

1970

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Recommended Citation

Edward P. Gallogly Jr. & George E. Meng, *Television: The Public Interest in License Renewals*, 20 Cath. U. L. Rev. 328 (1971).

Available at: <https://scholarship.law.edu/lawreview/vol20/iss2/8>

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Recent Developments

Television: The Public Interest in License Renewals

In January 1970 the Federal Communications Commission (FCC) released a policy statement concerning comparative hearings on renewal applications for radio and television broadcasting licenses.¹ This policy statement, which was a response to the license renewal controversy generated by *WHDH, Inc.*,² makes substantial changes for renewal applicants in two areas: (1) the administrative process used to decide between competing applicants, and (2) the criteria used as a basis for that decision.

Prior to the 1970 Policy Statement, the FCC provided a procedure whereby a challenger could compete for a station's license at renewal. In that procedure a comparative hearing was scheduled and the FCC's subsequent decision was based on an evaluation of criteria and standards which had evolved over many years.

Although in the 1970 Policy Statement the FCC recognizes the statutory right of the public to challenge at renewal,³ the renewal process is no longer competitive. The policy announced by the FCC in the 1970 statement divides the renewal hearing into two stages. At the first stage, the past performance of the renewal applicant is examined. If the renewal applicant "shows . . . that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area and that the operation of the station has not otherwise been characterized by serious deficiencies . . . his application for renewal will be granted."⁴ The renewal hearing will proceed to the second stage, *i.e.*, the comparative hearing,

1. FCC PUBLIC NOTICE, Jan. 15, 1970 (FCC 70-62) [hereinafter cited as 1970 Policy Statement]. The 1970 Policy Statement is also the subject of a staff study released after this article was written. STAFF OF THE SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 91ST CONG., 2d SESS., ANALYSIS OF FCC'S 1970 POLICY STATEMENT ON COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS (Subcomm. Print 1970). This article reaches some of the same conclusions as the staff study.

2. 16 F.C.C.2d 1 (1969), *aff'd*, Civil No. 17,785 (D.C. Cir. Nov. 13, 1970).

3. 47 U.S.C. §§ 307-09 (1964). *See also* 1970 Policy Statement 1.

4. *Id.* at 2.

only when the renewal applicant fails to show "adequate"⁵ past performance.

The license renewal controversy centers on the relationship of the FCC's regulatory authority and the concept of public interest. This article will evaluate the 1970 Policy Statement in relation to prior case law, the statutory means offered and available for FCC policy enforcement, and the public goals desirable in television broadcasting to determine whether this policy constitutes a breach of FCC authority.⁶ As an alternative to the 1970 Policy Statement, the article proposes the proper public interest goal for television broadcasting and its effective implementation within the boundaries of the FCC's regulatory authority.

Statutory guidelines limit the FCC's discretion and require that the "Commission shall determine, in the case of each application filed . . . whether the public interest, convenience, and necessity will be served by the granting of such application"⁷ Therefore, an examination of the FCC's statutory authority and its implementation is warranted.

The FCC's Statutory Authority

In the early days of radio it was recognized that frequency disturbances would necessitate technical control of the available spectrum allocations.⁸

5. The effect of the 1970 Policy Statement is to divide the renewal hearing into two stages. By an initial determination whether the licensee's past performance has been "substantially attuned," the FCC removes the opportunity for challengers to be heard. Therefore, there is no guarantee that the challenger will be able to show that he is better qualified. The statutory scheme provides an opportunity "for new parties to demonstrate in public hearings that they will better serve the public interest." *Id.* at 1. Since the policy statement would grant renewal to the incumbent licensee without a comparative hearing in many cases, it contradicts the statutory purpose to insure the public interest.

6. This article will focus exclusively on licensing of the television broadcast industry. The establishment of standards for judging renewal applications must respond to the relevant problems of the particular communication media involved. The FCC has recognized distinctions between regulating the television and radio industries by promulgating special rules and regulations applicable only to network programming of television shows. The regulation of television also differs substantially from radio in (1) the frequency space allocated to commercial television broadcasting is twenty times that of commercial radio broadcasting, (2) the costs of licenses and facilities for television operation is much greater than those for radio, and (3) the services and programming provided by television are entirely different in character than those provided by radio. For a further discussion of the applicability of standards at renewal both television and radio licenses, see *Renewal of Standard Broadcast Licenses [Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study]*, 14 F.C.C.2d 1 (1968) [hereinafter cited as *An Oklahoma Case Study*]. For statistical information on broadcast operations, see 35 FCC ANN. REP. 113-219 (1969).

