970).

18. S. REP. No. 681, 73d Cong., 2d Sess. 6 (1934). The provisions of the Radio Act were included under §§ 301-29 of the Communications Act. 47 U.S.C. §§ 301-29 (1970).

19. "In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927 . . . [b]ut the objectives of the legislation have remained substantially unaltered since 1927." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

20. Communications Act of 1934, § 309(a), 47 U.S.C. § 309(a) (1970).

21. 47 U.S.C. § 309(e) (1970). Section 309 was amended in 1952, 1954, 1956, 1960, and 1964. The amendments dealt primarily witb procedure, but did not in any way limit the right

Prior to such a hearing the Commission is required to notify the applicant and all other parties in interest, specifying with particularity the matters in issue.[22] The ensuing hearings are full hearings, in which both the applicant and all other parties in interest are permitted to participate.[23] If two or more applications for the same license are involved, the Commission may hold separate hearings on the applications, or it may consolidate the applications and decide them both in one comparative hearing.[24]

Whether or not the applicant has a *right* to a comparative hearing is primarily a question for administrative rather than judicial determination.[25] In *FCC v. Pottsville Broadcasting Co.*[26] the Supreme Court reversed a decision instructing the FCC not to hold a comparative hearing, ruling that whether applications should be considered separately or in a comparaive hearing was a matter entrusted by Congress to the agency's discretion. In *Ashbacker Radio Corp. v. FCC*,[27] however, the Court indicated that Congress had placed limits on this discretionary power. In *Ashbacker* the FCC had before it two mutually exclusive applications.[28] The Commission granted one application and scheduled the other for a hearing. The Court held that under these circumstances the granting of one application without a hearing on the other effectively deprived the loser of his statutory right to a hearing.[29] Although the holding in *Ashbacker* was clearly based on the Court's reading of congressional purpose, as reflected in section 309(e) of the Communications Act,[30] subsequent lower court decisions

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to a hearing as held in *Ashbacker*, see note 6 *supra*. *Compare* Communications Act of 1934, ch. 652, § 309, 48 Stat. 1085 *with* Act of July 16, 1952, ch. 879, § 7, 66 Stat. 715; Act of Sept. 13, 1960, Pub. L. No. 86-752, § 4(a), 74 Stat. 889-92; *and* Act of May 14, 1964, Pub. L. No. 88-306, 78 Stat. 193.

22. Communications Act of 1934, § 309(e), 47 U.S.C. § 309(e) (1970).

23. *Id.* The burden of proof is upon the applicant. The Act does not distinguish between an initial applicant and an incumbent seeking renewal; both bear the burden of proof and must show that the granting of a license would satisfy the public interest, convenience, and necessity. *Id.* §§ 307(a), (d), 309(a); see notes 38-42 *infra* and accompanying text.

24. See note 4 *supra*.

25. *See, e.g.*, United States v. Northern Pac. Ry., 288 U.S. 490 (1938). *See generally* 1 DAVIS § 8.12.

26. 309 U.S. 134 (1940).

27. 326 U.S. 327 (1945).

28. *Id.* at 328. See note 4 *supra* for a discussion of the term "mutually exclusive."

29. 326 U.S. at 333.

30. 47 U.S.C. § 309(e) (1970).

have indicated that the right to a comparative hearing may be based on due process considerations as well.[31]

Even though the right to a hearing for incumbents and newcomers is founded upon the same statutory provisions,[32] FCC decisions have revealed a strong pro-incumbent bias. In *Hearst Radio, Inc.*[33] the Commission found that the qualifications of the challenger were superior to those of the incumbent in several important respects,[34] but nevertheless awarded the license to the incumbent. The determinative factor cited by the Commission was the clear advantage of continuing the established service, as compared with the risks inherent in allowing the challenger to carry out proposed programming which, at least potentially, might never materialize in the proposed form.[35] In *Wabash Valley Broadcasting Corp.*[36] the Commission suggested that an applicant's past performance is the *most* reliable indication of what can be expected in the future, disregarded the challenger's apparent superiority in comparative criteria,[37] and renewed the incumbent's license. Although the Communications Act did not prescribe licensing standards other than the public interest, convenience, or necessity,[38] *Hearst* and *Wabash Valley* suggested that the Commis-

31. In Frontier Airlines, Inc. v. CAB, 349 F.2d 587 (10th Cir. 1965), the court stated that due process is denied an applicant when a competing application on mutually exclusive subject matter is heard and granted because a decision on an essential factor in the first application (the need for service on the proposed route) is based on a hearing at which the original applicant is not represented. *Id.* at 590. *See also* National Airlines, Inc. v. CAB, 194 F.2d 339 (D.C. Cir. 1952).