7. 47 U.S.C. § 309(a) (1964).

8. 68 CONG. REC. 3027 (1927) (remarks of Senator Dill). "I submit that [there] . . . is in itself no reason for refusing to relieve a situation that is fast making the millions of radio sets in this country useless and worthless because of the interference on the air."

The transmission of radio waves is physically possible only within a specific range of

The unlimited possibilities of technical development in communications and their wide-ranging effect on the democratic system caused Congress to predicate the FCC's regulatory authority on the public interest.⁹ The framework of this authority is structured with an insistence on public ownership with limited terms for licenses.¹⁰ The statutory standard of conduct, *i.e.*, "the public interest, convenience and necessity," provided the FCC with an affirmative command and the necessary discretion to regulate future developments in communications.¹¹

The Communications Act of 1934¹² was enacted to enforce the goal of service in the public interest. The Act provided three occasions at which the

frequencies called the radio spectrum. This spectrum is divided into separate bands used by different services, *i.e.*, radio, television, radar, etc. Each band is limited in frequency. Frequency is measured in megacycles per second, or more commonly, megaHertz. These two terms are synonymous and equal 1 million cycles per second. The television band for channels 7 through 13 is from 174 to 216 megaHertz. Technical standards require that the space used by one television channel be six megaHertz. Therefore, the band from 174 to 216 megaHertz is limited to seven television stations. Likewise, the radio and radar bands are limited. Unless some control is exercised interference is bound to occur with the increasing number of stations.

9. 47 U.S.C. §§ 307-08 (1964). When Congress established a regulatory scheme with public ownership, a limited license period, and a general standard of performance, some members expressed consideration for the broadcaster's first amendment rights, the limited availability of licenses within a private competitive system, the public's right to some minimum standard in program performance, and the seemingly unlimited potential of the industry itself. See *Hearings on S. 2910 Before the Subcomm. on Communications of the Senate Comm. on Interstate Commerce*, 73rd Cong., 1st Sess. (1934). The Supreme Court has commented that "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." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

Its usefulness as an expression of congressional policy, however, has been questioned by responsible critics. Professor Jaffe has commented that "there has never been a statutory policy. The FCC was simply told to go ahead and regulate in the 'public interest.'" Jaffe, Book Review, 65 *YALE L.J.* 1068, 1073 (1956). Judge Friendly takes the view that the use of the dummy standard in organizing most of the administrative agencies has actually been quite harmful in the development of positive regulatory functions within the agencies. Friendly, *The Administrative Agencies*, 77 *HARV. L. REV.* 1058 (1964).

10. 47 U.S.C. § 307(d) (1964).

11. "The standard of action established by this chapter is that public interest, convenience, and necessity must be served and within that framework the Commission is free to exercise its expert judgment, but . . . it must proceed within the scope of authority granted to it." *WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir. 1946), *rev'd on other grounds*, 329 U.S. 223 (1946). "The requirement that the Commission, in granting licenses, act as the public convenience, interest, or necessity require, does not confer an unlimited power, but is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services." *Yankee Network v. FCC*, 107 F.2d 212 (D.C. Cir. 1939). "In reviewing decisions of the Commission the Court is limited to questions affecting Constitutional power, statutory authority and basic prerequisites of proof." *American Broadcasting Co. v. FCC*, 179 F.2d 437 (D.C. Cir. 1949).

12. Act of June 19, 1934, ch. 652, 48 Stat. 1064, *as amended*, 47 U.S.C. §§ 151-609 (1964).

FCC could review station applicants and performance standards: (1) at initial application,¹³ (2) transfer,¹⁴ and (3) renewal.¹⁵ By providing for open competition at each of these times, the Act's purpose of public ownership was re-emphasized.¹⁶ Competition also aided the FCC's search for performance standards to regulate the issuance of broadcasting licenses.

Today, however, there are no longer three times at which service in the public interest can be reviewed by a competitive process. Review at initial application has been considerably limited because of the restricted availability of VHF-UHF television frequencies.¹⁷ Competitive review at transfer was terminated by a 1952 amendment to the Act.¹⁸ The only time at which a broadcaster's performance in the public interest can be reviewed is at renewal. Therefore, the history of FCC renewal policy from *Hearst Radio, Inc. (WBAL)*,¹⁹ through *WHDH, Inc.*,²⁰ to the 1970 Policy Statement must be examined.

The WBAL Policy

The FCC's policy regarding license renewals was first firmly established in *WBAL*. In *WBAL* the FCC favored renewal when the licensee's operation had been "meritorious," although comparatively the challenging applicant had gained preferences.²¹ The decision implicitly recognized that policy considerations make it "difficult . . . for a newcomer to make the comparative showing necessary to displace an established licensee."²² Thus, while the FCC continued to weigh the merits of the challenger's application at renewal in light of comparative factors, the past performance of the existing licensee merited weighted consideration.

13. 47 U.S.C. § 307(d) (1964).

14. *Id.*

15. 47 U.S.C. § 307(d) (1964).

16. *Id.* §§ 307-09.

17. Television stations assigned TV channels 2 through 13 are known as VHF (very high frequency) TV stations. Television stations assigned TV channels 14 through 83 are known as UHF (ultra high frequency) TV stations. Statistics made available by the FCC show that the number of commercial VHF and UHF television stations in operation or presently available in the top 100 markets are as follows:

Market Areas	Channels Allocated		Channels on the Air, Authorized Or Applied For		Channels Available	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10	40	45	40	45	0	0
Top 50	157	164	157	138	0	26
Top 100	264	298	264	217	0	81

35 FCC ANN. REP. 198-200 (1969).

18. Act of July 16, 1952, Pub. L. No. 82-554, § 5, 66 Stat. 711, 716, *amending*, 47 U.S.C. § 310(b) (1946) (codified at 47 U.S.C. § 310(b) (1964)).

19. 15 F.C.C. 1149 (1951).

20. 16 F.C.C.2d 1 (1969).

21. 15 F.C.C. 1178 (1951).

22. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969).

The policy announced in *WBAL* substantially removed²³ the renewal applicant from the comparative process. Since a considerable preference was established in the evaluation of the existing licensee's past performance, severe limitations were placed on the weight accorded other criteria as evidentiary factors.²⁴ Although these criteria were considered within the comparative process, the established preference shifted the burden of discrediting the licensee's past performance to the challenger, rather than requiring the existing licensee to compete on all the merits for the public's property.

The *WBAL* policy severely limited the regulatory function of the FCC at renewal and adversely affected the number of prospective challengers willing to invest the substantial funds required to contest renewal. Since renewal challenges were few and ineffective,²⁵ the FCC itself incurred the primary burden of checking the licensee's performance.²⁶ This policy was followed until the *WHDH* decision in 1969.²⁷

23. *WBAL* did not limit other criteria to a separate evaluation. It simply weighed the past performance of the licensee in such a manner that the value of other criteria was effectively negated.

24. The reasoning behind the FCC's policy of strongly favoring the existing licensee's past performance at renewal seems to have been formulated from two principal considerations: (1) that the past broadcast record was the best available criteria to judge future performance and (2) that industry investment in broadcast facilities represented a legitimate reliance factor which should not be disturbed without reason.

25. "The following table shows the number of renewal applications for radio and television stations set for hearing by the FCC in each fiscal year:

1958-2	1962-13	1966-16
1959-3	1963-13	1967-6
1960-21	1964-8	1968-15
1961-5	1965-16	

Most of the applications were designated for hearing because of evidence of misrepresentation." Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368, 371 n.21 (1970).

26. 47 U.S.C. § 307(d) (1964) gives the FCC the responsibility of reviewing licensee performance and insuring compliance with its public interest standard. There are, however, over 7,500 radio and television stations all of which are licensed for a three-year period. To accomplish the review of station performance required by the statute at renewal, the FCC designates every two months a geographical block of licenses which are presented for consideration by the FCC staff. Commissioners Cox and Johnson have commented on this procedure:

The Commission staff, acting on delegated authority, routinely grants all the renewal applications except for those few whose draftsmen were inexperienced and hence made technical mistakes in filling them out. Engineering and financial deficiencies revealed by the applications, survey deficiencies, high commercial levels, and certain unresolved complaints are also causes for delaying a grant. But programming deficiencies, even the most flagrant indifference to the local service obligation imposed by the Communications Act, raise no eyebrows.

An Oklahoma Case Study 9. The process for review is primarily the renewal branch's responsibility. Shortages in personnel, and funding limitations severely restrict any possible review.