32. See note 23 *supra* and accompanying text.

33. 15 F.C.C. 1149 (1951).

34. *Id.* at 1179-81.

35. *Id.* at 1183.

36. 35 F.C.C. 677, 1 P & F RADIO REG. 2D 573 (1963).

37. *Id.* at 684-85, 1 P & F RADIO REG. 2D at 584 (dissenting opinion of Commissioner Bartley).

38. See note 15 *supra* and accompanying text. The public interest, convenience, or necessity standard has consistently been held applicable to both original and renewal applications. Section 307(d) of the Communications Act of 1934 amended § 11 of the Radio Act (which had set forth the public interest, convenience, or necessity standard) by adding:

> . . . 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. 48 Stat. 1084 (1934).

The 1952 amendments to the Communications Act, see note 21 *supra*, deleted this language, but retained the public interest, convenience or necessity standard. Apparently, this deletion was intended to guard against the possibility that the incumbent's past broadcast record could not be considered at all in deciding his request for renewal. *Cf.* 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 398, 5 P & F RADIO REG. 2D 1901, 1912-13.

sion was slowly developing more specific criteria on a case-by-case basis.[39] These criteria were summarized in the 1965 "Policy Statement on Comparative Broadcast Hearings."[40] The FCC described the statement as a general review of the criteria governing the disposition of comparative hearing cases.[41] According to this statement, the criteria of primary importance were the best possible service to the public and maximum diffusion of control over the media of mass communication.[42] More specific criteria to be utilized in determining the best possible service were: full-time participation in station operation by owners;[43] adequacy of the proposed program service for local needs; past broadcasting experience; technically efficient use of frequency; and character.[44] Originally this policy statement was applicable only to new applications,[45] but the Commission soon indicated that it would also govern license renewal proceedings.[46] In the controversial 1969 *WHDH* decision[47] the Commission utilized the 1965 criteria for the first time in denying renewal to a licensee. In the same decision the FCC also appeared to reject the pro-incumbent position taken in *Hearst* and *Wabash Valley*, concluding that those decisions placed an extraordinary burden on new applicants and that the public interest would be better served if prior service record and the continuance of established service were not given such great weight.[48]

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39. This view is confirmed by other FCC actions. *See, e.g.*, the discussion in Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 680 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C. Cir. 1949).

40. 1 F.C.C.2d 393, 5 P & F RADIO REG. 2D 1901. *See generally* Grunewald, *Should the Comparative Hearing Process Be Retained in Television Licensing?*, 13 AM. U. L. REV. 164 (1964); Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

41. 1 F.C.C.2d 393, 5 P & F RADIO REG. 2D at 1907.

42. *Id.* at 393, 5 P & F RADIO REG. 2D at 1908.

43. The "integration" of ownership and management is considered important because an owner who is a full-time participant in the station's operation will necessarily also be a local resident, and thus more attuned to local needs than an "absentee" owner. *See id.* at 396, 5 P & F RADIO REG. 2D at 1909-10.

44. *Id.* at 395-99, 5 P & F RADIO REG. 2D at 1909-13.

45. *Id.* at 393 n.1, 5 P & F RADIO REG. 2D at 1907 n.1.

46. *See* Seven League Prods., Inc. (WIII), 1 F.C.C.2d 1597, 2 P & F RADIO REG. 2D 1091 (1965).

47. WHDH, Inc., 16 F.C.C.2d 1, 15 P & F RADIO REG. 2D 411 (1969), *aff'd sub nom.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, ___ U.S. ___ (1971).