27. 16 F.C.C.2d 1 (1969).

The WHDH Policy

In *WHDH* the FCC rejected the *WBAL* policy.²⁸ In reversing the examiner's determination the FCC stated that:

In our judgment, the Examiner's approach to this proceeding places an extraordinary and improper burden upon new applicants who wish to demonstrate that their proposals, when considered on a comparative basis, would better serve the public interest.²⁹

In recognizing that the *WBAL* policy had considerably limited the effective regulatory function of the license renewal proceeding, the FCC advocated "a different approach . . . when [the examiners] considered a past broadcast record."³⁰

In *WHDH* the FCC applied the guidelines set forth in its 1965 Policy Statement on Comparative Broadcast Hearings for Initial Applications³¹ to renewal proceedings. Under the *WHDH* policy the renewal applicant's past record will be disregarded if it is "within the bounds of average performance."³² If the renewal applicant's past record is within these bounds, then

28. *Id.* For a thorough treatment of *WHDH* see Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970). See also Goldin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970). Professor Goldin argues that *WHDH* is regarded by the FCC as a special case which does not reflect a change in policy. Whether *WHDH* is a special case or an announcement of a new policy is not relevant to this article. Its relevance is that it created much controversy in the broadcasting industry and Congress and was a motivating force for the 1970 Policy Statement. Professor Jaffe has attacked *WHDH* stating "that *WHDH* could mean that all licenses are now at hazard every three years, a proposition which would work a revolution in the industry and cause serious problems of financing." Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1700 (1969). Many factors including the profits in the television industry indicate that this "revolution" is not proved. See notes 61-65 *infra* and accompanying text.

29. 16 F.C.C.2d 1, 9 (1969).

30. *Id.* at 10.

31. 1 F.C.C.2d 393 (1965) [hereinafter cited as 1965 Policy Statement]. The 1965 Policy Statement identified the criteria applicable to persons competing at initial applications. Two primary goals, *i.e.*, the best practical service and diversification in the media, were recognized. Past programming criteria, such as integration of management and ownership, would be measured as evidentiary material in attaining the goals stated. In *Seven (7) League Productions, Inc. (WIII)*, 1 F.C.C.2d 1597 (1965), the FCC first gave notice that the 1965 Policy Statement would serve as the basis for the introduction of evidence in renewal cases.

32. 16 F.C.C.2d 1, 9 (1969).

Since the ultimate objective of the comparative hearing is to determine which applicant can best serve the public interest and since all applicants who are in the running can presumably provide satisfactory performance, a renewal applicant's record indicates he can better serve the public interest only if it is substantially above the level of performance which the Commission regards as satisfactory. Any challenger who is below this level will presumably be eliminated.

Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368, 384 (1970). "What was applicable in *WHDH*

he will be evaluated on other comparative factors with no preference given to his past record.

The FCC believed that this approach did not leave the new applicants competing at a disadvantage.

More importantly, the public interest is better served where the foundation for determining the best practicable service as between a renewal and a new applicant, are more nearly equal at their outset.³³

The *WHDH* decision, therefore, changed renewal policy from an examination primarily of past performance to a competitive process which evaluates past performance equally with other criteria. This change caused considerable controversy in the broadcasting industry and motivated the FCC to issue the 1970 Policy Statement.³⁴

The 1970 Policy Statement

The 1970 Policy Statement offers a different method for evaluating renewal applicants than that proposed in either *WBAL* or *WHDH*. This method replaced the competitive and regulatory structure of the statutory scheme by an administrative determination of the public interest.

The 1970 Policy Statement "calls for the balancing of two . . . considerations" to insure that the public interest standard is served.

The first [consideration] is that the public receive the benefits of the [statute] . . . inherent in the fact that there can be a challenge The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.³⁵

The Communications Act requires that the FCC allow challenges to the existing licensee in renewal proceedings.³⁶ The right to challenge renewal must

was the basic principle . . . that the renewal applicant cannot be accorded an unfair advantage because of the mere fact of his prior operation of the station." *Id.* at 386.

33. 16 F.C.C.2d 1, 10 (1969).

34. "There has, however, been considerable controversy on this issue, as shown by the hearings on S. 2004 now going forward before the Senate Subcommittee on Communications. Issuance of this statement will therefore contribute to clarity of our policies in this important area." 1970 Policy Statement 1.

35. *Id.* at 2.

36. The Supreme Court in *Ashbacher Radio Corp. v. FCC*, 326 U.S. 327 (1945) compelled the FCC to use the comparative hearing process. The Court stated that "[i]t is thus plain that § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied." *Id.* at 332. Although Section 309(a) has been amended, the provision substituted is essentially the same as the Court considered in *Ashbacher* and would seem to require giving both applicants a comparative hearing at renewal. The 1970 Policy Statement by first determining whether there has been substantial past performance, dismisses the comparative process at renewal since there is no guarantee that the challenger will reach the second stage of the proceeding.

be read as part of the framework of the FCC's authority.³⁷ Since the framework of that authority is based on public ownership with limited license terms, the Act provides that the grant of the license is for the term only, and that the license can not be "construed to create any right, beyond the terms, conditions, and periods of the license."³⁸ The Act also specifies that renewal applicants sign "a waiver of any claim to the use of any particular frequency" that may be based on the "previous use of the same [frequency]."³⁹ However, by first determining whether past performance has been "substantially attuned,"⁴⁰ the FCC recognizes rights beyond its statutory authority. Apparently, the FCC believes that the license creates rights of stability and continuity within the existing licensee that extend beyond the statutory term. The FCC has failed to show that this stability and continuity is necessary in the television broadcasting industry. Even if such necessity were shown, it could not justify a breach of the FCC's statutory authority.

In breaching its statutory authority, the FCC has not changed the evidentiary value of competitive criteria, but has evaluated these criteria administratively or dismissed them from consideration.⁴¹ These three criteria, (1) diversification, (2) owner-management integration, and (3) program proposals, must be considered competitively to determine which applicant would "better" serve the public interest.

The first of these criteria, diversification, was examined by the FCC principally to obtain diffusion in control, *i.e.*, separate ownership of the outlets within the community.⁴² This objective served both the public and first

37. *Id.*

38. 47 U.S.C. § 301 (1964).

39. *Id.* § 304.

40. The FCC also noted that in its consideration of the licensee's performance, questions relative to serious operational deficiencies would be explored in the hearing process. Facts once established could result in "demerits" against the renewal applicant. It seems that a demerit would then be considered within the public interest judgment of substantial service. Thus, the incumbent licensee with demerits would not be competing with the challenger, but would be judged within the issue of substantial performance. The FCC cited examples of operational deficiencies "such as rigged quizzes, violations of the Fairness Doctrine, over-commercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertisers" 1970 Policy Statement 3.

41. For example, after the policy statement the FCC amended their duopoly rules so that the rules now prohibit the common ownership of the same broadcast service (AM, FM or TV) where the contour of one encompasses the entire community of the other. FCC PUBLIC NOTICE, Apr. 6, 1970 (FCC 70-310). [hereinafter cited as Amended Duopoly Rules].

42. In its analysis of the basis and purpose of the amended duopoly rules, the FCC states that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Amended Duopoly Rules 5, *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). This principle, together with the desire to prevent undue economic concentration, forms the basis of all policies regarding diversification in the media. The FCC, however, reasons

amendment interests.⁴³ Another purpose for examining diversification is the FCC's stated objective of maximizing the program sources and viewpoints available to the community.⁴⁴ After the 1970 Policy Statement, the FCC provided administrative regulations to achieve diffusion in control; but a challenger can no longer gain preference by showing that he will better diversify program sources and viewpoints. By removing this competition, the goal of maximizing the available program sources and viewpoints can be attained only by the governing and imposing of set standards in television broadcasting by the FCC itself.⁴⁵

Prior to the 1970 Policy Statement, the second criterion, owner-management integration, and the concomitant concern for community control, was thought desirable and was preferred.⁴⁶ Today, however, owner-management integration, *i.e.*, ownership of the station and its effect on the service provided,

that the "key" to the public interest need for "diverse and antagonistic sources" lies in the separation of sources within the area served. The operations of the television industry indicate that mere separation of program sources will be ineffective to attain diversification. See notes 51-56 *infra* and accompanying text.

43. Congress has repeatedly expressed its concern for limited ownership of communications media. Congressman Luther A. Johnson's remarks prior to the passage of the 1927 Radio Act are representative of this concern:

There is no agency so fraught with possibilities for service of good or evil to the American people as the radio [I]t has limitless possibilities. The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed. . . . They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.