48. 16 F.C.C.2d at 9-10, 15 P & F RADIO REG. 2D at 423-24. It is possible that this construction of *WHDH* exaggerates the importance of the decision. In denying the station's petition for reconsideration, see 17 F.C.C.2d 856, 16 P & F RADIO REG 2D 185 (1969), the FCC revealed that WHDH had been treated as a new applicant, rather than as an incumbent, because

The *WHDH* decision was widely criticized.[49] Industry opposition[50] resulted in the introduction of a bill in the Senate which would have drastically revised the hearing procedures for renewal applications.[51] Proposed in the bill was a two-stage hearing procedure. In the first stage the question of renewal was to be considered prior to and exclusive of the applications of any challengers.[52] If the past performance of the incumbent was found to have been in the public interest, the

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of certain sui generis considerations. Although WHDH had operated WHDH-TV for nearly 12 years, that operation was largely conducted under a series of temporary authorizations, while the right to operate the station for a regular three-year period was under challenge. WHDH, Inc., *id.* at 872-73, 16 P & F RADIO REG. 2D 185, 203-04 (1969). For a detailed account of WHDH's license problems, see Comment, *The Aftermath of* WHDH: *Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970).

49. *See, e.g., $3 Billion in Stations Down the Drain?*, BROADCASTING, Feb. 3, 1969, at 19; Jaffe, WHDH: *The FCC and Broadcasting License Renewal, 82* HARV. L. REV. 1693 (1969).

50. *WHDH* was viewed in some quarters as a radical departure from previous law which threatened the stability of the broadcasting industry because large financial investments made in the expectation of "automatic" renewal now seemed in jeopardy. See the articles cited in note 49 *supra* for discussions of these misgivings.

The industry's main fear may have been that the *WHDH* decision would eventually lead to a rule excluding newspaper owners from controlling radio and television stations. Indeed, WHDH was ranked last among the competing applicants on the criterion of diversification because all its stock was owned by a local newspaper, and this was a significant factor in the loss of its license. The spectre of a broad rule excluding ownership of broadcast facilities by newspaper interests was clearly raised in Commissioner Johnson's concurring opinion. 16 F.C.C.2d at 27, 15 P & F RADIO REG. 2D at 438-39. Commissioner Johnson pointed out that in America's eleven largest cities every VHF television station was owned by a broadcasting network, multiple station owner, or major local newspaper. Although purporting to take no position on the merits of continued newspaper ownership of broadcasting properties in markets where there are competing media, and thereby clearly indicating disapproval of newspaper ownership of broadcasting stations where there are no competing media, he stated that it would be "healthy" to have at least one locally owned station in these major markets. For criticism of Commissioner Johnson's views see Jaffe, *supra* note 49, at 1697-99.

51. S. 2004, 91st Cong., 1st Sess. (1969). Several bills with the same provisions were introduced in the House. *See, e.g.*, H.R. 11073, 11509, 91st Cong., 1st Sess. (1969). The bills provided:

> That section 309(a) shall be amended by adding the following after the final sentence thereof: Notwithstanding any other provision of the Act, the Commission, in acting upon any application for renewal of a broadcast license filed under section 308, may not consider the application of any other person for the facilities for which renewal is sought.
>
> If the Commission finds upon the record and representations of the licensee that the public interest, convenience and necessity has been and would be served thereby, it shall grant the renewal application. If the Commission determines after a hearing that the grant of the application of a renewal applicant would not be in the public interest, convenience and necessity, it shall deny such application, and application for construction permits by other parties may then be accepted, pursuant to section 308, for the broadcast service previously licensed to the renewal applicant whose renewal was denied.

52. S. 2004, 91st Cong., 1st Sess. (1969).

Commission was to grant renewal.[53] The filing of competing applications was to be permitted only if renewal was denied, and hearings on such applications would have been held separately during the second phase of the procedure.[54] Although a large number of Congressmen announced their support of the measure, the bill was bitterly attacked in Senate hearings by a number of citizens' groups,[55] and was not enacted. During the period this congressional proposal was being considered, the FCC, without a formal rule-making proceeding[56] or other advance notice, issued the 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants."[57] The policy enunciated therein effectively achieved the result sought in the Senate since the issue of renewal was decided on the ground of the incumbent's "substantial service" to the public determined in a hearing prior to and exclusive of any consideration of the qualifications of challengers.[58] According to the Commission, however, the policy

53. *Id.*

54. *Id.*

55. *Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969). The main objections to the bill, as stated by the citizens' groups, were that it was racially discriminatory, effectively excluded minorities from media ownership in large communities, and hampered community efforts to improve local television programming. *See, e.g.*, Statement of Rev. Douglas Moore, *id.* at 611-12. The timing of the announcement of the FCC 1970 Policy Statement, see notes 57-60 *infra* and accompanying text, also contributed substantially to the demise of the Senate bill.

56. Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970), requires agencies to follow certain procedures in all cases of administrative "rule making," including the publication of advance notice in the *Federal Register*, and providing an opportunity for interested persons to participate. 5 U.S.C. § 551(4) (1970), defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Exempted from the rule-making requirements are "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* § 553(a)(3)(A). The Commission contended that the 1970 Policy Statement was a "general statement of policy" and therefore was not subject to the procedural safeguards described in § 4 of the APA. *Id.* § 553.

57. 22 F.C.C.2d 424, 18 P & F RADIO REG. 2D 1901 (1970).

58. See notes 7-11 *supra* and accompanying text. It is not necessarily true, however, that the "public interest" and "substantial service" tests are the same. A possible explanation of the 1970 Policy Statement is that the Commission tried to enact the bill as the Commission would have liked to have had it drafted. According to this explanation, the "public interest" test incorporated in the bill, because of the gloss placed on the words "public interest" in many FCC cases, could be interpreted to require nothing more than marginal service, while the FCC's "substantial service" test was susceptible to a more flexible interpretation and could be used by the Commission to insure that incumbents provided the maximum service possible in their particular situations. *See* 1970 Policy Statement, 22 F.C.C.2d at 425 n.1, 18 P & F RADIO REG. 2D at 1904 n.1. Although this view can be attacked as self-serving and "pro-industry," the

was designed to balance the advantages of competition and stability in the broadcasting industry.[59]

In *Citizens Communications Center*[60] the court determined initially that the case was both reviewable and ripe for review.[61] The court noted not only that the petitioners would suffer extreme hardship if review were withheld,[62] but pointed out that the 1970 Policy Statement was self-executing and had deterred the filing of a single competing application for a television license for more than a year.[63] Concern with the virtual non-existence of competition in the broadcasting industry since the issuance of the 1970 statement is reflected throughout the court's opinion, and is grounded in part in the court's conviction that a statutory presumption favoring incumbents does not exist:

> The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; nor is an inability to displace operating broadcasters inherent in government management . . . .[64]

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arguments for continuity and stability in the broadcasting industry do have some foundation. If a licensee cannot expect to retain his license for more than three years, he may be unwilling to make an investment sufficient to properly serve the public, but rather be intent primarily on making a quick profit. Similarly, any long-range plans for improvement or innovation would be very difficult to undertake. The foregoing notwithstanding, however, the court's conclusion that the "public interest" and "substantial service" tests were substantially identical is persuasive because both phrases are sufficiently vague and broad to permit the FCC to arrive at identical conclusions under either test.

59. 1970 Policy Statement, 22 F.C.C.2d at 424-25, 18 P & F RADIO REG. 2D at 1904. The Commission's concern with the stability of the industry does not seem justified. In the year following the WHDH opinion only eight out of approximately 250 television license renewals were challenged. STAFF OF SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, STAFF STUDY, 91st Cong. 2d Sess., at 18 n.101 (1970).

60. 447 F.2d 1201 (D.C. Cir. 1971).

61. *Id.* at 1205. The Commission argued that the policy statement merely established general guidelines to be applied in the future, and hence was interlocutory and not final within the meaning of 28 U.S.C. § 2342(1) (1970) and 47 U.S.C. § 402(a) (1970). The court held that even if the statement were interlocutory, it was reviewable immediately because of the allegation that the FCC's adherence to it had deprived the petitioners of their right to a full comparative hearing. 447 F.2d at 1205. *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112-13 (1948); Delta Air Lines v. CAB, 228 F.2d 17 (D.C. Cir. 1955).

62. In Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), the Court indicated that the ripeness of a controversy depended upon "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." Here, as the Court noted, the issues were " 'purely legal.' " 447 F.2d at 1205. Hardship was inherent in the situation, the Court held, because the expense of preparing a competitive television application could rise to as much as $250,000. *Id.* at n.7.

63. 447 F.2d at 1205.

64. *Id.* at 1207.