67 CONG. REC. 5558 (1927). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

44. Amended Duopoly Rules 2. The original duopoly rules were a qualifying standard which set the minimum criteria for competing in the renewal process. Once satisfied, a further question, *i.e.*, whether for diversification purposes one applicant was to be preferred over the other, had to be answered. The amended duopoly rules, however, present a set standard for the existing licensees, which, once satisfied, removes the concept of diversity from comparison and competition. The FCC has reinforced diversity in its 1970 amendment to the duopoly rules: "The multiple ownership rules of the Commission have a two-fold objective: (1) fostering maximum competition in broadcasting, and (2) promoting diversification of programming sources and viewpoints." *Id.* However, the 1970 Policy Statement when coupled with the rule-making on multiple ownership effectively limits that concept of diversity.

45. Since administrative rules cover only diffusion in control, the FCC is now required to set standards to maximize program sources and viewpoints. Likewise, the FCC must insure that these standards are enforced. Competition is ideally suited to that task. But the FCC in the 1970 Policy Statement has taken this burden upon itself despite its obvious lack of qualifications.

46. In *WBAL* the FCC recognized that a preference for one applicant in diversification would raise a presumption that local ownership has a greater familiarity with the needs and interests of the listeners. The question is not whether sixty rather than fifty individual licensees will better serve the public interest, but rather the relevant determination is whether any of the licensees reflects the needs and interests of the community.

is subjugated to an administrative ruling of separate ownership.⁴⁷ The determination that this standard of separate ownership will improve owner-management integration is not well founded.

The 1970 Policy Statement also dismisses from consideration the third criterion, program proposals and their effect within the competitive system. By dismissing this criterion, the FCC equates its own singular judgment of the licensee's performance with that to be derived from the competitive system. The challenged renewal applicant will still be subject to inquiry and criticism, but comparisons and review of practical proposals have been displaced.

Examined properly, each of these three criteria furthers what was, at least theoretically, the FCC's understanding of how to insure broadcasting operations in the public interest. The effective removal of these criteria from competitive examination destroys the impetus to challenge. Therefore, the review of licensee performance should prove perfunctory at best.⁴⁸

The FCC's establishment of all encompassing rulings to replace applicable criteria isolates the major change brought by the 1970 Policy Statement, *i.e.*, the replacement of the FCC's judicial role by administrative rulings.⁴⁹

However, the competitive process under the Act can achieve the objective of service in the public interest. But before this can be shown, a determination of the proper goal for television broadcasting and an examination of the practical operation of the television broadcasting industry must be made.

The Goal for Television Broadcasting

In the 1965 Policy Statement the primary focus was on competition between mutually exclusive applicants. Examination of certain criteria as evidence served to promote two primary goals, *i.e.*, the best practical service to the public and diversification in the media. Past programming of the renewal applicant in *WHDH*, although a "critical" factor toward ascertaining future performance, was accorded an evidentiary weight equivalent to other comparative factors to reach these two goals.

47. The 1970 Policy Statement negates competition and leaves only the amended duopoly rules to insure that the public interest is secured.

48. The challenge and the threat of it were factors that helped insure operation in the public interest. The FCC cannot review the operations of stations without a considerable increase in personnel and operating funds. Now that competition, heretofore an aid for the FCC's evaluation of operations in the broadcast industry, has been removed, the FCC has simply increased its workload. Since its staff and facilities are admittedly inadequate, the process of review will be superficial. *See* note 26 *supra*.

49. Although the FCC is not vested with the power of a court, its methods of operation are like those of a court. The FCC conducts hearings, listens to evidence, and makes judgments based upon the presentations in those hearings.

This comparative process advocated by the FCC in *WHDH* comes close to the proper regulatory function of license renewal proceedings. It admits that the FCC is the representative public owner, establishes the licensee as an applicant, recognizes the applicants on an equal basis as competitors, and most importantly, identifies implicitly the proper goal for television broadcasting, *i.e.*, local programming.

However, *WHDH* failed to discern and articulate clearly the purposes to be served by the renewal process under the statutory authority. The FCC's simple adoption, in *WHDH*, of the goals and criteria applicable to initial applications was wrong. There are obvious differences between initial and renewal applications and these differences suggest the fault of *WHDH*, *i.e.*, the failure of the FCC to grasp a separate identifiable goal for renewal applicants within the comparative process.