The court viewed the FCC decision in *WHDH*[65] as consistent with the Communications Act, and as "[i]ndicating a swing away from *Hearst* and *Wabash Valley*, in practical if not theoretical terms . . . ."[66] Undoubtedly aware that the FCC's 1970 Policy Statement constituted a reversal of the *WHDH* approach, the court was very explicit in assessing the 1970 statement in unfavorable terms:

> [It] administratively "enacts" what the Pastore bill sought to do. The Statement's test for renewal, "substantial service," seems little more than a semantic substitute for the bill's test, "public interest," and the bill's two-stage hearing, the second stage being dependent on the incumbent's failing the test, is not significantly different from the Statement's summary judgment approach.[67]

In holding the FCC's new approach invalid the court pointed out first, that while *Ashbacker* had involved original rather than renewal applications, there could be no doubt that the principle involved extended to renewals also, and comparative hearings were, therefore, mandatory for both types of proceedings.[68] Furthermore, the court determined that a comparative hearing could not be limited to a single issue, but rather "must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors . . . ."[69] For this reason, it indicated, the hearing granted by the Commission under the 1970 Policy Statement, which purported to be a comparative hearing limited to the single issue of the performance of the incumbent, did not qualify as a comparative hearing at all, for it did not give challengers any opportunity to demonstrate comparative superiority.[70] The court concluded, therefore, that the 1970 Policy Statement effectively denied challengers a comparative hearing, in violation of the *Ashbacker* doctrine.

Although the court purports not to be "impinging at all upon the Commission's substantive discretion in weighing factors and granting licenses,"[71] it is clear that its holding not only directs that a hearing

65. See notes 47-49 *supra* and accompanying text.

66. 447 F.2d at 1208. The pro-incumbent bias in *Hearst* and *Wabash Valley* is discussed in notes 33-37 *supra* and accompanying text.

67. 447 F.2d at 1210. *But see* note 58 *supra*.

68. 447 F.2d at 1211. The *Ashbacker* case is discussed at notes 27-30 *supra* and accompanying text.

69. *Id.* at 1212 *quoting*, Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 357 (D.C. Cir. 1949).

70. 447 F.2d at 1213. See notes 9-10 *supra* and accompanying text.

71. 447 F.2d at 1212 n.33, 1213.

be held, but also requires that certain substantive factors—other than the past performance of the incumbent—be considered at such hearings. The court recognized that the incumbent's prior performance is properly a significant factor in renewal proceedings, and, indeed, acknowledged that a greater burden may be placed upon new applicants who wish to displace an established licensee.[72] Nevertheless, new applicants, it reasoned, must be granted at least an opportunity to show superiority.

The court was sympathetic to the Citizens Communications Center's argument that the FCC's adoption of the 1970 Policy Statement necessitated a rule-making procedure in accordance with section 4 of the APA, stating that the Commission's contention to the contrary was, "to say the least, remarkable," and that there was a serious question concerning the propriety of the Commission's action.[73] However, the court declined to decide this issue. Judge MacKinnon, in a concurring opinion, projected the argument concerning lack of a proper rule-making procedure one step further, suggesting that the change effected by the 1970 Policy Statement could not be accomplished without amendment of the Communications Act.[74]

To the extent that the decision in *Citizens Communications Center* makes explicit the applicability of the *Ashbacker* doctrine to FCC renewal proceedings, it represents an extension of existing law. The court's willingness to take this step, and its willingness to risk intruding upon the Commission's authority to establish and apply substantive criteria were both fundamental to its decision.[75] Certain difficulties were inherent in the FCC position, even from an administrative point of view because the "procedure" set forth in the 1970 Policy Statement overlapped the substantive criteria elaborated in the 1965 Policy Statement.[76] The 1965 statement, for example, indicated that

72. *Id.* at 1213.

73. 447 F.2d at 1204 n.5.

74. *Id.* at 1215.

75. See note notes 69, 71 *supra* and accompanying text. While the court perhaps risked invading matters delegated to the discretion of the FCC in this portion of its opinion, it is probably more accurate to say that it looked beyond the form of the Commission's actions in order to ascertain their substance.

76. The Commission's lack of certainty with respect to the proper characterization of the 1970 Policy Statement was aptly summarized by the court:

> In order to avoid conflict with [*Ashbacker*] . . ., the Commission characterizes *Ashbacker* as dealing only with "procedure," and distinguishes the Policy Statement as being in effect substantive. Then, caught between Scylla and Charybdis, the Commission turns around and calls the Policy Statement "procedural rather than . . . substantive" in order to avoid conflict with Section 4 of the APA. 447 F.2d at 1204 n.5.

the substantive criteria of primary importance in licensing decisions were the "best practicable service to the public" and maximum diffusion of control of mass communications media.[77] Consideration of the "best practicable service" factor would be essentially eliminated under the 1970 Policy Statement, since the consideration of competing applications on the merits would be initially precluded. Furthermore, it is unlikely that a decision on the "best practicable service" would ever be reached when only "substantial service" was required for renewal. Similarly, to the extent that there is undesirable concentration in the industry, any significant flow of newcomers would be impossible under a policy that favored incumbents so heavily. The fact that the FCC adopted the 1970 Policy Statement in the face of these contradictions may illustrate its susceptibility to industry pressure.

In concluding the opinion the court stated: "[o]ur decision today restores healthy competition by repudiating a . . . policy which is unreasonably weighted in favor of the licensees it is meant to regulate . . . ."[78] The Court of Appeals for the District of Columbia Circuit no doubt overstated the effect its decision is likely to have on the communications industry. It would be quite possible, for example, for the FCC to continue the practices established by the 1970 Policy Statement under the guise of individual decisions on the merits after pro forma hearings, without articulating the policy it is following.[79] Were this to happen, it would not only be very difficult to detect, but very likely would also be beyond the reach of judicial intervention.[80]

Despite the potential for FCC circumvention it is difficult not to agree with the court's decision. In view of the fact that there are some

77. See notes 40-46 *supra* and accompanying text.

78. 447 F.2d at 1214.

79. In Office of Communications of United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969), the same court found that the FCC had exercised bad faith with respect to an earlier court decision involving the same parties, 359 F.2d 994 (D.C. Cir. 1966). See also the discussion in *1970 Duke Project* 207-09.

80. Such a course of events seems not entirely unlikely in view of pro-incumbent decisions by the FCC in the past. *See, e.g.*, Star Stations of Indiana, Inc., 19 F.C.C.2d 991 (1969) (licensee already on probation for irresponsible conduct committed fraud on advertisers; license renewed); Herman C. Hall, 11 F.C.C.2d 344 (1968) (licensee proposed no news or public affairs programming; license renewed). *See also Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1 (1968) (statement of Commissioners Cox and Johnson); *Renewal of Standard Broadcast and Television Licenses*, 11 F.C.C.2d 809, 810 (1968) (dissents of Commissioners Cox and Johnson).

persuasive reasons to favor incumbent licensees in renewal proceedings, the decision in *Citizens Communications Center* appropriately permits the FCC some leeway to impose a greater burden on challengers.[81] In the face of a statutory provision that does not favor incumbents,[82] however, there are tangible limits placed upon this authority which, failing amendment of the Communications Act, are inescapable. If the short period of license effectiveness does indeed pose a great problem for the radio and television industry, it is clear that amendment of the statute is a more efficacious approach to solving the problem than the stretching of administrative authority beyond its proper limits. No compelling reason exists why an amendment to the Communications Act need be destructive of competition, as the amendment proposed in the Senate subsequent to the *WHDH* decision would have been.[83] An alternative which might be considered is an extension of the period of license effectiveness.[84] Such an approach has the possibility of resulting in greater industry stability, without distortion of the administrative process or a total stifling of competition.

IV. INTERVENTION

PROCEDURAL RIGHTS OF THE CHARGING PARTY IN UNFAIR LABOR PRACTICE PROCEEDINGS

Courts have limited the procedural rights of charging parties in unfair labor practice proceedings by interpreting the National Labor Relations Act[1] to protect only public rights, thereby precluding any

81. See notes 58, 72 *supra* and accompanying text.

82. See text accompanying note 64 *supra*.

83. See note 51 *supra*.

84. The extension of the licensing period to, for example, eight or ten years, might have the effect of making licensees too secure in their positions to create a sufficient incentive to improve broadcasting quality. However, if such a change were combined with a mandatory public hearing halfway through the license period solely on the acceptability of the performance of the licensee, with loss of license occurring if "substantial service," or some other appropriate standard of service, has not been rendered, this problem could be avoided. A hearing of this nature, while of the kind declared improper in the *Citizens Communications Center* decision, might be appropriate as an interim proceeding under an amended communications statute.

1. National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970).