The regulatory goal for television broadcasting is stated in the 1970 Policy Statement:

the public interest standard is served, we believe, by policies which insure that the needs and interests of the . . . viewing public will be amply served by the community's *local* broadcast outlets.⁵⁰

The word "local" identifies the type of service in television broadcasting which should be of primary concern in the renewal procedure. In television broadcasting, "local" means programming oriented toward the particular community served by the television station. But, the practicality of "local" programming can be determined only after investigating the operations and motivations of the television industry.

The Television Broadcasting Industry

Depending on its location a television station serves a varying number of people and different types of communities. The FCC has long recognized that service in the public interest basically requires programming oriented toward these communities.⁵¹ But the actual manner in which stations oper-

50. 1970 Policy Statement 1 (emphasis added).

51. The FCC has stated the obligation of the licensees in this manner: "[they must] take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests." FCC PUBLIC NOTICE, July 29, 1960 (FCC 60-970).

Technical considerations had provided a system of locally based stations and the concept of the public interest insured that broadcasting would be attentive to the specific needs and interests of the local community. An Oklahoma Case Study 8. *In the Matter of Primer on the Ascertainment of Community Problems by Broadcast Applicants*, FCC PUBLIC NOTICE, Dec. 19, 1969 (FCC 69-1402), the FCC goes into some detail of the methods acceptable and the depth required in the station's ascertainment of the needs and interests of the community and the station's responsibility to correct the problems encountered.

ate belies much of the FCC's emphasis on local programming.

As commercial services, television stations, particularly the VHF stations, operate on an economically competitive basis within the confines of a community area. Their purpose, exclusive of the public interest control of the FCC, is to maximize profits.⁵² These profits are the results of the quantity of advertising sold. Advertisers pay considerable amounts to finance both the programming offered and the individual stations. These amounts are relative to the size of the audience. Therefore, the character of a station's programming and the type and size of its audience reflect the program's use as a marketable item.

In the television broadcasting field the majority of programs are either network or syndicate produced and in the commercially competitive VHF spectrum the stations are either network affiliated or independent. The network stations are given a percentage of the advertising for programming the network produced shows. Independent stations contract on an individual basis for the shows offered by the networks or syndicates and solicit the sponsors themselves.⁵³ Whether network or syndicate produced, the programs available to the individual stations are limited in type and quality.

Individual broadcasters rely primarily on these two sources since they cannot economically produce programs capable of competing for the available mass audiences.⁵⁴ Therefore, economic competition has brought about the dominance of network and syndicate programming which essentially reduces the station's performance to a task of program selection.⁵⁵

One commentator has observed that this process of program selection from the networks and syndicates has resulted in the mass production of a few basic types of entertainment shows. This process severely limits the control of national news and public affairs, and generally excuses the station's obligation of performance in the public interest.⁵⁶ Thus, economic competition has forced the utilization and eventual dominance of network programs which are designed not to serve the needs and interests of the local community, but to satisfy the need for nationally marketable programs of mass audience appeal.

This competition also affects the types of programs offered at particular times. At prime time, when the potential for profit is at a maximum, virtually all the stations offer network or syndicate programming in order to at-

52. See Barrow, *The Attainment of Balanced Program Service in Television*, 52 U. VA. L. REV. 633 (1966).

53. *Id.* at 640.

54. *Id.* at 640-41.

55. *Id.*

56. *Id.* at 634-44.

tract the greatest possible viewing audience. The programs which are locally oriented tend to be relegated to time slots of low audience capacity. This subordination of locally oriented programs further disserves the station's public function to respond to the needs and interests of the community. However, the FCC within its regulatory capacity under the statute can still achieve the goal of local programming.

The FCC's Regulatory Process and the Proper Goal

The problems presented in the operation of television stations severely test the regulatory purpose of the Communications Act of 1934.⁵⁷ The actual operation of the individual stations belies the FCC's concern that past performance be the sole criteria at renewal. The examination of the television broadcasting industry has shown that a station's concern for locally oriented programming is minimal.

The comparative hearing is within the limits of the FCC's authority and is a valid method of attaining the proper goal of the best practical service to the local community. The high cost, the time involved, and the FCC's strict ascertainment of qualifications for renewal applicants in the comparative hearing all work toward narrowing the possible applicants to those most qualified and competent in the broadcasting field. In this comparative hearing the FCC analyzes the licensee's past performance and the challenger's qualifications for the license. Minimally, this analysis requires a complete survey of the needs and interests of the community to be served, and a detailed presentation of the programming proposed by the applicant. The comparative renewal process also guards the renewal licensee from undue harassment. The challenger must post a construction bond for the facilities of the station and prove capable of sustaining its total operational expenses for one year without considering possible profits.⁵⁸ Moreover, the rigid qualification standards for challenging a renewal license and the experience of the hearing examiners have enabled the FCC readily to discern between possible performance and so called "blue sky" programming proposals.

However, the FCC, even in the light of these protections, reasoned that the predictability and stability of the industry was threatened by the comparative hearing.⁵⁹ In the 1970 Policy Statement the FCC stated that "[t]he in-

57. 47 U.S.C. §§ 151-609 (1964).

58. FCC Form 301 (adopted April 1969).

59. See *\$3 Billion in Stations Down the Drain?*, BROADCASTING, Feb. 3, 1969, at 19. Professor Jaffe commented that *WHDH* represents a regulatory approach which is deficient as a means of improving programming and which gives insufficient protection to the legitimate reliance interest of the broadcasters. He advocates different methods of regulation which he suggests would be substantially more effective and would not threaten the financial stability of the industry. Essentially, he recommends the estab-

stitution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it."⁶⁰ But the profits realized by individual stations over a three-year license period raise the question whether the predictability and stability of the industry is actually threatened by the comparative hearing.⁶¹ It can reasonably be calculated from the FCC annual reports that the average profit over the three-year license period is a 100 percent return on the licensee's facilities investment. The 50 largest VHF stations, which serve over 70 percent of the population, have a particularly healthy return on their investment.⁶² The process of acquiring broadcast facilities in either initial applications or transfers normally prevents a station from depreciating in value. The value of the facility increases two to three times its assets upon the granting of a license because of the value of the license itself and the expected profit return over the license period.⁶³ Therefore, the investment of the individual licensee who has purchased broadcasting facilities after an initial application cannot be jeopardized in the renewal process by the comparative hearing. Licensees who are challenged at renewal and who have purchased stations by transfer take a larger risk. That licensee might lose some investment if successfully challenged at renewal.⁶⁴

The FCC could have dealt with the possibility of investment loss as a problem to be resolved within the comparative renewal process. One resolution of this problem is that a challenger, if awarded the license on a competitive basis, would be required by the FCC to purchase the facilities for a fair negotiated price.⁶⁵ Therefore, the comparative process can achieve the

ishment of minimum standards in program performance similar to those suggested by Commissioners Cox and Johnson. He further hopes that the industry's current expansion into the areas of UHF TV, cable television, educational television, and pay TV will alleviate the problems of program diversity posed by the dominance of the top VHF stations and the networks. Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

60. 1970 Policy Statement 2.

61. Of 452 VHF television stations only 65 reported a loss. 122 reported profits in excess of 1 million dollars. However, on the loss side, only seven stations reported losses in excess of \$400,000, 35 FCC ANN. REP. 136 (1969).

62. *Id.* at 133-43. As of Dec. 31, 1968, 642 VHF and UHF television stations had invested \$1,306,790,000 in tangible broadcast property. Therefore, the average investment per station is approximately two million dollars. The income for these same stations in 1968 was \$494.8 million, in 1967 was \$414.6 million, in 1966 was \$492.9 million. *Id.* at 138. Over the three-year period the average income for the 642 television stations per station was \$2.2 million. *Id.* at 135.

63. See note 62 *supra*.

64. The transfer licensee may not have the benefit of an entire three year license term, and for that reason his profits may not account for the initial investment.

65. See, e.g., Biscayne Television Corp., 33 F.C.C. 851 (1962) where the FCC ordered that the new licensee would have to reimburse the displaced former licensee for the value of its transmitter and plant.

proper goal for the television broadcasting industry, without jeopardizing the stability and predictability of the industry.

Conclusion

The 1970 Policy Statement, which endeavors to protect the stability and predictability of the television industry, breaches the FCC's statutory authority. By providing for renewal of licenses after a determination that the past performance of the licensee was "substantially attuned" to the needs and interests of the community, the FCC essentially negates the right to challenge at renewal. Contrary to FCC statements, the 1970 policy will not insure the standard of public interest but will foster operation to secure the greatest profit. The proper public interest goal for the television industry is local programming. This goal *can* be achieved without endangering the stability and predictability of the broadcast industry by a comparative process within the statutory limits.

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